DALLAS BAR ASSOCIATION
REAL PROPERTY SECTION

January 8, 2018

CASE LAW UPDATE

DAVID A. WEATHERBIE, *Dallas*
Cramer Weatherbie Richardson Oliver
dweatherbie@cwrolaw.com

DAVID A. WEATHERBIE
Cramer Weatherbie Richardson Oliver LLP
Dallas, Texas
(214) 369-1170

CASE LAW UPDATE

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

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 519 S.W.3d and Supreme Court opinions released through December 29, 2017.

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

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

TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES 1

PART II GUARANTIES 4

PART III LEASES 7

PART IV EVICTIONS 11

PART V DEEDS AND CONVEYANCES 15

PART VI VENDOR AND PURCHASER 26

PART VII EASEMENTS 28

PART VIII ADVERSE POSSESSION AND QUIET TITLE ACTIONS 30

PART IX HOMESTEAD 31

PART X CONDEMNATION 32

PART XI LAND USE PLANNING, ZONING, AND RESTRICTIONS 36

PART XII TAXATION 42

PART XIII CONSTRUCTION 43

PART I
MORTGAGES AND FORECLOSURES

EverBank, N.A.* v. *Seedergy Ventures, Inc., 499 S.W.3d 534 (Tex.App.—Houston [14th Dist.] 2016, no pet.). In this case, the deed of trust was bought and sold several times over the years in a series of assignments. Kellibrook, the original beneficiary, assigned it to Inland; Inland changed its name to Irwin; Irwin assign it to MERS; MERS assigned it to EverBank.

The dates on the various assignment documents and the dates the assignments were recorded were confusing as well. The first assignment, from Kellibrook to Inland, was dated before the date of the deed of trust. The second assignment, from Irwin (nee Inland) to MERS was dated in 2001, but not recorded until 2013 (and failed to note that Irwin and Inland were one and the same). The assignment from MERS to EverBank was recorded before the assignment to its assignor, Irwin.

Sometime in between the assignments in and out of MERS, the homeowners defaulted in paying HOA assessments, and the HOA foreclosed and sold the property to Seedergy. EverBank then posted for foreclosure. Seedergy obtained a TRO in a lawsuit that claimed that EverBank lacked standing to foreclose.

Under the Texas Property Code, a party has standing to initiate a nonjudicial foreclosure sale if the party is a mortgagee. A mortgagee includes the grantee, beneficiary, owner, or holder of a security instrument, such as a deed of trust, or if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record. Even if a party does not have a recorded interest in a security instrument, the party may still have standing to foreclose if the party is the holder or owner of a note secured by the instrument. This rule derives from the common law maxim, now codified in Texas, that the mortgage follows the note.

Seedergy argued that EverBank did not have standing to foreclose as a matter of law because (1) EverBank was not the last assignee of record of the deed of trust, (2) EverBank was not the holder of the note, and (3) EverBank was not the owner of the note with the right to enforce it.

Seedergy argued that EverBank could not be the last assignee of record of the deed of trust because there were three breaks in the chain of assignments. Any one break would be sufficient to defeat EverBank's standing to foreclose under the deed of trust because a party not named in the original security instrument must be able to trace its rights back to the original holder.

The first break alleged by Seedergy addressed the original deed of trust in favor of Kellibrook and the assignment from Kellibrook to Inland. Without citing to any authority, Seedergy argued that there was a break in the chain because the assignment predated the deed of trust. Seedergy specifically focused on the notary dates of the two instruments: December 18, 1996 for the deed of trust, and December 13, 1996 for the assignment. Seedergy's argument appears to be that an assignment of a deed of trust cannot be executed before the deed of trust itself. Even if the court assumed that this argument were legally sound, Seedergy would not be entitled to summary judgment because Seedergy did not conclusively establish that the assignment predated the deed of trust. The face of the assignment contains specific information indicating where the deed of trust was recorded in the real property records. If the deed of trust was already recorded at the time the assignment was executed, then the assignment could not have predated the deed of trust.

Seedergy argued that a second break occurred in the assignment from MERS to EverBank. In this assignment, MERS expressly transferred the deed of trust to EverBank, but no mention was made of the

underlying note. Because there was no express assignment of the note, Seedergy argued that MERS split the note from the deed of trust, rendering both null. Seedergy relied upon an 1872 U.S. Supreme Court case which dealt with Colorado Territory law and federal common law. But, the court said, in Texas, nonjudicial foreclosure sales are governed by the Texas Property Code and there is no provision in the Texas Property Code that requires a foreclosing party to prove its status as holder or owner of the note.

Seedergy finally argued that a third break occurred between the assignment from the original mortgagee to Inland Mortgage Corporation and the assignment from Irwin Mortgage Corporation to MERS. In its motion, Seedergy claimed that there was an unexplained gap between these two assignments because Inland and Irwin are two different entities. In fact, it was the same entity that had changed its name.

Because Seedergy did not negate that EverBank was the last assignee of record of the deed of trust, we conclude that Seedergy did not conclusively establish that EverBank lacked standing to foreclose on the property.

Even if Seedergy had demonstrated that EverBank was not the last assignee of record of the deed of trust, Seedergy did not carry its additional burden of showing that EverBank was neither the holder nor the owner of the note.

Seedergy argued that EverBank could not be the holder of the note because Irwin purported to assign the note to MERS, and according to Seedergy, "MERS cannot actually hold mortgage notes as a matter of Texas law." Continuing with that premise, Seedergy argued that if MERS cannot hold the note, then neither can EverBank along an unbroken chain of assignments.

Seedergy was relying on ***Nueces County v. MERSCORP Holdings, Inc.,*** No. 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. July 13, 2013) which held, in that case, that MERS was not a lender, not holder, or note owner, but was acting merely as the nominee or agent of the lender. In this case, MERS was a beneficiary, not a nominee or agent for another lender.

Seedergy also argued in its motion that EverBank cannot show that it holds or owns the note along an unbroken chain of transfers. This argument was based on the fact that the assignment from MERS to EverBank transferred the deed of trust alone, whereas the other two assignments transferred both the deed of trust and the note. However, EverBank had the original note indorsed in blank. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed. Under Texas law, a holder of a note indorsed in blank is presumed to be entitled to enforcement of the instrument merely by showing possession of that instrument. Such a holder is not also required to establish an unbroken chain of title.

Furthermore, because the rule in Texas is that the mortgage follows the note, EverBank would be entitled to foreclose on the property as holder of the note even if the assignment of the deed of trust was void.

LSREF2 Cobalt (TX), LLC* v. *410 Centre LLC, 501 S.W.3d 626 (Tex. App.—San Antonio, 2016, no pet.). The Note and Guaranty waived the borrower's and guarantor's rights under Property Code § 51.003. There was a default and the parties began negotiating a settlement. Before negotiations began, the parties entered into a pre-negotiation agreement. The pre-negotiation agreement contained the following provision:

> 3. No Waiver by Obligor. [The borrower and guarantor] ha[ve] not in any way waived any rights or remedies it may have prior to and until the date of the Agreement with respect to the Loan or any of the

> Loan Documents, or otherwise available at law or in equity either directly in an action against Creditor, as a defense against any action by [the lender] against [the borrower or guarantor] or any other civil proceeding or otherwise.

The borrower and guarantor acknowledged that § 51.003 had been waived in the loan documents, but argued that Paragraph 3 of the pre-negotiation agreement revived their rights under that section. The court disagreed.

Paragraph 1 of the pre-negotiation agreement stated that nothing that occurred during settlement discussions would affect the parties' rights, remedies or defenses under the loan documents. It further provided that the loan documents would not be affected by anything unless agreed to in writing. Here, there was no settlement or written modification of the loan documents. The pre-negotiation agreement, by its express terms, sets parameters for these negotiations and specifies precise procedures for modifying the loan documents and the guaranty. Thus, the commercial setting and other objective factors indicate that the pre-negotiation agreement was a stand-alone agreement that did not alter the parties' legal rights under the existing agreements.

Carmel Financial Corporation* v. *Castro, 514 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), Carmel Financial claimed that its security interest in a single-family house water treatment system was a valid lien against the entire real property. Though the financing statement in favor of Carmel Financial preceded the first lien mortgage on the house, super-priority lien status as to the real property was not granted to Carmel.

The court construed the language of the security interest to relate solely to the water treatment system and not to the home, refuting Carmel's reading of UCC § 9.334(d) and 9.604(b). Under UCC § 9.334(d), the perfected purchase money security interest, which arises before the goods become fixtures, takes priority over a conflicting lien on the real property. UCC § 9.604(b) provides that goods that are or are to become fixtures allow for a secured party to foreclose under either the UCC or in accordance with real property rights. The court noted that the security agreement and financing statement did not describe the real property but limited the collateral to the water treatment system, and that neither of such UCC sections "operates independently to create a security interest in real property that the underlying security agreement did not authorize." Therefore, Carmel's fixture filing did not create a lien on real property and was not prior to the interest of first lienholder in the real property.

Villanova* v. *Federal Deposit Insurance Corporation, 511 S.W.3d 88 (Tex. App.—El Paso 2014, no pet.), concerned the sufficiency of a summary judgment motion and affidavit in connection with an alleged wrongful foreclosure. Villanova obtained a loan from HSOA in the amount of $693,000, secured by the property being acquired, the Frisco Home, and by an additional piece of collateral being a home in Corpus Christi. The closing documentation, typical for a home loan, included an affidavit of intent to permanently occupy the Frisco Home as Villanova's residence, and covenants in the deed of trust to occupy the Frisco Home as his primary residence and not to transfer an interest in the home without HSOA's approval. In breach of these covenants, Villanova conveyed the Frisco Home to Christina Roth, a woman he had met months earlier on an internet dating site, www.sugardaddyforme.com, with Roth agreeing to pay Villanova $66,000 at maturity of a note she executed in favor of Villanova. HSOA eventually discovered the breach and filed for foreclosure, which was suspended upon reaching a settlement agreement between Villanova and HSOA requiring Villanova to make certain payments, agree to refinance the house by a

certain date and failing that, to sell the house by a later date. Villanova breached all of those requirements and HSOA eventually foreclosed all of its collateral, being the Frisco Home and the Corpus Christi Home.

Villanova sued; HSOA filed for summary judgment and supported that motion for summary judgment with an affidavit of Paula Chin, the Vice President of Loan Servicing and Default Operations for HSOA. An affidavit in support of a summary judgment motion must be based on personal knowledge of the affiant, but the court concluded that Chin did not have the requisite personal knowledge. Therefore, HSOA was not entitled to a summary judgment since it could not prove damages, which were supported only by the Chin affidavit, which was defective due to lack of information concerning her personal knowledge and qualifications for damage calculations. This case is instructive to practitioners on what type of personal knowledge must be proved to be an effective affidavit in support of a summary judgment motion. A mere recitation of facts is not sufficient, in and of itself, and the title or position of a person does not carry with it an implied level of personal knowledge. The court required that statements in such an affidavit "need factual specificity such as place, time, and exact nature of the alleged facts." In other words, the affidavit must explain how such person became familiar with the facts in the affidavit. Also, the affidavit in this case did not specify whether Chin was the applicable vice president during the relevant time period or how her job duties in that role afforded her the knowledge about the specific facts in the case.

PART II
GUARANTIES

Rainier Income Fund I, Ltd.* v. *Gans, 501 S.W.3d 617 (Tex. App.—Dallas, 2016, pet. denied). In connection with the formation of two partnerships, Gans executed guaranties which guarantied the repayment of partner loans and capital contributions. The guaranties provided that the guarantied obligations were to be paid if the partner loans and contributions were not repaid in full upon the liquidation of the partnerships. The partnership agreements provided that the partnerships would be dissolved and liquidated upon the occurrence of various "dissolving events." Among the dissolving events was "a sale by the Partnership of the entire Project and the collection of all amounts derived from any such sale or sales...."

The partnerships were developing two real estate projects and borrowed bank loans. Ultimately the projects failed and the bank foreclosed. The question was whether the foreclosure was a "dissolving event" giving rise to the guarantor's liability under the guaranties.

According to the rule of *strictissimi juris*, a guarantor may require the terms of his guaranty be strictly followed and the agreement not be extended beyond its precise terms by construction or implication. The court construed the guaranties in light of this rule.

That there was a "sale" of the properties is not in dispute—legal title to the properties was transferred in exchange for money. The question is: who sold the properties? The investors argue the parties intended that, once they did not own and operate the commercial real estate projects which "represented the rationale and purpose" of the partnerships, the partnerships would be dissolved. They further assert the agreements do not specifically exclude any foreclosure or other manner of "sale." This argument, however, ignores the plain language of the partnership agreements, which specifically requires the sale to be "by the Partnership" for a dissolving event to occur. The properties were not sold by the partnerships; rather, they were sold by the substitute trustee at the direction of the bank at the foreclosure sales.

Moreover, in addition to a "sale by the Partnership," the partnership agreements also required "the collection of all amounts derived from any such sale or sales...." The parties stipulated the partnerships did not collect any amounts as a result of those foreclosure sales. The court agreed that the guaranties reflect an intent to establish personal liability on Gans to guarantee the investors would receive payment if the subject properties were sold by the partnership and funds were received in exchange. In other words, the purpose of the guaranties was to preclude the general partner from selling the properties and then refusing to distribute the funds. It is undisputed that neither the investors nor Gans received any payment as a result of the foreclosure sale. And the investors' suggestion that the sale did result in "proceeds" in the form of a "credit" against the debt owed to the Bank did not persuade the court otherwise.

Kartsotis* v. *Bloch, 503 S.W.3d 506 (Tex. App.—Dallas, 2016, pet. denied), involved contribution between co-guarantors pursuant to a Contribution and Indemnity Agreement, which had two primary operative provisions. Section 1 provided "if any Guarantor makes a payment in respect of the Obligations such Guarantor shall have the rights of contribution and reimbursement set forth below…" The triggering provision was Section 2 which provided "if any [Paid Guarantor] makes a payment upon or in respect of the Obligations that is greater than it's Pro Rata Percentage [1/3] of the Obligations, the Paid Guarantor shall have the right to receive from the other Guarantors who have not paid their Pro Rata Percentage … an amount such that the net payments made by the Paid Guarantor in respect of the Obligations shall be shared by Guarantors pro rata in proportion to their Pro Rata Percentage."

The three principals, who were guarantors subject to the CIA, entered into a number of financing transactions involving the Black Bull Run Development, a Montana golf course community, including a construction loan with La Jolla Bank (transferred to OneWest Bank), which had been guaranteed by Bloch, an indemnity from Bloch in favor of Commonwealth Title to indemnify against mechanics liens on the property, and a golf equipment lease with Wells Fargo Financial Leasing, which Bloch had guaranteed. Also involved was an additional loan to CLB Capital (the partnership in which the three partners participated) from Guaranty Bank, guaranteed by each of the three parties; however, it is not clear that this loan is related to the Black Bull Run Project which is the subject of the loan from La Jolla Bank BLACK BULL RUN Loan.

Ultimately the Black Bull Run project was unsuccessful and filed for bankruptcy. The BLACK BULL RUN Loan was settled by Bloch and another guarantor, Cureton, by the payment of money. The Commonwealth Title indemnity and the Wells Fargo leasing equipment loan were subjects of lawsuits which were also settled by Bloch (collectively, "BLACK BULL RUN Settlements"). The Guaranty Bank loan was extended twice and then finally matured. Kartsotis paid his share of the guarantor's debt on the Guaranty Bank loan, and when Bloch refused to pay his share, Kartsotis paid Bloch's share for him in order to retire the Guaranty Bank loan. The parties sued each other under the CIA, and upon review of a summary judgment, the court interpreted the meaning of the CIA.

