CASE LAW UPDATE

DAVID A. WEATHERBIE, *Dallas*
Cramer Weatherbie Richardson LLP

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CHAPTER 11

CASE UPDATE

DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON OLIVER LLP
DALLAS, TEXAS

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 654 S.W.3d and Supreme Court opinions released through June 2, 2023.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

Case Law Updates dating back to 2009 are posted on my firm's website, cwrolaw.com. Most are also posted on reptl.org as well.

TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES 1

PART II PROMISSORY NOTES 1

PART III GUARANTIES 2

PART IV DEEDS AND CONVEYANCES 2

PART V VENDOR AND PURCHASER 4

PART VI LEASES AND EVICTIONS 6

PART VII PROPERTY OWNERS ASSOCIATIONS AND RESTRICTIVE COVENANTS 7

PART VIII ADVERSE POSSESSION, QUIET TITLE, TITLE DISPUTES, PARTITION 9

PART IX CONDEMNATION 12

PART X TAXATION 15

PART XI BROKERS 18

PART XII CONSTRUCTION ISSUES 19

CASE LAW UPDATE

PART I MORTGAGES AND FORECLOSURES

PNC Mortgage* v. *Howard, No. 21-0941 (Tex. May 12, 2023). This case is at the Supreme Court for the second time. In the earlier Supreme Court Case, the court directed the court of appeals to consider (i) (1) whether the equitable subrogation lien claim asserted in this case is time-barred and (2) whether language in the deed of trust precludes assertion of the subrogation claim.

The Howards bought a home in 2003 with two purchase-money mortgages. Two years later, they refinanced the two mortgages with a loan from a bank. Nearly all of the proceeds of the refinancing went to pay off the two existing mortgages. The Howards stopped paying the new note. The bank sent a default notice and then accelerated its debt. After that, the note and loan were assigned to PNC. Despite having assigned the note to PNC, the bank conducted a foreclosure sale and purchased the property at that sale.

The Howards sued to set aside the foreclosure sale, naming both the bank and PNC. Four years later, the trial court granted the Howards' summary judgment motion and declared the bank's foreclosure sale void. After that, PNC finally made its claim on the note. By then the four-year statute of limitations had run. PNC then asserted a claim for foreclosure of the Howards' original lender under the doctrine of equitable subrogation. As the Supreme Court noted a "ping pong of appellate proceedings followed."

The issue at the Supreme Court this time was when any claim based on equitable subrogation would have accrued. The answer turns on how subrogation works in the mortgage lending context.

Subrogation simply means substitution of one person for another, that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. That substitution arises because the subrogation plaintiff has paid a debt owed by the defendant. Most often this arises in the insurance context, but it applies in every instance where one person has paid the debts of another.

PNC argues that limitations on a refinancing lender's subrogation claim should not begin to run until the maturity date of the note on the original debt that was refinanced. The court held, however, that this rule is incompatible with the dual nature of a note and deed of trust under Texas law. In the refinance transaction, the original note is paid. That note ceases to exist, it no longer has a maturity date, and a new note has been executed.

What equitable subrogation actually transfers to a refinance lender is the original creditor's security interest, giving the refinance lender an alternative lien if its own lien is later determined to be invalid. The transfer occurs automatically by operation of law.

The transfer that occurs through subrogation puts the receiving party on par with the party from whom the interest was transferred. It does not put the party receiving the interest in a better position.

A claim to foreclose on a real property lien accrues when the underlying note is accelerated. If the Howards' original lender had accelerated its notes due to nonpayment, that lender would have had four years from the date of acceleration to initiate foreclosure proceedings. If that lender had accelerated but then waited to foreclosure until the original maturity date of the note (perhaps thirty years later), its foreclosure claim would have been time-barred. PNC's position would give a refinance lender, just by virtue of being the second lender in time, not just four years from its acceleration to foreclose, but then an additional period, perhaps decades, to foreclose.

Like the original lender, a refinance lender has only one foreclosure claim, which accrues on acceleration. If the lien created by the refinance turns out to be invalid, then equitable subrogation substitutes the remedy of foreclosing on the original lender's lien instead. Subrogation provides the refinance lender with an alternative remedy, not an additional claim. Any claim that PNC would have through subrogation accrued in June 2009. Because PNC did not initiate foreclosure within four years of that date, its claim is time-barred.

PART II PROMISSORY NOTES

Angel* v. *Tauch, 642 S.W.3d 481 (Tex. 2022). The Bank held a $4.6 million judgment against Tauch, which the bank purportedly offered to settle for $2 million while admonishing Tauch that he needed to act "quickly" because the bank would "likely be look[ing] at other collection alternatives." Two days later, the Bank executed an agreement assigning the judgment to another of Tauch's creditors, the Gobsmack Gift Trust, for collection.

Almost immediately thereafter, the trust's attorney emailed Tauch's attorney, notifying him about the assignment and demanding payment in full on the judgment. At Tauch's request, the trustee's attorney forwarded a copy of the assignment agreement, which bore a stated effective date of the following day. On receipt of the assignment agreement, Tauch promptly emailed the bank to accept the settlement offer.

The bank and the trust rejected Tauch's assertion that a binding contract to settle the debt had been formed by his acceptance before the assignment agreement's effective date. Cross actions for declaratory and other relief ensued, and on cross motions for summary judgment, the trial court held that any offer was revoked on Tauch's receipt of the assignment agreement. The Court of Appeals reversed in a split decision, holding that the assignment did not render the bank unable to go

forward with the offer at the time of acceptance because its stated effective date was the following day. The dissent opined that the effective date was immaterial because precedent set the standard for an implied revocation as requiring only "some act inconsistent with the offer," not an act precluding the offer from materializing into a contract.

The Supreme Court reversed and rendered judgment that no contract to settle the debt was formed. More than 75 years ago, in ***Antwine* v. *Reed***, the Court held that an offer could be revoked without express words of revocation, so long as the offeree had knowledge that the offeror had acted inconsistently with the offer. 199 S.W.2d 482, 485 (Tex. 1947). ***Antwine*** was the first and last time the Court applied the doctrine. Because ***Antwine*** involved a land transaction and information communicated to the offeree by the offeror's agent, the parties disputed whether other types of offers can be impliedly revoked and whether the doctrine is applicable when the offeree learns about the offeror's inconsistent action indirectly rather than directly from the offeror or its agent.

The Court held that the doctrine is not constrained to land transactions and the touchstone is inconsistent action manifesting the offeror's unwillingness to enter the proposed bargain. The assignment agreement's effective date did not preclude its execution from manifesting the bank's unwillingness to enter the settlement. The dispositive issue is not the offeror's ability to enter the proposed bargain but continued willingness to do so, and assigning the judgment for collection was inconsistent with an intent to release the judgment. Tauch's receipt of the assignment agreement was sufficiently reliable information about the bank's action to effectuate a revocation of the settlement offer.

PART III GUARANTIES

BBVA USA* v. *Francis, 642 S.W.3d 932 (Tex. App.—Houston [14th Dist.] 2022, no pet.). Francis was one of the guarantors of a loan from the Bank to the Hospital. The Hospital defaulted, so the Bank accelerated and then sued the Hospital and the guarantors, including Francis. The Bank settled with the Hospital and the other guarantors, but not with Francis.

Francis contends that his obligations as guarantor are tied to the Hospital's liability and the Bank's release and settlement of the Hospital's liability extinguished Francis's obligations under the guaranty. Francis moved for summary judgment on that ground, contending that his obligations are limited to the "Indebtedness of Borrower" under the language of the guaranty.

To determine a guarantor's liability, the courts look to the language of the guaranty agreement. The interpretation of a guaranty agreement, like any contract, is a legal question to be reviewed de novo. Guaranties are to be strictly construed according to their precise terms and must not be extended the guarantor's obligations beyond the language of the agreement.

Here, the guaranty was a "continuing guarantee of payment and performance," in which Francis absolutely and unconditionally guaranteed full and punctual payment and satisfaction of the "Indebtedness" of the Hospital to the Bank, and the performance and discharge of all borrower's obligations under the loan documents. "Indebtedness", as defined in the guaranty included liability and obligations barred or unenforceable against the Hospital "for any reason whatsoever."

In the settlement agreement with the Hospital, the Bank reserved any rights it had against Francis. Despite this wording, Francis contends that the Bank is barred from asserting a deficiency claim against him as a guarantor based solely on the Bank's release of the Hospital as the principal obligor. Francis contends, in other words, that because the Bank discharged the principal obligation, he is no longer liable as a guarantor. But the Bank did not discharge the obligation. Under the language of the settlement agreement, the Bank agreed not to pursue the Hospital for the deficiency on the notes and released the Hospital of any and all liability, claims, or causes of action related to the loans. The Bank did not release the indebtedness. To the contrary, the Bank expressly reserved its right to pursue any claims against Francis as guarantor. There is no factual support for Francis's claim that the Bank is precluded from enforcing the guaranty simply because it released its claims against the Hospital.

Francis contends that language in the settlement agreement improperly broadens the scope of the guaranty. The court disagreed. The settlement agreement is tied to Francis's obligations as set forth in the guaranty agreement. Notwithstanding language in the settlement agreement reserving the Bank's claims against Francis, Francis expressly agreed as a guarantor to assume more extensive liability than Hospital. Although a guarantor's liability on a debt is normally measured by the principal's liability, a guarantor may agree to a more extensive or limited liability.

Perhaps most importantly, Francis waived "any and all rights or defenses based on suretyship or impairment of collateral other than actual payment." A waiver of "any and all rights" broadly waives all possible defenses.

PART IV DEEDS AND CONVEYANCES

Aaron* v. *Fisher, 645 S.W.3d 299 (Tex. App.—Eastland 2022, pet. denied). The question in this case was whether conveyances the from Lilly to W.T. and Chester were gifts or sales for consideration. If they were gifts, then the mineral interests would be separate property; if they were sales for consideration, the interests would be their community property that

belonged equally to W.T. and Chester and their respective spouses.

Both deeds recite that Lilly "grant[s], bargain[s], sell[s], convey[s], transfer[s], assign[s], and deliver[s the disputed mineral interests] unto [W.T. and Chester, respectively]". The deeds further contain a provision that Lilly does so "for and in consideration of the sum of Ten & no/100 DOLLARS ($10.00) cash in hand paid and [for] other good and valuable considerations." No other deed language or recital indicates or suggests that Lilly intended to gift the disputed interests to W.T. and Chester. In fact, in both deeds Lilly clearly provided that "[t]his sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease heretofore executed and now of legal record" The court declined to go beyond the four corners of the documents and disregard its plain language. The deeds were sales for consideration.

Endeavor Energy Resources, LP* v. *Trudy Jane Anderson Testamentary Trust, 644 S.W.3d 212 (Tex. App.—Eastland 2022, no pet.). The Holcombs agreed to sell a part of their surface estate to the Tom and Trudy Anderson. The contract provided that the Holcombs would reserve all of the mineral, royalty, and executive rights and interests in their ranch. The general warranty deed that was executed and delivered at closing didn’t reserve the minerals.

Believing that they had reserved to themselves all of the mineral rights and interests, the Holcombs later conveyed their executive rights to certain third parties, who then executed an oil and gas lease for the purpose of developing the minerals. Endeavor is the successor-in-interest of that lease, by way of a 2006 assignment. Further, Endeavor has been the lessee, and has operated on the property under the lease, ever since that assignment. Endeavor claims that, since it acquired the lease, Tom Anderson has executed multiple surface use agreements with Endeavor, in which the Andersons have purported to own the surface estate of the three tracts but have never claimed to own any mineral rights or interests in these tracts.

The parties later realized that the reservations in the original deed did not sufficiently memorialize and comport with their agreement and intent to reserve all mineral rights and interests in the subject property to the Holcombs. Upon recognizing this discrepancy, the Holcombs and Tom Anderson executed a correction deed which noted the mistake and included the mineral reservation.

Trudy did not join in executing the correction deed because she had died. Tom was appointed executor of her will and her will also established a testamentary trust which designated Tom as the trustee and gave all of Trudy’s real property to Tom in trust.

