CASE UPDATE

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

29th ANNUAL ROBERT C. SNEED
TEXAS LAND TITLE INSTITUTE
December 5 and 6, 2019
San Antonio, Texas

CASE UPDATE

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

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 577 S.W.3d and Supreme Court opinions released through November 8, 2019.

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.

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

TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES 1

PART II HOME EQUITY LENDING 1

PART III USURY 2

PART IV GUARANTIES 4

PART V LEASES 7

PART VI DEEDS AND CONVEYANCES 14

PART VII VENDOR AND PURCHASER 22

PART VIII PARTITION 29

PART IX BROKERS 30

PART X LIS PENDENS 31

PART XI EASEMENTS 32

PART XII ADVERSE POSSESSION AND QUIET TITLE ACTIONS 33

PART XIII CONDEMNATION 34

PART XIV LAND USE PLANNING, ZONING, AND RESTRICTIONS 34

PART XV TAXATION 37

PART XVI CONSTRUCTION 41

PART I
MORTGAGES AND FORECLOSURES

Mulvey* v. *U.S. Bank National Association, 570 S.W.3d 355 (Tex.App.—El Paso 2018, no pet.). Among other issues in this foreclosure case was whether Mulvey had properly tendered payment. Mulvey was behind in his payments on his loan. Wells Fargo was the loan servicer and the note required payments to be made to a specific post office box or other place designated by the noteholder. Instead, Mulvey tried to make payments at a Wells Fargo bank, in amounts less than what was owed.

Tender must be at the place provided in the contract for performance. Failure to tender at the place designated by the contract belies a proper tender. Even though Mulvey swore that he'd tendered payment at a Wells Fargo bank, he never established that the physical bank location was allowed or required by note holder.

Mulvey swore that he tried to make one monthly payment around July or August of 2009 (though the payment was due on the 1st of July). He does not claim to have made tender of any additional monthly payments, nor does his response or briefing explain how a refusal to accept that single payment excused his performance for all the subsequent payments. U.S. Bank's summary judgment was premised on a default of all the payments from July 1, 2009 through November 22, 2010 when the note was accelerated. Mulvey does not show that the improper refusal of a single payment excused all the subsequent payments not made under the loan.

PART II
HOME EQUITY LENDING

Alexander* v. *Wilmington Savings Fund Society, FSB, 555 S.W.3d 297 (Tex.App.—Dallas 2018, no pet.). Pamela claimed that Wilmington's home equity lien on the house owned by her and her husband was void because she did not sign the note. On the same day the note was signed, Pamela did sign a Texas Home Equity Security Instrument.

Pamela's argument was based up Texas Constitution art. XVI, § 50(a) (6)(Q)(xi), which says that a lender forfeits all principal and interest of the extension of credit "if the lien was not created under a written agreement with the consent of each owner and each owner's spouse. . ." Unfortunately for Pamela, the constitution's plain language merely requires that each spouse consent to the lien, and she had signed the document creating the lien. Section 50(a) (6)(Q)(xi) does not require an owner's spouse to consent to a home equity note.

Paull & Partners Investments, LLC* v. *Berry, 558 S.W.3d 802 (Tex.App.—Houston [14th Dist.] 2018, no pet.). In order to borrow a loan from Paull, the Berrys formed an LLC and conveyed their homestead to it. The LLC then borrowed the loan, executing a note and deed of trust. The Berrys continued to live in the house. After some difficulties in making payments, the LLC obtained an additional advance from Paull, which required a deed in lieu of foreclosure as security.

The Berrys defaulted on the loan, and when Paull matured the loan and gave notice of its intention to foreclose, the Berrys responded that the loan was void as an illegal loan on homestead. Paull filed the deed in lieu and the Berrys then filed suit.

Though still strongly protected by the Texas Constitution, homestead rights may be lost through death, abandonment or alienation. The Berrys argued that they never abandoned their homestead because they remained in the home after the conveyance to the LLC. But given the undisputed conveyance, to obtain summary judgment the Berrys also had to prove conclusively that they did not lose their homestead rights through alienation. Homeowners may lawfully convey their homestead to a corporation, even if they remain in the home

after the sale, for the purpose of obtaining a loan.

The Constitution declares void, however, pretended sales involving any condition of defeasance. A pretended sale is one in which the parties do not intend title to vest in the purchaser, but rather that title will be divested within a certain amount time by paying the specified amount. To show a pretended sale involving a condition of defeasance prohibited by the Constitution, there must be proof that: (1) the seller did not intend title to vest in the purchaser; and (2) the transfer involves a condition allowing the seller to reclaim title to the property after the loan is repaid.

The evidence recited by the Berrys does not conclusively prove they did not intend title to vest in the LLC. Instead, genuine issues of material fact exist as to their intent regarding title to the property. For example, the Berrys executed a warranty deed and delivered it to the title company, which later recorded it. Evidence that a deed has been signed, delivered, and recorded gives rise to a presumption that the grantor intended the deed to become operative as a conveyance. This presumption may be overcome by showing, for example, that the grantor had no intention of divesting himself of title. In such cases, the grantor's intent is a question of fact determined by examining all the facts and circumstances preceding, attending, and following execution of the deed.

The Berrys also failed to establish a condition of defeasance, the second requirement of a void pretended sale. A condition of defeasance is a condition that permits the seller to reclaim title to the property after the debt is paid. The condition need not be expressly stated in the instrument of conveyance. For example, a condition of defeasance may be implied from other language in the conveyance, such as that it was made to secure the payment of a debt; or stated in a contemporaneous document, such as an option to repurchase on particular terms after the debt is paid.

Here, the deed does not contain an express condition of defeasance or other language from which such a condition could be implied. Nor does the record contain any evidence of other statements of intent to reconvey the property on certain terms after the debt is paid. In any event, whether to imply a condition of defeasance is ordinarily a question of fact.

Because the Berrys did not conclusively establish the two requirements of a pretended sale, the trial court erred in granting summary judgment declaring the conveyance from the Berrys to the LLC void.

The Berrys also sought forfeiture under Article XVI, Section 50(a)(6)(Q)(x). Section 50(a)(6). Based on the Supreme Court's decision in ***Garofolo* v. *Ocwen Loan Servicing, L.L.C.***, 497 S.W.3d 474 (Tex. 2016), the court held that section 50(a)(6)(Q)(x) does not provide an independent cause of action for forfeiture of principal and interest owed on a loan.

PART III
USURY

Leteff v. Roberts, 555 S.W.3d 133(Tex.App.—Houston [1st Dist.] 2018, no pet.). Leteff was looking for financing for his business and was introduced to Roberts. They met and struck a deal. At Leteff's suggestion, Roberts would loan Leteff $40,000 that would be repaid in 45 days along with an "interest amount" of $20,000. They repeated this structure 17 times, 14 of which called for interest. On at least one occasion, Leteff met Roberts at Roberts's house for a loan of over half a million dollars. That amount was counted out in cash, and Leteff took the cash away in grocery bags.

Leteff repaid only four of the 14 interest bearing loans. Roberts sued and Leteff counterclaimed for usury. The trial court entered a conclusion of law that it would not award any interest in transactions to Leteff

where Leteff defaulted on the repayment. It then found Roberts liable for usury and awarded Leteff an offset against the money he had not repaid for the usury damages on the four loans that he had repaid. No usury damages or offsets were awarded for the 10 loans that were not repaid. The court also did not award attorneys' fees to either party.

Leteff appealed, claiming that he should have been awarded usury damages on all of the loans, whether or not repaid, and that he should have been awarded attorneys' fees.

A creditor who contracts with an obligor for interest that is greater than the maximum interest allowable by law is liable to the obligor for usury. Finance Code § 305.001(a-1). The creditor then owes the obligor a statutory penalty, which is computed by subtracting the amount of maximum allowable interest from the amount of interest actually contracted for and then trebling that result. Interest need not be expressed as a rate or percentage to be considered usurious. If the creditor agrees to any compensation that constitutes interest, the obligor is considered to have agreed on the rate produced by the amount of that interest, regardless of whether that rate is stated in the agreement. Interest means compensation for the use, forbearance, or detention of money. Finance Code § 301.002(a)(4). Usurious interest means interest that exceeds the applicable maximum amount allowed by law. Finance Code § 301.002(a)(17).

The unambiguous text of Finance Code § 305.001(a-1) provides that a creditor is liable for usury when the creditor merely contracts for usurious interest on a loan and notwithstanding the obligor's failure to repay that loan. The statute says:

"A creditor who contracts for or receives interest that is greater than the amount authorized by this subtitle in connection with a commercial transaction is liable to the obligor for an amount that is equal to three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for or received." Finance Code § 305.001(a-1). Either of the two acts connected by the "or" — (1) contracting for usurious interest or (2) receiving usurious interest — by itself is sufficient to trigger liability. Even if Roberts did not receive any usurious interest on the loans that Leteff did not repay, the statute requires that Roberts be held liable because he contracted for usurious interest.

The law awards an obligor usury damages as a boon or a windfall which he is allowed to receive as a punishment to the usurious lender" A successful claim of usury may allow the borrower to avoid a debt he might otherwise owe. The usury law therefore punishes Roberts for contracting for usurious loans, even if the result is a windfall for Leteff.

Roberts contended that these were not loans but were investments. Generally, investments are not subject to usury law because the law applies to transactions in which the obligor has an absolute obligation to repay the principal. The trial court found that these were loans, and Roberts did not challenge that finding of fact.

Roberts also argued that the interest amounts were Leteff's suggestion. But the test for alleged usury is not concerned with which party might have originated the usurious provisions.

Roberts also argued that equitable doctrines like unclean hands and unjust enrichment should bar a usury claim. The court held that the action for usury is not subject to these doctrines.

The court went on to award attorneys' fees to Leteff under Finance Code § 305.005. Under the statute's plain language, the only requirement for awarding an obligor reasonable attorneys' fees is that the creditor be found liable for usury. The trial court found Roberts liable for usury under Finance Code § 305.001. Therefore, the trial court should have awarded Leteff the amount that

the parties stipulated to for attorneys' fees.

PART IV
GUARANTIES

Duarte-Viera* v. *Fannie Mae, 560 S.W.3d 258 (Tex.App.—Amarillo 2016, no pet.). The Fannie Mae deed of trust signed by the borrower included provisions addressing determinations of fair market value for purposes of Property Code § 51.003, which provides for a determination of fair market value to reduce a post-foreclosure deficiency. The provisions required, among other things, that evidence of value be provided by expert opinion testimony only from a licensed appraiser with at least five years' experience in appraising similar property in the locale. At trial, the Guarantors sought an offset based on § 51.003. Their evidence of fair market value was a declaration by one of the Guarantors and a certified copy of a tax appraisal document. Fannie Mae objected to that evidence on the ground that allowing them into evidence would constitute a violation of the borrower's deed of trust. The trial court ruled the evidence was inadmissible.

The Guarantors argued that they were not parties to the deed of trust and that the deed of trust provisions were not included in the guaranty. So, the question was whether the Guarantors were bound by the deed of trust provisions.

The note, guaranty, and deed of trust were each made on the same day. The guaranty recites the Guarantors had an economic interest in the borrower, the guaranty was a required condition for the loan, and the guaranty was given in consideration for the loan. According to the guaranty's merger clause, the guaranty and the other loan documents represent the final agreement between the parties. Similarly, a clause in the deed of trust states that, the note and other loan documents represent the final agreement between the parties. The definition of loan documents includes all guaranties. Agreements executed at the same time, with the same purpose, and as part of the same transaction, are construed together.

Under the guaranty's language, the primary item guaranteed was the entire Indebtedness. The term "Indebtedness" was not defined in the guaranty but in the deed of trust, which defined the Indebtedness to mean the principal of, interest on, and all other amounts due at any time under the note, the deed of trust or any other loan document. The amounts due at any time under the note and deed of trust would include a deficiency remaining after foreclosure.

The Guarantors argue that calculation of the Indebtedness does not include the offset against a deficiency provided under § 51.003. Determining the Indebtedness and applying the statutory offset, the Guarantors argue, have nothing to do with one another. Accordingly, they reason, their guarantee of the Indebtedness bears no relation to the terms of the deed of trust affecting the manner in which fair market value, and the resulting offset, are to be determined.

The court disagreed. By the Guarantors' reasoning, the offset to which the Guarantors would be entitled is to be determined by § 51.003, unaffected by the evidentiary requirements of the deed of trust, while the offset available to the borrower would be determined by § 51.003, as affected by those requirements. If that's the case, the amounts owed by the guarantor and borrower could be quite different. The court did not see how that result would accomplish the guarantee of the entire indebtedness required by the guaranty. Construing the documents together, and applying the express terms of the guaranty, the court held the provisions of the deed of trust applicable to the Guarantors.

Orr* v. *Broussard, 565 S.W.3d 415 (Tex.App.—Houston [14th Dist.] 2018, no pet.). Co-guarantors generally are required to bear equally the loss resulting from the principal debtor's default. Thus, a co-obligor who discharges more than his share of the common obligation may seek equitable

contribution from his co-obligors. The elements of a claim for equitable contribution are that (a) the plaintiff and the defendant share a common obligation or burden, and (b) the plaintiff has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden.

Godoy* v. *Wells Fargo Bank, N.A., 575 S.W.3d 531 (Tex. 2019). Godoy guarantied a loan made to GDG. The guaranty included a number of waivers of defenses. Among those, the guaranty included a waiver of "any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations."

GDG defaulted, Wells Fargo foreclosed and there was a resulting deficiency. Wells Fargo sued Godoy on his guaranty, and Godoy responded that the two-year statute of limitations in Property Code § 51.003 barred the action. In response, Wells Fargo claimed that Godoy waived the two-year statute. The trial court ruled in favor of Wells Fargo.

On appeal, Godoy argued that a statute of limitations defense can only be waived if the language in the waiver is specific and for a defined period of time. Godoy claimed that the waiver he agreed to was indefinite and thus void as against public policy because, he contended, it allowed Wells Fargo to bring suit at any time in the future. Fargo argued that, by signing a broad waiver of all defenses, a party such as Godoy can waive all limitations defenses indefinitely. The court of appeals held, based upon the Supreme Court's holding in ***Moayedi* v. *Interstate 35/Chisam Road, L.***P., 438 S.W.3d 1 (Tex. 2014), that Godoy's agreement to waive all rights or defenses arising by reason of any anti-deficiency law was sufficient to waive section 51.003(a)'s two-year statute of limitations. The court of appeals did not consider Godoy's argument that his contractual waiver of the limitations period was void as against public policy.

Although it did not consider Godoy's public policy arguments against enforcement of the waivers, the court of appeals did not decide whether the guaranty agreement's waiver provision was sufficient to waive all Godoy's possible limitations defenses. Because Wells Fargo sued within the four-year limitations period applying generically to suits to collect debts, the court of appeals concluded that its suit was timely even if Godoy could not contractually waive all limitations defenses. The court of appeals decided only that Godoy waived the two-year statute of limitations and that Wells Fargo's suit—filed three-and-a-half years after the foreclosure sale—was not barred by the four year limitations period that would apply in the absence of the two-year period.

