CASE UPDATE

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TARRANT COUNTY BAR ASSOCIATION
REAL ESTATE SECTION LUNCHEON
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The case selection for this episode of the Case 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 332 S.W.3d 716 and Supreme Court opinions released through May 6, 2011.

In an effort to streamline the case discussions, various statutory and other references have been reduced to a more convenient shorthand. The following is an index of the more commonly used abbreviations.

"Bankruptcy Code" – The Federal Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.

"DTPA" – The Texas Deceptive Trade Practices Act, Texas Business and Commerce Code, Chapter 17.

"UCC" – The Texas Uniform Commercial Code, Texas Business and Commerce Code, Chapters 1 through 9.

"Prudential" – ***Prudential Insurance Co. of America*** **v.** ***Jefferson Associates***, 896 S.W.2d 156 (Tex.1995), the leading case regarding "as-is" provisions in Texas.

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.

This and past Case Law Updates are available at our website cwrwlaw.com.

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PART I
MORTGAGES AND FORECLOSURES

Chase Home Finance, L.L.C.* v. *Cal Western Reconveyance Corporation, 309 S.W.3d 619 (Tex.App.-Houston [14th Dist.] 2010, no pet. history to date). Dickerson bought a lot on Galveston. It was initially financed by AHL, with Dickerson giving AHL a first lien and second lien on the lot. The AHL liens were later assigned to Wells Fargo.

Shortly after buying the lot, Dickerson conveyed the lot to Gooch, subject to the AHL liens. Gooch filed for bankruptcy right after that and later she sold the lot to Landin. Landin borrowed from People's Choice to buy the lot and gave People's Choice a first and second lien on the lot. The People's Choice first lien deed of trust contained a provision stating that People's Choice would be subrogated to any liens paid off with the proceeds of the loan. The People's Choice loan paid off the AHL first lien, which was released, but the AHL second lien was not paid off or released. HSBC bought the People's Choice notes and liens. Its servicer was Chase.

HSBC foreclosed on the People's Choice first lien. After the foreclosure, the AHL second lien was assigned to RTR, which then sought to foreclose on the lot. Chase then filed suit to prevent RTR from foreclosing on the second lien it had acquired from AHL. Chase claimed that, because the proceeds from the People's Choice first lien had been used to pay off the AHL first lien, the holder of the People's Choice first lien (i.e., HSBC) was subrogated to the rights of the AHL first lien and that the HSBC foreclosure extinguished the AHL second lien.

The trial court concluded that RTR was entitled to retain the AHL second lien. Further, on the principle that a lienholder should not be granted subrogation if the superior or equal equities of others with recorded interests would be prejudiced thereby, it denied subrogation to Chase and held that the AHL second lien was prior to Chase's lien.

The trial court found that material prejudice to RTR would result based on the following factors: (1) if equitable subrogation were applied in this case, then rather than RTR being subordinate to the original AHL fixed rate loan, RTR would be subject to a more risky variable rate loan; (2) when the People's Choice (now Chase) loan was made, the new borrower was not properly qualified, was not a suitable borrower for the loan transaction, and made very few payments against the new mortgage before going into default; (3) the People's Choice loan was $41,000 greater than the note it repaid; (4) the borrower of the People's Choice loan was a bad credit risk; (5) permitting subrogation would cause accrued interest under the AHL first lien to be converted to principal under the People's Choice first lien, prejudicing the second lien holder with a greater interest burden in front of it; and (6) a reasonable second lienholder would not voluntarily subordinate its position because of the material prejudices created by any such subordination.

The trial court also found that People's Choice and its successors, including Chase, had a duty to pay off the AHL second lien, and that they knew and acknowledged that they had a duty to pay the amount necessary to extinguish this lien. In addition, the trial court found that People's Choice assumed the responsibility to pay off the AHL second lien. There is no written agreement in the record reflecting such a duty or assumption of responsibility. None of closing documents impose on People's Choice the duty to pay off the AHL second lien. In its closing instructions, People's Choice states that the title policy should not have an exception for a lien like the AHL second lien, and the title policy complied with this instruction.

In ***Texas Commerce Bank National Association* v. *Liberty Bank***, 540 S.W.2d

554 (Tex.Civ.App.-Houston [14th Dist.] 1976, no writ), this court held that a bank lender was entitled to subrogation as a matter of law. The facts in ***TCB*** are substantially the same. The court in ***TCB*** held that Liberty Bank, who had repaid an existing first lien, was expressly subrogated to the rights of the holders of the prior liens it had repaid and that, as a matter of law, there was no prejudice to TCB. Both before the pay-off of the senior liens by Liberty Bank and after this pay-off and subrogation of Liberty Bank to the senior position, TCB was entitled to the amount remaining after the amounts of these liens were subtracted from the proceeds of the foreclosure sale in a foreclosure of the two senior liens.

The trial court in this case appears to have evaluated prejudice based on the presumption that, if subrogation were granted, it would have to be as to all amounts owed under the People's Choice first lien note. Therefore, the trial court considered the fact that, although the initial interest rate of the People's Choice first lien note was lower than the AHL first lien note, after two years, the People's Choice first lien note changed to a high, variable interest rate. However, if subrogation were granted, priority would be given only to the $348,482.63 paid by People's Choice plus six-percent interest thereon from the date of payment. Therefore, the difference in interest rates is not material to the analysis.

The trial court also emphasized that Landin was a borrower with a high likelihood of default. First of all, this testimony was based on speculation by the corporate representative of RTR, premised on the terms of the Landin purchase rather than on a credit report or other direct information regarding Landin's creditworthiness. Even presuming a high risk that Landin would default, there is no evidence that this risk of default was higher than the risk associated with Dickerson. Although the record also lacks direct information regarding Dickerson's creditworthiness, it reflects that, less than a month after purchasing the property with no down-payment, Dickerson conveyed title to Gooch and warranted to her that the property was free from all encumbrances. In fact, the Property was encumbered with two liens from the recent closing. After making at most a few payments against his indebtedness to Aames, Dickerson stopped paying, and his loan went into default. There is no evidence in the record that Gooch assumed Dickerson's indebtedness, and at the time of the sale to Landin, Gooch had filed for bankruptcy protection. Even if it were appropriate to consider prejudice arising from the substitution of Landin in place of Dickerson as the debtor, the record evidence is legally insufficient to support a finding that this change was prejudicial.

The parties in this case argue over whether this case involves purely contractual subrogation or purely equitable subrogation. In cases like the one at hand, there is no contract between the two lenders who are disputing whether the subsequent lender is entitled to subrogation; however, there is an express deed-of-trust provision between the debtor and subsequent lender stating that, if proceeds are used to pay off a prior debt, the lender will be subrogated to all rights of the prior lienholder. Under precedent from the Supreme Court of Texas, such cases fall into a third, hybrid category. In these cases, the right of subrogation is not wholly dependent on the application of a contract, and it is not wholly dependent on equitable principles. In such cases, though the analysis does involve equitable considerations, each case is not controlled by its own facts, and the subsequent lender can be entitled to subrogation as a matter of law. In these cases, the subsequent lender's actual or constructive knowledge of the lien previously filed by the other lender does not defeat the subsequent lender's right to subrogation. Likewise, in such cases, the subsequent lender's alleged negligence is not relevant to the subrogation analysis.

Caress* v. *Lira, 330 S.W.3d 363 (Tex.App.-San Antonio 2010, pet. denied).

Gares bought three lots with a loan from the Bank. When Gares defaulted, the Bank posted the three lots for foreclosure. The day after the posting, Gares sold one of the lots to Lira. Lira received a payoff letter and from the bank and paid the amount requested by the bank. However, the lien on the Lira lot was not released and the foreclosure took place, with the substitute trustee conveying all three lots to Caress. Lira filed a trespass to try title suit against the Bank and Caress.

To recover in her trespass to try title suit, Lira bore the burden to prove her title to the disputed property by: (1) proving a regular chain of conveyances from the sovereign, (2) establishing superior title out of a common source, (3) proving title by limitations, or (4) proving title by prior possession coupled with proof that possession was not abandoned.

In this case, there is no dispute Lira and appellants claim title from a common source; thus, Lira had only to prove she held superior title. In her motion for summary judgment, Lira argued she held superior title because the trustee's sale of the lot to appellants was void on the grounds that the bank agreed to release the lot from the lien in exchange for Lira paying to the bank the agreed payoff amount on the lot. Lira requested and received a payoff amount as it applied to the lot, and although she paid that amount to the bank, the bank did not execute an instrument evidencing the bank's release of the lot. The bank then allowed the same lot to be sold at a foreclosure sale.

In their response, Caress and the Bank countered that the foreclosure sale was not void because the Gares deed of trust does not contemplate or authorize a partial payment of the debt owed by Gares. Instead, according to appellants, the Gares deed of trust requires that the entire debt secured by the deed be paid before any lien is released. Therefore, they argued, because Lira only made a partial payment toward Gares' debt as to the one lot, the lien on the one lot could not be released.

The court declined to construe the full payment clause as precluding the bank from releasing its lien on a lot-by-lot basis. While the Gares deed of trust does not contain a separate clause expressly entitled as an agreement between the bank and Gares allowing Gares to sell off the property lot-by-lot and obtain a release of lien as to the sold lots, two clauses in the deed of trust evidence an intent to allow for such an occurrence under certain circumstances. One clause indicates that Gares could sell part of the mortgaged property with the Bank's consent. Another allows the Bank to release any part of the mortgaged property without affecting its lien on the balance. The court held that these clauses evidence an intent by the parties that the bank may release its lien on a lot-by-lot basis.

After examining the plain language of this unambiguous deed and construing the deed in its entirety, the court conclude it was the intent of the parties that the bank could release its lien as to any part of the mortgaged property without first requiring that the entire indebtedness be paid in full. Lira's summary judgment evidence establishes that the bank admitted the payoff check was sufficient for the Bank to execute a partial release of lien releasing the lot and the Bank no longer had a lien against the property. However, despite these admissions, the bank never executed a document evidencing its release of its lien. Nevertheless, under the circumstances presented here, we do not believe the failure to execute a written release invalidates the sale to Lira. A lien is usually extinguished upon payment of the indebtedness that it was created to secure.

Therefore, because the lien on the lot purchased by Lira was extinguished prior to the foreclosure sale, there was no lien as to that lot to foreclose, and the trustee had no power to transfer title to the lot to appellants.

Green Tree Servicing, LLC* v. *1997 Circle N Ranch Limited, 325 S.W.3d 869 (Tex.App.-Austin 2010, no pet.). Seven manufactured houses were situated on land owned by Circle N. The houses were owned by separate owners, each of which leased the land. Each house was purchased with financing from Green Tree and secured by a lien on the house. Ultimately, each owner defaulted on his or her loan obligations and ceased to occupy the home. Pursuant to the security instruments and the UCC, Green Tree sold each of the seven manufactured homes "as is and where is" to third-party purchasers. Thereafter, some of the manufactured homes remained on Circle N's property, with no lot rentals being paid, for what in some instances proved to be weeks, months, or even years before their third-party purchasers eventually removed them. Circle N sued Green Tree to recover unpaid rentals on the lots.

The legislature has addressed the respective rights of creditors and property owners under such cir-cumstance in chapter 347, subchapter I of the Finance Code. Finance Code § 347.401, sets forth a general rule that "[e]xcept as provided by this subchapter, a lien or charge against a manufactured home for unpaid rental of the real property on which the manufactured home is or has been located is subordinate to the rights of a creditor with a security interest or lien that is: (1) perfected under this chapter; and (2) recorded on the document of title issued with the manufactured home." However, Finance Code § 347.402, titled "Possessory Lien," creates the following exception to section 347.401:

"(a) The owner of the real property on which a manufactured home is or has been located and for which rental charges have not been paid has a possessory lien that is not subject to Section 347.401 to secure rental charges if:

> (1) the creditor described by Section 347.401 repossesses the manufactured home when the charges have not been paid; and
>
> (2) the owner of the real property has mailed to the creditor by certified mail, return receipt requested, written notice of the unpaid charges.

There is no question that Green Tree was a creditor and Circle N a property owner with respect to the seven houses. It was also undisputed the Circle N sent Green Tree the required notices of unpaid charges. The dispute was whether subchapter I made Green Tree personally liable for the unpaid rental charges, as Circle N claimed. Green Tree argued that subchapter I gave Circle N only a possessory lien in each manufactured home to secure the amount of unpaid rentals determined under subsections (b) and (c) of section 347.402, but did not make Green Tree personally liable for the unpaid rental amounts secured by the liens. Because it had previously sold each of the homes to third parties, Green Tree insisted, Circle N's remedies, if any, lay against those other parties, or whoever might possess the homes now, rather than Green Tree.

The cornerstone of subchapter I's remedies for property owners is section 347.402. Reflecting section 347.402's focus is its title: "Possessory Lien." On its face, section 347.402 purports only to create a "possessory lien" in favor of the property owner when the conditions of subsection (a) are met. A "possessory lien" is a type of claim or security interest in specific property that permits a creditor to take and retain possession of the property until a debt or obligation is satisfied. While creating a "possessory lien" against specific property—the manufactured home—section 347.402 does not purport to create a cause of action against or impose liability upon the creditor or any other specific person for the unpaid rental amounts secured by the lien.

In contending that subchapter I creates a cause of action imposing personal liability on the creditor for the rental charges determined under section 347.402(b) and (c), Circle N urges that section 347.403, when read in conjunction with section 347.402, evidences legislative intent to create a cause of action whereby property owners can recover rental charges from creditors. Circle N further asserts, subchapter I must create a cause of action against creditors for unpaid rentals because if it were otherwise, it would provide no protection for the property owner's interests despite the legislature's obvious concern for those interests.

The court ultimately held that the legislature did not create a cause of action in subchapter I through which Circle N could recover personally from Green Tree for unpaid rental amounts. Circle N emphasizes various perceived inequities and practical difficulties it faced in enforcing its possessory liens where, as here, the creditor sells the manufactured homes in place to third-party purchasers. Circle N complains that it had no practicable means to determine that Green Tree had sold the homes, who the third-party purchasers were, or that the purchasers would be removing the homes from Circle N's property. Circle N further insinuates that Green Tree opted to sell the manufactured homes in place in a calculated attempt to avoid Circle N's possessory lien, an allegation Green Tree denies. Whatever merit these complaints might have, the court was constrained, first, by the narrowness of Circle N's claim for relief. Both in the district court and on appeal, Circle N has relied exclusively on a purported cause of action under subchapter I whereby Green Tree is made personally liable for the unpaid rentals. The court expressed no opinion regarding whether Circle N might have had any other statutory or common-law remedies against Green Tree or other parties in regard to the seven manufactured homes at issue, as that question was not before the court. More importantly, the court was further constrained by the words the legislature has chosen in subchapter I, and any remedy from the consequences of the legislature's choices must lie in that governmental branch rather than this one.

Black* v. *Washington Mutual Bank, 318 S.W.3d 414 (Tex.App.-Houston [1st Dist.] 2010, pet. pending). Lundy owned a house and got a $1 million loan on it from WaMu. Less than a month after obtaining the loan, Lundy conveyed the house by quitclaim to Black, who paid $100,000 down and made monthly payments of $8,500. About a year after entering into the agreement to purchase the property, Black received a phone call from Lundy telling her that he needed to do something with the lender or bank and he needed her to go and release the property but he would give it back to her. Black signed the deed giving the property back to Lundy. Lundy did not transfer the property back to Black, and Black never heard from Lundy again.

WaMu foreclosed on the loan. Black was given notice of the sale. After the foreclosure, WaMu gave Black a notice to vacate and then filed this forcible detainer action. Black claimed that the justice court and county court lacked subject matter jurisdiction over the case because it involved the determination of title to the property. A justice court in the precinct in which real property is located has jurisdiction over a forcible detainer suit. The sole issue to be determined in a forcible detainer action is the entitlement to actual and immediate possession, and the merits of the title shall not be adjudicated.

Black argues that the granting of a quitclaim deed from Lundy granted her "equitable title" and a greater right of possession than WaMu. However, a quitclaim deed, by its very nature, only transfers the grantor's right in that property, if any, without warranting or professing that the title is valid. Thus, Black took the property subject to the terms of the deed of trust, which allow foreclosure. Further, Black admitted at trial that she did not have title at the time of sale because she conveyed her interest back to Lundy. Black fails to include in her analysis how her conveyance of the property back to Lundy affected her claimed "equitable title." While Black may seek recourse against Lundy independent of the forcible detainer suit, her argument has no bearing on the determination of immediate right of possession.

See also ***Williams* v. *Band of New York, Mellon***, 315 S.W.3d 925 (Tex.App.-Dallas 2010, no pet.). Defects in the foreclosure process may not be considered in a forcible detainer action to evict the foreclosed homeowner.

And see also ***Shutter* v. *Wells Fargo Bank***, N.A., 318 S.W.3d 467 (Tex.App.-Dallas 2010, pet. pending). The lender proved its right to possession of the property by presenting in evidence the substitute trustee's deed, the deed of trust, and notices to the borrower and the other residents of the property to vacate. The substitute trustee's deed showed the lender purchased the property in a public auction following appellant's default on the deed of trust. The deed of trust showed the borrower was a tenant at sufferance when she did not vacate the property after thje lender purchased it. The notice to vacate informed the borrower of her tenant-at-sufferance position and the lender's requirement that she vacate the property. This evidence was sufficient to establish the lender's right to immediate possession of the property.

PART II
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Athey* v. *Mortgage Electronic Registration Systems, Inc., 314 S.W.3d 161 (Tex.App.-Eastland 2010, pet. denied). The Atheys executed a promissory note payable to Decision One and secured by their property. The note contained a legend at the top in bold and all caps that said "THIS NOTE CONTAINS PROVISIONS AL-LOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT." The body of the note contained a provision that said the interest rate would change on September 1, 2007 and every six months after that.

In contrast to this language, the Atheys contended that an unnamed representative of Decision One told them at closing that the note had a fixed interest rate.

Decision One raised the interest rate from 7.79% to 10.79%. The Atheys defaulted and the lender accelerated. The Atheys contended that they were defrauded when the Decision One representative misrepresented that the interest rate was fixed. The lender moved for summary judgment on this claim, arguing that the note fully disclosed that the interest rate was variable. The Atheys do not dispute that the note unambiguously provided for an adjustable interest rate but contend that, absent proof of their actual knowledge that the rate was variable (knowledge which cannot be inferred merely from what they would have learned had they read the note), testimony that the representative said the interest rate was fixed is sufficient to preclude summary judgment.

While the court agreed that the Atheys were not required to independently investigate the Decision One representative's statement before relying upon it, does this mean that they could rely upon an oral statement clearly inconsistent with conspicuous provisions of the note? The Athey's argued that they could, reasoning that, because the Decision One representative's statement induced them to sign the note, they could rely upon it even if it was contradicted by a conspi-cuous note provision. A party to a contract may not successfully claim that he believed the provisions of the contract were different from those plainly set out in the agreement or that he did not understand the meaning of the language used. To vitiate a contract, a fraud must be something more than merely oral representations that conflict with the terms of the written contract.

Even if bright-line rules for determining whether reliance is justified are sometimes wanting, Texas courts have been more stringent in their analysis of fraudulent inducement claims when the contract is a promissory note. The policy behind this heightened proof requirement is to avoid uncertainty and confusion in the law of promissory notes.

