# CASE LAW UPDATE

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# CASE UPDATE

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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 667 S.W.3d and Supreme Court opinions released through November 10, 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.

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## PART I
## FORECLOSURES

***PNC Mortgage* v. *Howard***, 668 S.W.3d 644 (Tex. 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 (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
## GUARANTIES

***CL III Funding Holding Co.* v. *Steelhead Midstream Partners, LLC*** 655 S.W.3d 844 (Tex. App.-Fort Worth 2022, pet. pending). A debtor cannot recover from its surety for its own debt—even if the debtor acquires that debt by assignment. Principal debtors and sureties have a vertical relationship with one another; even if both parties are directly liable to the creditor, between themselves the principal debtor bears primary liability while the surety bears secondary liability. Consistent with this relationship, Texas courts have long recognized that, if a surety is called to perform on a principal debtor's behalf, the surety is entitled to reimbursement and is subrogated to the rights of the creditor.

Just as sureties can recover from principal debtors based on their vertical relationship, co-debtors who share principal liability for a debt can recover their proportional shares from one another based on their horizontal relationship. The co-debtor "occupies a hybrid status" in this regard; it is in the position of a surety to the extent that it promises to answer for the portion of the debt that benefited its fellow co-debtor but is not a surety for the portion of the debt for which it personally benefited.

The same is true of co-sureties; they can recover from one another in proportion to their shares of secondary liability. And just as a surety who pays a debt can step into the shoes of the creditor to collect from the principal, so too can a co-debtor or co-surety step into the shoes of the creditor to collect the proportional shares owed by its co-debtors or co-sureties. But the co-debtor or co-surety who pays the whole debt cannot recover for its own share of the liability; the right to subrogation is limited to the extent of its co-debtors' or co-sureties' liability.

Given that a paying surety can collect from the principal debtor and that co-sureties or co-debtors can collect their proportional shares from one another, it almost goes without saying that a principal debtor cannot collect from its surety, and that a sole , principal debtor cannot collect from anyone. If one joint debtor has assumed the obligation of paying the entire debt, so that among or between the debtors the assuming debtor occupies the position of principal and the other debtor or debtors the position of sureties, then should payment be made by the one who is ultimately obliged to discharge the debt, no right of subrogation can arise. In such instances, the paying party is the one ultimately responsible for the debt, so it is not entitled to reimbursement for paying its own debt.

## PART III
## ARTICLE 9 SECURITY INTERESTS

***Agrifund, LLC* v. *First State Bank of Shallowater***, 662 S.W.3d 523 (Tex. App.-

Amarillo 2022, pet. denied). A security interest in goods is a purchase money security interest to the extent that the goods are purchase-money collateral with respect to that security interest. UCC § 9.103(b)(1). "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral. A "purchase-money obligation" (or PMSI) is an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used. ). In transactions other than consumer-goods transactions, the secured party claiming a PMSI has the burden of establishing the extent to which its security interest is a PMSI.

A perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter. UCC § 9.324(a).

The Bank's security agreement in this case provides that the property subject to the security interest includes supplies used or produced in a farming operation and crops grown or to be grown for the 2018 crop year. Thus, the Bank argues, its interest is a PMSI because (1) the debtors pledged as security supplies to be used in their farming operation and their crops to be grown and (2) the Bank's loans to the debtors enabled them to acquire the seed, which it characterizes as a crop to be grown, and chemical purchased in August of 2018.

The court disagreed. The very term "purchase money security interest" denotes that the security interest must be taken in the items actually purchased. The Bank's loan to the debtors did not enable them to purchase a crop; it enabled them to produce one. To create a PMSI, the value must be given in a manner that enables the debtor to acquire interest in the collateral. This is accomplished when a debtor uses an extension of credit or loan money to purchase a specific item.