The Trust filed a trespass to try title action, claiming that Tom’s signature on the correction deed had no legal effect. The Trust alleged that for the correction deed to be effective, both Tom and his children would be required to sign. The Holcombs counterclaimed and asserted that the correction deed was valid. The trial court granted summary judgment in favor of the Trust and concluded that the correction deed did not substantially comply with Section 5.029 of the Property Code.

The Correction Instrument statutes, including Section 5.029, were enacted by the legislature in 2011 in response to a 2009 Texas Supreme Court decision in which the court held that correction deeds should not be used to convey additional, separate properties that were not otherwise described in the original deed. These statutes permit the use of correction instruments to make both material and nonmaterial corrections under certain circumstances, including the conveyance of additional, separate properties that were previously prohibited by ***Myrad Props., Inc.* v. *LaSalle Bank Nat'l Ass'n***, 300 S.W.3d 746, 750 (Tex. 2009).

For a correction deed making a material correction to be a valid and enforceable instrument, Section 5.029 requires that either the original parties to the transaction or the heirs, successors, or assigns of an original party, if applicable, must execute it. The Correction Instrument statutes also contain a retroactive component: correction instruments that are recorded prior to the statutes’ effective date of September 1, 2011, are required only to "substantially comply" with the provisions of Section 5.029. This retroactive component applies here because the correction deed in this case was executed and recorded in 2007. Nevertheless, the Correction Instrument statutes do not define what constitutes substantial compliance. Generally, that phrase means that one has performed the "essential requirements" of a statute, and it excuses deviations which do not seriously hinder the legislature's purpose in imposing such requirements.

In ***Broadway National Bank* v. *Yates Energy Corp.***, 631 S.W.3d 16 (Tex. 2021), the Supreme Court held that Section 5.029 permits the original parties to a conveyance to execute a valid correction deed even when the original grantees no longer own the property at issue. In so holding, the court rejected the argument (which is advanced by the Trust) that all current interest owners in the property must execute the correction deed. Thus, an "heir, successor, or assign" is required to execute a correction deed only if an original party to the transaction is unavailable.

Although the court in ***Yates Energy*** clearly held that Section 5.029 is satisfied when all original parties to the transaction execute the correction deed, in the case before us, all original parties to the 2003 general warranty deed did not sign the 2007 correction deed because Trudy had passed before the correction deed was executed and recorded. Importantly, the court in ***Yates Energy*** defined "successor" in a footnote: "In the context of this statute, the term ‘successors’ fills the gap

between 'heirs' and 'assigns,' covering entities and legal representatives who succeed an original party other than as an heir or assign."

According to the arguments advanced by the parties, Trudy's successor or successors under Section 5.029 are either (1) Tom only or (2) Tom and the two Anderson children. Because the Anderson children do not have a vested interest in either Trudy's estate or the property held in the testamentary trust, the court held that Tom is Trudy's sole successor under, and for purposes of, Section 5.029. Tom's broad powers as executor and trustee permitted him to execute the 2007 correction deed as Trudy's sole successor because he possessed all decision-making authority regarding both Trudy's estate and the trust assets, with the exception of any conveyance of real property held by the trust, which, as Court of Appeals discuss below, is not an impediment to the execution of a valid correction deed.

The Trust argues that, even if Tom is Trudy's sole successor under Section 5.029, he failed to validly execute the 2007 correction deed because (1) he did not have the authority to do so and (2) when he signed the correction deed, he did so only in his individual capacity. In support of this argument, the Trust points out that the trust agreement explicitly limits Tom's authority as trustee with respect to any sale or conveyance of real property held by the trust. It is true that the joinder and consent of the Anderson children is required under the trust agreement for any such action. However, the court did not agree that Tom exceeded his authority as trustee or executor of Trudy's estate when he executed the 2007 correction deed.

The Trust further contends that ***Yates Energy*** stands for the proposition that a correction deed is itself a conveyance, and not merely a clarification of the original instrument of conveyance. This argument misses the mark. In fact, the language in the Correction Instrument statutes that reference the purpose and effect of a correction deed clearly precludes that argument. The execution of a correction deed itself, without more, does not constitute a sale or conveyance of real property. In fact, a correction deed conveys nothing; it simply "replaces and is a substitute for the original instrument.

Jordan* v. *Parker, No. 21-0205 (Tex., December 30, 2022). A father devised his estate to his widow for life, with the remainder upon her death to his children, including his son. The father granted his widow complete control over the estate's assets during her lifetime, including the power to sell estate property and to redirect a child's remainder interest to others. Among the estate's assets was a partial interest in land known as the Cottonwood Ranch. Other owners of the ranch included the father's widow. The widow eventually conveyed her separate interest in the ranch to their son and daughter.

A few years later, while his mother was still living, the son conveyed to his daughters "all of my right, title and interest in and to" the ranch. The question presented in this case is whether the son gifted a remainder interest in his father's estate property when he conveyed his present interest in the same property without expressly reserving any remainder interest.

Applying the rule in ***Clark* v. *Gauntt***, 161 S.W.2d 270 (Tex. [Comm'n Op.] 1942), the court concluded that the son did not convey his remainder interest in the estate property. The son's remainder interest was in his father's estate overall, not a particular piece of property, and any property interest from the estate that the son might eventually inherit was subject to complete divestment during his mother's lifetime. At the time the son conveyed his present interest to his daughters, his mother was living, and she had complete control over the estate's assets. In such circumstances, the property interest in the ranch that the son would eventually inherit through his father's will amounted to no more than an expectancy. As the court of appeals correctly held, a grantor conveys an expectancy interest only through a clear manifestation of the grantor's intent to do so.

PART V VENDOR AND PURCHASER

Lennar Homes of Texas Land and Construction, Ltd. i Whiteley, No. 21-0783 (Tex. May 12, 2023). Isaacson bought a house from Lennar. The purchase agreement incorporated the terms of Lennar's warranty booklet, stating that the warranties were limited to only those stated in the warranty booklet and disavowing any other warranties or representations.

The purchase agreement also included two arbitration clauses. First, Isaacson and Lennar agreed to arbitrate any disputes. This clause was binding on Isaacson other occupants of the home. The second arbitration clause provided that all disputes relating to warranties would be resolved in accordance with the warranty booklet, i.e., they would be arbitrated.

Lennar conveyed the home to Isaacson by a special warranty deed that provided it was subject to the arbitration provision. The deed provided that the arbitration provision ran with the land and was binding on Isaacson's successors and assigns. Isaacson sold the home to Whiteley, conveying it by General Warranty Deed. Shortly after the sale, Whiteley noticed serious mold problems.

Whiteley sued Lennar on various claims. Lennar filed an application to stay proceedings in the lawsuit, relying on the arbitration agreements in Isaacson's purchase contract and his special warranty deed. Whiteley opposed Lennar's request for arbitration, arguing that she was not a party to and did not sign any of the arbitration agreements. In reply, Lennar argued that Whitley was bound to arbitrate, either as a successor to Isaacson under the doctrine of direct-benefits estoppel, or because she assumed Isaacson's obligations under his purchase contract. The trial court granted Lennar's application.

In the arbitration, Whiteley pursued her claims for negligent construction and breach of implied warranties against Lennar. The arbitrator denied all relief sought by Whiteley. Lennar then went back to the trial court filing a motion to confirm the arbitration award. Whitely opposed the motion and filed a motion to vacate the arbitration award. The trial court denied Lennar's motion and granted Whiteley's motion to vacate the arbitration award. The court of appeals affirmed.

The Supreme Court reversed the court of appeals and held that the trial court had erred in granting Whiteley's motion to vacate and denying Lennar's motion to confirm because a warranty which the law implies from the existence of a written contract is as much a part of the writing as the express terms of the contract. Moreover, although liability for Whiteley's claims arises in part from the general law, nonliability arises from the terms of any express warranties. Accordingly, Whiteley's claims were premised on the existence of the purchase-and-sale agreement and, as such, she was bound to arbitrate under the doctrine of direct-benefits estoppel. The court therefore reversed the court of appeals' judgment, rendered judgment confirming the award against Whiteley, and remanded to the trial court for further proceedings with respect to Lennar's request to confirm the remainder of the arbitrators' award against two of its subcontractors.

MSW Corpus Christi Landfill, Ltd.* v. *Gulley-Hurst, L.L.C., No. 21-1021 (Tex. March 24, 2023). This case concerns the correct calculation of damages when (1) a buyer breaches a real estate contract (2) after the seller has fully performed and (3) the value of the property at the time of the breach exceeds the contract price.

The general rule for measuring benefit of the bargain damages is to calculate the difference between what was promised and what was received. Although some courts have noted that when the breached contract is for real estate, the measure of damages is the difference between the contract price and the property's market value at the time of the breach, this formula applies only when the value of the property has remained the same or has decreased after the purchaser's breach, leaving the seller unable to receive the expected value of the contract. When the property's market value at the time of the breach exceeds the contract price, the correct measure of benefit of the bargain damages is the difference between the promised contract price and what the seller received.

"Policy and precedent compel this conclusion." The purpose of benefit of the bargain damages is to place the seller in the same economic position he would have been in had the contract been performed. Thus, a party generally should be awarded neither more nor less than his actual damages. Permitting a seller to recover more than the contract price would place him in a better economic position than had the contract been performed.

Conversely, calculating benefit of the bargain damages as the difference between what the seller expected and what she received causally connects the seller's compensation to the buyer's breach. The breach cost the seller the previously agreed-upon contract price, not the property's market value. The seller lost the opportunity to sell the property for its market value not because of the buyer's actions but because the seller decided to contract with the buyer for a lower price.

West Loop Hospitality, LLC* v. *Houston Galleria Lodging Associates, LLC, 649 S.W.3d 461 (Tex. App.-Houston [1st Dist.] 2022, pet. denied). Typically, the benefits and burdens of a contract belong solely to the parties to the contract, and no one may sue on the contract unless he is a party to the contract or in privity. An exception to this general rule exists if a person qualifies as a third-party beneficiary to the contract. Absent statutory or other legal authority providing otherwise, whether a person is a third-party beneficiary to a contract depends solely on the contracting parties' intent.

To establish third-party beneficiary status, a party must demonstrate that the contracting parties intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit. It is not enough that the third party would benefit, either directly or indirectly, from performance of the contract, that the contracting parties knew that the third party would benefit, or that the third party intended or expected to benefit from the contract. The contracting parties must have intended to grant the third party the right to be a claimant in the event of a breach. The benefit to the third party must be more than incidental. However, the contract need not have been executed solely to benefit the third party.

To determine third-party beneficiary status, a court looks solely to the language of the contract, construed as a whole. The contract must include a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party; any implied intent is insufficient. The contract need not state "third-party beneficiary" or any similar "magic words." A court will not presume intent to create third-party beneficiary status. Instead, the court must begin with the presumption that the contracting parties intended to contract solely for themselves, and only a clear expression of intent to create a third-party beneficiary overcomes this presumption. If the language of the contract leaves any doubt about creating a third-party beneficiary, the court will resolve that doubt against conferring third-party beneficiary status.

A third-party beneficiary "steps into the shoes" of the contracting parties and is subject to and bound by all provisions of the contract.

Here, the trial court ruled that Choudhri was an intended third-party beneficiary of the purchase

agreement as a matter of law. The trial court not provisions in the purchase agreement relating to Choudhri becoming a member of the developer entity. The court of appeals agreed. The rights and benefits to Choudhri set out in the purchase agreement were more than merely incidental. Although Choudhri is not the sole beneficiary of the purchase agreement, he is not required to be.

WK Properties, Inc.* v. *Perrin SA Plaza, LLC, 648 S.W.3d 513 (Tex. App.-San Antonio 2021, no pet.). WTK agreed to sell the shopping center to 901 Investments, which simultaneously assigned the contract to Perrin. The original contract identified the property by street address, mentioning, but not including and Exhibit A.

The contract required the seller to provide a copy of the seller's most recent survey. WTK sent a "Land Title Survey" to Perrin and the title company. The survey showed the property as 5.045 acres consisting of Lot 8 and a pad site called Lot P-36, which was contiguous and contained about a quarter acre of land.