At the Supreme Court, Godoy contends that his contractual waiver of limitations defenses is void as against public policy. In ***Simpson* v. *McDonald***, 179 S.W.2d 239, 243 (Tex. 1944), the Supreme Court stated "It appears to be well settled that an agreement in advance to waive or not plead the statutes of limitation is void as against public policy." Since Simpson was decided, courts of appeals have built upon its holding to require that a waiver of a statute of limitations is void unless the waiver is specific and for a reasonable time. The courts of appeals have never understood Simpson as Godoy does, as an absolute bar on contractual waivers of statutes of limitation. Instead, from even before Simpson was decided, the general rule has been that such waivers must be specific and for a reasonable time. Blanket pre-dispute waivers of all statutes of limitation are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced.

The court said this holding did not conflict with ***Moayedi*** which held that a general waiver in a guaranty was sufficient to waive the right of offset under Property Code § 51.003. ***Moayedi*** did not consider statutes of limitations, which the court found significant because a limitations bar differs

materially from a debtor's or guarantor's rights to valuation and offset under chapter 51.

While in general, parties may waive statutory and even constitutional rights, a statute of limitations is not solely a right belonging to the party asserting it. It protects defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. In addition to affording comfort and repose to the defendant, statutes of limitation protect the courts and the public from the perils of adjudicating stale claims.

In examining whether Godoy's contractual waiver of the two-year limitations period is enforceable, the court looked at the waiver provisions of the guaranty. Section (E) of the waivers states that the guarantor "waives any and all rights or defenses arising by reason of . . . any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations." Section (F) purports to waive "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." The court held that both of those waivers were unenforceable with respect to statutes of limitation because they purport to completely waive all limitations periods. Neither section is "specific" to a particular limitations period, and neither section has a "reasonable time" period limiting the waiver.

Section A of the waivers provides that "Guarantor also waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale. . ." Unlike sections (E) and (F), section (A) is both "specific" and "for a reasonable time." As for specificity, section (A) waives a particular, identifiable statute of limitations—the two-year period provided by section 51.003. It does so by waiving all "defenses" arising from any "antideficiency" law. Section 51.003 is Texas's "anti-deficiency law.

Section (A) also satisfies the "for a reasonable time" requirement. It does not state a substitute limitations period or provide a specific end-date for the waiver, defects which might make other such agreements unenforceable. In this instance, however, the law provides a reasonable four-year limitations period as a backstop. Once section 51.003(a)'s two-year statute of limitations is waived by operation of section (A), the four-year statute of limitations applying to suits to collect debts found in section 16.004(a)(3) of the Civil Practice and Remedies Code becomes applicable.

Wyrick* v. *Business Bank of Texas, N.A., 577 S.W.3d 336 (Tex.App.—Houston [14th Dist.] 2019, no pet.). The Bank made a loan to the Borrower, which was supposed to be secured by some leasehold assignments. The Guarantors guarantied the loan pursuant to a written guaranty that contained the typical bank guaranty provisions. The guaranties stated that the Guarantors "unconditionally, irrevocably, and absolutely" guarantied payment and performance of the Borrower's obligations. It also contained broad waivers and stated that the Guarantors' obligations "shall not be affected by any circumstances, whether or not referred to in this Unconditional Guaranty, which might otherwise constitute a legal or equitable discharge of a surety or guarantor." The guaranties specifically stated that the Guarantors waived "all rights to require Lender to (a) proceed against the borrower; (b) proceed against or exhaust any collateral held by Lender to secure the payment of the indebtedness or (c) pursue

any other remedy it may now or hereafter have against the borrower."

When the Borrower defaulted, the Bank did not foreclose on its collateral but proceeded against the Guarantors. The Guarantors objected. They contended that the Bank had assured them it would proceed against the collateral first. They noted that the Bank didn't foreclose on the collateral because it failed to secure the leasehold assignments and landowner consents contemplated by the note.

The Guarantors claimed that they were fraudulently induced into signing the guaranties by the Banks's representation to them that it would obtain valid security interests in the collateral. In order to show fraudulent inducement, the Guarantors were required to prove that they had justifiably relied upon the Bank's representations. Although justifiable reliance usually presents a fact question, it may be negated as a matter of law when circumstances show that the reliance cannot be justified. Texas courts have repeatedly held, a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms. Reliance on oral representation that is directly contradicted by express terms of written agreement not justified as a matter of law.

The guaranties state explicitly that appellants' obligations would be unconditional irrespective of the genuineness, validity, regularity, or enforceability of the loan. By signing the guaranties, the Guarantors waived the benefit of all principles or provisions of law, statutory or otherwise that contradict the terms of the guaranties and agreed that their obligations would not be subject to any legal or equitable discharges. The Guarantors further agreed that "any security for the Debt may be modified, exchanged, surrendered[,] or otherwise dealt with," and that in any event the Bank was not required to proceed first against the Borrower or exhaust any collateral before enforcing the guaranties. Because the guaranties' express terms make clear that the Bank could have abandoned or "surrendered" the collateral altogether, whether the Bank actually secured the collateral or whether the collateral is actually available is immaterial.

The Guarantors' argument about reliance also failed because they knew at the time they signed the guaranties that the Bank did not have valid security interests in the collateral. A party may not rely justifiably on a fraudulent misrepresentation when "he knows that it is false or its falsity is obvious to him.

The Guarantors also claimed that the guaranties were unenforceable because of a mutual mistake. According to the Guarantors, the alleged mutual mistake was that neither the Guarantors nor the Bank was aware that there was no collateral. The Bank challenged this defense, asserting that the Guarantors assumed the risk of any mistake under the guaranties' terms. Here, the Guarantors assumed the risk that the Bank's acts or omissions would leave the Bank without collateral, or that the Bank could enforce the guaranties without first proceeding against any secured collateral, because all parties agreed the Guarantors would be liable on the guaranties "irrespective of the genuineness, validity, regularity[,] or enforceability of the Note, the Assignment, or any other circumstance which might otherwise constitute a legal or equitable discharge."

PART V
LEASES

***Rohrmoos Venture* v. *UTSW DVA Healthcare, LLP*,** No. 16-0006 (Tex. April 26, 2019). Rohrmoos leased a building to UTSW for a dialysis clinic. At some point UTSW began experiencing water penetration in the building's concrete foundation and installed ceramic floor tiles because of the moisture problems. Because UTSW viewed the commercial building as unsuitable for its intended commercial purpose, UTSW

terminated its lease early, vacated the premises, and relocated, while still allegedly owing approximately $250,000 in unpaid rent.

UTSW then sued Rohrmoos and the joint-venturers behind it for breach of contract and breach of the implied warranty of suitability. Rohrmoos answered with various affirmative defenses and counterclaimed for negligence and breach of contract. The case was submitted to a jury. The jury found that UTSW and Rohrmoos both failed to comply with the lease, that Rohrmoos failed to comply first, and that Rohrmoos breached the implied warranty of suitability. The court of appeals affirmed.

Rohrmoos argues that the court of appeals incorrectly assumed that a material breach of a commercial lease can justify termination, resulting in a holding that is contrary to our decision in Davidow. There was a question whether this issue was properly preserved on appeal, and the Supreme Court held that it was. The availability of termination as a remedy did not become an issue until the trial court entered judgment authorizing termination. When that happened, Rohrmoos promptly filed a motion to reform the judgment or, alternatively, for a new trial. In that motion, Rohrmoos asserted that under Texas law, a tenant claiming material breach of lease is not entitled to terminate the lease unless the lease expressly provides for that remedy. This gave the trial court notice of Rohrmoos's complaint that the verdict and judgment were at least partially based on a theory of recovery that Rohrmoos contends did not support termination as a matter of law. Furthermore, whether a tenant can terminate a commercial lease under Davidow for material breach is a question of law for the court to decide, and it is not one which must be resolved before the jury can properly perform its fact-finding role.

Rohrmoos's position is that ***Davidow*** expressly prohibits termination as a remedy for material breach of a commercial lease. However, the court said that ***Davidow*** merely held that there was an implied warranty of suitability in commercial leases, and what the implied warranty means, i.e., that that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. The court said that ***Davidow*** did not, as Rohrmoos contends, make an absolute statement that a material breach of a commercial lease will never justify termination. In fact, if anything, the holding in ***Davidow*** leans the other way.

In ***Davidow***, the Supreme Court addressed the implications of independent covenants in Texas property law, concluding that they were antiquated and unworkable in the modern lease setting. The opinion begins with the observation that "[a]t common law, the lease was traditionally regarded as a conveyance of an interest in land, subject to the doctrine of caveat emptor." Once the landlord delivered the right of possession to the tenant, the tenant had a duty to pay rent as long as he was in possession. All lease covenants at common law were thus considered independent because the tenant, being in possession of everything he was entitled to under the lease, had to pay rent no matter what lease covenant the landlord breached. This outdated common law concept, ***Davidow*** noted, "is no longer indicative of the contemporary relationship between the tenant and landlord." The ***Davidow*** court held that the tenant's obligation to pay rent and the landlord's implied warranty of suitability are therefore mutually dependent.

The Supreme Court said that, although the last sentence refers to the tenant's obligation to pay rent as being dependent on the landlord's implied warranty of suitability, there is no reason to conclude that the court in ***Davidow*** did not intend to extend that same dependency to the landlord's obligations under the lease. Rohrmoos cites no authority that has interpreted ***Davidow*** to mean that a tenant cannot terminate a commercial lease

for material breach of the contract. This is because there is none, and the court saw no reason to hold otherwise.

To be clear, said the court, ***Davidow*** stands for the proposition that in a commercial lease, a landlord warrants that the property is suitable for the tenant's intended commercial purpose. This implied warranty exists separately and apart from any obligation the landlord may have under the lease. As a matter of law, the implied warranty is limited only by specific terms in the parties' commercial lease whereby a tenant expressly agrees to repair certain defects. Parties are also free to contract out of the implied warranty by expressly waiving it in their contract. Termination is available as a remedy for breach of the implied warranty of suitability. The same holds true for a landlord's material breach of the commercial lease.

Wasson Interests, Ltd. **v.** ***City of Jacksonville***, 559 S.W.3d 142 (Tex. 2018). The City built Lake Jacksonville in the late 1950s. Over the next several decades, the City developed the surrounding area and began leasing lakefront lots to private parties. In 1996, the Wassons entered into long-term leases of City-owned lakefront lots and constructed a seven-bedroom house. The lease agreements incorporated the City's Rules & Regulations Governing Lake Jacksonville by reference. Those rules provide that all lots outside the City's corporate limits—which include the Wassons' lots—"shall be restricted to residential purposes only," and that no lot may be used to operate a "business or commercial enterprise." The rules also provide that breach of "any of the regulations . . . shall be grounds for cancellation of the lessee's lease."

The Wassons initially lived on the property but later moved and assigned the leases to Wasson Interests, Ltd. Planning to use the property as a bed-and-breakfast and event center, they sought several variances from the Lake Jacksonville Advisory Board and the City Council, although it believed the variances were unnecessary. The Board denied the requests. The Wassons did it anyway, advertising and renting the property for short lease terms. The City decided these uses violated the leases and terminated them.

The City initially sought to evict the Wassons, but the parties worked out a reinstatement and permitted Wasson to rent the property to single families and small groups for short periods of time and only for "residential purposes." Later, the City again terminated the leases, claiming that the Wassons had been using sham leases to circumvent the reinstatement. Wasson sued. The City claimed that governmental immunity barred the Wassons' claim. The trial court and the court of appeals agreed.

Municipal corporations exercise their broad powers through two different roles; proprietary and governmental. This dichotomy recognizes that sovereign immunity protects governmental units from suits based on its performance of a governmental function but not a proprietary function. In an earlier version of this case, the Supreme Court held that the governmental/proprietary dichotomy applies to breach-of-contract claims. ***Wasson Interests, Ltd.*** **v.** ***City of Jacksonville*** (Wasson I), 489 S.W.3d 427, 439 (Tex. 2016). After ***Wasson I***, on remand the court of appeals held that the Wassons' claims arose from the City's performance of a governmental function. The Supreme Court in this case held otherwise.

The distinction between a municipality's governmental and proprietary functions seems plain enough, but the rub comes when it is sought to apply the test to a given state of facts. Generally, governmental functions consist of a municipality's activities in the performance of purely governmental matters solely for the public benefit. Historically, governmental functions have consisted of activities normally performed by governmental units such as police and fire protection. Acts done as a

branch of the state—such as when a city exercises powers conferred on it for purposes essentially public—are protected by immunity.

Proprietary functions, by contrast, are those performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality, and not as an arm of the government. These are usually activities that can be, and often are, provided by private persons. Acts that are proprietary in nature, therefore, are not done as a branch of the state, and thus do not implicate the state's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign.

Article XI, § 13 of the Texas Constitution authorizes the Legislature to define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law. Exercising that authority, the Legislature, in the Tort Claims Act, has defined and enumerated governmental and proprietary functions for the purposes of determining whether immunity applies to tort claims against a municipality. Civil Practice & Remedies Code § 101.0215.

The Act enumerates thirty-six governmental functions, ranging from police and fire protection and control to animal control. Conversely, the Act defines proprietary functions as those that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality.

The City asserts that immunity applies because all of its activities constituted governmental functions, including its creation of Lake Jacksonville as a water supply, its decision to lease the property surrounding the lake, its adoption of ordinances and rules governing use of the leased property, and its attempt to enforce those rules against Wasson.

The Wassons, however, argue the only relevant activity is the City's decision to lease the property.

The court agreed with the Wassons. It held that, to determine whether governmental immunity applies to a breach-of-contract claim against a municipality, the proper inquiry is whether the municipality was engaged in a governmental or proprietary function when it entered the contract, not when it allegedly breached that contract. Stated differently, the focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply. Conversely, if a municipality contracts in its governmental capacity but breaches that contract for proprietary reasons, immunity does apply. This approach is most consistent with the purposes of both immunity and the governmental/proprietary dichotomy, and it provides clarity and certainty regarding the contracting parties' rights and liabilities.

It went on to hold that the City acted in its proprietary capacity when it leased the property to the Wassons. In reaching that decision, the court considered whether (1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

The court held that the City's entering into the leases was discretionary, that the benefit of the leases was for the residents of the City, not the public at large, that the City was acting on its own behalf, not on behalf of the State, and the act of entering into the leases was not sufficiently related to a governmental function to overcome the

proprietary nature of the action.