## PART IV
## DEEDS AND CONVEYANCES

***Balmorhea Ranches, Inc.* v. *Heymann***, 656 S.W.3d 441 (Tex. App.-El Paso 2022, no pet.). The doctrine of presumed lost deed or grant, also referred to as title by circumstantial evidence, has been described as a common-law form of adverse possession. Its purpose is to settle titles where the land was understood to belong to one who does not have a complete record title, but the person has claimed ownership for a long time. The Supreme Court of Texas observed, "[t]he rule is essential to the ascertainment of the very truth of ancient transactions. Without it, numberless valid land titles could not be upheld." ***Magee* v. *Paul***, 110 Tex. 470, 221 S.W. 254, 256-57 (1920).

Generally, the doctrine applies when there is a gap in the chain of title and operates to create an evidentiary presumption that a deed may have been executed in favor of the party who has asserted ownership for a long time. The general statement of the doctrine is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect.

Generally, the application of the presumption is a question of fact, not law. However, the presumption may be established as a matter of law in cases where the deeds are ancient and the evidence is undisputed. The events to which the presumption of lost grant has been applied usually occur when there is a gap in title before the Twentieth century.

Relatedly, because of the age in these gaps in title, these cases usually involve some proposed reason for the gap. For example, there are cases where a title was lost or destroyed. There are cases where a party proved they were entitled to a muniment of title but never obtained one. There are cases where potentially fraudulent conveyances created chains of title so confusing it was impossible to determine the exact history of the land. And still there are others where a clerical error resulted in a gap in title.

## PART V
## VENDOR AND PURCHASER

***Fibela* v. *Wood***, 657 S.W.3d 664 (Tex. App.-El Paso 2022, no pet.). Fibela and Wood signed a contract for Fibela to buy a house from Wood. The closing of the sale did not occur and about four years after the contract was signed, Fibela filed suit against Wood. Wood answered, pleading limitations and mutual mistake as her defenses. Wood claimed that, at the time the contract was signed, she mistakenly believed she owned the property, which was actually owned by her daughter. Fibela amended his petition to add a claim of statutory fraud, claiming that Wood made a false representation to him about owning the property for the purpose of inducing him to enter into the contract. The trial court granted summary judgment for Wood and ordered Fibela take nothing.

On appeal, among other things, the court dealt with Fibela's statutory fraud claim and the breach of contract claim.

Texas law prohibits false representations in transactions involving real estate or stock. Business & Commerce Code § 27.01. § 27.01. The elements for a statutory fraud claim based on a real estate transaction are: (1) there was a transaction involving real estate; (2) during the transaction, the defendant made a false representation of fact, made a false promise, or benefitted by not disclosing that a third party's representation or promise was false; (3) the false representation or promise was made for the purpose of inducing the plaintiff to enter into a contract; (4) the plaintiff relied on the false representation or promise by entering into the contract; and (5) the reliance caused the plaintiff injury.

Wood asserts there was no evidence that she knew she was not the owner of the property when the contract was signed or that she knowingly made a material misrepresentation to Fibela with the intent that he would rely on this misrepresentation to his detriment, or that Fibela incurred damages. The court held that Fibela presented no evidence establishing that Wood entered the contract knowing that she did not own the property. So, the summary judgment for Wood on the statutory fraud claim was affirmed.

As to the breach of contract claim, the court looked at Wood's claim that there was no valid and enforceable contract because she did not own the property. To establish a valid, enforceable contract, the following elements must be shown: "(1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds on the essential terms of the contract (mutual assent); (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. Wood asserts there was no meeting of the minds because the property was not actually owned by her at the time the

contract was executed or at the time set for closing.

However, in an express contract, mutual agreement is expressly stated. Here, Fibela presented evidence of the express terms agreed to by both Fibela and Wood. The parties' writing demonstrated that Wood agreed to sell the Property to Fibela for an agreed price and closing on a certain date. Based on such writing, Wood failed to negate the existence of an enforceable contract.

Furthermore, Wood cited no authority demonstrating that a contract for sale is rendered unenforceable when a seller does not own the property at the time the contract is made. Generally, in the absence of an agreement to the contrary, it is unimportant that the vendor's title is bad, or that the land is encumbered at the time the contract is made, if it is made in good faith and he is prepared to convey the title guaranteed at the time set for performance. There is no rule of law which renders it illegal for a person to promise to convey land which he does not own. The fact that the seller did not own the land at the time the contract was made becomes important only in connection with other facts showing grounds for equitable relief to the purchaser. The court concluded that Wood's lack of ownership provides no basis to nullify the contract.