After WTK sent the survey and before closing, WTK and Perrin executed an amendment to the sales contract changing the legal description to read "NCB 15685 BLK LOT 8 (PLETZ SUBD) and NCB15685 BLK Lot P-36 .248AC."

At closing WTK delivered a deed which conveyed the property as "BEING ALL OF LOT 8, NEW CITY BLOCK 15685, PLETZ SUBDIVISION, SITUATED IN BEXAR COUNTY, TEXAS." It did not include the pad site, Lot P-36. After closing, ETK continued to pay taxes on the pad site.

About three years later, WTK informed Perrin of its intention to sell or develop the pad site. Perrin then sued WTK, seeking a declaration that the original sale was for the entire property including the pad site and asking for reformation of the deed delivered at closing. The trial court granted summary judgment for Perrin, requiring WTK to execute a corrected deed that included the pad site.

On appeal, WTK argued that the amended contract was void because the property description failed to meet the specificity requirements of the statute of frauds, i.e., that it did not describe the property so that it can be identified with reasonable certainty.

For an instrument that purports to convey a property interest, the sufficiency of the legal description in that instrument is a question of law. To meet the Statute of Frauds specificity requirement, a property description is sufficient if the writing furnishes within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty.

In its first two subissues, WTK asserts the amended contract fails to identify Lot P-36, and Lot P-36's description in the amended contract is abbreviated—with no explanatory references for its terms—which makes identification impossible.

The original contract identifies the property as located in Bexar County at "11823 Perrin Beitel, San Antonio, Texas 78217." This description provides the property's street address, city, county, state, and zip code. The contract amendment addresses "THE PROPERTY AT 11803–11855 Perrin Beitel Road, San Antonio, TX 78217, Perrin Oaks Plaza." This amendment reference adds a common name, Perrin Oaks Plaza, and a range of street addresses, which refer to a specific shopping center. The amendment revises the property's legal description to be "NCB 15685 BLK LOT 8 (PLETZ SUBD) and NCB 15685 BLK Lot P-36 .248AC." As amended, the contract describes the conveyed property as two lots, each identified by block and lot number; the subdivision; the city, county, state, and zip code; the size of Lot P-36; and the common name of the properties: "Perrin Oaks Plaza." The court held that WTK's first two subissues fail.

In its third subissue, WTK argues the amended contract fails to provide the size, shape, boundaries, city, county, and state of the property to properly identify the pad site.

Although the amended contract includes the city, county, and state for the pad site, the amended sales contract pages alone do not provide the size, shape, and boundaries of the conveyed property. However, as WTK's trial counsel explained, the amended contract's property description abbreviations were taken from the Bexar County Appraisal District ("BCAD") records. The court held that the abbreviations were explicit references to the BCAD maps, and those maps can show a property's size, shape, and boundaries.

Besides referencing the BCAD maps, the amended contract also required the delivery of the survey, and the survey showed the property as both the 5.045 acre tract and the pad site. The court concluded that, as a matter of law, the contract's property description was sufficient. The court went further by saying that, even if the contract's description was insufficient, the trial court could have properly considered the survey which fully explained the contract's abbreviations.

PART VI LEASES AND EVICTIONS

Gloston* v. *Ellison, 651 S.W.3d 637 (Tex. App.-Houston [14th Dist.] 2022, no pet.). In this eviction case, after the county court rendered judgment for the landlord, it paid the landlord the amounts the tenant had paid into the court registry for the appeal. The question in this case was whether the county court had jurisdiction to pay the amount when it did.

The money paid into the court registry was not an ordinary appeal bond but is specifically defined as payment for a rental period made in connection with appeal with a pauper's affidavit. Property Code § 24.0053. The provision further permits the plaintiff in the lawsuit to withdraw this money from the registry

upon request, but provides specific requirements as to the manner and time for such requests. Under the Property Code these funds were clearly available for disbursement to the landlord upon a sworn motion and hearing during the pendency of the de novo trial up to its conclusion, but the landlord failed to request and obtain a favorable ruling on the disposition of funds in this time period.

PART VII PROPERTY OWNERS ASSOCIATIONS AND RESTRICTIVE COVENANTS

In re *Kappmeyer*, No. 21-1063 (Tex. May 12, 2023). The Kappmeyers owned three lots in Unit I of Key Allegro Island Estates. There are a total of five Units included in the subdivision. The subdivision comprises approximately 700 properties. Some are bayfront and others abut one of the canals that cross the island.

Over a period of time, the developer of the subdivision recorded restrictive covenants for each of the Units. The restrictions did not provide for mandatory association dues or assessments of any kind. Only a single reference, discussing canal maintenance, mentioned an owners association. That reference was to the Key Allegro Canal Owners Association. None of the Koppmeyers' lots are adjacent to a canal and it is undisputed they would not be subject to assessments for the canal under the agreements or original restrictive covenants.

In 2017, the Board of Directors of the Key Allegro Canal and Property Owners Association (successor to the Key Allegro Canal Owners Association) executed amended and restated deed restrictions for each of the five Units in the subdivision. These restrictions added a few things to the original restrictions, including liens and assessments. The property owners in the subdivision did not vote on the amended restrictions before they were adopted.

The Koppmeyers sued for a declaratory judgment that the amended restrictions could not be enforced because they were not approved by the required percentage of owners, they conflict with the original restrictions, and they impose new restrictions against an existing owner.

The trial court ordered the Koppmeyers to join and serve all of the property owners in the subdivision or face dismissal of their action. They brought this mandamus action, which was denied by the court of appeals leading them to this action at the Supreme Court.

When a party seeks to compel joinder of persons as parties to a proceeding, including a declaratory-judgment action, Texas Rule of Civil Procedure 39 governs. The trial court's requirement of joinder was based upon Rule 39(a)(2) which requires joinder, if feasible. Rule 39(a)(2)(ii) of the Texas Rules of Civil Procedure requires joinder of a person who "claims an interest relating to the subject of the action" if disposition in the person's absence subjects any of the current parties "to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." The court explained that, while the absent homeowners could claim an interest in enforcing the amended restrictions against the Kappmeyers, no evidence indicates that any of them has actually claimed such an interest as required to compel their joinder. The fact that the declaration sought could affect the absent homeowners does not in itself satisfy Rule 39's joinder prerequisites. Thus, the trial court clearly abused its discretion in requiring the Kappmeyers to join the other 700 property owners.

JBrice Holdings, L.L.C.* v. *Wilcrest Walk Townhomes Association, Inc., 644 S.W.3d 179 (Tex. 2022). JBrice purchased two townhomes in the Wilcrest Walk subdivision. JBrice then offered the townhomes for lease on a vacation rental website. The record does not contain a copy of any lease agreement, but website listings advertise the townhomes for rent for two- and three-night minimums. The townhomes in Wilcrest Walk are subject to neighborhood deed covenants. The covenants also empower the Wilcrest Walk Townhomes Association, the respondent, to enforce the covenants and otherwise govern the community.

One of the Wilcrest Walk covenants governs leasing activity. Leases must be in writing and tenants must comply with the neighborhood covenants. This covenant, however, limits additional restraints on an owner's right to lease. A leasing restriction must be found within the covenants or in the Association's governing documents, otherwise, there is no restriction on leasing. The governing documents provide that all leases must (i) be in writing, and (ii) provide that such leases are specifically subject in all respects to the provisions of the Declaration, Articles of Incorporation and By-laws of the Association, and that any failure by the lessee to comply with the terms and conditions of such documents shall be a default under such leases.

Another covenant limits townhome occupancy to private single family residences for the Owner, his family, guests and tenants, and it forbids commercial uses.

The Association demanded that JBrice stop leasing its townhomes for short-term rentals. In response, JBrice sued to enforce the covenant granting it the right to lease without restriction. JBrice observed that neither the residential-use clause nor any other covenant limits an owner's right to rent his property for a minimum duration. The Association counterclaimed, alleging breach of the residential-use provision, and it further asserted a nuisance claim.

Meanwhile, the Association adopted rules forbidding townhome rentals that would require an owner to remit state hotel tax, effectively banning

rentals of fewer than thirty days. JBrice amended its suit, seeking a declaration that the Association's new rules are unenforceable because they conflict with the Wilcrest Walk covenant limiting restraints on an owner's right to lease.

The trial court granted partial summary judgment to the Association, ruling that JBrice had violated the residential-use restriction. After an evidentiary hearing, the court permanently enjoined JBrice from leasing its townhomes for periods of fewer than seven days.

The Court of Appeals affirmed on different grounds. It held that Property Code Section 204.010(a)(6) authorized the Association to adopt rules banning short-term rentals. Section 204.010(a)(6) grants owners' associations in Harris County the authority to regulate property uses within their neighborhoods, provided that the regulations do not conflict with the neighborhood's deed covenants. Despite the Wilcrest Walk covenant limiting the Association's power to impose restraints on an owner's right to lease, the Court of Appeals concluded that the Association could impose rules limiting short-term rentals because the governing documents are silent as to the specific duration of any lease.

Restrictive covenants are contracts that run with the land, and are subject to the general rules of contract construction. A covenant under review may not be enlarged, extended, stretched or changed by construction. Thus, to validly limit an owner's property use, a covenant must plainly prohibit that use. Otherwise, an owner who purchases for value and without notice takes the land free from the restriction. As with contracts, courts should avoid an interpretation of one covenant that nullifies another.

Relying primarily on its prior opinion in ***Tarr* v. *Timberwood Park Owners Association***, 556 S.W.3d 274 (Tex. 2018), the Supreme Court rejected all of the Association's arguments. It held that the short-term rentals did not violate an existing covenant. It held that the residential-use covenant imposes no minimum on the duration of a lease agreement.

It held that the covenants at hand do not preclude rental income generated by residential occupancy. The townhomes are not to be occupied or used for any purpose other than as a private single-family residence for the Owner, his family, guests and tenants. Thus, the Wilcrest Walk covenants except tenant use from commercial activity by equating tenant use with owner, family, and guest use. When the income derived from a use is in the form of rent, and the nature of that use is residential occupancy, then this residential-use provision does not prohibit it. As JBrice notes, its leasing business does not occupy the premises; its tenants do. Because tenants are included among those permitted to use the townhomes, with no expressed restriction as to the minimum duration of such use, a short-term tenant does not violate the residential-use covenant.

Nor does the required "private" character of the use impose a minimum limit on the duration of a lease. In this context, "private" means "for the use of one particular person or group of people only." In the Wilcrest Walk covenants, such a group expressly includes "tenants," which deprives "private" of the meaning the Association assigns the term. To conclude that "private" use means "noncommercial" use would render the commercial-use prohibition—and its exception for tenants—superfluous. Even if "private" ordinarily could evoke non-commercial use, the commercial use provision excepts tenant occupancy, and it requires no minimum duration for the exception to apply. In ***Tarr***, the court held that commercial- and business-use prohibitions do not, without more, impose a durational limit on leasing. The addition of "private" in the covenant does not do so either.

The court also declined to categorize leases of a particular term as something other than a lease. A lease is contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration. The court observed in ***Tarr*** that a short-term rental is a lease so long as it maintains the characteristics of a lease; namely, the right to use and occupy the property. JBrice contracts with tenants to allow them the right to exclusively occupy the townhomes for the duration specified in the rental agreements; the evidence does not indicate otherwise. The trial court had no basis from which to conclude that JBrice's rental agreements were not leases.

Of the limits on leasing that exist within the Association's covenants, none imposes a minimum lease term. In interpreting covenants, courts do not extrapolate restrictions beyond those to which the owners agreed—particularly here, where the covenants expressly forbid it. Because the Wilcrest Walk covenants do not require owners who choose to rent their townhomes to do so for a particular duration, the trial court erred in imposing a minimum lease term by injunction.

Having concluded that the Wilcrest Walk covenants do not prohibit short-term rentals, the court next determined whether the Property Code independently authorizes the Association to prohibit them.