El Paso Education Initiative, Inc.* v. *Amex Properties, LLC, 564 S.W.3d 228 (Tex.App.--El Paso 2018, pet. denied). EPEI, doing business as Burnham Wood Charter School District, wanted to lease a site from Amex to construct a building. EPEI operates open-enrollment charter schools chartered by the Texas Education Agency.

A lease was signed by EPEI and Amex. The Lease Agreement contained a recital stating that the document was executed as of 17 April 2008 and included Martinez's signature as manager of Amex as the landlord and Burnham's signature as president EPEI as the tenant. Unaware that the lease had been signed, the attorneys for EPEI and Amex continued to negotiate the terms. A few weeks later, EPEI's attorney sent Amex a notice unequivocally rejecting the Lease Agreement and that it no longer desired to lease any property from Amex.

Amex sued EPEI claiming anticipatory breach of the lease. EPEI filed a plea to the jurisdiction claiming governmental immunity which the trial court denied as to the breach of contract claims and claims for consequential damages. This court affirmed that denial in an earlier case. EPEI filed two additional pleas to the jurisdiction.

Sovereign immunity protects the State and its agencies from lawsuits for money damages. Political subdivisions of the state are entitled to such immunity— referred to by the term governmental immunity— unless such immunity has been waived. . Sovereign immunity encompasses immunity from suit, which bars a suit unless the state has consented, and immunity from liability, which protects the state from judgments even if it has consented to the suit. Immunity from suit implicates a court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. Texas open-enrollment charter schools are governmental entities entitled to immunity from suit to the same extent as public-school districts.

By entering into a contract, a governmental entity necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of the agreement, but it does not itself waive immunity from suit. Immunity from suit may only be waived by the Legislature to protect its policymaking function. To ensure that legislative control is not easily disturbed, a waiver of immunity must be clear and unambiguous.

The issue raised here is whether EPEI waived its immunity from suit pursuant to the waiver provided by Local Government Code § 271.152, which provides that a local governmental entity that is authorized to enter into contracts waives immunity from suit when it enters into a contract subject to Chapter 271. When it does so, immunity from suit is waived.

Because EPEI is an open-enrollment charter school, it is deemed a local governmental entity for purposes of Section 271.152. In addition, no one disputes that EPEI is authorized to enter into contracts. The sole question was whether EPEI entered into a contract subject to Chapter 271.

To qualify as a contract subject to Section 271.152's waiver of immunity, a contract must: (1) be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be properly executed on behalf of the local governmental entity. EPEI claimed the lease was not "properly" executed on behalf of EPEI. Section 271.151(2) does not define the phrase "properly executed." The common meaning of the term "properly" is suitably, fitly, rightly, or correctly. Likewise, the common meaning of the term "execute," when used in the context of a legal instrument, is to complete or perform what is required to give validity to (as by signing and perhaps sealing and delivering). The common meaning of the phrase "on behalf of" is in the interest of, as the representative of, or for the benefit of. As

related to a contract, these terms together convey the meaning that a contract is "properly executed on behalf of" to mean that a contract is signed by a representative in accordance with the requirements for making it valid.

Section 271.151(2)(A) does not state that the contract must be properly executed by the local governmental entity; but instead, it requires that a written agreement be "properly executed on behalf of the local governmental entity." Based on the plain text, the court construed the phrase "properly executed" as referring to the discrete requirements or procedures which are outlined in the relevant statutes, ordinances, charters, or other documents governing the entity and allowing it to enter into contractual agreements. It further construed the phrase "on behalf of" to indicate that the local governmental entity will act through its authorized representative.

In sum, viewed in the light most favorable to Amex, the record shows that (1) EPEI's charter authorizes contracts, such as a lease; (2) the board's minutes purport to indicate that Burnham had at least some authority to enter into the Lease and that the board members were aware of Burnham's discussions with Amex; and (3) Amex delivered the Lease to EPEI in satisfaction of the contract's terms to finalize the agreement. Given the jurisdictional evidence presented by the parties, he court concluded that the resolution of whether the Lease was "properly executed on behalf of" EPEI is an issue for the fact finder on remand, that EPEI did not satisfy its burden in negating the trial court's jurisdiction over the case, and that the trial court correctly denied EPEI's plea to the jurisdiction.

Encinas* v. *Jackson, 553 S.W.3d 723 (Tex.App.—El Paso 2018, no pet.). Pursuant to the terms of the written lease that superseded an oral agreement, Encinas, the tenant, agreed to make Jackson's (the landlord's) loan payments and to be responsible for taxes. There had been an agreement that Encinas would buy the property from Jackson, but that had fallen through.

Jackson learned that Encinas had failed to pay either the loan payments or taxes, so he paid them. Encinas and Jackson entered into an agreement for Encinas to repay him, but she failed to do so. Jackson found a buyer for the property and sold it, and Encinas moved out. After the sale, Jackson sued Encinas to recover the loan payments and taxes that she had failed to pay.

Encinas claimed that the delinquent payments had been satisfied when Jackson sold the property and that he would be unjustly enriched if he recovered the missing payments from her. As she put it, Jackson would be able to "have his cake and eat it too." She also claimed that she was buying the property and business and that, by his sale of the property, Jackson had converted "loan equity" that she had built up The court disagreed.

Conversion is the wrongful exercise of dominion or control over another's property in denial of, or inconsistent with, the other's rights. Money is subject to conversion only when it can be identified as a specific chattel and where there is an obligation to deliver the specific money in question or otherwise particularly treat the specific money. The trial court had held that, although Encinas had tried to purchase the property, the agreements she had made to assume Jackson's loan and pay taxes were done as a tenant under a lease agreement.

Under the terms of the lease agreement, Encinas was to pay the bank directly for Jackson's business loan and was to pay property taxes. She testified that she understood that she was purchasing the laundry business under owner financing and acknowledged that she did not buy the business when she failed to obtain financing, but Encinas also admitted that after her financing failed, she had agreed but failed to make business loan payments as required by

the on-going lease. Encinas also acknowledged that she knew, as stated in the lease agreement, that the business was for sale. Encinas never testified that she was entitled to recover any funds from Jackson's sale of the business to its purchaser, nor presented any other evidence in support of a conversion cause of action for alleged "loan equity." Jackson paid the amounts Encinas failed to pay under the terms of the lease and Encinas failed to show that as an owner, Jackson's subsequent sale of the business, even at a profit, inured any benefit to her as his tenant.

Smith* v. *El Paso Veterans Transitional Living Center, 556 S.W.3d 361 (Tex.App.—El Paso 2018, pet. withdrawn). VTLC filed suit in justice court to evict Smith. Smith lost at the justice court and the county court. On appeal to the Court of Appeals, Smith claimed that his attorney provided him with inaccurate, inadequate, and ineffective services. He claimed that the Sixth Amendment to the U.S. Constitution guarantied him the right of effective assistance of counsel. The court ruled, however, that the doctrine of ineffective assistance of counsel does not apply in civil cases unless there is a constitutional or statutory right to counsel. A defendant in an eviction case does not have a constitutional or statutory right to counsel.

Williamson* v. *Howard, 554 S.W.3d 59 (Tex.App.—El Paso 2018, no pet.). A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant's beneficial use of the premises. Constructive eviction essentially terminates mutuality of obligation as to the lease terms, because the fundamental reason for the lease's existence has been destroyed by the landlord's conduct. The general requirements for constructive eviction are: (1) an intention on the part of the landlord that the tenant shall no longer use or enjoy the premises; (2) a material act or omission by the landlord that substantially interferes with the use and enjoyment of the premises; (3) the act must permanently deprive the tenant of the use and enjoyment of the premises; and (4) the tenant must abandon the premises within a reasonable time after the commission of the act.

The first element requires that the landlord act with the intent to deprive the tenant from the use or enjoyment of the property, although the landlord's intent can be inferred from the circumstances. The second element requires that the landlord commit a material act or omission that substantially interferes with the use and enjoyment of the premises. Here, at some point, utilities were cut off to the trailer park where Williamson had her trailer. Here, Williamson did not cite any statute, rule, or case law in support of the proposition that failing to pay utilities with the subsequent cessation of utilities, in the residential context results in an intentional omission and substantial interference with the use and enjoyment of the premises. In addition, there was only her speculative testimony that it was the landlord’s failure to pay the utility bill that resulted in the termination of utilities. There was no evidence of the landlord’s intent to deprive her of the use of the premises.

***St. Anthony's Minor Emergency Center, L.L.C.* v. *Ross Nicholson 2000 Separate Property Trus*t**, 567 S.W.3d 792 (Tex.App.—Houston [14th Dist.] 2018, pet. denied). The original landlord leased space to EIC. The lease prohibited subletting without the landlord’s written consent, but EIC informed the landlord that its intent was to sublease most of the space to compatible medical companies, and it did so. The landlord didn’t object, but there was no written consent. The original landlord sold the building and assigned the lease to Ross.

EIC defaulted on the lease. St. Anthony’s, as a subtenant, had been paying rent to EIC, but it didn’t make it to Ross, so Ross locked St. Anthony’s out of the space. St. Anthony’s sued.

To establish an unlawful lockout or constructive eviction, a plaintiff is required to prove a landlord-tenant relationship between

the parties. St. Anthony's argues it has done so by virtue of its sublease with EIC. But a landlord that is not a party to a sublease generally has no rights or obligations under the sublease because there is no privity of estate or contract between the landlord and sublessee.

St. Anthony's argues that it has a landlord-tenant relationship with Nicholson under chapter 92 of the Property Code, which St. Anthony's concedes applies only to residential tenancies. Regardless, St. Anthony's asked the court to apply the definitions for "landlord" and "tenant" in chapter 92 to commercial tenancies under chapter 93. The court held that, even if it were to conclude that the definitions were applicable here, which it declined to do, they merely describe parties that can create a landlord-tenant relationship. The relationship itself is still governed by the terms of the applicable lease.

PART VI
DEEDS AND CONVEYANCES

Carl M. Archer Trust No. Three* v. *Tregellas, 566 S.W.3d 281 (Tex. 2018). In June 2003, a warranty deed transferred the surface of certain property located in Hansford, County Texas to the Trustees. In a separate agreement entered into at the same time, the 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, the Farbers, sold their mineral interests on March 28, 2007 to the Tregellases. Before conveying the interests, the Farbers did not notify the Trustees of their intent to sell or of the terms of the deal, and they weren't told of the sale after the fact. The Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011.

The Tregellases argued that the Trustees' claim for specific performance of the ROFR was barred by the statute of limitations. The Trustees argued that the ROFR "ripened into" an option to purchase the conveyed interests on the same terms and conditions and that they had timely exercised the option by filing suit. They also argued that the Tregellases purchased the interest with actual or constructive notice of the ROFR and thus, stood in the shoes of the Farbers. They claimed also that the statute of limitations did not bar their claim because the discovery rule and the doctrine of fraudulent concealment tolled the limitations period.

The trial court rendered judgment for the Trustees and granted specific performance. It held that the Tregellases took the interests with knowledge of the ROFR and were not BFPs and that limitations did not bar the claim. The court of appeals reversed, holding that the cause of action accrued when the mineral interests were conveyed. It held that the discovery rule did not apply because the injury is of the type that generally is discoverable by the exercise of reasonable diligence.

A right of first refusal, also known as a preemptive or preferential right, empowers its holder with a preferential right to purchase the subject property on the same terms offered by or to a bona fide purchaser. Generally, a right of first refusal requires the grantor to notify the holder of his intent to sell and to first offer the property to the holder on the same terms and conditions offered by a third party. When the grantor communicates those terms to the holder, the right ripens into an enforceable option. The holder may then elect to purchase the property according to the terms of the instrument granting the first-

refusal right and the third party's offer, or decline to purchase it and allow the owner to sell to the third party.

A grantor's sale of the burdened property to a third party without first offering it to the rightholder on the same terms constitutes a breach of contract. When a right of first refusal relating to real property is breached, rightholders most frequently seek the remedy of specific performance. If the property has already been conveyed to a third party, however, the only remedy available from the grantor is money damages. Nevertheless, specific performance may still be available as a remedy against the third-party purchaser.

To that end, a person who purchases property with actual or constructive notice of a right of first refusal takes the property subject to that right. And courts are in agreement that such a purchaser stands in the shoes of the original seller when specific performance is sought and may be compelled to convey title to the holder of the right of first refusal. This accords with the longstanding jurisprudence regarding executory contracts for the sale of real property, which may be enforced by specific performance when a third party purchases the property with notice of the contract. Pursuant to the trial court's unchallenged findings, the Tregellases purchased the interest with notice of the ROFR and thus stand in the grantor's shoes with respect to the Trustees' request for specific performance. In the Supreme Court, the Tregellases' sole challenge to the trial court's judgment granting specific performance was that the Trustees' claim is barred by the statute of limitations as a matter of law.

The statute of limitations is an affirmative defense that serves to establish a point of repose and to terminate stale claims. The parties do not dispute that the Trustees' contract claim is governed by the four-year statute of limitations, meaning they were required to assert it within four years after the cause of action accrued.

As a general matter, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy. Put differently, 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. Texas courts consistently hold that a right of first refusal is breached when property is conveyed to a third party without notice to the rightholder. Applying these principles, the court of appeals in this case held that the Trustees' cause of action accrued when their bargained-for right of first refusal had been dishonored and the agreement breached.

The Supreme Court agreed with the court of appeals that the rules governing the accrual of causes of action point to the date of conveyance as the accrual date for limitations purposes. Again, the ROFR was breached when the Farbers conveyed their mineral interest without notifying the Trustees of the Tregellases' offer. At that point, the Trustees' preemptive right was impaired despite the fact that the Tregellases took the property subject to that right. This is because, even if the Trustees retained the right to purchase the mineral interest (albeit from the Tregellases rather than the Farbers), once they learned of the conveyance, they lost their right to purchase the interest at the time contemplated by the ROFR: before the property was sold to a third party.

In sum, when the Farbers sold the burdened mineral interest to the Tregellases in March 2007 without first giving the Trustees the opportunity to purchase it pursuant to the ROFR, a wrongful act caused a legal injury authorizing the Trustees to seek a judicial remedy. Thus, the claim is time-barred unless the accrual date is otherwise deferred.

The discovery rule is a limited exception to the general rule that a cause of action accrues when a legal injury is incurred. When applicable, the rule defers accrual until

the plaintiff knew or should have known of the facts giving rise to the cause of action. The discovery rule is applied when the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable. These two elements attempt to strike a balance between the policy underlying statutes of limitations (barring stale claims) and the objective of avoiding an unjust result (barring claims that could not be brought within the limitations period). The parties do not dispute that the injury here is objectively verifiable; in contention is discoverability.

An injury is inherently undiscoverable when it is unlikely to be discovered within the prescribed limitations period despite due diligence. The determination of whether an injury is inherently undiscoverable is made on a categorical basis rather than on the facts of the individual case. Here, therefore, the courts look not to whether the Trustees in particular could have discovered their injury with diligence, but whether the Trustees' injury was the type of injury that could be discovered through the exercise of reasonable diligence.