The Atheys' evidence does not establish the trickery, artifice, or device necessary to void a promissory note. The oral representation upon which they rely is directly, clearly, and conspicuously contradicted by the note's heading and introductory paragraph. The court did not hold that a fraudulent inducement cause of action can never lie merely because the operative oral representation is contradicted by a provision within the contract. But in this instance, the Atheys could not reasonably rely upon an oral representation that was so plainly contradicted.

Stephens* v. *LPP Mortgage, Ltd., 316 S.W.3d 742 (Tex.App.-Austin 2010, pet. denied). LPP acquired Stephens's note from the SBA. The note was secured by a deed of trust. LPP initially sued to collect on the note. In that original suit, LPP did not pursue foreclosure of the lien or otherwise place the deed of trust at issue. LPP prevailed and obtained a judgment and attempted collection, but the writ of execution was returned Nulla Bona. LPP then filed suit for judicial foreclosure of its lien.

Stephens contends that after suing on the promissory note and reducing that claim to judgment, LPP Mortgage was barred by res judicata from pursuing the remedy of foreclosure of the deed of trust lien securing repayment of the note. For res judicata to apply, there must be (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims that were raised or could have been raised in the first action. The doctrine of res judicata seeks to bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. Under the doctrine, if a plaintiff prevails in a lawsuit, his cause of action merges into the judgment and the cause of action dissolves. The question, here, is whether LPP Mortgage was required to litigate its claim for judicial foreclosure of its lien as part of its prior suit on the promissory note.

It has long been the rule in Texas that suit may be maintained on a note secured by lien without enforcement of the lien, and after judgment another suit can be brought to foreclose the lien. Stephens argued, however, that this longstanding rule was overruled by the Texas Supreme Court's decision in ***Barr* v. *Resolution Trust Corp.***, 837 S.W.2d 627 (Tex.1992), where the court "reaffirmed" the transactional approach to res judicata, which relates to what claims could have been litigated in a prior lawsuit. Under the transactional approach, res judicata may apply if the subsequent suit arises out of the same subject matter as a previous suit and, through the exercise of diligence, could have been litigated in the previous suit. A determination of what constitutes the subject matter of a suit requires an examination of the factual basis of the claims without regard to the form of action.

Stephens claimed that, in order to ascertain the entire agreement between contracting parties, separate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together. So, if the note and deed of trust should be construed together based on this principle, it follows that under the transactional approach to res judicata-as set out in Barr-a final judgment on the note will bar a subsequent suit to foreclose the lien.

The court disagreed. The fact that two

documents should be viewed together for purposes of construing those documents' terms is not, by itself, sufficient to require all claims under either document to be brought together, particularly given that, here, the two documents create two separate and severable rights held by LPP. When a debt is memorialized by a note that is secured by a lien, the note and lien constitute separate obligations. Such separate obligations may be litigated in separate lawsuits. Therefore, the holder of a note and security interest may bring suit and obtain judgment on the note, and-if, as is the case here, the holder did not request foreclosure in that suit, the judgment on the note in the holder's favor is not satisfied, and no provisions of the note or deed of trust contractually alter the parties' remedies-the lien-creditor may later bring suit for judicial foreclosure of the lien. Until the underlying debt is actually satisfied, the recovery of a judgment on the note secured by a deed of trust lien, where foreclosure of the lien has not been sought in that suit, does not merge the deed of trust in the judgment and does not preclude foreclosure on the lien in a subsequent suit instituted for that purpose.

PART III
USURY

Threlkeld* v. *Urech, 329 S.W.3d 84 (Tex.App.-Dallas 2010, pet. stricken). Threlkeld signed a promissory note payable to Urech. The note provided that interest would accrue at 1 00% per annum. Principal and interest were due and payable in one year.

Although Threlkeld made sporadic payments under the note, he never paid the full amount owed. After Threlkeld defaulted, Urech contacted an attorney to discuss his legal rights of recovery. On December 17, 2003, based on his attorney's advice, Urech sent a “correction letter” under section 305.103 of the Texas Finance Code informing Threlkeld that the note, as executed, violated Texas usury law. Urech also informed Threlkeld that the letter was intended to correct the violation and “the stated interest rate of 100% per annum in the Note [was] reduced, from the inception of the loan until payment [was] finally made, to the maximum lawful rate of interest not to exceed 18% per annum.”

On October 5, 2007, Urech filed suit to recover the amounts he alleged were still due under the note. Threlkeld answered and sent Urech a letter under chapter 302 of the Texas Finance Code stating his position that the 18% interest rate specified in the purported correction letter was usurious. Threlkeld advised Urech he had 61 days to modify the note again. Urech refused to modify the note any further, and Threlkeld filed a counterclaim for usury.

Threlkeld claimed Urech that the correction letter was not sent timely and the maximum amount of allowable interest that could be applied to the note was 10%, not 18%.

Threlkeld argued Urech knew at the time the note was signed that the stated interest rate was usurious and, therefore, the correction letter was not sent within 60 days after Urech discovered the usury violation as required by section 305.103 of the Texas Finance Code. The court disagreed. The summary judgment evidence regarding Urech's knowledge consists solely of the affidavits made by the parties. Urech testified in his affidavit that he was unaware of the usury violation until he consulted with an attorney and that he sent the correction letter fifty-three days later. This testimony establishes that the correction letter was sent within the sixty-day window provided for in section 305.103.

Threlkeld contends the maximum amount of interest that can be applied to the note is 10% under section 302.001(b) of the Texas Finance Code. Threlkeld cites no authority to support his contention that the maximum interest rate to which a usurious note may be corrected is 10%. Threlkeld argues only that an 18% annual rate of interest is usurious and there is no language in the note that would support the 18% rate. To support his argument that the 18% interest rate is usurious, Threlkeld relies on the portion of section 302.001(b) that states "[a] greater rate of interest than 10 percent a year is usurious unless otherwise provided by law." Threlkeld's reliance on this language is misplaced because Texas law provides for a greater rate of interest in section 303.009 of the finance code. Section 303.009 establishes an alternative interest rate ceiling with a "minimum ceiling" of 18% a year. This 18% minimum rate ceiling is applicable to written contracts through Section 303.002. Accordingly, Texas law authorizes an interest rate of at least 18% to be applied to a written contract such as the one at issue here, and the rate is not usurious.

PART IV DEEDS AND CONVEYANCE DOCUMENTS

Smith-Gilbard* v. *Perry, 332 S.W.3d 709 (Tex.App.-Dallas 2011, no pet.). Perry owned a piece of property along West Grove Street in Kaufman. While looking for some land for a medical facility, Raymond, who worked for the Kaufman Economical Development Corporation at the time, asked Perry if she would be interested in selling the vacant lot west of the fence located on her property. Perry informed Smith-Gilbard and her husband, Dr. Lewis, that Perry was interested in selling the lot west of the fence line. Perry and Smith-Gilbard later entered into a contract and closed the sale. Perry told Smith-Gilbard that she did not see any reason to incur the additional expense of having a new survey made because there had been no changes to the property described in the deed she received when she purchased it. That deed described the property as a parcel of land situated in the County of Kaufman, State of Texas, a part of the C.A. Lovejoy Survey, Abstract Number 303. They used that description in the contract, along with a statement that the property measured 113' x 200'.

When the property was conveyed, the property was described by metes and bounds in terms that were identical to the 1965 warranty deed that Perry had provided in lieu of a survey. The metes and bounds descriptions of the property, however, included an additional 1,881 square feet of the lot that extended east beyond the fence line. At trial, it was undisputed that the "Lot 125" of the "C.A. Lovejoy Addition" referred to in the contract between the parties was the same piece of property described in both the 1965 and 2002 warranty deeds as part of the "C.A. Lovejoy Survey." Perry did not tell Smith–Gilbard she did not intend to convey all of the property described in both the 1965 warranty and 2002 deeds as the "C.A. Lovejoy Survey."

Perry sued Smith–Gilbard in September 2004, seeking reformation of the deed based on an alleged mutual mistake of the parties. The petition acknowledged that Perry executed and delivered the 2002 warranty deed to Smith–Gilbard. Perry argued, however, that it was the specific intent of the parties to sell the property described in the deed "up to but not including" the portion of the lot that extended east beyond the fence line. Specifically, she alleged that, principally through the title company assisting in the closing, the premises were erroneously described.

Perry also alleged that she made repeated requests to Smith–Gilbard to reform the deed, to no avail. The trial court concluded Perry was entitled to reformation of the warranty deed because there was an agreement among the parties that was not reflected in the deed, and that the deed should thus be reformed to describe the eastern boundary of the property sold by Perry to Smith–Gilbard as ending at "the existing fence line."

A mutual mistake of fact occurs when the parties to an agreement have a common intention, but the written contract does not reflect the intention of the parties due to a mutual mistake. When a party alleges that, by reason of mutual mistake, an agreement does not express the real intentions of the parties, extrinsic evidence is admissible to show the real agreement.

To prove a mutual mistake, the evidence must show that both parties were acting under the same misunderstanding of the same material fact. A mutual mistake regarding a material fact is grounds for avoiding a contract, but the mistake must be mutual rather than unilateral. A unilateral mistake does not provide grounds for relief even though it results in inequity to one of the parties.

When seeking relief from a mutual mistake, the party seeking reformation must also prove what the true agreement was, but its case is not made by proof that there was an agreement which is at variance with the writing. It must go further and establish that the terms or provisions of the writing that differ from the true agreement made were placed in the instrument by mutual mistake. The doctrine of mutual mistake must not routinely be available to avoid the result of an unhappy bargain.

In this case, the evidence at trial indicates that the parties intended to rely on the metes and bounds description in the 1965 warranty deed that was incorporated into the 2002 warranty deed to accurately describe the property. Smith–Gilbard testified that she relied on the metes and bounds description of the property that was found in the 1965 and 2002 warranty deeds, and Perry provided Smith–Gilbard the 1965 warranty deed as a description of the property in lieu of preparing a new survey. According to Smith–Gilbard, Perry told her that she had owned "the property for a very long time, nothing had changed, nothing was different on it," so there was no reason to incur the additional cost of a new survey. Perry testified that she provided the 1965 warranty deed because "[Smith–Gilbard] wanted a description of the property." There is no indication in the record that Perry ever told Smith–Gilbard that she did not intend to convey all of the property described in the deeds, or that she was only interested in selling a parcel measuring "113 x 200" feet. Moreover, it is well-known that specific descriptions by metes and bounds prevail over more general descriptions.

Escondido Services, LLC* v. *VKM Holdings, LP, 321 S.W.3d 102 (Tex.App.-Eastland 2010, no pet.). As far back as 1862, the Texas Supreme Court in ***Mitchell* v. *Bass***, 26 Tex. 372 (Tex.1862), adopted a general rule where a grantor conveyed an easement or right-of-way for a public road and retained the underlying fee, including the minerals. The established doctrine of the common law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road. That is the legal construction of the grant unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

Many courts have referred to two doctrines as justification for the general rule: (1) the appurtenance doctrine and (2) the strip and gore doctrine. The appurtenance doctrine is based on the presumption that a conveyance reflects an intention to carry with it the appurtenant easements and incidents belonging to the property at the time of the conveyance.

The strip and gore doctrine is essentially a presumption that, when a grantor conveys land he owns adjacent to a narrow strip that thereby ceases to be of benefit or importance to him, he also conveys the narrow strip unless he plainly and specifically reserves the strip for himself in the deed by plain and specific language. The presumption is intended to apply to relatively narrow strips of land that are small in size and value in comparison to the adjoining tract conveyed by the grantor.

Nguyen* v. *Yovan, 317 S.W.3d 261 (Tex.App.-Houston [1st Dist.] 2009, pet. denied). For a land sales contract to meet the requirements of the statute of frauds, it must furnish within itself or by reference to another existing writing the means or data to identify the particular land with reasonable certainty. Here, the contract for deed described the property as "15817 Hwy. 6, Santa Fe, Tx. The property description is as follows: ABST 613 PAGE 6 LOTS 5 thru 7 HIGHWAY 6 UNRECORDED SUB SANTA FE, TEXAS 0.384 ACRES PARCEL # 4005-0000-0005-000." The property description was clearly taken from appraisal district records.

Here, the contract contains a complete street address. Courts have held that a street address or a commonly-known name for property may be sufficient property description if there is no confusion. Neither party argues that there has been any confusion about the exact property that was conveyed by any of the deeds. In addition, the contract refers to another existing writing which has the means to identify the land with particular certainty. The seller's expert surveyor said that he could use tax records to identify the property. Although he said that the description of the property would not be exact, a contract for deed need only have the "means or data by which the land to be conveyed may be identified with reasonable certainty." The law does not require a metes and bounds description or a plat in a recorded subdivision in order for land to be conveyed by a contract for deed.

Here, the contract for deed provides the size of the property, an address, a lot number in an unrecorded subdivision, an abstract number referencing a railroad survey map of the unrecorded subdivision locating it in the county, and a tax identification number for the parcel conveyed coordinated with the map. The parties were able to drive to the house and lot and there was no confusion as to the property conveyed by the contract for deed. The court held that the evidence presented meets the standard of reasonable certainty and the contract satisfies the statute of frauds as a matter of law.

Wiggins* v. *Cade, 313 S.W.3d 468 (Tex.App.-Tyler 2010, pet. denied). The royalty deeds in question each contained the same legal description, beginning with a reference to the property being the northwest corner of a 45 acre tract formerly owned by Mrs. Kate Crook. The descriptions did not show either the name of the survey or the abstract number in which the property was situated.

An instrument conveying land must contain a sufficient legal description or the instrument is void under the statute of frauds. A property description is sufficient if the writing furnishes within itself or by reference to some other writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty. A recital of ownership in a deed may be used as an element of description and may serve as a means, together with some other element, of identifying the land with reasonable certainty. Where the deed contains some data susceptible of being connected, by parol testimony, with some definite land, the description is in law sufficient. A deed is not void for uncertainty unless on its face the description cannot, by extrinsic evidence, be made to apply to any definite land. If enough information appears in the description so that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient.

An affidavit in support of the validity of the deed was given by Tonroy. He stated that by using the description in the two royalty deeds and by examining the public records of the county clerk of Rusk County, Texas, he determined that the forty-five acres formerly owned by Mrs. Kate Crook was located in the M.V. Peña Survey, A-27, of Rusk County, Texas. He stated that he was able to determine this information from a search for Kate Crook in the grantor/grantee indices of the Rusk County clerk's office. He stated that this was the only forty-five acre tract that Kate Crook ever owned in Rusk County and that therefore he was able to locate the land described in the two royalty deeds with reasonable certainty.

The court agreed. Parol evidence can be used to connect data described in the instrument, such as the name of a land owner, to establish the sufficiency of a legal description. This is just what the affidavit explained.

Poag* v. *Flores, 317 S.W.3d 820 (Tex.App.-Fort Worth 2010, pet. denied). An equitable suit to quiet title is not subject to limitations if a deed is void. If a deed is voidable, however, then the four-year statute of limitations controls. The question of whether a deed is void or voidable depends on its effect upon the title at the time it was executed and delivered. A void deed is without vitality or legal effect. A voidable deed on the other hand operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.

Here, Poag alleged that the language in the administrator's deed, "surface estate only," was not the intent of the document and was a fraud on the creditors of the Estate. He further alleged that the failure of the administrator's deed to evidence the true intent of the parties was due to a mutual mistake or a unilateral mistake by one party together with the fraud or other inequitable conduct by the other. Because deeds obtained by fraud or mutual mistake are voidable rather than void, and because unilateral mistake does not apply to the facts of this case, the administrator's deed at issue here is voidable. Therefore, the four-year statute of limitations applies.

The four-year statute of limitations also governs a suit for reformation. The two-year statute of limitations governs a claim for slander of title. In general, a cause of action accrues and limitations begin running when a wrongful act causes a legal injury. Here, Poag claims that the wrongful act occurred in June 1996 when the administrator's deed, which conveyed four parcels of land from Flories to Anson, was recorded in the Tarrant County deed records as a conveyance of "surface estate only." Thus, Poag's slander of title, reformation, and suit to quiet title causes of actions filed in 2006 are clearly barred by the applicable two- and four-year statutes of limitations. Poag, however, argues that the discovery rule applies to his claims. The court disagreed.

The discovery rule defers the accrual of a cause of action until the plaintiff knows, or by exercising reasonable diligence, should know of the facts giving rise to the claim. For the discovery rule to apply, the injury must be inherently undiscoverable and objectively verifiable. An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence. Here, the conveyance Poag attacks occurred in 1996 between Flories and Anson. The conveyancing document (the administrator's deed) was recorded in the Tarrant County deed records on June 11, 1996, and conveyed the "surface estate only" in four parcels of land from Flories to Anson. On June 21, 1996, Anson conveyed two of those four parcels of land to Poag.

The recording of the administrator's deed on June 11, 1996, charged Poag with notice that Anson only possessed the surface estate, thereby commencing Poag's two- and four-year period of limitations to file an action to set the administrator's deed aside.

Bright* v. *Johnson, 302 S.W.3d 483 (Tex.App.-Eastland 2009, no pet.). The Johnsons filed this suit against Clarence O. Bright to reform a deed dated May 2, 2002, by which they conveyed thirty-three acres to Clarence O. Bright. They alleged that the sales contract between the parties called for all minerals to be reserved or retained by the Johnsons; but, through a scrivener's error, the warranty deed failed to reserve or retain the minerals. Clarence O. Bright acknowledged that he had agreed that the Johnsons would keep all the minerals and that, even at closing, he still believed they had.

Clarence O. Bright's son, Clarence Dwaine Bright, intervened in the suit. He testified that he purchased one-half of what his father had purchased from the Johnsons. Clarence Bright had paid $59,400 to the Johnsons for the thirty-three acres, and Dwaine Bright paid $30,000 for the undivided one-half interest. Clarence Bright and Dwaine Bright executed a document, which was not recorded, but which was dated June 13, 2003, to reflect Dwaine Bright's acquisition from Clarence. After the Johnsons filed this suit and a notice of lis pendens, Clarence Bright executed and caused to be recorded two "corrected" deeds without warranty conveying to Dwaine Bright one-half of Clarence Bright's interest in the thirty-three acres.

The Johnsons argued that in their Contract, the parties agreed that the Johnsons would reserve all of the minerals. Therefore, a mutual mistake occurred when the person preparing the deed to Clarence Bright did not reserve or retain the minerals on behalf of the Johnsons. Thus, a scrivener's error occurred and the deed should be reformed.

The Sales Contract contains the following language: "The Property will be conveyed subject to the following exceptions, reservations, conditions and restrictions (if none, insert "none")." That language is followed by these terms: "A. Minerals, Royalties, and Timber interests: (1) Presently outstanding in third parties." The parties inserted the word "None." That language is then followed immediately by "(2) To be additionally retained by Seller" (emphasis added). The parties wrote the words "All of Record" (emphasis added). As to mineral leases and surface leases, the parties wrote in "None." This agreement might not be a model of clarity, but the court believed that it reflects the intent of the parties that, as to minerals, there are no outstanding interests in third parties but that the Johnsons are retaining all of record. The careful title examiner or scrivener should know that the Johnsons were retaining all of the minerals of record and that the conveyance as to other matters was to be made subject to those other matters.

