CASE LAW UPDATE

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CASE UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 685 S.W.3d and Supreme Court opinions released through November 8, 2024.

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

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

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

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PART I
PROMISSORY NOTES, MORTGAGES AND FORECLOSURES

Moore* v. *Wells Fargo Bank, N.A., 685 S.W.3d 843 (Tex. 2024). The Moores obtained a loan from Wells Fargo Bank. The Bank held the loan, but PHH serviced the loan.

The deed of trust contained an acceleration clause in the event of default: "all sums secured by this Security Instrument and accrued interest thereon shall at once become due and payable at the option of Lender without prior notice, except as otherwise required by applicable law, and regardless of any prior forbearance." The deed of trust also waived any notice of intent to accelerate. Upon acceleration, however, the Moores were entitled to reinstate the loan "as if no acceleration had occurred" by paying all sums due plus costs.

After the Moores defaulted on the loan, the mortgage servicer issued a notice of intent to accelerate in, and it gave written notice that it had accelerated the loan on February 2, 2016. A foreclosure sale scheduled for March 1 did not occur.

Eight months later, the mortgage servicer sent the Moores a "Notice of Acceleration of Maturity" that rescinded its earlier acceleration of the note. In the next paragraph, the notice reaccelerated the debt and set a new foreclosure date. Additional notices sent to the Moores repeated the rescission language and then reaccelerated the loan in November 2016, January 2017, March 2017, and March 2019. Each notice updated both the amount the Moores owed in total and the amount the Moores could pay to cure their default and reinstate the loan. The final notice contained additional language: "Any acceleration of the Note made prior to sending this Notice is hereby rescinded in accordance with the Practice and Remedies Code § 16.038."

During and after this time, the mortgage servicer scheduled multiple foreclosure sales that never occurred, and the Moores filed multiple bankruptcy petitions, which the bankruptcy court dismissed. As of the date of this case, Wells Fargo had not foreclosed on the property, and the Moores had not made a payment on the loan in eight years.

In August 2020, the Moores sued in state court, seeking a declaratory judgment that the limitations period had run four years after the first acceleration in February 2016. Wells Fargo and PHH removed the case to federal court and moved for summary judgment. They contended that they had rescinded earlier accelerations under Section 16.038 and further had abandoned acceleration by demanding less than the full balance of the loan. The district court granted summary judgment.

The Moores appealed to the Fifth Circuit. The Fifth Circuit certified the following questions to the Texas Supreme Court: (1) May a lender simultaneously rescind a prior acceleration and re-accelerate a loan under Civil Practice and Remedies Code § 16.038? and (2) If a lender cannot simultaneously rescind a prior acceleration and re-accelerate a loan, does such an attempt void only the re-acceleration, or both the re-acceleration and the rescission?

In Texas, a lender must bring suit to foreclose on a real property lien not later than four years after the day the cause of action accrues. Civil Practice and Remedies Code § 16.035(a). Generally, the accrual date is the maturity date of the loan. Pertinent here, however, promissory notes often also contain acceleration clauses that permit the lender to accelerate the loan upon the borrower's default. When a lender chooses to accelerate, the cause of action for foreclosure of the lien accrues at the time of acceleration.

Not all accelerations are carried through to foreclosure. A lender may abandon or rescind acceleration of the note, restore the original maturity date, and reset the limitations period, thus giving the borrower an opportunity to cure the default.

Civil Practice and Remedies Code § 16.038 provides one nonexclusive method of rescission. Under § 16.038(b), rescission of acceleration is effective if made by a written notice of a rescission or waiver served on each debtor who is obligated to pay the debt. Rescission under this section does not affect a lienholder's right to accelerate the maturity date of the debt in the future nor does it waive past defaults.

While the Moores received multiple letters notifying them that the lenders had rescinded earlier accelerations of the loan, they argued that the limitations period did not reset because these letters further informed them that their loan was reaccelerated. The Moores contend that § 16.038 refers to a lienholder's right to accelerate "in the future." Relying on this language, they argued that a notice rescinding an earlier acceleration is ineffective if it is accompanied by a notice that the loan is reaccelerated.

Wells Fargo and PHH argued that the statute does not make rescission contingent on refraining from reaccelerating the loan in the same notice. Rather, the statute expressly contemplates that a lender may reaccelerate after rescission.

The Supreme Court agreed with Wells Fargo and the federal district court. The statute provides the means of rescinding acceleration. It does not require that the rescission notice be distinct or separate from other notices that a lender might send to borrowers with a loan in default. In the absence of any restriction, the court would not read one into the statute.

The statute's express provision that a rescission does not affect a lienholder's right to accelerate the maturity date of the debt in the future does not create a waiting period between rescission and reacceleration of specific duration. It is the very nature of rescission to remove the earlier acceleration, paving the way for a new one to follow, whether in the same letter or by separate notice.

A lender's simultaneous reacceleration does not nullify a rescission that complies with Civil Practice and Remedies Code Section 16.038. Because the court answered the Fifth Circuit's first question "yes," it did not need to answer the second question.

In re *Abraham*, 662 S.W.3d 541 (Tex. App.—El Paso 2022). To establish the defense of limitations, the movant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pled or otherwise raised. Once the movant meets its burden, the non-movant has the burden to present evidence raising a genuine issue of material fact to avoid the statute of limitations. If a plaintiff fails to raise a genuine issue of material fact as to the affirmative defense, the trial court must grant the summary-judgment motion.

A person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues. Civil Practice & Remedies Code § 16.035(a). If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment. If a note contains an acceleration clause, default is not the triggering event that

starts the limitations running on the note; rather, the action accrues only when the holder actually exercises its option to accelerate.

Effective acceleration requires two acts: (1) notice of intent to accelerate; and (2) notice of acceleration. Both notices must be clear and unequivocal. The notice must allow the borrower to cure the default and apprise him or her that failure to cure will result in acceleration of the note and foreclosure under the power of sale. Although a lender usually gives notice of acceleration by expressly declaring the entire debt due, a lender may give notice of acceleration by taking some other unequivocal action showing the debt is accelerated.

Here, the note contained an acceleration clause that provided for the option of acceleration upon a default. The Estate, successor to the maker, argued that the statute began to run in January 1996 because the holder, Williams, admitted in his pleadings that the note had matured or was in default. The Estate pointed to William's summary judgment motion showed a balance due of $50,629.00 on January 1996, which constitutes William's judicial admission that the note was past due at that time.

Williams contended that the final payment on the note was not due until December 2009, the date that the fifteen-year note would have matured. He claimed that the amortization table was not a judicial admission that the note was accelerated in 1996, but that the table was proffered as an indication that the amount he had lost in the transaction underlying this lawsuit was greater than the value of what was owed him under the note. William also contended that the table did not constitute a judicial admission because it was not deliberate, clear, and unequivocal.

Through his amortization table, William claimed that he was owed $1,175,323.65, based on: (1) the $50,629.00 remaining balance on the note as of January 1996; and (2) over a million dollars in interest at 18%, compounded annually, as of 2013. Although no formal notice of William's acceleration appears in the record, this is a mathematically clear and unequivocal action on William's part that he exercised his option to accelerate the note in January 1996. The court noted that, without formal notice of acceleration, a lender may give notice of acceleration by taking some other unequivocal action showing the debt is accelerated.

PART II
PROMISSORY NOTES AND LOAN AGREEMENTS

Rock Creek Capital* v. *Stewart, 681 S.W.3d 799 (Tex. App.—Houston [14th Dist.] 2023, no pet.). Evan Stewart received some Sallie Mae student loans. His father co-signed the loan applications. In November 2020, Evan and his father received letters from Sallie Mae that the balances of both loans had been “charged-off” and that any scheduled future payments had been cancelled.

Before the charge-offs occurred, Sallie Mae, Rock Creek, and others executed a "Charged-Off Educational Loan Portfolio Purchase and Sale Agreement" dated May 27, 2020, by which Sallie Mae sold certain loans to Rock Creek. Rock Creek contends that the acquired loans included Evan’s two student loans. The Loan PSA was effective May 13, 2021. Nine days later, Sallie Mae mailed letters to Evan and his father notifying them that both loans had been sold to Rock Creek and that it was important that they contact Rock Creek to make payment arrangements going forward.

A Bill of Sale was executed in connection with Sallie Mae’s sale to Rock Creek. The account schedule lists the balances of Sallie Mae and SMB Trust accounts together with a

largely redacted spreadsheet, which purports to list outstanding loans by account number, loan number, loan balance, and borrower social security number. Only one line of the spreadsheet was not redacted, and the account number and other information referenced on that line does not match either of the Sallie Mae loans at issue.

A party seeking to enforce a note must prove (1) that a certain note is in question, (2) that the defendant signed the note, (3) that the plaintiff is the owner or holder of the note, and (4) that a certain balance is due and owing on the note.

The dispositive issue is whether Rock Creek proved as a matter of law that it is the holder of the promissory notes. A holder is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. When an instrument is payable to an identifiable person, the "holder" is the person in possession if he is the identified person.

The trial court implicitly determined that Rock Creek is not the holder of the promissory notes because it found that Rock Creek failed to prove that it acquired the notes as part of the Bill of Sale.

It is undisputed that the promissory notes, when issued, were payable to Sallie Mae. Therefore, considering the face of the notes, Rock Creek does not qualify as a holder because it is not a person or entity identified in the notes as a payee.

According to Rock Creek, it became the holder of the notes through negotiation. A person to whom an instrument is not payable can become a holder by negotiation. Negotiation is the transfer of possession of an instrument by a person other than the issuer to a person who thereby becomes its holder. "[I]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. The indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed to it as to become part of it.

To prove that it acquired the notes by negotiation, Rock Creek had to prove possession of the notes and an indorsement by Sallie Mae. The notes in the record contain no indorsement written by or on behalf of Sallie Mae nor is there any paper or attachment so firmly affixed to them as to become a part of the instruments.

If an instrument not in the possession of the original holder lacks a written indorsement, a person in possession can still prove holder status and enforce the instrument if he proves the chain of title by which he acquired the instrument. The transfer may be proven by documents or oral testimony.

The court held that there was evidence supporting the trial court's conclusion that Rock Creek is not a holder. The Bill of Sale and its attachments on which Rock Creek relies do not identify the two notes at issue as included in the transferred portfolios. The attached spreadsheet ostensibly listing the transferred loans by account number is entirely redacted except for one loan, which does not match any of the identifying information associated with either loan at issue. And although there was testimony that Rock Creek is currently the holder of the notes, the testimony was qualified to the best of the witness's knowledge.

PART III
DEEDS AND CONVEYANCES.

Jordan* v. *Parker, 659 S.W.3d 680 (Tex. 2022). A father devised his estate to his widow

for life, with the remainder upon her death to his children, including his son. The father granted his widow complete control over the estate's assets during her lifetime, including the power to sell estate property and to redirect a child's remainder interest to others. Among the estate's assets was a partial interest in land known as the Cottonwood Ranch. Other owners of the ranch included the father's widow. The widow eventually conveyed her separate interest in the ranch to their son and daughter.

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

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

Armour Pipe Line Co.* v. *Sandel Energy, Inc., 672 S.W.3d 505 (Tex. App.—Houston [14th Dist.] 2023, no pet.). Under the estoppel-by-deed doctrine, a person is bound by the recitals in a deed in which the person was a party or in which the person's predecessor in title was a party if the party claims title through the deed. A "recital" has been defined as the formal statement or the setting forth of some matter of fact, in any deed or writing, in order to explain the reasons upon which the transaction is founded. The Texas Supreme Court has determined that under the estoppel-by-deed doctrine, each party to a deed is bound by the reservations in a deed in which the party or its predecessor in title was a party if the party claims title through the deed. Although estoppel by deed operates most commonly against a grantor, this doctrine also operates against a grantee who accepts a deed. Under the estoppel-by-deed doctrine, a grantee who accepts a deed is a party to the deed, and, as between the grantor and the grantee and those in privity with them, the reservations in the deed are binding and effective, even if the grantor did not have good title to the property in question when the deed was executed.

Under the stranger to title rule, if a grantor in a deed owns no title to the property conveyed in the deed and thus is a "stranger to title," then any exception or reservation of real property in favor of the grantor is ineffective, inoperative, and conveys no title to this grantor. Under the stranger to deed rule, if a grantor in a deed makes a reservation or exception of real property in favor of a person not a party to the deed and thus a "stranger to the deed," then this exception or reservation in favor of the stranger to the deed is ineffective, inoperative, and conveys no title to the stranger.

The Stranger to Deed Rule developed long ago under English common law. The rule derived from the common law notions of reservations from a grant and was based on feudal considerations. Though a reservation arguably could vest an interest in a stranger to the deed, the early common law courts vigorously rejected this possibility, apparently

because they mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin. Commentators have attacked the Stranger to Deed Rule as a groundless, hyper-technical, and arbitrary rule that violates the unambiguous intent of the parties to the deed. The United Kingdom abolished the Stranger to Deed Rule in 1925 by means of the Law of Property Act, and some American states also have abrogated this rule.

Despite these developments, the Stranger to Deed Rule still appears to be the majority rule among the states, and under binding precedent from the Supreme Court of Texas, the Stranger to Deed Rule applies under Texas law. The Stranger To Deed Rule does not conflict with the estoppel-by-deed doctrine because estoppel by deed binds the parties to the deed and those claiming under them but does not bind strangers to the deed.