The court of appeals held that the Trustees' injury was not inherently undiscoverable. It noted that a conveyance of real property, including one made in violation of a right of first refusal, is likely to be reflected in a publicly recorded instrument and that knowledge of the conveyance may also be gleaned from other public sources like tax rolls and from commercial sources like abstractors. The court thus concluded that the holder of a first refusal right exercising reasonable diligence to protect its interest (as contracting parties must do) would have discovered the conveyance.

The Supreme Court has held that the discovery rule applies in certain circumstances even though the injury could have been gleaned from reviewing publicly available information. Courts have applied the discovery rule to a property owner's fraudulent-lien claims despite the lien's filing in the property records. Such an injury is nevertheless inherently undiscoverable where the property owner has no reason to believe that any adverse claim has been made on his property, and no reason to be checking regularly to see whether such a filing has been made. This is consistent with the well-settled principle that one who already owns the land is not required to search the records every morning in order to ascertain if something has happened that affects his interests or deprives him of his title.

A right of first refusal has been described as essentially a dormant option. The rightholder has no right to compel or prevent a sale per se; rather, as explained, he has the right to be offered the property at a fixed price or at a price offered by a bona fide purchaser if and when the owner decides to sell. Only when the grantor communicates her intention to sell and discloses the offer does the holder have a duty to act by electing to accept or reject the offer.

In light of the grantor's duty to provide notice of an offer, the corresponding absence of the rightholder's duty to act before receipt of said notice, and the fact that a purchaser takes property subject to a recorded first-refusal right, the court agrees with the Trustees that a rightholder who has been given no notice of the grantor's intent to sell or the existence of a third-party offer generally has no reason to believe that his interest may have been impaired. In turn, we cannot conclude that such a rightholder in the exercise of reasonable diligence would continually monitor public records for evidence of such an impairment.

The court thus held that a grantor's conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor's intent to sell or the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder's cause of action until he knew or should have known of the injury.

Trial v. Dragon, No. 18-0203 (Tex. June 21, 2019). Leo and his six siblings each owned a one-seventh interest in the Karnes County property. Leo gave have of his interest to his wife, Ruth. Nine years later, Leo and his siblings conveyed the Karnes County property to the Dragons. The deed to the Dragons reserved minerals for fifteen years. The Dragons did not get title insurance or an abstract of title and weren't represented by counsel. They paid $100,000 for the property, which the sellers financed over a fifteen-year term.

The deed to the Dragons didn't mention the earlier conveyance to Ruth, and she wasn't a party to the conveyance to the Dragons.

About four years after the sale to the Dragons, Leo died and left his wife a life estate with the remainder to their two sons. Ruth kept collecting Leo's share of the Dragon's payments and eventually signed the release of lien "Leo Trial by Ruth Trial." Ruth died and her one-fourteenth interest passed to the two sons.

After the mineral reservation expired, the Dragons sought a new division order directing royalty payments to them. The operator paid those amounts to the Dragons until a lease status report was done and the operator learned that Ruth owned the interest in her own right and it had passed to her sons. A new division order was entered, directing payment to the sons.

The Dragons sued the sons, asserting breach of warranty and estoppel by deed. The trial court ruled in favor of the sons and the Dragons appealed.

On appeal, the Dragons argued that the trial court erred in denying their motion for summary judgment because the 1992 deed conveyed the entire interest in the property, and estoppel by deed divested the Trials of any interest. The sons countered that together they inherited the 1/14 interest from their mother, an independent source from the 1992 deed, and therefore estoppel by deed did not apply.

The court of appeals reversed the trial court's judgment and rendered judgment for the Dragons based on estoppel by deed and the Supreme Court's decision in ***Duhig* v. *Peavy-Moore Lumber Co***., 144 S.W.2d 878. The court of appeals relied on ***Duhig*** to hold that because Leo, grantor to the 1992 deed, breached the general warranty at the very time and execution of the deed by purporting to convey what he did not own, estoppel by deed would apply to estop Leo from claiming an interest that contradicts the general warranty. Building on that, the court concluded that estoppel by deed applies to the sons as remainder beneficiaries of Leo's estate, estopping them from claiming an interest that contradicts the general warranty because estoppel by deed applies to grantors, grantees, privies in blood, privies in estate, and privies in law.

Under the court of appeals' opinion, the sons were divested of an interest they inherited from their mother—her separate property—to satisfy their father's sale of the property in a separate grant. The sons argue that the court of appeals erred by endorsing the proposition that a wife can be divested of her separate real property, despite never having signed a deed, to honor a title warranty made by her husband, merely because the wife's heirs are the same as the husband's heirs. Stated differently, the sons assert that estoppel by deed does not apply because they are not claiming an interest in the property under their father, Leo, the original grantor to the Dragons under the 1992 deed. They are instead contending that their interest in the property arises from their mother who did not sign the 1992 deed and, thus, could not be bound by that deed.

The Dragons, on the other hand, contend that under Texas law a grantee is protected against an over-conveyance when the deed contains a general warranty because the grantor and his or her heirs are estopped from

claiming an ownership interest until the grantee is made whole.

In the broadest sense, estoppel by deed stands for the proposition that all parties to a deed are bound by the recitals in it, which operate as an estoppel. Over the years, the doctrine of estoppel by deed developed in the courts of appeals to have a wide application that all parties to a deed are bound by the recitals in it, which operate as an estoppel, working on the interest in the land if it be a deed of conveyance, and binding both parties and privies. The doctrine, however, is not without limitations. Estoppel by deed does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed.

One of the most prominent displays of the estoppel by deed doctrine is this Court's decision in Duhig, which the court of appeals applied to the facts at issue here. Duhig applies the doctrine of estoppel by deed to a very distinct fact pattern, and its holding is narrow and confined to those specific facts. Duhig, owned a tract of real property subject to a one-half mineral reservation from a previous owner. Duhig purported to convey all of that land and the mineral estate to a subsequent purchaser while attempting to reserve one-half of the minerals for himself. But the warranty deed signed by Duhig did not mention the prior owner's reservation, nor did it indicate that Duhig did not own all of the minerals. The court in that case held that the grantor breached his general warranty in the deed by appearing to convey more than he actually did.

Had the Court stopped its analysis with that observation, then the holding would have rested exclusively on breach of warranty, with the remedy being self-correcting—that any reservation is rendered ineffective until the shortfall in the warranty is remedied, which would presumably be captured by damages. But the Court went on to apply equitable principles because the Duhig held the very interest, one-half of the minerals, required to remedy the breach at the very instance of execution and breach.

Although Duhig still has a place in Texas jurisprudence, the court held that it didn't apply in this case. The facts presented in this case differ significantly. While, in Duhig, the grantor owned the interest required to remedy the breach, at the time of the 1992 deed, Leo did not own the interest required to remedy the breach – Ruth did. And the sons didn't inherit it until after Ruth's death many years later. Had Leo not transferred one-fourteenth to Ruth but held it in trust for his sons, so that the sons would inherit the interest directly from Leo, then perhaps Duhig's application of the estoppel by deed doctrine would fare better for the Dragons. But that is not the case.

Furthermore, regarding the broader estoppel by deed doctrine on which Duhig is based, the sons point out that they do not claim under the 1992 deed, even though they are, undoubtedly, Leo's privies. Rather, they claim an interest independent from that 1992 deed, by title predating the 1992 sale to the Dragons. Estoppel by deed does not bind individuals who are not a party to the reciting deed, nor does it bind those who claim title independently from the subject deed in question.

Cochran Investments, Inc.* v. *Chicago Title Insurance Company, 550 S.W.3d 196 (Tex.App.—Houston [14th Dist.] 2018, pet. pending). England and Garza owned a duplex, subject to a deed of trust to EMC. England conveyed his interest in the duplex to Garza, but in a later involuntary bankruptcy, the conveyance was set aside as a fraudulent conveyance. EMC foreclosed and Cochran bought the duplex at the foreclosure sale.

Cochran sold property to Ayers and gave a special warranty deed. Chicago Title issued an owners title policy to Ayers. The trustee in the England bankruptcy sued EMC and Cochran, claiming that the foreclosure violated the bankruptcy automatic stay.

Ayers was later added to the suit. At that point, Ayers filed a title insurance claim with Chicago Title, which assumed his defense. Chicago settled the suit with the trustee by paying some money, then sued Cochran to recover as subrogee of Ayers under the title policy. The trial court found in favor of Chicago Title and concluded that Chicago Title was subrogated to the rights of Ayers and that Cochran had breached the covenant of seisin implied in the special warranty deed.

On appeal, Cochran asserts that the deed conveying the duplex to Ayers did not imply the covenant of seisin.

A covenant is implied in a real property conveyance if it appears from the express terms of the contract that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore they omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. A covenant will not be implied simply to make a contract fair, wise, or just.

The implied covenant of seisin is an assurance to the grantee that the grantor actually owns the property being conveyed, in the quantity and quality which he purports to convey, and it is breached if the grantor does not own the estate that he undertakes to convey. The covenant of seisin operates in the present and is breached by the grantor at the time the instrument is made if he does not own the property that he undertakes to convey.

To determine whether a conveyance implies the covenant of seisin, courts analyze the conveyance's language. A deed implies the covenant of seisin if the grantor includes in the conveyance a representation or claim of ownership.

Here, the deed at issue does not represent or claim ownership on behalf of Cochran. The granting clause used the words "grant" and "convey," but the court held that the use of those words does not imply the covenant of seisin. Property Code section 5.023(a) delineates the two covenants implied by a conveyance's use of these words:

"(a) Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:

"1. that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and

"2. that at the time of the execution of the conveyance the estate is free from encumbrances."

Chicago Title does not allege that Cochran conveyed the duplex to a person other than Ayers or that the duplex was subject to encumbrances.

Because the deed that conveyed the duplex to Ayers does not represent or claim that Cochran is the owner of the property, it does not imply the covenant of seisin

Ferrara* v. *Nutt, 555 S.W.3d 227 (Tex.App.—Houston [1st Dist.] 2018, no pet.). In 2011, Ferrara and Nutt entered into a Contract for the Lease and Mandatory Purchase of Real Estate - essentially a contract for deed. The lease term was for 13 years, and required Ferrara to purchase the property at the end of the term. The property was a house. The Contract was not recorded.

Ferrara leased the house to Rodriguez. In 2013, Nutt sold the house to Dalu, and after that sale, Rodriguez paid her rent to Dalu instead of Ferrara. Ferrara sued Nutt and Dalu. The trial court held that Property Code Section 5, Subchapter D, which relate generally to executory contracts for the conveyance of residential real property, did not apply to the Contract because the

Property was not "used or to be used as the purchaser's residence or as the residence of a person related to the purchaser within the second degree by consanguinity or affinity."

It is undisputed that Ferrara was not living on the property at the time Nutt sold the property to Dalu in June 2013; instead, Ferrara had rented the property to Rodriguez beginning in early 2012, and he and his family lived on another property nearby. Ferrara claimed that he had always intended to live in the house. He argued that the fact that he rented the property to Rodriguez does not mean that he abandoned his intent to make the property his permanent residence. However, the record contains no evidence concerning Ferrara's plans to move back onto the property. He offered no timeframe of how long he had intended to rent the property to Rodriguez or of when he planned to move onto the property beyond his testimony that he rented the property to recover what he had invested in repairs to the property. He presented no evidence of definite plans or preparations to return to the property. Viewing the evidence in the light most favorable to the trial court's findings, as we must, we conclude that the trial court reasonably could have inferred from the evidence presented that the property was not going to be used as a residence by Ferrara and that this finding was therefore not against the great weight and preponderance of the evidence.

The trial court had also denied Ferrara's suit to quiet title. A suit to quiet title relies on the invalidity of the defendant's claim to the property and exists to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right.

In its conclusions of law, the trial court concluded that, because the Contract does not comply with Property Code Section 5, Subchapter D, the suit to quiet title should be denied. The court of appeals disagreed with that conclusion. Subchapter D applies to a particular type of executory contract, but does not apply to every contract for deed; however, it does not follow that because Subchapter D does not apply, these contracts for deed are invalid or that purchasers under these contracts cannot prevail on suits to quiet title. It agreed with Ferrara that the trial court erred to the extent that it dismissed Ferrara's suit to quiet title against Dalu solely because Subchapter D did not apply to the Contract. However, the court when on to look at whether Ferrara established his quiet title claim.

Upon execution of the contract for deed, the purchaser acquires an equitable right to make payments on the property and to receive a deed and legal title when he completes the payments. While the purchaser under a contract for deed obtains an immediate right to possession of the property, the seller retains legal title and has no obligation to transfer it unless and until the purchaser finishes paying the full purchase price, which is typically done in installments over several years.

As the plaintiff in the suit to quiet title, Ferrara bore the burden to establish his superior equity and right to relief. Unfortunately, Ferrara failed to show that he had made the payments required to establish equitable or legal title.

The trial court also dismissed Ferrara's fraud and DTPA claims. Ferrara argued that the trial court erred in dismissing his fraud and DTPA causes of action against Dalu because the record unequivocally demonstrates that Dalu knew that Nutt was not free to convey the Property to him free from any encumbrances. Dalu's knowledge concerning the contractual relationship between Ferrara and Nutt, however, has no bearing on the merits of Ferrara's fraud claims. To prevail on both his common law fraud and fraud in a real estate transaction claims, Ferrara was required to establish that a material misrepresentation was made to him, and, in the context of his fraud in a real estate transaction claims, he was required to establish that the misrepresentation was made

to him for the purpose of inducing him to enter into a contract. There is no evidence that Nutt or Dalu made any misrepresentations to Ferrara at that time to induce him into entering into the Contract. Indeed, Ferrara can point to no evidence in the record of any misrepresentations made to him at any relevant point in time, nor can he point to any evidence in the record that Nutt entered into the Contract with no intention to perform the Contract.

Heredia* v. *Zimprich, 559 S.W.3d 223 (Tex.App.—El Paso 2018, no pet.). In the process of splitting two tracts of property between Luevano and the Heredias, the deed into the Heredias described a 0.3209 acre tract. Based on the description in the deed, the front property line is 117.52 feet and the back line is 120 feet. This varies from the plat, which showed the front and back lines are 109.45. When the Heredias went to the city to get a permit for utilities, they were told that they needed a survey of the property and had to "do a lot split" with the city. They agreed to a plat. About the same time, Luevano presented the Heredias with a Correction Deed, telling them that it was for the lot split.

The Correction Deed changed the description of the 0.3209 acre tract to a 0.2941 acre tract. There were some other issues with the Correction Deed that raised questions of fraud.

Zimprich bought Luevano's property and about the same time, the Heredias built a rock wall in a portion of the property that was described in the original deed, but not in the Correction Deed description. Zimprich sued, alleging trespass to try title and seeking to have the wall removed.