Oftentimes the terms "reservation" and "exception" are used interchangeably. But, that depends on the context in which the terms are used. Here, the contract goes further and contains not only the language "reserved," it also contains the words "additionally retained " in reference to the minerals. The Brights have confused "exceptions" and "reservations." The parties, listed "All of Record" that would have excepted the two interests owned by third parties. However, the interests owned by third parties would not have been "retained" by the Johnsons as the seller. They would have been an exception to the property conveyed. It is clear from the record and the briefing that the parties were not using the words "reservation" and "exception" interchangeably; they used the words "reserved" and "retained" in such a manner that no minerals were to be conveyed to the Brights. Here, the Johnsons "retained" or "reserved" the minerals (that they owned of record) to themselves.

PART V
LEASES

Italian Cowboy Partners, Ltd.* v. *Prudential Insurance Company of America, --- S.W.3d ----, 2011 WL 1445950 (Tex. 2011). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's

Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The lease with Italian Cowboy contained the following relevant provisions:

> 14.18 Representations. Tenant acknowledges that nei-ther Landlord nor Landlord's agents, employees or con-tractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.
>
> 14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party....

The court first turned to the question whether the lease contract effectively disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim and concluded that it does not. First, a plain reading of the contract language at issue indicates that the parties' intent was merely to include the substance of a standard merger clause, which does not disclaim reliance. Moreover, even if the parties had intended to disclaim reliance, the contract provisions do not do so by clear and unequivocal language. For these reasons, the court held, as a matter of law, that the language contained in the lease agreement at issue does not negate the reliance element of Italian Cowboy's fraud claim.

A contract is subject to avoidance on the ground of fraudulent inducement. For more than fifty years, it has been the rule that a written contract even containing a merger clause can nevertheless be avoided for antecedent fraud or fraud in its inducement and that the parol evidence rule does not stand in the way of proof of such fraud.

The court has recognized an exception to this rule in ***Schlumberger Technology Corp.* v. *Swanson***, 959 S.W.2d 171 (Tex.1997), and held that when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement. In other words, fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause. In Schlumberger, the court stated that it had a clear desire to protect parties from unintentionally waiving a claim for fraud, but also identified a competing concern—the ability of parties to fully and finally resolve disputes between them.

Here, the parties dispute whether a disclaimer of re-liance exists, or whether the lease provisions simply amount to a merger clause, which would not disclaim reliance. The question of whether an adequate disclaimer of reliance exists is a matter of law. The analysis of the parties' intent in this case begins with the typical rules of contract construction.

Prudential focuses on section 14.18 of the lease contract, suggesting that Italian Cowboy's fraud claim is barred by its agreement that Prudential did not make any representations outside the agreement, i.e., that Italian Cowboy impliedly agreed not to rely on any external representations by agreeing that no external representations were made. Standard merger clauses, however, often contain language indicating that no representations were made other than those contained in the contract, without speaking to reliance at all. Such language achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms. The court disagreed and held that the only reasonable interpretation of the contract language at issue here is that the parties to this lease intended nothing more than the provisions of a standard merger clause, and did not intend to include a disclaimer of reliance on representations. Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement.

To disclaim reliance, parties must use clear and unequivocal language. his elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud. Here, the contract language was not clear or unequivocal about disclaiming reliance. For instance, the term "rely" does not appear in any form, either in terms of relying on the other party's representations, or in relying solely on one's own judgment.

The court then discussed Italian Cowboy's fraud claims, which the Court of Appeals did not deal with and, holding that the actions of the property manager were actionable as fraud, remanded the fraud claims to the Court of Appeals for further consideration.

The court then dealt with the claims of breach of the implied warranty of suitability. In a commercial lease, the lessor makes an implied warranty that the premises are suitable for the intended commercial purposes. Specifically, a lessor impliedly warrants that at the inception of the lease, no latent defects exist that are vital to the use of the premises for their intended commercial purpose. Moreover, a lessor is responsible for ensuring that essential facilities will remain in a suitable condition. However, if the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.

Here, Italian Cowboy did not expressly waive the implied warranty of suitability. However, it did accept responsibility to make certain repairs that might otherwise have run to Prudential as a result of the implied warranty of suitability. The parties dispute whether Italian Cowboy's responsibilities under the lease included repairs to the particular defect in the premises—the sewer gas odor, or its cause. While Italian Cowboy characterizes the defect as the presence of the odor itself, the court said that the proper analysis of the defect in this particular case must inquire into the cause of the odor because this is the condition of the premises covered by the duty to repair. Italian Cowboy offered uncontroverted evidence that a grease trap had been improperly installed, causing raw sewage to back up from the sewer lines. The court looked to the lease to see which party had the responsibility for repairing that defect.

The lease provided that the landlord was responsible for repairs to the common area and for structural repairs. At various points, the lease assigned repair obligations in different ways to both parties. With respect to plumbing matters, however, the court noted that while Italian Cowboy may have assumed at least some duty to repair, it was at the same time expressly precluded from making alterations to utility lines or systems without consent. Although the court of appeals did not discuss it, the trial court credited this distinction, finding the fact that "structural components and ... utility lines or systems serving and within the Premises ... ultimately had to be altered (not just repaired) to arrest the sewer gas odor. Because, as the court noted, the ultimate cure for the odor problem was an alteration of the sewer lines, and because Italian Cowboy was prohibited from making alterations, the obligation was Prudential's and this was covered to the implied warranty.

The court also noted Prudential's obligation to maintain the common areas, which included sanitary sewer lines. Thus, Prudential was not relieved by the contract from liability for breach of the implied warranty of suitability as to a latent defect in facilities that were vital to Italian Cowboy's use of the premises as a restaurant.

Prudential asserts that even if rescission might have been proper at some point, Italian Cowboy ratified the lease by continuing in the lease for a period of time after having knowledge of the defect. However, even if ratification were a defense to breach of the implied warranty of suitability, Italian Cowboy's actions in this case could not give rise to ratification. Texas law requires only that one rescind within a reasonable time from discovering the grounds for rescission. The court reviewed the facts and determined that Prudential failed to establish ratification. It was in no way injured or suffered unjust consequences by Italian Cowboy's temporary efforts alongside Prudential to remedy the odor. Moreover, Prudential has not established that Italian Cowboy waited an unreasonable length of time to terminate the lease. The latent defect was not yet remedied—indeed, the underlying causes of the odor remained unknown—when Italian Cowboy closed and stopped paying rent, only a few weeks after the persistent odor materialized

Merry Homes, Inc.* v. *Chi Hung Luu, 312 S.W.3d 938 (Tex.App.-Houston [1st Dist.] 2010, no pet.). Luu's lease provides that Luu may use the premises only for the purpose of operating a nightclub or bar and for no other purpose. The lease also prohibits Luu from using the premises for any activity that violates any applicable law, regulation, zoning ordinance, restrictive covenant, or governmental order or for any activity that violates any applicable federal, state, or local law. An additional provision requires Luu to "satisfy himself that the leased premises may be used as Luu intends by independently investigating all matters related to the use of the leased premises or Property.

Luu submitted his liquor license application to the City of Houston. Approximately one month later, the city faxed a letter to Luu, informing him that the city denied his application since the premises is located less than 300 feet from a public school and less than 300 feet from a public hospital. The city mailed a follow-up letter, again informing Luu that it denied his application, but also suggesting that he attempt to qualify for the restaurant exception, which would allow Luu to operate a restaurant that serves alcohol at the premises. Luu testified that immediately after he received the first denial from the City of Houston, he contacted his landlord, Merry Homes, and requested a meeting to determine how to proceed under the lease.

Luu ultimately determined that opening a restaurant instead of a bar would not be financially feasible. Merry Homes refused to refund Luu's deposit or cancel the lease. Luu sought a declaratory judgment that the lease was void since it could not be performed legally, and also asserted claims of common law and statutory fraud, negligent misrepresentation and statutory fraud, negligent misrepresentation, and violations of the Deceptive Trade Practices Act.

The trial court declared the lease void on two grounds: (1) the provisions of the lease that restricted the use of the premises to that of a nightclub or bar, fatally conflicted with the provisions that prohibited any use of the premises that violates an applicable law or regulation; and (2) Luu could not perform his contractual obligations legally, since he could not obtain a liquor license for the premises due to its proximity to a public school.

The Texas Supreme Court previously has held that a contract to fulfill an obligation which cannot be performed without violating the law contravenes public policy and is void. The purpose behind this principle is to benefit and protect the public, not to punish or protect a party to the contract. If the illegality does not appear on the contract's face, a court will not find it void unless facts showing the illegality are before the court. If the parties could perform the contract in a legal manner, the contract is not void merely because the parties may have performed the contract in an illegal manner or committed illegal acts in carrying out the contract.

Whether a contract violates a statute is determined by looking at the specific facts of the case and deciding the intention of the parties in executing the contract. Here, the Texas Alcoholic Beverages Code authorizes counties and cities to adopt regulations prohibiting the sale of alcohol within 300 feet of a public school. The City of Houston has adopted such a regulation.

Although the lease, on its face, does not require violation of the law, the only permissible use of the premises under the lease's terms is impossible and illegal, given the location of the premises relative to a school. As Luu cannot obtain a liquor license and therefore cannot perform under the lease without violating the statute and ordinance, the trial court properly determined that this lease is void for illegality.

Five Star International Holdings Incorporated* v. *Thomson, Incorporated, 324 S.W.3d 160 (Tex.App.-El Paso 2010, pet. denied). Thomson leased 950,000 square feet of commercial and industrial space from Five Star. Thomson was to pay base rent and "additional rent" comprised of CAM, taxes, and insurance. Five Star was required to submit annual statements of additional rent and Thomson was to pay based on estimates during each year, subject to an adjustment at the end of each year. If payments were less than actual expenses, Thomson would pay the landlord the shortfall and if payments were more than actual, Thomson would get a refund. Between 1998 and 2005 Thomson paid approximately 2.3 million dollars for CAM, over 3 million dollars in taxes, and approximately $226,000 for insurance.

Thomson filed suit against Five Star alleging Thomson had been overcharged for common area expenses. In its third amended petition, Thomson also alleged that Five Star had breached the lease agreement by consistently overcharging Thomson for property taxes and common area expenses and by refusing to refund the overpayments. Thomson claimed that it was overcharged for property taxes because Five Star did not pass on the benefit of tax abatements and exemptions which the landlord received from local taxing authorities. At trial, Thomson also claimed that Five Star failed to segregate the property taxes due on the leased property from the taxes due on the larger tract, and was therefore billing Thomson for taxes owed on property beyond the acreage covered by the lease.

The lease also required Thomson to sign estoppel certificates from time to time certifying, among other things, that there were no defaults on the part of the landlord. The lease provided that, if Thomson failed to provide the estoppels, its failure was conclusive that: (1) the lease was in full force and effect; (2) there were no uncured defaults in the landlord's performance; (3) not more than one month's rent and charges had been paid in advance; and (4) the lease had not been modified. F–Star made two estoppel certificate requests which were not timely answered by Thomson; one in 2003, and another in 2005.

The jury found in favor of Thomson and also found that Thomson had not waived its right to recover the overpayment.

Five Star challenged the jury's finding that Thomson had not waived its right to a refund. Waiver is an affirmative defense for which Five Star bore the burden of proof at trial. When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate that the finding is against the great weight and preponderance of the evidence. While the lease provisions relating to estoppel certificates and the related certificate requests may serve as evidence contradicting the jury's finding, a court may not consider such evidence in a "matter of law" legal sufficiency review unless it first determines there is no evidence in the record to support the finding. The court noted that at the time the estoppel certificates were requested, the parties were already involved in litigation. The evidence of Thomson's actions in pursuit of its claims supports the jury's determination that the company did not intend to surrender its right to recovery. As this constitutes some evidence in support of the verdict, the court may not consider evidence to the contrary in its review. Therefore, the evidence is legally sufficient to support the jury's verdict regarding the estoppel certificates.

Hoppenstein Properties, Inc. **v.** ***Schober***, 329 S.W.3d 846 (Tex.App.-Fort Worth 2010, no pet.). A tenant's assertion that a landlord failed to mitigate damages is an affirmative defense. Thus, the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages. A defendant is not entitled to any reduction in the amount of damages if it does not prove the amount of damages that could have been avoided.

Here, the jury awarded the landlord only the amount of the past due rental that had accrued before the tenant vacated the premises. The jury did not award any amounts—rental, late fees, cost of improvements to the premises (all authorized by the lease agreement in the event of a tenant default)—for any time after the tenant vacated the premises. But the tenant failed to prove that the landlord could have immediately rented the premises and therefore avoided all damages. Accordingly, the court held that the evidence was factually insufficient to support the jury's finding that the landlord sustained no post-abandonment damages because of the tenant's breach.

GKG Net, Inc. **v.** ***Mitchell Rudder Propertyies, L.P.***, 330 S.W.3d 426 (Tex.App.-Houston [14th Dist.] 2010, no pet.). Traditionally, Texas courts have regarded the landlord whose tenant has abandoned the lease before the end of its term as having four options. First, the landlord can maintain the lease and sue for rent as it becomes due. Second, the landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term.

Third, the landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord can declare the lease forfeited (if the lease so provides), and relieve the tenant of liability of future rent. If the landlord re-lets the premises for only a portion of the unexpired term, as here, then the measure of damages has two components: (1) the measure of damages for the period of re-letting is the contractual rent provided in the original lease less the amount realized from the re-letting, and (2) the measure of damages for that portion or period of the lease term as to which there has been no re-letting is the difference between the present value of the rent contracted for in the lease and the reasonable cash market value of the lease for its unexpired term.

Kahn* v. *Imperial Airport, L.P., 308 S.W.3d 432 (Tex.App.-Dallas 2010, no pet.). Imperial owned the leased premises. Its manager negotiated a lease with Kahn. The leased premises was to be occupied by a store under the name "Condom Sense." Kahn operated four stores under the same name in Dallas.

At trial, two different versions of the lease were introduced. Kahn's version' signature line was as follows:

LESSEE:

Condom Sense

By: Steve Kahn It's president

STEVE KAHN (President)

(Type Name and Title)

By: DBA Condom Sense

____

On Imperial's version of the lease, the signature line was similar, but not identical:

LESSEE:

Condom Sense

By: It's president

Steve Kahn

(Type Name and Title)

By: STEVEN KAHN

____

(Type Name and Title)

Kahn applied for the store's certificate of occupancy himself. He did not disclose the nature of the business in his application. In December 2005, Kahn oversaw creation of M. Stack, a limited liability corporation that Kahn claims was to be the actual lessee. During this time period, Imperial finished out the premises to Kahn's specifications at a cost of $27,000. Rent was paid for the initial months of the Lease term by an entity named SB TAZ, LLC.

The Irving Condom Sense store opened on February 9, 2006. The next day, the store was raided by the Irving police, who seized some, but not all, of the store's inventory. The City of Irving did not close the store down. Kahn, his mother Marcia Kahn, and M. Stack (collectively designated the Applicants by the City) entered into an Agreed Order with the City. The terms of that order required the store to cease sale of "items used in conjunction with sexual activity" and to change its name. In return, the Applicants would avoid prosecution. But despite the order, the store did not re-open, and after April 2006 no more rent payments were made.

Imperial sued Steven Kahn, CSI, and M. Stack for breach of the Lease. The trial court concluded Kahn breached the Lease and is individually liable as the lessee.

Kahn challenges the trial court's findings that he entered into the Lease in his individual capacity and should be liable in that capacity. Kahn testified he signed the Lease on July 21, 2005 as Condom Sense's president. He testified he was not president of CSI on that date, but he did not know what entities he was president of on that date. Kahn claimed at trial that M. Stack was really the lessee under the Lease, although he acknowledged that "M. Stack" did not appear anywhere in the Lease. He agreed that M. Stack did not exist when the Lease was signed, or when the Certificate of Occupancy was signed, and that he had no authority to sign the Lease for M. Stack. Kahn testified it was his practice to have a DBA Condom Sense enter into a lease on behalf of an entity to be formed after "everything [is] resolved." If the landlord wanted the lease signed before forma-tion, he testified, there would be an addendum to the lease. But Kahn testified no addendum was drafted in this case, and he had never notified anyone at Brad-ford that M. Stack was to be the lessee for the Irving store.

Kahn's arguments have no basis in law. Initially, an individual cannot sign for and bind a DBA entity. A DBA is no more than an assumed or trade name. And it is well-settled that a trade name has no legal existence. Thus, to the extent Kahn purported to sign the Lease on behalf of Condom Sense as a DBA, he bound only himself. Likewise, one cannot sign for and bind a legal entity that does not yet exist. Kahn argues he signed the Lease as a promoter for the later-created M. Stack. But when a promoter signs a contract on behalf of an unformed entity, he is personally liable on the contract unless there is an agreement with the contracting party that the promoter is not liable. The record contains no evidence Imperial agreed not to hold Kahn liable. Moreover, the Lease was not made in the name of the unformed entity; there was conflicting testimony concerning whether the landlord knew Kahn was purporting to sign for an unformed entity; and no evidence was presented indicating M. Stack adopted the Lease after its formation. The court thus conclude that, under the facts of this case, Kahn is personally liable on the Lease.

Kahn went on to argue that his failure to make rent payments and comply with the terms of the Lease should be excused because the Lease was terminated by the City's actions. The trial court's findings support Kahn on this issue. The court found a substantial part of the Leased Premises was taken by the City of Irving for quasi-public use under a governmental law, ordinance or regulation and that this taking materially interfered with the intended use of the leased premises. Accordingly, according to the trial court, no rent or other obligations of the lessee were owed after the date of the raid.

A taking may be either physical or regulatory. A physical taking occurs when the government authorizes an unwarranted physical occupation or appropriation of an individual's property. A compensable regulatory taking occurs if governmental regulations deprive a property owner of all economically viable use of his property or if those regulations totally destroy the property's value.

Kahn argues the Irving Condom Sense store could not be operated for its intended use under the terms of the Agreed Order and under the City's interpretation of its ordinance. However neither of these restrictions on the use of the leased premises qualifies as a governmental taking. The Agreed Order represents the joint decision of the Applicants-including Kahn-and the City; it was not a unilateral act or regulation by the City. Kahn could have chosen to litigate the City's interpretation of the ordinance. Indeed, he testified at trial that at least one court had held Condom Sense was not a sexually oriented business under an identical ordinance. But Kahn voluntarily agreed not to litigate and to accept the restrictions in the Agreed Order. And as to the restrictions posed by the ordinance itself, it is uncontroverted that the Irving ordinance pre-dated Kahn's negotiation of the Lease and that Kahn himself was familiar with the ordinance. When existing law regulates the use of property, an owner's reasonable expectations must take those regulations into account. Kahn did not prove he had a reasonable expectation of operating the store he intended at the leased premises. Accordingly, the court concluded he did not prove a regulatory taking in this case.

Wood Care Centers, Inc. **v.** ***Evangel Temple Assembly of God of Wichita Falls, Texas***, 307 S.W.3d 816 (Tex.App.-Fort Worth 2010, pet. denied). After Hurricane Katrina hit New Orleans, Evangel Temple contacted Wood Care to lease the property to assist evacuees. Several drafts of a lease were circulated. The final version contained a "ten-percent termination clause" that provided Evangel Temple could terminate the lease by giving notice to Wood and paying 10% of the rental payments then owed. The lease also contained a provision that allowed Evangel Temple to terminate if the premises was denied a tax exemption for the property. The tax exemption was granted, but with a proviso that the exemption would be lost if the use of the premises changed.