Brooke-Willbanks* v. *Flatland Mineral Fund, LP, 660 S.W.3d 559 (Tex. App.--Eastland 2023, pet. dismissed). This case involves the construction of a deed conveying a mineral interest, which I won't get far into. However, it does contain references to various axioms, etc., that apply to construction of deeds in general.

The construction of an unambiguous deed is a question of law for the court. When construing an unambiguous deed, the court's primary responsibility is to ascertain the intent of the parties solely from all of the language within the four corners of the deed. What controls is not the intent that the parties meant but failed to express; rather, it is the intent that the parties did, in fact, express. Additionally, the court must strive to harmonize all parts of the deed and construe it to give effect to all of its provisions. When different provisions of a deed appear to be contradictory or inconsistent, the court must attempt to construe the instrument so that no provision is rendered meaningless.

Generally, deeds are construed to confer upon the grantee the greatest estate that the terms of the instrument will allow. In other words, a deed will pass whatever interest that the grantor possesses in the land, unless the deed contains language that expresses a clear intention to grant a lesser estate. Thus, unless the deed contains reservations or exceptions that reduce the amount of the estate conveyed, a warranty deed will pass all of the estate owned by the grantor at the time the conveyance is consummated.

The deed in this case contains a "subject to" clause that further clarifies the intent of the parties. The words "subject to,' when used in their ordinary sense, mean subordinate to, subservient to or limited by. "Subject to" clauses limit the estate and associated rights that are granted and warranted to a party.

Mark S. Hogg, LLC* v. *Blackbeard Operating, LLC, 656 S.W.3d 671 (Tex. App.—El Paso 2022, no pet.). In Texas, to satisfy the statute of frauds as a matter of law, a conveyance must contain a valid legal description of the land to be conveyed. Under the statute of frauds, a land description must "furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty. If enough appears in the description so that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient.

Here, the statute of frauds defense depends only on whether the Assignment in this case—or any existing writing referenced in the Assignment—identifies the actual land at issue. The court said it need look no further than the Exhibit A to the Assignment itself to see that it does make a sufficiently specific reference.

After identifying the two specific leases—including the 1994 Lease—Exhibit A goes on to state that the Leases are recorded in the "Real Property Records of Winkler County" and interests in those Leases are conveyed "INSOFAR AND ONLY INSOFAR as the above Leases cover the following described lands, to-wit: The SE/4 of Section 24, Block B-10, PSL Survey, limited in depth from the surface to 6,300 feet beneath the surface of the earth." This type of description has been held sufficient to satisfy the statute of frauds. The writing does not have to list metes and bounds to be enforceable, but it must provide the necessary information to identify the property with reasonable certainty. Here, the Assignment identifies the county, survey, block, and section of the described land.

Fogal* v. *Fogal, 671 S.W.3d 753 (Tex. App.--Beaumont 2023, no pet.). Marjorie was Todd's and Neil's mother. Marjorie was the trustee of the family trust. As trustee, she signed a deed conveying the property from the trust jointly to herself and Todd. About four years later, Marjorie conveyed her undivided interest in the property to Neil. So, when Marjorie died, she no longer owned an interest in the property.

Todd's contention was that Marjorie's conveyance to Neil did not cut off his survivorship rights in the property as joint tenant with Marjorie, but that the survivorship right he acquired from the trust matured when Marjorie died. On the other hand, Neil contends that he and Todd became tenants in common in the Property when his mother conveyed her undivided interest in the Property to him. Neil also argues that by conveying an undivided interest out of a joint tenancy, a joint tenant destroys whatever benefit the surviving joint tenant might have received under the survivorship clause of a joint tenancy deed.

The deed from Marjorie as trustee to herself and Todd grants the property to them "as joint owners with rights of survivorship ... and not as tenants-in-common." Her deed to Neil conveyed "All of Grantor's undivided interest in" the property to Neil. Under the deed to Neil, Marjorie reserved a life estate in the property, but provided that "[u]pon the death of Grantor, full record title shall vest in Grantee." The deed identifies Marjorie as the Grantor and Neil as the Grantee.

After Marjorie's death in 2021, Neil sued Todd and sought an order partitioning the Property. He also asked the trial court to order the Property sold. Todd answered the petition, filed a cross-action, and asked for a declaratory judgment to "straighten out title" under the two deeds. Todd alleged that because he survived Marjorie, he owns the property's entire fee.

Both Neil and Todd agree the two deeds at issue, both of which were signed by Marjorie—one in her capacity as a trustee of a trust and the other in her individual capacity as the owner of an undivided interest in the Property—are unambiguous. However, they differ over the legal effect of the deeds.

Todd argues that under the deed to him, he and Marjorie owned the Property as joint tenants with a joint right of survivorship. Because he had a joint survivorship right with his mother, Todd claims, when Marjorie died his survivorship interest in her undivided interest matured, and he became (he claims) the sole owner of the property. As to the deed to Neil, Todd interprets that deed as a deed he had the right to choose to elect to void when his mother died because (he claims) the deed prejudiced his right to inherit the property under the survivorship clause of his deed.

In contrast, Neil argues that when Marjorie conveyed her undivided interest to him, reserving a life estate for her benefit, she destroyed the joint tenancy created by the other deed and made Neil and Todd tenants in

common regarding their rights of ownership in the property. To be sure, Neil construes the deed from the Trust—the deed on which Marjorie's rights of ownership in the property are found—as having left Marjorie free to dispose of her undivided interest in the property as she saw fit. He notes that the language in the deed from the Trust doesn't restrict Marjorie from disposing of the property. And Neil points out that no language in the deed to him shows Marjorie intended to delay the vesting of his ownership of the property to a date after the date she delivered the deed to him.

The court noted that the plain language of the deed to Neil shows that Marjorie conveyed her undivided interest in the property to Neil. These three considerations lead the court to that conclusion.

First, Marjorie acquired her undivided interest in the Property under a General Warranty Deed from the Trust. The property was granted, sold, and conveyed to Marjorie and Todd as joint owners with rights of survivorship.

Second, none of the language in the deed from the Trust restricted Marjorie's right to dispose of her undivided interest in the Property. Under Texas law, an estate in land that is conveyed or devised is a fee simple estate unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law. And while the deed created survivorship rights in the property for both Marjorie and Todd, both of their survivorship rights were contingent and uncertain for each since whether Todd or Marjorie would inherit the other's interest under the deed depended (among other things) on whether the other grantee was the first to die. More to the point, because both Marjorie and Todd owned their interest in the Property with no restriction prohibiting the other from selling or alienating their interest in the Property, the rights of survivorship depended on both parties owning their interest in the property until the other died.

Third, Texas looks to the English common law when it is not inconsistent with the constitution or laws of this state. Under English common law, the sale of one joint tenant's interest in a property held by joint tenants cuts off the survivorship rights that the surviving joint tenant would have otherwise enjoyed had the property not been sold.

The court was persuaded that her decision to deed her undivided interest in the property to Neil cut off the expectance interest that Todd might have otherwise realized had Marjorie continued to own property in joint tenancy with Todd until her death.

Gaskins* v. *Navigator Oil and Minerals, Inc., 670 S.W.3d 391 (Tex. App.--Eastland 2023, pet. denied). At one time, J.S. Clay owned the entire mineral interest in the subject property. In the 1950s, Clay and his family conveyed a 20/160 royalty interest in the property to third parties who are not involved in the underlying suit. The core of the parties' dispute on appeal focuses on the extent to which the remaining 140/160 royalty interest in the property was divided in a 1960 conveyance between Clay and Joe Mac and LaVerne Gaskins.

The original general warranty deed from Clay equally divided the remaining 140/160 royalty interest to Clay (70/160) and Joe Mac and LaVerne (70/160). But a correction deed was executed soon thereafter that changed certain language and interests that were conveyed in the original deed.

In this case, Navigator is the successor to Clay and the Gaskins are successors to Joe Mac and LaVerne.

The original deed was executed on March 23, 1960. The correction deed was executed by Clay and Joe Mac twenty-three days later. The purpose of the Correction Deed was to clarify the scope of the interests conveyed in the original deed. According to Gaskins, the original deed (1) erroneously conveyed only one-half of the executive rights to Joe Mac and LaVerne, (2) erroneously failed to except and reserve for Clay, and his heirs and successors, a 90/160 royalty interest, and (3) failed to separately except and reserve the 20/160 royalty interest that had been previously conveyed to certain unrelated third parties. Hence, in addition to clarifying the scope of the conveyed interests, the Correction Deed was executed to correct these errors.

Since their enactment in 2011, the Correction Instrument statutes have codified the procedures required for the execution of valid correction instruments. Property Code §§ 5.027 - .031. The statutes also provide certain protections and presumptions for correction instruments that comply with these procedures and permit the use of correction instruments to make both material and nonmaterial corrections under certain circumstances.

To make material corrections to the original deed, the statutes require that a correction deed, to be valid and enforceable, must be (1) executed by the original parties to the recorded instrument of conveyance or, if applicable, by a party's heirs, successors, or assigns, and (2) recorded in each county in which the original instrument of conveyance that is being corrected is recorded. A correction deed that complies with Section 5.029 receives certain protections and presumptions and is (1) effective as of the effective date of the original instrument; (2) prima facie evidence of the facts stated in the correction instrument; (3) presumed to be true; (4) subject to rebuttal; and (5) notice to a subsequent buyer of the facts stated in the correction instrument.

The statutes also contain a retroactive component: correction deeds that were recorded before the statutes' effective date of September 1, 2011, such as the correction deed in this case, need not strictly comply with the statutory requirements; rather, only substantial compliance is required. Older correction deeds receive the same protections and presumptions that are set out in Section 5.030, unless a court of competent jurisdiction renders a final judgment determining that the correction instrument does not substantially comply with Section 5.029.

Navigator contends that the correction deed is void and ineffective because it (1) does not correct any error or ambiguity that is subject to correction under the Correction Instrument statutes, and (2) was not signed by all original parties to the original deed. Consequently, Navigator reasons that the correction deed is not entitled to any of the statutory presumptions or protections provided by the Correction Instrument statutes. The court disagreed.

Navigator argued that there was no error or ambiguity in the original deed that would allow execution of a correction deed. But the court held that there is no requirement that an error or ambiguity must exist in the original deed for a correction deed to be valid. 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. To the contrary, the Correction Instrument statutes contain broad authorizations to correct original instruments, with few limitations. This correction-by-agreement remedy is a nonjudicial process that is designed to promote efficiency in non-adversarial circumstances.

Parties to the original instrument may correct "an ambiguity or error," including the "extent of the interest conveyed." However, the correction instrument conveys nothing; it simply "replaces and is a substitute for the original instrument" and clarifies the scope of the conveyed interests. Rather, the parties' compliance with the statutory requirements regarding the execution and recording of the correction instrument determines the instrument's validity and effectiveness. Thus, Navigator's focus here is misplaced—the validity of the 1960 Correction Deed turns on the original parties' compliance with these statutory requirements which are necessary to validate a correction deed, not on the apparent intent of the parties when they executed the original instrument.

Navigator then argued that the correction deed was void and invalid because LaVerne, as an original grantee, did not sign it. However, the absence of LaVerne's signature is of no consequence. The court held that because Joe Mac signed the Correction Deed on behalf of the grantees , which included LaVerne, the deed substantially complied with the applicable statutory requirements for a pre-2011 correction deed that makes material corrections to the original instrument; therefore, the Correction Deed is valid and enforceable.

Importantly, it has been held that a correction deed that does not comply or even substantially comply with Section 5.029 is not necessarily void. A correction deed that does not comply with Section 5.029 is not effective to the same extent as provided by Section 5.030 but nothing in the statute renders it without any effect.

Correction instruments executed before 2011 need only "substantially comply" with the requirements of Section 5.029. The statutory text does not define what constitutes "substantial compliance" but, in construing Section 5.031, the court has held that the term means that one has performed the essential requirements of a statute, and it excuses deviations which do not seriously hinder the legislature's purpose in imposing such requirements.

Only the first requirement of Section 5.029(b)—that all parties to the original instrument must execute the correction deed—is at issue here. Navigator claimed that because Joe Mac signed the correction deed on LaVerne's behalf, it was not executed by each party to the original recorded instrument; therefore, the Correction Deed does not comply with Section 5.029(b). The court disagreed.

First, the statute only requires that each party to the original recorded instrument must execute, not sign, the correction deed. Nothing in the text of the Correction Instrument statutes specifically requires that all the parties to the original instrument of conveyance must sign the correction deed. Second, even if the statute required that each party to the original instrument of conveyance must sign the correction deed, this deed need only "substantially comply" with Section 5.029 to be valid and effective, and here Joe Mac signed it on behalf of himself and LaVerne. The question the court must decide is: does a correction deed substantially comply with Section 5.029(b) if it is signed by a grantee's representative? The answer in this instance is yes. Here, because the person who signed the correction deed (Joe Mac) did so in a representative capacity and is also the other original grantee, and because the correction deed recites that, by his signature, Joe Mac executed the correction deed on behalf of all grantees, which included LaVerne, the court held that this correction deed substantially complies with Section 5.029. Furthermore, even if Joe Mac lacked the authority to sign on behalf of LaVerne, the correction deed would not be void, but would be only voidable.