The crux of this decision involved the interpretation of "Obligations". Bloch's interpretation was that the CIA covered any payments made by one of the guarantors in connection with the related financings; on the other hand, Kartsotis interpreted the CIA to only refer to payments made in excess of the designated percentage of the primary obligations related to the financing transactions. The payment by Bloch for the BLACK BULL RUN Settlement was less than one-third (1/3) of the debt owed on the primary obligation. The court interpreted

Section 2, the triggering clause, to be triggered only upon a payment of the Obligations, in an amount that exceeded the threshold test before being entitled to a reimbursement or contribution. The CIA defined Obligations as both "Future Obligations" and "Existing Obligations", which such Existing Obligations were set forth on Exhibit A to the CIA (which specified the BLACK BULL RUN Loans and the Wells Fargo lease, but not the Commonwealth Title indemnity). Consequently, the Court concluded that since Bloch's payment with respect to the BLACK BULL RUN Settlement was less than 1/3 of the outstanding Obligations, then the triggering event (being a payment greater than 1/3 of the total debt) was not activated, and no contribution was required.

This case presents a lesson for practitioners in the drafting of indemnity or contribution agreements, particularly as it relates to the description of both the obligations for which a contribution or indemnity is applicable, and the threshold at which contributions begin. Further, in interpreting the definition of "Obligations", the court held the provisions in the contract's recitals were somewhat inconsistent with the provisions in the body of the contract and that contract recitals are not deemed strictly part of the contract and will not control over the operative provisions in the body of the contract. General contract construction favors the specific provisions (such as in the body of the contract) over general recital provisions. As a drafting lesson, specific and important defined terms should probably be dealt with in the body of the contract as opposed to recitals.

Chahadeh* v. *Jacinto Medical Group, P.A., 519 S.W.3d 242 (Tex.App.—Houston [1st Dist.] 2017, no pet.). Chahadeh guarantied payment of two loans from Jacinto to University General Hospital. UGH defaulted on the loans and filed bankruptcy. Jacinto filed a proof of claim in the UGH bankruptcy, then separately sued Chahadeh on his guaranties. Chahadeh claimed that the filing of the proof of claim by Jacinto vested the bankruptcy court with exclusive jurisdiction over its claims against him as guarantor.

Bankruptcy courts have original and exclusive jurisdiction over all cases under title 11, but have only original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11. Thus, the only aspect of a bankruptcy proceeding over which the bankruptcy court has exclusive jurisdiction is the bankruptcy petition itself. State courts have concurrent jurisdiction over any other matters that arise in or relate to cases under title 11.

While Jacinto's suit against Chahadeh is arguably related to UGH's bankruptcy petition, the bankruptcy court does not have exclusive jurisdiction over a suit that is merely related to a bankruptcy petition. Chahadeh also contends that his liability under the guaranty agreements could not be conclusively established until the bankruptcy court determines UGH's liability on the underlying promissory notes. Chahadeh contends that his liability could be reduced or discharged if UGH's liability on the underlying promissory notes is reduced or discharged by the bankruptcy court. But Chahadeh's liability under the guaranty agreements is a separately enforceable obligation. The guaranties provide that: "Guarantor hereby agrees that its obligations under this Guaranty Agreement shall not be released, discharged, diminished, impaired, reduced, or affected for any reason or by the occurrence of any event, including . . . any disability of [UGH], or the dissolution, insolvency, or bankruptcy of [UGH]." Under the terms of the guaranty agreements, Chahadeh may be held independently liable for the amount of the outstanding debts under the promissory notes without regard to the outcome of the bankruptcy proceeding.

Julka* v. *U.S. Bank National Association, 516 S.W.3d 84 (Tex.App.—Houston [1st Dist.] 2017, no pet.).

Copperfield Timberlake borrowed a loan from Prudential, which was later assigned to the Bank. The loan was non-recourse except for "bad boy" carve-outs. Julka guarantied the carve-outs and also committed to full recourse on the loan up to $250,000.00. Copperfield Timberlake defaulted, and the Bank sued it and also sued Julka on his guaranty. Julka asserted the affirmative defenses of payment and quasi-estoppel. Julka contended that he has satisfied his obligations under the guaranty because he had provided more than $250,000 of his personal funds to Copperfield Timberlake, which in turn allowed Copperfield Timberlake to continue making payments on the note for nearly two years before the event of default occurred.

Julka relied on bank statements that showed he had advanced more than $250,000 to Copperfield Timberlake, which was used to make payments on the debt. Those contributions, however, are not evidence that raises a fact issue as to Julka's defense of payment on the guaranty, because that agreement required personal payment to the Bank, not payment from Copperfield Timberlake on the underlying note that the guaranty secured. Although Julka transferred personal funds to Copperfield Timberlake for it to make payments, Copperfield Timberlake made those payments to the Bank on behalf of the corporation, not in satisfaction of Julka's personal obligation. As a result, those payments are attributable solely to Copperfield Timberlake, and not to Julka.

PART III
LEASES

Shields Limited Partnership* v. *Bradberry, No. 15-0803 (Tex. March 23, 2017). Though the tenant frequently defaulted on the lease's rental-payment terms, the landlord regularly accepted the tenant's rental payments when tendered and without protest. The lease provided that the landlord's acceptance of late payments "shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of [the] lease in the future." It also provided that all waivers had to be in a writing signed by the waiving party and that forbearance of enforcement would not constitute a waiver.

When the landlord sought to evict the tenant, the tenant contended that the landlord's conduct in accepting late rental payments waived the contractual nonwaiver clause.

The right to possession of the leased premises is governed by the commercial lease between landlord and tenant. The terms of the lease in this case required the tenant to pay rent on time, in full, and without demand. Rent paid more than ten days late is a default under the lease. There was no evidence that the parties ever agreed in writing to waive any lease obligation.

The landlord asserts that a nonwaiver provision may not be waived by engaging in the very act the contract disclaims as constituting waiver, The tenant argues that nonwaiver provisions are "wholly ineffective" and can be waived to the same extent as any other contractual provision.

The court considered the force and effect of a nonwaiver provision in light of Texas's public policy that strongly favors freedom of contract. Given Texas's strong public policy favoring freedom of contract, there can be no doubt that, as a general proposition, nonwaiver provisions are binding and enforceable. Here, however, the question is not whether the nonwaiver clause in the parties' agreement is enforceable, but whether that clause is waivable and, if so, the circumstances under which waiver may occur.

Freedom of contract is a policy of individual self-determination; individuals can control their destiny and structure their business interactions through agreements with other competent adults of equal bargaining power, absent violation of law or

public policy. The contractual doctrine of waiver, whether express or implied, rests on a similar conceptual policy of individual self-determination—an idea no more complicated than that any competent adult can abandon a legal right and if he does so then he has lost it forever.

To the extent there has been any doubt up to this time, the court affirmed that a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly. But the mere fact that a nonwaiver provision may be waived does not render the provision wholly ineffective.

The court agreed that a nonwaiver provision absolutely barring waiver in the most general of terms might be wholly ineffective. But it did not agree that a nonwaiver provision is wholly ineffective in preventing waiver through conduct the parties explicitly agree will never give rise to waiver. Such a contract-enforcement principle would be illogical, since the very conduct which the clause is designed to permit without effecting a waiver would be turned around to constitute waiver of the clause permitting a party to engage in the conduct without effecting a waiver.

While the court couldn't address every possible situation for delineating the circumstances under which a nonwaiver provision could be waived, it could say "with certainty" that accepting late rental payments could not waive the parties' agreement that contractual rights, remedies, and obligations will not be waived on that basis, especially when the lease provides a specific method for obtaining a waiver. The court therefore held that engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify the nonwaiver provision in the parties' lease agreement.

FP Stores, Inc. **v.** ***Tramontina US, Inc.***, 513 S.W.3d 684 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). This case is important for the practitioner because it is the first time a court has addressed the "bad faith" element of §93.011 of the Texas Property Code and only the sixth time a court had provided guidance on §93.011. §93.011 imposes liability on a commercial landlord who retains a security deposit in bad faith. In this case, the tenant sued the landlord for breach of contract and retaining a security deposit in bad faith. The applicable provision of the sublease provided that "within 60 days after Sublesee surrenders the leased premises and provides written notice to Sublessor of Sublessees forwarding address, Sublessor will refund the security deposit less any amounts applied toward amounts owed by Sublessee or other charges authorized by this sublease." The provisions in the sublease are very similar to §93.011, which includes a presumption of bad faith if a landlord fails to act within such sixty (60) day period and allows for a tenant to receive an "amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld and reasonable attorney's fees." §93.011 places the burden on the landlord to prove that the retention of the security deposit was reasonable and not in bad faith. Because the landlord had clearly not returned to security deposit within the required sixty (60) day period the trial court granted summary judgment in favor of the tenant. The landlord appealed, and the Houston Court of Appeals agreed that there was sufficient evidence presented at trial that the landlord acted in good faith and, therefore, summary judgment was inappropriate. The appeals court relied on court interpretations of Property Code §92.109 (a parallel statute that applies only to residential leases) to hold that under §93.011 of the Texas Property Code "a commercial landlord retains a tenant's security deposit in bad faith if it retains the security deposit in honest disregard of the tenant's rights or with the intent to deprive the tenant of a lawful refund." The courts will presume that the landlord acted in bad faith if the tenant shows that the landlord failed to timely provide a refund of the security deposit or an accounting. To rebut the presumption the

landlord must "present more than a scintilla of evidence that it acted in good faith" which the landlord in the present case had done.

UDR Texas Properties, L.P.* v. *Petrie, 517 S.W.3d 98 (Tex. 2017). Petrie was assaulted and robbed at the Gallery apartment complex. In his suit against the owner, the trial court concluded Gallery owed no duty to Petrie to protect him but the court of appeals reversed, holding there was evidence Gallery knew or should have known of a foreseeable and unreasonable risk of harm.

Generally, property owners have no legal duty to protect persons from third-party criminal acts. But a property owner who controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. A risk must be both foreseeable and unreasonable to impose a duty on a property owner. This approach is not peculiar to premises-liability cases; it is essential to the determination of duty in all of tort law. Foreseeability is a prerequisite to imposing a duty. But once foreseeability is established, the parameters of the duty must still be determined.

The court of appeals acknowledged that unreasonableness plays a role in the duty inquiry but concluded that an evaluation of the factors we laid out in ***Timberwalk Apartments, Partners, Inc.* v. *Cain***, 972 S.W.2d 749 (Tex. 1998) is dispositive of whether the risk of criminal conduct is both foreseeable and unreasonable. The Supreme Court disagreed. It conceived the ***Timberwalk*** factors as a means to aid courts in determining foreseeability specifically. The factors of foreseeability include proximity (there must be evidence that other crimes have occurred on the property or in its immediate vicinity), recency and frequency (how recently and how often criminal conduct has occurred in the past), similarity (The previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger), and publicity (The publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger).

When the court first applied these factors in ***Timberwalk***, it concluded only that the risk that a tenant would be sexually assaulted was in no way foreseeable. Because the lack of foreseeability was dispositive in that case, further consideration of the unreasonableness of the risk was unnecessary.

Gallery argues the court should render judgment in its favor because Petrie offered no evidence of, and did not argue that he faced, an unreasonable risk of harm. He never offered any such evidence and is without excuse for not doing so. Although we have not disposed of a post- ***Timberwalk*** case on unreasonableness grounds, our precedents are unambiguous: the foreseeability and unreasonableness inquiries are distinct. Moreover, Petrie has been on notice at every stage of this case that he must argue and offer evidence of unreasonableness. On multiple occasions, Gallery argued to the trial court that it must conclude the crime against Petrie was both foreseeable and the risk unreasonable.

Based on Gallery's arguments in both courts below and before the court and the standard set forth by its precedents, Petrie was at least on notice that in addition to establishing foreseeability he might be required to put on evidence and argue that he faced an unreasonable risk of harm. He chose to stand on the position that the ***Timberwalk*** factors were dispositive of both foreseeability and unreasonableness, and further chose not to offer any evidence on Gallery's burden to prevent or reduce the risk from violent crime. Because he presented no evidence and made no argument on an essential element in the

determination of whether a legal duty exists, judgment should be rendered in Gallery's favor.

Phillips* v. *Abraham, 517 S.W.3d 355 (Tex.App.—Houston [14th Dist.] 2017, no pet.). Phillips leased a house from the Abrahams. During the term of the lease, Phillips fell while walking up the driveway. He claimed it was because the driveway was in disrepair with many loose and broken rocks. Phillips stated that he knew of these defects, but he did not know of the specific area or stone that may come loose at any time at the end of the drive.

In the premises-liability context, a landowner owes an invitee a negligence duty to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not. Ordinarily, the landowner need not do both; the landowner can satisfy its duty by providing an adequate warning even if the unreasonably dangerous condition remains. This general rule comports with the rationale for imposing a duty on landowners in the first place. The landowner typically is in a better position than the invitee to know of hidden hazards on the premises, so the law mandates that the landowner take precautions to protect invitees against the hazards, to the extent the landowner knows or should know of them.

When the condition is open and obvious or known to the invitee, however, the landowner is in no better position to discover it. When an invitee is aware of an unreasonably dangerous condition on the premises, the condition, in most cases, no longer will pose an unreasonable risk because the law presumes that the invitee will take reasonable measures to protect against known risks, which may include a decision not to accept the invitation to enter onto the landowner's premises.

A landowner's duty to invitees is not absolute. A landowner is not an insurer of a visitor's safety. Instead, a landowner owes a duty to exercise ordinary, reasonable care. Thus, a defendant has no duty to take safety measures beyond those that an ordinary, reasonable landowner would take. In most circumstances, a landowner who provides an adequate warning acts reasonably as a matter of law, and because there is no need to warn against obvious or known dangers, a landowner generally has no duty to warn of hazards that are open and obvious or known to the invitee. The court held that the alleged unreasonably dangerous condition on the premises was known to Phillips before his injury.

There are two exceptions to the general rule under which an invitee's awareness of the risk does not relieve the landowner of its negligence duty to make the premises reasonably safe. The first exception, not applicable here, may arise when a dangerous condition results from the foreseeable criminal activity of third parties.

The second exception may arise when the invitee necessarily must use the unreasonably dangerous premises, and despite the invitee's awareness and appreciation of the dangers, the invitee is incapable of taking precautions that will adequately reduce the risk. This necessary-use exception applies when (1) it was necessary for the invitee to use the portion of the premises containing the allegedly unreasonably dangerous condition and (2) the landowner should have anticipated that the invitee was unable to avoid the unreasonable risks despite the invitee's awareness of them. Phillips asserts that today's case falls within this necessary-use exception.

The court held that it was unnecessary for Phillips to walk over or through the portion of the premises containing the allegedly unreasonably dangerous condition, so this exception did not apply.

Phillips knew of the alleged unreasonably dangerous condition on the premises before the occurrence made the

basis of this suit and that neither the criminal-activity exception nor the necessary-use exception applies.

PART IV
EVICTIONS

Trimble* v. *Federal National Mortgage Association, 516 S.W.3d 24 (Tex.App.—Houston [1st Dist.] 2016, pet. pending). There are at least two rights at issue when a mortgagor defaults on his financial obligations: a right to title to the property and a right to possession. A justice court has jurisdiction to determine the right of possession through a forcible detainer action, but the forcible detainer action cannot " resolve any questions of title beyond the immediate right to possession. The existence of a title dispute does not deprive a justice court of jurisdiction over the forcible detainer action; it is only deprived of jurisdiction if the right to immediate possession necessarily requires the resolution of a title dispute. The justice court's determination of possession in a forcible detainer action is a determination only of the right to immediate possession of the premises, and does not determine the ultimate rights of the parties to any other issue in controversy relating to the realty in question.