The trial court determined that Zimprich is the owner of the parcel in question and the wall constructed by the Heredias is on the Zimprich property.

On appeal, the Heredias challenge the validity of the Correction Deed. They assert that the Heredia Correction Deed is invalid because there were no facial imperfections in the original warranty deed or in the Heredias' chain of title (Issues One and Six), the Heredias did not agree to the Heredia Correction Deed (Issue Two), there was no mutual mistake which caused a defect or imperfection in the original warranty deed (Issue Three), and a correction deed cannot be used to convey an additional, separate parcel of land not conveyed in the original deed.

The Heredias' arguments are based on ***Myrad Properties, Inc.* v. *LaSalle Bank National Association***, 300 S.W.3d 746 (Tex. 2009). In ***Myrad Properties***, the Supreme Court acknowledged the longstanding rule that a correction deed could be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds. It held, however, that a correction deed could not be used to substantively change an unambiguous conveyance of real property to include an additional parcel of land not described in the original deed, as that would undermine the purpose of record notice.

The Texas Legislature responded to ***Myrad Properties*** in 2011 by enacting statutes which permit the use of correction deeds under specified circumstances to make both material and nonmaterial corrections to a deed. Property Code § 5.027-31.

Under Property Code §§ 5.028 and 5.029, the parties to the original transaction or the parties' heirs, successors, or assigns, may execute a correction instrument to make both nonmaterial and material corrections to the recorded original instrument of conveyance. Pertinent to this case, a correction deed may be utilized to add or remove land to a conveyance that correctly conveys other land. The statutes pertaining to correction deeds do not limit the use of correction deeds to correct facial imperfections in the original warranty deed or in the chain of title, nor is there a requirement that there be a mutual mistake

which caused a defect or imperfection in the original warranty deed. While the Heredias assert that they did not agree to the Correction Deed, the evidence supports the trial court's determination that the Heredias signed the Correction Deed, and they acquiesced to the change in the metes and bounds by signing a Subdivision Plat on August 1, 2007 and a Deed of Trust in 2015 containing the same metes and bounds of their property as the Heredia Correction Deed.

Strait* v. *Savannah Court Partnership, 576 S.W.3d 802 (Tex.App.—Fort Worth 2019, pet. pending). This is a fairly complicated case involving construction of a long line of conveyances, which I won't go into; however, the court reminds us of two rules for interpreting deeds.

First, the court discussed "strips and gores." It is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved. The reason for the rule is obvious. Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain and specific language, that the grantor intended to reserve the strip. This presumption is known as the strip-and-gore doctrine. Application of the strip-and-gore doctrine is highly policy-driven: it discourages title disputes and prolonged litigation— providing certainty in land titles— and encourages the use and development of real property. Texas public policy requires that we read a deed conveying land that does not identify but nevertheless creates a relatively narrow strip of land no longer useful to the grantor as conveying title in the strip to the grantee unless the grantor expressly and affirmatively reserves title to the strip in the deed.

Next, the court discussed the "centerline" presumption. The established doctrine of the common law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

Like the strip-and-gore doctrine, this centerline presumption applies even if the description of the land in the deed or field notes terminates at the street, public highway, or railroad right-of-way, unless a contrary intention is expressed in plain and unequivocal terms. Moreover, the centerline presumption applies when an abutting road is referenced in a deed or plat, even if the road was not yet being used.

PART VII
VENDOR AND PURCHASER

International Business Machines Corporation* v. *Lufkin Industries, LLC, No. 17-0666 (Tex. March 15, 2019). Fraudulent inducement is a species of common-law fraud that arises only in the context of a contract. A fraudulent-inducement claim requires proof that: (1) the defendant made a material misrepresentation; (2) the defendant knew at the time that the representation was false or lacked knowledge of its truth; (3) the defendant intended that the plaintiff should rely or act on the misrepresentation; (4) the plaintiff relied on the misrepresentation; and (5) the plaintiff's reliance on the misrepresentation caused injury. In a fraudulent-inducement claim, the misrepresentation occurs when the defendant falsely promises to perform a future act while having no present intent to perform it. The plaintiff's reliance on the false promise induces the plaintiff to agree to a contract the plaintiff would not have agreed to if the defendant had not made the false promise.

The software system contract entered into between Lufkin and IBM contained a

disclaimer of reliance "upon any representation made by or on behalf of IBM that is not specified" in the contract. The contract also contained a merger clause that said the contract was the entire agreement that replaces any prior oral or written communications.

It turned out that a lot of the oral representations made by IBM during the sales and training process were incorrect and Lufkin had some big problems with the software. It sued IBM claiming, among other things, that it was fraudulently induced into the contract.

A merger clause, standing alone, does not prevent a party from suing for fraudulent inducement. Similarly, a clause that merely recites that the parties have not made any representations other than those contained within the written contract is not effective to bar a fraudulent-inducement claim. But a clause that clearly and unequivocally expresses the party's intent to disclaim reliance on the specific misrepresentations at issue can preclude a fraudulent-inducement claim.

Not every such disclaimer is effective, and courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding. When sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement.

Barrow-Shaver Resources Company* v. *Carrizo Oil & Gas, Inc., No. 17-0332 (Tex. June 28, 2019). The first draft of a farmout agreement regarding some oil and gas properties contained a "consent to assignment provision" that said the rights under the letter agreement could not be assigned without the written consent of Carrizo, "which consent shall not be unreasonably withheld." The "not be unreasonably withheld" wording was deleted in the next draft. Barrow-Shaver objected, but was assured by Carrizo that it would provide consent to assignments. The parties ultimately agreed to a provision without the "not be unreasonably withheld" wording.

After entering into the agreement, Raptor approached Barrow-Shaver about an assignment of the farmout. To assign its rights, Barrow-Shaver would have to get Carrizo's written consent. After a back and forth, Carrizo refused to consent and the sale to Raptor fell through.

Barrow-Shave sued Carrizo for breach of contract. Both parties agreed that the consent to assignment was unambiguous. The trial court agreed, holding that the agreement was silent as to the reasons under which Carrizo could refuse consent to Barrow-Shaver's assignment. The trial court submitted the breach of contract question to the jury, explaining that it may consider evidence of industry custom in deciding whether Carrizo breached the agreement. The jury found in favor of Barrow-Shaver. The court of appeals reversed, holding that Carrizo could withhold its consent to assign for any reason or no reason—that is, that the purposeful deletion of the qualifying language "which consent shall not be unreasonably withheld" showed that Carrizo bargained for hard consent. The court of appeals held that because the provision was unambiguous, it should have been construed as a matter of law and therefore the breach of contract issue should not have been submitted to the jury. The Supreme Court affirmed the court of appeals' holding.

Barrow-Shaver argued that the agreement does not define the word "consent," and that the use of that term qualifies Carrizo's right to withhold consent to an assignment. Nothing in the agreement suggests that the parties intended to use the term in a technical sense; rather, the term can easily be understood according to its plain, ordinary, and generally accepted meaning—approval. So, the court said its analysis does

not turn on what "consent" is, but on what the farmout agreement requires as to the giving or withholding of consent.

The farmout agreement indicates that the parties agreed to how consent must be given: consent must be express, and it must be in writing. The contract contains no other consent requirements—it does not impose a deadline for consent to be given, it does not require that it be notarized or signed by a particular individual, nor does it prescribe a specific format for the consent, except that it be written and express. To the extent that the farmout agreement does not reflect any additional requirements as to Carrizo's consent, the absence of such language indicates there are no other qualifiers.

The consent-to-assign provision plainly states that Barrow-Shaver cannot assign its rights unless it obtains Carrizo's consent, which must be express and in writing. In other words, Carrizo has a right to consent to a proposed assignment, or not. The plain language of the provision imposes no obligation on Carrizo—it does not require Carrizo to consent when certain conditions are satisfied, require Carrizo to provide a reason for withholding consent, or subject Carrizo to any particular standard for withholding consent. The crux of this contract construction issue is whether the agreement's silence as to refusal or withholding of consent should nevertheless be interpreted to qualify Carrizo's right to withhold consent to an assignment of Barrow-Shaver's rights. After a lengthy discussion about silence as to material and immaterial terms, the court concluded that the express language of the consent-to-assign provision can be construed with only one certain and definite interpretation—a consent obligation only as to Barrow-Shaver and no qualifications as to Carrizo's right to withhold consent.

The court declined to allow extrinsic evidence to show industry custom and usage that would support Barrow-Shaver's position. Evidence of surrounding facts and circumstances, including evidence of industry custom and usage, cannot be used to add, alter, or change the contract's agreed-to terms.

The court also declined to find and implied duty to withhold consent only when it is reasonable to do so or to imply a duty of good faith and fair dealing in this situation. Any such implied obligations are not based on the meaning of "express written consent," as there is no indication in the contract that the parties intended a meaning other than the ordinary, non-technical meaning of the term. The obligation Barrow-Shaver asks the court to imply—that Carrizo not act unreasonably in withholding consent—amounts to an implied covenant to act reasonably and in good faith. The contract imposes no such duty, and precedent does not support implying one. The court held that Carrizo's right to withhold consent to a proposed assignment is unqualified.

Because the court concluded that the contract unambiguously allowed Carrizo to refuse its consent for any reason, Carrizo could not breach the parties' agreement for withholding its consent as a matter of law.

MJR Oil & Gas 2001 LLC* v. *AriesOne, LP, GFP Texas, Inc., 558 S.W.3d 692 (Tex.App.--Texarkana 2018, no pet.). In Texas, a real property covenant runs with the land when it touches and concerns the land, it relates to a thing in existence or specifically binds the parties and their assigns, it is intended by the parties to run with the land, and the successor to the burden has notice. In addition, there must be privity of estate, which means there must be a mutual or successive relationship to the same rights of property. For a covenant to run with the land, the parties creating the covenant must intend for it to do so.

MJR was given a right of first refusal that was created in an unrecorded Settlement Agreement between Energy and MJR. The Settlement Agreement initially provides for certain conveyances of oil and gas leases and

other property between the parties, including the conveyance by Energy of certain ORRI to MJR. The Settlement Agreement then addresses certain continuing obligations of Energy, including its obligation to give MJR a ROFR as to any planned assignment, farmout, sale, or transfer of any lease in which MJR has an interest. The Settlement Agreement went on to provide that it was binding upon and benefited the parties and all of their respective assigns and successors.

AriesOne, a successor to Energy, argued that because the "assigns and successors" provision did not say that the ROFR ran with the land, it didn't.

While the use of such terminology is helpful in determining intent, it is not dispositive, and an obligation intended to run with the land can be created without such language. The Settlement Agreement contains language that indicates the parties intended the ROFR to be a continuing obligation of both Energy and its assigns. First, the paragraph granting the ROFR provides that any transferee of any of the leases must agree to be bound by all the obligations in the Settlement Agreement. Since this refers to transferees of the leases, which were owned by Energy, this refers to the assigns and successors of Energy and evidences the intent of the parties that the ROFR would be a continuing obligation of these assigns and successors. This conclusion is strengthened by the placement of this clause within the paragraph granting MJR its ROFR. In addition, the Settlement Agreement specifically provides that it is binding on the parties and their assigns and successors. While not dispositive, this is yet another indication that the parties to the grant of the ROFR intended that it would be a covenant running with the land. So the court held that the parties intended the ROFR to run with the land.

To be a covenant running with the land, there must also be privity of estate between the parties when the covenant was established. There must also be privity of estate between the parties to the grant of the covenant and those against whom the covenant is sought to be enforced. The covenant must be contained in a grant of land or in a grant of some property interest in the land. An option to purchase land creates an interest in land. Thus, the court held there was privity of estate.

There must also be privity of estate between the parties to the grant of the covenant and those against whom the covenant is sought to be enforced. To the extent an unbroken chain of title has been established between Energy and AriesOne, there is privity of estate between these parties.

A covenant touches and concerns the land when it affects the nature, quality, or value of what is conveyed, or if it either renders the grantor's interest in the land less valuable or renders the grantee's interest more valuable. The option to purchase all of Energy's interest in the leases undoubtedly increased the value of MJR's interests, so the court held that the ROFR touches and concerns the land. Further, the covenant must relate to a thing in existence to be a covenant running with the land. The burdened interests existed at the time the ROFR was granted, so the ROFR related to a thing in existence.

Finally, the successor in interest must have notice of the covenant running with the land. The ROFR was granted in the unrecorded Settlement Agreement, but the Settlement Agreement was referred to in the assignment of MJR's interests. The rule in Texas is that a purchaser is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims. Thus, the assignees of the interests were on notice of the ROFR contained in the Settlement Agreement.

TLC Hospitality, LLC* v. *Pillar Income Asset Management, Inc., 570 S.W.3d 749 (Tex.App.—Tyler 2018, pet. denied). Pillar

entered into a written contract with TLC to purchase an apartment complex owned by TLC. The contract was a typical "free-look" contract, with an inspection period and right for the buyer to terminate. The contract described the property as street address 3101 Mustang Drive, Grapevine, TX 76051 and made reference to a legal description in an exhibit. But neither that exhibit nor any other exhibit to the contract contained such a description. Part of the purchase price was to be paid by the assumption of an existing loan. The lender had to approve the assumption and the contract provided that either party could terminate if the lender's consent wasn't obtained.

The contract was amended twice, to extend the inspection period and to require that Pillar apply for assumption approval within a set period of time. Pillar and TLC got a bit sideways regarding the assumption approval, with TLC not providing requested financial information to aid in Pillar's assumption application. TLC sent Pillar a letter terminating the contract. Pillar sued TLC for breach of contract. The trial court found in Pillar's favor.

Among other issues on appeal, the court looked into whether the contract was void under the statute of frauds, specifically because of the failure to include a complete legal description.

The statute of conveyances and the statute of frauds require that conveyances of and contracts for the sale of real property be in writing and signed by the conveyor or party to be charged. Property Code § 5.021 and Business and Commerce Code § 26.01(b)(4). In order for a conveyance or contract for sale to meet the requirements of the statute of frauds, the property description must furnish within itself or by reference to another existing writing the means or data to identify the particular land with reasonable certainty. The purpose of a description in a written conveyance is not to identify the land, but to afford a means of identification. If enough appears in the description so that a person familiar with the area can locate the premises with reasonable certainty, it is sufficient to satisfy the statute of frauds.

A street address or a commonly-known name for property has been held to be a sufficient property description if there is no confusion.

Here, the agreement described the property as follows: "The real property located in the City of Grapevine, County of Tarrant, State of Texas ... together with all existing buildings, structures, fixtures, amenities and improvements thereon situated known as and by the street address 3101 Mustang Drive, Grapevine, TX 76051." Below this description of the property, TLC agreed to convey any right it had to the use of the name "Village on the Creek Apartments" in connection with the property. The record contains no evidence of confusion as to the identity of the property subject to the agreement. Further, TLC presented no evidence that there is more than one tract of land fitting the description in the deed, that it owned other property nearby, or any other evidence indicating that the property cannot be located with reasonable certainty. The court held that the property description was sufficient to identify the property with reasonable certainty.