After the last of the evacuees moved out of the facility, Evangel Temple sent a termination letter to Wood. It's not clear from the case, but it appears that Evangel Temple lost its tax exemption at the time it sent the notice. Wood sent a letter demanding 10% of the remaining lease payments. Evangel Temple claimed not to owe the 10% because of the tax exemption termination clause. The trial court rendered a take-nothing judgment against Wood. The appeal deals primarily with the conflict between the ten-percent termination clause which required a payment for termination and the tax exemption clause which required none.

The essential question is whether Evangel Temple breached the provision of the Agreement that states: "Both parties agree to cooperate with each other to achieve any available property tax exemption." Wood Care argues the evidence conclusively established Evangel Temple's breach of this provision because it admittedly could have come up with another tax exempt use.

Although Evangel Temple "could have" submitted another exemption application for the facility after the evacuees left, there was considerable testimony about Evangel Temple's many efforts to find another use and its resulting inability to finalize an agreement with any of the potential organizations for any of the potential tax-exempt uses. Evangel Temple's efforts to find other tax-exempt uses for the facility included meeting with CPS about an interim facility for children, speaking with the county's veteran's office about a veteran's home, communicating with Dallas representatives about a Sudanese refugee facility, speaking with a representative about an annex for women, consulting with a director of the Dallas Dream Center about a place for at-risk teenagers, and providing a tour of the building for a prison-aftercare expert. Concerning Evangel Temple's cooperation with Wood Care to achieve an exemption, Wood Care suggested a youth bible study group be placed at the vacant building. Wood Care did not suggest any other uses and did not make any further attempt to cooperate after the evacuees left the facility. Bateman stated that he did not personally have any conversations with Wood Care about a continued use of the property. The evidence at trial supported the trial court's findings of fact that Evangel Temple did not breach the Agreement and that it "made reasonable and good faith efforts" to find another use for the facility.

Taylor **v.** ***Carbajal***, 304 S.W.3d 585 (Tex.App.-Beaumont 2010, pet denied). The lease provided for a term of five years,. The lease required payments of $800 per month, and provided that "amount paid on lease will go to purchase of property $125,000." The badly drafted option to purchase contained in the commercial lease read as follows:

> Option to Purchase. Provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to purchase for an additional term of _____ months commencing at the expiration of the initial lease term. All of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be the sum of $ _____. The option shall be exercised by written notice given to Lessor not less than _____ days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

The Tenants remained in possession of the property beyond the end of the initial term. The Landlord began demanding more money and refusing to agree to apply rents to the purchase price.

The Tenants gave written notice of their intent to exercise the option to purchase the property. The Landlord rejected the next rent payment and on a few weeks later, gave written notice to vacate the premises. The Tenants filed a petition for declaratory judgment and deposited with the trial court he balance due on the purchase price of the property.

The Landlord claimed the option to purchase expired at the end of the initial lease term. The Tenants contended that the option to purchase remained in effect while they remained as tenants of the property paying rent and not otherwise in default.

The first question was whether the lease expired at the end of its stated term or remained in effect on the date the Tenants gave notice of exercise of the option. The general common law rule provides that a tenant who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a tenant holding under the terms of the original lease. The court looked to the terms of the lease to determine whether the terms of the lease continue in the event of a holdover tenancy.

It is apparent that the Landlord converted a form lease renewal clause into an option clause, retaining some of the renewal language and leaving several terms blank. The option paragraph provides that "[a]ll of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be the sum of $ _____." It is undisputed that the Tenants continued to pay monthly rent in the amount of $800, and that the Landlord accepted each payment until after the Tenants gave written notice of the option to purchase. It follows that the parties did not understand this clause to mean that no rent was due. Thus, it appears the "monthly rent" exception did not apply, and all of the terms and conditions of the lease applied during the "renewal term."

"Renewal term" is not defined in the lease, but the previous sentence states that "[p]rovided that Lessee is not in default in the performance of this lease, Lessee shall have the option to purchase for an additional term of _____ months commencing at the expiration of the initial lease term." The second half of this sentence is somewhat ambiguous: do the Tenants have an unspecified number of months to exercise the option to purchase mentioned earlier in the sentence, or is the phrase merely an acknowledgment that the lease might be renewed for an unspecified period of time? The agreement of the parties did not provide the Tenants with the right to renew the lease; instead, they could exercise an option to purchase the property. However, by accepting the lease payments after the end of the initial term, the Landlord elected to treat the Tenants as holding under the terms of the original lease.

Under either possible construction of the clause, the express terms of the contract provided that all of the terms and conditions of the lease continued during the "renewal term." The contract does not provide for the length of the renewal term; however, at the very least, it would include the period during which the Tenants continued in possession of the property and the Landlord accepted monthly lease payments without giving notice of termination.

The next question was whether the option period expired. The contract provided that "[t]he option shall be exercised by written notice given to Lessor not less than _____ days prior to the expiration of the initial lease term." The Landlord construe the contract to require written notice "prior to the expiration of the lease term." Thus, they argue, the Tenants failed to meet the final sentence of the option paragraph, which required written notice to be given "within the time specified" by the option paragraph.

The Tenants argue that when the time for performance is omitted, the contract may be performed within a reasonable time.

Time is of the essence in an option contract because it is unilateral. In this case, however, the unilateral option was part of a bilateral contract. The Tenants had the exclusive right to exercise the option to purchase, but the Landlord had the exclusive right to renew the lease under the same terms and conditions as the original lease. Thus, under this contract both parties could control what occurred after the five-year lease term ended. The Tenants could purchase the property, or the Landlord could renew the lease. The option provision was not excluded from the renewal language. Because the provision was left blank, the contract failed to specify that the notice had to be given before the expiration of the initial lease term.

The contract in this case is distinguishable from a case in which the extension of the lease is contingent upon the exercise of the option. Here, a renewal clause is contained within the option paragraph, but it is not expressly contingent on the exercise of the option. That renewal clause expressly provides that all of the terms and conditions of the contract will continue during a renewal. The only potentially contrary provision appears in a clause that was left blank. Under these circumstances, a reason-able time for the exercise of the option includes the period of time during which the parties continued to perform the lease. The Tenants gave written notice before the Landlord gave notice of termination. Accordingly, the trial court did not err in declaring that the Tenants have a right to purchase the property for the amount agreed to in the lease.

PART VI
VENDOR AND PURCHASER

TC Dallas #1, LP* v. *Republic Underwriters Insurance Company, 316 S.W.3d 832 (Tex.App.-Dallas 2010, no pet. history to date). TC Dallas and Republic entered into a contract for purchase and sale of an office building in which the Dallas National Bank had been a tenant since 1996. TC Dallas intended to re-develop the property, but it could not do so until all the tenants, including the Bank, vacated the building. The purchase price was $20 million, but Republic agreed to share TC Dallas's expenses for terminating the leases of the remaining tenants and the costs of managing and operating the property until the last tenant vacated.

The contract provided that, after closing, TC Dallas had the sole and exclusive right to negotiate the termination of the tenants' leases and provided for the sharing of "O&T Expenses," defined as lease termination expenses as adjusted for operating expenses incurred and rents collected for the period in question.

TC Dallas did not develop the property. Instead, it entered into a second contract to sell the property to SCA. This second contract stated that the $16 million sales price reflected a $6 million reduction from the "intended" sales price. The $6 million was a "Bank Credit," which was defined as the amount by which the intended purchase price was reduced to compensate SCA for the risk involved in taking title subject to the Bank's lease, the cost of terminating the Banks' lease, and the intervening operating costs and rent collections. The second contract mentioned the first contract and said that TC Dallas retained all of the rights under that contract, including the rights related to sharing the O&T Expenses.

SCA and the Bank negotiated an amendment of the Bank's lease which initially extended the term, but cancelled all renewal rights. As part of the agreement, SCA was to pay the Bank $2 million. The $2 million was sent by SCA to TC Dallas and from TC Dallas to the Bank.

TC Dallas then sued Republic seeking reimbursement of O&T Expenses. TC Dallas argued that the plain language of the first contract made the $2 million payment was a lease termination cost, clearly made part of O&T Expenses. Republic argued that it had no obligation to reimburse TC Dallas for any part of the "Bank Credit."

Under the first PSA, Republic agreed to pay forty percent of the O & T Expenses, defined as "all Lease Termination Costs incurred by Purchaser [TC Dallas] ... increased by Operating Expenses incurred...." For payments to be "Lease Termination Costs," they had to be "buy-out fees, termination fees and other consideration paid or given to tenants to terminate the leases." For the payments to be "Operating Expenses" they had to be "expenses and disbursements that Purchaser [TC Dallas] incurs in connection with the ownership, operation, management and maintenance of the Property."

TC Dallas argues that some portion of the $6 million Bank Credit should be considered Operating Expenses under the first PSA because the discount constituted an "expense" or "disbursement" incurred by TC Dallas "in connection with the ownership, operation, management and maintenance of the property." The court disagreed.

First, according to the second contract, the Bank Credit was a discount in the sales price of the property made by TC Dallas to Turtle Creek Partnership, not an expense or disbursement. This conclusion is not affected by the fact that its existence arose out of the respective desires of the contracting parties to allocate costs (or risks of costs) that might be incurred in the future. Second, the $6 million Bank Credit (i.e., the discount) was not incurred by TC Dallas "in connection with the ownership, operation, management and maintenance of the property." Rather, it was incurred by TC Dallas in connection with TC Dallas's sale of the property to SCA. And these conclusions are unaffected by the fact that the definition of "Bank Credit" makes clear that its purpose was to compensate SCA for the expenses it (not TC Dallas) may incur in owning, managing, and operating the property while it was occupied. Accordingly, the $6 million Bank Credit, as such, does not constitute Lease Termination Costs or Operating Expenses as defined in the first PSA, and thus does not constitute "O & T" Expenses under that agreement.

TC Dallas also argues that the $2 million of the Bank Credit paid by SCA to the Bank-albeit via TC Dallas-should be considered Lease Termination Costs because the definition of "Bank Credit" in the second PSA stated it was for "anticipated costs of terminating the Bank Lease." However, the definition of "Bank Credit" makes clear the credit was compensation to the Purchaser, Turtle Creek Partnership, for the expenses that Turtle Creek Partnership, not TC Dallas, would incur in terminating the Bank's lease.

TC Dallas also argues that the $2 million of the Bank Credit paid by SCA to the Bank-albeit via TC Dallas-should be considered Lease Termination Costs as defined in the first PSA because it paid the Bank $2 million for the Bank's agreement not to renew its lease after 2010, and it incurred this expense because the source of the $2 million paid to the Bank was the Bank Credit. TC Dallas "paid" the Bank by sending the Bank the money TC Dallas received from SCA. However, the court held that TC Dallas's payment in that manner does not mean that TC Dallas "incurred" a Lease Termination Cost. "Incur" means "become liable or subject to. Thus, assuming without deciding that the $2 million "Bank Lease Modification Costs" paid to the Bank was in connection with terminating the lease, unless TC Dallas was liable to the Bank for that payment it did not "incur" Lease Termination Costs under the first PSA. The agreement with the Bank, though, said that SCA was liable for the payment, not TC Dallas.

That TC Dallas was not liable to the Bank for (and thus did not "incur") the Bank lease modification costs amount, was established by section 12.18 of the second PSA, which eliminated the existence of any third-party beneficiaries to the second PSA. Because the Bank could not enforce the second PSA as third-party beneficiary, TC Dallas could not be liable to the Bank for payment of the $2 million.

Barry* v. *Jackson, 309 S.W.3d 135 (Tex.App.-Austin 2010, no pet.). Barry entered a contract with the Jacksons to buy their home. The Jacksons entered into a contract to buy a replacement house. After their option to terminate the replacement house contract expired, Barry informed the Jacksons that he was backing out of his deal to buy their house. The Jacksons lost the earnest money deposit on the replacement house contract. They re-listed their house and ultimately sold it for less than Barry had agreed to pay. The Jacksons sued Barry for breach of contract.

On appeal, Barry contends that (1) the Jacksons elected a contractual remedy that bars them from receiving damages, and (2) there was insufficient evidence of the property's market value to support the trial court's damages award.

Barry's first contention was that the Jacksons had asked the trial court to order the release of Barry's earnest money to them. The court held that the Jacksons had not elected to receive the earnest money as liquidated damages. Although the Jacksons filed a motion for summary judgment seeking the release of Barry's earnest money, that was sought and granted by the trial court in partial satisfaction of the breach-of-contract damages they sought. Shortly after Barry announced his intention to breach his contract, the Jacksons refused to sign a form that would have given them the earnest money and released Barry from further liability. In their amended petition, the Barrys were very clear in seeking damages for breach of contract, which their contract with Barry allowed. There is sufficient evidence to show that the Jacksons did not elect to receive liquidated damages, relinquish their right to sue, or engage in conduct inconsistent with that right.

The court next turned to Barry's complaint related to the evidence supporting the trial court's damages award. Barry argues that the Jacksons did not present sufficient evidence to show the property's market value at the time of his breach. The Jacksons claimed that the market value of the house at the time of the breach was the price Barry had agreed to pay for the house and that their damages were the price they got in the later sale plus the added expenses they incurred.

The general rule in a breach-of-contract case is that damages should put the plaintiff in the same economic position he would have been in had the contract been performed. 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. The market value of the property may be determined by a fair resale, after notice to the party within a reasonable time after the breach.

The Jacksons sold their house more than a year after Barry breached the contract. Although the court recognized that what is a reasonable time is a question of fact, varied by the circumstances of each case, the Jacksons provided no evidence related to whether thirteen months was a reasonable time, especially considering that they took the house off the market for a number of months and had the property listed for sale by owner, rather than through a realtor who could list it in the MLS system, for a time. For example, they did not present testimony by an appraiser or realtor as to whether the real estate market had undergone significant fluctuations during that year, that the eventual sales price would have been a fair market value for the property at the time of the breach, or whether market conditions in October 2003 were similar to those in August 2002. Recent events in the nationwide real estate market show without a doubt that one year can make an enormous difference in the value of real estate, and Texas courts have recognized this fact. As plaintiffs, it was the Jacksons' burden to establish the property's market value as of August 2002, not October 2003, and thus it was their burden to establish that the later sale was within a reasonable amount of time. Because the Jacksons did not present any evidence that would support reasonable inferences either that the October 2003 sale occurred within a "reasonable time" or that the October 2003 sales price reflected the property's value at the time of Barry's breach more than a year earlier, the trial court erred in awarding them the difference between the two contract prices.

Franco* v. *Lopez, 307 S.W.3d 551 (Tex.App.-Dallas 2010, no pet.). Franco entered into a contract to sell three parcels of land to Lopez and Valdespino. The contract was not dated, but according to the contract, it was effective when received by the title company, which was February 2, 2007. The closing was to be on January 19, 2007 (which was, in case you missed it, before the effective contract date) or within 7 days after title objections were cured, and time was of the essence. The closing didn't occur on January 19. In the following months, Lopez and Valdespino deposited additional earnest money and tried to close after receiving a survey of the property, but Franco refused. Lopez and Valdespino sued for specific performance. Franco argued that the buyers had failed to deposit earnest money, obtain a survey, and appear for the January 19 closing, and that such failures were defaults that excused his performance.

The court found that earnest money had been timely deposited. Moreover, the survey provision in the contract didn't specify when the survey was supposed to be obtained. Furthermore, because closing wasn't to be until 7 days after title objections and the title commitment was not due until well after January 19, the failure to close on January 19 could not be a default.

Franco also argued that specific performance was not available because the buyers had failed to close by the required closing date. Generally, where a contract provides that time is of the essence, a party must tender performance within the specified time to be entitled to specific performance. The court had already considered and rejected Franco's complaints based on the buyers' failure to perform by January 19. To the extent Franco argues that the buyers are barred from seeking specific performance because, after January 19, 2007, they never tendered the full amount of the purchase price, the court noted that Franco never presented this complaint to the trial court. By failing to present this theory to the trial court, Franco has waived error on appeal with respect to this issue.

Absent waiver, however, the court would still conclude that Franco's argument lacks merit. Texas cases have long recognized that where a party openly refuses to perform his part of the contract a plaintiff need not tender performance before bringing suit. Where tender of performance is excused, a party must plead and prove he is ready, willing, and able to perform. In this case, there is ample evidence from which the trial court could have found that Franco openly refused to perform his part of the contract and that the buyers were ready, willing, and able to perform their obligations under the contract. Accordingly, the trial court did not err in awarding the buyers specific performance of the contract.

Thedford Crossing, L.P.* v. *Tyler Rose Nursery, Inc., 306 S.W.3d 860 (Tex.App.-Tyler 2010, pet. pending). Tew agreed to sell Thedford approximately 361 acres near Tyler for $6 million. The contract was extended by its terms when Thedford paid an extension fee. During the extension period, the contract was amended to provide two alternate means of purchasing the property, either by cash for the original purchase price of $6 million or for seller financing that raised the price to $10 million and provided for an initial deposit and some partial releases of the land to Thedford free of the seller financing lien. Thedford elected the seller financed method and made the initial deposit. Then the parties started negotiating the location of the partial release portions of the land.

When the closing date was approaching, the parties had not agreed on which acreage was to be released. Ultimately, because they couldn't agree, the sale was not closed. Thedford filed suit, alleging breach of contract and fraud.

Tew contends that the parties' agreement concerning the release tract was a condition precedent to closing that had not been satisfied. Tew also argued that the contract omitted material terms rendering it indefinite and uncertain as to the parties' obligations. Theford disagreed.

A contract must be sufficiently definite in its terms so that a court can understand what the promissor undertook. If an alleged agreement is so indefinite as to make it impossible for a court to fix the legal obligations and liabilities of the parties, it cannot constitute an enforceable contract. Similarly, a contract providing for an agreement to be negotiated in the future is void. The parties, however, may agree on some terms sufficient to create a contract, leaving other provisions for later negotiation so long as those terms are not material or essential. However, those terms left for future negotiation are not part of the enforceable portion of the contract.

Here, the essence of the parties' agreement is the sale of real estate. The parties agreed that Tew would sell and Thedford would buy approximately 361 acres of land. The contract identified the location of the 361 acres to be conveyed, set forth the price Thedford would pay Tew, and stated the date on which the sale must close. Based on the court's reading of the contract, there is no uncertainty concerning these terms, and, thus, there exists a valid contract for the sale of 361 acres of real estate.

The terms concerning the location of land to be released to Thedford free of lien, though undoubtedly of concern to the parties, is not an essential term to the contract for sale of real estate. Thus, the parties' expression of this term as one to be agreed upon in the future does not serve to nullify the contract as a whole.

Likewise, the manner of release and extent of Tew's conveyance of the property between the closing of the option and the final closing date is not an essential term to the contract for sale of real estate. Thus, the parties' failure to specify such details is not fatal to their contract. Further still, the terms and provisions applicable to the payment of the balance of the pur-chase price are not essential terms to the overall sale of the property. Thus, the court concluded that while each of these details may be important to the parties and may have proven to be valuable additions to their agreement given the benefit of hindsight, the absence of such terms does not serve to render unenforceable the contract for sale.

With regard to the question of whether the agreement as to the release portion was a condition precedent to Tew’s obligations, the court looked to the intention of the parties as expressed in the contract. Conditions precedent to an obligation to perform under a contract are those acts or events occurring subsequent to the making of a contract that must occur before there is a right to immediate performance and before there is a breach of a contractual duty. In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible, when the intent of the parties is doubtful, or when a condition would impose an impossible or absurd result.

Thedford argues that the contract contains no language that would indicate the existence of a condition precedent. The court agreed that the contract contains no such language. However, while certain terms such as “if,” “provided that,” “on condition that,” or some other phrase ordinarily connote the parties' intent that there be a condition precedent, no particular words are necessary for the existence of such a condition.