Wood asserted the affirmative defense of unilateral mistake. Generally, a mistake by one party to an agreement will not be grounds for equitable relief. Equitable relief may be granted for unilateral mistake when: (1) the mistake is of so great a consequence that to enforce the contract would be unconscionable; (2) the mistake relates to a material feature of the contract; (3) the mistake occurred despite ordinary care; and (4) the parties can be placed in status quo, i.e. , the recission must not prejudice the other party except for the loss of the bargain.

Wood argued her evidence showed it was uncontradicted that she was a 78-year-old widow. and that she did not know she was not the title owner of the property. Therefore, she argues, there is not a scintilla of evidence that she knowingly or intentionally made a representation to Fibela that she knew to be untrue. The court held that Wood's arguments were conclusory and failed to meet the required elements of unilateral mistake.

***Lennar Homes of Texas Land and Construction, Ltd.* v. *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 and 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.

Also see these cases, which add to the principles in ***Lennar***: ***Taylor Morrison of Tex., Inc.* v. *Ha***, 660 S.W.3d 529 (Tex. 2023) and ***Taylor Morrison of Tex., Inc.* v. *Skufca* ex rel. *KSX***, 660 S.W.3d 525 (Tex. 2023).

***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 noted 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 agrees 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 an 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.

***Sanchez* v. *Retreat at Mesa Hills***, 657 S.W.3d 64 (Tex. App.-El Paso 2022, no pet.). Sanchez appealed the eviction ordered by the justice of the peace. Sanchez was able to remain in possession of the premises, but only if he paid a month's rent into the court registry. Sanchez made the payment, but not within the required time period, so the landlord filed a motion to dismiss. The county court granted the motion and ordered Sanchez to pay back rent, court costs, and attorneys' fees. Sanchez still did not vacate and filed this appeal.

Sanchez argued on appeal that a motion to dismiss for failure to pay rent during the pendency of an appeal does not give the trial court discretion to make a judgment on the merits, but rather, only allows the trial court to grant a writ of possession. This court disagreed.

The trial court acted within its authority in ordering that a writ of possession may immediately be issued upon Sanchez's failure to vacate. As to the remainder of the trial court's order, the court found the trial court acted within its authority in granting judgment for unpaid rent, court costs, and attorney's fees. Property Code §24.0054 provides that, if a county court finds that the tenant has not complied with the payment requirements pending appeal, the county court shall issue a writ of possession unless on or before the day of the hearing the tenant pays all rent and landlord's reasonable

attorneys' fees. At the hearing, the county court found that Sanchez had not paid those amounts, so it was proper for the court to order payment of all unpaid rent and attorneys' fees.

## 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 Kappmeyers 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 Kappmeyers 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.

***Urias* v. *Owl Springs North, LLC***, 662 S.W.3d 561 (Tex. App.-El Paso 2022, no pet.). Prewitt sold properties with a restriction that the property be used for residential housing only. Sometime after the purchase, Urias began using the Property for non-residential purposes, specifically, a truck parking business and an RV

parking business. In 2015, the city annexed the property and zoned it in a manner that permitted commercial use. In 2019, Owl Springs sued for breach of the restrictive covenant. They later filed a motion for summary judgment, claiming the deed restrictions are valid. The trial court granted summary judgment in favor of Owl Springs.

On appeal, Urias did not contest the validity of the restrictions or that it had been violating them. Instead, they claimed waiver, estoppel, changed conditions, and limitations barred enforcement. Owl Springs argued that these affirmative defenses were forfeited because Urias had not pled them.

Urias argued the trial court lacked subject matter jurisdiction because the four-year limitations period for enforcing deed restrictions had run. A party urging the affirmative defense of limitations has the burden to plead, prove, and secure findings to sustain it. The court held that Urias's failure to timely raise the limitations defense resulted in a waiver of that defense.

To prove the affirmative defense of abandonment or waiver of a restrictive covenant, a defendant must prove then-existing violations so great that an average person could reasonably conclude the restriction in question has been abandoned. Factors to be considered are the number, nature, and severity of the violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize the benefits intended through the covenant to a substantial degree.