Property Code § 204.010(a)(6) permits property associations within Harris County to regulate property uses within a given subdivision, unless the governing documents say the association cannot. The important caveat at the outset of the statute prevents association actions contrary to the owners' agreements found in the deed restrictions. The Supreme Court has upheld the statute's limitation when the deed restrictions "otherwise provided" that the association lacked authority to adopt contrary rules.

Here, the court held that the Association's rules

prohibiting short-term rentals conflict with the Wilcrest Walk deed restrictions because the restrictions "otherwise provide" that the Association must not restrain an owner's right to lease a townhome beyond restrictions found in the neighborhood's governing documents. Because the Association's rules conflict with the deed restrictions, the court held that Section 204.010(a)(6) did not grant the Association the independent authority to adopt them.

The court noted that Association is not without recourse against conduct of short-term tenants or rental-property owners that unduly interferes with the use and enjoyment of other owners within the community. Should seventy-five percent of the townhome owners agree, the deed restrictions permit the neighborhood to amend the covenants to restrict leasing. And, under the current version of the deed restrictions, the Association may pursue relief from a tenant's nuisance or annoyance.

Sunchase IV Homeowners Association, Inc.* v. *Atkinson, 643 S.W.3d 420 (Tex. 2022). This case concerns whether a defendant condominium association is entitled to attorney's fees after obtaining a take-nothing judgment on claims by a plaintiff unit owner. Sunchase IV is a condominium complex in South Padre Island. The property is administered and managed by the Homeowners Association, Sunchase, a non-profit corporate entity of which each unit owner is a member. Its Board operates the property subject to rules and regulations contained in its governing documents.

Atkinson owns a unit in the Sunchase IV complex. In July 2008, Hurricane Dolly caused damage to Sunchase IV, including Atkinson's unit. Following a lengthy repair and insurance disbursement process, Atkinson sued Sunchase and its Board for fraud, civil conspiracy, breach of fiduciary duty, breach of contract, negligence, gross negligence, conversion, and trespass. Ultimately, the trial court entered a take-nothing judgment against Atkinson and awarded over $200,000 in attorneys' fees.

The Court of Appeals affirmed the take-nothing judgment, but it held that Sunchase was not entitled to attorneys' fees. It held that Sunchase was not a prevailing party under Property Code § 82.161.

Property Code § 82.161 says that the prevailing party in an action to enforce the declaration, bylaws, or rules of a condominium is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party. Because it provides that a prevailing party "is entitled to" attorney's fees, this is a mandatory fee-shifting provision. The Legislature did not define "prevailing party" in Chapter 82, but the court has previously construed the term in other contexts.

The Court of Appeals concluded that to qualify as the prevailing party, Sunchase must have shown that it was adversely affected by a violation of the Property Code, the declaration, or the bylaws and that it suffered damages or otherwise obtained affirmative relief from the trial court. This is a correct statement of the two-pronged test for identifying prevailing plaintiffs. But neither the text of Section 82.161 nor cases support applying such a test to defendants.

First, the Court of Appeals incorrectly applied subsection (a) to Sunchase, holding that it must have been adversely affected by a violation of Chapter 82. But subsection (a) just restricts the class of plaintiffs who may bring a cause of action under the act. In contrast, a defendant seeking fees need only satisfy subsection (b), which requires that it prevail in an action to enforce a condominium's governing documents or rules. It does not require the party seeking fees to be the same party who brought the action.

Second, the Court of Appeals incorrectly concluded that Sunchase must have suffered damages or obtained affirmative relief to qualify as a prevailing party. But the text of subsection (b), unlike some other fee-shifting statutes, does not contain a requirement that the prevailing party obtain damages or affirmative relief.

PART VIII ADVERSE POSSESSION, QUIET TITLE, TITLE DISPUTES, PARTITION

Pape Partners, Ltd.* v. *DRR Family Properties LP, 645 S.W.3d 267 (Tex. 2022). The Papes purchased a tract of land. The purchase included irrigation water rights. The purchase included irrigation water rights recognized by the State of Texas in two Certificates of Adjudication. The Papes attempted to record their purchase of water rights with TCEQ. The TCEQ notified DRR and other potentially interested landowners that they might own an interest in the water rights. DRR filed a change of ownership form, and the TCEQ eventually concluded that DRR owned a portion of the water rights. The TCEQ changed its records to reflect DRR's ownership.

The Papes moved to reverse the TCEQ's decision, and the motion was overruled by operation of law. The Papes did not pursue an administrative appeal, but brought the present suit seeking a declaration that it owns all of the water rights in the tract. The Papes further asserted claims against DRR for trespass to try title adverse possession and to quiet title. DRR moved to dismiss the Papes' claims against it for lack of subject matter jurisdiction, asserting that the Papes had failed to exhaust their administrative remedies. The trial court granted DRR's motion.

A divided Court of Appeals affirmed. The majority concluded, with no supporting analysis, that "the regulatory scheme behind surface water permits is pervasive and indicative of the Legislature's intent that jurisdiction over the adjudication of surface water permits is ceded to the TCEQ. It thus agreed with DRR that Pape's only remedy was a suit for judicial review under Chapter 5 of the Water Code, which by then was

time-barred.

The Supreme Court began with the basic, constitutional rule that a district court has subject-matter jurisdiction to resolve disputes unless the Legislature divests it of that jurisdiction. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. Thus, the district court has subject-matter jurisdiction to resolve a claim. And historically, the power to determine controverted rights to property has been vested in the judicial branch.

By contrast, there is no presumption that administrative agencies are authorized to resolve disputes. Rather, they may exercise only those powers the Legislature, in clear and express statutory language, has conferred upon them. Courts will not imply additional authority to agencies, nor may agencies create for themselves any excess powers. Because of the presumption in favor of jurisdiction and the narrowness of administrative agency jurisdiction, the burden to demonstrate that exclusive jurisdiction rests with an administrative agency falls on the party resisting the district court's jurisdiction.

Whether an agency has exclusive jurisdiction depends on statutory interpretation. Specifically, Court of Appeals courts look for either an express grant of exclusive original jurisdiction to the agency or a pervasive regulatory scheme indicating that the Legislature intended the administrative process to be the exclusive means of remedying the problem presented.

The relevant statutes here are in Chapters 5 and 11 of the Water Code. The court reviewed both chapters and concluded that nothing in that act gives TCEQ authority to decide conflicting claims to water rights acquired with the title to land. Indeed, the administrative process that Pape initiated after purchasing Robinson's farm is provided for not by statute but by two of the commission's administrative rules. All the rules say is that an owner of a water right shall promptly inform the executive director of any transfer of water right or change of the owner's address and then file a form, chain-of-title documents, and a fee with the director. The court noted that TCEQ agrees with this. In TCEQ's amicus brief, it referred to these provisions as an administrative record-keeping function.

The court held that TCEQ lacks jurisdiction to decide conflicting claims of ownership to surface-water rights.

Durant* v. *Lumberjack Energy, LLC, 648 S.W.3d 366 (Tex. App.-Texarkana 2021, no pet.). Trespass to try title is the sole method to determine title to land or real property in cases where there is no boundary dispute. In a trespass to try title suit, it is incumbent on the plaintiff to discharge the burden of proof resting on him to establish superior title. To maintain an action of trespass to try title, the person bringing the suit must have title to the land sought to be recovered. A plaintiff's right to recover depends on the strength of his or her own title, not the weaknesses of the title of his or her adversary. A plaintiff is not entitled to recover unless the plaintiff's own title is effectively disclosed. Recovery can be based on proof of ... superior title out of a common source. Here, Lumberjack asserts superior title out of a common source.

Odell inherited the property from Lula's estate. He then executed a quitclaim deed to himself and his wife, Ella. Odell died intestate. His two surviving children conveyed their mineral interest in the property to Lumberjack. After that conveyance, Ella died leaving her estate to Durant.

Recognizing a problem with the quitclaim deed, Lumberjack claimed that the quitclaim was an invalid attempt to convert Odell's separate property into community property because the quitclaim lacked Ella's signature. Durant argued that her signature was not required to make the quitclaim conveyance valid. The trial court agreed with Lumberjack and declared the quitclaim deed invalid.

The question on appeal was whether the quitclaim deed was a valid transfer of the property into the community estate. Current law allows for the transfer of separate property to the community if the conveying document contains the signature of both spouses. Family Code § 4.203. The court then looked into the law in effect at the time of the quitclaim, i.e., 1995.

In ***Tittle* v. *Tittle***, 148 Tex. 102, 220 S.W.2d 637 (1949), the Supreme Court held that when one spouse passes to the other by gift his or her title to separate property, it could not become the community property of both, because the law declares that property so acquired shall be the separate property of the donee. For this reason, where one spouse pretends to divest whole separate title, does not convey it to the other spouse, but declares that the instrument shall only operate to make the property belong to the community estate, the result is not really a conveyance of title, but only an agreement by which a change in the character of such title is attempted, without the existence of the facts necessary, under the law, to effect the change.

As a result, the 1995 quitclaim deed, like the husband's deed in Tittle, both of which purported to convert separate property into community property, is invalid pursuant to the law in effect at the time.

Stelly* v. *DeLoach, 644 S.W. 3d 657 (Tex. 2022). Stelly had lived on and rented the land in question from the original owners since 1999. In April 2000, Stelly and DeLoach decided to form a joint farming venture. They purchased farming equipment and the 600 acres Stelly lived on from the original owners. They closed on the land transaction in October 2000, with DeLoach securing a loan for the land from Capital Farm Credit.

DeLoach's name alone was on the original warranty deed.

The handwritten agreement between Stelly and DeLoach said that Stelly would pay DeLoach the total notes, taxes and fees for the land along with all notes on equipment financing by DeLoach. DeLoach agreed to pay Stelly $4,500 a month for Stelly to manage farming operations. In exchange, Stelly made payments on the note and allowed DeLoach to use farm equipment owned by Stelly. The agreement concluded by saying that, upon final payment, DeLoach will deed the property to Stelly. "Same with all equipment purchased."

Stelly had fully repaid DeLoach by May 2005. In September of that year, they both signed a deed of two and a half acres to Stelly's parents for their home. However, despite Stelly's performance, DeLoach did not transfer ownership to Stelly. DeLoach stopped paying Stelly and announced that Stelly owned nothing and that he intended to sell the 600 acres.

Stelly sued for breach of the contract for the sale of the land. The trial court rendered judgment holding that Stelly owned the real property and the equipment free and clear.

The Court of Appeals reversed holding (i) that Stelly had pleaded only a breach of contract claim, not a trespass to try title claim, (ii) the cause of action on the breach of contract claim accrued in 2005, and (iii) therefore, limitations had run on the claim. The Court of Appeals noted that a trespass to try title claim would have been timely.

Based upon the Supreme Court's earlier holding in ***Brumley* v. *McDuff***, 616 S.W.3d 826 (Tex. 2021), it held that Stelly had adequately pleaded a trespass to try title claim and had acquired equitable title upon completing the payments to DeLoach.

A trespass-to-try-title action requires the petition to allege: (1) the parties' real names and residences; (2) a legally sufficient description of the premises; (3) the plaintiff's claimed interest; (4) that plaintiff possesses the premises or is entitled to possession; (5) that the defendant unlawfully entered and dispossessed the plaintiff of the premises and withholds possession; and (6) a prayer for relief. The court held in ***Brumley*** that these pleading requirements are detailed, but they are not arduous. Stelly satisfied these requirements.

DeLoach does not contest that a trespass-to-try-title action where equitable title vested would be exempt from the four-year limitations period. The jury found that an agreement existed between DeLoach and Stelly, that Stelly had not breached the agreement, and that DeLoach had failed to comply. Under our precedents, this jury determination is sufficient to find that Stelly was vested with an equitable title to the property sufficient to enable him to maintain his action in trespass to try title.

Castillo* v. *Luna, 640 S.W.3d 256 (Tex. App.—Houston [14th Dist.] 2021, pet. pending). To prevail under the ten-year statute of limitations, a person must prove by a preponderance of the evidence that the possession of the disputed property by the person, or by the person's predecessors in interest, was (1) actual and visible; (2) adverse and hostile to the claim of the owner of record title; (3) open and notorious; (4) peaceable; (5) exclusive; and (6) involved continuous cultivation, use, or enjoyment for ten years. Property Code 16.026(a).