Conditions precedent are acts or events occurring subsequent to the making of a contract that must occur before there is a right to immediate performance. Here, the contract sets forth that the parties agreed to close by one of two methods and that the seller finance method required some future agreements by the parties. It is apparent that the contract required the parties to mutually agree that, among other things, Tew would release fifty contiguous acres, the location of which would be agreed upon, to Thedford. However, the contract does not set forth any date by which the release of such property or the determination of its location must occur. Rather, the contract required only that the parties agree that (1) Tew will release the land and (2) the parties would mutually agree upon the location of the land.

Tew contends that treating the provision as a covenant would lead to an absurd result. The court disagreed. Tew's argument rests upon his assertion that the parties imposed upon themselves a deadline of the closing date to agree upon the location of the fifty acre tract. However, as set forth above, a close reading of the contract reveals that no such deadline was expressed in the agreement. There is no indication from the plain language of the contract that the parties intended to compel the release of the fifty acre tract at the time of closing. Therefore, based on the plain meaning of the language of the contract, the court held that the parties' mutual agreement concerning the location of the fifty contiguous acres to be released by Tew was a covenant rather than a condition.

Hicks* v. *Castille, 313 S.W.3d 874 (Tex.App.-Amarillo 2010, pet pending). Castille bought 96 acres (out of a 100-acre tract) from Hicks. The other 4 acres included a quarter-acre parcel subject to a tower lease. Castille was given a right of first refusal to buy the 4-acre tract. Hicks sent Castille a notice of intent to sell the quarter-acre tract on which the tower lease was located and which was included in the four-acre tract on which Castille held a right of first refusal. According to Hicks, Castille then had sixty days to exercise his then-matured option to purchase the .28 tract on the same terms to which American Tower and Hicks had agreed: $50,000.00. Castille did not exercise his option to purchase the .28 acre. Instead, on June 18, 2008, he filed suit for declaratory relief.

Castille reads the ROFR agreement as allowing Hicks to sell the 4-acre tract only as one entire parcel. In other words, he reads the agreement as one which would prohibit Hicks from selling a portion, rather than the entirety, of the 4-acre tract. Hicks, on the other hand, reads the Agreement without such restriction and maintains that the Agreement permits such a sale of a portion of the 4-acre tract so long as he notifies Castille in accordance with the terms of the Agreement.

The court began its analysis by observing that alienability is a legal incident of property, and restraints against it are generally contrary to public policy. The right of alienation is an inherent and inseparable quality of an estate in fee simple. A restriction not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation.

The court said that to adopt Castille's construction of the Agreement would be enforcing what appears to be an unreasonable restraint on alienation: an outright prohibition of indeterminate duration from selling any portion of the land in question less than four acres. Castille has not directed this Court to a case which would support the position that a landowner may not partition or sell portions of the property described in an agreement conferring a right of first refusal. Adhering to the relevant rules of construction, the court then examined the Agreement from a utilitarian perspective, bearing in mind the purposes and restrictions associated with a right of first refusal, and have construed the Agreement in such a way as to not invalidate it.

Having done so, the court concluded that the agreement permits the sale of a portion of the four acres so long as Hicks gives proper notice in accordance with the agreement. To hold otherwise would cause the right of first refusal to represent an unreasonable restraint on alienation by prohibiting Hicks from selling any portion of the tract less than four acres. The converse application would also be unreasonable, permitting the right of refusal to do something it must not do; to hold that Castille has a right to buy all four remaining acres intact would run afoul of the well-established rule that a holder of a right of first refusal cannot compel the owner to sell the property at issue. That is, to read the agreement to mean that Hicks can only sell the entire four-acre tract of land could have the practical effect of forcing him to sell land that he does not wish to sell. The court will not construe the agreement to create a right of first refusal that is inconsistent with the principles concerning such rights

Chambers* v. *Equity Bank, SSB, 319 S.W.3d 892 (Tex.App.-Texarkana 2010, no pet.). The case begins like a bad novel. "Unknown to Charles M. Chambers, when he passed by the Lighthouse Resort on Lake Fork on a weekend fishing trip in early 2004 and noticed the "for sale" sign, was the fact that lurking beneath the resort's surface was a damaged or defective septic system."

Chambers entered into a contract to buy the house from the Bank. While he did not know about the bad septic tanks, the Bank did. A "pre-closing" of the Lighthouse property took place June 28, 2004, at which time various, but not all, closing documents were signed; none were filed for record at that time. At that time, Chambers signed a promissory note for $650,000.00, the Bank gave Chambers the keys to the Lighthouse property along with $15,000.00 for operating expenses, and Cham-bers began cleaning up the property. Chambers did not pay any part of the sales price on June 28 and admits that the property was not purchased on that date. On June 29, 2004, Chambers was advised by the Sabine River Authority of the problem with the septic system. As a result, Chambers and the Bank entered into an amended contract July 20, 2004, which provided that the Bank was to repair the septic system for an allowance not to exceed $32,000.00.

Before the septic-system repairs could be made, Chambers filed for bankruptcy and stopped making payments on the note to the Bank. The Bank foreclosed on the property and sued Chambers for the remaining deficiency on the loan. Chambers thereafter filed suit against the Bank for fraud and real estate fraud. The two cases were consolidated.

The fraud in question concerns the Bank's failure to inform Chambers about the condition of the septic system. The question here is whether there is sufficient evidence that Chambers ratified that fraud.

Ratification occurs when the parties' obligations are adjusted after the defrauded party learns of the fraud. An agreement is also ratified if a party, by word or conduct, affirms the agreement after becoming aware of any fraud that would otherwise impair the agreement. That is, ratification occurs whenever the parties act in a way that recognizes, in spite of the revealed fraud, the existence of a binding contract.

In this case, the evidence shows that, after Chambers learned of the fraud, the purchase of the property was completed, including the signing of an amended contract of sale expressly addressing the matter at the heart of the fraud allegation-repair of the septic system-at a cost to the Bank of $32,000.00. The court held that ratification had occurred.

PART VII
ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Ramsey* v. *Grizzle, 313 S.W.3d 498 (Tex.App.-Texarkana 2010, pet. denied). This case involves a confusing set of circumstances relating to an oil and gas lease. The confusion led to a declaratory judgment action being filed by Grizzle. Ramsey argued that the case, which involved title to the mineral estate, should have been brought as a trespass to try title case rather than a declaratory judgment action and that Grizzle had failed to prove a title interest in the mineral lease in question.

The Texas Supreme Court has explained that oil and gas leases are unique: In Texas it has long been recognized that an oil and gas lease is not a "lease" in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is "determinable" because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate. In this case, the lessors retained only a royalty interest. When an oil and gas lease reserves only a royalty interest, the lessee acquires title to all of the oil and gas in place, and the lessor owns only a possibility of reverter and has the right to receive royalties. A royalty interest, as distinguished from a mineral interest, is a nonpossessory interest.

With an exception not applicable here, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property. When the suit does not involve the construction or validity of deeds or other documents of title, the suit is not one for declaratory judgment. Since title to real property was at issue in the instant case, a declaratory judgment action is not a proper vehicle to resolve the matter. Had this been a boundary dispute, a declaratory judgment action is permissible. Had it been a case in which interpretation of the lease was at issue, the matter may have been properly resolved through a declaratory action. As the instant case stands, however, title was at issue here, meaning the proper vehicle was a trespass to try title action.

Trespass to try title is a purely statutory creation and embraces all character of litigation that affects the title to real estate. The action is governed by special pleading and proof requirements established by the Texas Rules of Civil Procedure. A plaintiff who has no interest at all in the land lacks standing to assert a trespass to try title action. 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 defendant is not required to show title in himself or herself, nor may the plaintiff rely on the defendant's failure to do so. Ordinarily, a plaintiff may recover (1) by proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession and that the possession has not been abandoned.

Another trespass to try title case decided this year is ***Kennedy Con., Inc.* v. *Forman***, 316 S.W.3d 129 (Tex.App.-Houston [14th Dist.] 2010, no pet.), which dwells, for the most part, on the evidence required to establish title.

Gully* v. *Davis, 321 S.W.3d 213 (Tex.App.-Houston [1st Dist.] 2010, pet. denied). When adverse possession commences before a severance of the mineral estate, the adverse possession includes both the surface and mineral estate. Adverse possession commenced prior to limitations will extend to the mineral estate even if the titleholder severs the mineral estate before the limitations period has fully run. In contrast, possession of the surface estate that commences after a severance of the mineral estate is not sufficient to constitute adverse possession of the mineral estate. Thus, in this case involving adverse possession of the mineral estate in the 52–acre tract, William and Rosia Moore's adverse possession must have commenced before Camilla Davis severed the mineral estate by reserving it to herself in 1904.

In 1892, William and Rosia Moore began living on the 52 acres as husband and wife. At that time, and for at least 20 years preceding that time, George Moore, William's father, was George Davis's tenant on the land at issue in this appeal. In the 1879 deed, George Moore specifically stated he was George Davis's tenant on the property and would surrender possession of the property to George Davis on demand. Similarly, in 1889, the Prussia Harney lawsuit was filed and the judgment in that suit in 1898 stated George Moore was George Davis's "tenant in possession" of the property.

Because William and Rosia Moore's possession of the lands within the League was joint possession with George Davis, their adverse possession claim is limited to lands actually enclosed. But the record contains no summary judgment evidence showing the 52–acre tract was actually enclosed.

PART VIII
EASEMENTS

Severance* v. *Patterson, --- S.W.3d ----, 2010 WL 4371438 (Tex. 2010). This case answers certified questions from the United States Court of Appeals for the Fifth Circuit.

1. Does Texas recognize a "rolling" public beach-front access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act?

3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

The central issue is whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.

In April 2005, Severance purchased three properties on Galveston Island's West Beach. “West Beach” extends from the western edge of Galveston's seawall along the beachfront to the western tip of the island. One of the properties, the Kennedy Drive property, is at issue in this case. A rental home occupies the property. A public easement for use of a privately owned parcel seaward of Severance's Kennedy Drive property pre-existed her purchase.

Five months after Severance's purchase, Hurricane Rita devastated the property subject to the easement and moved the line of vegetation landward. The entirety of the house on Severance's property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach. When the State sought to enforce an easement on her private property pursuant to the OBA, Severance sued several State officials in federal district court. She argued that the State, in attempting to enforce a public easement, without proving its existence, on property not previously encumbered by an easement, infringed her federal constitutional rights and constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her substantive due process rights under the Fourteenth Amendment.

Texas has a history of public use of Texas beaches, including on Galveston Island's West Beach. These rights of use were proven in courtrooms with evidence of public enjoyment of the beaches dating to the nineteenth century Republic of Texas. But that history does not extend to use of West Beach properties, recently moved landward of the vegetation line by a dramatic event, that before and after the event have been owned by private property owners and were not impressed with pre-existing public easements. On one hand, the public has an important interest in the enjoyment of Texas's public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.

The Open Beaches Act states the policy of the State of Texas for enjoyment of public beaches along the Gulf of Mexico. The OBA declares the State's public policy to be “free and unrestricted right of ingress and egress” to State-owned beaches and to private beach property to which the public “has acquired” an easement or other right of use to that property. Privately owned beaches may be included in the definition of public beaches. The Legislature defined public beach by two criteria: physical location and right of use. A public beach under the OBA must border on the Gulf of Mexico. Along the Gulf, public beaches are located on the ocean shore from the line of mean low tide to the line of vegetation, subject to the second statutory requirement that the public must have a right to use the beach. This right may be “acquired” through a “right of use or easement” or it may be “retained” in the public by virtue of continuous “right in the public since time immemorial.”

The area from mean low tide to mean

high tide is called the "wet beach," because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the "dry beach." The wet beaches are all owned by the State of Texas. However, the dry beach often is privately owned and the right to use it is not presumed under the OBA. The Legislature recognized that the existence of a public right to an easement in privately owned dry beach area of West Beach is "dependant" [sic] on the government's establishing an easement in the dry beach or the public's right to use of the beach. Accordingly, where the dry beach is privately owned, it is part of the "public beach" if a right to public use has been established on it. The question is did the easement on the property seaward of Severance's property "roll" onto Severance's property?

The court reviewed the history of land ownership along the beaches of Galveston since the days of the Republic and eventually held that the State had divested its entire property interest in the dry beaches. It thus held that a public beachfront easement in West Beach, although dynamic, does not roll. The public loses that interest in privately owned dry beach when the land to which it is attached becomes submerged underwater. While these boundaries are somewhat dynamic to accommodate the beach's everyday movement and imperceptible erosion and accretion, the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land the easement originally attached to is eroded. This could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners. Texas does not recognize a "rolling" easement on Galveston's West Beach. Easements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. That result would be unworkable, leaving ownership boundaries to mere guesswork. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, even when boundaries seem to change suddenly.

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State, conveyed the State's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. Accordingly, there are no inherent limitations on title or continuous rights in the public since time immemorial that serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements does not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beach Act or the common law.

Boerschig* v. *Southwestern Holdings, Inc., 322 S.W.3d 752 (Tex.App.-El Paso 2010, no pet.). Boerschig sued SHI, alleging, among other things, that SHI violated the express "ranch road" easement by using it for its invitees to access a resort rather than a ranch, and to access nonappurtenant properties.

When considering the terms of an express easement, a court applies basic principles of contract construction and interpretation. The contracting parties' intentions, as expressed in the grant, determine the scope of the interest conveyed. Any doubts about the parties' intent are resolved against the grantor, or servient, estate, and the court adopts the interpretation that is the least onerous to the grantee, or dominant, estate in order to confer on the grantee the greatest estate permissible under the instrument.

Citing Marcus Cable Assocs.* v. *Krohn, 90 S.W.3d 697 (Tex.2002), Boerschig asserts that the easement may only be used as contemplated by the parties at the time the easement was entered into, that is, to access a ranch, not a commercial resort. In Marcus Cable, the Supreme Court construed an easement that granted an electrical utility permission to construct and maintain "an electric transmission or distribution line or system" over private real property. Marcus Cable obtained permission from the electrical utility to attach cable lines and wiring to the utility's poles. The private property owners sued, claiming that the cable company did not have a valid easement and that they had not consented to the placement of the cable lines across their property. After determining that settled law had interpreted the terms "electric transmission" and "electric distribution" as referring exclusively to conveyances of electricity, the Supreme Court, relying on the specific language in the grant, held that the grant expressed in the easement encompassed only an "electric transmission or distribution line or system," not a use for cable television transmission. Thus, the Supreme Court concluded that the utility easement was limited to the purpose of conveying electricity and declined to permit a use by Marcus Cable that went beyond conveying electricity.

Boerschig asserts that since the easement refers to the "McCracken Tinaja China Ranch," the "Cibolo Creek–Cienega Ranch," and the road as a "ranch road," the easement may only be used to access ranches, that is, a farm or establishment for rearing cattle and other stock, not to access commercial resorts. The court disagreed. The easement provides for a general right of ingress and egress. It does not provide that either party may only use the easement to access property that may only be used for those ranching purposes as claimed by Boerschig. Indeed, simply because the word "ranch" is contained in the title of a property does not mean that property is limited to such a use.

Further, although the properties may be labeled ranches or the road a "ranch road," those names are not sufficient by themselves to limit the easement's use to access only ranch properties, that is, to limit what the owners of the respective estates can do with their property. Indeed, an easement granted for general purposes of ingress and egress includes not only the use required at the time of the grant, but also the right to use the easement for any purpose connected to the use of the property. Absent any expressed language limiting or negating what the owners may do on their properties, the court declined to hold that simply labeling the properties ranches or the road a ranch road is sufficient by itself to limit the properties to ranching operations only.

Finally, the court noted that Boerschig was aware at the time the easement was granted that SHI was intending to operate a resort on its ranch.

Lambright* v. *Trahan, 322 S.W.3d 424 (Tex.App.-Texarkana 2010, pet. denied). Dedication of a roadway may occur as a result of either an express grant or dedication or by implication. Generally, an express dedication is accomplished by deed or written instrument. In order to complete the creation of a public easement by an express dedication of property, as here, there must be acceptance of the dedication by or on behalf of the public. This does not require a formal or express acceptance of a dedication by the public; rather, an implied acceptance by the public is sufficient. That is, by general and customary use, the public can accept a dedication.

In this case, the County has never provided any maintenance for any part of any of the roadways at issue. Rather, the property owners who use the roads have maintained those roads. There was no proffer of any evidence of a formal acceptance of the dedication by the County Commissioners' Court.

There was testimony that the "general public" uses the road. Specifically, census takers, ambulance drivers, and police were said to have regularly used the road. The use of a roadway by law enforcement officers, ambulance drivers, and census takers is not conclusive as to the intent of those members of the public to accept a dedication of a roadway as a public roadway. In similar fashion, such officials might use a hallway in an apartment building for access to an apartment within it without any thought that the hallways have been dedicated to public use. The trier of fact must infer the intent of the members of the public from its actions. Apparently, the trial court here did not infer that the public's use of these roads in these circumstances as described by the evidence sufficiently showed the intention of the public to accept them as public roads. Given the paucity of evidence on the issue of public acceptance and the fact that the burden to prove their acceptance lay with the proponents, we believe a "reasonable and fair-minded" fact-finder could conclude that the proof of acceptance of the roadways by public use failed to meet the required burden.

Reaves* v. *Lindsay, 326 S.W.3d 276 (Tex.App.-Houston [1st Dist.] 2010, no pet.). The express easement involved in this case said it was for the "purpose of maintaining and keeping in repair a roadway and for the use, liberty, privilege and easement of passing and repassing in common with the grantor and others. When the Reagans sought to fence their property with a gate abutting the farm to market road and to install gates and cattle guards, the Lindsays sued, claiming that the easement entitled them to access the FM.

The intent expressed in the grant by the contracting parties determines the scope of the easement. The easement does not specifically address the use of gates or cattle guards. Instead, the Lindsays argue that the terms "liberty" and "roadway" in the easement grant them the right to the easement withoutgates, cattle guards, and other obstructions.

The grant's terms are not specifically defined so we must give them their plain, ordinary, and generally accepted meaning. Liberty is defined as the "freedom from arbitrary or undue external restraint, esp. by a government." Liberty is also defined as "the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views." These definitions suggest that liberty is a person's right or freedom to act without arbitrary or oppressive restraint. It is not a right to act without any restraint whatsoever.

The court said that it cannot hold that liberty, as a matter of law, means the right to ingress and egress free of gates, cattle guards, or other obstructions as suggested by the Lindsays. The Lindsays' interpretation extends beyond the plain and ordinary meaning of the term. Furthermore, there is no evidence in the summary judgment record that suggests that installing gates or cattle guards would be arbitrary or oppressive.

The Lindsays also claim that the term "roadway" in the easement grant supports a conclusion that the easement, as a matter of law, must be open and unobstructed. The Lindsays argue that the inclusion of the word "other" in the easement's grant of the right to pass and repass "in common with Grantor, his heirs and assigns, and others" suggests that the road was meant to be open to the public and, accordingly, free from obstructions. The court did not agree with the Lindsays that the use of the word "other" in the easement in this case compels the same conclusion as the use of the words to be "kept open as a pass-way for the traveling public." We read the language of the easement to acknowledge that people other than the actual property owners may occasionally use the road. To argue that all roads that are not used exclusively by their owners are public roads would eviscerate the concept of private roads.