Van Duren* v. *Chife, 569 S.W.3d 176 (Tex.App.—Houston [1st Dist.] 2018, no pet.). The Van Durens bought a house from the Chifes. The Chifes partially financed the sale. The contract signed by the parties was a standard form promulgated by the Texas Real Estate Commission that brokers generally must use in homes sales. The form provides buyers with two options as to the acceptance of a property's condition: one in which they accept the property "in its present condition" and another in which they accept the property subject to the seller's completion of specified repairs. In this case, the Van Dorens opted to accept the property "in its present condition."

After living in the house for two years,

the Van Duren's discovered substantial water damage and mold throughout the house. They sued the Chifes for negligent misrepresentation, fraud by nondisclosure, statutory fraud in a real estate transaction, and violations of the DTPA. They also sued the Chifes' broker, Mathews. The trial court entered summary judgment in favor of both the Chifes and the broker, and the Van Durans appealed both. The court held that the trial court had not disposed of all of the issues between the Van Durens and the Chifes, so it dismissed the appeal as to the Chifes.

The Van Durens' claims against Mathews included claims of negligence and fraud. Mathews argued that the "present condition" clause in the contract barred those claims because the clause negates the causation and reliance elements required to prove them. The Van Durens argued that the clause doesn't expressly disclaim reliance and thus cannot negate reliance as a matter of law. They also claimed that the "present condition" provision was surreptitiously inserted into the contract without their knowledge and thus is unenforceable as it was not freely negotiated. Finally, they claimed they were fraudulently induced to accept the house "in its present condition."

Causation is a necessary element of a claim for negligence. Reliance is a necessary element of claims for negligent misrepresentation, fraud by nondisclosure, and statutory fraud in a real estate transaction.

When buyers contract to buy something "as is," they agree to make their own appraisal of the bargain and to accept the risk that they may be wrong. The sellers give no assurances, express or implied, as to the value or condition of the thing sold. Thus, an enforceable "as-is" clause negates the elements of causation and reliance on claims relating to the sale. In assessing the enforceability of an "as-is" clause, courts consider the totality of the circumstances surrounding the agreement. An "as-is" clause generally is enforceable as long as it was a significant part of the basis of the bargain, rather than an incidental or boilerplate provision, and was entered into by parties of relatively equal bargaining position.

Two scenarios may render a valid "as-is" clause unenforceable. The first involves fraudulent inducement. When sellers secure an agreement to an "as-is" clause through false assurances about the value or condition of the thing being sold or by the concealment of information as to its value or condition, the "as-is" clause does not bar claims against the sellers. Buyers also are not bound by an "as-is" clause if they have a right to inspect the property but the sellers impair or obstruct the exercise of this right.

The Van Durens point out that the "as-is" clause interpreted by the Supreme Court of Texas in ***Prudential Insurance Company of America* v. *Jefferson Associates***, 896 S.W.2d 156, explicitly disclaimed any reliance by the buyer, and that the present-condition clause in their agreement with the Chifes does not.

The contract provided for acceptance of the property "in its present condition." While this provision did not disclaim reliance, an explicit disclaimer is not required for it to be an "as-is" clause. In the seminal "as is" case, Prudential, the Supreme Court stated that the clause before it left no doubt as to its meaning but noted that "it should not be necessary in every 'as is' provision to go into this much detail." The Van Durens did not advance an alternative reasonable interpretation of this language, so the court applied the clause as written, stating that to interpret it as anything other than an as is clause would render it meaningless.

The Van Duren's claimed that the provision was boilerplate and not a genuine, bargained-for term. The Van Durens do not claim unequal bargaining power or lack of sophistication. Nor do they dispute that they bought the Royal Lakes home in an arms-length transaction, in which both sides were

represented by licensed real estate brokers.

There was no evidence that the clause was boilerplate or was surreptitiously inserted into the contract. The contract was a standard form promulgated by the Texas Real Estate Commission that brokers generally must use in homes sales. A mandatory form contractual provision that requires the parties in any given transaction to choose from two or more options is by definition negotiable and not boilerplate.

The Van Durens also claimed that Mathews fraudulently induced the them into signing the contract by delivering a Seller's Disclosure Notice that failed to include material information about the water problems and making misrepresentations about an earlier inspection. With respect to the Sellers' Disclosure Notice, the law imposes a duty on the sellers of real property, not their agents, to make the statutorily-required disclosures. The Notice, which is a standard form promulgated by the Texas Association of Realtors, makes clear that the representations within it are the sellers' alone. The broker, therefore, generally cannot be held liable for misrepresentations in, or omissions from, the Notice because they are not his misrepresentations or omissions.

There is an exception. The Notice contains a representation that the "brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate." Under this provision, the broker has a duty to come forward if he has any reason to believe that the sellers' disclosures are false or inaccurate; thus, he can be held liable for this representation if it is shown that he knew it to be untrue. The court held that the Van Duren's failed to show that Mathews had knowledge of existing defects.

Finally, the Van Durens claimed that Mathews breached his duty to treat all parties to the transaction fair and fiduciary manner. The existence of a fiduciary duty is an element of a claim for breach of fiduciary duty. While brokers also must treat other parties to a transaction fairly, this obligation does not make the broker a fiduciary of these other parties whom he does not represent.

Rima Group, Inc.* v. *Janowitz, 573 S.W.3d 505 (Tex.App.—Houston [14th Dist.] 2019, no pet.). Rima, as Buyer, entered into two contracts to buy property from the Trust. Each contract contained a seller financing addendum in which Rima agreed to deliver a credit report to the Trust by December 9, 2016. Rima failed to provide the credit report under each contract by the date it was due. The addenda provided that if Rima did not provide the credit report within the specified time, the Trust could terminate the contract by notice to Rima within seven days after the expiration of the time for delivery of the credit report. On the termination deadline, the Trust gave notice that it was terminating each contract based solely on the failure to timely deliver the credit report.

Rima sued seeking specific performance. The trial court ruled that the Trust had properly terminated the contracts.

Under the unambiguous text of each contract, Rima had to deliver a credit report to the Trust on or before the Credit Report Deadline— within 5 days after the Effective Date of each contract. The parties do not dispute this deadline, nor do they dispute that Rima failed to deliver a credit report to the Trust on or before the deadline. Under the clear text of each contract, if Rima does not deliver a credit report to the Trust on or before the Credit Report Deadline, the Trust may terminate the contract by notice to Rima on or before the Termination Deadline.

The parties do not dispute that "within 7 days after expiration of the time for delivery" means on or before the Termination Deadline. Rima does not dispute that the Trust gave notice of termination on the Termination Deadline based on Rima's failure to deliver the credit report. Instead, Rima asserts that the summary-judgment evidence raises a fact issue as to whether the doctrines of waiver and estoppel preclude the

Trust from terminating each contract based on Rima's failure to deliver a credit report on Rima to the Trust on or before the Credit Report Deadline.

Waiver may be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming the known right. Waiver is largely a matter of intent, and for implied waiver to be found through a party's conduct, intent must be demonstrated clearly by the surrounding facts and circumstances. Ordinarily waiver is a question of fact, but waiver may be decided as a matter of law based on undisputed evidence regarding the facts and circumstances. The court reviewed the evidence and concluded that there was a fact issue as to whether a waiver had occurred.

PART VIII
PARTITION

Bowman* v. *Stephens, 569 S.W.3d 210 (Tex.App.—Houston [1st Dist.] 2018, no pet.). Two brothers and a sister co-own a 117-acre lakefront property on Lake Austin. It is comprised of two parcels of land that were purchased in separate transactions by their grandmother in the 1950s. One tract is roughly 35 acres and has 900 feet of frontage along Lake Austin. The land gently slopes upward from the river. The property includes a modest house, boat dock, and gazebo. The other tract is roughly 85 acres and has steep slopes, heavy vegetation, and other topographical features that make it difficult to access. The upper tract is undeveloped. It is near but not in the Balcones Canyonland Conservation Plan's Preserve, which was created about 20 years ago to protect the natural habitat of local endangered species. These 85 acres are designated for future inclusion in the Preserve. The designation requires a landowner to go through a federal permitting process when developing the land.

The two brothers approached their sister about selling the property and splitting the money. The sister didn't want to sell and asked if the property could be partitioned in kind. She wanted the house and the boat dock that she had installed. The brothers sued.

The law will not force a reluctant joint owner of real property to maintain a joint ownership. Instead, joint owners of real property may compel a partition of the interest or the property among the joint owners. Property Code § 23.01. Partitions may be in kind (meaning that property is divided into separate parcels and each parcel is allotted to a separate owner) or by sale (meaning that property is sold and sale proceeds are divided among the owners). Texas law favors partition in kind over partition by sale.

The threshold question in a partition suit is whether the property is susceptible of partition in kind or if it is, instead, incapable of partition in kind because a fair and equitable division cannot be made. A tract may be incapable of partition in kind even though a partition in kind is not physically impossible. The issue is whether partition in kind is so impractical or unfair that partition by sale would best serve the parties' interest and restore or preserve the maximum value of the property.

The party seeking to obtain a partition by sale (instead of the legally favored partition in kind) has the burden to demonstrate that partition in kind is impractical or unfair. Generally, where the evidence is conflicting or admits of more than one inference, it is a question of fact for the jury or the trier of facts whether or not a partition in kind is feasible or a sale for division necessary.

One of the recognized factors for determining whether property is incapable of partition in kind is whether it can be divided without materially impairing its value.

Even if partition in kind is possible and will preserve the land's value, a trial court may reasonably conclude partition in kind is not feasible, fair, practical, or equitable given the parties' interests in the property. If the

trial court determines property is incapable of partition in kind, then the trial court must order partition by sale.

In this case, the court of appeals upheld that the trial court's holding in favor of partition in kind.

PART IX
BROKERS

In re *Rescue Concepts, Inc.*, 556 S.W.3d 331 (Tex.App.—Houston [1st Dist.] 2017, no pet.). Rescue Concepts and Smith executed a letter of engagement for legal representation related to the negotiation and sale of property owned by Rescue Concepts. Rescue Concepts agreed to pay a contingency of 3% of the gross sales price. Rescue Concepts entered into a contract for the sale of the property to HouReal. In the provision of the contract relating to brokers, Smith's firm was designated as the Principal Broker and Smith was listed as its agent.

The sale never closed. HouReal sued Rescue Concepts for breach of contract. In the course of the litigation, the HouReal's broker, JLL, sought discovery of communications between Smith and Rescue Concepts. Rescue Concepts claimed attorney-client privilege. JLL argued that the requested communications were not privileged because they were made while Smith was performing services as a real estate broker, not as a lawyer. The trial court found that none of the communications were privileged. Rescue Concepts filed this mandamus petition.

In its sole issue raised in its petition for writ of mandamus, Rescue Concepts asserts that the trial court abused its discretion in ruling that email correspondence between it and Smith was not privileged and ordering all emails produced without redactions. The question was whether Smith was an attorney or a broker.

Smith claimed that she was a lawyer, not a broker. Smith claimed that she negotiated the terms of a contract for sale of the property, that she "regularly communicated with her client regarding the legal implications of the ongoing negotiations, and that she provided legal analysis of certain provisions or conditions being negotiated.

JLL argues that it produced at least conflicting evidence, if not conclusive evidence, that no attorney-client relationship existed between Smith and Rescue Concepts, and thus, the decision of the trial court as to whether the privilege applied must be deemed conclusive. JLL argues that Smith's emails regarding the negotiation and the sale of the property did not constitute the rendition of professional legal services when no actual legal advice is given.

The court held that, contrary to its assertion, JLL has failed to identify any evidence controverting the existence of an attorney-client relationship between Smith and Rescue Concepts. It has presented no evidence that Smith acted only as a real estate broker. It presented no evidence rebutting the statements of both Smith and Rescue Concepts' representatives that they had formed an attorney client relationship. Rather, JLL points to statements within Smith's engagement letter indicating that the scope of employment included the negotiation of a sale in exchange for a fee of 3% of the gross sales price, arguing that brokers may negotiate the sale of property. JLL also points to language in the engagement contract indicating Smith was hired as an exclusive listing agent for the subject real property, not as an attorney.

These arguments by JLL ignore the nature of the services that Smith provided to Rescue Concepts. Specifically, they ignore the distinction between an attorney— who is authorized as a licensed attorney to perform virtually all of the services a broker can perform— and a real estate broker— who may not perform any of the services that require a licensed attorney. Smith provided advice regarding contract terms and matters related to litigation that fall within the scope

of professional duties of attorneys but outside the scope of work that brokers are authorized to perform.

The authorized activities of a real estate broker are those set out in the Real Estate License Act, Chapter 1101 of the Occupations Code. An attorney licensed in this state may act as a broker without obtaining a separate real estate license. While an attorney is authorized to act as a broker without obtaining a separate real estate license, a real estate broker cannot provide attorney services to his clients, such as providing legal advice requiring the use of legal skill or knowledge; advising a person regarding the validity or legal sufficiency of an instrument of the validity of title to real property; or drafting documents from a non-approved form.

The services provided to Rescue Concepts by Smith in this case were clearly those of an attorney acting in part as an attorney/broker, but going far beyond that. By its plain language, Rescue Concepts' engagement letter addressed legal representation related to the negotiation and sale of property owned by Rescue Concepts. The engagement letter set out the scope of Smith's employment as providing legal representation regarding the negotiation and sale of Rescue Concepts' Property, and it contained multiple references to Smith's duties as an attorney. Construing the plain language of the engagement contract as a whole, it clearly evinces an intent to form an attorney-client relationship between Smith and Rescue Concepts related to the negotiation and sale of the Property.

The services Smith performed that a broker could also have performed were authorized by the exclusion for attorneys from the strictures in the Real Estate License Act. In addition, Smith engaged in numerous activities that a broker could not have performed, such as providing legal advice to her client regarding contract terms, advising Rescue Concepts regarding re-platting the property, pipeline right-of-way issues, and tax implications, and negotiating for and drafting special contract provisions to effectuate the sale of the Property. A non-attorney broker is expressly barred by the Real Estate License Act from performing such services.

Looking to the nature of the relationship between Smith and Rescue Concepts as set out in their engagement contract, the parties' explicit statements, and objective standards of what the parties said and did, the court concluded that the evidence establishes, as a matter of law, that an attorney-client relationship existed between Smith and Rescue Concepts.

PART X
LIS PENDENS

In Re I-10 Poorman Investments, Inc., 549 S.W.3d 614 (Tex.App.—Houston [1st Dist.] 2017, no pet.). In this mandamus action, Poorman challenged the trial court’s order denying expungement of a lis pendens filed by Woodcreek.