Because a forcible detainer action's purpose is not to establish title, a plaintiff bringing a forcible detainer action is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession. When there is a landlord-tenant relationship between the purchaser at foreclosure and the current possessor of the property, such a relationship provides a basis for the trial court to determine the right to immediate possession, even if the possessor questions the validity of a foreclosure sale and the quality of the buyer's title. The validity of the foreclosure sale can be challenged in an adjudication of title regardless of the resolution of the forcible detainer action; parties have the right to sue in the district court to determine whether the trustee's deed should be cancelled, independent of the award of possession of the premises in the forcible detainer action.

Because the borrower can still challenge the foreclosure in an adjudication of title, the purchaser at foreclosure who brings a forcible detainer action must only show sufficient evidence of ownership to demonstrate a superior right to immediate possession by establishing that: (1) it has a landlord-tenant relationship with the borrower; (2) it purchased the property at foreclosure; (3) it gave proper notice to the occupants of the property to vacate; and (4) the occupants refused to vacate the premises.

A provision in the borrower's mortgage creating a landlord-tenant relationship after a foreclosure sale satisfies the first element to give the purchasing bank a superior right to immediate possession, even if the borrower is simultaneously challenging the validity of the foreclosure sale. Trimble, who had obtained the property from Henderson, the borrower, argues that Fannie Mae cannot rely on the deed of trust's provision that the Hendersons would become tenants at sufferance after a foreclosure sale because Fannie Mae was not a party to the deed of trust. But the mortgage provides that the Hendersons "shall immediately surrender possession of the Property to the purchaser at the sale." Fannie Mae was the purchaser at the foreclosure sale, and, thus, the Hendersons were required to " immediately surrender possession" to Fannie Mae.

As to the requirement for proper notice, Trimble argued that Fannie Mae did not satisfy that element because it did not give the borrower the required notice under Section 24.005 of the Property Code. Fannie Mae mailed notice to the Hendersons via both certified mail with return receipt requested and first-class mail. When a letter

containing notice is properly addressed and mailed with prepaid postage, a presumption exists that the notice was received by the addressee. The presumption may be rebutted by an offer of proof that the addressee did not receive the letter but, in the absence of any proof to the contrary, the presumption has the force of a rule of law. To overcome this presumption and support his argument that neither he nor the borrowers received notice, Trimble relies on the certified-mail envelope, which indicates that it was returned to Fannie Mae's attorney and contains a stamp stating " Return to Sender Attempted Unable to Forward." Trimble also relies on his affidavit that he did not receive notice. But the certified-mail envelope and Trimble's affidavit that he did not receive notice are insufficient to raise a question of fact regarding whether a mortgage holder who intends to foreclose on a property has fulfilled the Property Code's notice requirements. Section 24.005 requires that, when notice to vacate is given by mail, notice be given to the premises in question. It does not require receipt by any particular person. On the contrary, even when notice is given in person, such notice may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older. Fannie Mae mailed notice via both certified mail with return receipt requested and first-class mail. Both notices were addressed to " Mildred Henderson, I.B. Henderson And/Or All Occupants." There is no evidence in the record that the first-class-mail envelope was not delivered as addressed, that is, to the premises.

Lenz* v. *Bank of American, N.A., 510 S.W.3d 667 (Tex. App.—San Antonio 2016, no pet.), involved a forcible detainer action after a foreclosure. In the forcible detainer action, the attorney for the owner of the property after foreclosure attached an affidavit signed by the attorney in support of the eviction. The tenant in sufferance claimed the affidavit was insufficient under Rules of Civil Procedure 510.3(a)(West), which provided in relevant part that "a petition in an eviction case must be sworn to by the plaintiff …." Relying on the rationale of Rule 500.4, allowing a third party agent or attorney to represent them, the court held that an attorney could verify an eviction petition filed on behalf of a corporate client.

Borunda* v. *Federal Nat. Mortg. Association, 511 S.W.3d 731 (Tex. App.—El Paso 2015, no pet.), was a reminder that a suit for forcible detainer does not require proof of title to the property. After the foreclosure sale under a deed of trust containing a provision making the holdover owner a tenant at sufferance, a forcible detainer action was ripe for adjudication without proof that title was vested in the foreclosing mortgagee. Therefore, in this case, Borunda was not able to allege title defects in the foreclosure sale (such as the foreclosing mortgagee having failed to honor various accommodations provided to Borunda. Those would have to be brought in another suit, and would not be a defense against the forcible detainer action.

Tehuti* v. *Bank of New York Mellon Trust Company, National Association, 517 S.W.3d 270 (Tex.App.—Texarkana 2017, no pet.). Where, as here, foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property.

In re *American Homes for Rent Properties Eight, LLC*, 498 S.W.3d 153 (Tex.App.—Dallas 2016, no pet.), This is a mandamus proceeding arising from a county court at law order abating a post-foreclosure eviction case on the basis that title was in dispute and the subject of a separate district court proceeding.

Woods purchased a home in Wylie and executed a deed of trust securing the purchase money. The deed of trust provided that following a foreclosure sale, the

borrower or any person holding possession of the property through the borrower must immediately surrender the premises to the purchaser at the foreclosure sale. It further provided if possession was not surrendered, the person in possession would become a tenant-at-sufferance. Woods defaulted on the note.

After Woods defaulted, she entered into an option contract with Southern Home which gave Southern Home the option to purchase the property. The option contract included an addendum that provided upon purchase of the property, Southern Home agreed it would not evict Woods but rather would make a rental agreement. The lender foreclosed its lien on the property. American Homes purchased the property at the foreclosure.

American Homes notified Woods that she had to vacate the property. It then filed a forcible detainer action. The day before the eviction hearing, Woods deed the property to Southern Home. At the eviction hearing, the JP dismissed the action. American Homes appealed to county court. Woods answered the county clerk suit filing a plea to the jurisdiction, claiming that that the right to actual possession of the property could not be decided without determining ownership of the property as between American Homes and Southern Home.

A justice court or county court at law is not deprived of jurisdiction in a forcible detainer lawsuit merely because of the existence of a title dispute. In fact, in most cases the right to immediate possession can be determined separately from the right to title. The trial court is only deprived of jurisdiction if the determination of the right to immediate possession necessarily requires the resolution of a title dispute.

When the owner of real estate executes a valid deed of trust and then conveys an interest in the mortgaged property to a third party, the rights of the grantor's vendee (here, Southern Home) are subject to the rights held by the beneficiary of the deed of trust (here, American Homes). Thus, a grantor subject to a tenant-at-sufferance clause in a mortgage cannot convey an interest in property free of that clause. Both the grantor under the deed of trust and any occupant who holds the property pursuant to a conveyance from the party who agreed to the deed of trust become tenants-at-sufferance following foreclosure of the deed of trust. Accordingly, Southern Home, as a tenant-in-sufferance, was not entitled to possession of the property after foreclosure. As the questions of possession and title were not intertwined in this case, the trial court erred in abating the lawsuit.

Goodman-Delaney* v. *Grantham, 484 S.W.3d 171 (Tex.App.—Houston [14th Dist.] 2015, no pet.). Mary owned a home in Houston when she married James. In addition to James, Mary had five children, including Grantham. Mary died intestate. James continued to live at the house following Mary's death and later married Rhonda. James dies in 2014. Grantham served a notice to vacate on Rhonda and subsequently file for eviction, which the justice court granted.

On appeal to the county court, Grantham admitted she did not have a landlord-tenant relationship with Rhonda. The county court also ruled in favor of Grantham.

A justice court has subject matter jurisdiction over forcible detainers, but the justice court and the county court at law on appeal lack jurisdiction to resolve title issues. The forcible detainer process is supposed to be a summary, speedy, and inexpensive proceeding to determine who has the right to immediate possession of property. Thus, a forcible detainer only addresses who has the right to possess the property, not who has title to it.

A forcible detainer action is dependent on proof of a landlord-tenant relationship. Without a landlord-tenant relationship, a justice court cannot determine the issue of

immediate possession without first determining who has title to the property.

Here, Grantham conceded that she did not have a landlord-tenant relationship with Rhonda. Rhonda entered the property legally when she married James. Grantham alleges she obtained title to the property in part through inheritance and in part by deed from her siblings. Accordingly, the justice court had to determine whether Grantham had title to the property before it could determine whether Grantham had a superior right to possess the property over Rhonda. The justice court, and the county court at law on appeal, did not have jurisdiction to make such a determination.

Guillen* v. *U.S. Bank, N.A., 494 S.W.3d 861 (Tex.App.—Houston [14th Dist.] 2016, no pet.). Guillen defaulted on his mortgage and the lender foreclosed then instituted an eviction proceeding in the justice court. Guillen appealed to the county court and, while that appeal was pending, filed a suit in district court to set aside the foreclosure claiming it was barred by limitations. Guillen then filed a plea to the jurisdiction of the county court, claiming that it did not have jurisdiction until the title issue was settled in the district court. The county court ruled against Guillen and entered judgment in favor of the lender.

Guillen argues that: (1) the statute of limitations issue litigated in the district court is so intertwined with the issue of the right of immediate possession that the county court was deprived of jurisdiction to determine possession until such time as the title issue was resolved; (2) the tenancy-at-sufferance clause in his deed of trust cannot provide an independent basis for jurisdiction in the county court because the deed of trust is void; and (3) because the power of sale expired prior to the foreclosure sale, the lien and the power of sale to enforce it became invalid.

Justice courts have exclusive subject matter jurisdiction over forcible entry and detainer actions. The only issue in an action for forcible entry and detainer is the right to actual and immediate possession. The justice courts do not have jurisdiction over any title disputes, even those related to and involving the same parties as the forcible entry and detainer action. The justice court generally may resolve the issue of immediate possession independent of any title issues as long as a landlord-tenant relationship exists. .). If a deed of trust contains an enforceable tenancy-at-sufferance clause, the justice court may resolve the issue of possession independent of any title issues. Accordingly, a justice court is not deprived of jurisdiction merely by the existence of a title dispute; it is deprived of jurisdiction only if resolution of a title dispute is a prerequisite to determination of the right of immediate possession.

Guillen argues that the statute of limitations issue he raised in the district court is sufficiently intertwined with the issue of immediate possession such that it must be resolved in the district court before the county court may assume jurisdiction to rule on the forcible entry and detainer action. Guillen contends that, because the statute of limitations has run, both the deed of trust and the power of sale pursuant to it are void. If the deed of trust is void, it follows that the tenancy-at-sufferance clause is also void, which deprives the justice court of its independent basis for jurisdiction.

The court held, though, that even though Guillen asserts that this case presents a novel issue, his title suit raises a validity-of-foreclosure issue that the court has twice held is not relevant to possession. The court could see no reason to treat Guillen's statute of limitations claim differently than any other attack on the foreclosure process. The question of the foreclosure's validity—whether based on the terms of the deed or the terms of the governing statute— is to be resolved by the district court independent of the county court's determination in the forcible detainer action that the lender is

entitled to immediate possession of the property.

PART V
DEEDS AND CONVEYANCES

Davis* v. *Mueller, No. 16-0155 (Tex. May 26, 2017) reversing ***Mueller* v. *Davis***, 485 S.W.3d 622 (Tex.App.-Texarkana 2016). While the Statute of Frauds requires only that certain promises or agreements be in writing and signed by the person to be charged, as applied to real-estate conveyances, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty. This rule by which to test the sufficiency of the description of property to be conveyed is so well settled at this point in our judicial history, and by such a long series of decisions by the supreme court, as almost to compel repetition by rote.

Cope conveyed her mineral interests in ten vaguely described tracts in Harrison County, Texas to Davis. The conveyance was on a printed form with tiny text. The list of tracts was followed by this sentence: "Grantor agrees to execute any supplemental instrument requested by Grantee for a more complete or accurate description of said land."

Another paragraph, including a Mother Hubbard clause, followed this, saying "The 'Lands' subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and owned or claimed by Grantors. . . . Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described."

About the same time, it so happened that Mills conveyed his mineral interests in two tracts, also in Harrison County, also to Davis. The conveyance was on an identical form with a similarly vague description of the tracts followed by the same provisions.

Later, Cope and Mills, independently, deed to Mueller the same interests previously deeded to Davis. Mueller sued to quiet title to the mineral interests.

In this case, the specific property descriptions in Cope's and Mills's deeds to Davis do not satisfy the Statute of Frauds, and Davis does not argue to the contrary. But Texas law has long given effect to a general conveyance of all the grantor's property in a geographic area, such as a county, the state, or even the United States, thereby enlarging an accompanying conveyance of property specifically described.

Mueller argues that the deeds are ambiguous because the general granting clause is in the same paragraph as the Mother Hubbard clause. A Mother Hubbard clause is not effective to convey a significant property interest not adequately described in the deed. The proximity shows, Mueller contends, that the general grant was only of all small pieces of the specifically described tracts in Harrison County, not of other tracts. But if that were true, the general grant would accomplish nothing; the Mother Hubbard clause itself covers small pieces that may have been overlooked or incorrectly described. The general grant's conveyance of "all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described" could not be clearer. All means all.

Mueller also argues that a reference to an unidentified portion of a larger, identifiable tract is not sufficient to satisfy the Statute of Frauds. The court agreed with that proposition, of course, but it has no application here. A conveyance of the north or east part of a tract does not identify specific acreage; neither does a conveyance of a certain number of acres out of a

subdivision or survey in which the grantor owns multiple tracts. The rule Mueller cites would apply if Cope and Mills had conveyed part of what they owned in Harrison County, because the parts could not be identified from the deeds. But they conveyed all.

Mueller argues that each grantor's express agreement "to execute any supplemental instrument requested by Grantee for a more complete or accurate description of said land" shows that the parties contemplated that any other tracts would be covered by separate instruments, which would not be necessary if the general grant covered them. But the agreement is consistent with the general grant. It simply provides that if supplemental instruments are required to carry out the specific and general grants, the grantor will supply them.

We conclude that the general grants in the deeds are valid and unambiguous, conveying title of Cope's and Mills's Harrison County mineral interests to Davis. Because those conveyances preceded the conveyances of the same interests to Mueller, Davis has superior title.

Tanya L. McCabe Trust* v. *Ranger Energy, 508 S.W.3d 828 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), construed the relatively new "correction instruments" statutes pursuant to Property Code §§ 5.027, 5.028, 5.029 and 5.030. The issue addressed was whether the addition of new property in a corrected deed of trust constitutes a non-material or material correction.

The Trust obtained a conveyance of overriding royalty interests of various percentages in various different assignments in 2011, some excluding and some including the disputed McShane Fee and Bruce Lease; however, a correction instrument in November 2011 included these disputed tracts. The prior owner, Mark III, of the overriding royalty interests had obtained same from a third party, Tomco, in 2008. The assignment of overriding royalty interests to the Trust included eight different properties including the disputed McShane fee and the Brice lease, as well as six other properties. The assignment from Tomco to Mark III included only six properties, excluding the McShane and Brice properties. Mark III, obtained a mortgage in late 2008 from Peoples Bank, which covered only the original six properties, omitting McShane and Brice. Ultimately when these errors were discovered, Tomco and Mark III executed a correction assignment in December, 2011, which was after the conveyances to the Trust. Mark III defaulted on the Peoples Bank loan and entered into a 2012 settlement agreement with a renewal deed of trust containing only the six properties, omitting McShane and Brice; however, the error was eventually discovered by Peoples Bank and a corrected deed of trust was filed by Peoples Bank in January, 2013. Thereafter, Mark III defaulted and Peoples Bank foreclosed under its corrected deed of trust claiming that such foreclosure wiped out the Trust's overriding royalty interests, to which the Trust objected and brought suit.