Generally, a party may execute a legal document without signing it. The term "execute" is not limited to mean only "sign." Rather, the term "execute" is defined in several respects. Black's Law Dictionary defines "execute" as "[t]o perform or complete (a contract or duty) ... [t]o change (as a legal interest) from one form to another ... [t]o make (a legal document) valid by signing ; to bring (a legal document) into its final, legally enforceable form."

To be sure, even in the context of older, pre-2011 correction instruments, it appears that a correction deed must be signed by at least some of the parties, if not necessarily all of them, in order to substantially comply with Section 5.029. This leaves open the possibility that a grantee or grantor to the original instrument of conveyance may sign the correction deed on behalf of another grantee or grantor in order to at least substantially comply with the statutory requirement that all parties execute the correction deed.

Van Dyke* v. *Navigator Group, 668 S.W.3d 353 (Tex. 2023). Only in a legal text could the formula "one-half of one-eighth" mean anything other than one-sixteenth. But in the law, "one-half of one-eighth" sometimes equals one-half—in the context of reservations of mineral interests. Likewise, the law sometimes calculates one-half of 1,000 to be 600, not 500—in the context of contracts for rabbits. Those results may seem bizarre, unsatisfying, and literally "fuzzy math." They can also be inefficient; resolutely adhering to the rules of arithmetic would more rapidly end litigation. The rules that courts must apply, however, are not primarily those of arithmetic but of textual construction. The rules of construction, in turn, reflect the principle that legal texts—including private-law documents like contracts, deeds, and wills—still bear the meaning that their words had when they were drafted, even if the use of the same words today might generate a different meaning.

This case involves the first seeming oddity mentioned above: the so-called "double-fraction" dilemma from antique mineral conveyances in which the parties insisted on using two fractions. The 1924 deed from George and Frances conveyed their ranch and underlying mineral to White and Tom, with the following reservation: "It is understood and agreed that one-half of one-eighth of all minerals and mineral rights in said land are reserved in grantors, . . ., and are not conveyed herein." Afterwards, both parties engaged in many transactions that reflected that each side in the conveyance had an equal one-half interest in the minerals. For nearly ninety years after the original deed, the parties continued, without exception, to engage in transactions and to make representations that were consistent with the understanding that each original side always had a one-half interest in the minerals.

In 2013, the White parties brought a trespass-to-try title action after the lessee began paying royalties to both sides in equal shares. At stake is at least $44 million in accumulated disputed royalties. The ownership of those (and presumably future) royalties depends on which side correctly interprets the deed's mineral reservation of "one-half of one-eighth."

The White parties asserted that the double fractions are merely an elementary arithmetic formula with no additional meaning, so that only a 1/16 interest was ever reserved. The Mulkey parties contended that the double fraction reflects a term of art common at the time the deed was drafted and that the use of this term of art reserved one-half of the mineral interest.

The trial court entered an order granting the White parties' motion for partial summary judgment on the construction of the 1924 deed.

The order declared that the deed's reservation of "one-half of one-eighth of all minerals and mineral rights" unambiguously reserved only a 1/16 interest in the mineral estate. The court of appeals affirmed, holding that the deed unambiguously conveyed 15/16 of the mineral estate. The court of appeals concluded that the estate-misconception theory—the theory that the Mulkey parties pressed to justify their counter-arithmetical reading—had no role to play because the deed did not contain any conflicting provisions requiring harmonization and because the subject property was not burdened by a lease at the time of conveyance (or before then). The court of appeals thus applied standard multiplication to determine the quantum of mineral interest reserved.

The Supreme Court held that the trial court and the court of appeals erred in holding that the Mulkey parties did not have a one-half interest in the minerals.

First, the court concluded that the deed itself reserved a one-half interest in the mineral estate. Antiquated instruments that use 1/8 within a double fraction raise a presumption that 1/8 was used as a term of art to refer to the "mineral estate." That presumption is readily rebuttable, however. If the text itself has provisions—whether express or structural—illustrating that a double fraction was in fact used as nothing more than a double fraction, the presumption will be rebutted. But the presumption is not rebutted here. Nothing in the text of this deed suggests that rote multiplication was intended, and it is not inconsistent with any part of the deed to read 1/8 as a term of art that references the entire mineral estate.

The court went on to explain how to construe the deed.

Whether the 1924 deed reserved a 1/2 mineral interest for the Mulkey parties or a 1/16 interest—or anything else—reduces to a question of textual interpretation. The fact pattern may seem odd to those not steeped in Texas oil-and-gas law, but the legal framework for analyzing this text is the same as for any other. Unless otherwise defined in the text, courts will adopt a term's ordinary meaning. One fundamental premise, however, is that a text retains the same meaning today that it had when it was drafted. Thus, the ordinary meaning at the time of drafting remains the meaning to which courts must later adhere.

The meaning of an unamended text, in other words, is unaffected by the passage of time, linguistic developments, or the evolution of usage. These phenomena may affect our language by giving new meanings to (or subtracting old meanings from) any given word or phrase. But the original text does not evolve with the broader language. The test is what the text reasonably meant to an ordinary speaker of the language who would have understood the original text in its context. Whatever that meaning was then remains the meaning today.

For example, early Texas jurisprudence recognized that a contract for a "thousand" rabbits was understood to mean 1,200; reference to a "day" could mean ten hours in context. Texts of that era using those terms still bear those meanings. The way to change a text's meaning is to change the text , not to observe that an unchanged text includes language that, unbeknownst to those who committed the text to writing, would at some point in the future eventually carry a different meaning.

Thus, the analysis does not turn on what one might think "one-half of one-eighth" would mean if written today. It does not matter whether that phrase would clearly mean 1/16, or whether the now-unusual step of spelling out a double fraction would make its meaning inherently ambiguous, or something else. Indeed, the challenge is not particularly legal in

nature. Instead, it is to overcome the cognitive dissonance that arises because, at least at first glance, "one-half of one-eighth" seems unusually clear yet is alleged to mean something radically different from what we might expect. After all, it is certainly true that one-half times one-eighth did equal one-sixteenth in 1924 and at every other time in history. But 1,000 has always meant 1,000 (not 1,200) throughout history, too, even for rabbits; days have always had 24 hours, not 10. Setting aside our preconceptions and our instinctive resort to basic math, the only question is whether, in the context of a mineral-conveyance instrument from 1924, the double fraction reasonably referenced unchanging arithmetic at all. The analytical framework here—simply determining what a term meant and thus means—turns out to be exactly the same as it always is.

Deeds provide a good example of why we insist on language bearing its ordinary meaning. Recording deeds and similar instruments is purposefully a public enterprise designed to elicit public reliance. The reliability of record title contributes mightily to the predictability of property ownership that is so indispensable to our legal and economic systems. A properly recorded deed, like the one at issue here, provides all persons, including the grantor, with notice of the deed's contents, which would be far less valuable without a consistent and stable judicial construction of terms used in deeds. The meaning of a deed, in other words, matters to the public writ large, not merely to those who wrote it. So important is it that these records are public and permanent that we recently overturned a decades-old default judgment foreclosing a tax lien largely because of the failure to consult public deed and tax records which would have revealed information necessary to achieve proper service on a defendant.

The court then turned to the Mulkey parties' claim that they had acquired title to one-half the minerals under the "presumed-grant" doctrine.

The presumed-grant doctrine, "also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession. The doctrine requires its proponent to establish three elements: (1) a long-asserted and open claim, adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim. The court of appeals imposed an additional fourth element: a gap in the title. The court said there was nothing in precedent that mandated this additional test. Nevertheless, the extensive history of transactions and dealings among the parties provides enough evidence for the existence of such a gap even if it were needed.

The parties' history of repeatedly acting in reliance on each having a one-half mineral interest conclusively satisfies the presumed-grant doctrine's requirements. This ninety-year history includes conveyances, leases, ratifications, division orders, contracts, probate inventories, and a myriad of other recorded instruments that provided notice. There was a long and asserted open claim—for nearly a century, both parties acted in accordance with each side owning a one-half interest. And until this litigation began in 2013, the White parties never said anything to the contrary.

Echols Minerals, LLC* v. *Mac Green, 675 S.W.3d 344 (Tex. App.--Eastland 2023, no pet.). This case, concerning a reservation of a non-participating royalty interest, concerned, in part, the interpretation of two deeds. For purposes of this outline, the contents, etc., of the two deeds are generally not relevant. The case discusses the situation in which two deeds may be read together in order to construe their meaning.

In ***Rieder* v. *Woods***, 603 S.W.3d 86, 94 (Tex. 2020), the Texas Supreme Court addressed the circumstances under which contracts are to be construed together. Under appropriate circumstances, instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times and the instruments do not expressly refer to each other. Where appropriate, a court may determine, as a matter of law, that multiple separate contracts, documents, and agreements were part of a single, unified instrument. In determining whether multiple agreements are part and parcel of a unified instrument, a court may consider whether each written agreement and instrument was a necessary part of the same transaction.

When construing multiple documents together, courts must do so with caution, bearing in mind that tethering documents to each other is simply a device for ascertaining and giving effect to the intention of the parties and cannot be applied arbitrarily and without regard to the realities of the situation. With respect to construing two or more instruments relative to the conveyance of interests in lands, instruments between the same parties may be construed together, whereas instruments between different parties sometimes may be construed together when forming a single transaction.

The court in ***Rieder*** ultimately held that the two agreements at issue were not "components of a single, unified instrument. The court reached this conclusion by comparing the terms of the two agreements. It noted that the agreements had different parties and different signatories. It also noted that the two agreements did not reference each other or incorporate the terms of one into the other.

Here, the grantors in the 1952 NPRI deed are Floyd Haynes and his wife Lola Haynes, Robert Bruce Haynes and his wife Mary E. Haynes, and D'Lorz Inez Haynes. They conveyed an undivided 5/6 interest in the property to Madison for a recited consideration. The deed is dated January 6, 1952, and it was executed by the grantors in January 1952, February 1952, and March 1952. The 1952 NPRI deed was filed for record on April 1, 1952. The grantors in this deed reserved an undivided 33.25/278.5 non-participating royalty interest.

In the 1952 guardian deed, the grantor is Floyd Haynes as guardian of Roselyn Ray Haynes, a minor. In the deed, he conveyed an undivided 1/6 interest to Madison for a recited consideration. The 1952 guardian deed is dated February 6, 1952, and Floyd Haynes executed it on the same date. The 1952 guardian deed was also recorded on April 1, 1952. The 1952 guardian deed does not contain a reservation of an NPRI, but it does contain a provision stating that it was "subject to all outstanding royalty and mineral conveyances.

The 1952 NPRI deed and the 1952 guardian deed have the same grantee (Madison). Additionally, they deal with the same surface estate, and they were executed at roughly the same time. However, the two deeds have different grantors, convey different interests, and importantly, have different terms. The two deeds do not constitute a "single, unified instrument" because the deeds are stand-alone instruments of conveyance that are effective independently of each other. The two deeds could have easily included the same terms, but they do not.

Wright* v. *Jones, 674 S.W.3d 704 (Tex. App.--Waco 2023, no pet.). Billy and Jean executed a Lady Bird Deed conveying to Lewis the family home and ten acres located in Navarro County and reserving to the Grantors a life estate in the property. Billy died. Both Billy

and Jean executed reciprocal wills that left their entire estate to the surviving spouse.

About a year after Billy's death, Jean signed a durable power of attorney appointing Dorothy as her attorney-in-fact to act on Jean's behalf regarding real property transactions and estate, trust, and other beneficiary transactions, among other things.

A couple of years later, Dorothy, acting under the durable POA, executed a revocation of the Lady Bird Deed, which was signed by both Dorothy and Jean. Later, Dorothy signed an additional revocation of the Lady Bird Deed. Both revocations identified Lewis as the sole beneficiary or grantee and sought to "cancel and revoke any and all interests of Grantee in the Property," including all present, future, remainder, and contingent interests.

Jean then filed suit against Lewis, asserting a trespass claim and requesting injunctive relief. Lewis filed an answer. Jean filed an amended petition which included a requested declaration that the two revocations were effective, and that Lewis has no interest in the Property. After a bench trial, the trial court rendered judgment in favor of Jean and Dorothy on their trespass claims and a declaratory judgment that the revocations were effective.

The Lady Bird Deed provided that Billy and Jean were joint grantors and Lewis was the grantee. The grant conveyed the property, subject to reservations, to Lewis, her heirs, successors, and assigns forever. The Lady Bird Deed also included the reservation of life estates in the grantors.

Ordinarily, when a life estate is measured by two or more persons, the life estate ceases upon the death of the last party. A testator may create successive life estates in the same property, as where he gives to a named beneficiary for life, and then to another for life, and so on to any number of persons, provided that are persons in being at the time the will take effect, each such estate to begin upon the termination of a preceding life estate. However, this Lady Bird Deed did not expressly create successive life estates that began upon the termination of a preceding life estate. Moreover, Billy and Jean were married, so the property in question was community property. There was nothing in the Lady Bird Deed which would have vested title in Billy's life estate in Jean.