"Claim of right" means that the claimant entered into and possessed the property as his own. Although the Luna family entered onto the property in 1966, they did so as tenants. At that time, they did not claim ownership of the disputed strip of land. Sylvia and Garcia claim only that the Luna family initially rented Lot 11, and that they believed the disputed strip to be part of that property. The earliest date that the Luna family would have claimed ownership of the disputed strip was October 10, 1973, when Manuel and Alice Luna bought Lot 11.

Adverse possession need not continue in the same person; rather, limitations may be proved by "tacking," that is, by cumulating the periods of possession of each holder and successor between whom there is privity of estate. Sylvia and Garcia argue that the period of the Luna family's claim of right to the disputed strip can be tacked onto the prior owner's claim to the same land.

The problem with this argument is that the prior owners of Lot 11 were not shown to have asserted over the disputed strip a similar claim of right hostile to the owners of Lot 10. Garcia testified that her family rented Lot 11 from Samuel Sikes, and both Garcia and Castillo testified that the owner of Lot 10 also had the surname "Sikes." Garcia further testified that Samuel Sikes's sister Alberta Sikes lived next door in Lot 10. Garcia and Sylvia further introduced into evidence the deed evidencing Manuel and Alice Luna's purchase of Lot 11, and the deed shows that the Lunas purchased the property from Samuel T. Sikes.

Significantly, however, Samuel Sikes sold the property both in his individual capacity and in his capacity as the independent executor of Alberta Sikes's estate. A reasonable factfinder could not ignore the evidence that the Sikes family owned both lots, and more particularly, that Alberta Sikes both resided at Lot 10 and co-owned Lot 11. Under these circumstances, it would not be reasonable to infer that, regarding the disputed strip, Samuel and Alberta Sikes, as owners of Lot 11, asserted a claim of right hostile to the owners of Lot 10 in a manner that would allow Sylvia and Garcia to "tack" their family's period of alleged adverse possession onto the Sikes family's ownership. Thus, to prove adverse possession, Sylvia and Garcia needed to show that the resident members of the Luna family cultivated, used, or enjoyed the disputed strip for at least one continuous ten-year period after the Lunas purchased Lot 11 in October 1973.

In determining whether adverse possession has been proved, the court must consider the nature of the land and the use to which it was put. The claimant need only use the land for a purpose to which is adaptable, and in the same manner an ordinary owner would use the property. Sylvia and Garcia rely on the use of the disputed strip as a garage and driveway. The court found there was legally insufficient evidence that the disputed strip was continuously used as a driveway for the requisite period of time.

Wood* v. *Wiggins, 650 S.W.3d 533 (Tex. App.-Houston [1st Dist.] 2021, pet. denied). Texas law will not force a reluctant joint owner of real property to maintain joint ownership. Instead, a joint owner of real property may compel a partition of the interest or the property among the joint owners under Chapter 23 of the Property Code and the Texas Rules of Civil Procedure. This right to partition is considered absolute.

Rule 770 of the Texas Rules of Civil Procedure governs the judicially ordered sale of land held by cotenants. Rule 770 provides: "Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition, which sale shall be for cash, or upon such other terms as the court may direct, and shall be made as under execution or by private or public sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests." Whether a property can fairly be partitioned in kind is a question of fact for the factfinder to decide. Texas law favors partition in kind over partition by sale, and the burden is on the party seeking a sale to justify it.

Although owners of land generally have the right to partition their realty, they can waive that right through expressed or implied agreement. If they so agreed, the party who sought a partition will be estopped from asserting such a right. Consequently, the relinquishment of the right to partition has been characterized as an estoppel or waiver.

Here, Wood's argument is that Wiggins waived the right to seek, or is estopped from seeking, partition of these five properties because he agreed that Wood was "in charge of whatever goes on with them." According to Wood, this waiver or estoppel should have precluded the trial court from ordering the partition of these properties and appointing a receiver. But the defenses of waiver and estoppel are affirmative in nature and must be pleaded and proved. Given this, it was incumbent upon Wood to affirmatively plead that Wiggins was estopped from partitioning these properties or had waived his right to do so. This, Wood did not do. Having failed to plead the affirmative defenses of estoppel or waiver, Wood has waived his right to challenge the partition and appointment of a receiver on these bases.

PART IX CONDEMNATION

Hidalgo County Water Improvement District No. 3* v. *Hidalgo County Irrigation District No. 1, No. 21-0507 (Tex. May 19, 2023). The Improvement District and the Irrigation District provide water and irrigation services to Hidalgo County. The Improvement District entered into an agreement with the City of McAllen to extend an irrigation pipeline. The route of the extended pipeline crosses the Irrigation District's canal. The Irrigation District offered to purchase an easement from the Irrigation District, but negotiations to do so failed, so the Irrigation District filed a condemnation action against the Irrigation District. The commissioners appointed by the trial court awarded damages to the Irrigation District, but the Irrigation District objected to the award based on the "paramount-public-importance doctrine." Before the trial court ruled on that objection, the Irrigation District filed a plea to the jurisdiction of the court, claiming that, as a governmental entity, it is immune from condemnation suits. The trial court granted the plea and dismissed the case. The Court of Appeals affirmed.

The Supreme Court reversed, holding that governmental immunity does not apply to the Improvement District's condemnation suit. In doing so, the court recited the modern justifications for sovereign immunity and analyzed the historical development of condemnation proceedings in Texas.

City of Grapevine* v. *Muns, 651 S.W.3d 317 (Tex. App.-Fort Worth 2021, pet. pending). The City passed an ordinance expressly prohibiting short term rentals s in the City. As a result, the Homeowners sued the City, requesting declarations that the STR Ordinance violates their substantive-due-course-of-law rights, is preempted, and is unconstitutionally retroactive. The Homeowners also asserted a regulatory-takings claim.

The City moved for summary judgment and filed a plea to the jurisdiction arguing that the trial court lacks subject-matter jurisdiction over this case because (1) the Homeowners failed to exhaust their administrative remedies; (2) the Homeowners are seeking an advisory opinion on the STR Ordinance because they have not challenged the City's existing zoning ordinance under which STRs are not a permitted use in the first place; (3) the Homeowners' regulatory-takings claim is invalid; and (4) governmental immunity bars the Homeowners' claims for declaratory and injunctive relief. The trial court disagreed and denied the City's motion and plea. The City has filed this interlocutory appeal contending that the trial court lacked jurisdiction and thus erred by denying the City's jurisdictional plea.

In a lengthy opinion, the court reversed the part of the trial court's order denying the City's plea to the jurisdiction. The court affirmed the remainder of the trial court's order.

City of Webster* v. *Hunnicutt, 650 S.W.3d 792 (Tex. App.-Houston [14th Dist.] 2022, pet. pending).

Hunnicutt owned a two-thirds undivided interest in a 23.5-acre tract of land in the City of Webster. The City wished to develop the area around the interstate into a regional shopping and entertainment destination which included public roads to service the development.

City employee Betsy Giusto visited Hunnicutt in her home with a deed prepared for Hunnicutt's signature, which proposed to convey 4.111 acres of Hunnicutt's 23.5-acre tract to the City. Hunnicutt describes that she was induced to sign the deed conveying not only the approximate 2.6 acres needed for the grand entrance but also another 1.5 acres of land consisting of a pipeline easement and a five-foot strip of land south of the pipeline easement to vastly increase the value of the land owned by the City.

Hunnicut sued the City in Harris County district court, asserting an inverse condemnation claim, seeking rescission of the deed, and seeking to void the conveyance of the 4.111 acres. She later dismissed the inverse condemnation claim in the district court because such claims may be brought only in the county courts in Harris County and refiled the claim in the county court.

The supreme court has held that an inverse-condemnation claim must be based on intentional governmental action that is within the government's authority. Only when the governmental entity has properly exercised its authority may it be liable under article I, section 17. However, governmental entities are not responsible for damages caused by the neglects or wrongs committed by their officers. Unintentional acts of negligence or intentional acts that are outside the authority of the state may be torts, but they are not takings. An inverse condemnation claim founded on tortious conduct cannot be maintained.

Hlavinka* v. *HSC Pipeline Partnership, LLC, 650 S.W.3d 483 (Tex. 2022). The Legislature has cultivated two sources of condemnation authority for pipelines, one in Business Organizations Code Section 2.105, and the other in Natural Resources Code Chapter 111. The Hlavinkas argue that any entity claiming common-carrier status through Business Organizations Code Section 2.105 must first qualify as a common carrier under Natural Resources Code Section 111.002, which identifies different products for pipeline transportation than the products Section 2.105 identifies. Section 111.002 does not purport to be an exclusive list of common-carrier pipeline products, but the Hlavinkas nonetheless argue that Section 2.105 is essentially subordinate to Section 111.002 when it comes to condemnation authority, rather than an independent grant of that authority for the pipeline-transportation products Section 2.105 identifies.

Section 2.105, however, does not refer to Section 111.002. Instead, Section 2.105 explicitly expands condemnation authority to pipeline entities engaged as common carriers for the transport of products beyond those included in Section 111.002. It does so by incorporating Sections 111.019 through 111.022 from Chapter 111, without reference to Section 111.002. Section 111.019 grants eminent domain power to common-carrier pipelines. Because Section 111.002 and Section 2.105 separately incorporate its provisions, they provide alternative paths to obtaining that power.

To limit common-carrier status for pipeline companies claiming it under Section 2.105 to only those that transport the products listed in Natural Resources Code Section 111.002 imposes a statutory constraint that the Legislature did not. Such a reading deprives Section 2.105 of its effect for those products it explicitly identifies but that are not listed in Section 111.002. Recognizing as much, courts have long interpreted Section 2.015 and its predecessor statutes to be an independent grant of condemnation authority. Thus, the Supreme Court held that Business Organizations Code Section 2.105 confers the condemnation "rights and powers" found in Natural Resources Code Sections 111.019 through 111.022 for those common-carrier pipelines that transport the products that Section 2.105 identifies.

Given that Section 2.105 grants condemnation authority for common-carrier pipelines that transport the products it identifies, the Hlavinkas next argue that HSC has failed to establish that polymer-grade propylene is an "oil product" identified within Section 2.105. Section 2.105 does not define "oil product." The Natural Resources Code, however, defines "oil" as "crude petroleum oil," and "petroleum product" to include "any other liquid petroleum product or byproduct derived from crude petroleum oil." Further, the Railroad Commission defines "product" to include "refined crude oil, ... processed crude petroleum, residue from crude petroleum, ... blends or mixtures of petroleum, and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not." The court concluded that polymer-grade propylene is an oil product.

The final question about HSC's condemnation authority is whether its pipeline serves a public use. Public use is a constitutional requirement that a pipeline common carrier must fulfill to exercise eminent-domain authority. Section 2.105 incorporates this element by requiring that a pipeline transporter be "engaged as a common carrier." This standard prevents the misuse of eminent domain for purely private purposes.

The test for determining public use in this context is that a public use as a matter of law if it is reasonably probable that, in the future, the pipeline will "serve even one customer unaffiliated with the pipeline owner. The Hlavinkas argue that there should be an additional requirement: the manufacturer of the transported product must also have no affiliation with the pipeline owner. The court of appeals concluded that a jury must resolve such a question.

The Supreme Court held that the court of appeals

erred in suggesting that the jury determined the question of public use. This would inject substantial uncertainty into multi-parcel infrastructure development, risking inconsistent adjudications among multiple triers of fact. The court held that the HSC pipeline serves at least one unaffiliated customer, and thus HSC established that the pipeline serves a public use.

City of Baytown* v. *Schrock, 645 S.W.3d 1274 (Tex. 2022). Schrock owned a lot in Baytown with a mobile home on it. He leased the mobile home for rental income from Tenants. Until 2011, the City required landlords to either guarantee payment for utility bills or to file a declaration with the City stating that the landlord would not guarantee its tenant's utility payments. The City also had an ordinance prohibiting the connection of new utility service at properties encumbered by outstanding utility bills.