The court held that the language of the easement does not address the issue of whether gates and cattle guards can be installed on the easement. This does not end the inquiry, however. When an express easement is stated in general terms, the easement implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner. No interest in real property passes by implication as incidental to a grant except what is reasonably necessary to the fair enjoyment of the property. This is a balancing test involving the question whether the Lindsays' claim to a right to a roadway without any gates or cattle guards is reasonably necessary and convenient and whether this claimed right puts as little burden as possible on the Reaveses.

Neither of the parties presented much evidence relevant to this balancing test in their motions for summary judgment. The Lindsays correctly argue that they have the right to use the entire easement as a roadway. The Reaveses state that they intend to use their land to raise cattle, but do not explain why it would be too great of a burden to build a fence and gate alongside the easement tract rather than across the easement considering that their right to use the portion of land subject to the easement for raising cattle is secondary to the Lindsays' right to use it as a roadway.

The court thus held that the record was underdeveloped on the issue of whether an easement without gates or cattle guards is reasonably necessary and convenient for the Lindsays while putting as little burden as possible on the Reaveses. Accordingly, this could not have been a basis for summary judgment for either party.

Van Dam* v. *Lewis, 307 S.W.3d 336 (Tex.App.-San Antonio 2009, no pet.). The Lewises claim an easement exists across a portion of land owned by the Van Dams, which provides the Lewises and other individuals access to Lake Corpus Christi. The trial court granted a declaratory judgment, in favor of the Lewises, confirming an easement by implied dedication "for the benefit of the public. . ."

The subdivision includes numbered lots and undivided areas designated as "Undivided Q" on the subdivision plat. Over the years, portions of the Q areas were sold to individuals holding lots adjacent to the Q areas including one of the Van Dams' predecessors in title. The disputed easement in question takes the form of a path or overgrown road over that portion of the Van Dams' property formerly designated as Undivided Q-2. The Lewises' property is also adjacent and contiguous to the portion of the Van Dams' Q-2 property in question. Critically, the Q-2 property completely separates the Lewis property from the water. The Lewises argue there is an easement across the Van Dams' property granting them access to the lake.

From August of 2005 through early 2006, the Lewises accessed the lake through their back gate, crossing the Q-2 property, to enjoy the lake. In the spring of 2006, Daniel Van Dam notified Patrick Lewis that the Q-2 property was private property and the Lewises' use of Q-2 was trespassing. The Van Dams subsequently installed a metal chain across their property with a sign that said "Private property, no trespassing." Additionally, the Van Dams began constructing a retaining wall and a boat ramp on the Q-2 property.

The trial court's judgment specifically

declares that an easement by implied dedication burdens the Van Dams' Q-2 property. Dedication is the appropriation of land, or an easement therein, by the owner, for the use of the public. Once dedicated, a landowner reserves no rights that are incompatible with the full enjoyment of the public. In Texas, the elements of an implied dedication are well established: (1) the landowner induced the belief that the landowner intended to dedicate the property to public use;n (2) the landowner was competent to do so; (3) the public relied on the landowner's actions and will be served by the dedication; and (4) there was an offer and acceptance.

Determining that a dedication was intended requires more than simply failing to act or acquiescence in the use of land, although direct evidence of an overt act or a declaration is not required. Consequently, in the present case, mere acquiescence and use by the neighbors, without some additional factor from which the donative intent can be inferred, does not establish an easement by implied dedication. Even if the evidence establishes some intent that neighbors could traverse the Q-2 property, the use of the Q-2 property by a limited class of persons is not sufficient to constitute an implied dedication of the Q-2 property for public use. There was no testimony that the public at large used the Q-2 property to access Lake Corpus Christi. Based on the record, the court concluded that there is legally insufficient evidence of donative intent by the original owners and developers the subdivision to burden the Q-2 property with an easement.

Ferrara* v. *Moore, 318 S.W.3d 487 (Tex.App.-Texarkana 2010, pet. pending). Brian Hays owned an eleven-acre tract of land abutting a county road, which he subdivided into five lots. Each deed contained an easement for a "non-exclusive right-of-way for purposes of ingress and egress between a public road and the tract conveyed." Each of the deeds referenced an attachment in which the particular easement was specifically described by metes and bounds. In 2005, Ferrara purchased tract # 2 by warranty deed in which he also was granted such an easement and the tract was subject to all valid easements which allowed northern property owners, including owners of otherwise landlocked tract # 5, access to their property from a county road. Ferrara installed a fence and a gate around the easement in February 2006 and began to block the road. He justified this action by claiming he "researched it and that piece of property north of me did not have legal access to use that [easement]. It was a privilege."

Hays was notified by Roy Gay, another owner of property north of tract # 2, that he was "allowed to enter the gate for a couple of times and then Mr. Ferrara would not let them enter any longer." To no avail, Hays spoke with Ferrara "several times about the easement" and clarified that Ferrara was not allowed to block it. Thereafter, "Ferrara came out and ... cut trees [and laid them] all across the easement where it wasn't passable," despite being directed to open the gate. Finally, to avoid conflict, Hays used a bulldozer to create a road on someone else's property to allow the other tracts to access the county road.

In May 2009, the Moores purchased tract # 5 and discovered that Ferrara was blocking access and use of their easement. The Moores asked Ferrara "once again could we settle this amicably ... and [Ferrara] said no, that [he'd] have to be taken to court." So, the Moores filed suit. They asked the court to order Ferrara to remove the gates to the easement, issue an injunction enjoining him from "erecting any other impediment to the free and unrestricted use of the easement," and sought damages and attorney's fees. Ferrara's pro se answer alleged that the "[f]ence and gate" had been in place for three and one-half years and the easement had not been used for that time and was therefore abandoned.

After a bench trial, which Ferrara attended pro se and called no witnesses other than himself, the trial court issued judgment declaring that the Moores had an express easement for means of ingress and egress onto their property. It permanently enjoined Ferrara from "erecting or placing gates, fences, posts, barriers, wires, chains, locks, logs, rocks, or any other impediment or obstacle" that would "interfer[e] in any manner with [the Moores'] free and unrestricted use and enjoyment of the Easement." The existing gates were to be removed, and Ferrara was ordered to pay damages and $4,500.00 in attorney's fees. After judgment was entered, Ferrara retained counsel.

On appeal, Ferrara argues that the court misinterpreted the easement terms and erred in ordering him to remove gates and other obstacles on the easement. Interpretation of contracts granting easements are reviewed de novo.

A servient estate cannot interfere with the right of the dominant estate to use an easement for the purpose for which it was granted or sought. Likewise, the easement owner must make reasonable use of the right and not unreasonably interfere with property rights of the owner of the servient estate. Any use by others that interferes with the exercise of superior easement rights must yield. The Moores' easement originated from an express grant with a specific description. Their rights are paramount to the extent of the grant.

The court first looked to the grant and its purpose. In this case, all five tracts were borne from a single acquisition of 111 acres. Because all tracts north of tract # 2 did not have access to a public roadway, they were granted "a non-exclusive right-of-way for purposes of ingress and egress between a public road and the tract conveyed and described herein." Additionally, the easement provided that the grantor and his assigns "shall have the non-exclusive right to use any portion of this easement that lies within the tract conveyed herein." Because the gates and fences were built on specifically described easement property, grantees were improperly barred from using these portions of the easement. Ferrara's actions in building a barbed wire fence on one end of the easement, a gate on another end of the easement which remained locked, in felling logs across the easement to make it impassable, and in denying access to grantees of the easement for a period of three years, could certainly be considered as contrary to the purpose of the easement as expressed within the grant. At trial, Ferrara appeared to believe the Moores had no right to an easement and only International Paper Company had legal access on deed for that easement. Ferrara did not attempt to show that the Moores' use of the easement would impair or interfere with his use of the property.

When the easement was granted, no gates, fences, or other obstacles were placed across the roadway. It was openly used for ingress and egress from 1985 until Ferrara's obstacles were built in 2006. There is nothing in the record to suggest that there are uses for the easement property other than to provide access to landlocked property owners. Where, as here, an easement is granted to provide abutting landowners access to a roadway, and no gates existed prior to the grant of the easement, it is evident access to the roadway was to be unobstructed.

Michael Moore testified that he cannot travel down the easement to his property without running over Ferrara's gate, jumping over stumps, and finally breaking through a six-foot barbed wire fence wired to a post. The trial court did not err as a matter of law in its interpretation of the deed and the parties' intent. Contrary to the motion for new trial alleging the court was without legal authority to do so, the trial court could enjoin Ferrara from "erecting or placing gates, fences, posts, barriers, wires, chains, locks, logs, or any other impediments or obstacles ... on the Easement.

PART IX
CONDOMINIUMS AND OWNERS ASSOCIATIONS

Holly Park Condominium Homeowners' Association, Inc.* v. *Lowery, 310 S.W.3d 144 (Tex.App.-Dallas 2010, pet. denied). Lowery quit paying her monthly assessments, so the Association gave her notice of default and conducted a non-judicial foreclosure of her unit, then sold the property. Lowery sued for wrongful foreclosure and sought a declaratory judgment finding the non-judicial foreclosure void. Lowery contended that only a judicial foreclosure was permitted under her declaration. She contended further that the Texas statutes governing condominium regimes did not abrogate this specific contractual right.

Because the Holly Park condominium regime was created before January 1, 1994, it is governed primarily by the Condominium Act (the "Old Act"), codified at chapter 81 of the Texas Property Code. However, the condominium regime is also governed by the Uniform Condominium Act (the "Uniform Act"), codified at chapter 82 of that code, to the extent provided by section 82.002. Section 82.002, in turn, sets forth a list of specific provisions in the Uniform Act that apply to pre-1994 condominium regimes. Those listed provisions apply only to events and circumstances occurring after January 1, 1994, and they do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.

Among the listed provisions of the Uniform Act that conditionally apply to the Holly Park condominium regime is section 82.113, which addresses assessments levied by an association against a unit owner. The Old Act does not provide an association with any method of enforcing its owners' obligation to pay assessments, with the single exception of an association's claim for unpaid assessments against sales proceeds when an owner sells her unit. But section 82.113 of the Uniform Act, titled "Association's Lien for Assessments," provides that an assessment levied by an association is a personal obligation of the owner, secured by a continuing lien on the condominium unit.

Holly Park's bylaws, which are incorporated into the declaration, state that enforcement of the assessment lien shall be by judicial foreclosure. Lowery maintains that judicial foreclosure represents the outer limit of the Association's right to enforce its assessment lien.

The Uniform Act provides that foreclosure can be either judicial or non-judicial, and the Association relied on it in conduction the non-judicial foreclosure; however, the provision states that these foreclosure rights exist except as provided in the declaration.

The declaration in this case balanced the interests of the parties on the issue of unpaid assessments. It specifically provided the Association with an assessment lien and a method of enforcing that lien, although the Old Act did not provide either of those mechanisms. At the same time, the declaration assured Lowery that she would have her day in court before her property could be sold for unpaid assessments. This was the parties' agreement; it is laid out in an existing provision of the bylaws, incorporated into the declaration. Any application of section 82.113 of the Uniform Act that allowed nonjudicial foreclosure without Lowery's approval would upset the balance for which the parties contracted. It would invalidate an existing provision of the declaration or bylaws and, thus, would violate the property code.

Ritter* v. *Las Colonitas Condominium Association, 319 S.W.3d 884 (Tex.App.-Dallas 2010, no pet.). The Las Colonitas Condominium is a condominium association, comprised of 243 units. It was built approximately thirty years ago and many of its common elements are in need of repairs. The bylaws of the Association provide that any special assessment for additions, alterations, or improvements in excess of $25,000 must be approved by fifty-one percent of the owners. However, if the special assessment is for the "replacement, repair, maintenance or restoration of any Common Elements," approval of the owners is not necessary.

The board of directors for the Association passed a $200,000 special assessment. Owners did not vote on the assessment. The Association gave owners six months to pay the special assessment. Ritter has not paid the special assessment. Sometime after the assessment, Ritter distributed post cards to units alleging the special assessment was "illegal," and scheduled a meeting to discuss the issue. Before filing this lawsuit, the Association asked Ritter to retract the information. When Ritter failed to do so, the Association filed suit, seeking a declaratory judgment that the special assessment was valid. Ritter filed a counterclaim against the Association and alleged that the special assessment violated the bylaws.

A new board of directors was elected and the new board passed a resolution to clarify the purpose of the special assessment. The resolution provided that the special assessment was to fund replacement, repair, maintenance, and restoration work on the common elements, and would not be used for any additions, improvements, or alterations.

On appeal, Ritter argued that the board of directors did not authorize a special assessment and that the special assessment was for additions, alterations or improvements to the common areas, and therefore, it was invalid without a vote of the majority of the owners. The bylaws, submitted by both parties as summary judgment evidence, established that a special assessment for replacement, repair, maintenance, and restoration of the common areas, did not require a vote of the owners. However, a special assessment for additions, alterations or improvements to the common areas in excess of $25,000, required the vote of fifty-one percent of the owners. It is undisputed that the owners did not vote to approve the special assessment. The court held that the summary judgment evidence submitted by the Association showed that the assessment had been authorized by the board and that it was for repairs, not new construction, and was therefore valid.

PART X
BROKERS

S&I Management, Inc.* v. *Choi, 331 S.W.3d 849 (Tex.App.-Dallas 2011, no pet.). When Lee was looking to buy some property for a gas station, he met with Choi, who said he worked for the Michael Group real estate brokerage. They found a site and Lee agreed to buy it. Before the purchase, Lee and Choi were looking at other businesses in the neighborhood when Lee asked Choi about a nearby property with a defunct gas station. Choi told Lee that no one would move into that space because the gas station there was decrepit and old. After the purchase, Quiktrip opened a gas station on the lot with the defunct gas station, taking business away from Lee and reducing the value of his property. Lee sued Choi and the Michael Group for fraud and DTPA violations. The claims against the Michael Group were based on theories of vicarious liability under the doctrine of respondeat superior.

Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his agency or employment even though the principal or employer has not personally committed a wrong. The justification for imposing this liability is that the principal or employer has the right to control the means and methods of the agent or employee's work. An employer is not vicariously liable for the torts of an independent contractor it hires because an independent contractor has sole control over the means and methods of the work. A contract between the parties that establishes an independent contractor relationship is determinative of the parties' relationship in the absence of extrinsic evidence indicating that the contract was a "sham or cloak" designed to conceal the true legal relationship of the parties or that despite the contract terms, the true agreement vested the right of control in the principal.

The Michael Group attached a form contract to its motion for summary judgment. The Independent Contractor Agreement provided that Choi was an independent contractor but that the Michael Group was "legally accountable" for Choi's activities. Nothing in the contract gave the Michael Group the right to control the means and methods of Choi's work.

Lee argues that the Agreement was insufficient to establish Choi's independent-contractor status as a matter of law because it does not identify the contractor and it is not signed by the alleged contractor. Under the statute of frauds, certain contracts are not enforceable unless they are in writing and signed by the person against whom enforcement of the contract is sought. However, the Michael Group was not seeking to enforce the Agreement against Choi or anyone else; it attached the Agreement to show the terms of the agreement between it and Choi.

Lee also points to the statement in the contract that "Contractor understands that Broker is legally accountable for the activities of Contractor." However, whether The Michael Group is vicariously liable to third parties under the doctrine of respondeat superior for Choi's torts depends on whether it had sole control over the means and methods of Choi's work. Nothing in the contract, and no other evidence presented by Lee, purports to give it that authority. The statement that "Contractor understands that Broker is legally accountable for the activities of Contractor" did not give The Michael Group sole control over the manner and means used by Choi to sell real estate.

The Independent Contractor Agreement established Choi's independent-contractor relationship with the Michael Group. Accordingly, the court concluded the trial court did not err in granting The Michael Group's traditional motion for summary judgment.

SJW Property Commerce, Inc.* v. *Southwest Pinnacle Properties, Inc., 328 S.W.3d 121 (Tex.App.-Corpus Christi-Edinburg 2010, pet. pending). At the tail end of a very long case dealing with fraud, tortious interference, and the like, the court dealt with a broker's claim for its brokerage fee. The seller argued that the listing agreement in question was unenforceable because it did not contain an adequate property description. The court said that it had reviewed Occupations Code § 11001.806(c) and found "that the statute merely requires that an agreement to sell or purchase real estate be in writing and signed by the party against whom an action is brought, which does not appear to support the seller's argument that the listing agreement is unenforceable. "We therefore reject the Palmer companies' argument that the Listing Agreement was unenforceable because it lacked an adequate property description."

This would certainly be news to the Texas Supreme Court, which has consistently held that § 11001.806(c) requires an adequate property description. The sufficiency of the description is determined by the test that is used in cases arising under the Statute of Frauds and the Statute of Conveyances. See ***Owen* v. *Hendricks***, 433 S.W.2d 164, 166 (Tex.1968), ***Texas Builders* v. *Keller***, 928 S.W.2d 479 (Tex.1996), and a whole lot of other cases.

PART XI
CONSTRUCTION AND MECHANICS' LIENS

In re *Purported Liens or Claims against Samshi Homes, L.L.C.*, 321 S.W.3d 665 (Tex.App.-Houston [14th Dist.] 2010, no pet.). De Leon filed with the Harris County clerk's office claims of liens against five properties in Harris County. In each instrument, De Leon stated that "in accordance with a contract with Vinay Karna," De Leon "furnished labor and materials for improvements to the ... property" owned by Karna. De Leon further stated in the instruments that "$4633.00 ... remains unpaid and is due and owing under said contract. [De Leon] asserts a lien on said improvements and premises to secure the payment of the amount claimed."

Samshi Homes filed its motion, alleging that it, and not Karna, was the owner of the five properties on which De Leon had filed the lien claims. The motion further states that Karna never entered into any agreement with De Leon. The motion concludes that the instruments in question are fraudulent as defined by Government Code § 51.901(c)(2), and that the documentation or instruments should therefore not be accorded lien status.

Government Code § 51.901(c)(2) authorizes a person or entity that owns real property, and has reason to believe that another has filed a document purporting to create a lien against that property, to file a motion with the district clerk alleging that the instrument in question is fraudulent, as defined by § 51.901(c), and therefore should not be accorded lien status. Section 51.903(c) authorizes a district judge with jurisdiction to rule on the motion. In doing so, the judge may make his or her determination based on a review of the instrument itself, without the benefit of testimonial evidence.

Section 51.901(c)(2) provides that an instrument filed for recording in the property records is presumed to be fraudulent if, among other things the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and is not a document or instrument provided for by the constitution or laws of this state or of the United States.

Samshi Homes acknowledges that the instruments in question are attempts to create mechanic's liens under Property Code § 53.054, but argues that the instruments did not meet the requirements of that section, for various reasons. All of Samshi Homes' contentions, however, go beyond the scope of sections 51.901 and 51.903 of the Government Code. In a proceeding pursuant to those sections, a trial court is limited to determining whether a particular instrument, or instruments, is fraudulent as defined in the statutes. It may not rule on the validity of the underlying lien itself or other claims between the parties.

As Samshi Homes acknowledges, the instruments De Leon filed are in the form of mechanic's liens, and, as such, are instruments provided for by the laws of this state and therefore not presumed to be fraudulent under section 51.901(c)(2)(A).