Reconciling Texas community-property law with the language of the Lady Bird Deed in this case yields a conclusion that Billy and Jean each reserved a life estate in their respective one-half interest in the property. And most importantly, there is no language in the Lady Bird Deed stating that upon the death of either Billy or Jean Wright, the deceased spouse's one-half interest would be conveyed to the surviving spouse for the remainder of their life. Instead, Billy's one-half interest vested in Lewis immediately when Billy died.

Therefore, because the Lady Bird Deed did not include language conveying Billy's one-half interest to Jean upon his death and resulted in title vesting in Lewis immediately upon Billy's death, neither revocation of the Lady Bird Deed executed by Dorothy, as Jean Wright's attorney-in-fact, was effective as to Billy's one-half interest that vested in Lewis.

Despite the foregoing, Dorothy relied on Billy and Jean Wright's reciprocal wills to confirm their intent to leave everything to the other upon their death. The court noted that extrinsic evidence of intent is admissible only if the deed is ambiguous on its face, but the court found no ambiguity. A mere disagreement about the proper interpretation of a deed, however, does not make the deed ambiguous; the instrument is ambiguous only if, after application of the rules of construction, the deed

is reasonably susceptible to more than one meaning. Because the deed was not ambiguous, the court would not consider the parties' wills to ascertain the intent of the parties to the Lady Bird Deed. And even if the court considered the wills, Billy's one-half interest would have already vested in Lewis and, thus, would not have been considered a part of Billy's estate at the time the will was probated.

Based on the foregoing, the court concluded that title to Billy's one-half interest in the property vested in Lewis immediately upon Billy's death. This means that Lewis and Jean's successors-in-interest are cotenants in the property at issue. Furthermore, the parties did not have authority to revoke the Lady Bird Deed.

And because the finding of trespass damages is based on the trial court's erroneous determination that Lewis did not own a one-half undivided interest in the property, sustaining the complaint in issue one necessarily requires that issue two, which challenges the determination that Lewis did not have a right of immediate possession and resulted in a finding of damages for trespass, must also be sustained.

PART IV
EASEMENTS.

Albert v. Fort Worth & Western Railroad Company, No. 22-0424 (Tex. February 16, 2024). Albert purchased a ten-acre tract of land in Johnson County (the Property) to build a cement mixing plant. Albert and two business partners formed Chisholm Trail Redi-Mix, LLC to operate the planned plant.

Western owns the tract of land that separates Albert's property and the highway. Both properties were originally part of the same 702-acre tract. That tract was severed in 1887 when a 12.7-acre strip was conveyed in fee simple to Western's predecessor-in-interest, to build railroad tracks. This severance divided the 702-acre tract into a larger Southwestern Tract, a smaller Northeastern Tract, and the narrow tract for the railroad. Albert's Property is the smaller Northeastern Tract, which is separated from the highway by the railroad tract.

A single-lane gravel road crossing the railroad tract connects Albert's Property to the highway over the railroad tracks. A prior owner of Albert's tract, Meek, obtained a license from Western's predecessor to build a gravel crossing from the property to the highway across the railroad tract. The license restricted the use to personal and agricultural purposes and was not assignable without consent.

The Property was sold a number of times until Albert eventually bought it. Meek did not attempt to assign his license when he sold the Property, nor did any of his successors. Nevertheless, all of the subsequent purchasers from Meek continued to use the crossing for various purposes, including commercial uses, despite not having a license to do so. Over those decades, none of the railroad tract owners objected to the use or attempted to block the path over the railroad tracks.

When Western acquired the railroad tract in 2005, it began sending notices to the Property's owners informing them that they were trespassing on Western's right-of-way by using the gravel crossing. But like its predecessors, Western never attempted to physically interrupt the gravel crossing's path over the railroad tracks. So, by all appearances, the gravel crossing has remained an unblocked route connecting the Property and the highway since the crossing was first built sometime before 1941.

Over Western's objections, Albert bought the Property and Chisolm Trail, his company, built and operated the concrete plant. Because the gravel crossing is the sole point of ingress

and egress to the concrete plant from the highway, Chisholm Trail's trucks used the crossing to reach the highway.

Western sent Albert a cease-and-desist letter demanding that he and Chisholm Trail stop using the gravel crossing. Albert and Chisholm Trail sued, seeking a declaratory judgment that they held an easement by estoppel, an easement by necessity, and a prescriptive easement for the gravel crossing. The case proceeded to a jury trial. The jury found that Albert was entitled to an easement by estoppel, an easement by necessity, and a prescriptive easement over the railroad crossing.

Western appealed, arguing the evidence was legally insufficient to support the easement findings and factually insufficient to support the trespass findings. The court of appeals reversed and rendered judgment for Western as to the easement claims, holding that the evidence was legally insufficient to support all three easement findings.

An easement is a nonpossessory interest in real property that authorizes its holder to use another's property for a particular purpose. An easement entitling an adjacent landowner to cross over an adjoining tract of land—also called a "way easement"—is an easement appurtenant to the land; the easement attaches to the land itself and conveys with the dominant estate. Because easements appurtenant are real-property interests, the statute of frauds generally requires that a signed writing evidence their creation or transfer. But the law recognizes several exceptions to the writing requirement, implying an easement if the party claiming it can prove certain facts. Given that implied easements run "somewhat in derogation of the registration statutes and indeed the Statute of Frauds," courts construe them narrowly.

Here, Albert submitted three implied-easement theories to the jury—easement by estoppel, easement by necessity, and prescriptive easement—and the jury returned a verdict for Albert on all three theories. The Supreme Court agreed with the court of appeals that the evidence is legally insufficient to support the jury's easement-by-estoppel and easement by-necessity findings but did not elaborate, saying "further discussion of these issues would not add to the jurisprudence of the state."

However, the court held there is legally sufficient evidence supporting the jury's prescriptive-easement finding, requiring partial reversal of the court of appeals' judgment.

A person can acquire a prescriptive easement if he uses someone else's land in a manner that is adverse, open, and notorious, continuous, and exclusive for the requisite ten-year period. The burden is on the party claiming the easement rights to establish all necessary facts.

The adverse use necessary to establish a prescriptive easement is the same adversity of use necessary to establish title by adverse possession. As such, the dominant estate holder's use must be of such a nature and character that it notifies the servient estate holder that the claimant is asserting a hostile claim. Use is open and notorious when the servient owner has actual or implied notice of the use. Finally, the use must be exclusive; when a landowner and the claimant of an easement "both use the same way," the claimant's use is not exclusive and is thus insufficient to establish a prescriptive easement.

Because way easements—including those acquired by prescription—are easements appurtenant, they run with the land until terminated. So, once established, the way easement allows the successors in interest to the

dominant estate to continue crossing the servient estate along the established way. Easements appurtenant can terminate by merger of the dominant and servient estates, abandonment, prescription, or failure of purpose.

The jury heard three key pieces of evidence that would allow a reasonable and fair-minded juror to conclude that Albert is entitled to a prescriptive easement over the gravel crossing. First, although only Meek had a license to use the gravel crossing, the trial testimony established that Meek's successors in interest continued to use the crossing for five decades before Western objected to the continued use. Second, trial testimony indicated that only the Property's owners, their licensees, and their invitees used the gravel crossing during this time. And third, the gravel crossing appears to pre-date the Meek license by nearly two decades and was readily observable in an aerial survey of the surrounding area as early as 1941.

Western argued that the prescriptive-easement finding must fail because the evidence adduced at trial conclusively established that the adverse use was not exclusive. In particular, Western argued that both it and its predecessors have continuously used the railroad tracks that the gravel road crosses for well over a century. This argument misunderstands the law.

The exclusivity analysis focuses on whether the landowner and the easement claimant "both use the same way." A "way" is "a path, passage, road, or street." Here, the Property's owners have used the gravel crossing over the Railroad Tract as a "path or passage" to and from the highway for decades according to witness testimony. Western admits that it solely runs trains on the tracks, never crossing the tracks via the gravel crossing, and there is no evidence attempting to show any predecessor differed.

Reaching this conclusion does not, as Western contends, confuse using the "same way" with using property "in the same way." Again, exclusivity is destroyed when the landowner and easement claimant use the same "path or passage" that constitutes the easement. Western does not use, and by all accounts has never used, the "way" at issue—the gravel road that crosses the tracks. Rather, Western uses the tracks perpendicular to the gravel crossing, which does not preclude exclusivity.

In short, the evidence adduced at trial is legally sufficient to support the jury's finding that Albert is "entitled to a prescriptive easement for use of the railroad crossing." The court of appeals erred in holding otherwise.

PART V
VENDOR AND PURCHASER.

Lennar Homes of Texas, Inc. **v.** ***Rafiei***, No. 22-0830 (Tex. April 5, 2024). Rafiei and his wife bought a house from Lennar Homes. Rafiei alleges that, approximately three years after purchasing the home, "there was a sudden and unexpected explosion" of the garbage disposal when he turned it on, injuring him. Rafiei sued Lennar for premises liability and negligence, alleging that Lennar had improperly installed the garbage disposal.

The purchase contract that Rafiei and Lennar executed contains an agreement to submit disputes between them to arbitration under the Federal Arbitration Act. "Disputes" includes any claims related to the home, claims related to personal injury, and notably, "issues of formation, validity or enforceability of [the arbitration agreement]." The delegation clause provides: "All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)."

The agreement also sets forth particular arbitration procedures. Arbitration must be

"administered by the AAA in accordance with the AAA's Construction Industry Arbitration Rules." If the claimed damages exceed $250,000 or the claimant demands punitive damages, then the agreement requires that three arbitrators resolve the dispute, unless the parties agree to use only one. Finally, the agreement requires that each party "bear its own costs and expenses."

Lennar moved to compel arbitration. Rafiei opposed the motion, arguing that the arbitration agreement and its delegation provision are unconscionable because arbitration was prohibitively costly and would prevent him from pursuing his claims. The trial court denied Lennar's motion and a divided court of appeals affirmed. The majority held that the trial court could have concluded that the delegation provision and the arbitration agreement as a whole were both unconscionable because arbitrating the threshold issue of arbitrability would cost $8,025. If Rafiei were required to pay more than $6,000, it held, he would be precluded from pursuing his claims.

Arbitration costs that are so excessive that they make the arbitral forum unavailable to a party seeking to vindicate his rights may render an agreement to arbitrate unconscionable. The theory behind unconscionability in contract law is that courts should not enforce a transaction so one-sided, with so gross a disparity in the values exchanged, that no rational contracting party would have entered the contract. The party opposing arbitration bears the burden to show unconscionability.

When an agreement delegates arbitrability issues to an arbitrator like this one does, it is for the arbitrator—not a court—to determine whether the arbitration agreement as a whole is unconscionable due to excessive costs. In that circumstance, an unconscionability challenge presents one narrow question for a court to decide: whether the party opposing arbitration has proven that the cost of arbitrating this delegated threshold issue of unconscionability is excessive, standing alone, and prevents the party from enforcing its rights. In other words, Rafiei must show that the delegation provision itself is unconscionable.

To determine unconscionability, a court must first consider a comparison of the total costs of the two forums and decide whether that cost differential is so substantial as to deter the bringing of claims. As evidence of these costs, Rafiei provided an attorney's affidavit and the AAA Administrative Fee Schedules. In his affidavit, the attorney discusses the cost to arbitrate the overall dispute based on the agreement and the fee schedules. He does not, however, address the relevant issue— whether the cost to arbitrate the arbitrability question presents an insurmountable obstacle to bringing this claim such that the delegation clause is itself unconscionable.

The court held that Rafiei has not presented evidence that he will likely incur arbitration costs in an amount that would deter enforcement of his rights due to his inability to pay them. The principle behind unconscionability "is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. Unequal bargaining power alone does not establish grounds for defeating an agreement to arbitrate.

Nooner Holdings, Ltd.* v. *Abilene Village, LLC, 668 S.W.3d 956 (Tex. App.—Eastland 2023, pet. denied). The parking lot had problems. In the contract to sell the shopping center, the parties included the following provision regarding the parking lot:

> Parking Lot Work. Seller [Abilene] and Buyer [Nooner] acknowledge that there are defects in the parking lot

> located upon the Land. Seller, at its cost, shall cause repair work to be performed on the parking lot during the Feasibility Period, as and to the extent determined necessary by Seller in its sole and absolute discretion. If Buyer is unsatisfied with such work for any reason, Buyer may terminate this Agreement during the Feasibility Period in accordance with Section 8.4 above.

As the court noted, parking lot defects were acknowledged. Any repair work to be performed by Abilene was only to the extent determined necessary by Abilene in its "sole and absolute discretion," and if unsatisfied, Nooner, as Buyer, was entitled to terminate the entire agreement up until closing. The contract of sale also included a comprehensive "As-Is" clause, "Due Diligence Review" clause and an investigation clause. The "As-Is" clause, as the name implies, indicates that the Buyer is accepting the risk of all the faults associated with the property and "accepts and agrees to bear all risks with respect to all attributes and conditions, latent or otherwise, of the Property.

Despite the language of the parties' negotiated agreement, there is no evidence that the Nooner made any attempt to survey the parking lot, request more information from the Abilene, or further inspect the premises. Nooner realized too late that the scope of the parking lot defects extended well beyond the surface defect that Abilene had affirmatively identified.