Although Schrock had rented out the property, he did not file a rental declaration with the City until 2009, after the City had assessed Schrock $1,999.67 in past unpaid utility bills. Schrock contested the assessment, and after a hearing, the City reduced the amount he owed to $1,157.39. The City placed a lien in that amount against the property.

In 2010, the City refused to connect utilities to the property when one of Schrock's tenants requested it, which caused the tenant to cancel the lease. The City's refusal to connect service violated Texas Local Government Code section 552.0025. Section 552.0025 prohibits municipalities from conditioning utility service connections on payment of outstanding utility bills incurred by other customers residing at the same address.

Later that year, Schrock attempted to tender payment, but the City refused to accept his check. Schrock returned to the City offices to make payment in cash but ultimately refused to pay. In the years that followed, Schrock neither paid the assessment nor attempted to sell or lease the property. It fell into disrepair and was vandalized.

In 2012, Schrock sued the City for inverse condemnation and other claims, primarily alleging that the City's refusal to reconnect his utility service violated section 552.0025 and caused damage to his property. The City filed a plea to the jurisdiction, claiming that it is immune from Schrock's claims. After a lengthy procedural history in state and federal court, only Schrock's regulatory takings claim remained for trial. During trial, Schrock testified about his attempts to resolve the lien and to the property's deterioration, which he attributed to the City's wrongful refusal to connect utilities to the property. The assistant city manager testified about the City's efforts to collect payment for the outstanding bills. The trial court directed a verdict for the City, concluding that Schrock had failed to adduce evidence of a taking.

The Court of Appeals reversed. The Court of Appeals concluded that fact issues existed as to whether the City had interfered in bad faith with Schrock's investment backed expectations, which, in turn, presented some evidence of a regulatory taking.

A city is immune from suit unless its immunity is waived. Under the Texas and United States Constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an "inverse condemnation" claim. To establish an inverse condemnation claim, a plaintiff must show that the government intended to or was substantially certain that its actions would take or damage the property for public use; otherwise, the doctrine of governmental immunity bars the claim.

The parties dispute whether a claim of economic harm to property resulting from the improper enforcement of a municipal collection ordinance alleges a regulatory taking. The City contends that Schrock's evidence fails to show that the City took or damaged his property for public use. The City argues that the enforcement of municipal ordinances that do not themselves regulate property use cannot constitute a regulatory taking, even when such enforcement was improper as a matter of state law. According to the City, the ordinance in this case was not a property use regulation; instead, the ordinance was a means to collect outstanding bills for utility services provided to the property. Further, the City argues, it did not deprive Schrock of the use of his property, even though it indirectly caused the property to be without utility service and temporarily placed a lien against it.

Schrock responds that the City's improper actions caused a loss in his rental income and a diminution in the property's value even if its collection ordinance is not a land-use regulation. He alternatively contends that the City's actions constitute either a physical taking or an exaction, entitling him to compensation.

The right to own, use, and enjoy one's private property is a fundamental right. When the government takes, damages, or destroys private property for public use, it must provide compensation.

A regulatory takings claim is one in which "the plaintiff complains that the government through regulation so burdened his property as to deny him its economic value or unreasonably interfere with its use and enjoyment. The Supreme Court observed in ***City of Houston* v. *Carlson***, 451 S.W.3d 828, 830 (Tex. 2014) that courts historically have limited regulatory takings claims to those arising directly from land-use restrictions. In that case, the City of Houston ordered several condominium owners to vacate their property because they failed to make mandated repairs. The owners sued, claiming a regulatory taking based on Houston's improper application of its regulations. In holding that the owners failed to state a regulatory taking, the court contrasted between an ordinance that

directly regulates land use and one that does not—even though it could impair use of the property as a result of its enforcement. The property owners in ***Carlson*** failed to show a taking because the repair ordinance there did "not implicate any property-use restriction.

Like Houston's ordinance in ***Carlson***, the Baytown ordinance in this case did not regulate land use. The ordinance permitted the City to refuse to connect utility service to the property until outstanding utility bills associated with the property were satisfied. The City's provision of utilities to the property was a service; its regulation of that service was not a regulation of the property itself. As with the claims in ***Carlson***, the true nature of Schrock's claim lies in the City's wrongful enforcement of its ordinance, not in an intentional taking or damage of his property for public use. In ***Carlson***, the plaintiffs similarly alleged that Houston wrongfully applied its regulations. The court reiterated in ***Carlson*** that governments generally are immune from such claims. Schrock's challenge is no different from the challenge in ***Carlson*** to the city's alleged misapplication of its building ordinance.

While the court would not foreclose the possibility that enforcement of an ordinance that does not directly regulate land use could amount to a taking, this one does not. A regulation with a condition of use so onerous that its effect is tantamount to a direct appropriation or ouster may impair a property so restrictively, or intrude on property rights so extensively, that it effectively takes the property. However, nearly every civil-enforcement action results in a property loss of some kind. Property damage due to civil enforcement of an ordinance unrelated to land use, standing on its own, is not enough to sustain a regulatory takings claim.

In re *Breviloba, LLC*, No.21-0541 (Tex. June 24, 2022). District courts and county courts have concurrent jurisdiction in eminent domain cases. But if an eminent domain case involves an issue of title or any other matter that cannot be fully adjudicated in the county court at law, that court must transfer the case to the district court. In addition to county courts at law's eminent domain jurisdiction, some county courts at law also have concurrent jurisdiction with district courts in civil cases, limited by a dollar cap on the amount in controversy. Government Code § 25.0003(c)(1).

The question in this case is this: in an eminent domain case brought in a county court at law, do counterclaims that challenge the authority to condemn and seek damages in excess of the amount-in-controversy cap on the court's additional jurisdiction require a transfer to the district court? The Supreme Court held that it does not. The amount-in-controversy cap under Government Code § 25.0003(c)(1) does not apply to Property Code § 21.001's self -contained grant of jurisdiction over eminent domain cases.

Miles* v. *Texas Central Railroad & Infrastructure, Inc., 647 S.W.3d 613 (Tex. 2022). This case involves the long-proposed high-speed rail line between Dallas and Houston. Texas Central Railroad was formed "to plan, build, maintain and operate an interurban electric railroad. Texas Logistics was formed to "construct, acquire, maintain, or operate lines of electric railway between municipalities in this state for the transportation of freight, passengers or both" and to "operate and transact business as a railroad company."

The question in this case is whether these two private entities have been statutorily granted the power of eminent domain, a power otherwise reserved to the State and its political subdivisions because of the extraordinary intrusion on private-property rights that the exercise of such authority entails.

The entities rely on the Transportation Code's grant of eminent-domain authority to legal entities chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state. The court held that the entities have that eminent-domain authority.

The majority opinion was written by Justice Lehrmann. Chief Justice Hecht and Justice Young filed concurring opinions, Justices Devine, Huddle and Blacklock filed dissenting opinions. Justice Bland did not participate.

PART X TAXATION

Mitchell* v. *MAP Resources, Inc., 649 S.W.3d 180 (Tex. 2022). Elizabeth S. Mitchell owned a mineral interest in property in Reeves County, and she died in 2009. Her heirs, the petitioners, sued to declare void a 1999 default judgment foreclosing a tax lien on Elizabeth's interest, alleging that she was not properly served with notice of the underlying foreclosure suit and thus the judgment violated her constitutional right to procedural due process. The taxing authorities that brought the foreclosure suit served Elizabeth and almost 500 other defendants by posting citation on the courthouse door.

Elizabeth's heirs contend that she should have been served personally because her name and address were available in eight publicly recorded warranty deeds and in the county's tax records. Respondents, the current owners who purchased the property at a tax sale or later acquired an interest in it, reply that those deeds and records cannot be considered in this collateral attack on the foreclosure judgment because they are outside the record of the underlying suit.

The trial court granted summary judgment for the current owners, ordering that the heirs take nothing. A divided Court of Appeals affirmed, holding the heirs did not conclusively establish a violation of Elizabeth's due process rights and declining to consider the warranty deeds because of the bar on extrinsic evidence collateral attacks.

The questions before the Supreme Court were whether information available in relevant public records

be considered in a collateral attack on a judgment that alleges constitutional due process violations and, if those records are considered here, were Elizabeth Mitchell's due process rights violated in the 1999 suit? The court answered both questions "yes."

When public property or tax records include contact information for a defendant that was served by publication, a court hearing a collateral attack on a judgment on due process grounds may consider those records. And because the deed records here featured Elizabeth's mailing address, the court held that serving her by posting did not comply with procedural due process.

Pecos County Appraisal District* v. *Iraan-Sheffield Independent School District, No. 22-0313 (Tex. May 19, 2023). The ISD hired a lawyer on a contingent fee basis to pursue the alleged undervaluation of Kinder Morgan's mineral interests by the Appraisal District. Kinder Morgan filed a motion alleging that the ISD had no power to hire attorneys on a contingent fee basis. The trial court agreed with Kinder Morgan and dismissed the ISD's lawsuit. The Court of Appeals reversed.

Kinder Morgan referred to the lawyer hired by the ISD as a "tax ferret." Not to be outdone, the lawyer referred to Kinder Morgan as a "tax cheat" and "the progeny of Enron." But the Supreme Court said this case doesn't turn on whether it is accurate toa call the lawyers contingent fee agreement with the ISD a "tax ferret contract." The Supreme Court said "This colorful terminology does not aid our review of the legal queston presented, which turn primarily on the relevant provisions of the Tax Code, none of which use mammalian metaphors." (In my favorite footnote of the season, the court said "We assume the parties mean no disrespect to the furry mammal itself, a beloved pet of Queen Elizabeth I, celebrated annually on National Ferret Day, April 2."

Tax Code § 6.30(c) provides that the governing body of a taxing unit may pay compensation to any competent attorney to enforce collection of delinquent taxes, but that any compensation cannot exceed 20 percent of the amount collected. The court previously held in In re Geomet Recycling LLC, 578 S.W.3d 82 (Tex. 2019) that this authorizes a 20 percent contingent fee only for the collection of delinquent taxes. The parties dispute whether the action by the ISD was to enforce the collection of delinquent taxes.

The court held that the taxes the ISD wanted Kinder Morgan to pay are in no sense "delinquent." The ISD argued that the taxes are delinquent because, absent Kinder Morgan's alleged fraud, they taxes were owed in previous years and are delinquent in the sense that they weren't paid when they should have been paid. But, said the court, the Tax Code doesn't use the label "delinquent" casually or colloquially. It is a defined term of art.

Tax Code § 31.02(a) states that taxes are due on receipt of the tax bill and are delinquent if not paid before February 1 of the following year. Here, no taxes have been imposed so there are no delinquent taxes. The ISD's lawsuit seeks to require the Appraisal District to raise its valuation of Kinder Morgan's property so it will owe additional taxes which have not yet been imposed.

The ISD cannot be right about the authority granted to it by § 6.30(c) unless delinquent means one thing in that section and an altogether different thing everywhere else in the Tax Code. It held that nothing in the Tax Code's interrelated provisions governing property taxes indicates that delinquent has a different meaning in § 6.30(c) than it does elsewhere in the Code. Also, the ISD's position doesn't adequately account for § 6.30(c)'s use of the words "enforce" and "collection." There can be no "collection" here because no taxes have been assessed; there can be no "enforcement" of a payment obligation that has not yet arisen.

Holcim (US) Inc.* v. *Ellis County Appraisal District, 642 S.W.3d 840 (Tex. App.—Texarkana 2021, pet. denied). Holcim filed a protest challenging the District's valuation of its property and hired counsel to represent it in front of the Ellis Appraisal Review Board. Notices were sent by regular mail and email to Holcim's counsel. The notices clearly explained that evidence was required at the hearing and warned that the appeal would be dismissed "if you fail to appear."

No one appeared on Holcim's behalf on the date of the hearing. Because no evidence was received at the hearing and no request was made to postpone, the ARB issued a notice of dismissal. The notice stated that the protest was forfeited.

When an employee of Holcim's counsel called the ARB to inquire as to whether the hearing had been rescheduled, the ARB requested a "good cause letter." Holcim's counsel responded with a letter stating that it had mailed the affidavits but that the postal service had failed to log the package into its system and had failed to deliver it.