In re *Classic Openings, Inc.*, 318 S.W.3d 428 (Tex.App.-Dallas 2010, no pet.). This mandamus proceeding involves a suit brought by Gary Sayre against Classic Openings, Inc. for breach of contract, deceptive trade practices, and breach of express and implied warranties after Classic Openings replaced windows and doors in Sayre's residence. Classic Openings claims the trial court abused its discretion by failing to abate the case under the Residential Construction Liability Act, Property Code § 27.004(d). The Dallas Court of Appeals conditionally grant the writ.

Sayre contends the RCLA does not apply to his claims because he is not seeking damages under that act, However, Property

Code § 27.002(a)(1) provides that the RCLA applies to “any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods.” A “construction defect” includes “an alteration of or repair or addition to an existing residence ... on which a person has a complaint against a contractor.” Property Code § 27.001(4).

Sayre alleged Classic Openings overcharged for improper windows and the incorrect configuration of three doors. These allegations are a complaint against a contractor regarding the alteration or repair of an existing residence. Thus, Sayre's allegations fall within the RCLA. Consequently, Sayre was required to give Classic Openings written notice of the defect sixty days before filing suit. While Sayre did give the required notice under the DTPA, that notice does not suffice to provide Classic Openings with the specific notice required under the RCLA.

Choy* v. *Graziano Roofing of Texas, Inc., 322 S.W.3d 276 (Tex.App.-Houston [1st Dist.] 2009, no pet.). Choy was the president of Windwater, which was owned by Tan Yu. Windwater hired Graziano to install roofs on new houses it was building. To pay for the work, Windwater had construction loans from Citibank and Frost. Graziano invoiced for the work and when it wasn't paid, it sued Windwater, later adding claims against Choy individually. Graziano alleged that, instead of paying Graziano with the construction loan proceeds, Choy had made the decision to misapply or had actually misapplied the funds received for that purpose by Windwater.

In typical order, draw requests were sent to the banks, the banks would approve the draw requests and send funds to Windwater. Choy testified that Tan Yu “possibly” took some of the funds received from these draw requests overseas. He did not authorize the construction loan proceeds going overseas, but he knew the loan construction proceeds owed to Graziano were taken overseas. Choy issued check and wire transfers from Windwater's operating accounts to Tan Yu when Yu directed him to do so. Choy stated that he did not have a choice as to whether to send money to Tan Yu rather than to contractors because Tan Yu was the owner of the company, and, if he had refused to comply, he would have been fired. Choy admitted he knew that Graziano and other contractors did not get paid for work they had completed. Choy also admitted that bank interest and some payrolls were not paid. Tan Yu also knew the contractors were not being paid for their work. Approximately $4.723 million was wired from Windwater to Tan Yu.

The Texas Supreme Court has indicated that the Act should be construed liberally in favor of laborers and materialmen. The Act was specifically enacted to serve as a special protection for subcontractors and materialmen, when contractors refuse to pay the subcontractor or materialman for labor and materials.

Choy also argues that the evidence is legally and factually insufficient to show that he was a trustee and that Graziano was a beneficiary of trust funds. Property Code § 162.002, entitled, “Contractors as Trustees,” provides, “A contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds.” Choy testified that he was the President of Windwater and that he had control over the funds received from Frost and Citibank. Furthermore, he Vice–President of Graziano, testified that he received checks from Windwater and that the checks were signed by Choy. Choy produced no contrary evidence. Based on this evidence, the court concluded that Choy was a trustee of construction trust funds.

Likewise, Graziano was properly classified as a beneficiary of trust funds. A subcontractor who furnishes labor or material for the construction or repair of an improvement on specific real property in this state is a beneficiary of any trust funds paid or received in connection with the improvement.

Choy contends, however, that, as a trustee under the Act, he had no duty to pay out trust funds to a subcontractor who furnished labor or materials for the construction or repair of specific real property unless and until certain events occur in a particular sequence. Specifically, Choy contends that Graziano had to submit evidence that the labor and/or materials were provided prior to the receipt of trust funds and that the payment obligation arising therefrom is due and payable within 30 days of receipt of the trust funds. He contends that section 162.031 of the Act, entitled "Misapplication of Trust Funds," "permits a recipient of loan proceeds to use such proceeds for any purposes whatsoever provided they do not have at the time such loan proceeds are received any outstanding current or past due obligations as defined under Property Code Section 162.005(2)." He further contends that Graziano ignored the definition of current or past due obligations in section 162.005(2) and that there is a complete absence of any evidence that complies with Act's definition of 'current and past due obligations. Choy states that the term "due and payable" is limited to "no later than 30 days following receipt of the trust funds." He contends that "[i]f an obligation is not due and payable within 30 days of receiving the trust funds then those funds are not trust funds under the definitions of the Trust Fund Act." Finally, Choy claims that "there is no evidence in the record to prove" that Windwater was obligated to Graziano for labor or materials furnished in the direct prosecution of work under a construction contract prior to the receipt of trust funds and that "such obligations were due and payable 30 days from the receipt of trust funds."

Any construction of the statute such as that Choy urges would be absurd. First, it would remove from the definition of "current and past due obligations" all past due obligations, rendering the statutory definition of "past due obligations" meaningless. Second, it would mean that borrowers like Windwater could request construction loan funds on the basis of an invoice for completed work, as here, and not have to pay the beneficiary whose invoice supported the borrower's draw request because the beneficiary invoiced the borrower before it requested the funds and did not specify that it required payment within 30 days after the borrower received the funds that were released by the bank to the borrower on the basis of the invoice. The court held that, by the plain language of the Act, the words "due and payable ... no later than 30 days" after a trustee's receipt of construction trust funds include invoices already due and payable at the time trust funds are requested by a trustee.

PART XII
CONDEMNATION

State of Texas* v. *Brownlow, 319 S.W.3d 649, 53 Tex. Sup. Ct. J. 1100 (Tex. 2010). The State sought to condemn Brownlow's 12.146 acres of land for the opening, construction and maintenance of a floodplain mitigation pond. The parties eventually settled the condemnation suit with an Agreed Judgment for an easement on the property "for the purpose of opening, constructing, and maintaining a detention/mitigation facility in, over, and across the tract of land for the purpose of making additions to, improvements on, and repairs to said detention facility or an part thereof." A recital in the judgment noted that the State sought the property "for highway purposes."

The State then began to remove a whole lot of dirt and use it in another section of the Highway 35 widening project. The Brownlows protested that the excavated soil was not part of the Agreed Judgment. They contend that as the fee simple owners of the land the soil belongs to them. They claimed that the State unconstitutionally took the excavated dirt, entitling them to compensation. The State filed a plea to the jurisdiction. It argued that the Agreed Judgment gave it the right to use the dirt for highway construction purposes, it was within its rights to remove and use the dirt, and that it was immune from suit on the basis of sovereign immunity. The Court of Appeals held that the dirt belonged to the Brownlows and that they could maintain their takings suit.

When the State acquires fee simple title to land through a condemnation proceeding, it acquires the land as well as appurtenances to and buildings on the land. However, where only an easement is acquired, the owner retains title to the land and all that is ordinarily considered part of the land. If only an easement is acquired, it is the State's burden to assure that the document granting the easement expressly addresses any special arrangements or provisions in the easement taking. The State's burden flows from the principle that an easement's express terms, interpreted according to their generally accepted meaning delineate the purposes for which the easement holder may use the property. An easement, unlike a possessory interest in land, is a nonpossessory interest that authorizes its holder to use the property for only particular purposes. An easement does not transfer rights by implication except what is reasonably necessary to fairly enjoy the rights expressly granted. If the rule were otherwise, easements would effectively become possessory, rather than nonpossessory, land interests. The emphasis placed on an easement's express terms serves the important public policy of promoting certainty in land transactions.

The State argued that the Brownlows failed to state a takings claim because the Agreed Judgment gave the State the right to use the dirt for highway construction purposes and the Brownlows did not have a compensable interest in the dirt the State removed. To recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken. The heart of the State's argument is that the Agreed Judgment expressly or implicitly gives it the right to remove the dirt excavated from the Brownlows' land and use it in highway construction, or that, in any event, use of the dirt is reasonably necessary for the State to fully enjoy the easement rights it was expressly granted. The Agreed Judgment, however, sets out the purposes of the easement as "opening, constructing, and maintaining" a mitigation pond; it does not grant the State rights to use the Brownlows' property for other purposes. Using the dirt at a site remote from the Brownlows' property to construct a highway does not constitute a use related to either (1) opening, (2) constructing, or (3) maintaining a mitigation pond on the Brownlows' property. The purpose of a mitigation pond is to hold water.

Nor does a recital in the Agreed Judgment that the State first sought the Brownlows' property for "highway purposes" expressly or implicitly grant the State a right to use the dirt from the easement for highway construction. It was incumbent on the State to be sure the property rights it needed were acquired and encompassed within the language of the Agreed Judgment.

The Agreed Judgment mentions "highway purposes" a single time, and that is in the recitals. In contrast, at five different points—twice in the granting clauses and three times in the recitals—the Agreed Judgement announces that the State is acquiring the easement for the purpose of "opening, constructing, and maintaining" a detention facility. Express decretal language in a judgment controls over recitals. Therefore, a single statement in the recitals that the State "sought and prayed for the acquisition, for highway purposes" is not clear enough to carry the State's burden. It does not unambiguously indicate that the State has the right to use the Brownlows' property for purposes unrelated to "opening, constructing, or maintaining" the mitigation pond generally, or more specifically, as highway construction material.

The State argues that under longstanding precedent, it has the right to use all materials located in the easement for the purpose of constructing, repairing, or improving roadways. It argues this right tacitly inures to every condemned easement. But, while courts have held that the cities could use materials removed from the streets during the grading process to construct and grade other roads, they were not considering materials removed from easements other than easements for city streets. In contrast, the soil removed from the Brownlows' property was not removed as part of the grading process nor was the property in the highway right of way. The materials could be removed only for the specific purpose of opening, constructing, and maintaining the mitigation pond.

The State also argues that it was entitled to use the dirt to construct a highway embankment because doing so was necessary to fully enjoy its easement. The court agreed that an unlimited easement carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use. But the rights reasonably necessary for full enjoyment of an easement are limited. They do not encompass rights foreign to the purpose for which the easement is granted. The servient estate holder retains these rights.

City of Edinburg* v. *A.P.I. Pipe & Supply, LLC, 328 S.W.3d 82 (Tex.App.-Corpus Christi-Edinburg 2010, pet. pending). The City condemned property, originally obtaining fee simple title to 9.869 acres of land. Later, it entered a Judgment Nunc Pro Tunc, replacing the original condemnation with a judgment taking a right-of-way easement over the property. The judgment was recorded in the real property records. The later judgment, however, was void because it was issued after the trial court's power had expired and because it purported to change the original judgment.

The owner of the 9.869 acres, White, then sold some property to API, which included the easement condemned by the City. The City then granted TxDoT an easement across the 9.869 acres to construct a drainage easement. TxDoT started removing dirt from the drainage channel and API sued claiming inverse condemnation.

In an earlier proceeding, TxDoT and the City argued that they were immune from a suit for inverse condemnation because API/Paisano did not have an interest in the property. They argued that, because the Nunc Pro Tunc judgment was void, the earlier judgment granting the City fee simple title was in effect, API had no ownership interest that could be inversely condemned and thus the court had no jurisdiction in this matter. The court disagreed and the case went to trial. TxDoT and the City filed a second plea to the court's jurisdiction.

In the second plea, TxDoT and the City argued that the first judgment was recorded in the official records of Hidalgo County, Texas on April 28, 2004. TxDoT and the City attached a certified copy of the first judgment showing its recording information.—before API's purchase of the property. Thus API, according to TxDoT and the City, could not be a BFP.

The City and TxDot further claimed that API's suit was not just for inverse condemnation but for trespass to try title, and they are immune from such a suit. The City and TxDot concede that the Texas Constitution waives sovereign immunity for inverse condemnation claims. They argue, however, that a proper inverse condemnation claim necessarily requires a showing that the claimant had a compensable interest in the property.

Property Code § 13.001(a) says "A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law." It is undisputed that both the first and second judgments were filed in the official property records prior to API's purchase. Additionally, the City and TxDoT do not dispute that they agreed to the second judgment and took steps to have it filed in the property records. The only dispute relates to the legal effect of these actions.

The City and TxDoT dispute that API can be a good faith purchaser for value. First, the City and TxDoT argue that API cannot rely on equitable doctrines, such as the good faith purchaser for value doctrine or estoppel, to take title away from a governmental entity. However, the "good faith purchaser for value" doctrine is not merely an equitable doctrine—it is statutorily mandated, and no exception is made in the statute for governmental entities. In fact, other courts have applied the good faith purchaser for value doctrine as against a governmental entity.

The question remains, however, whether API had either constructive or actual notice of the City and TxDoT's claim to the property in fee simple. API does not dispute that it had notice or actual knowledge of both the first and second judgments, which were filed of record. The question is whether API should have known that, after the fact, the City and TxDoT would claim that the second judgment, to which they agreed and which they caused to be filed, was void. The court held that API was not required to inquire as to the effect or validity of the second judgment and was entitled to rely on the second judgment, filed in the official property records.

The City and TxDoT next argue that API's suit is really for trespass to try title and negligence, and they have sovereign immunity from these claims. TxDoT and the City's argument that this suit is one for trespass to try title is not supported by the law. A takings claim is not the functional equivalent of a trespass to try title claim or a suit to quiet title. The remedy for an inverse condemnation claim is just compensation for the taking, while a successful tres-pass to try title claim requires immediate transfer of possession of the property.

Circle X Land and Cattle Company, Ltd.* v. *Mumford Independent School District, 325 S.W.3d 859 (Tex.App.-Houston [14th Dist.] 2010, pet. denied). In 2002, the School District and Robertson County expressed their desire to acquire thirty acres of land to develop a sports and recreation complex. When the county decided to withdraw from the deal, the school district did not proceed with the acquisition. But the school district revisited the idea three years later, and on August 11, 2005, its board of trustees voted to start condemnation proceedings. A panel of three special commissioners reviewed the district's petition and approved the condemnation of thirty acres of Circle X's land. Circle X sued in district court claiming the school district had acted arbitrarily and capriciously in deciding to condemn the land.

Circle X contends the school district failed to conclusively establish that its governing body determined that Circle X's land was being taken for school purposes and that it was necessary. Specifically, Circle X contends that the only viable evidence the school district presented about the condemnation proceeding was the minutes reflecting the board of trustees' decision to condemn the property. The minutes reflect that "the Board approved to start condemnation procedures (eminent domain) on 30 acres of land presently owned by Holmes Estate." Circle X argues these minutes are vague and state no purpose for the condemnation.

Although the minutes do not expressly state the condemnation's purpose or necessity, the trial court properly considered all the evidence, including the affidavits, in concluding that the district in fact determined that the condemnation was for school purposes and a necessity.

City of Houston* v. *Guthrie, 332 S.W.3d 578 (Tex.App.-Houston [1st Dist.] 2010, pet. pending). The Fireworks Operators own and operate fireworks stands outside the Houston city limits. The Property Owners own the land that is leased to the Fireworks Operators. Both the Fireworks Operators and the Property Owners sued the City challenging its use of certain strategic partnership agreements and the Houston City Fire Code to ban the sale of fireworks outside the city limits.

The Fireworks Operators and the Property Owners claim the City's actions constitute an unconstitutional taking, as well as an unconstitutional exercise of police power. They allege claims under the Texas Private Real Property Rights Preservation Act ("PRPRPA") for unlawful government taking of property and proprietary rights without just and due compensation. Government Code §§ 2007.001 et seq.

The City argues that the Fireworks Operators and Property Owners have failed to plead facts establishing (1) they have standing to bring any claims under PRPRPA and (2) any actions by either the City or the MUDs that would come within PRPRPA's waiver of immunity. PRPRPA waives sovereign immunity for certain governmental entities, so long as the other requirements of the statute can be satisfied. The statute unquestionably vests district courts with subject-matter jurisdiction to hear claims brought under the statute. However, PRPRPA limits the categories of persons who may bring suit under the statute. In addition, PRPRPA's waiver of immunity only applies to a limited scope of governmental actions.

To have standing to bring a claim under PRPRPA, plaintiffs must be "owners" who allege a "taking"—defined as either (1) a governmental taking under the United States Constitution or the Texas Constitution or (2) a governmental action reducing the market value of property by at least 25 percent. "Owner" is defined as "a person with legal or equitable title to affected private real property at the time a taking occurs."

The Fireworks Operators argue their position as leaseholders gives them sufficient interest in the real property to assert a claim under PRPRPA. While leaseholders may have some interest in real property sufficient—in some cases—to assert a constitutional takings claim, PRPRPA's use of the term "title" in the definition of "Owner" indicates title to a real property interest—whether surface, water, mineral or some combination thereof—must be held before a party has standing to sue under the act. Because their pleadings affirmative allege they are mere lessees, and actual title to the land is held by Property Owners, the trial court erred by denying the pleas to the jurisdiction as to Fireworks Operators' claims against the City.

Nevertheless, the Fireworks Operators argue they have standing to assert claims under PRPRPA because their leasehold interest is the equivalent of having "equitable title" in real property. The court disagreed. "Equitable title" is a right, enforceable in equity, to have the legal title to real estate transferred to the owner of the right upon the performance of specified conditions. In this case, Fireworks Operators do not allege they have a right to have legal title of the real property upon which their businesses are located transferred to them. Accordingly, under the facts as alleged, Fireworks Operators' leasehold interests do not constitute "equitable title" under PRPRPA. Therefore, they lack standing to asset any claims under this statute.

Alewine* v. *City of Houston, 309

S.W.3d 771 (Tex.App.-Houston [14th Dist.] 2010, pet. pending). Homeowners in a subdivision close to Bush Intercontinental Airport sued the City because construction of a new runway resulted in increased airplane flights over a corner of their neighborhood. The City successfully moved for summary judgment, arguing the homeowners were not entitled to compensation for inverse condemnation or intentional nuisance because they had not shown their property was "taken" by the government. The City argued that (1) the homeowners' complaints do not rise to the level of a constitutional "taking" because their homes remain habitable; (2) no "taking" occurred because the average noise level in the neighborhood does not exceed that approved by the federal government for residential use; and (3) the "community damages rule" bars recovery because all plaintiffs claimed similar injuries. The trial court granted summary judgment without specifying the basis for its ruling.

A government is vested with certain inherent powers commensurate with its status as a sovereign, including the right of "eminent domain" in which private property is taken-in exchange for compensation-and converted for public use. Some "takings" are more conspicuous than others. This case would more appropriately be described as an "inverse condemnation" action, in which an owner claims his property has already been taken-outside of proper condemnation proceedings-without compensation.

To recover compensation for inverse condemnation under Texas Constitution Article I, Section 17, a claimant must plead and prove (1) an intentional governmental act; (2) resulted in a "taking" of his property; (3) for public use. Here, the parties' dispute focuses only on the second prong of this test, that is, the proof necessary to establish a "taking" of property by airplane overflights. To establish a taking by aircraft overflights, a landowner must show that the flights directly, immediately, and substantially interfere with the land's use and enjoyment. However, the City contends the homeowners must also show the overflights have rendered their homes uninhabitable-that is, unusable for their intended purpose-to prove a constitutional "taking" of property.

In ***City of Austin* v. *Travis County Landfill Co.***, 73 S.W.3d 234 (Tex.2002), the Texas Supreme Court held that, to establish a taking by aircraft overflights, a landowner must show that the flights directly, immediately, and substantially interfere with the land's use and enjoyment. To meet this standard, the landowner must show that the overflight effects directly and immediately impact the land so that the property is no longer usable for its intended purpose. In this case, then, the court held that, to demonstrate a compensable taking-by-overflight under current Texas law, the homeowners were required to prove the overflights directly, immediately, and substantially impacted the land so as to render their property unusable for its intended purpose as a residence.