At issue was the effect of the various correction instruments on the state of title concerning the overriding royalty interests of the Trust. The correction instruments statues divide correction instruments into those dealing with non-material corrections and material corrections. The court majority concluded the correction instruments were material based on Property Code § 5.029(a), providing in relevant part, that a material correction includes one where the correction adds "land to a conveyance that correctly conveys other land." Property Code § 5.029(a)(1)(C). By contrast, a non-material correction includes, the correction of "a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted from the original instrument". Property Code § 5.028(a)(1). As to a material correction, the statute requires the corrected instrument to be executed by each party; in the subject

case, Peoples Bank had independently made the correction, filed it and provided a copy and notice to the debtor. Therefore, the Trust alleged the correction instrument was invalid and not effective since it did not comply with the statutory requirement. The court found the correction instrument invalid.

Further, such statutes provide that the correction instrument replaces and is a substitute of the original instrument and may be relied upon by a bona fide purchaser, but the correction instrument is subject to the interests of an intervening creditor or subsequent purchaser for valuable consideration without notice acquired after the date of the original instrument but prior to the date of the correction instrument. Property Code § 5.030(b), (c). Since the court determined that the correction instrument was invalid, it did not reach the test of whether the Trust was a bona fide purchaser. Consequently, the overriding royalty interests of the Trust was deemed not to have been extinguished by the Peoples Bank foreclosure.

There was a strongly worded dissenting opinion by Justice Evelyn Keyes, who viewed the correction instruments as being non-material, as opposed to material. Justice Keyes' basic premise was that the addition of the McShane and Brice properties was immaterial and could have been corrected by a knowledgeable person under the statute (in lieu of both parties signing the correction deed of trust), based on the rationale that because the original conveyance of the properties contained all eight properties (including McShane and Brice), the omission of the McShane and Brice properties in the subsequent mortgages was a clerical error; apparently, the Justice does not consider it feasible that not all of the properties would be mortgaged. Continuing that reasoning, Justice Keyes thought the assignee should have known the deed of trust should have included all of the property acquired by the assignee (Trust). By the same token, Justice Keyes finds that the Trust could not be a bona fide purchaser since it could not prove that it had no notice that it's overriding royalty interests in McShane and Brice should have been included in the original deed of trust to Peoples Bank; somehow ignoring the fact that record title, as reflected the original deed of trust, did not include those two properties.

Tregellas* v. *Carl M. Archer Trust No. Three, 507 S.W.3d 423 (Tex. App.—Amarillo 2016, pet. pending). This case concerns a right of first refusal with respect to a mineral interest. In June 2003, a warranty deed transferred the surface of certain property located in Hansford, County Texas to the Archer Trustees. In a separate agreement entered into simultaneously the Archer Trustees were granted a "Right of First Refusal" to purchase the minerals under the surface. The ROFR specifically provided that it was subordinate to mortgages and other encumbrances. Unfortunately, although the property description in the ROFR was otherwise correct, it contained the incorrect county, listing the county as Ochiltree instead of Hansford. The Archer Trustee's attorney prepared a correction and sent it to the grantors for signature but only two of the many grantors signed and returned the correction. The correction was filed of record in Hansford County in September 2004. Two of the original grantors sold their mineral interests on March 28, 2007 to Tregellas. The Archer Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011.

To further complicate matters, in 2008, heirs of one of the original grantors, the Smiths, sold their interest to Tregellas. After they learned of the Archer Trustee suit, the Smith transaction was restructured into a loan secured by a deed of trust with a note payable in ninety days. In August 2012, Tregellas acquired the Smith interest at a non-judicial foreclosure sale.

Upon finding out about the foreclosure transaction, the Archer Trustees amended their petition and alleged that Tregellas "obtained the Smith minerals by subterfuge, artifice, or device." The trial court granted specific performance to the Archer Trustees with respect to both the Farber and Smith ROFR interest.

Tregellas appealed and argued, among other issues, that the correction instrument did not comply with the requirements of the Property Code. §5.028 allows individuals with personal knowledge of facts to prepare and execute an instrument to make a non-material change that results from an inadvertent error. The correction of a county name is included in the list of non-material corrections permitted to be made. Tregellas argues the correction instrument did not substantially comply with the requirements of §5.028 because: (1) the instrument does not state the basis for the the affiant's, Tidwell's, personal knowledge; (2) a signed copy was not sent to the property owners and (3) a copy was not filed in the original incorrect county (Ochiltree) but instead was filed only in Hansford County.

Although the instrument did not state the basis for the Tidwell's knowledge, the court found that because the Tidwells were among the list of grantors one could infer their personal knowledge and that the instrument, therefore, substantially complied with the personal knowledge element of §5.028.

The court also found substantial compliance with the notice requirement because the Archer Trustees had sent the unsigned notice to all of the Grantors.

Finally the court found that the correction complied with the recording requirements. Although a literal reading of §5.028(d)(1) requires the correction to be filed in all counties where the original was filed, because the correction contained the recording information for the original document, the court found substantial compliance. [Note: substantial compliance was all that is required for documents recorded prior to September 1, 2011 when the law was revised. It was further revised in 2013.]

The next argument put forth by Tregellas was that the Archer Trustee's claim for specific performance of the ROFR was barred by the statute of limitations. Generally, when a grantor of a ROFR sells property in breach of a ROFR "there is created in the holder an enforceable option to acquire the property according to the terms of the sale." However, Civil Practice and Remedies Code §16.004(a)(1) requires "a suit for specific performance of a contract for conveyance of real property to be brought no later than four years after the cause of action accrues." The court held that the breach occurred on March 28, 2007, when the Farbers sold their property to Tregellas and that the suit for specific performance was barred because it was filed outside the four year statute of limitations period. The court relied on ***S.V.* v. *R.V.***, 933 S.W.2d 1 (Tex. 1996), where the Texas Supreme Court's stated "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."

The Archer Trustees argued unsuccessfully, that, with respect to rights of first refusal, the right is dormant until the holder is notified of a potential sale. The court disagreed and said that supporting the Archer Trustee's argument would result in profound uncertainty that was "inconsistent with the purpose of the statutes of limitation" which is to "establish a point of repose and to terminate stale claims."

The Archer Trustees then argued for application of the discovery rule which tolls the accrual of a cause of action until the party learns of the injury or, through reasonable due diligence, could have learned of the injury. The court dismissed the

Archers Trustees' arguments and relied on the Texas Supreme Court's holding in ***Cosgrove* v. *Cade***, 468 S.W.3d 32, 36 (Tex. 2015), which limits application of the discovery rule to injuries that are "inherently undiscoverable" and not ones that are discoverable by the exercise of "reasonable due diligence" such as a search of public records such as the county clerk's real property records or the tax rolls. Furthermore, the appeals court emphasized that the Texas Supreme Court has specifically held that there are only rare instances where the discovery rule should be applied to breach of contract cases as each party to a contract is required to protect their own interests and "diligent contracting parties should generally discover any breach during a relatively long four-year limitations period."

In response, the Archer Trustees argued that it is well settled in Texas that "owners of property are under no duty routinely to search the deed records for later-filed documents impugning their title." The appeals court distinguished the case at hand because the Archer Trustees did not own the mineral interest they only owned an option to acquire a mineral interest. The appeals court reversed the trial court with respect to the Farber interest and upheld the trial court with respect to the Smith interest.

Harkins* v. *North Shore Energy, L.L.C., 501 S.W.3d 598 (Tex. 2016). This is a complex and long running dispute between a landowner and a well operator whereby the landowner argued that an oil well drilled by the operator trespassed on the landowner's property. The crux of the case involves construction of ambiguous legal descriptions attached to an option agreement for oil and gas leases drafted by the operator. The description in question stated "Being 1,210.8224 acres of land, more or less, out of the 1,673.69 acres out of the Caleb Bennett Survey, A-5, Goliad County, Texas and being the same land described in the [Export Lease]." The land description in the Export Lease stated "being all of the 1,673.69 acre tract … SAVE AND EXCEPT a 400.15 acre tract described in the [Hamman Lease]." The oil well operator believed the option agreement gave them the right to select up to 1,210.8224 acres out of the entire 1,673.69 acres and that the option agreement was ambiguous because the Export Lease described a 1,273.54 acre tract and not a 1,210.8224 acre tract. The landowner argued that the description specifically excluded the approximately 400.15 acres where the operator had drilled the well. The trial court held for the operator on summary judgment. The appeals court reversed and remanded, holding that the description was ambiguous and, therefore, a question of fact for a jury which made summary judgment inappropriate. The case wound its way up and down through the Texas court system for six years before finally being settled in October 2016 by the Supreme Court of Texas.

The court held that the option agreement was not ambiguous and in doing so, relied on various cases where the court has previously held that a contract is not ambiguous if "the contract's language can be given a certain or definite meaning." The court stated that merely because parties argue that certain language has a different meaning does not, in and of itself, make language ambiguous. A contract is only ambiguous if both interpretations given to specific language are reasonable. The court found that accepting the operator's argument required one to ignore the "plain and express wording of the Option Agreement" which clearly excluded the 400.15 acres. In contrast, because the description attached to the Option Agreement included the phrase "more or less", the two slightly different acreages contained in the property descriptions could be harmonized which prevented the descriptions from being ambiguous. The court held that because there was "only one reasonable interpretation of the Option Agreement, the Option Agreement is not ambiguous."

Richardson* v. *Mills, 514 S.W.3d 406

(Tex. App.—Tyler 2017, pet. denied). This case involves interpreting two ambiguous old documents filed of record in Nacogdoches County. The first instrument is a July 9, 1906 instrument whereby the Mills family granted to the Lindsey family certain rights concerning minerals under the subject property. The issue is whether those rights were temporary, in the form of a mineral lease, or permanent, in the form of a mineral deed. The second instrument is a 1908 instrument that the Mills argue released the 1906 instrument. The trial court found that the two instruments were ambiguous when read together and, therefore, allowed extrinsic evidence of the intent of the parties to be introduced to clarify the ambiguity. Based on the evidenced introduced, the trial court concluded that the first instrument was a lease and the second instrument released the lease. The appeals court disagreed and found that both instruments were unambiguous on their face and refused to permit parol evidence regarding the parties' intent.

The appeals court went on to hold that the first instrument was unambiguously a deed because it used the word "forever" in both the habendum clause and in the warranty making it very clear that it was not intended to grant temporary rights to develop the property but something more permanent.

The Mills next tried to argue that there was an implied covenant in the first instrument that the Lindseys would develop the land and when they failed to do so the 1st agreement expired. The Tyler Court of Appeals relied on the Texas Supreme Court's holding in ***Danciger Oil & Refining Co. of Texas* v. *Powell***, 137 Tex. 484, 154 (1941), where the court held "that there is no implied covenant for development when there is language of an unconditional conveyance and the instrument is silent about whether grantee is required to either explore the land for oil and gas or develop it in any manner after the discovery thereof."

The appeals court then turned to its analysis of the 1908 instrument. Unfortunately, the 1908 release stated it was releasing a July 9, 1907 instrument. The Mills argued this was a "latent ambiguity" and a mere mistake which could be clarified by parol evidence. However, the court found there were many other discrepancies which pointed to the 1908 instrument being a release of another instrument and not the 1906 deed. For example, the 1908 release states that "by the terms of said contract or lease the time for said development has expired rendering null and void such lease." The 1906 instrument contains no references to any time frame for performance of work to be conducted. The 1908 instrument also states that it was delivered to "the Nacogdoches Land Company." The 1906 instrument makes no reference to the "Nacogdoches Land Company." The appeals court ultimately concluded that 1906 instrument was an unambiguous mineral deed and the 1908 agreement was an unambiguous document releasing another instrument and not the 1906 deed.

Aguilar* v. *Sinton, 501 S.W.3d 730 (Tex. App.—El Paso, 2016, pet. denied). At some point during a long period of contention between Aguilar and Villasenor on the one hand and the Hammett Group on the other, centering primarily about some contaminated real property that Aguilar and Villasenor had acquired from the Hammett Group, Aguilar and Villasenor prepared, executed, and recorded a "Special Deed" reconveying the property to the Hammett Group. The Special Deed was prepared without the knowledge or agreement of the Hammett Group.

The Hammett Group sued seeking a declaratory judgment that the Special Deed was null and void. Aguilar and Villasenor filed a counterclaim for breach of contract claiming, among other things, fraud because the Hammett Group had concealed the existence of a cattle dipping vat on the property, and contending that they would

not have accepted the property if they had known. The trial court declared the Special Deed null and void and entering a take-nothing judgment on the counterclaims.

A deed must be both delivered and accepted by the grantee in order for there to be a valid conveyance. A deed which is not accepted by the grantee does not convey any interest in the land. The affidavits of Sinton and Hammett state that they never saw the 2006 Special Deed until 2011, and never agreed to accept the property, and have not paid taxes on it. Further, Aguilar testified in his deposition that no one in the Hammett Group agreed to have the land conveyed back to them.

Aguilar and Villasenor argue that they created a fact issue on acceptance because Aguilar asserted in his responsive affidavit that he contacted the appeal attorney for the Hammett Group, nine years after the appeal had concluded and discussed conveying property back to the Hammett Group, and that after he had prepared and recorded the Special Deed, he delivered a copy to the attorney who said he forwarded it to the members of the Hammett Group. The court disagreed that this evidence was sufficient to create a fact issue on acceptance. Aguilar never stated in his affidavit that the Hammett Group accepted conveyance of the property through the attorney, only that Aguilar prepared and filed the Special Deed and then hand-delivered a copy to the attorney who "accepted the delivery."

The court also rejected Aguilar and Villasenor's contention that by merely recording the Special Deed they created a presumption, and thus a fact issue, on delivery and acceptance. In those cases recognizing a presumption of acceptance arising from the filing of a deed, the presumption of acceptance of the conveyance was created because the deed was delivered to the grantee and recorded by the grantee. A presumption of acceptance does not arise when, as here, the grantors both execute and record the deed without the approval of the grantees.

Lemus* v. *Aguilar, 491 S.W.3d 51 (Tex.App.—San Antonio 2016, no pet.). Elvira and Garza signed a document titled "Will from Johnny Montoya Garza and Elvira G. Aguilar." The "Will" said "we agree that the house be evenly owned by John Rene Aguilar, Laura Ashley Wells and Johnny B. Wells and that nothing will be done without the authorization of John Rene Aguilar, Johnny B. Wells and Laura Ashley Wells." After that, Elvira was diagnosed with Alzheimer's.

The trial court found the "Will" constituted a present transfer of title of the house to the grandchildren, subject to a life estate for the benefit of Elvira and Garza. The trial court further held the document met the requisites of a good and valid gift deed, transferring title from Elvira, as grantor, to the grandchildren, as grantees.

On appeal, the court first held that the "Will" was not, in fact, a valid will under Texas law. Because the will was not written by Elvira or signed in the presence of two competent witnesses, it concluded that it was not a valid will under section 251.051 or section 251.052 of the Texas Estates Code.

The court then addressed whether the "Will" was, in fact, a gift deed. Whether a document is a valid gift deed is a question of law and reviewed de novo. Irma argued that the document fails as a gift deed because it is testamentary in nature, has no present intent of land conveyance, and was not acknowledged, witnessed, or filed.

Property Code § 5.021 sets forth the requirements for a valid deed. The document must (1) be in writing, (2) be signed, (3) describe the property, and (4) be delivered. A valid gift of real property further requires the document set forth (1) the intent of the grantor, (2) the delivery of the property to the grantee, and (3) the gift to be accepted by the grantee. Delivery is

required, but it need not be actual or immediate. If, however, the grantor intended for the title to pass immediately upon execution and acknowledgement, there is a valid constructive delivery.

The court said the key issue turns on the intent of the donor when the document was executed. Establishing donative intent requires evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee. Until the donor has absolutely and irrevocably divested herself of the title, dominion, and control of the subject of the gift, she has the power to revoke the gift.