Holcim filed an appeal in District Court. Its petition requested that the protest be remanded to the ARB. The Appraisal District filed plea to the jurisdiction arguing that the trial court lacked jurisdiction because Holcim failed to exhaust administrative remedies and never requested a new hearing under Section 41.45(e-1). In its response to the plea to the jurisdiction, Holcim argued that the ARB knew on the day of the hearing that Holcim had timely mailed the affidavits, that Holcim wanted to pursue its protest and that there was good cause to reschedule the hearing. Holcim also argued that Section 42.231 allowed the trial court to remand the protest.

The trial court granted the District's plea to the jurisdiction after finding that (1) the ARB did not receive the hearing affidavits before the hearing, (2) Holcim was notified that the ARB had not received the affidavits before the protest hearing but did not request

a postponement of the hearing, (3) the ARB dismissed Holcim's protest due to failure to appear, (4) Holcim was entitled to a new hearing if requested not later than the 4th day after the scheduled hearing date but did not timely request a hearing or timely submit a letter showing good cause, (5) Holcim did not avail itself of the administrative remedies outlined in Section 41.45(e-1), and (6) exhaustion of administrative remedies was a prerequisite to appeal. As a result, the trial court dismissed Holcim's petition for want of jurisdiction.

The Court of Appeals affirmed. It is undisputed that Holcim received timely notice of the hearing but failed to appear in person, by affidavit, or by any other method. As a result, the ARB had no evidence to consider at the hearing and dismissed Holcim's protest. Holcim argues that the postal service's failure to deliver timely mailed documents constituted good cause for a new hearing, but it is also undisputed that Holcim failed to request, within four days of the hearing, a new hearing based on good cause and that no determination on the issue of good cause was made by the ARB.

Holcim's petition requested an appeal on the merits of his property tax protest, but the ARB never decided the merits, which was a prerequisite to obtaining the relief requested by Holcim's prayer. Even so, Holcim argues that the provisions of Tax Code Sections 42.01 and 42.231 apply and confer jurisdiction on the trial court. The court disagreed.

Section 42.01 allows an appeal from a lack of jurisdiction determination. Holcim's petition sought a judicial determination of the appropriate tax treatment of its property for the tax year. Holcim requested that the trial court, among other things, fix and determine the Property's appraised value to be no more than its market value, order the Property's appraised value according to the appraisal roll reduced to no more than the appraised value determined by the Court, order the Property appraised equally and uniformly in accordance with the law, and remove or reduce to the lawful amount any tax liens upon the Property in favor of the taxing units. Essentially, the petition sought a trial de novo of the valuation of the property even though the ARB did not make a final determination on the protest. The petition did not mention Section 42.01 and did not appeal any lack of jurisdiction determination to the trial court. The District points out that it did not dismiss the protest for lack of jurisdiction, but because it determined that Holcim forfeited the protest by failing to appear. Because Holcim did not appeal a lack of jurisdiction determination, Section 42.01 did not serve to confer jurisdiction over the claims asserted or the relief requested by Holcim.

Holcim also requested a remand for a new hearing under Section 42.231, but that section only applies when an appraisal review board has entered an order determining the protest. Because Holcim's protest was dismissed, rather than determined, Section 42.231 does not apply.

Haynes* v. *DOH Oil Company, 647 S.W.3d 793 (Tex. App.—Eastland 2022, no pet.). Mary's property was sold at a tax foreclosure and sheriff's deeds were delivered to the foreclosure buyer. Over a decade later, Mary sued, alleging that the sheriff's deeds were void for an inadequate property description and also claiming that the sheriff's deeds conveyed only royalty interests, not her entire mineral interests. DOH claimed that Mary's suit was barred by the limitations provision in Tax Code § 33-54 and also by Mary's failure to comply with Tax Code § 34.08(a) which requires a deposit into the court's registry before bringing suit.

Although Mary brought suit nearly a decade after DOH purchased the disputed property by sheriff's deed, she argues that her claims are not barred by the Tax Code's statute of limitations because, due to the void description, title to the real property never passed. In other words, because the DOH deed was void ab initio, the Tax Code's statute of limitations period never began to run against Mary. The court disagreed.

Under § 33.54(b) of the Tax Code, so long as the original property owner exercises diligence in performing their obligation to pay property taxes, they will not lose their right to challenge the validity of a tax sale following a foreclosure suit for which they were not served; the statute of limitations is tolled during that time. In this case, the corrected DOH deed was recorded on March 13, 2009. Mary did not commence her suit against DOH until October 15, 2019, more than a decade later. It is undisputed that Mary failed to pay taxes on the disputed property at any point during those ten years. Moreover, at no point during the proceedings below or now on appeal has Mary contended that she was not served in the suit to foreclose the tax liens on the disputed property. Accordingly, the statute of limitations ran on Mary's claim for trespass to try title about nine years before she commenced her suit against DOH. Thus, her claim is barred.

The court also held that Mary's title claims were also barred by § 33-54. Mary contends that her trespass to try title claim was merely asking for a declaration of the parties' rights resulting from the sheriff's deeds. She argues that suits to quiet title which merely seek a declaration as to the scope of the conveyance in a sheriff's deed—styled as a question of interpretation rather than a collateral attack on the deed's validity—are not barred by the Tax Code's statute of limitations. Again, the court disagreed.

The legislature did not condition the Tax Code's application on whether a plaintiff's cause of action amounts to a trespass to try title; rather, whatever it may be and however the claim is drafted, it is conditioned on the action "relating to the title to property." Here, Mary's suit to remove cloud on her title—whether pleaded as an attack on DOH's title, a request for a declaration to limit Appellees' DOH's title, or a defense of Mary's own

asserted title—is "an action relating to the title to property" and is thus subject to the Tax Code's statute of limitations.

While a claimant may artfully plead claims in an effort to avoid the Tax Code's limitations period, the legislature forestalled such attempts when it settled upon the phrase: "relating to the title to property." The plain meaning of the phrase "relating to" is quite sweeping. It means to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. To satisfy this chosen broad language, nothing more than a tangential relationship is necessary.

PART XI BROKERS

Perthuis* v. *Baylor Miraca Genetics Laboratories., LLC, 645 S.W.3d 228 (Tex. 2022). When a seller agrees to pay sales commissions to a broker (or other agent), the parties are free to condition the obligation to pay commissions however they like. But if their contract says nothing more than that commissions will be paid for sales, Texas contract law applies a default rule called the "procuring-cause doctrine." Under that rule, the broker is entitled to a commission when "a purchaser [was] produced through [the broker's] efforts, ready, able and willing to buy the property upon the contracted terms. ***Goodwin* v. *Gunter***, 109 Tex. 56, 185 S.W. 295, 296 (1916). In this case, the agreement between the parties was silent about any exceptions to the duty to pay commissions for sales that petitioner procured. The procuring-cause doctrine therefore applies.

Jones* v. *Coppinger, 642 S.W.3d 51 (Tex. App.—El Paso 2021, no pet.). Jones sued the broker, Coppinger. Two years after the sale of the house closed, Jones sued her broker, Coppinger claiming that, during contract negotiations, Coppinger had failed to inform her that the buyer was engaged in a 1031 exchange. In addition, during negotiations, Coppinger disclosed to the buyer, without telling Jones, that there was a tax lien on the property to be paid out of the closing proceeds and that the sellers had an "urgency" to sell the property. Jones claimed the failure to disclose the 1031 during the negotiations meant that Jones was not able to use the time deadline imposed by the 1031 to negotiate a higher price. The trial court granted summary judgment in favor of Coppinger and awarded attorneys' fees and costs.

The Court of Appeals noted that the allegations based on non-disclosures, regardless of what was allegedly not disclosed, all lead back to a common issue: Jones's theory of damages.

Under each of the alleged claims, some damages must generally result from the complained of conduct. At the trial court, Jones's theory was based upon the claim that she could have negotiated a better price for the property. However, noted the court, Jones presented no evidence that any of the allegedly non-disclosed information would have raised the purchase price.

First, Jones argues that if she had known of the 1031 exchange, she could have negotiated with the buyer to pressure him into paying the "equitable value" of the property, which she said was \$1.5 million. However, Jones presented no summary judgment evidence to establish that the fair market value of the house was \$1.5 million, or that it was in fact any higher than the price agreed upon in the sale contract. Instead, when asked at her deposition why she believed the house had a fair market value of \$1.5 million, her only response was that the property was "pretty."

More importantly, there is no evidence in the record to support Jones's allegation that the buyer would have been willing to pay \$1.5 million for the property, or that, in fact, he would have paid any more than the agreed-upon amount in the sales contract simply because he was utilizing a 1031 exchange. And faced with a higher counter-offer, the eventual buyer had three options: (1) accept the higher counter-offer; (2) make his own counter-counter-offer; or (3) walk away from the deal. Based on this record, a court can only speculate which option he would have pursued. Yet, a party may not recover damages that are too remote, too uncertain, or purely conjectural. When a plaintiff's claim for damages is based solely on speculation or conjecture, summary judgment is appropriate.

In addition, Jones's claim that she was damaged by the undisclosed email communications that Coppinger had about the IRS suffers from the same defect. Jones complains that the email exchange reflected that Coppinger was concerned that the IRS might foreclose on the property, which created an "urgency" on her part to make a "quick" sale of the property, so that she would not lose her commission. But her theory of how she was damaged by the failure to disclosure that information is virtually identical to the alleged failure to disclose the 1031 exchange information. That is, she claims she could have negotiated a better sales price if she had known of the email exchanges. In addition to not presenting evidence that the buyer would have paid a higher sales price if negotiations had continued, she provides no explanation for how this information would affect the sales price of the property, or how it could have had any impact on the parties' negotiations.

Marcus & Millichap Real Estate Investment Services of Nevada, Inc.* v. *Triex Texas Holdings, LLC, No. 21-0913 (Tex. January 13, 2023). Triex bought a gas station in Lubbock from Hamilton Holdings, owned by Larry Taylor. Marcus & Millichap was retained by both Triex and Hamilton Holdings as their broker for the deal. Marcus & Millichap's agent told Triex that dual representation would be beneficial because it would allow for greater disclosure of information about the property before the transaction. As part of the transaction, Triex leased the station back

to its existing operator, Taylor Petroleum—also owned by Larry Taylor. Triex and Taylor Petroleum entered a twenty-year lease.

In December 2012, Taylor Petroleum defaulted on its lease. More than three years later, Triex sued Larry Taylor, Hamilton Holdings, and Taylor Petroleum for fraud, breach of contract, and related torts. After a deposition of Taylor Petroleum's president and CFO, Triex began to suspect that Marcus & Millichap had omitted some key details so as to overvalue the property and raise the amount of its commission. As a result, in March 2017, more than four years after Taylor Petroleum defaulted on the lease and more than eight years after Marcus & Millichap broker the sale, Triex added Marcus & Millichap to the lawsuit.

Marcus & Millichap moved for summary judgment based on limitations. The trial court granted the motion. Triex appealed and the court of appeals allowed Triex to amend its petition to plead the discovery rule. Triex did so, asserting that it was unaware of the actions of Marcus & Millichap and had no reason to know of the injuries they caused until February 2017. Marcus & Millichap again moved for summary judgment, arguing that the discovery rule did not save the time-barred claims. Again, the trial court granted the motion.

The court of appeals reversed and remanded, concluding that a fact issue existed as to whether Triex knew or should have know in December 2012 that the injury was the result of Marcus & Millichap's actions.

Actions for breach of fiduciary duty are governed by a four-year statute of limitations. Generally, a claim accrues when the defendant's wrongful conduct causes the claimant to suffer a legal injury. This is true even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.

The discovery rule is a narrow exception to the legal injury rule that defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action. It applies when the injury is by its nature inherently undiscoverable. An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence. The determination of whether an injury is inherently undiscoverable is made on a categorical basis rather than on the facts of the individual case.

In the fiduciary context, the nature of the injury is presumed to be inherently undiscoverable because fiduciaries are presumed to possess superior knowledge. So, a person to whom a fiduciary duty is owed may be unable to inquire into the fiduciary's actions or may be unaware of the need to do so. Accordingly, even if inquiry is made, facts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved.