Poorman was developing a residential subdivision in Katy. In connection with the development, Poorman filed a Declaration of Covenants, Conditions and Restrictions and created Woodcreek as its HOA.

Woodcreek sued Poorman for all sorts of fraud and misrepresentation claims, contending that Poorman had represented and marketed the development as having all sorts of amenities. Woodcreek complained that Poorman had not conveyed certain common area amenities and recreational tracts to it. In connection with the lawsuit, Woodcreek filed a lis pendens.

Poorman filed a motion to expunge the lis pendens under Section 12.0071(c)(2) of the Property Code, which provides for expunction if "the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim." The trial court denied the motion to expunge.

Poorman filed this mandamus action.

In its motion, Poorman asserted one ground for expunging the lis pendens filed by the Woodcreek: that Woodcreek had failed to establish by a preponderance of the evidence the probable validity of its real property claim. Woodcreek responded, claiming its pleadings indicate it was claiming an interest in real property and its counsel had submitted an affidavit supporting the lis pendens notices. The only evidence attached to Woodcreek's response was its attorney's affidavit and an amended notice of lis pendens.

A lis pendens placed in the property records is notice to third parties of a dispute concerning ownership of the property. Once a lis pendens has been filed, the statute allows removal of the lis pendens either by expunction or cancellation. Property Code § 12.071(c) provides that a court "shall" expunge the notice of lis pendens if: "(1) the pleading on which the notice is based does not contain a real property claim; (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim; or (3) the person who filed the notice for record did not serve a copy of the notice on each party entitled to a copy under Section 12.007(d)."

Woodcreek admits that no evidence was presented at the hearing, but it argues that no abuse of discretion is shown because the trial court made its determination based on the parties' pleadings, which is allowed under the first prong of § 12.0071(c). Poorman sought expunction based on the "preponderance of the evidence" ground, but Woodcreek nevertheless contends the trial court could have denied expunction on the first statutory ground— the pleading of a real property claim.

Here, Poorman sought to expunge the lien on the second ground of Section 12.0071(c). Because a party may seek expunction of the lis pendens on any of the enumerated grounds, Woodcreek was charged with providing the probable validity of its claim by a preponderance of the evidence.

Because Poorman argued in the trial court that the preponderance of the evidence did not support the probable validity of the lis pendens, the trial court could not deny the motion to expunge unless Woodcreek met its evidentiary burden of proving by a preponderance of the evidence the probable validity of its real property claim.

The court held that Woodcreek failed to meet its evidentiary burden. The only evidence offered by Woodcreekwas the affidavit of its attorney, who stated in his affidavit that Woodcreek's lawsuit was "one involving title to real property" and "[seeking] the establishment of an interest in real property." Although the attorney's affidavit reiterates Woodcreek's claim that Poorman had represented it would convey certain properties to Woodcreek, it does not set forth facts proving the probable validity of its real property claim. Because Woodcreek did not meet its evidentiary burden of proving the probable validity of its real property claim, the trial court abused its discretion in denying Poorman's motion to expunge the lis pendens.

PART XI
EASEMENTS

R2 Restaurants, Inc.* v. *Mineola Community Bank, SSB, 561 S.W.3d 642 (Tex.App.--Tyler 2018, pet. denied). An easement is a nonpossessory interest that authorizes a holder's use of property for only a particular purpose. Ordinarily, intent to abandon an easement must be established by clear and satisfactory evidence, and abandonment of an easement will not result from nonuse alone; instead, the circumstances must disclose some definite act showing an intention to abandon and terminate the right possessed by the easement owner.

Clearpoint Crossing Property Owners

Association* v. *Chambers, 569 S.W.3d 195 (Tex.App.—Houston [1st Dist.] 2018, pet. denied). The Chambers own 32 acres adjoined by land owned by the Clearpoint and Space Center, leased to Cullen's. The Chambers tract is landlocked, lacking direct access to a public road. Exxon previously owned the Chambers tract and abandoned an earlier easement that gave the Chambers access across the Clearpoint tract in exchange for two express easements.

In one of the two express easements, Clearpoint conveyed an easement across its land via a private road. In the other Space Center conveyed an easement across a parking lot. Together, the two easements gave access from the Chambers tract to Space Center Boulevard. Both easements are perpetual, irrevocable, and run with the land to benefit Exxon's successors and assigns. The easements state that their purpose was to give "free and uninterrupted pedestrian and vehicular ingress to and egress from" a parcel of the Chambers tract identified as "Drill Site BB," which they describe as a 7-acre tract within the larger Chambers Tract. Exxon had owned the drill site before they acquired the entire Chambers tract.

When the Chambers began using the easements to clear the land in preparation for growing hay and for building storage units on another 5 acres, Clearpoint objected. Clearpoint and Space Center contended that the express easements are limited in scope and grant the Chambers access to benefit Drill Site BB, not the entire tract, and for the sole purpose of furthering drilling activities. Clearpoint and Space Center also disputed whether the Chambers were entitled to an implied easement by necessity.

The jury found that the express easements granted a right of ingress and egress to benefit the entire Chambers tract. In addition, based on the jury's findings, the court held that the Chambers had an easement by necessity.

On appeal, the court held that the plain language of the express easements provided access to Drill Site BB and not to anywhere else on the Chambers tract; however, the court also held that the easements do not limit the right of access to uses associated with drilling.

As to the Chambers' claim of an easement by necessity, the court noted that, to establish an easement by necessity, the Chambers had to prove, among other things, that the claimed access is a necessity and not a mere convenience. This requires a showing of strict necessity. Thus, if the proof establishes that the Chambers have other means of accessing the Chambers tract, a necessity easement cannot exist as a matter of law.

The express easements unambiguously grant part of the Chambers tract a right of ingress and egress across the Clearpoint tract, for the purpose of accessing Drill Site BB. Drill Site BB's northern and eastern boundaries, in turn, adjoin the remainder of the Chambers tract. Because the Chambers can access the remainder of their property from Drill Site BB, for which they have express easements across the Clearpoint tract to a public road, the Chambers cannot establish the strict necessity required for the law to imply an easement by necessity.

PART XII
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

M&M Resources, Inc.* v. *DSTJ, LLP, 564 S.W.3d 446 (Tex.App.—Beaumont 2018, no pet.). Whether a claimant must seek relief related to property interests through a trespass to try title action, as opposed to a suit under the Declaratory Judgments Act, has been a source of confusion. Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property.

Civil Practice & Remedies Code § 37.004(a) states a "person interested under a deed ... or whose rights, status, or other legal

relations are affected by a ... contract ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder." Even so, the Property Code § 22.001(a) provides a "trespass to try title action is the method of determining title to lands, tenements, or other real property.

In this case, because the underlying dispute involves ownership of the possessory interest in the mineral estates at issue, the court held that the proper and mandatory vehicle for resolving those claims is a trespass to try title action.

PART XIII
CONDEMNATION

San Jacinto River Authority* v. *Burney, 570 S.W.3d 820 (Tex.App.--Houston [1st Dist.] 2018, pet. pending). During Hurricane Harvey, the San Jacinto River Authority released water from Lake Conroe into the San Jacinto River. Owners of homes that flooded in Kingwood, Texas have sued the River Authority in the district courts of Harris County, seeking compensation for their inverse-condemnation and statutory takings claims.

Generally, Texas district courts and county courts at law have concurrent jurisdiction in eminent-domain cases. Harris County is an exception. Before September 1, 2015, county civil courts at law had exclusive jurisdiction of all eminent-domain proceedings in Harris County. For cases filed on or after September 1, 2015, the Legislature modified the subject-matter jurisdiction of Harris County courts with respect to eminent-domain cases by amending Government Code § 25.1032(c).

PART XIV
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Tarr* v. *Timberwood Park Owners Association, 556 S.W.3d (Tex. 2018). 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. The Court of Appeals affirmed, holding that short-term renters were not residents but "transients, and relying on Property Code § 202.003(a), which requires that "a restrictive covenant be liberally construed to give effect to its purpose and intent." The Supreme Court reversed.

The court first dealt with the conflict between the common law maxim that restrictive covenants are to be strictly construed and Property Code § 202.003(a) which requires certain covenants to be liberally construed. After more than seven pages of learned discussion on the matter, the court basically punted, stating "We have not yet deliberated section 202.003(a)'s effect, if any, on the construction principles we have long employed to interpret restrictive covenants. Nor do we reach that decision today. We don't have to reconcile any potential conflict between section 202.003(a) and the common-law principles—or whether those common-law standards can ever again be appropriately employed—because our conclusion today would be the same regardless of which interpretative standard prevails." The court held that the unambiguous covenants simply did not address the use on the property in this case. "No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation."

The HOA's arguments were, first, that the rentals violated the restriction that only "single family residences" could be constructed on the property, and, second, that the use violated the restriction that the property be used only for "residential purposes."

The HOA contended that, because Tarr often rented to groups that included members of more than one family, that such a use violated the single-family residence restriction. Its argument was based on reading two provisions together—the one that restricted what could be constructed on the property and one that restricted the use of the property. The court held that "to combine those provisions into one mega-restriction is a bit of a stretch." The court held that the single-family residence restriction merely limits the structure that can properly be erected upon Tarr's tract and not the activities that can permissibly take place in that structure.

The court also held that the use did not violate the residential purposes restriction. The covenants in the Timberwood deeds fail to address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like. They do not require owner occupancy or occupancy by a tenant who uses the home as his domicile. Instead, the covenants merely require that the activities on the property comport with a "residential purpose" and not a "business purpose." The court declined to add restrictions to the Timberwood covenants by adopting an overly narrow reading of "residential." The court expressly disapproved of the cases that impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements. Affording these phrases their general meanings and interpreting the restrictions as a whole, the court held that so long as the occupants to whom Tarr rents his single-family residence use the home for a "residential purpose," no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds.

Schack* v. *Property Owners Association of Sunset Bay, 555 S.W.3d 339 (Tex.App.—Corpus Christi 2018, no pet.). This is the first reported case involving VRBO type rentals following the Supreme Court's ruling in ***Tarr* v. *Timberwood Park Owners Association, Inc.***, 556 S.W.3d 274 (Tex. 2018). Here, the owners were renting their house for short term rentals on VRBO. The restrictive covenants included two that the POA claimed were being violated by the short term rentals: First, a Dwelling Restriction that the property was intended for one single family dwelling per lot and their use is restricted to that purpose, and second, that an Occupancy Restriction which provided that occupancy of a lot was limited to one family, which was defined as "any number of persons related by blood, adoption or marriage living with not more than one (1) person who is not so related as a single household unit, or no more than two (2) persons who are not so related living together as a single household unit . . ."

The court first addressed whether the Dwelling Restriction was a structural or use restriction. The court held that the wording of the Dwelling Restriction suggests that it refers only to the types of structures that may be constructed on any given lot in the subdivision. The restriction refers to "one single family dwelling unit per lot. The terms "unit" and "per 'Lot' " clearly orient this restriction to the types of structures that may be erected on a given lot: that the Declaration prohibits the construction of multiple separate dwellings and multi-unit structures that accommodate many families in discrete spaces. It is undisputed that a single-family dwelling structure was erected on the lot. We therefore find no conflict between the use and the Dwelling Restriction.

The court next addressed the Occupancy Restriction. The court focused on the words "living together as a household unit" in the

restriction. For its discussion of the phrase "living as a household unit," the court said it was critical to note that the ***Tarr*** court consistently drew parallels between the term "residential purposes" and the term "living." In general, the ***Tarr*** court said, the term "residential purposes" does not specifically forbid short-term rentals because "property is used for 'residential purposes' when those occupying it do so for ordinary living purposes. So long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, they are using the property for residential purposes.

To this court, the parallel drawn by the ***Tarr*** court resolved the matter. Generally speaking, "residential purposes" are equivalent to living purposes, and because the term "residential purposes" does not prohibit short-term rentals, neither does the term "living as a household unit." Like the restrictions discussed in ***Tarr***, the restrictions fail to specifically address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like. The Occupancy Restriction does not prohibit short-term rentals, so long as the renters meet the definition of "family."

Finally, the court addressed the restriction that no commercial enterprise could be conducted on the property. In assessing such a restriction, the court looked at whether the covenant's language focuses upon the owner's use of the property or upon the activity that actually takes place on the land. Distinguishing between restrictions concerning off-site uses and on-site uses is helpful when assessing a covenant's tolerance for short-term rentals, because in internet rental arrangements much of the arguably "commercial" activity often occurs off the property.

In this case, the Commercial Enterprise Restriction relates solely to the activity "on any tract," and the focus is therefore what commercial activity actually transpires on the Property. Thus, determining whether the Commercial Enterprise Restriction was violated depends on the degree to which the rental operation had a commercial presence on the Property itself. Here, the trial court had held that the use did not violate the Commercial Enterprise Restriction, and this court held that the evidence was sufficient to support that finding.

Severs* v. *Mira Vista Homeowners Association, Inc., 559 S.W.3d 684 (Tex.App.--Fort Worth 2018, pet. denied). The Severses' breach-of-contract claim ultimately turns on the scope of the architectural control committee's authority to vary or waive its standards and procedures for approving the Gaudins' second-story addition and whether the HOA thus violated the CCRs and Design Guidelines. Section 2.1 of the Guidelines requires a minimum fifteen-foot side setback for each home, and section 5 requires a design-and-construction approval process that includes, in part, the submission of building plans to the ACC prior to the commencement of construction.

Section 5.15 of the Guidelines states, in part, "The Architectural Control Committee reserves the right to waive or vary any of the procedures or standards set forth herein at its discretion for good cause shown." The court noted that section 5.15 of the Guidelines distinguishes between the ACC's right to waive or vary. This matters because the remainder of section 5.15 concerns the requirements for granting variances, which the remainder of section 5.15 requires to be requested in writing and there was no writing. The court thought that didn’t matter. Even though it was undisputed that no written variance was requested or issued for the second-story addition, the ACC would still have discretion under the Guidelines to waive any procedure or standard should it apply. The ACC had the right to waive any procedures or standards. The 15-foot setback requirement that upset the Severses was held by the court to be a “standard,” which the ACC could waive. Similarly, any procedure for approval of construction could be waived, and that included the setback requirement.

Dealer Computer Services, Inc.* v. *DCT Hollister RD, LLC, 574 S.W.3d 610 (Tex.App.—Houston [14th Dist.] 2019, no pet.). Standing is implicit in the concept of subject-matter jurisdiction, and subject-matter jurisdiction is essential to the authority of a court to decide a case. A restrictive covenant such as a deed restriction is a contractual agreement between the seller and purchaser of real property. Ordinarily, only the contracting parties and those in direct privity with the contracting parties have standing to enforce restrictive covenants.