Here, said the court, the conveyance in the "Will" lacks present donative intent. The document provides "[w]e agree that the house be evenly owned by [John, Laura, and Johnny]" and the document's title as a will clearly implies the donor's intent to transfer ownership of the property to the grandchildren upon the testators' deaths. The transfer did not provide for an immediate and unconditional divestment of the donors' interests. The donors' intent is further evidenced by the document's title—"Will from Johnny Montoya Garza and Elvira G. Aguilar."

Aery* v. *Hoskins, Inc., 493 S.W.3d 684 (Tex.App.—San Antonio 2016, no pet.). This litigation arises from a dispute involving three siblings' agreement to pool and share royalty interests in each of their three separate tracts of land. This appeal concerns the issue whether one sibling's undivided royalty interest held in the other tracts included in the pool became an appurtenance to his land and thereby was passed with that sibling's conveyance of his land through a general warranty deed. The facts are complicated and relate to oil and gas interests, so this summary includes only a discussion of various aspects of deed construction.

As the term pertains to real property, any "appurtenance" to land is any right or obligation that attaches to and is tied to ownership of a particular parcel of land. Appurtenances include all rights and interests necessary for the full enjoyment and beneficial and necessary use of property. The word "appurtenances" in a deed covers only what is legally appurtenant to the land described. It does not, without particular mention, convey any rights which do not naturally and necessarily belong to the thing granted in the hands of the grantor. Because it is necessary to its use, an appurtenance attaches to the land that requires it and cannot be separated from it. Under this understanding, an appurtenance to land typically includes such things as improvements, buildings, littoral rights, and use of water or sewer lines.

The surface-estate and mineral-estate interests of land are generally not considered an appurtenance, but rather the fee, itself. However, a mineral estate can be severed from the surface estate and may be held by an owner different from the owner of the surface estate. Even so, the mineral estate belongs to, or is part of, the respective land and cannot be separated from the land. Going further, any of the five attributes of a mineral estate, including the royalty interest, can be separated from the mineral estate and held by a different owner. However, when any of the five attributes of a mineral estate is separated, these attributes remain appurtenant to the mineral estate from which they originated. Similarly, the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved. Thus, while a mineral estate can be separated from the surface estate and further separated from its attributes, all still remain attached to the land from which they originate and derive their source.

An appurtenance to a particular property can include rights or interests in other

property (servient property) if the right or interest is necessary for the full enjoyment of the property (dominant property) and is used as a necessary incident. In such an event, the right or interest becomes an appurtenant benefit to the dominant property and an appurtenant burden to the servient property. Such an appurtenance that includes a right or interest in other property typically comprises rights such as easement of access or right of way and water rights.

Because they attach to the land, itself, appurtenant benefits and burdens to land can be divided between different owners, but cannot be separated from the land or otherwise assigned or transferred off of the land, or fee, itself. Therefore, to be appurtenant to land, a right or obligation must benefit or encumber the property to which it is attached; it cannot be separated from the land to which it is attached. As attached to the land, an appurtenance automatically passes when the property is conveyed and remains with the owner or possessor of the property and/or the dominant and servient estates.

A benefit or burden related to property that is not tied to ownership or possession of the property is a personal interest, or an interest "in gross." Because an interest in gross is personal, it attaches to the holder, and the holder must specifically pass or convey the interest.

A general warranty deed passes to the grantee all the rights, appurtenances and interests the grantor holds in the conveyed land unless there is language in the instrument that clearly shows an intention to convey a lesser interest. A reservation by implication in favor of the grantor is not favored by courts. Therefore, any appurtenance (benefit or burden) to the conveyed land passes to the grantee even if not specified. To retain an appurtenance, a grantor must specifically reserve it for himself. A general warranty deed does not pass any right held by the grantor that is personal. Such a personal, interest in gross must be specifically granted.

Gause* v. *Gause, 496 S.W.3d 913 (Tex.App.—Austin 2016, no pet.). A deed or other document is not made ineffective by its destruction or loss. Production of the original document is excused when it is established that the document has been lost or destroyed. Other evidence of the contents of a writing is admissible if the original has been lost or destroyed. Loss or destruction of the document is established by proof of search for this document and inability to find it.

Savering* v. *City of Mansfield, 505 S.W.3d 33 (Tex. App.—Fort Worth 2016, pet. pending). In November 1995, a joint venture filed a Plat Revision in the Tarrant County records for the development of a residential community called the Arbors of Creekwood. The Plat divided the lots into RI, which were intended for residential use and R2, which were "intended for public recreation use."

On December 11, 1995, the same joint venture filed a Declaration of Covenants, Conditions and Restrictions for the Arbors of Creekwood. The Declaration stated the HOA would "hold record fee simple title to the Common Properties." The Common Properties are defined as including "[a]ny and all greenbelt areas, bicycle and/or jogging paths, landscape easements, floodways, creeks, drainage ways…or other similar areas shown on the Plat…" The HOA's articles of incorporation were not filed until four days later, December 15, 1995.

On December 22, 1995, the joint venture executed a warranty deed that conveyed the R2 lots to the Communities Foundation of Texas, Inc. (the "Foundation").

In December 2012 the Foundation conveyed the R2 lots to the Mansfield Park Facilities Development Corporation (the "City").

In 2013 the City constructed a bridge over a creek which connected the jogging trails within the Arbors of Creekwood to a public park located on the opposite side of the creek.

Several residents of the Arbors of Creekwood then filed litigation seeking injunctive relief to prevent the opening of the bridge and to quiet title in the R2 lots. The residents claimed that the R2 lots had been conveyed to the HOA by the Declaration as part of the Common Properties. The City made many unpersuasive arguments as to why the R2 lots were not included within the definition of Common Properties before finally arguing that even if they were included that "the Declaration could not have conveyed the R2 lots to the HOA because the HOA didn't exist at the time the Declaration was filed." The City, and the dissent opinion, rely on the rule that "a deed is void if the grantee is not in existence at the time the deed is executed." The Fort Worth Court of Appeals disagreed with the City and entered judgment in favor of the residents.

The dissent in the case argues succinctly that the "attempted conveyance was a day late and a dollar short." The City filed a petition for review on January 13, 2017 and it remains to be seen whether we have heard the end of this case.

Jackson v. Wildflower Production Company, 505 S.W.3d 80 (Tex. App.—Amarillo 2016, pet. denied). In this case, following a bank foreclosure, two different parties were granted a mineral interest by the bank seven days apart. The first grant, to Jackson, was "a Mineral Deed Without Warranty" dated November 23, 1993 and recorded on December 3, 1993. The second grant, to Wildflower Production, was also a "Mineral Deed Without Warranty" dated November 30, 1993 and recorded on December 14, 1993. The trial court found that Wildflower "acquired a superior claim of title' by virtue of being an innocent purchaser for value without actual or constructive notice of Jackson's ownership interest." The appeals court reversed the trial court's decision. The case turned on the difference between the title conveyed by a deed versus a quitclaim. According to the appeals court, "[i]f, when taken as a whole, the instrument discloses a purpose to convey the property itself, and not merely a transfer of the grantor's interest, it will be given the effect of a deed, even though it may have some characteristics of a quitclaim. Conversely, if the instrument, taken as a whole, indicates the grantor's intent to merely transfer whatever interest the grantor may own, it will be treated as a quitclaim deed." Under the Texas recording system, "the grantee under a later deed will prevail over the grantee in a prior unrecorded deed of the same property, unless the purchaser had notice of the prior unrecorded conveyance." However, a very important caveat to this general rule is that a "party receiving a quitclaim deed to land cannot avail himself of the defense of innocent purchaser for value without notice." Essentially, the courts feel that the very essence of quitclaim deed "conveys upon its face doubts about the grantor's interest and a buyer is necessarily put on notice as to those doubts." The recipient of a quitclaim deed is "deemed to be on notice of all legal or equitable claims, recorded or unrecorded, existing in favor of a third party at the time the quitclaim deed was delivered" and takes the property subject to those adverse legal claims. The appeals court goes on to discuss what makes a document a quitclaim and takes great pains to clarify that the mere use of quitclaim words, such as "all of my right, title and interest, is not the litmus test for determining whether a particular instrument is a quitclaim."

Wildflower argued that the Texas Supreme Court's decision in ***Bryan v. Thomas***, 365 S.W.2d 628 (Tex. 1963), where Justice Culver stated "[t]o remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's

undivided interest in a particular tract of land, if otherwise entitled, will be accorded the protection of a bona fide purchaser" supported their argument that the instrument was a deed and not a quitclaim. The appeals court distinguished the holding in Bryan by explaining that: (1) the deed in Bryan contained a warranty clause; and (2) to be a quitclaim an instrument must have other indicators of the grantor's intent, such as "the absence of a covenant of seisin or a warranty of title." The appeals court concluded that the Wildflower Deed was a quitclaim because it (1) conveyed only the "grantor's right, title, interest, and estate," (2) contained no covenant of seisin, (3) included no warranty of title, and (4) otherwise did not express and intent to convey the property itself."

Greer* v. *Shook, 503 S.W.3d 707 (Tex. App.—El Paso 2016, pet. pending). This case deals with conflicting interpretations of a 1927 instrument from Lynn Eddins to John Bordon whereby Eddins granted Borden a series of interests that appear upon first impression to be contradictory. The instrument contained the following grants:

In paragraph 1 of the instrument "an undivided one sixteenth (1/16) interest in and to all of the oil, gas and other minerals [which] may be produced…"

In paragraph 4 of the instrument it stated "[b]e it expressly understood between the parties that the vendor is the owner of all of the royalty and that the grantee is purchasing one half (1/2) of the royalty [] one half (1/2) of the minerals, produced in and from wells or other operations…"

In paragraph 5 the instrument went on to provide that "[s]aid land being now under an oil and gas lease executed in favor of John Ross, … this sale is made subject to the terms of said lease, but covers and includes one half (½) of all the oil royalty…"

Under the terms of the lease referred to in paragraph 5 Eddins retained a 1/8 royalty interest in the production.

Finally, in paragraph 6, the instrument provided that in the "event the above described lease for any reason becomes cancelled or forfeited, than and in that event an undivided one sixteenth (1/16) of the lease interest and all future rentals on said land ... shall be owned by said Grantee, he owning one sixteenth of all oil, gas and other minerals in and under said lands…"

At some point the original lease expired and Eddins successors entered into a new lease with Patriot Resources, Inc. with an average royalty of approximately ¼. In 2013 Patriot determined the deed was ambiguous and it was unclear whether the Borden successors were entitled to: (1) 1/16 of all production regardless of the size of the royalty interest or (2) ½ of any royalty interest established pursuant to the terms of a lease. Patriot filed an interpleader to have the court settle the matter. Eventually both the Bordons and the Eddins filed motions for partial summary judgment. The trial court found that the successors of John Borden were entitled to a ½ mineral interest in any production. The successors of Eddins appealed. The El Paso Court of Appeals affirmed the finding of the trial court.

The El Paso Court of Appeals carefully laid out some very helpful rules of interpretation for the practitioner faced with interpreting an old mineral deed. These rules, along with the historical color provided by the court make the case helpful reading for any practitioner faced with a similar dilemma. The first rule of construction the appeals court referred to as the "Double Fraction Problem and the Legacy of the 1/8 Royalty." The court explained, referring to the Texas Supreme Court's discussion of the issue in ***Hysaw* v. *Dawkins***, 483 S.W.3d 1, 9 (Tex. 2016), that historically the royalty in virtually all oil and gas leases was 1/8. Therefore, when granting a portion of their retained interest parties would tend to either use a double fraction (1/2 of 1/8) or simply say the

"single fraction of 1/16, to express that he was actually giving the grantee ½ of his entire royalty interest." Another related concept is what the court referred to as the "estate misconception doctrine." Under this doctrine, the court explained that many land owners who "leased their minerals to an operator [thought] they only retained 1/8 of the minerals in place, rather than a fee simple determinable with the possibility of reverter in the entirety of the mineral estate." The court found that when applying these two doctrines to the conveyance at issue in this case one can easily resolve all of the apparent contradictions and it was clear that the instrument conveyed a ½ mineral interest which "included a corresponding royalty interest." Furthermore, the court stated that the arguments put forth by the Bordens would require one to ignore all but two sentences of the instrument which ignores years of Texas Supreme Court guidance on the interpretation of mineral instruments. As stated by the court, the Texas Supreme Court has repeatedly held that a mineral deed must be interpreted in its entirety by "construing each and every provision in the deed and harmonizing any apparent conflicts found in the deed as a whole" and without rendering any provision meaningless. Although the analysis of the court is sound and appears well grounded in the law, this case may not be over yet as the parties have appealed to the Supreme Court of Texas.

PART VI
VENDOR AND PURCHASER

Thomas* v. *Miller, 500 S.W.3d 601 (Tex.App.—Texarkana 2016, no pet.). Bobby and Thomas entered into an oral agreement that would allow Bobby to purchase the property in question. The agreement was that if Bobby paid off the mortgage, the property would be his. Bobby claimed they even shook hands to confirm their agreement.

The property contained two water wells and a house, described as "condemned." Nevertheless, Bobby decided to repair the dilapidated home, and he spent approximately $30,000.00 on that endeavor. He also repaired the water wells on the property. Bobby testified that he took these actions based on his oral agreement with Thomas and that the home renovation was completed in 2006. The evidence at trial demonstrated that Thomas, who owned a barbecue restaurant near the property and accepted shipments of materials for Bobby during the renovation, was well aware of the work being done on the property.

Bobby testified that he was overseas for two years and that his wife Thyra took care of making the monthly payments on the home during that time. Thomas attempted to evict Bobby and Thyra from the property. Feeling harassed, Thyra moved out of the house while Bobby was away. When she moved out, she quit making the mortgage payments and there was a balance of some $3,100 left on the mortgage.

After Thyra moved out, Thomas deeded the property to Clay Jiles, prompting Bobby and Thyra to file suit. Their petition alleged that they had made payments on the note and substantial improvements to the property in reliance on the oral agreement. They asserted causes of action for breach of contract, promissory estoppel, and fraud. In his answer to the lawsuit, Thomas asserted the statute of frauds.

A contract which is for the sale of real estate or which is not to be performed within one year after the agreement's formation is not enforceable unless it is (1) in writing and (2) signed by the person to be charged with the promise. It is uncontroverted that this was an oral contract for the sale of real property and was not to be performed within a year. Also, the adequacy of a property description in any instrument transferring an interest in real property is a question of law within the purview of the statute of frauds.

Thomas argues that the property description was insufficient for there to be a

meeting of the minds and that it did not satisfy the requirements of the statute of frauds. The purpose of a written land description is not merely to identify the property, but also to provide an actual means of identification.

Undoubtedly, the oral contract did not satisfy the statute of frauds because (a) it was not made in writing and (b) it did not contain a sufficient property description. Nevertheless, the failure to meet the statute of frauds does not end the court's inquiry. Since Thomas met his initial burden to demonstrate that the statute of frauds applies, the burden shifted to the Bobby and Thyra to establish an exception that would remove the oral contract out of the statute of frauds.

Partial performance is an exception to the statute of frauds. The partial performance exception is enforced only when denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit.

In order to establish the partial performance exception, Bobby and Thyra had to show that (1) they had performed acts unequivocally referable to the agreement (2) that the acts were performed in reliance on the agreement (3) that as a result of the acts they had experienced substantial detriment (4) that they have no adequate remedy for their loss and (5) that Thomas would reap an unearned benefit such that not enforcing the agreement would amount to a virtual fraud. The partial performance must be 'unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.

The court held that there was sufficient evidence to uphold the jury's finding that Bobby and Thyra met the partial performance exception to the statute of frauds.