Here, the discovery rule applies, but it does not save Triex's claims. The rule applies because a fiduciary relationship existed, and before Taylor Petroleum's breach, Triex was unaware of the need to inquire into its fiduciary's actions.

When the discovery rule applies, the statute of limitations does not begin to run until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury. This means the discovery rule defers accrual until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have let to the discovery of the wrongful act. The discovery rule does not linger until a claimant learns of actual causes and possible cures. Nor does it defer accrual until the plaintiff knows the specific nature of each wrongful act that may have caused the injury or the exact identity of the wrongdoer.

In 2012, Triex had actual knowledge of its injuries and became aware of the need to inquire into Marcus & Millichap's actions. The court of appeals concluded that the evidence conclusively established that appellants were aware that they had sustained an injury by December 1, 2012, the date Taylor Petroleum defaulted. But it determined that a fact issue existed as to whether Triex knew or should have known that the injury was the result of wrongful acts committed by Marcus & Millichap. The court of appeals came to this conclusion by relieving Triex of the responsibility of diligent inquiry because of its fiduciary relationship with Marcus & Millichap.

But the Supreme Court has held that those owed a fiduciary duty are not altogether absolved of the usual obligation to use reasonable diligence to discover an injury. Recognizing that the presence of a fiduciary relationship can affect application of the discovery rule, the court has held that it remains the case that a person owed a fiduciary duty has some responsibility to ascertain when an injury occurs. When the fact of misconduct becomes apparent it can no longer be ignored, regardless of the nature of the relationship.

PART XII CONSTRUCTION ISSUES

James Construction Group, LLC* v. *Westlake Chemical Corporation, 650 S.W.3d 392 (Tex. 2022). This case arises out of a construction contract dispute between an owner and contractor; the principal issues are: (1) whether the owner was required to strictly (or only substantially) comply with a written-notice condition precedent to recover damages in a termination for default; (2) whether the owner could substantially comply with the written-notice requirement absent a writing; and (3) whether a provision barring recovery of consequential damages merely waived liability for such damages or constituted a covenant not to sue.

Westlake, the owner, replaced James, the contractor, for safety violations following a fatal accident involving a James employee. The contract

allowed Westlake to assign work to James and other contractors at Westlake's discretion. Westlake was entitled under to intervene and require James to improve its safety at James's cost if James was performing work unsafely. Westlake was also entitled to terminate the contract with James for convenience or default.

To terminate for default based on safety violations and recover associated costs, Westlake was required to give James three notices in writing: (1) that Westlake had reasonably determined there were serious safety violations; (2) that Westlake was not reasonably satisfied with the pace and quality of James's remediation efforts; and (3) that James was terminated for default. The contract also included an indemnity provision and a waiver of consequential damages.

Westlake sued James for breach of contract to recover the costs of hiring a replacement contractor. James counterclaimed, alleging Westlake breached by improperly terminating James for default and seeking contractually prohibited consequential damages. The jury found that Westlake substantially complied with all three notice conditions, and that James violated the agreement by failing to pay Westlake's costs associated with transferring the work. It also found that James failed to indemnify Westlake in litigation following the worksite fatality and that Westlake's claims for consequential damages also violated the agreement.

The trial court rendered judgment largely on the jury's verdict, awarding both parties damages and attorney's fees. The Court of Appeals affirmed the judgment as to the award of damages and attorney's fees to Westlake and reversed as to the award to James on its counterclaim. The Court of Appeals held that the doctrine of substantial compliance applied to the notice requirements and that the evidence was legally sufficient to support the jury's findings that Westlake substantially complied. It also held that Westlake did not breach the contract by seeking consequential damages because the provision barring such damages was merely a liability waiver, not a covenant not to sue.

The Supreme Court affirmed in part, reversed in part, and remanded to the trial court for further proceedings on Westlake's attorney's fees. The Court first held that substantial compliance was the appropriate standard when evaluating compliance with a contractual notice condition. However, the Court explained that without a writing in some form, a party does not comply, substantially or otherwise, with a written-notice condition. The Court concluded that at a minimum, Westlake failed to provide two of the three required written notices. To the extent there were writings from Westlake to James, they failed to provide the requisite notice, and it was undisputed that there was no writing whatsoever giving the final notice terminating James. The Court therefore held Westlake did not substantially comply with the written-notice conditions precedent to termination for default and was not entitled to contract damages under that provision.

The Court further rejected Westlake's argument that another contract provision which had no notice requirement provided an independent ground for the same damages award, holding that such a provision could not be used as an end-run around the more stringent requirements under the contract's termination-for-default section.

However, the Court affirmed as to James's failure to comply with its indemnity obligations. The Court rejected James's argument that Westlake's failure to provide the requisite notices of default constituted a material breach that excused those obligations because the written-notice requirement was a condition precedent to termination for default, not a covenant.

The Court further affirmed the take-nothing judgment on James's counterclaim for breach of contract, interpreting the provision to constitute a waiver of liability for consequential damages, not a covenant not to sue. Construing the provision's language as a whole and considering the nature of the waiver—which bars only a type of damages—the Court held that the provision did not subject a party to liability merely for seeking damages that are ultimately classified as consequential rather than direct. Accordingly, while James could not be held liable for Westlake's consequential damages, Westlake did not breach the contract by seeking them.

Chief Justice Hecht, joined by Justice Devine, Justice Busby, and Justice Bland, dissented in part, opining that Westlake substantially complied with the contract's written-notice requirements. The dissent would have held that a writing was not required to substantially comply in light of evidence of actual notice. The dissent also would have held that there were writings supplying notice from Westlake as to the first two requisite notices and that a writing from James supplied the final required notice.

Justice Boyd, joined by Justice Blacklock and Justice Huddle, dissented as to James's Section 26 counterclaim, opining that the provision unambiguously created a covenant not to sue and that the trial court's judgment in James's favor on that claim should be reinstated.

In re *Custom Home Builders of Central Texas Inc.*, 647 S.W.3d 419 (Tex. App.—San Antonio 2021, no pet.). Civil Practice & Remedies Code § 15.011 states that "Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located."

Custom Home Builders build a custom home for some folks in Guadalupe County. The homeowners then sued for construction defects, filing the suit in Bexar County. Custom Homes filed a motion to transfer venue

to Guadalupe Count, claiming that the suit is for recovery of damages to real property and that § 15.011 mandates venue in the county where the house is located. The homeowners argued that § 15.011 applies only to suits involving title to or possession of land. The trial court denied the motion. Custom Homes filed this mandamus action.

The Court of Appeals held that the common and ordinary meaning of "damages to real property" is money claimed for loss or injury to land or anything attached to the land. After a lengthy and scholarly discussion, the court held that § 15.011 mandates venue in the county where the land is located.

Pepper Lawson Horizon International Group, LLC **v.** ***Texas Southern University***, No. 21-0966 (Tex. May 19, 2023). TXU contracted with two construction companies Pepper Lawson to build student housing. The two companies jointly subsequently formed Pepper Lawson to do the work. Pepper Lawson completed the project more than six months after the contractual deadline. Invoking equitable adjustments and justified time extensions under contractual provisions, Pepper Lawson invoiced TSU for an adjusted remaining balance due. The university refused to pay that amount, alleging that several contract provisions precluded the adjustments and time extensions. Pepper Lawson sued TSU for breach of contract to recover the amount due and sought interest and attorney's fees under a statutory provision incorporated into the contract. The university asserted governmental immunity and alleged that the statutory waiver set forth in Civil Practice & Remedies Code § 114.003 is inapplicable because Pepper Lawson failed to plead a claim covered by the provision. The trial court denied TSU's plea. On appeal to the Court of Appeals, TSU argued, for the first time, that Pepper Lawson lacked standing because the entity was formed after the contract was entered into and was not a party to a written contract.

The Supreme Court reversed the Court of Appeals. It held that Pepper Lawson had pled a cognizable breach of contract claim and sought damages that were within the scope of the statutory waiver. Pepper Lawson was not required to prove its contract claim in order to establish a waiver of governmental immunity.

Trimcos, LLC **v.** ***Compass Bank***, 649 S.W.3d 907 (Tex. App.-Houston [1st Dist.] 2022, pet. denied). The question here involves the time of inception of the Trimcos's mechanic's lien. In connection with the closing on the construction loan for the project, Trimcos—the general contractor—signed affidavits attesting that no work had commenced on the project and no materials had been delivered to the property where the project was to be built. These representations track the statutory language establishing when a lien attaches. Property Code § 53.124. The Bank relied upon those affidavits in lending funds for the construction of the project.

Trimco's asked the court to follow the relation-back doctrine first declared by the Supreme Court in Oriental Hotel v. Griffiths. 88 Tex. 574, 33 S.W. 652 (1895). According to that common-law doctrine, if there is a general construction contract between an owner and a contractor, the time of inception of all mechanic's liens created by the construction is the date that the general construction contract was executed. Trimcos argues that because its execution of the contract—a general construction contract—with the owner predates Compass's deed of trust, its mechanic's lien has priority over Compass's deed of trust. Compass, on the other hand, looks to Property Code § 53.124 as the sole authority for establishing the priority of Trimcos's mechanic's lien and argues that, because that section does not declare that a mechanic's lien relates back to the date of the contract, Trimcos's mechanic's lien does not predate Compass's deed of trust.

When the Texas Supreme Court decided Oriental Hotel, the mechanic's lien statute did not address a lien's time of inception. In 1971, though, the Texas Legislature amended the statute to define "inception of the lien." This amendment was passed in reaction to the first opinion rendered by the Supreme Court in Irving Lumber Co. v. Alltex Mortgage Co. 14 Tex. Sup. Ct. J. 212 (July 2, 1971), on reh'g , 468 S.W.2d 341 (Tex. 1971), which allowed oral construction contracts to indicate the inception of a mechanic's lien, thereby in effect allowing the creation of silent or secret mechanic's liens. By defining the "inception of a lien," the amended statute "created the system whereby mortgagors could rely upon notice in the county records or by visual inspection of the property as to any existing liens on the property.

Since 1971, then, Texas has statutorily defined the time of inception of a mechanic's lien. Currently, Property Code § 53.124 specifies that the time of inception of a mechanic's lien is the commencement of construction of improvements or delivery of materials to the land on which the improvements are to be located and on which the materials are to be used, as long as they are visible from inspection of the land on which the improvements are being made. And § 53.124 specifically addresses original contractors, i.e., persons who contract with an owner either directly or through the owner's agent, providing that the owner and original contractor may jointly file an affidavit of commencement with the county clerk of the county in which the land is located not later than the 30th day after the date of actual commencement of construction of the improvements or delivery of materials to the land. An affidavit with contents that comply with the statute will constitute prima facie evidence of the date of the commencement of the improvement described in the affidavit, which is the time of inception of a mechanic's lien arising from work described in the affidavit. These provisions would have no purpose if the general

contractor could simply rely on the date of the general construction contract as the time of the inception of the mechanic's lien.

The Texas Constitution directs the Texas Legislature to provide by law for the speedy and efficient enforcement of mechanic's liens Constitution art. XVI, § 37. Because mechanic's liens are creatures of statute, it would violate that constitutional directive if the court decided to override the Property Code's specific definition of the time of a lien's inception with a common-law rule gleaned from a case decided before the applicable statute defined the time of inception. A fundamental constraint on the courts' role in statutory interpretation is that the legislature enacts the laws of the state and the courts must find their intent in that language and not elsewhere.

The court concluded that for purposes of enforcing a mechanic's lien, Property Code § 53.124, which defines the time of inception of a properly perfected mechanic's lien as the earlier of either (1) the commencement of a lienholder's construction of improvements on the property or (2) the lienholder's delivery of materials to the land on which the improvements are to be located and on which the materials are to be used, provides the only measure for calculating the time of inception of a mechanic's lien, including those liens between an original contractor and owner. Thus, the priority of Trimcos's mechanic's lien is determined by one of the statutory measures in § 53.124, not by when Trimcos and Bell executed the contract.