A residential-only restrictive covenant may be nullified or voided when there has been such a change of conditions in the restricted area or surrounding it that it is no longer possible to secure in a substantial degree the benefits sought to be realized through the covenant. In considering whether this change in conditions has occurred, courts should look to: (1) the restricted area's size; (2) the restricted area's location with respect to where the change has occurred; (3) the type of change or changes that have occurred; (4) the character and conduct of the parties or their predecessors in title; (5) the purpose of the restrictions; and (6) to some extent, the unexpired term of the restrictions.

The property in question was annexed by Pecos City in 2015 and zoned for commercial use. Although a zoning ordinance, by itself, is insufficient to destroy valid deed restrictions, a zoning ordinance is some evidence of a change of conditions involving the residential character of the area. Annexation by the city is also an indicator of a change of conditions. Because the property was zoned commercial by Pecos City, which happened after Appellants purchased it, it may no longer be possible to secure in a substantial decree the benefits sought to be realized through the residential restrictive covenant.

***River Plantation Community Improvement Association* v. *River Plantation Properties LLC***, 661 S.W.3d 812 (Tex. App.-Beaumont 2022, pet. pending). The reciprocal-easement doctrine applies when an owner of real property subdivides it into lots and sells a substantial number of those lots with restrictive covenants designed to further the owner's general plan or scheme of development. The central issue is usually the existence of a general plan of development. The lots retained by the owner, or lots sold by the owner from the development without express restrictions to a grantee with notice of the restrictions in the other deeds, are burdened with what is variously called an implied reciprocal negative easement, or an implied equitable servitude, or negative implied restrictive covenant, that they may not be used in violation of the restrictive covenants burdening the lots sold with the express restrictions.

When a plaintiff seeks to enforce a reciprocal-easement claim against the grantor of the property (or the grantor's successor), the plaintiff must prove that both the plaintiff's and defendant's tracts are: (i) traceable to a common developer; (ii) who developed a tract of land for sale in lots; (iii) who pursued a general plan or scheme to develop the land; (iv) for the benefit of himself and the purchasers of the various lots; and (v) by numerous conveyances, when selling the lots, the developer inserted in the deeds substantially uniform restrictions, conditions, and covenants against the use of the property.

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

***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.

## PART IX
## PARTITION

***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 X 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. denied). 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. denied). 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.

***Miles* v. *Texas Central Railroad & Infrastructure, Inc.***, No. 20-0393 (Tex. June 24, 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 XI
## 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.

***Gill* v. *Hill***, 658 S.W.3d 618 (Tex. App.-El Paso 2022, pet. pending). The sheriff's deed from the tax foreclosure sale was recorded on April 8, 1999. In 2019, Gill filed a lawsuit collaterally attacking the validity of the tax sale, alleging that their predecessors in title owned a portion of the mineral interests sold at the tax sale and were not properly served, making the tax sale void for lack of due process.

Tax Code §33-54 provides a limitations period of one year from the date that the deed executed to the purchaser at the tax sale is filed of record for challenges to title of property sold in a tax sale. The sheriff's deed, showing a recording date, establishes the accrual date of claims. Accordingly, Hill conclusively proved the accrual date. It was not necessary to negate the discovery rule, since it was neither pleaded by Gill nor is applicable to claims challenging a tax sale.

## PART XII
## BROKERS

***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 known 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.

***Hernandez* v. *Vazquez***, 656 S.W.3d 589 (Tex. App.-El Paso 2022, no pet.). Hernandez was renting a home that was foreclosed. After discovering the home had been foreclosed, Hernandez made attempts to purchase the home through the new owner's listing agent, Vazquez. Hernandez claims he made several verbal offers to purchase the home, but Vazquez never submitted the offers to the new owner. Hernandez asserts Vazquez misrepresented to him that the offers had not been accepted when, in fact, Vazquez had never forwarded them. Hernandez contends because of Vazquez's failure to forward the offers, he was deprived of

the opportunity to purchase the property, evicted, and he incurred significant relocation expenses. Hernandez sued for negligence, negligence per se, common-law fraud, negligent misrepresentation, and exemplary damages. The trial court granted summary judgment for Vazquez.