Zaragoza* v. *Jessen, 511 S.W.3d 816 (Tex. App.—El Paso 2016, no pet.). The Jensens entered into negotiations with the Zaragoza to buy a house for their daughter. Mrs. Jensen and Mrs. Zaragoza prepared a document outlining the terms of the transaction, but it was never signed. Under the terms of the unsigned agreement the Jensens were to pay the Zaragozas a down payment of $73,010; and to assume payment of the first mortgage with a balance of $33,990.00. The Zaragozas were to use the down payment to pay off a second mortgage. Once the first mortgage was paid off, the Zaragozas agreed to deed the property to the Jensens. The Jensens paid the down payment and the Zaragozas turned over possession on the house on June 18, 2007.

The Jensens then made over $9,717.41 in improvements to the house. In September of 2009 the Jensens paid the first mortgage in full. The Zaragozas refused to sign over the deed to the house and they also failed to pay off the second mortgage. The Jensens sued for breach of contract and the Zaragozas claimed that the statute of frauds prevented enforcement because the contract was never signed.

The El Paso Court of Appeals held that the statute of frauds is subject to a "well-recognized exception under the doctrine of partial performance." Under this exception, if a contract has been partly performed it may be "enforced in equity if denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap unearned benefits." The appeals court went on to outline the elements required for a purchaser to enforce an oral contract: (1) payment; (2) possession and (3) improvements or other facts that would create a fraud on the purchaser if the contract were not enforced.

The Jensens were clearly able to establish every element of the three prongs laid out by the appeals court.

Another case involving oral contracts and partial performance is ***Burrus* v. *Reyes***, 516 S.W.3d 170 (Tex.App.—El Paso 2017, pet. denied).

Capcor at Kirby Main, L.L.C.* v. *Moody Nat'l. Kirby Houston S, L.L.C., 509 S.W.3d 379 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In this case, a prospective purchaser of commercial property sued the vendor for breach of the sales contract and the escrow agent for tortious interference with the contract and breach of fiduciary duty with respect to a failed closing. The trial court had awarded the seller attorney fees, the escrowed funds and contractual liquidated damages and the prospective purchaser appealed. At issue in the case was the title company's refusal to accept a cashier's check delivered after 5:00 on the day of closing when the escrow agent had informed the purchaser's lawyer the day before the transaction, and the purchaser on the morning of the closing, that a wire would be required. The contract at issue was the standard Texas "Unimproved Property Contract" promulgated by the Texas Real Estate Commission. The contract contained a specific closing date and stated "[a]t closing … Buyer shall pay the Sales Price in good funds acceptable to the escrow agent." The contract went on to provide that failure to close on the closing date entitled the other party "to exercise its contractual remedies, which included terminating the contract and receiving the earnest money as liquidated damages." Although the Texas Title Manuel considers a cashier's check to be a form of good funds, Fidelity National Title had a policy not to accept cashier's checks because of the increase in the number of fraudulent checks. Furthermore, cashier's checks are subject to a three day recall which meant that the transaction could not close and fund the day the agent received the check. The day after the scheduled closing, the purchaser offered to send a wire but the seller refused and instead cancelled the contract. The purchaser sued. In addition to the arguments against the agent, the purchaser claimed that failure to deliver good funds on the day of closing was not a material breach. The appeals court reiterated that it is well accepted that a material breach of a contract by one party excuses the other from performance and although time is not "ordinarily of the essence," "[t]imely performance may be a material term if "it is clear the parties intend that time be of essence..."" A contract must either explicitly state that time is of the essence or there must be something about the deal that makes it apparent to the parties that time is of the essence. Generally, if a party has the right to cancel a contract if it is not consummated at a certain date and time, the courts will usually find that time was of the essence. In this case, the terms of the contract clearly allowed the seller to terminate the contract and retain the earnest money if the purchaser failed to deliver good funds acceptable to the escrow agent by the closing date.

Rancho Esperanza, Ltd.* v. *Marathon Oil Company, 488 S.W.3d 354 (Tex.App.—El Paso 2015, no pet.). It is a well-established rule in Texas that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere subsequent purchaser does not have standing to recover for injuries committed before his purchase. The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. A subsequent landowner may assert a cause of action for pre-existing injuries only if there is an express assignment of the cause of action.

PART VII
EASEMENTS

United States Invention Corporation* v. *Betts, 495 S.W.3d 20 (Tex.App.—Waco 2016, no pet.). In the deed from Thomas to the Hoggs, Thomas purportedly reserved a thirty-foot wide public utility easement adjacent to the northwest property line of the property being conveyed. The easement was contained within property owned by the Bettses. The Hogg property and the Betts property derived from a common source, and were separated by a 1915 partition judgment.

US Invention bought the Hogg property and filed suit seeking a declaration that it had an implied easement appurtenant to the Hogg property or that it had an express easement. The Bettses claim that the reservation of the easement was ineffective because Thomas didn't own the property where the easement was purportedly located. The Bettses were granted a directed verdict and a judgment for trespass damages and attorneys' fees. US Invention appealed, claiming it had proved an implied easement and an express easement.

An implied easement attaches to the dominant estate when it is severed from the servient estate if the use of the servient estate is apparent and necessary to the use of the dominant estate. Use of the servient estate by the dominant estate must be: (1) apparent and existing at the time of severance of the two estates; (2) continuous enough that the parties must have intended its use to pass with the dominant estate; and (3) reasonably necessary to the comfortable enjoyment of the dominant estate. Whether these requirements are met is determined at the time of the severance of the estates.

At trial, US Invention presented evidence of unity of ownership between the dominant and servient estates just prior to the 1915 partition judgment. However, it produced no probative evidence that the alleged road that constituted the easement existed and was in apparent use in 1915, or that the road had been continuously used since the 1915 partition. The surveyor testifying for US Invention said that there had been a roadway there that dated back around forty or fifty years, but that would have shown only that the road was there in the mid-fifties. The court held that US Invention had not provided more than a scintilla of evidence and that the evidence in support of an implied easement was no more than mere surmise or suspicion.

In the alternative, US Invention claimed an express easement. Even though US Invention had abandoned that on appeal, the court said it was still not persuaded by the argument. A reservation or exception in favor of a stranger to a conveyance is inoperative and cannot operate as a conveyance to the stranger of an interest in land. Here, there is no evidence in the record indicating that Thomas owned an interest in appellant's property, nor is there evidence that appellant owned an interest in the Hogg Property. In other words, if Thomas was attempting to reserve an easement for appellant, such a reservation would have failed because appellant was a complete stranger to the transaction.

Horse Hollow Generation Tie, LLC* v. *Whitworth-Kinsey #2, Ltd., 504 S.W.3d 324 (Tex. App.—Austin 2016, no pet.). This case involves a 180 foot easement corridor along a 200 mile transmission route connecting Horse Hollow's wind farms near Abilene with a substation in San Antonio. Horse Hollow contends that there was a mutual mistake in the easement agreements signed by the landowners regarding how the landowners would be paid and that the easement agreements should be reformed to correct the mutual mistake. The trial court refused to reform the easement to reflect the mutual agreement of the parties and Horse Hollow appealed.

The appeals court stated that "reformation requires two elements: (1) an original agreement and (2) a mutual mistake made after the original agreement in reducing the original agreement to writing."

The trial transcript was clear that both parties understood that the first payment for the easement would be based on an estimated length and the second on the actual surveyed length. Unfortunately, the actual agreement stated that both payments would be made based on the estimated length which would have resulted in a significant windfall to the Whitworths. The appeals court found that the mutual mistake was clear, overturned the trial court, and reformed the easement.

Houston Laureate Assoc.* v. *Russell, 504 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Houston Laureate is the owner of an office building that is surrounded by a green belt and walking paths. Houston Laureate entered into an easement agreement granting a permanent, non-exclusive easement to use the green belt land for recreational purposes to the residents of an adjoining subdivision. At some point, Houston Laureate started charging fitness instructors who were instructing residents a licensing fee and demanded that all parties stay on the paths and off the grass. The residents sued. The trial court granted partial summary judgment to the residents and found that Houston Laureate breached the easement by requiring the residents to stay on the paths and by charging a licensing fee. Although the appeals court overturned part of the trial court's ruling, it agreed with the trial court that the Easement Agreement allowed the residents to use the land without charge. The appeals court found that Houston Laureate had the right to impose reasonable rules on the use of the greenbelt but denying all use of the greenbelt was unreasonable.

PART VIII
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Rife* v. *Kerr, 513 S.W.3d 601 (Tex. App.—San Antonio 2016, pet. denied). In this case, a trespass to try title action regarding an undivided ½ mineral interest, the trial court granted the Kerrs no evidence summary judgment motion and the Rifes appealed. The appeals court agreed that the Rifes had produced some evidence that "they have superior title to the mineral estate" and reversed and remanded the case for further proceedings. The case is helpful to the practitioner because the appeals court thoroughly outlined the law on trespass to try title cases. As stated by the San Antonio Court of Appeals "[t]o prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." The Rifes' claim rested on item two, above, superior tile through a common source. The Kerrs and the Rifes both claim title from L.A. Kerr who held title to certain lots as a trustee for the express purposes of "expediting and simplifying the sale of lots" on behalf of the original owners of the lots. Subsequent agreements between the parties specifically stated that the "[l]ots that remained in the hand of L.A. Kerr, Trustee" were "set aside for the joint use and benefit of L.A. Kerr and A.H. Rife." Under well-established law, "[t]itle, to trust property vests immediately in the beneficiaries if an express trust becomes dry or passive." Where, as in this case, the "purpose of a trust is to hold property 'for the use and benefit of another', then the trust is a dry passive trust" and the property immediately vests in the beneficiaries. As a result, the property at issue was arguably vested in Rife and Kerr, and not with Kerr as trustee.

To further complicate matters, in 1932, Kerr, in his individual capacity, and not as trustee, conveyed via deed to his wife a series of lots which included the lots to which the Rifes' claim an undivided ½ interest in the mineral estate. If the trust was indeed a "dry trust" Kerr could only have conveyed to his wife his ½ interest in the properties not Rifes' ½ interest. The chain of title is further complicated by the fact that in 1937 L.A. Kerr, as Trustee, conveyed to

A.H. Rife a full undivided ½ interest in the "unsold" lands held by "in my name as trustee".

If things weren't complicated enough, the Kerrs added another wrinkle to the case by claiming that they have adversely possessed the property since the 1932 deed. Because the Kerrs and Rifes are arguably co-tenants in the property, the Kerrs have a much higher burden to establish adverse possession. The standard that applies to co-tenants is "ouster-unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants." This more stringent requirement can be met in two ways: (1) conveyance of the property by one co-tenant purporting to convey the entire property "and record of such conveyance, followed by possession, constitutes notice of repudiation" and (2) continuous long-term possession of the land under the claim of ownership by one co-tenant without repudiation by the other cotenant. The appeals court held that the Kerrs produced some evidence of ouster and remanded the case to the trial court for further proceedings. Although there was some evidence presented to the trial court supporting ouster of the surface estate, it will be interesting to see whether the Kerrs can also prevail on a claim of ouster with regards to the mineral estate.

PART IX
HOMESTEAD

Hankins* v. *Harris, 500 S.W.3d 140 (Tex.App.—Houston [1st Dist.] 2016, no pet.). Roy and Norma owned a home in Houston that they used it as their primary residence. Hankins obtained a judgment against Norma and another party in an action for slander. Hankins recorded an abstract of the judgment against Norma. After the abstract was recorded, Roy and Norma separated. Norma moved to Brownsville and said she was not moving back to the house. Roy and Norma divorced, and in their settlement agreement, the house was given to Roy and Norma was paid some money.

Hankins sought a writ of execution to foreclose his judgment lien on the house. Despite the fact that Roy filed bankruptcy and that the bankruptcy court issued an order specifically prohibiting Hankins's scheduled execution sale of the house, the constable proceeded with the sale where Hankins purchased what he claimed was Norma's interest in the house.

Roy and his family continued to live in the house. Roy and Norma eventually reconciled and Norma moved back in. Over the years, Hankins sent demand letters asserting his interest in the house, and each demand letter was repudiated by Roy's lawyers. Roy died and his daughter Sarah inherited it. When Hankins sent another demand letter, Sarah sued to quiet title. The trial court held that Sarah owned the house, that Hankins had no interest in it, and that the constable's sale was void.

On appeal, Hankins claimed that Sarah failed to establish as a matter of law that the homestead exemption invalidated the execution sale. Hankins argued that after the divorce, Norma possessed a co-tenancy in the property that she abandoned, allowing his lien to attach. Hankins claimed Roy no longer had a family homestead but rather a single-adult homestead that would protect only his half-interest in the community property. Hankins also argued that Roy did not own the entire property on the execution date, because the marital settlement agreement anticipated only a future transfer rather than a final division of the property.

Sarah responded that Norma did not abandon her interest in the property, and Roy's homestead interest alone was able to protect the entire property from levy and foreclosure. In the alternative, she argued that at the time of the levy, Norma owned no interest in the property that she could abandon or that Hankins could purchase.

When an abstract of judgment is recorded and indexed it constitutes a lien and attaches to any real property owned by the defendant that is not exempt. Generally, a lien may not attach to property that is held as the debtor's homestead, because the Texas Constitution provides that homestead property is exempt from forced sale to pay debts, except for certain specified categories of debts.

A homestead can belong to either a family or to a single adult person. The constitutional family homestead exemption applies to the entire family, and not to either spouse individually. Therefore, so long as real property is a family homestead due to one spouse's intention and use, that property is protected by the homestead exemption, unless full abandonment has been pleaded and proved.

Once a property has been established as a homestead, the property remains exempt unless it ceases to be a homestead due to abandonment, alienation, or death. Abandonment of a homestead occurs when the homestead claimant ceases to use the property and intends not to use it as a home again.

In Texas, spouses may divide their community property through a marital property settlement agreement that can direct the payment of money as consideration for the conveyance of an interest in real estate. When such an agreement is reached, even though incorporated into a final divorce decree, it is treated as a contract and governed by the law of contracts rather than the law of judgments. As in a contract for a sale of land, when a property settlement agreement directs the payment of money as consideration for the conveyance of an interest in real estate, this creates a purchase-money vendor's lien for the spouse who sells her share of the property. The holder of the vendor's lien no longer has title to the property, but she can use it as an encumbrance against the property to satisfy the debt.

Here, the divorce agreement that was incorporated into the final decree included stipulations that the entire property would be transferred to the other spouse in exchange for financial consideration. Before the divorce, each spouse had an undivided homestead interest as a family member. So long as real property is a family homestead by virtue of one spouse's intention and use, that property is protected by the homestead exemption, unless abandonment is pleaded and proved. After the divorce, the remaining spouse received the full homestead interest pursuant to the divorce decree and transfer of land.

Therefore, both before and after the divorce, the spouse that received the transfer had an undivided, possessory homestead interest that prevented a judgment lien from attaching, The court concluded that Roy's undivided homestead interest protected the property at all relevant times and prevented Hankins's lien from attaching, rendering the foreclosure sale and execution deed unconstitutional and void.

PART X
CONDEMNATION

Caffe Ribs, Incorporated* v. *State of Texas, 487 S.W.3d 137 (Tex. 2016). The Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. The supreme court has effectuated this constitutional imperative by requiring payment of the "market value" of the condemned property--that is, "the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying." An impending condemnation project, however, can distort the value of property. The inflationary effects of such a project are referred to as "project enhancement, while the deflationary effects are referred to as

"condemnation blight" or project diminishment. Since neither project enhancement nor project diminishment reflects true "market value, the project-influence rule has evolved to ensure that such components of value are removed from the market-value determination. The rule thus provides that any change in property value that results from the government manifesting a definite purpose to take property as part of a governmental project must be excluded from an award of adequate compensation. The rule ensures that the condemnee is made whole, not placed in either a better or worse position than he or she would have enjoyed had there been no condemnation.