Nooner first filed suit against those who built the parking lot, then joined Abilene. The trial court granted Abilene's summary judgment motion. Nooner moved to sever its claims against Abilene and appealed the judgment.

The court of appeals began by saying that, while "While a party may not like the consequences of the terminology they chose in negotiating a contract, we must enforce it as written, particularly as between sophisticated parties."

Nooner claimed that summary judgment was improper as to its claims of statutory fraud, common law fraud, and fraudulent inducement. It argues that Abilene failed to conclusively negate an element of Nooner's claims of false representation and justifiable reliance.

Section 27.01(a) of the Business and Commerce Code creates a statutory fraud cause of action in a real estate transaction. According to that statute, the fraud must be in a real estate or stock transaction, which consists of a false representation of a material fact is made to a person for the purpose of inducing the person to enter into a contract and is relied upon by that person.

Common law fraud requires (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or it was made recklessly, without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Fraudulent inducement is a particular species of fraud that arises only in the context of a contract. A party claiming fraudulent inducement must show that (1) the other party made a material representation, (2) the representation was false and was either known to be false when made or was made without knowledge of its truth, (3) the representation was intended to be and was relied upon by the injured party, and (4) the injury complained of was caused by the reliance.

Nooner claimed that Abilene made only a partial disclosure, i.e., of defects only in a limited area of the parking lot, so Abilene had a duty to disclose the full extent of the parking lot defects. Nooner also argued that the language of the contract does not contain the clear language necessary to disclaim Nooner's reliance on the partial disclosure as a matter of law. The court said that its analysis was limited to sophisticated parties in the negotiation of non-boilerplate contractual provisions that allocate relevant risks and duties between the parties where no direct misrepresentation has been made.

Nooner claimed that the failure to disclose the full range of damage to the parking lot met the element of false representation. Failing to disclose information is equivalent to a false representation when particular circumstances impose a duty on a party to speak, and the party deliberately remains silent. As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information. Whether such a duty exists is a question of law. Generally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship.

The court noted that all of Nooner's claims of fraud require proof of a misrepresentation. It also noted that no actual misrepresentation was made to Nooner that the parking lot was free of defects.

Nooner claimed there was a duty for Abilene to disclose. It claimed that a seller of real estate has a duty to disclose material facts that (1) would not be discoverable by the exercise of ordinary care and due diligence by the purchaser or (2) a reasonable investigation and inquiry would not uncover. But Nooner failed to provide evidence that the parking lot defects of which it complains would not have been discoverable by the exercise of ordinary care and due diligence by the purchaser, or which a reasonable investigation and inquiry would not uncover. Nooner provided no evidence of any due diligence steps taken or any effort to inspect or investigate at all to meet that common law element—much less Nooner's contractually accepted duties of inspection or investigation. Nooner provided no basis upon which the court could hold that a reasonable investigation and inquiry would not have led it down the same path as that taken by Abilene to ultimately have a third-party inspection to uncover parking lot defects. And when a party fails to exercise such diligence, it is 'charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated. There can be no misrepresentation in failing to reveal that knowledge with which Abilene is charged as a matter of law.

Nooner also argued that when Abilene disclosed limited defects in the parking lot, it "intentionally" created a false impression that this was the only damage to the parking lot, and Nooner relied upon that impression.

The court said it is important to note that we are not merely dealing with common law issues, but also with an agreement that contains specific contractual provisions that directly bear on accepted duties and risks between the parties. The contractual provisions are relevant as to whether, in light of these terms, there is a misrepresentation or whether reliance thereon would be justified. These unambiguous contractual terms accepted by Nooner, of course, include the parking lot work clause, the "As-Is" clause, and the due diligence/inspection clauses.

A buyer's affirmation and agreement that he is not relying on representations by the seller should be given effect" in a contract when an "as-is" clause negotiated by sophisticated parties also appears. An "as-is" clause is a form

of disclaimer of reliance.

An abundance of "red flags" may preclude justifiable reliance as a matter of law. Justifiable reliance is a fact question but may be negated as a matter of law when circumstances exist under which reliance cannot be justified. "Red flags" alone or direct contradictions in express contract terms alone can negate justifiable reliance as a matter of law. The contract here contains both direct contradictions and red flags that negate any justifiable reliance on an alleged misrepresentation through a partial disclosure.

The "red flags" in the record do not permit Nooner, as a sophisticated buyer, to ignore them with impunity. While direct contractual contradictions focus on specific language and the accompanying representations, "red flags" reflect general circumstances that warn a party of the risks of the transaction that they are about to enter. First, the parking lot clause may not contain a direct contradiction, but its presence—particularly as a product of negotiation—is a clear acceptance of risk by Nooner that directs Nooner's attention to the parking lot as a potential issue. Second, Nooner agreed that it would take the property, not excluding the parking lot, "as is." Third, Nooner, through the due diligence/investigation clauses, unequivocally assumed the responsibility to inspect and investigate the condition of the parking lot. Nooner was on notice that this parking lot was, in part, defective. when a buyer has knowledge of existing issues but chooses not to exercise due diligence to inquire more about the details of those issues, it cannot justifiably rely on an alleged failure to disclose for purposes of claiming fraud or negligent misrepresentation.

Said* v. *Valdes, 668 S.W.3d 793 (Tex. App.—El Paso 2023, pet. denied). Said attempted to purchase an affordable housing property in Austin. The contract required Said to provide eligibility information and the sale was conditioned on Said obtaining income certification from the City within 60 days of the contract date. Said did not obtain and furnish the income certification. The purchase contract was terminated.

Said sued the Sellers for breach of contract. The trial court granted summary judgment in favor of the Sellers. Said filed a motion for a new trial, which was denied.

The essential elements of a breach of contract claim are: (1) existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) a breach of the contract by the defendant; and (4) damages sustained as a result of the breach.

The Sellers filed a motion for summary judgment in response to the suit for breach of contract. In their motion the Sellers argued they could conclusively establish, as a matter of law, that no income certification was provided, and such proof conclusively negates the performance and breach elements of the breach of contract claim.

Pursuant to the purchase agreement, the sale of the property and the obligations of the parties were subject to an affordable housing program. As part of such affordable housing program, sale of the property was conditioned on Said, as purchaser, obtaining approval from the City of Austin of income certification within sixty days of the effective date of the purchase agreement. Said never tendered the required income certification. Numerous communications were sent to Said seeking confirmation of eligibility, but he did not respond. Written notice of termination was sent to Said on September 22, 2021. The purchase agreement was then terminated on October 14, 2021.

In any case, the purchase agreement plainly states the Sellers' obligation to consummate the

transaction was conditioned on Said obtaining the required income certification within sixty days of June 9, 2020. In response to a motion for summary judgment, a nonmovant must expressly present to the trial court the issues that would defeat the movant's right to a summary judgment. Said did not do so. Instead, the Sellers did provide summary judgment evidence that conclusively negated the performance and breach elements of Appellant's breach of contract claim. Accordingly, Appellees were entitled to judgment as a matter of law and summary judgment granted in their favor was proper.

PART VI
LEASES AND EVICTIONS

Westwood Motorcars, LLC* v. *Virtuolotry, LLC, No. 22-0846 (Tex. May 17, 2024). Westwood leased commercial property in Dallas to operate an automobile dealership. The original term of the lease expired in 2013 but Westwood had two extension options. Westwood exercised the first option and the term was extended. Ownership of the property changed during that term and Virtuolotry became the new landlord.

When Westwood sought to exercise its option to extend the lease for the second additional term. But Virtuolotry's lawyers said no, asserting that Westwood had breached the lease in numerous ways. Arguments ensued. Eventually, the parties went to court.

Westwood sued Virtuolotry in district court, seeking a declaratory judgment that it had not breached the lease and that it had properly extended the lease for another two years. Later, Virtuolotry sued in justice court to evict Westwood for unpaid rent, lease violations, and holding over unlawfully. The justice court ruled for Virtuolotry and awarded it "possession only." Westwood appealed the judgment to the county court at law. A few weeks before the trial date for the trail de novo, Westwood's lawyers again wrote Virtuolotry. The letter insisted that Westwood was not in default and had properly extended the lease. Yet it also notified Virtuolotry that Westwood would vacate the premises on March 31. Westwood formally withdrew its appeal in county court, so the de novo trial on Virtuolotry's eviction suit never occurred.

But Westwood pressed its pending suit in district court, adding claims for breach of contract and constructive eviction. That case proceeded to a jury trial.

The jury found that Virtuolotry breached the lease agreement, causing damages consisting of lost profits, lost benefit of the bargain, and a lost security deposit. It also found that Boyd (the owner of Virtuolotry) constructively evicted Westwood, causing damages in the form of relocation expenses, and it awarded exemplary damages against Boyd. Ultimately, the district court rendered judgment against Virtuolotry for $783,731 in damages (plus interest) and over $350,000 in attorney's fees, and against Boyd for $23,331.37 in actual damages and $200,000 of (capped) exemplary damages.

Virtuolotry and Boyd appealed, raising ten issues. The court of appeals reversed and rendered a take-nothing judgment, relying solely on the theory that, by agreeing to the eviction-suit judgment in county court, Westwood "voluntarily abandoned the premises" and thus extinguished any claim for damages. The court of appeals reasoned that Westwood could not establish that it suffered any damages resulting from Virtuolotry's or Boyd's actions because Westwood agreed to the issuance of a writ of possession to Virtuolotry and did not identify any act of Virtuolotry or Boyd as being the cause for its decision. Moreover, according to the court of appeals, Westwood's agreement to the

judgment in the county court case amounted to affirmatively representing Virtuolotry had the lawful right to possession. And so, the court concluded, by admitting Virtuolotry had the right to possession, Westwood effectively abandoned its constructive eviction claim and was "precluded from recovering damages for a breach-of-contract claim premised on the issue of possession.

Chapter 24 of the Property Code grants justice courts jurisdiction in eviction suits, including suits for forcible entry and detainer and forcible detainer. Eviction suits are designed to provide a summary, speedy, and inexpensive remedy for the determination of who is entitled to possession of the premises. But as a consequence, eviction suits are limited in scope and effect, with the sole focus being the right to immediate possession of real property.

An eviction suit in justice court is not exclusive, but cumulative of any other remedy that a party may have and matters beyond the justice court's limited subject matter jurisdiction may be brought in another court of competent jurisdiction.

Under this scheme, an eviction suit in justice court may run concurrently with another action in another court without issue—even if the two proceedings overlap and the other action adjudicates matters that could result in a different determination of possession. That is because the justice court's judgment is a determination only of the right to immediate possession and does not determine the ultimate rights of the parties to any other issue in controversy relating to the realty in question.

Westwood contends that the court of appeals erred by giving a judgment of possession from a court of limited jurisdiction preclusive effect over Westwood's claim for damages in district court. Virtuolotry and Boyd do not contest that the county court's judgment may not be given preclusive effect over the district-court action. They instead argued that Westwood's voluntary agreement to cede possession and vacate the premises conclusively defeats its damages claims as an evidentiary matter. The Supreme Court disagreed.

The court of appeals erred by enlarging the legal significance of the agreed judgment in county court. An agreed judgment should be construed in the same manner as a contract, and the courts fundamental objective is to ascertain the parties' intent. The agreed judgment merely said that Westwood "no longer wishes to appeal the decision of the Justice Court awarding possession of the property." Nothing in this text demonstrates an intent by Westwood to abandon its claims for damages—indeed, there is no mention of other claims at all. Nor does Westwood concede that Virtuolotry was legally entitled to possession under the terms of the lease. The only express representation from Westwood is that it no longer wishes to challenge the justice court's award of possession to Virtuolotry.

To be sure, Westwood stipulated to a judgment awarding possession of the premises to Virtuolotry. But the court cannot divorce this agreed judgment from its context: an appeal of a justice-court judgment in an eviction suit. Again, a judgment in an eviction suit is a final determination only of the right to immediate possession. Such a judgment is not, by contrast, a final determination of the parties' ultimate rights, the wrongfulness of the eviction, or any other question. And such a judgment does not have preclusive effect on a subsequent action in district court or bar a suit for damages. Against that backdrop, Westwood's agreement to entry of the county-court judgment cannot reflect assent to anything more than what that judgment resolves—i.e., who receives immediate possession of the property.

Mr. W Fireworks, Inc.* v. *NRZ Investment. Group., LLC, 677 S.W.3d 11 (Tex. App.—El Paso 2023, pet. denied). Nathan Lee originally entered into a two-year lease with Mr. W allowing Mr. W to lease a "100' by 100' area of frontage" located along the side of a specified road on a 49.243-acre tract of land (the 49-acre tract) in Travis County owned by the Lees. The stated purpose of the lease was to allow Mr. W to operate a seasonal fireworks stand on the subject property, and it gave Mr. W the exclusive right to sell fireworks on the subject property during the lease term, including any option period. The lease further provided that if Mr. W paid the Lees $1,350 on the 20th of every June and December, the lease would be considered "optioned" for that year. The lease also included a restriction that prohibited the landlord from leasing or selling any part of the property to anyone selling fireworks in competition with Mr. W during the term of the lease and for ten years after that. That provision also stated that "Lessor will give Lessee the first right of refusal should Lessor decide to sell". A memorandum of lease was recorded that included a reference to the ROFR.