Hernandez's negligence claim was based on his argument that a real estate agent owes a duty to be faithful and observant to trust placed in the agent and that the agent be scrupulous and meticulous in performing the agent's function in any real estate transaction involving any member of the public, even if the agent has a principal agent relationship with another individual. Hernandez stated that he believes this duty arises from Chapter 531 of the Texas Administrative Code, the section of the administrative code that provides regulations governing the Texas Real Estate Commission. When questioned in his deposition about Vazquez's duty to him, Hernandez admitted that Vazquez was never acting as his real estate agent in this transaction. Hernandez argued that Vazquez still had a duty to him under 22 Administrative Code § 531.1, which requires the agent, in performing duties to the client, to treat other parties to the transaction fairly. Hernandez stated that, although a real estate agent may be acting as an agent for another person, that does not mean that he can commit fraud and negligence with a person that's making an offer to purchase real estate in a transaction. He stated: "[A]lthough there may not be an agent principal fiduciary duty, there is a fiduciary duty to the public, a member of the public that is involved in a real estate transaction ... with somebody that he may be an agent for."

The court held that Hernandez has not produced, and it had not found cases imposing a duty forming the basis of a negligence claim on a real estate agent under these regulations. It declined to adopt the regulations found in the Canons of Professional Ethics and Conduct as the basis for a negligence claim by a potential party to a real estate transaction against a real estate agent for the other party to the transaction.

## PART XIII
## CONSTRUCTION ISSUES

***U.S. Polyco, Inc.* v. *Texas Central Business Lines Corporation***, No. 22-0901 (Tex. Nov. 3, 2023, *per curiam*). Polyco manufactures and sells asphalt products throughout the United States. In early 2013, Polyco sought to expand its business by building a new manufacturing plant that would have direct railroad service. To that end, Polyco contacted Texas Central, a short-line freight railroad company. After several months of negotiation, the two companies agreed that (1) Polyco would use an undeveloped parcel of land leased by Texas Central for Polyco's new asphalt manufacturing plant and (2) Polyco would use Texas Central's railroad service for its asphalt shipments.

The parties entered into two contracts. The "Transload Agreement" governed how Polyco would "transload" its asphalt shipments—that is, how it would transfer them from railcar to truck. The "Railroad Allowance Agreement" generally governed how the parties would develop and improve the undeveloped parcel of land for Polyco's asphalt plant and transloading operations. Both contracts also addressed how certain costs would be allocated once the project was underway.

The primary issue before the Supreme Court concerns how the Railroad Allowance Agreement allocated the costs of building infrastructure on the undeveloped parcel between Polyco and Texas Central. Polyco agreed to advance up to $1.2 million to make "TCB Infrastructure Improvements," a defined term in the agreement. The agreement provided

for a "further written agreement." The parties disputed whether that provision applies to everything listed regarding the TCB Infrastructure Improvements section or only to the reference to "other items" that immediately preceded the additional writing requirement. The scope of the "in writing" requirement determines whether Polyco had to obtain further written agreement for work involving slabs on the land.

According to Texas Central, Polyco's contract with a third party to construct those slabs (and other contracts) led Polyco to incur expenses far above its $1.2 million advance. Because Polyco did not obtain Texas Central's written agreement about such improvements, Texas Central reasoned, the improvements did not qualify as "infrastructure" that Texas Central was obligated to fund. Polyco countered that no such written agreement was required. Only "other items in or adjacent to" the property required separate written agreements, Polyco argued, but concrete slabs were already specifically listed as infrastructure in the agreement.

Polyco sued Texas Central for breach of contract. The trial court granted the motion, specifically holding that the phrase "as are agreed upon by TCB and Customer in writing" modifies only the phrase "other items in or adjacent to the Designated Areas." At the ensuing trial, Polyco was awarded almost $9 million in damages plus an additional $2 million in prejudgment interest and attorneys' fee.