Dealer CS was not party to the Northwest Crossing section 3 deed restrictions in question here. It owned property in section 4, which was developed later. The section 3 deed restrictions do not list Dealer CS as a party who may enforce section 3 deed restrictions. Dealer CS does not dispute that it lacks standing under the terms of the deed restrictions themselves. The enforcement provision of section 3 deed restrictions states that the Association or section 3 property owners. Dealer CS nonetheless contends that it has standing to enforce the restrictions because the property is operated under a common scheme or plan.

Under Texas law, a property owner may subdivide property into lots and create a subdivision in which all property owners agree to the same or similar restrictive covenants designed to further the owner's general plan or scheme of development. When property has been developed under such a general plan or scheme of development, each property owner in the development has standing to enforce deed restrictions against other property owners within the development.

The "general plan or scheme" doctrine does not authorize owners of lots in previously or subsequently platted subdivisions to enforce the covenants of property in other subdivisions. Courts have held that where the grantor's entire tract of land is developed in separate sections and not as a single unit, there is no general plan or scheme that would permit owners in all the subdivisions to enforce restrictive covenants against each other.

Because the undisputed evidence shows the sections of Northwest Crossing were developed in stages, the "general plan or scheme" doctrine does not apply and Dealer CS lacks standing to enforce section 3 restrictions.

PART XV
TAXATION

Sorrell v. Estate of Benjamin Carlton, No. 16-0874 (Tex. May 3, 2019). For decades, the lower courts have held that substantial compliance with statutory requirements is sufficient for redemption from a tax foreclosure. In this case, the Supreme Court held that, in light of its longstanding practice of favoring redemption over forfeiture in this property rights context, a party's timely substantial compliance with the redemption statute's requirement to pay certain amounts may satisfy the redemption statute's requirement.

Bosque Disposal Systems, LLC* v. *Parker County Appraisal District, 555 S.W.3d 92 (Tex. 2018). The plaintiffs are taxpayers who own land in Parker County. Each tract at issue in this case contains a saltwater disposal well, in which wastewater from oil and gas operations can be injected and permanently stored underground. When valuing these tracts for property tax purposes, PCAD assigned one appraised value to the wells (creating distinct appraisal accounts for "saltwater disposal facilities" apart from the existing appraisal accounts for the surface land) and another appraised value to the land itself. PCAD estimated the wells' market value based on the income generated from their commercial operation.

The taxpayers contend that separate appraisal of the wells and the land amounts to illegal double taxation of the wells as a matter of law. The trial court rendered summary judgment for the taxpayers, but the court of

appeals reversed.

The parties do not dispute that the taxpayers own taxable land in the district. Nor do the parties dispute that the taxpayers' land contains functioning saltwater disposal wells that have significant market value. Importantly, the taxpayers do not claim that land containing a valuable saltwater disposal well has the same market value as a comparably sized tract of land with no such well on it. Instead, the taxpayers complain that PCAD appraised the wells as separate units of real property apart from the land. This, the taxpayers contend, violated the Tax Code's definition of "real property" and amounted to double taxation of the wells in violation of the Texas Constitution. According to the taxpayers, the wells themselves do not fit within any of the categories of "real property" listed in the Tax Code, and appraising the wells separately from the land effectively appraises (and taxes) the wells twice—once on the value of the land, and once on the separate value of the wells. The taxpayers rely heavily on the fact that the wells have never been severed from the surface land and remain part of the taxpayers' fee simple ownership of these properties.

PCAD responded that it appraised the surface land in one account based on comparable tracts of raw land, and it appraised the wells in another account based on the income method of appraisal. According to PCAD, its appraisal of the land did not take into account the value of the wells, and that the sum of the two appraisals approximates the market value of the entire property, wells and all. In the District's view, the Tax Code requires it to appraise these properties based on their market value, and splitting each property into two accounts—one for the land and one for the well—was one lawful way of estimating the properties' overall market value.

The court found nothing legally improper in PCAD's decision to separately assign and appraise the surface and the disposal wells. The Tax Code expressly contemplates that taxing districts may separately appraise "separately taxable estates or interests in real property." Tax Code § 25.02(a)(3). Generally, a tract of land and its improvements are appraised together and assigned a single value. But appraisal districts are permitted to divide a tract and its improvements into separate components, each with its own tax account number, and appraise them individually.

Further, the Tax Code does not prohibit the use of different appraisal methods for different components of a property. In fact, the Code suggests otherwise, requiring the chief appraiser to consider each method and to select "the most appropriate method" when "determining the market value of property." Tax Code § 23.0101.

The taxpayers offered several objections to this result, but the court found none of them persuasive. The taxpayers contended that a separately appraisable "estate or interest" under the Tax Code arises only from "transfers, conveyances, and reservations." They argued that the "estate or interest" taxed here "simply does not exist" because it has not been severed from the surface land. But the court has held that different "aspects of real property can be taxed separately" and that "[t]his rule does not depend on whether each aspect is separately owned." ***Matagorda County Appraisal District* v. *Coastal Liquids Partners, L.P.***, 165 S.W.3d 329 at 332 (Tex. 2005).

The taxpayers also argued that the wells cannot be taxed because they are "intangible" and "permit dependent," and amount to nothing more than a "right to inject." Intangible property, such as a legal right, generally is not taxable. But any suggestion that the disposal wells are non-taxable intangibles ignores the wells' physical existence. The Tax Code defines "intangible personal property" as "a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise

perceived by the senses, although its existence may be evidenced by a document." Tax Code § 1.04(6). The injection facilities are hardly incorporeal; they consist of physical, underground rock and stored liquids, a well bore, down-hole tubing, and surface equipment. They are as tangible as any taxable mineral estate. The Code's definition of "intangible" does not describe these wells.

The taxpayers pointed out that they need a permit to operate the wells. But to accept that argument would have to ignore economic realities and a plain reading of the statute to conclude that the facilities at issue here, despite all their substantial physical aspects, are in reality intangibles because a permit may be required to operate them. By this reasoning a refinery would be a non-taxable intangible, as would valuable mineral estates, because permits are required to operate refineries and extract minerals.

Hegar* v. *EBS Solutions, Inc., 549 S.W.3d 849 (Tex.App.—Austin 2018, pet. pending). The Comptroller assessed franchise taxes against EBS. Although EBS paid some of the taxes that were due, EBS did not pay the full amount before filing a suit seeking to recover the amount of taxes paid and seeking injunctive relief. In response, the Comptroller filed a plea to the jurisdiction asserting that the suit should be dismissed because EBS did not comply with "the statutory jurisdictional requirements" before filing suit. The district court denied the plea to the jurisdiction.

Under common law, there was no right to sue to protest revenue laws. By enacting various provisions of the Tax Code, the legislature waived sovereign immunity for three types of taxpayer suits: protest suits: Protest suits, suits seeking injunctive relief, and refund suits. Only the first two are pertinent to this case.

For tax-protest suits, "a person who is required to pay a tax" but wants to challenge the assessed tax must "pay the amount claimed by the state" and submit a written protest with the payment. Tax Code § 112.051. In addition to tax-protest suits, a taxpayer may seek a restraining order or an injunction prohibiting "the assessment or collection of a tax." Tax Code § 112.101(a). However, before a taxpayer may seek an injunction, he must comply with certain statutory criteria. Of significance here, the taxpayer must either pay all taxes, fees, and penalties then due" or file a bond "in an amount equal to twice the amount of the taxes, fees, and penalties then due and that may reasonably be expected to become due during the period the order or injunction is in effect.

In the portion of the Tax Code governing injunctive suits, the legislature also chose to include § 112.108, which stated when it was first enacted that with the exception of the restraining order or injunction discussed above, "a court may not issue a restraining order, injunction, declaratory judgment, writ of mandamus or prohibition, order requiring the payment of taxes or fees into the registry or custody of the court, or other similar legal or equitable relief against the state or a state agency relating to the applicability, assessment, collection, or constitutionality of a tax or fee covered by this subchapter or the amount of the tax or fee due." After its enactment, the Supreme Court held the provision to be unconstitutional because the requirement of prepayment of taxes violated the open courts mandate of the Texas Bill of Rights. Section 112.108 was then amended, but that amendment was also held to be unconstitutional for requiring the prepayment of taxes as a condition for judicial review. After nearly two decades, § 112.108 has not been amended after this determination.

Here, EBS received a tax bill for $298,520. It made two payments of $75,000 each then sued the Comptroller alleging that it had made payments under protest, invoking Tax Code §§ 112.051-060, and also sought to enjoin the Comptroller from further collection actions. As part of its suit, EBS also filed an oath of inability to pay under

authority of the amended version of section 112.108, asserting that it was unable to pay the full amount owed before challenging the assessment and that requiring EBS to pay the full amount would constitute an unreasonable restraint on its right to access the courts. The district court concluded that prepayment of the franchise taxes, penalties, and interest would constitute an unreasonable restraint of EBS's right of access to the courts.

In response to EBS's suit, the Comptroller filed a plea to the jurisdiction, arguing that the suit should be dismissed for lack of subject-matter jurisdiction because EBS did not meet the statutory prepayment requirements for filing a protest suit and for seeking injunctive relief under the Tax Code. In addition, the Comptroller urged that EBS's attempt to avoid the prepayment obligations by filing an oath of inability to pay under § 112.108 was ineffective because the entirety of § 112.108 has been declared unconstitutional. The district court denied the Comptroller's plea to the jurisdiction.

On appeal, the Comptroller contends that the district court's order denying the plea to the jurisdiction should be reversed. When attacking the district court's ruling, the Comptroller argues that the Tax Code requires the taxpayer prepay the assessed tax in its entirety or post a bond for twice that amount before filing a protest suit or seeking injunctive relief, that EBS's partial payment is not sufficient to constitute compliance with the prepayment requirements, and that there is no valid exception for a taxpayer who files an oath of inability to pay.

The Court of Appeals held that the district court did not have jurisdiction because EBS did not comply with the statutory prerequisites for pursuing a protest or injunction. The invalidation of § 112.108 left the taxpayer with the same options that were available before § 112.108 was enacted – it allows the taxpayer to pursue a declaratory judgment action that would not otherwise be barred by sovereign immunity and that any violation of the open-courts provision stemming from requiring taxpayers to comply with the statutory prerequisites before pursuing a protest suit or seeking injunctive relief was cured by the invalidation of § 112.108. Thus, requiring EBS to comply with prepayment obligations before pursuing a protest suit or injunction did not violate EBS's constitutional rights because EBS had another avenue available to it that did not involve prepayment obligations. EBS could have pursued declaratory relief.

Grimes County Appraisal District* v. *Harvey, 573 S.W.3d 430 (Tex.App.—Houston [1st Dist.] 2019, no pet.). Harvey's application to continue his agricultural exemption was denied. Although he did not make any tax payment by the statutory delinquency date of February 1, he filed a protest with the Grimes County Appraisal Review Board. The ARB scheduled a hearing, but at the hearing, before any evidence was received, the ARB announced that it was dismissing Harvey's protest for lack of jurisdiction based on the GCAD records indicating that Harvey hadn't made any tax payment by February 1. Tax Code § 42.08(b) requires a property owner who appeals tax determination to pay statutorily determined minimum tax payment before the delinquency date or the property owner forfeits the right to proceed to a final determination of the appeal, and provides a means to establish amount of minimum payment.

Harvey filed suit, in which GCAD filed a plea to the jurisdiction because of Harvey's failure to pay. The trial court denied the jurisdiction plea and GCAD appealed.

GCAD argues that the trial court erred in denying its plea to the jurisdiction because Harvey's failure to pay any property taxes by the delinquency date deprived the trial court of subject-matter jurisdiction.

To be eligible to appeal an appraisal determination, a property owner is required to have paid a minimum amount of taxes by

the delinquency date. The minimum tax payment is calculated in one of three ways, but the parties agree that, in this case, the amount Harvey owed by February 1 was the taxes due on the portion of the taxable value of the property that is not in dispute. Compliance with Section 42.08's payment deadline is a jurisdictional prerequisite to district court's subject matter jurisdiction to determine property owner's rights.

Harvey concedes that he did not make a tax payment before February 1, 2017. Nonetheless, he argues that his payment of zero dollars complies with Section 42.08(b)(1) because there is no way to know the "portion not in dispute" until the agricultural-use exemption has been finally determined. In other words, according to Harvey, without a proper hearing on all of his claims, the entire amount is in dispute, leaving the amount that is not in dispute equal to zero dollars. The court did not agree.

Harvey's underlying contention is that his land has benefitted from an agricultural-use exemption in past years and continued to qualify for the exemption for the 2016 tax year. Under the exemption, Harvey's recent property tax bills have been between $100 and $200 annually. It was $138.13 in the 2015 tax year. Harvey expressly does not argue that he owes zero dollars in 2016 property taxes. He agrees he owes some amount in taxes. Thus, there was some amount of taxes that were due and undisputed. Yet Harvey paid nothing— not even an estimate of the amount that would have been due had he continued to benefit from the agricultural-use exemption he sought. Accordingly, Harvey failed to meet the minimum payment requirement of Section 42.08.

PART XVI
CONSTRUCTION

Lyda Swinerton Builders, Inc.* v. *Cathay Bank, 566 S.W.3d 836 (Tex.App.—Houston [14th Dist.] 2018, pet. pending). After a lot of problems getting paid, the contractor suspended work and ordered its subcontractors to suspend work as well. No work was done again after the suspension. The contractor filed its first mechanics' lien. The owner asked the contractor remain on the work site and the contractor did so, incurring costs for keeping its materials and equipment on site. The contractor sent a notice of intent to terminate the contract, but the owner kept assuring it that financing was on the way, so the contractor did not expressly terminate the contract. The owner filed bankruptcy. Finally, the contractor left the site, but claimed that it never terminated or abandoned the contract.

In a lien priority dispute with the bank, the trial court held that the contractor had a lien superior to the bank's lien, but held that the contract was "constructively terminated" ninety days after the contractor suspended work, thereby making several of the lien affidavit filings untimely and ineffective.

Section 53.053(b) of the Texas Property Code addresses when a debt to an original contractor accrues. The statute provides that indebtedness to an original contractor accrues on the last day of the month in which the contract is terminated by a written declaration received by either the original contractor or the contracting party, or the contract is completed, finally settled, or abandoned. It is undisputed that the contract was never completed or finally settled. It is also undisputed on appeal that neither the contractor nor the owner received a written declaration from the other terminating the contract. The court then looked to see if the contract had been abandoned.

The Property Code does not recognize "constructive termination" as a basis for determining when a debt to an original contractor accrues. The bank seemed to recognize this and argued on appeal that the court should construe the trial court's conclusion of law regarding constructive termination as, in reality, a determination that the contract was abandoned on that date. The court declined to do so because both parties submitted proposed findings and conclusions regarding abandonment of the contract and the trial court did not adopt them. The court

therefore treated the trial court's failure to adopt them as a deliberate refusal, and would not imply or presume any findings regarding abandonment.