A second lease with Mr. W was entered into, drafted by Mr. W, stating that the parties were extending the first lease for six months and continuing with consecutive six-month options. It also provided that Mr. W had the exclusive right to sell fireworks from the property. Either party could cancel the lease on 30-days' notice. And it included a legal description of the leased property. It also included the same restriction and ROFR wording.

The Lees entered into a contract to sell the property, including the leased tract, to NRZ. When the title company discovered the memorandum of lease, Nelson Lee sent an email to Mr. W's manager notifying Mr. W of the sale to NRZ. Mr. W sent notice that it was exercising its ROFR. The Lees entered into a contract with Mr. W and then notified NRZ that they were unable to comply with the NRZ contract because of the ROFR to Mr. W.

NRZ filed a lawsuit against both Mr. W and the Lees seeking a declaratory judgment that Mr. W's ROFR was void, or alternatively, that Mr. W did not properly exercise the ROFR, because Mr. W asked for different terms than what the NRZ contract called for—including a different closing date. NRZ sought specific performance of the NRZ contract and further sought damages from Mr. W based on its claim that Mr. W had tortiously interfered with the NRZ contract. In response, Mr. W brought a claim against the Lees for breach of contract for their alleged refusal to sell Mr. W the property and sought specific performance of its ROFR, allowing it to purchase the property for the "same price and on the same terms and conditions" as the NRZ contract. Mr. W brought a counterclaim against NRZ, in the alternative, seeking damages for NRZ's alleged tortious interference with its ROFR.

The trial court granted NRZ's summary judgment motion. NRZ then filed a second motion for a traditional and no-evidence summary judgment, seeking a final judgment that (1) it was entitled to specific performance of its sales agreement with the Lees and (2) Mr. W take nothing on its claim for tortious interference with its contract. The trial court then entered its final judgment ruling that all claims of Mr. W were null and void. It also granted NRZ's request for specific performance of its sales contract with the Lees. The court dismissed Mr. W's claims against both NRZ and the Lees; dismissed NRZ's claim against Mr. W for tortious interference with its contract with the Lees; and denied NRZ's request for an award of attorney's fees and costs.

Because Mr. W contends that the Lees breached the ROFR in the lease agreement, the

court of appeals first reviewed the law pertaining to rights of first refusal. 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 ROFR requires the grantor to notify the holder of its intent to sell and offer the property to the holder on the same terms and conditions offered by a third party prior to a sale. Selling property subject to an ROFR to a third party without first offering it to the rightholder on the same terms can constitute a breach of contract.

When the grantor communicates the terms of a third party's offer to the holder, the ROFR ripens into an enforceable option. The terms of the option are formed by both the ROFR provisions and the terms and conditions of the third-party offer. The holder may then elect to purchase the property according to the terms of the option or decline to purchase and allow the owner to sell to the third party. The exercise of an option like the acceptance of any other offer must be positive and unequivocal. This requirement is "often treated as identical with the requirement that an acceptance must not change, add to, or qualify the terms of an offer. The owner of property subject to a ROFR remains the master of the conditions under which he or she will relinquish interest in the property so long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the right, and therefore, the rightholder does not have the privilege to negotiate with the seller regarding the terms of the third-party offer.

Because an acceptance of an option contract is achieved only through strict compliance with its terms, any performance by less than strict compliance is generally considered to be a rejection of the option. Accordingly, a right holder who proposes a new demand, condition, or modification of the terms is treated as having rejected the offer. And in that instance, the owner may sell the formerly burdened property to anyone.

Mr. W claimed that the Lees breached the ROFR. A claim for breach of contract requires pleading and proof that (1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach.

Mr. W's ROFR-breach claim appears to center on its complaint that the Lees delayed almost two weeks before notifying it of the NRZ contract, which Mr. W repeatedly argues hindered its ability to accept the April 15 closing date in the NRZ contract. The ROFR, however, contains no express term requiring the Lees to notify Mr. W of a third-party sales contract within a certain timeframe. Instead, the ROFR simply provided that the "Lessor will give Lessee first right of refusal should Lessor decide to sell."

The details of a particular preferential purchase right depend upon the contract between the parties. Here the ROFR, which Mr. W itself drafted, contained no language requiring the Lees to notify Mr. W within a certain time frame or to give Mr. W a certain amount of time in which to exercise its rights under the ROFR. And because Mr. W drafted the lease, both NRZ and the Lees point out that the court strictly construed the ROFR against Mr. W.

Because the record undisputedly reflects that the Lees offered Mr. W the opportunity to purchase the property as required by the ROFR, albeit just not as quickly as Mr. W would have liked, the court concluded that Mr. W failed to raise a question of fact on the issue of whether the Lees breached the ROFR.

As to Mr. W's claims against NRZ that it had tortiously interfered with Mr. W's ROFR, the court held that Mr. W's claim had no legal basis. The elements of tortious interference with an existing contract are: (1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss.

In evaluating a claim for tortious interference with a contract, a threshold question is whether the contract itself was subject to the alleged interference. Mr. W's ROFR simply gave Mr. W the right to purchase the subject property if the Lees decided to sell. It did not bar the Lees from entering into a sales contract with a third party prior to notifying Mr. W of its decision to sell. And it certainly did not bar NRZ from seeking to purchase the property. Therefore, NRZ and the Lees had a legal right to enter into a sales contract prior to such notification. Accordingly, because the ROFR was not subject to tortious interference by NRZ's lawful actions in entering into the sales contract with the Lees, Mr. W's tortious inference claim fails as a matter of law.

Bagby 3015, LLC* v. *Bagby House, LLC, 674 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2023, no pet.). The tenant, Bagby House, sued its landlord, Bagby 3015, and Bagby 3015's owner and managing member, Ansari. Bagby House alleges multiple causes of action, including claims for breach of contract (the lease), theft or conversion, deceptive trade practices, breach of an express or implied warranty or covenant of quiet enjoyment, and fraud. Based on these causes of action, Bagby House alleges and seeks to recover damages, fees, and costs totaling more than $2,000,000. Much of the case involves whether the case should be dismissed under the Texas Citizens Participation Act.

Bagby House runs a restaurant on the leased premises. Among other things, it alleges Bagby 3015 and Ansari breached an implied warranty or covenant of quiet enjoyment and the corresponding provision, or another provision, of the lease by burglarizing the restaurant, cutting holes in the restaurant's floors, ripping out wires, and so on.

The questions addressed by the court were whether Bagby House had made a prima facie case under the Act for breach of the warranty or covenant of quiet enjoyment.

The elements of a claim for breach of the warranty or covenant of quiet enjoyment are the same as the elements of a constructive-eviction claim, regardless of whether the warranty or covenant is express or implied, absent contractual language to the contrary. These elements are: (1) the landlord's intention that the tenant shall no longer enjoy the premises; (2) a material act by the landlord that substantially interferes with the tenant's intended use and enjoyment of the premises; (3) an act that permanently deprives the tenant of the use and enjoyment of the premises; and (4) abandonment of the premises by the tenant within a reasonable time after the commission of the act. Thus, among other things, a quiet-enjoyment claim requires an eviction, whether actual or constructive in nature.

Bagby House does not allege that it was evicted from or had abandoned the leased premises in its live pleading. Nor did Bagby House present evidence of eviction or abandonment. On appeal, Bagby House says that it did not have to present evidence. According to Bagby House, Bagby 3015 and Ansari did not raise the issue of abandonment in the trial court. Therefore, it reasons, they have waived this issue.

The court disagreed. Bagby House's waiver argument stands the Texas Citizens

Participation Act's shifting burden of proof on its head. Under the Act, Bagby 3015 and Ansari bore the burden to show that the Act applied to Bagby House's claims. Once Bagby 3015 and Ansari had done so, the burden of proof then shifted to Bagby House to establish a prima facie case "for each essential element of the claim." Therefore, Bagby House was obligated to put on evidence of abandonment, whether Bagby 3015 and Ansari raised the issue or not, and Bagby House did not do so. Accordingly, the trial court was obligated to dismiss Bagby House's quiet-enjoyment claim to the extent that the claim depends on false-report allegations.

As to Bagby House's claim of breach of the lease, the court noted that a commercial lease is a type of contract. ***Dupree* v. *Boniuk Interests***, 472 S.W.3d 355, 364 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The elements of a claim for breach of a lease or contract are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach.

On appeal, Bagby 3015 and Ansari contend that Bagby House failed to make a prima facie case that they breached the lease. Bagby 3015 and Ansari reason that to show a breach based on false reports, Bagby House must produce evidence that they are the ones who made the false reports, as opposed to someone else. According to Bagby 3015 and Ansari, Bagby House's sole evidence on this issue is conclusory. They likewise maintain that Bagby House's evidence of damages is conclusory.

With respect to the issue of damages, the court agreed that Bagby House did not make a prima facie showing that it sustained damages resulting from the false reports.

Contract damages may include direct and consequential damages. The former often include damages to restore the benefit of the bargain. The former often include damages to restore the benefit of the bargain. Id. The latter include foreseeable damages that were caused by the breach but were not a necessary consequence of it, which are recoverable so long as the parties contemplated that these damages would be a probable result of the breach when they made the contract. Lost profits are one traditional measure of consequential damages.

A nonmovant need not present direct evidence of damages to make a prima face case on this element of a challenged claim. However, the evidence must be sufficient to allow a reasonable factfinder to draw a rational inference that some damages naturally flowed from the movant's conduct.

The court held that Bagby House did not make a prima facie case of damages as to its breach-of-lease claim to the extent the claim is based on false reports to governmental authorities. The trial court was obliged to dismiss this part of the claim.

Mosaic Baybrook One, L.P.* v. *Simien, 674 S.W.3d 234 (Tex. 2023). Mosaic, the landlord, billed apartment tenants each month to recover certain amounts it had paid the municipal utility district. This fee included not only (1) each apartment's allocated portion of the utility's customer service charge for water and sewer service, but also (2) an undisclosed amount equivalent to part of the utility's charges for non-water emergency services.

Simien sued Mosaic under the Water Code on behalf of a tenant class, alleging that this practice violated administrative rules regarding submetering of utility service or nonsubmetered master metered utility costs. Water Code § 13.505. Among other things, the rules provide

that charges billed to tenants for submetered or allocated utility service may only include bills for water or wastewater from the retail public utility. Administrative Code § 24.124(a).

The trial court granted summary judgment in favor of Simien.

Paragraph seven of the lease provided that the landlord would pay for certain items, if checked, and the tenant would pay for all other utilities and services. An addendum to the lease included a provision stating the reason for allocation of costs. The stated reason was that apartment owners receive bills for services provided to the residents. In order to help control the cost of rent, the landlord has chosen to allocate the fees using a standardized formula. The addendum then provided that the landlord will allocate the following services and governmental fees, showing various types of fees with a box that could be checked by each to indicate if that particular fee would be allocated to tenants.

Simien signed a lease with Mosaic. In the addendum to his lease, the box for allocating emergency services fee was not check and his lease included only pest control fees, convergent billing fee, and valet trash fees. Fees for law enforcement, ambulance, and fire service were not included.

For each month that he lived at Baybrook Village, Simien received a residential account statement from Mosaic which included a monthly service charge, a monthly water service rate, a monthly sewer service rate, a monthly fire protection rate, a monthly emergency medical service rate, and a monthly law enforcement service rate.

In is lawsuit, Simien alleged that he routinely paid Mosaic over $50 per month in water and sewer charges when his actual charges should have been approximately $17 less. Simien alleged that Mosaic had violated the Water Code and applicable Public Utility Commission ("PUC") rules by assessing and collecting water and sewer base fees in excess of the actual water and sewer base fee that the MUD imposed on Mosaic. Simien sought the statutory remedies that section 13.505 of the Water Code provided for tenants at that time, which include three times the amount of all overcharges, a civil penalty of one month's rent for each class member for each violation, and reasonable attorney's fees.

Following a hearing, the trial court signed its initial order granting Simien's motion for partial summary judgment. Simien filed this interlocutory appeal.

Chapter 13 of the Water Code provides that the PUC may regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation. The PUC is authorized to do all things, whether specifically designated in Chapter 13 or implied in that chapter, necessary and convenient to the exercise of these powers and jurisdiction.

Subchapter M of Chapter 13 regulates how apartment landlords may bill their tenants for water and wastewater-related charges, whether submetered or allocated. Submetered utility service commonly refers to water utility service that is master metered for the owner by the retail public utility (here, the MUD) and individually metered by the owner at each dwelling unit, as well as wastewater utility service based on submetered water utility service. Nonsubmetered master metered utility service—also referred to as allocated service or nonsubmetered service—includes water utility service that is master metered for the apartment house but not submetered, as well as wastewater utility service based on master metered utility service. The service in this case was nonsubmetered.

The court of appeals held that Simien had established a violation of Water Code §13.505.

Arredondo* v. *Village on the Lake, 681 S.W.3d 853 (Tex. App.—Houston [14th Dist.] 2023, no pet.). Both the Federal Fair Housing Act and Texas Fair Housing Act prohibit discrimination in the rental or sale of a dwelling, or in the provision of connected services or facilities, based on certain protected characteristics, including familial status. To prove housing discrimination, a plaintiff may show either disparate treatment or disparate impact on a protected class. Arredondo generally pleads that the apartments committed familial status discrimination.