Texas Central appealed, arguing that the trial court misread the agreement. The Court of Appeals applied to canons of construction: the series-qualifier canon and the last-antecedent canon. Under the series qualifier canon, the Court of Appeals reasoned, the phrase as are agreed upon by Texas Central and Polyco in writing would modify all items in the series listed in that section of the agreement, including various concrete and ground surface improvements. But under the last-antecedent canon, the Court of Appeals said, the phrase "as are agreed upon" by Texas Central and Polyco in writing would only modify the last item in the series, which is the phrase other items in or adjacent to the property. Standing alone, either canon might reasonably apply to this text, the Court of Appeals explained, but punctuation is a permissible indicator of meaning, and based on the absence of a comma before the "as are agreed in writing" phrase, that phrase appears to only apply to other items in or adjacent to the property, as suggested by the last-antecedent doctrine. This result is precisely what the trial court had reached.

The analytical approach undergirding that result is consistent with the Supreme Court's general principles of contract interpretation, and it would have been unremarkable but for the fact that the Court of Appeals' reasoning did not stop there. In a subsequent section, the court ventured beyond the contractual text. Despite what the Court of Appeals had previously noted, it found that the parties strongly disagreed about the meaning of the text, so it held that the agreement was ambiguous and could not be construed as a matter of law. It reversed the trial court and remanded for a new trial.

On appeal, the Supreme Court noted that the Court of Appeals, quite correctly, began its analysis by applying two relevant canons of construction and observing that they might reasonably point in different directions. Canons often do; the last-antecedent and series-qualifier canons generally will. The task of the court is to assess the language, structure, and context of a written instrument to determine which principle carries more weight and relevance. That is why the Court of Appeals—again, correctly—determined that, in this context, the punctuation of the agreement favored the last-

antecedent canon's application. Had the Court of Appeals affirmed the trial court's reading, its decision would have squarely aligned with the Supreme Court's decision in ***Sullivan* v. *Abraham***, 488 S.W.3d 294 (Tex. 2016)), in which the Supreme Court applied the last-antecedent canon based largely on the Legislature's inclusion of an Oxford comma in a provision of the Texas Citizens Participation Act.

As the court emphasized in ***Sullivan,*** use of the Oxford comma, while instructive, is not definitive. In this case, the omission of an Oxford comma only reveals the lack of anything else in the text or context that supports the notion that the parties intended the "in writing" requirement govern everything in that section. Had they so intended, they had multiple structural and syntactical tools—not merely the use of a comma—to achieve that result. By choosing instead to itemize distinct improvements in the agreement and include the writing requirement only at the end, the comma's absence is instructive because it conveys that the "in writing" provision is simply part of the final item in the list. The point is that something is needed to link that phrase to what goes before—perhaps a comma, perhaps distinct placement of the requirement, perhaps making it a separate sentence. Instead, the agreement's structure and syntax—together with its incorporated exhibit—indicate the opposite.

It is not reasonable to interpret this final phrase as imposing a future writing requirement on the improvements listed earlier. That reading is inconsistent with the written statement that the parties "agreed to" the listed and shown improvements. The court could thus not adopt, or deem as a reasonable competitor, Texas Central's more unnatural reading of the agreement. That reading would require the court to conclude that the parties intended to mandate an agreement "in writing" to items already listed in the agreement, thus necessitating not one but two written agreements regarding the same thing—without any textual basis for adopting such a reading.

The Court of Appeals accordingly erred by concluding that there were "multiple, reasonable interpretations" of the provision of the agreement. By "multiple," it simply meant two—the two the court had already examined, only one of which it could embrace. And by "reasonable," it simply meant plausible, but lawyers in litigation can often generate plausible arguments to advance their clients' position. When there is a plausible basis for dispute, lawyers should disagree by making the strongest available arguments for their clients; counsel in this case have discharged that duty well and honorably. But such disagreement is not a basis for a court to abandon the interpretive task— it is what makes that task needed. Whenever possible, courts must assess adverse arguments and resolve a text's meaning as a matter of law. If lawyerly disagreement about text meant that a legal instrument's disputed meaning must be resolved as a matter of fact, it would be a poor advocate who could not obtain a jury trial to interpret the text.

***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 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.

***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.