While the project-influence rule may be neatly stated, it is not always so neatly applied, as precedent recognizes. The supreme court has previously instructed trial courts that they, not the jury, must make the preliminary determinations that the evidence warrants application of the rule and, if applicable, the date the government manifested a definite purpose to take the condemned property (i.e., the date after which any change in value attributable to the governmental project should be disregarded). The court has not, however, instructed trial courts on the exact manner in which the project's influence on the condemned property's value must be corrected, because that depends on the facts of the particular case.

County of El Paso* v. *Navar, 511 S.W.3d 624 (Tex. App.—El Paso 2015, no. pet.). Navar had owned a mobile home park for years and petitioned the County to issue a Certificate of Compliance (regarding water, sewer, gas and electric services) for additional lots to be leased to new tenants. The Certificate of Compliance was sought by Navar on April 1, 2008, and was still not issued as of May 11, 2010. Pursuant to Tex. Loc. Gov't Code Ann. § 232.028(e), the County Commissioners Court must make a determination within 20 days after the date of receipt of the request and issue the Certificate, if appropriate, within 10 days after its determination is made. The lead planner for the County denied issuance of the Certificate because the "residences … were not in compliance with statutory authority", but without identifying any statutory authority on which such statement was based. Navar sued the County and, later, the County issued the Certificate of Compliance. Even though he received the Certificate, Navar continued the lawsuit alleging a wrongful taking of personal property, as well as other causes of action. In reviewing the plea to the jurisdiction of the court, based on a governmental immunity theory, the court considered whether the evidence raised a fact question on jurisdiction; if so, the plea would be denied. Although a governmental subdivision is immune from suit for money damages, there is an exception for a regulatory taking, which the court found to exist. Although Navar alleged a regulatory taking under the Nollan/Dolan exaction test, ***Nollan* v. *Calif. Coastal Comm'n***, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); ***Dolan* v. *City of Tigard***, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and the Penn Central unreasonable interference test, ***Penn Cent. Transp. Co.* v. *City of New York***, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The court looked to the unreasonable interference test as established by ***Penn Central***, which held that a regulatory taking occurs when government action unreasonably interferes with a landowner's use and enjoyment of the property. The court cited three factors or elements: (1) the economic impact of the regulation on the claimant, (2) the extent the regulations interfered with distinct investment-backed expectations, and (3) the character of the government action. Navar had pled each of the appropriate elements, alleging that he was unable to lease new mobile homes, had lost rental income from such activities, and the County's refusal to issue the Certificate of Compliance without a legitimate basis. Therefore, the court found the County had effected a regulatory taking by improperly relying on zoning

standards to revoke the property's "grandfathered" non-conforming status. Having proven at least one type of regulatory taking, the court concluded that other types of regulatory taking were not necessary to be proven. But, in a concurring opinion Justice Hughes noted that the government immunity provision would not be applicable to the extent that Navar was complaining about the County's misapplication of the law to his property or with respect to the timeliness of the County's determinations, since a challenge based upon the infirmity of the process would not constitute a regulatory taking.

City of Floresville* v. *Starnes Investment Group, LLC, 502 S.W.3d 859 (Tex. App.—San Antonio, 2016, no pet.). Starnes asserted the City's wrongful delay in approving its zoning application and delay in providing water and sewage services constituted a taking and deprived it of its reasonable investment backed expectations. Starnes contended it was denied all economically beneficial or productive use of its property from March 29, 2012—when the City zoning applications were originally filed—until September 12, 2013—when the applications were approved.

There is a clear and unambiguous limited waiver of immunity for valid claims under article I, section 17 of the Texas Constitution, the "takings clause," which provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made ...." If the government appropriates property without paying adequate compensation, the owner may bring an inverse condemnation claim to recover the resulting damages. An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development.

To plead a valid inverse condemnation claim and establish waiver of immunity under the takings clause, a plaintiff must allege that the governmental entity (1) intentionally performed certain acts in the exercise of its lawful authority (2) that resulted in taking, damaging, or destroying the plaintiff's property (3) for public use. A governmental entity does not have immunity from a valid takings claim. If, however, the plaintiff fails to allege a valid takings claim, the governmental entity retains its immunity from suit.

In a takings case, the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. It is not enough that the act causing the harm be intentional—there must also be knowledge to a substantial certainty that the harm will occur. A taking cannot rest on the mere negligence of the government. When damage is merely the accidental result of the government's intentional act, there is no public benefit and the property cannot be said to have been taken or damaged for public use.

In this case, Starnes was initially told that the City's zoning ordinances did not apply to his development, but was later told that the ordinances did apply. There is no dispute that the information intentionally provided by the City's attorney the first time was incorrect. However, Starnes alleges no facts that the information was the result of anything more than either a mistake or negligence on the City attorney's part. Starnes alleges no facts that the City knew to a substantial certainty that harm would occur as a result of the delay in its mapping project or the incorrect information it provided while the mapping project was ongoing. As a result, there is no public benefit and the property cannot be said to have been taken or damaged for public use. So there was no inverse condemnation.

In re *Tarrant Regional Water District*, 495 S.W.3d 296 (Tex.App.-Tyler 2015, no

pet.). The trial court signed an order refusing to appoint special commissioners during the administrative phase of the condemnation proceeding. The order provided further that the court would only do so, if at all, after a hearing was set and held on the Plea to the Jurisdiction of Defendant Lazy W District No. 1 and a ruling is made by the Court on that Plea. The District filed a petition for a writ of mandamus challenging that order.

Generally, mandamus relief is appropriate only when the trial court clearly abuses its discretion and there is no adequate appellate remedy. A trial court has no discretion in determining what the law is or in applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in the issuance of a writ of mandamus.

A condemnation proceeding is not within the general jurisdiction of the court; any power to act is special and depends upon the eminent domain statute. When an entity with eminent domain authority wants to acquire real property for public use but cannot agree with the landowner on the amount of damages, that entity must file a condemnation petition in the proper court, either district court or county court at law, of the county in which the land is located. The judge of the court in which a condemnation petition is filed or to which an eminent domain proceeding is assigned is required to appoint three disinterested property owners who reside in the county as special commissioners. These special commissioners must promptly schedule an evidentiary hearing on the amount of damages due the property owners, assess the amount of damages, and file their decision with the trial court.

From the time the condemnor files the original statement seeking condemnation up to the time of the special commissioners' award, the proceeding is administrative in nature. The administrative phase is completely separate from any judicial proceeding that may later take place, and the Property Code says nothing about giving a trial court power to oversee this initial phase. During the administrative phase, the trial court's jurisdiction is limited to appointing the commissioners, receiving their opinion as to value, and rendering judgment based upon the commissioners' award. Any judgment or order made outside of the statutory authority is void.

When the District filed its condemnation petition, the trial court had a statutory duty to appoint three special commissioners. The court held that the trial court was without jurisdiction to refuse to appoint special commissioners in this condemnation proceeding.

Padilla* v. *Metropolitan Transit Authority of Harris County, 497 S.W.3d 78 (Tex.App.—Houston [14th Dist.] 2016, no pet.). The Texas Constitution provides that no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. Thus, the Texas Constitution waives governmental immunity from suit for the taking, damaging, or destruction of property for public use and requires compensation for such destruction. To prove an inverse condemnation claim, a claimant must show that a governmental actor intentionally performed acts that resulted in the taking, damaging, or destruction of its property. For purposes of article I, section 17, a governmental entity acts intentionally if it knows either that a specific act was causing identifiable harm or that specific property damage was substantially certain to result from the entity's action. A governmental entity is substantially certain that its actions will damage property when the damage is necessarily an incident to or necessarily a consequential result of the governmental entity's action. An awareness that damage is a mere possibility is not evidence of the governmental entity's intent. The government's knowledge must be determined as of the time it acted, not with

the benefit of hindsight.

Not all damage caused by government construction projects is compensable. Property owners may not recover for injuries sustained in common with the community where the property is situated, such as damage from noise, dust, increased traffic, diversion of traffic, circuity of travel, and other inconveniences incident to road or highway construction.

Damages peculiar to a property owner, such as impaired access, are not barred by the concept of community injury. To obtain compensation for impairment of access, a plaintiff must establish that the governmental entity materially and substantially impaired access rights to his property. More specifically, the plaintiff must show that there has been: (1) a total but temporary restriction of access; (2) a partial but permanent restriction of access; or (3) a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed. If the plaintiff does so, the property owner is entitled to be compensated for the lost profits arising from the denial of access. Whether there has been a material and substantial impairment of access is a question of law for the court.

PART XI
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Elbar Investments, Inc.* v. *Garden Oaks Maintenance Organization, 500 S.W.3d 1 (Tex.App.—Houston [1st Dist.] 2016, pet. denied). The relevant restrictive covenant states: "No residence shall be erected on a lot or homesite of less frontage than seventy-five (75) feet." The disputed property was part of a Garden Oaks lot that originally had a frontage of 75 feet. A multi-family duplex residence was constructed on the lot in 1979. When built, this residence fully complied with the Garden Oaks deed restrictions. A prior owner split the lot in half, resulting in the two halves of the duplex separately occupying the two new lots. Each new lot had a frontage of 37 1/2 feet.

Garden Oaks sued the Elbar for violation of the restrictive covenant. At trial, the president of the HOA admitted that the structure was in compliance when it was built and that Elbar had done no new construction. The trial court ruled against Elbar, specifically finding that Property that is initially in compliance with deed restrictions can nevertheless fall into noncompliance by the act of subdividing the lot, even if the deed restrictions do not explicitly prevent subdividing lots.

Elbar contended that no violation of the deed restrictions has been demonstrated, because the only relevant prohibition is that no residence shall be erected on a lot or homesite of less frontage than seventy-five (75) feet, and it did not construct anything new on the property. The commonly accepted meaning of the word "erect" at the time the covenant was imposed on the subdivision was "to raise, as a building; build; construct."

The court of appeals held that the covenant at issue in this case does not, by its terms, suggest that a conforming structure later may come to violate the restriction if a subdivision of the property causes a change to the frontage. The Garden Oaks covenant prohibits a residence from being erected under a specific circumstance, when the lot or homesite has less frontage than 75 feet. Based on the language of the covenant, when a new residence is built, it must conform to the frontage requirements, but the covenant does not provide that later subdivision of the lot without erecting another residence will cause a previously conforming residence to fall into violation of the frontage requirement.

The deed restrictions anticipate the construction of duplex residences and do not prohibit subdivision of lots. By requiring the initial construction to comply with the deed

requirements, the restrictions ensure an aspect of uniformity of appearance without prohibiting a future division of ownership of a conforming duplex. Any future new construction would remain subject to the architectural restrictions, and would be a proper subject for an enforcement suit such as this one.

Based on the commonly accepted meaning of "erected" and the context of the other subsections of the deed's architectural restrictions, the court concluded that the covenant in this case is unambiguous, and that the division of the duplex's ownership did not cause a violation of the restrictive covenant prohibiting residences from being "erected" on a lot with less than 75 feet of frontage.

Tarr* v. *Timberwood Park Owners Association., 510 S.W.3d 725 (Tex. App.—San Antonio 2016, pet. granted). In a case that is of interest to many in the age of Airbnb, a homeowner entered into thirty-one short term rental arrangements which totaled 102 days over five months. The deed restrictions for the Timberwood Park Owners Association provided that homes should be "used solely for residential purposes." The HOA notified Tarr that renting out his home was a commercial use and a violation of the deed restrictions. Tarr filed a declaratory judgment action seeking a declaration that leasing the house was a residential purpose and there was no "durational" requirement in the deed restrictions. Tarr and the HOA both filed motions for Summary Judgment and the trial court granted the HOA's motion.

On appeal, Tarr argued the following: (1) the HOA allows rentals and does not require that a homeowner personally occupy his home; and (2) the individuals that Tarr rented to were using the house for residential purposes. Relying on the San Antonio Court of Appeals opinion in ***Munson* v. *Milton***, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied), the HOA argued that short-term renters were not residents but "transients". The San Antonio Court of Appeals agreed with the HOA. Although the appeals court noted that "[c]ovenants restricting the free use of land are not favored by the courts, [they] will be enforced if they are clearly worded and confined to a lawful purpose." Furthermore, §202.003(a) of the Texas Property Code requires that "a restrictive covenant be liberally construed to give effect to its purpose and intent." In this case the appeals court found the restrictive covenant to be unambiguous. The appeals court went on to note that, as noted by the ***Munson*** court, the "Texas Property Code draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like." The appeals court agreed with the ***Munson*** court that the term ""residence" generally requires both physical presence and an intention to remain"“

After this case, there is now a clear split among the Texas courts. In a very similar case, ***Zgabay* v. *NBRC Property Owners Association***, No. 03-14-00660-CV, 2015 WL 5097116, at 3 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.), the Austin Court of Appeals found that a covenant that stated that homes should be only used "for single family residential purposes" was ambiguous and unenforceable and homes could be rented out for temporary use.

Western Hills Harbor Owners Association* v. *Baker, 516 S.W.3d 215 (Tex.App.—El Paso 2017, no pet.). A declaration containing restrictive covenants in a subdivision defines the rights and obligations of property ownership, and the mutual and reciprocal obligation undertaken by all purchasers in a subdivision creates an inherent property interest possessed by each purchaser. Restrictive covenants are subject to the general rules of contract construction. Section 202.003 of the Property Code expressly states that a restrictive covenant shall be liberally construed to give effect to its purposes and intent.

The Association filed an amendment to its Declaration, raising the amount of annual assessments. The Lot Owners sought a declaration that the amendment was not properly adopted and was therefore void and invalid, and further sought damages based on the additional assessments the Association had improperly collected in violation of the original Declaration. Here, the original Declaration, which contains the original restrictive covenants governing the subdivision, did not provide either the right to amend or a method for doing so. Instead of relying on the Declaration, the Association contends the right to amend and the method for doing so can be found in the subdivision's Amended Bylaws, and it further contends the Amended Bylaws should be considered.

The Association's argument that the Amended Bylaws should be considered part of the subdivision's “dedicatory instrument,” is based almost exclusively on the fact that the Association filed the Amended Bylaws in the county deed records, albeit almost 20 years after they were purportedly adopted, apparently believing that this filing was all that was required to demonstrate their validity.

However, the Association here did not provide a copy of any original bylaws that allegedly were adopted or filed at or near the same time the Declaration was adopted, which could be considered as part of an “overall scheme” by which the subdivision was to be governed. Nor did the Association assert that any such contemporaneous original bylaws exist. Further, the Declaration itself does not indicate that the subdivision was to be governed by any bylaws, and the Association presented no evidence to support any conclusion that the subdivision's developer intended for the subdivision to be governed by any such bylaws. The Association made no effort to explain the authority by which any of the subdivision's bylaws were purportedly adopted, or the manner in which any such adoptions took place. The court thus concluded that the Association failed to carry its burden of establishing that the Amended Bylaws were properly adopted or that they were intended to be part of the subdivision's dedicatory instrument.

Chapter 209 of the Texas Property Code, which applies to residential subdivisions that are governed by declarations that authorize a homeowners' association to collect regular or special assessments on all or a majority of the property in the subdivision, provides that a residential subdivision requiring “mandatory” membership of its property owners in such a homeowners association may amend its restrictive covenants upon a 67 percent of the total votes allocated to property owners entitled to vote on the amendment of the declaration, in addition to any governmental approval required by law. So, the question was whether the Declaration made membership mandatory.

The Declaration does not expressly state that membership in the Association is mandatory; however, the Declaration nevertheless imposes mandatory assessments on all lot owners, giving the owners no choice but to pay those assessments. Further, the Declaration provides that those assessments are for the construction of improvements in the subdivision, which were to be utilized solely by members of the Association and their families. From this language, the court concluded that the subdivision developer made clear its intent to create a mandatory-membership association for the benefit of its members, as opposed to one that was simply voluntary.