Disparate treatment is deliberate discrimination. It refers to treating some people less favorably than others because of a protected trait. There can be no liability under the FHA or TFHA for discriminatory treatment claims unless the protected trait motivated the challenged action. That is, the evidence must create a reasonable inference that the protected trait was a "significant factor" in the action. It is enough to show that the protected trait was a consideration and played some role in the housing decision.

Arredondo did not provide the court with any argument about whether she presented direct or circumstantial evidence of disparate treatment at the trial court, and she does not discuss the legal framework under which the court should analyze her claim. In its examination of the evidence, the court did not see direct evidence of animus against Arredondo based on familial status. In the absence of direct evidence, a claim for intentional discrimination based on circumstantial evidence is evaluated using a burden-shifting evidentiary standard, in which the plaintiff must first establish a prima facie case of disparate treatment. If the plaintiff provides such prima facie evidence, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action. Then, the burden shifts back to the plaintiff to rebut the reason offered by the defendant by showing it was a ‘pretext for discrimination.

The elements of a prima facie case vary depending on the facts and claims of the case. The general elements are (1) the plaintiff is a member of a protected class under the Fair Housing Act; (2) the plaintiff was eligible for favorable treatment; (3) the defendant acted adversely toward the plaintiff; and (4) favorable treatment remained open to non-members of the protected group (e.g., the housing opportunity remained available to similarly situated residents). It is undisputed that Arredondo and her minor children are members of a protected familial class. However, Arredondo has not provided specific citation to the record, argument, or authority as to how she established a prima facie case of disparate treatment. Adequate appellate briefing entails more than mentioning arguments in passing. An appellant’s brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Because Arredondo has not delineated the elements of her prima facie case or provided citations to authority or the record, she has waived her argument on appeal for intentional discrimination.

Arredondo also claimed constructive eviction and breach of warranty of quiet enjoyment. "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. Texas law relieves the tenant of contractual liability for any remaining rentals due under the lease if

she can establish a constructive eviction by the landlord. 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 essential elements of constructive eviction are (1) an intention on the part of the landlord that the tenant shall no longer enjoy the premises, (2) a material act by the landlord that substantially interferes with the tenant's intended use and enjoyment of the premises, (3) an act that permanently deprives the tenant of the use and enjoyment of the premises, and (4) abandonment of the premises by the tenant within a reasonable time after the commission of the act. The elements of a breach of the warranty of quiet enjoyment are the same as constructive eviction.

The apartments had given oral and written notices to Arredondo about the noise created by her and her children. Arredondo explained that she felt harassed by the verbal warnings and written notices the Village gave her each time her downstairs neighbor complained. Mere notices to a tenant, followed by the tenant's vacating the premises, is not sufficient to constitute a constructive eviction; there must be substantial interference. Although the Village's warnings and notifications about the noise complaints upset Arredondo, this does not create a fact issue showing an intention or a material act by the landlord, substantially interfering with her use of the property.

PART VII
PROPERTY OWNERS ASSOCIATIONS; RESTRICTIVE COVENANTS

George* v. *Cypress Springs Property Owners Association, 668 S.W.3d 877 (Tex. App.—El Paso 2023, no pet.). Section 3.01 of the Declaration required structures to be approved by the Architectural Control Committee. It prohibited various kinds of buildings, including double wide manufactured homes, or single wide mobile homes.

The Georges purchased a lot in Cypress Springs a began constructing a second home. The house had corrugated steel walls and cedar siding. Almost immediately, other residents of Cypress Springs began complaining to the Board of Directors. Wieters, a member of the Board of Directors, went to look at the structure. He met with the Georges and asked if they had received ACC approval. The Georges said they were not aware of the requirement or that the Declaration would preclude him from placing the house on the property. When Wieters told the Georges that the house would not be approved, they responded that it was their property and that they would fight him over the house. Wieters filed a written notice of complaint.

After receiving the complaint Georges that they were in violation of §§ 3.01, 3.03, and 3.04 of the Declaration by installing the house. The letter directed the Georges to either respond in writing within ten days or remove the house from the property. In the interim, the Georges connected and installed electricity, a septic tank, television cable, and air-conditioning in the house, which they anchored to the ground and added "hurricane straps."

The Georges responded in writing on May 21, 2018, acknowledging that they had violated the spacing requirements for the house set forth in § 3.03 of the Declaration. However, they contended that the house was not a "manufactured/mobile building" under the Declaration, but claimed it was instead a "prefabricated home" that their parents would live in. Cypress Springs responded with another

letter stating that because the aforementioned violations had not been remedied, the Board of Directors had voted on the matter and were assessing $600 in fines against the Georges for violations of §§ 3.01, 3.03, and 3.04. The letter ordered the Georges to cure the violations or risk assessment of further fines or legal action.

Cypress Springs sued the Georges for (1) a permanent injunction to remove from the Georges' property all structures that had not previously been approved by the ACC, (2) statutory damages, and (3) attorney's fees and costs. The Georges counterclaimed for a declaratory judgment that the house did not violate the Declaration and for attorney's fees. The case was tried to a jury, which returned a verdict in favor of Cypress Springs. Specifically, the jury found that the Georges had violated §§ 3.01 and 4.01(a) of the Declaration. The trial court entered a final judgment enjoining the Georges to remove the house from their property and awarding Cypress Springs statutory damages, attorney's fees, and post-judgment interest.

As a general matter, covenants restricting the free use of land are not favored by courts, but they will be enforced if they are clearly worded and confined to a lawful purpose. When the restrictive covenant's language is unambiguous, we are required to construe the covenant liberally to give effect to its intent and purpose. If the language is ambiguous, the restrictive covenant is construed against the party seeking its enforcement and all doubts must be resolved in favor of the free use of the property. The words and phrases in the restriction are to be given their commonly accepted meaning at the time the restriction was written and should not be enlarged, extended, changed, or stretched by construction.

The court of appeals held that there was sufficient evidence that the Georges had violated Section 3.01 of the Declaration by constructing a mobile home or manufactured home on the property, using the common and ordinary meanings to such terms. Given the broad definitions that courts have recognized regarding "mobile homes" and "manufactured homes" when applied in the context of restrictive covenants, the jury could have reasonably found that the Georges' home constituted a mobile home or manufactured home within the meaning of the Declaration.

The court also held that the Georges had violated Section 4.01 of the Declaration by failing to obtain ACC approval of the house.

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

***Faith P. and Charles L. Bybee Foundation* v. *Knutze*n,** 681 S.W.3d 818 (Tex.App.—Austin 2023, no pet.). A claim for trespass to try title is distinct from a claim to quiet title, though the differences are nuanced. A claim to quiet title is traditionally one in which the superior title holder seeks to remove a challenge to that title. Thus, the plaintiff in a quiet-title suit must prove, as a matter of law, that he has a right of ownership and that the adverse claim is a cloud on the title that equity will remove.

Over time, the term "quiet title" has acquired a colloquial meaning encompassing many kinds of title disputes, including those more aptly named as trespass-to-try-title actions. Even when plaintiffs have called their claims ones to "quiet title," the claims are actually claims for trespass to try title when their substance amounts to seeking title ownership of land.

PBEX II, LLC* v. *Dorchester Minerals, L.P., 670 S.W.3d 374 (Tex. App.—Amarillo 2023, pet. pending). This appeal addresses the issue of whether a non-operating working

interest in an oil and gas lease may be adversely possessed.

PBEX and Torch both argue that a Working Interest is "nonpossessory" in nature, and therefore not subject to adverse possession as a matter of law. PBEX and Torch insist that because the Working Interest is a "non-operator" interest, it is necessarily nonpossessory in nature, and nonpossessory interests in minerals are not subject to adverse possession.

However, according to the court, in Texas, a working interest owner as a lessee under an oil and gas lease is granted the right to possess all of the oil, gas, and other minerals underlying the leased estate, subject to the payment of royalties to the lessor. Working interests in oil and gas leases are therefore possessory interests in real property and subject to adverse possession as a matter of law. Contrary to the urging of PBEX and Torch, there is no distinction between "operating" and "non-operating" working interests under Texas Law–all working interests are possessory.

Accordingly, the Working Interest is subject to adverse possession, and Dorchester was required to demonstrate all the requirements of adverse possession in order to prevail on its motion for summary judgment.

Gates* v. *McDonald, 674 S.W.3d 420 (Tex. App.--Eastland 2023, pet. denied). This case relates to the second phase of the parties' partition proceedings. The McDonalds filed suit to partition some real property in Coleman County. The trial court entered the first partition decree which (i) determined that the property could be partitioned in kind, (ii) set out each party's interest in the property, and (iii) appointed commissioners to partition the property.

Gates appealed and challenged the first partition decree, but the second phase of the case continued. Ultimately, the commissioners submitted a report recommending how the property should be partitioned. The primary issue in this case is whether Gates's objections to the commissioners' report were timely filed. Gates's attorney electronically submitted the commissioners' report to the district clerk on the afternoon of September 22, 2021. However, the district clerk did not affix a file mark on the commissioners' report showing that it was filed on September 22. Instead, the clerk affixed a file mark that indicated that the commissioners' report was filed on September 23. The file date of September 23 remained undisturbed for the next several days, including through October 23, which was the thirtieth day after September 23, and through October 25, the date on which Gates filed his objections to the report.

The trial court held that Gates's objections were untimely.

A partition case consists of two decrees that are both final and appealable. In the first decree, the trial court determines the following: (1) the share or interest of each owner in the property that the owners seek to divide, (2) all questions of law or equity that may affect title, and (3) whether the property in dispute is subject to partition or sale. Further, the trial court is required to appoint three or more disinterested persons as commissioners who shall partition the property in dispute pursuant to the trial court's decree; the trial court may also provide directions to the commissioners as may be necessary and appropriate.

With respect to the second decree, which is the focus of Gates's challenge in this appeal, the commissioners shall proceed to partition the real estate described in the decree of the court, in accordance with the directions contained in such decree and with the provisions of law and these rules. After the partition is completed, the commissioners must submit, under oath, a

written report to the trial court. Within thirty days after the commissioners file their report, any party to the partition suit may file objections with the trial court.

Rule 769 of the Rules of Civil Procedure sets out the requirements for the substance of the commissioners' report. It also sets out the procedures by which the commissioners and the clerk must abide. With respect to the clerk's responsibilities, the rule requires that the clerk shall immediately mail written notice of the filing of the commissioners report to all parties. Here, the clerk did not send written notice of the filing of the commissioners' report to the parties.

Even though the clerk did not mail notice of the filing of the commissioners' report, the clerk affixed a file mark on the commissioners' report indicating that the report was filed on September 23. The file mark is the memorandum of the clerk of the date of a document's filing. Until corrected, the date of the file mark is conclusive evidence of the date of filing. The memorandum of the date of filing, affixed by the clerk or judge, is not conclusive where its error is shown by evidence received on that issue, but it does control unless it is amended, if erroneous, pursuant to a formal order of court.

The September 23 date of filing, as reflected by the clerk's file mark, remained unchanged for the thirty-day period following the filing of the commissioners' report, and it extended through the date Appellant filed his objections to the commissioners' report. On November 3, the McDonalds filed their response asserting an earlier filing date for the commissioners' report—September 22—because that is the date that their counsel electronically transmitted it to the electronic filing service provider. On November 23, two months after the date of filing of the commissioners' report, the trial court determined that Gates's objections were untimely. In doing so, the trial court did not expressly change the date of filing of the commissioners' report. As a result, for the purpose of this appeal, the court considered that the trial court implicitly changed the date of filing to September 22 in its final judgment entered on November 23.

Until the date of the file mark is corrected, it remains conclusive evidence of the date of filing. As applied to the facts in this case, this principle justifies Gates's reliance on the file date of September 23 at the time he filed his objections to the commissioners' report. Thus, Gates's objections to the commissioners' report were timely.

PART IX
CONDEMNATION

Texas Department of Transportation* v. *Self, No. 22-0585 (Tex. May 17, 2024). The Selfs own a tract of rural land that adjoins a portion of FM 677 in Montague County and extends to the centerline of that road. The State has a right-of-way easement that reaches fifty feet from the centerline of the road in each direction and thus burdens part of the Selfs' property. The Selfs' predecessors constructed a fence along the edge of the easement, but the Selfs hired a contractor to remove this decaying fence and construct a new fence. The Selfs offered evidence that they instructed the fence contractor to set the fence two to three feet on [the Selfs'] side of the right-of-way easement to preserve large trees that had grown along the original fence and allow the trees and fence to be maintained. As a result, a strip of the Selfs' property two to three feet wide outside the new fence was not burdened by the State's right-of-way easement.

TxDOT started a highway maintenance project and, as part of that project, contracted with TFR to remove brush and trees from the

right-of-way. TxDOT instructed TFR to clear everything between the fences, so TFR's subcontractor cut all trees up to the Selfs' fence line. The Selfs sent a letter to TxDOT and attached a survey they had obtained, which showed that twenty-eight oaks and elms with trunk diameters ranging from eighteen to thirty-nine inches were removed near their fence line—thirteen of which were wholly outside the State's right-of-way and seven of which were partly outside it.