City of Houston* v. *Mack, 312 S.W.3d 855 (Tex.App.-Houston [1st Dist.] 2009, no pet.). The Macks filed suit against the City on September 30, 2008, alleging that after FEMA approved the new Flood Insurance Rate Maps, its property was within a newly delineated floodway. The Macks contend that, in light of that designation, the City's 2006 amendments to section 19-43(a) of the Code prohibited the issuance of building permits to them for "new construction, additions to existing structures or substantial improvement of any structure" on their property. In addition, the Macks contend that the Code, as it applied until September 1, 2008, prohibited the City Engineer from issuing any building permits for such construction. The Macks allege that during that period of time, the City's ordinance deprived them of the use, benefit, and enjoyment of their property, amounting to a taking without just compensation.

The City's alleged that the Macks failed to exhaust the administrative remedies allowed by the Code. The City further alleged that, because the Macks had not filed an application for a permit, nor had they yet appealed such a denial as allowed by the Code, their claims were not ripe and the trial court lacked jurisdiction to consider their petition. The Macks did not dispute the fact that they did not apply to the City for building or development permits before they filed suit. However, the Macks claimed that, under the plain language of the 2006 ordinance, their intended use for the property was expressly forbidden and the Code allowed no discretion or variances under such circumstances. Therefore, the Macks argued, their application for a permit would have been futile.

Ripeness is an element of subject matter jurisdiction and, as such, is subject to de novo review. A regulatory-takings claim may challenge a land-use restriction on its face or as applied to particular property. A facial challenge is ripe when the restriction is imposed, but an as-applied claim is not ripe until the regulatory authority has made a final decision regarding the application of the regulation to the property.

Ripeness concerns whether, at the time a lawsuit is brought, the facts have developed sufficiently such that an injury has occurred or is likely to occur, rather than being contingent or remote. To establish that a claim is ripe based on an injury that is likely to occur, the plaintiff must demonstrate that the injury is imminent, direct, and immediate, and not merely remote, conjectural, or hypothetical. By focusing on the concreteness of injury, the ripeness doctrine allows a court to avoid premature adjudication and issuance of advisory opinions.

The City contends that the Macks have not alleged that they suffered a "concrete injury." However, in their petition, the Macks allege they have been deprived of the "use benefit and enjoyment of the Property" and that the property's value has been drastically reduced because "after the date of the amendment, Plaintiffs could neither construct any improvement in or upon the Property nor sell the Property to anyone who desired to construct any improvements in or upon the Property." Moreover, the Macks allege that they had entered into a listing agreement with a local real estate broker in furtherance of their intention of selling the property for development.

The court held that record does not support the City's contention. In addition to viewing the Macks' allegations in their favor, the court must take as true all evidence favorable to the Macks and indulge every reasonable inference and resolve any doubts in their favor. The Macks alleged that their property was in a Houston floodway. They also alleged that the 2006 amendments to the City Code deprived them of the "use, benefit, and enjoyment" of the property because they could not sell it to anyone who desired "to construct any improvements in or upon the property." Considering these allegations, the court concluded that the Macks have alleged a "concrete injury."

City of San Antonio* v. *De Miguel, 311 S.W.3d 22, (Tex.App.- San Antonio 2009, no pet.). The De Miguels' lawsuit alleged in their inverse condemnation and nuisance lawsuit that the City constructed a drainage facility near their residence that diverted surface water onto their property during rainfall.

Nuisance liability arises only when governmental immunity is clearly and unambiguously waived. In some cases, a city may be held liable for a non-negligent nuisance-that is, one that rises to the level of a constitutional taking. In others, the Texas Tort Claims Act may waive immunity from nuisance claims (Civil Practice & Remedies Code § 101.021). Here, the plaintiffs do not assert there exists any statutory waiver of immunity and the court found none; therefore, it concluded there is no statutory waiver. Consequently, the City can only be liable for a non-negligent nuisance rising to the level of a constitutional taking.

To properly assert a non-negligent nuisance claim against a governmental entity, a party must plead and show the following elements: (1) the governmental entity intentionally performed an act in the exercise of its lawful authority; (2) that resulted in the taking, damaging, or destruction of the party's property; (3) for public use. Here, the City's plea to the jurisdiction challenged only the first element; therefore, the court limited its analysis to whether a fact issue exists on the question of whether the City intentionally performed an act that rises to the level of a taking.

The City argues the plaintiffs did not plead or show the City knew a specific act was causing identifiable harm or knew that specific property damage was substantially certain to result from an authorized government action. A person's property may be taken, damaged or destroyed if an injury results from either the construction of public works or their subsequent maintenance and operation. However, a city has no duty to provide drainage or facilities adequate for all floods that may occur or reasonably be anticipated as long as the city does nothing to increase the flow of surface water across the land in question. The existence of such liability would tend to deter the city from providing even partial relief from flooding. In determining the extent of the protection to be provided, a city must weigh the needs of the entire community and allocate available resources so as best to serve the interests of all its citizens. Here, the De Miguels point to no new action taken by the City after the conclusion of the 1989 lawsuit that resulted in an increased flow of surface water across their property.

Garcia* v. *State of Texas, 327 S.W.3d 243 (Tex.App.-San Antonio 2010, no pet.). Garcia was charged with possession of marijuana in a drug free zone in an amount more than two ounces but less than four ounces. At the time of the arrest, Sergeant Cleghorn then went into the vehicle and saw a three-pound Folgers coffee can on the passenger side floorboard. Cleghorn knew that people who traffic narcotics like to use items like coffee and mustard to mask the odor of marijuana. Sergeant Cleghorn opened the can, which had a plastic lid on it but did not have a seal. Sergeant Cleghorn then pushed his finger down into the coffee, felt a plastic bag, and pulled it out. The plastic bag contained marijuana.

Garcia argues that by placing his bare hand in the coffee, the police officer destroyed consumable property in violation of the Takings Clause of the Fifth Amendment to the Constitution. Nice try, but when property has been seized pursuant to the criminal laws or subjected to in rem forfeiture proceedings, such deprivations are not ‘takings' for which the owner is entitled to compensation.

PART XIII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Webb* v. *Voga, 316 S.W.3d 809 (Tex.App.-Dallas 2010, no pet.). Kathy Webb filed suit against the POA and other property owners seeking a declaratory judgment that the POA and owners had abandoned and waived the restrictive covenants. The evidence showed that Webb did not own a lot in the restricted subdivision. Record title to the lot was in her husband’s name.

Subject matter jurisdiction is an issue that may be raised for the first time on appeal and may not be waived by the parties. Standing is a component of subject matter jurisdiction; therefore, standing cannot be waived and may be raised for the first time on appeal. Standing deals with whether a litigant is the proper person to bring a lawsuit. To establish standing, one must show a justiciable interest by alleging an actual or imminent threat of injury peculiar to one's circumstances and not suffered by the public generally. As to each of Webb's causes of action against the Association and her cause of action against the Lot Owners, Webb's ownership of property in the subdivision was critical to her standing to maintain her claims.

Although Webb claimed ownership, the evidence showed that the property had been deeded to her husband and her name did not appear in record title. Webb's contention that she had standing in a representative capacity for the record title owner is unfounded. Webb's suits as consolidated were brought in her individual capacity and not as a representative or fiduciary of the record title owner, and there is no pleading or evidence in the record to support a contention that Webb brought claims other than on her own behalf. Further, Webb acknowledges Robert Webb as the record owner of the property at all relevant times.

The evidence shows Webb was not a property owner. The court concluded that Webb lacked standing for her causes of action against the Association and the lot owners and, therefore, the trial court lacked subject matter jurisdiction over those causes of action.

Hourani* v. *Katzen, 305 S.W.3d 239 (Tex.App.-Houston [1st Dist.] 2010, pet. denied). Katzen owned Lot 7 in the subdivision. Lot 7 is surrounded, on the sides and rear, by property owned by others. The lake extends almost completely across the front of Lot 7. Hence, a narrow path of approximately 15 feet, situated between the eastern edge of the lake and the eastern boundary line of the property, provides the only street access to the dry portion of the lot behind the lake. There is also a 15-foot setback line along the eastern boundary line, which comes near to or touches the edge of the lake. Katzen sought to either build a bridge over the edge of the lake or to obtain a variance to pour a driveway. Katzen was granted a special variance from the City of Piney Point Village to build "a driveway/bridge" within 15 feet of the edge of the lake and within the setback zone.

The subdivision's restrictive covenants required the homeowners association's approval for improvements of the type in question. Because the association had forfeited its existence, Katzen submitted his plans to the other owners in the subdivision. Several owners told Katzen they disapproved. Katzen filed suit against the other owners, alleging the restrictions were preventing him from accessing his property.

Hourani, one of the objecting owners, contended that the trial court disregarded the pre-construction approval process mandated by the restrictions. Katzen contended that he was not required to obtain that approval because the homeowners association had forfeited its charter and there was no board in existence to grant or withhold the approval of his plans.

The record shows that the Association "forfeited existence" in 1989 and was not reinstated April 4, 2006. Hence, in 2004, when Katzen sought to begin construction of his driveway, he could not have complied with Section 2.2, which required the written approval of an entity that had forfeited its existence. The court recognized that, notwithstanding the status of the Board, any person entitled to benefit under a restrictive covenant is entitled to enforce it. Hence, here, any one or more of the property owners could have compelled Katzen to seek pre-approval of the Board, had it existed. Nothing in the Restrictions, however, requires Katzen to submit certain plans to, or obtain written approval from, each of the individual property owners in the subdivision, in the absence of a board.

Uptegraph* v. *Sandalwood Civic Club, 312 S.W.3d 918 (Tex.App.-Houston [1st Dist.] 2010, no pet.). The subdivision's deed restrictions are restrictive covenants concerning real property. Restrictive covenants are subject to the general rules of contract construction. As when interpreting any contract, the court's primary duty in construing a restrictive covenant is to ascertain the drafter's intent from the instrument's language. In ascertaining the drafter's intent, the court must examine the covenant as a whole in light of the circumstances present when the covenant was made.

Whether restrictive covenants are ambiguous is a matter of law for the court to decide. A covenant is unambiguous if, after appropriate rules of construction have been applied, the covenant can be given a definite or certain legal meaning. In contrast, if, after appropriate rules of construction have been applied, a covenant is susceptible of more than one reasonable interpretation, the covenant is ambiguous. Mere disagreement over a restrictive covenant's interpretation does not necessarily render the covenant ambiguous.

At common law, covenants restricting the free use of land are not favored but will still be enforced when they are confined to a lawful purpose and are clearly worded. Accordingly, under the common law, a restrictive covenant's words cannot be enlarged, extended, stretched, or changed by construction. All doubts concerning a restrictive covenant's terms are resolved in favor of the free and unrestricted use of the land, and any ambiguity must be strictly construed against the party seeking to enforce the covenant.

In 1987, the Legislature amended the Texas Property Code to provide that all restrictive covenants contained in instruments governing certain residential developments, regardless of the date on which the covenants were created, must be liberally construed to give effect to their purposes and intent. Property Code §§ 202.002(a) and .003(a).

Some courts of appeals have recognized that the common-law requirement of construing restrictions strictly and section 202.003(a)'s requirement of construing residential covenants liberally to effectuate their purposes and intent might appear contradictory. As a result, some courts of appeals have held or implied that section 202.003(a)'s liberal-construction rule concerning residential covenants supersedes the common-law rule of strict construction.

In contrast, other courts of appeals, including the Houston 1st District, have concluded that there is no discernable conflict between the common law and section 202.003(a). Even among the courts that believe that the common law and section 202.003(a) can be reconciled, there exists a split in how to apply section 202.003(a). Some of these courts have simply continued to apply the common-law rule without a precise explanation of how to reconcile it with section 202.003(a). Other courts of appeals have held that the common-law rule applies only when there is an ambiguity concerning the drafter's intent, but to determine if such an ambiguity exists, these courts first apply section 202.003(a)'s liberal-construction mandate.

Some courts of appeals since 1987 have simply continued applying the common-law strict-construction rule without referring to section 202.003(a) at all. Others have applied section 202.003(a)'s liberal-construction standard without referring to the common-law construction principles at all. The Texas Supreme Court has noted, but not yet resolved, the potential conflict between the common law and section 202.003(a).

PART XIV
AD VALOREM TAXATION

Woodway Drive LLC* v. *Harris County Appraisal District, 311 S.W.3d 649 (Tex.App.-Houston [14th Dist.] 2010, no pet.). In December 2006, First Reliance sold the parcel to Woodway. Despite the year-end conveyance, First Reliance filed a notice of protest with HCAD protesting the 2007 tax assessment. The protest was denied.

First Reliance filed a suit challenging the review board's determination. The following February First Reliance amended its petition to add Woodway as a plaintiff. HCAD filed a plea to the court's jurisdiction, arguing that the trial court lacked jurisdiction because First Reliance was not the owner of the property on January 1, 2007, that only the property owner on that date, Woodway, had the right to protest and appeal, and that Woodway had failed to make a timely protest or appeal. The trial court agreed and dismissed the case.

As a general rule, only a property owner may protest tax liability before an appraisal-review board and seek judicial review in court. Section 42.21(a) of the Property Tax Code requires a party who appeals as provided by Chapter 42 of the Property Tax Code to timely file a petition for review with the district court. Failure to timely file a petition bars any appeal under the chapter. A property owner may designate a lessee or an agent to act on the property owner's behalf for any purpose under the Property Tax Code, including filing a tax protest.

Therefore, to qualify as a "party who appeals" by seeking judicial review of an appraisal-review board's tax determination under section 42.21(a), First Reliance had to be an owner of the property, a designated agent of the owner, or the authorized lessee of the property under the circumstances stated in section 41.413. A party who does not meet one of the above criteria would lack standing under the Property Tax Code. If the litigant lacks standing, the trial court is deprived of subject-matter jurisdiction to consider a suit for judicial review based on an ad valorem tax protest. Here, First Reliance did not own the property as of January 1, 2007. It did not claim rights to protest under the Property Tax Code as either a lessee or an agent. Therefore, First Reliance lacked standing to pursue judicial review as a "party who appeals" under section 42.21(a).

F-Star Socorro, L.P.* v. *El Paso Central Appraisal District, 324 S.W.3d 172 (Tex.App.-El Paso 2010, no pet.). A taxpayer's protest with respect to amount of property taxes it was required to pay, whether categorized as a challenge to a tax "exemption," or a challenge to a tax "abatement," fell within catch-all category of action that the taxpayer was entitled to protest before appraisal district, such as to vest appraisal district with authority to review taxpayer's claim, and, thus, taxpayer's failure to pursue an administrative protest with appraisal district deprived trial court of jurisdiction over taxpayer's suit against appraisal district seeking a declaratory judgment that appraisal district had misapplied abatement agreements taxpayer had entered into with various entities when purchasing property in its annual property appraisals of taxpayer's property.

Genesis Tax Loan Services, Inc.* v. *Kothmann, No. 09-0828 (Tex. May 13, 2011). The Kothmanns have a vendors' lien on each of four tracts of land. Each lien is secured by a duly recorded deed of trust. At the purchaser's request, Genesis paid one year's ad valorem taxes on the tracts and claims a tax lien on each tract by transfer from the county tax collector. Each transfer is on a one-page form with two parts. The top part is entitled "Affidavit Authorizing Transfer of Tax Lien", signed by the owner, authorizing Genesis's payment of the taxes and the tax collector's transfer of the tax lien to Genesis. The bottom part is entitled "Tax Collector's Certification/Transfer of Tax Lien," signed on behalf of the tax collector, certifying Genesis's payment of the taxes, and transferring the tax lien to Genesis. Both the authorization and the certification bear notarized acknowledgments, including notarial seals. The certification did not bear the tax collector's seal of office because the office did not have one. Receipts issued to Genesis by the tax collector less than a month after the certifications were executed mistakenly showed the Kothmanns to be the owners of the tracts. The tax collector did not keep a record of the transfers.

The original tax lien transfers were never recorded. Instead, Genesis recorded a photocopy of each, attached to an affidavit by Genesis's president, stating that the original had been mailed to the county clerk but had been lost either in the mail or at the courthouse. Each affidavit stated that the attached lien transfer was a true and correct copy of the original.

Neither the Kothmanns nor Genesis was paid. The Kothmanns foreclosed their liens and purchased the tracts at the sale. When Genesis attempted to foreclose its liens, the Kothmanns sued to have their liens declared superior to Genesis's. The trial court ruled in favor of Genesis, but the Court of Appeals reversed, holding that Genenis had not pled the superiority of its lien as an affirmative defense but only as a general denial. The Court of Appeals also held that for a tax lien to be enforceable, the original, not a photocopy, of the taxpayer's authorization and the tax collector's transfer must be recorded. That court said the appropriate remedy was to obtain replacement originals or to prove up the contents of the lost documents in a judicial proceeding.

The Supreme Court reversed and remanded.

The Court of Appeals' holding that a defendant must raise by affirmative defense a claim of lien superiority that competes with the plaintiff's claim is flawed in its premise: that all the plaintiff must do to establish a prima facie case is prove that its lien is senior. Seniority does not always establish superiority. A tax lien on real property is made superior by statute to many other liens on the property irrespective of when the liens were perfected. The Kothmanns' proof of when their liens were created and recorded was insufficient to establish the superiority of their liens. Given the statutory priority of tax liens, the Kothmanns were required to prove the invalidity of Genesis's tax liens in order to obtain judgment.

Even when the only issue in a lien-priority case is seniority, a plaintiff must do more to prevail than simply offer evidence of the date of its own lien and rest. The plaintiff must also prove that the defendant's competing lien is junior. The general denial of the plaintiff's claim puts the entire matter at issue.

With respect to the recording of affidavits and copies of the transfers instead of the original transfers, the court first noted that the statute does not expressly require that only original documents be recorded. The Court of Appeals held that originals were required in order to prevent fraud, but the Supreme Court said this concern is fully met by allowing a challenge to authenticity. And, while the court noted that a judicial proceeding was a viable means of proving up lost documents, it wasn't the exclusive means of doing so. However, looking to Rule 1003 of the Texas Rules of Evidence, the court noted that duplicates are admissible in court to the same extent as originals unless there is a question as to authenticity or the circumstances would render it unfair to admit the duplicate. The court saw this as an instructive way of dealing with the enforceability of tax lien transfers. "Decades since the invention of xerography and the manufacture of the photocopier, the only legitimate basis for refusing to consider a photocopy as conclusive evidence of an original document is that reason exists to think the photocopy is not an exact duplicate, because of alteration or in some other way." The court held that the tax liens are enforceable because verified copies were recorded in lieu of originals.

The Kothmanns also argued that the lien transfers were unenforceable because the tax collector had not attached the collector's seal of office. The collector didn't have a seal and didn't get one until a year later. The court held that the acknowledgment by a notary (with a seal) was sufficient. The court said that, if these transfers were unenforceable, then every other lien transfer before the collector bought his seal would be unenforceable as well, and the court wasn't willing to go there.

The Kothmanns also raised issues of enforceability because of the collector's failure to keep a record of all transfers and failure to issue receipts. The court held that these failures by the collector were irrelevant to the enforceability of Genesis's liens.