The Declaration gives the Association the discretion to refuse membership to a particular lot owner and to expel the lot owner from membership. The Lot Owners content that this means membership cannot be considered mandatory. This position is incorrect. The fact that a subdivision's declaration gives a homeowner's association

the discretion to refuse membership to a property owner or to expel an owner from membership in accordance with its internal rules and regulations, does not render membership in the Association any less mandatory, where an individual purchasing property within the subdivision otherwise agrees to pay those assessments in accordance with the subdivision's restrictive covenants.

Yeske* v. *Piazza Del Arte, Inc., 513 S.W.3d 652 (Tex. App.—Houston [14th Dist.] 2016, no pet.). In this case, the owner of a condominium unit, Yeske, filed an action against the HOA, members of the board of directors of the HOA and related defendants seeking a declaratory judgment that the HOA lacked authority to collect assessments or foreclose on his unit and asserting a wide variety of other claims. Although the case was complex and focused largely on procedural matters there were two nuggets of interest to the practitioners regarding the Texas Uniform Condominium Act (the "Act").

One of the many claims made by Yeske against the HOA was that the HOA did not have that authority because the HOA was never properly incorporated. The HOA was named "Piazza Del Arte Homeowners Association, Inc." but that entity did not legally exist. Instead, an entity named "PDA HOA 5801 Winsome" had been registered with the Secretary of State since 2006. An assumed name certificate was not filed with the Secretary of State until 2013 (10 days after Yeske had filed his second amended petition in the case at hand). Yeske argued that §82.101 of the Act required a certificate of incorporation be issued by the State of Texas for an HOA prior to an HOA conveying any units. The appeals court held that a technical violation of the Act does not excuse payment of condominium assessments. The appeals court relied on a 2007 case, ***Plano Parkway Office Condominiums* v. *Bever Properties, LLC***, 246 S.W.3d 188, 195 (Tex. App.—Dallas 2007, pet. denied), where the Dallas Court of Appeals held that the "defining event in the creation of a condominium regime is the filing of a declaration under section 82.051(a) and 82.055 of the Texas Property Code, not the incorporation of the unit owner's association."

In the other claim of interest, Yeske asserted a claim for breach of fiduciary duty against the treasurer of the HOA. The treasurer argued that as a matter of law officers and directors of a HOA do not owe individual unit owners a fiduciary duty. The appeals court overturned the trial court and found that §82.103(a) of the Act "specifically provides that an officer or director of an association is not liable to the association or any unit owner for monetary damages for an act or omission occurring in the persons capacity as an officer or director unless: (1) the officer or director breached a fiduciary duty to the association or the unit owner; (2) the officer or director received an improper benefit; or (3) the act or omission was in bad faith, involved intentional misconduct, or was one for which liability is expressly provided by statute." (emphasis added)

Happy Endings Dog Rescue* v. *Gregory, 501 S.W.3d 287 (Tex.App.—Corpus Christi 2016, pet. denied). The Gregorys sued Happy Endings for violating a deed restriction that prohibited operating of a veterinary clinic. In the suit, they sought damages of $200 a day for each day of violation, citing Property Code § 202.004, which provides the trial court discretion to award up to $200 per day of violation to property owners associations in a planned development.

During trial, the Gregorys admitted that their claim did not fall within the rule of Property Code § 202.004 and that they were therefore not eligible to collect $200 per day in statutory penalties provided by that section. However, they asserted that they were entitled to damages in this amount "by analogy" to the statute.

The Gregorys produced no authority supporting their claim for statutory damages "by analogy." Instead, Texas canons of construction disfavor this position under the facts of this case. The doctrine of *expressio unius est exclusion alterius*--that is, expression of one implies the exclusion of others--is not an absolute rule, but it is a useful aid to determine legislative intent. By statutory definition, chapter 202 of the Property Code applies only in a residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development. The fact that the Legislature made civil damages expressly available in specific instances suggests that the Legislature did not intend for them to be available, by analogy, in this unrelated instance.

Moseley* v. *Arnold, 486 S.W.3d 656 (Tex.App.—Texarkana 2016, no pet.). For at least the last twenty-four years, the five-acre tract at the southeast corner of Interstate Highway 20 and Texas Highway 43 in Harrison County, on which was once located a business known as Moseley's Truck Stop, has been unimproved property. But, back in 1985, when the five-acre tract and its personal property had been sold as a package by Moseley it had hosted the truck stop. As part of the sale, the five acres was benefitted by a restrictive covenant on the 6.379 acres located at the northeast corner of the same intersection and owned by Moseley. That covenant provided that the Retained Tract may not be developed and used as a truck stop and fuel stop. Now, three decades after the sale, a dispute has arisen between Moseley and the current owner of the five acres, Arnold concerning the restrictive covenant's enforceability against the Retained Tract.

The trial court granted Arnold summary judgment that the restrictive covenant was enforceable against the Retained Tract. Moseley's appeal argues that Arnold lacked standing to enforce the covenant and that fact issues on the presence of changed conditions make Arnold's summary judgment improper.

Moseley argues that, under the terms of the restrictive covenant agreement, Arnold is not one of the intended beneficiaries of the restrictive covenant, Moseley reasons that the transaction with the people he sold to, the Gormans, gave them two separate and distinct rights as expressed in the two separate documents delivered to them at closing. The warranty deed gave them their ownership rights in the five-acre tract, and the restrictive covenant agreement gave them the right to restrict the use of the Retained Tract. Moseley emphasizes that the warranty deed did not reference the restrictive covenant and points to the language in the operative clause of the restrictive covenant agreement stating that the restrictive covenant is "for the benefit of Robert T. Gorman, and wife, Nancy S. Gorman, and their successors and assigns." This, he argues, shows the clear intent of the parties to limit the right of enforcement of the restrictive covenant to the Gormans and their successors and assigns of the restrictive covenant agreement. In other words, Moseley contends that only those persons who received a specific, written assignment of the restrictive covenant agreement from the Gormans have standing to enforce the restrictive covenant. Since there is no evidence of an assignment of the restrictive covenant agreement, and since none of the deeds in Arnold's chain of title reference the restrictive covenant, Moseley reasons that there is no privity of estate that would entitle Arnold to enforce the restrictive covenant.

Arnold argues that the intent of the parties was that the intended beneficiaries of the restrictive covenant are the five-acre tract and any person owning an interest in the five-acre tract. Therefore, she argues, since she owns the five-acre tract, she is an intended beneficiary and has standing to enforce the restrictive covenant.

Standing is a constitutional prerequisite to maintaining suit. The lack of standing deprives a court of subject-matter

jurisdiction to hear a case. In suits over restrictive covenants, a person has standing to enforce the restriction only on showing that the restriction was intended to inure to his or her benefit.

Generally, a restrictive covenant may be enforced only by the parties to the restrictive covenant agreement and those parties in privity with them. Privity of estate exists when there is a mutual or successive relationship to the same rights of property. Further, any person entitled to benefit under the terms of a restrictive covenant may enforce it. The summary judgment evidence establishes that Arnold is the successor of the Gormans' interest in the five acres. The resolution of this issue, then, requires us to construe the intent of the parties, as expressed in the restrictive covenant agreement, to determine whether Arnold, as the successor of the Gormans' interest in the five-acre tract, is an intended beneficiary who is entitled to benefit under the terms of the restrictive covenant agreement.

The operative clause of the restrictive covenant agreement contains three clauses relevant to determining the parties' intent regarding its intended beneficiaries. First, it states that the purpose of the restrictive covenant is to benefit the Gormans, their successors and assigns. Second, it provides that the restrictive covenant is given to protect the value and desirability of the five-acre tract being purchased by the Gormans. Finally, the operative clause expresses the parties' intent that the restrictive covenant run with the land and binds all parties owning any interest in the Retained Tract.

Moseley's construction requires us to consider the first clause only and renders the remaining clauses meaningless. However, when the clauses are read together, it is clear that the restrictive covenant is meant to benefit the five-acre tract the Gormans were purchasing, and that the Gormans and their successors and assigns are meant to be beneficiaries only to the extent of their ownership interest in the five-acre tract. Since the summary judgment evidence establishes that Arnold owns the five-acre tract and is a successor to the Gormans' interest in the five-acre tract, she is a beneficiary under the plain terms of the restrictive covenant agreement and may enforce the restrictions.

In re *Keenan*, 501 S.W.3d 74 (Tex. 2016). Keenan lives in the River Oaks subdivision in Houston. Her home is subject to deed restrictions enforced by a homeowners' association, River Oaks Property Owners, Inc. In 2014, ROPO sued Keenan seeking an injunction requiring Keenan to remove improvements that allegedly violated a limit on impervious cover. The limit is found in 2006 "Amended Restrictions" that purported to amend the neighborhood's deed restrictions. Keenan filed a declaratory judgment counterclaim asserting that the Amended Restrictions were "not properly enacted" and were "unenforceable."

Keenan served a discovery request for production of the homeowner ballots on the 2006 Amended Restrictions. ROPO objected that the ballots were confidential and privileged voting records and were irrelevant to the dispute. The trial court signed an order granting Keenan access to the ballots. But the order stated that only Keenan's counsel could review the ballots and that Keenan could not copy the ballots; it also provided that the contents of the ballots could not be disclosed "to anyone else" without further court order.

Keenan's counsel inspected the ballots and asked for modification of the January 27, 2015 order that would remove the restrictions on access to the ballots and order production of the ballots to Keenan. The trial court refused to order production of the ballots. Keenan sought mandamus relief.

A writ of mandamus will only issue if the trial court clearly abused its discretion and relator has no adequate remedy by appeal. The court thought a key issue is

whether ROPO obtained sufficient votes to enact the 2006 Amended Restrictions. Keenan is entitled to challenge the sufficiency of the votes, but the trial court has so restricted Keenan's ability to do so that mandamus relief is warranted.

Under the trial court's rulings, Keenan cannot introduce the ballots themselves to prove an insufficient vote to approve of the amendment in issue, nor will the ballots be a part of the record for purposes of appellate review. Keenan's attorney cannot reveal the contents of the ballots at trial under the January 27, 2015 order. Assuming no hearsay or best evidence problem, Keenan's counsel could in theory testify on this key factual dispute, if the trial court allows it, because he reviewed the ballots. But Keenan's counsel should not be forced to do so.

Under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct, "A lawyer shall not . . . continue employment . . . if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client." Keenan's lawyer should not be forced to withdraw because the trial court's discovery rulings have made his knowledge the only means of presenting the factual support on a key issue. Rule 3.08 "should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice."

ROPO cites section 209.00594 of the Property Code in support of its claim that the ballots should be treated as confidential, though ROPO concedes that the ballots are not statutorily protected as confidential, per se. Section 209.00594(c) states that only a person qualified to tabulate votes in a property owners' association election may be given access to the ballots.

The court would not foreclose the trial court from entering an appropriate protective order if it determines that the confidentiality of the ballots is an interest that should be protected in these circumstances. Such measures might include an order sealing the ballots, providing that only selected persons such as jurors, parties, attorneys, and experts are allowed to examine the ballots, requiring that the identity of the voters be redacted, or requiring that persons with access to the ballots not disclose their contents except as specified in the order.

The court conditionally granted mandamus relief directing the trial court to permit Keenan to copy the ballots and disclose them for purposes of discovery, expert analysis, trial preparation, and trial. The ballots should be included in the record. The court may order redaction of names of the voters or require the ballots to be filed under seal, or impose some other appropriate protective order to protect confidentiality.

PART XII
TAXATION

Sorrell* v. *Estate of Carlton, 504 S.W.3d 379 (Tex. App.—Houston [14th Dist.] 2016, pet. pending). Sorrell acquired certain property, previously owned by the Estate of Carlton, at a tax sale. The Estate attempted to redeem the property, in accordance with Tex. Tax Code § 34.21, approximately a month prior to the deadline for redemption. The statutory redemption provision requires payment of: (i) the amount bid for the property, (ii) the amount of deed recording fees, (iii) the amount paid for taxes, penalties, interest and costs, and (iv) a redemption premium of 25% of the aggregate total. The tender by the Estate did not include the amount for taxes, penalties, interest and costs, and the tender included a letter requiring execution of a redemption deed and a statement to notify the Estate if there were any additional claimed expenses, which would be "paid, upon review."

The court majority considered whether the tendered amount was substantial

compliance under the redemption statute and concluded the amount was not small or insignificant and, therefore, was not in substantial compliance. The court reviewed other authority on whether payments would constitute substantial compliance, noting that the determination was based, on a case by case basis, on the size of the amount paid and the size of the amount left unpaid as well as the promptness of the late payment. Other courts have concluded there was substantial compliance in payment where the amount of shortage was $172.72, and another where the amount was less than 1% of the amount owed; however, in other cases the payment amount was not in substantial compliance when the tender was short by $7,782 and $6,076. In the subject case, the shortage in payment by the Estate was approximately $11,700. Nevertheless, the court noted that it could not stop its analysis based solely on the amount tendered, but must consider other factors for substantial compliance. The Estate had written a letter requesting an itemization of additional expenses, to which Sorrell responded four days after the redemption deadline. To effect a redemption after the tax sale, the prior owner must make an unqualified tender of the required amounts within the statutory time period; however, the Sorrell court would not view the Estate's tender as conditional merely for asking for the quitclaim deed allowed by statute. The court distinguished ***Bluntson* v. *Wuensche Servs., Inc.***, 374 S.W.3d 503 (Tex. App.—Houston [14th Dist.] 2012, no pet.), because the tendering party asked for the tendered checks to be held in trust pending the resolution of other costs. On the other hand, in Sorrell, the Estate did not condition its offer on the resolution of any issue, nor did it threaten to dispute any itemization by Sorrell by reason of the language that such other costs would be paid “upon review”.

Justice Frost dissented noting that the statutory payment amounts were clear and required and should be strictly construed, pointing out that if the purchaser at the tax sale refused to provide itemization, the statutory regime provided an alternative means to determine the exact amount needed to be tendered. Further, Justice Frost took issue as to whether the term “upon review” represented an unconditional tender, concluding that such language was not an unconditional agreement to pay the statutory requirements and, therefore, would not constitute an unconditional tender.

PART XIII
CONSTRUCTION

El Paso County* v. *Sunlight Enters. Co., 504 S.W.3d 922 (Tex. App.—El Paso 2016, no pet.). This case is of particular interest to the construction industry because it interprets §16.071(a) of the Texas Civil Practice and Remedies Code which provides that a “contract stipulation requiring a claimant to give notice of a claim for damages as a condition precedent to the right to sue on a contract is not valid unless it is reasonable, and that a stipulation requiring notification within less than 90 days is void.” Although the language of §16.071(a) has been in its current form since 1891, no court has ever addressed whether §16.071(a) specifically applies to the notice of claims provisions which are typically found in construction contracts. In the case at hand, Sunlight entered into a construction contract with El Paso County (the “County”). The County terminated the contract for lack of performance. Sunlight sued for breach of contract claiming that it had incurred costs as a direct result of the County's actions to delay and/or hinder Sunlight's performance under the Contract. The Contract in question had a clause requiring Sunlight to file any claims regarding additional compensation within seven days or they would be deemed waived. Sunlight argued that the deadlines imposed by the contract were voided by §16.071(a) and the trial court issued a partial summary judgment in favor of Sunlight.

The El Paso Court of Appeals reversed the trial court and held that §16.071(a) does not apply to the conditions of a contract

requiring notice of requests for extensions of time or additional compensation because these are not the same as a "claim for damages." The appeals court reasoned that §16.071(a) must "be strictly construed because it is restrictive and in derogation of the common-law right to freely contract." The appeals court went on to state that despite the fact that many construction contracts provide broad notice provisions that require notice as a condition precedent to the right to sue on the contract, and are often times related to conditions that may lead to a claim for damages, these provisions are not the same as a "notice of a claim for damages."