The Selfs obtained multiple estimates of the cost to replace the twenty felled trees that had been located wholly or partly outside the right-of-way with trees up to twenty inches in diameter (the largest commercially available), and they sought $251,000 from TxDOT to compensate them for this cost. TxDOT rejected the claim. So, the Selfs sued, alleging negligence and inverse condemnation.

As to negligence, the Selfs did not show either that the subcontractor's employees were in TxDOT's paid service or that other TxDOT employees operated or used the motor-driven equipment that cut down the trees, as required to waive immunity under the Tort Claims Act. So, the negligence claim failed.

The Selfs alleged that TxDOT and its agents lacked "authority" or "consent" to enter the Selfs' property outside the right-of-way and that their acts in directing and implementing the removal of trees outside the right-of-way were "physical" and "intentional." The Selfs also offered evidence that a TxDOT inspector "did direct the contractor to cut the trees down." But TxDOT responded, and the court of appeals held, that the record "does not contain evidence . . . that TxDOT acted with the requisite intent to support an inverse condemnation claim."

When the government takes private property without first paying for it, the owner may recover damages for inverse condemnation. The elements of an inverse condemnation or "takings" claim are that (1) an entity with eminent domain power intentionally performed certain acts (2) that resulted in taking, damaging, or destroying the property for, or applying it to, (3) public use.

Although the Constitution does not expressly require an intentional act, such a requirement helps ensure that the taking is for "public use." Here, the Selfs alleged, and the evidence shows, that TxDOT intended to damage the property: a TxDOT employee expressly directed TxDOT's agents to cut down the trees at issue, and it is undisputed at this stage that doing so destroyed the Selfs' personal property. The Selfs owned the land on which the trees stood—and thus the trees themselves—both within and outside TxDOT's right-of-way easement. And their survey shows that at least twenty of the felled trees were wholly or partially outside the easement, so TxDOT cannot rely on that easement to show consent. In addition, the record contains ample evidence—including TxDOT's contract with TFR—that TxDOT directed the trees' destruction as part of exercising its authority to maintain the highway right-of-way for public use. That is all the plain text of Article I, Section 17 of the Constitution and precedents require to maintain a constitutional claim of compensation for inverse condemnation.

ATI Jet Sales, LLC* v. *City of El Paso, 677 S.W.3d 180 (Tex. App.—El Paso 2023, no pet.). Political subdivisions of the state, including cities, enjoy immunity from suit unless it has been expressly waived. Governmental immunity protects local government units, such as the City, for governmental functions. Such immunity deprives courts of subject-matter jurisdiction over suits brought against governmental units and their agents unless the governmental unit has consented to suit through waiver of that immunity.

The assessment and collection of taxes is a governmental function. However, the Texas Constitution waives governmental immunity for claims brought under the Takings Clause. But that waiver is predicated upon a properly pled takings claim. The government's improper use of its taxing power to take real property supports a proper takings claim.

On the other hand, if the government properly uses its taxing power to take private property, the Takings Clause and its governmental-immunity waiver does not apply.

The court held that both the City and the tax assessor acted lawfully in connection with the collection of taxes—and thus ATI's takings claim is not viable—the trial court does not have subject-matter jurisdiction to hear a declaratory judgment action on that issue either.

City of Webster* v. *Moto Kobayashi Trust, 674 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2023, no pet.). The Owners owned three unoccupied buildings in Webster. After an inspection, the City's chief building inspector notified the Owners that the buildings had "structural issues," were "unsafe" and a threat to human life, safety, and health, and posed a "safety and security risk" because unauthorized people could access them. The building official referred the matter to the Building Board of Adjustment, which conducted a hearing and recommended to the City that the buildings be repaired or demolished because they were unsafe and structurally deficient.

The City conducted a public hearing on the board's recommendation. Relevant here, Local Government Code § 214.001 authorizes the City to enact ordinances requiring, among other things, the repair, removal, or demolition of buildings that are "dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare" or "boarded up, fenced, or otherwise secured" in a manner that inadequately prevents unauthorized entry or use of the building by "vagrants or other uninvited persons as a place of harborage" or by children.

After the hearing, the City approved an ordinance declaring that the buildings were dangerous, structurally deficient, and posed a threat to human life, safety, and health. In addition, the City found that the buildings did not comply with applicable building and property maintenance codes. The ordinance ordered the demolition or removal of the buildings, with no option for repair, within 45 days. Or else the City would do so.

The Owners appealed to the Harris County district court under Local Government Code § 214.0012, which allows a property owner aggrieved by an order of a municipality issued under Section 214.001 to file in district court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The Owner's petition alleged that the ordinance was illegal for several reasons, including vagueness, procedural errors, and insufficient evidence, and they sought a judgment declaring the ordinance unenforceable.

The Owners also pleaded an inverse condemnation claim, alleging that the forced demolition of their property under Section 214.001 violated the Texas Constitution's Takings Clause, and requested damages.

The City filed a plea to the jurisdiction, arguing that the district court lacked jurisdiction over the inverse condemnation claim because, under Government Code § 25.1032(c), county civil courts at law have exclusive jurisdiction over such claims. The District Court denied the City's plea.

The jurisdictional question here turns on the

construction of two statutes, which is also a question of law subject to de novo review.

The City argues that the district court lacks jurisdiction over Owners' inverse condemnation claim because Government Code § 25.1032(c) gives the Harris County civil courts at law exclusive jurisdiction of such claims.

An inverse condemnation action is a constitutional claim in which a property owner asserts that a governmental entity intentionally performed acts that resulted in a "taking" of property for public use, without formally condemning the property, and require compensation. Sometimes called a "takings claim," it is a type of eminent domain proceeding. Generally, Texas district courts and county civil courts at law have concurrent jurisdiction in eminent domain cases, including inverse condemnation actions. Harris County is an exception. In Harris County, Government Code § 25.1032(c) governs jurisdiction over eminent domain proceedings. Both Houston courts of appeals have determined that, under Section 25.1032(c), county civil courts at law have exclusive jurisdiction over constitutional inverse condemnation claims in Harris County.

As is its prerogative, the legislature has mandated that inverse condemnation claims in Harris County must be brought in the civil courts at law. The plain language of Section 25.1032(c) and the court's own precedent compel the court to conclude that the district court lacks jurisdiction over Owners' inverse condemnation claim. The district court erred by not refusing to dismiss the Owners' inverse condemnation claim.

PART X
TAXATION.

Gill* v. *Hill, No. 22-0913 (Tex. April 26, 2024). In 1998, the taxing authorities in Reeves County sued over 250 defendants who owned property in Reeves County. The attorney for these taxing entities filed a citation-by-posting affidavit claiming that the names and residences of the owners of the properties were unknown and could not be ascertained after diligent inquiry. The property owners were all represented by the same attorney ad litem, who was appointed just eight days before trial. After a bench trial, the trial court rendered judgment in February 1999, authorizing the properties' foreclosure. The Gill Parties owned mineral interests that were subject to the foreclosure judgment.

The following month, Hill purchased at auction the foreclosed mineral interests previously owned by the Gill Parties. The conveyance was by a sheriff's tax deed dated April 6, 1999. The sheriff's deed was filed the same day and recorded on April 8.

Twenty years later, in 2019, the Gill Parties, sued to have the foreclosure judgment declared void for lack of due process and to quiet title to the mineral interests in their names. They allege that the 1999 judgment was void due to "a complete failure of service of citation" on the defendants in the foreclosure suit.

Hill moved for summary judgment, arguing that the one-year statute of limitations in the Tax Code for challenges to property sold in a tax sale barred the suit. The Gill Parties responded that the Tax Code's statute of limitations did not apply because the defendants in the foreclosure suit were not properly served and, thus, the foreclosure judgment, tax sale, and resulting deed are void. However, the Gill Parties did not present any evidence to support these arguments. The trial court granted Hill's motion for summary judgment. The Gill Parties appealed.

A divided court of appeals affirmed. The majority held that the sheriff's deed

conclusively established the accrual date for limitations, so the burden shifted to the Gill Parties to adduce evidence raising a genuine issue of material fact as to whether there was a due-process violation that could render the statute of limitations inoperable. Because the Gill Parties relied only on their arguments and presented no evidence of a due-process violation, the majority concluded, Hill was entitled to summary judgment. The dissenting justice would have held that it was Hill's burden, as the movant, to conclusively prove that no due-process violation had occurred, and that the statute of limitations applied.

The Fourteenth Amendment to the United States Constitution protects the citizens of Texas by preventing the State from depriving any person of life, liberty, or property, without due process of law. As in ***Mitchell* v. *MAP Resources, Inc.***, 649 S.W.3d 180 (Tex. 2022),.a case involving similar issues, the parties in this case have not identified any differences in text or application that are relevant to the issues raised here, so we treat the requirements of both Constitutions as identical for purposes of this opinion.

To afford due process, the government must provide the owner of property to be taken notice and opportunity for hearing appropriate to the nature of the case. The adequacy of this notice is not judged by whether actual notice was provided but by whether the government appropriately attempted to provide actual notice. Of course, actual notice is preferable, but if a property owner cannot be reasonably identified, constructive notice can satisfy due process.

The Gill Parties argue that a statute-of-limitations defense cannot bar their attack on the 1999 foreclosure judgment because that judgment was obtained without affording their predecessors, the defendants in that suit, constitutionally required due process in the form of notice of the suit. They argue that Hill, as the summary-judgment movant, bore the burden to conclusively negate their assertion that the 1999 judgment and resulting deed are void by proving notice of the suit satisfied due process. In the alternative, the Gill Parties argue that we should take judicial notice of the facts in Mitchell and hold, without regard to the record in this case, that there is a fact issue here regarding whether their predecessors were afforded constitutionally adequate notice of the 1999 foreclosure suit.

Throughout this suit, the Gill Parties have challenged Hill's entitlement to summary judgment on limitations and argued that the 1999 judgment and resulting tax sale did not satisfy due-process requirements. But Hill contends that the Gill Parties waived their argument about which party bore the burden of proof regarding these due-process complaints in the context of a traditional motion for summary judgment by not timely raising it in their briefs in the court of appeals. Requiring parties to first raise issues in the lower courts preserves judicial resources and promotes fairness among litigants. But briefs do not have to perfectly articulate every point of law to preserve arguments that are fairly subsumed in the issue addressed.

The Gill Parties' argument that it was Hill's summary-judgment burden to conclusively establish the validity of the 1999 judgment and resulting tax sale is fairly subsumed in their issues asserting that the judgment and sale were void and that Hill failed to establish that he was entitled to summary judgment. Construing the Gill Parties' briefing reasonably, yet liberally, the court held that there was no waiver. The court then considered whether Hill had met his summary judgment burden to show that posted notice of the 1999 foreclosure suit was constitutionally adequate and thus establish that the suit is time-barred.

Under Tax Code § 33.54(a), the suit is barred unless it was commenced within one year of the date that the deed executed to the purchaser at the tax sale [was] filed of record. Hill, in moving for summary judgment, bore the burden to conclusively establish his defense. Thus, Hill carried his burden to conclusively establish that the Tax Code's one-year limitations period expired in April 2000—some nineteen years before the Gill Parties brought this suit.

The crux of the parties' dispute is whether Hill had to prove anything more to obtain summary judgment. Hill claims he did not. But the Gill Parties contend Hill also bore the burden to negate their claim that the 1999 foreclosure judgment is void because it was obtained based on constitutionally inadequate notice. Put differently, the Gill Parties contend Hill had to prove that the foreclosure judgment that gave rise to the tax sale by which Hill obtained the mineral interests comports with constitutional due-process requirements. But the court agreed with Hill that the burden of proof was on the nonmovant to raise a fact issue on whether the foreclosure judgment was void.

There are two types of defenses against limitations with differing burdens of proof. Affirmative defenses like unsound-mind tolling that argue that certain days within the limitations period should not be counted place the burden of proof on the movant. But affirmative defenses that concede the limitations period expired yet argue limitations should not bar the suit place the burden of proof on the nonmovant.

In this case, the Gill Parties argued that, although many years have passed since the 1999 deed was recorded, the suit should not be time-barred because the underlying foreclosure judgment was procured in violation of due-process requirements and is thus void and incapable of triggering the Section 33.54(a) limitations clock. The Gill Parties raised a defense that, if established, would defeat limitations even though it has run. It was their burden to present evidence raising a fact issue whether the foreclosure judgment was, in fact, void. They failed to meet that burden because they adduced no evidence that notice of the 1999 suit was constitutionally inadequate so as to render the judgment void.

Hill satisfied his summary-judgment burden to conclusively show that the one-year statute of limitations expired before this suit was filed. The Gill Parties bore the burden to raise a genuine issue of material fact as to whether the 1999 judgment was void because it was obtained without constitutionally adequate notice, in violation of Gill's due-process rights. The Gill Parties adduced no such evidence; accordingly, the trial court correctly granted summary judgment on Hill's limitations defense. Nevertheless, because the summary-judgment proceedings took place without either side having the benefit of the Supreme Court's decisions in ***Draughon*** or ***Mitchell***, both of which substantially clarified the applicable law and likely would have affected the parties' motion practice, the court vacated the lower courts' judgments and remanded the case to the trial court for further proceedings.