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Real Property

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This article covers cases from Volumes 528 through 559 of the Southwestern Reporter (Third Edition) that the authors believe are noteworthy to the jurisprudence on real property law.

I. INTRODUCTION

During this Survey period, there were several forcible detainer cases challenging jurisdictional standing of the justice court, supersedeas bond procedures and tenancy-in-sufferance language. Also, there were typical interpretation of contractual language cases, some appropriate and some questionable, with several pending before the Texas Supreme Court for resolution. Most courts continued to follow the Texas Supreme Court's lead in imposing a strict four corners approach to interpreting deeds and documents. The courts also imposed a strict compliance approach to correction instruments.

There was also a steady stream of sufficiency of summary judgment affidavits and several will be discussed for this Survey period. The standards and methods of determining fair market value in anti-deficiency suits were analyzed by one court, and in what may come as a surprise to many practitioners, the Texas Supreme Court reversed a lower court's holding on the appropriate standard for damages for slander of title. An expansion of the *Moayedi* doctrine for statute of limitations waiver was also considered.

There were a few cases of first impression: (1) using the *res judicata* doctrine "as a weapon"; (2) using premises liability for an "off-premises" cause of injury; (3) finding no covenant of seisin in the presence of a complete failure of title conveyed by a special warranty deed; (4) finding that a residential use restrictive covenant was not violated by repeated temporary rentals; and (5) interpreting what behavior of a landlord constitutes "bad faith" when it comes to the issue of withholding the refund of a security deposit.

II. MORTGAGES, LIENS AND FORECLOSURES

A. Construction of Conflicting Documents—Forgery

Edwards v. Fannie Mae[1] involved a contested foreclosure sale based upon the interpretation of a note and deed of trust with conflicting information. Edwards brought suit against the Federal National Mortgage Association (Fannie Mae) on property inherited from his mother. The crux of the suit was that the foreclosure was not conducted on the appropriate

1. 545 S.W.3d 169 (Tex. App.—El Paso 2017, pet. denied).

note and deed of trust, because the petition attached a note and deed of trust which referenced or contained different dates of execution (March 6, 2007 and March 15, 2007) and principal amount ($156,500 and $158,400) of such documents.[2] Fannie Mae's summary judgment position was supported by an affidavit of its foreclosure specialist, which identified a note and deed of trust and also referred to the loan as a Texas home equity note.[3] The deed of trust attached to the motion for summary judgment contained a provision that it was not a Texas home equity loan.[4] The El Paso Court of Appeals characterized these discrepancies as "the inaccuracies in mass produced loan documents and foreclosure paperwork."[5] On the issue of whether the discrepancies created a genuine issue of material fact as to the existence of an alleged second promissory note, the court determined that no such discrepancy existed since the documents contained "enough other connections that . . . they unquestionably reference each other:"[6] (1) the maker and borrower were the same in both; (2) the final installment payment dates were the same in both; (3) the documents were executed at the same time; and (4) the property was the same in both documents.[7] As to whether the transaction was a Texas home equity loan, the court determined that such inconsistent statement did not lead to any confusion over the note in default, which was the note referenced by the deed of trust.[8] Edwards, on his claim of forgery, did not present credible evidence, having only provided an inadmissible conclusory affidavit stating he knew his mother's signature and that it was not her signature on the deed of trust.[9] The court required that there must be a factual basis as to how the affiant is familiar with his mother's signature (such as possession of handwritten letters, bills, and other writings), how the witness obtained such personal knowledge, and an explanation of the unique qualities of the signature that were missing or different which raised the issue of forgery.[10] While this conclusion might seem stretched to reach a particular result, it nevertheless reinforces the practitioner's obligations in affidavit preparation.

B. Foreclosure—*Res Judicata* Defense

McKeehan v. Wilmington Savings Fund Society, FSB[11] involved a foreclosure of a home equity loan, but the First Houston Court of Appeals decided on two points not directly related to foreclosure. McKeehan signed a home equity mortgage but was unable to make his scheduled payments and entered into a forbearance agreement. The forbearance

2. *Id.* at 172.
3. *Id.* at 173.
4. *Id.*
5. *Id.* at 172.
6. *Id.* at 175.
7. *Id.*
8. *Id.* at 180.
9. *Id.* at 179.
10. *Id.*
11. 554 S.W.3d 692 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

plan substituted reduced monthly payments for the period from July 2011 to December 2011, with a balloon payment and resumption of regular scheduled payments in January 2012.[12] A dispute occurred which resulted in McKeehan failing to make the January and February 2012 payments and Wilmington initiated foreclosure. When Wilmington's third Rule 736 Application for Nonjudicial Foreclosure was denied, it filed for judicial foreclosure against McKeehan.[13] The trial court entered judgment in favor of Wilmington and McKeehan appealed on numerous grounds. Wilmington raised as an affirmative defense the doctrine of *res judicata*. In a prior proceeding of this matter (2013 suit), McKeehan alleged Wilmington's lien on the home was unconstitutional; however, instead of challenging the constitutionality of the lien, Wilmington defended on the basis of the statute of limitations. A federal court concluded the suit was time barred and dismissed the case.[14] So, in the current proceeding, Wilmington took the position that McKeehan should have defended based on a claim of no default under the forbearance agreement, but did not do so; therefore, the current suit should be dismissed based on the *res judicata* doctrine.

The affirmative defense of *res judicata*[15] is typically used in defense of an action brought against the party asserting such doctrine. But Wilmington asserted this doctrine to block McKeehan's defensive claim of performance.[16] The court of appeals found that Wilmington's defense in the prior case did not require it to assert its right for foreclosure as a compulsory counterclaim in the 2013 suit and, therefore, the 2013 suit should not prevent McKeehan's defense in the current foreclosure action.[17] As a matter of first impression, the court determined that Wilmington could use the *res judicata* defense "as a weapon to prevent . . . [the assertion of the] defense of payment."[18]

C. Foreclosure—Servicer's Standing

Hinton v. Nationstar Mortgage LLC[19] involved a foreclosure sale challenge based on a servicer's lack of standing to foreclosure and a Texas constitutional challenge based on an inaccurate closing estimate of ad valorem tax payments. Hinton defaulted on his homestead loan six months after the closing. On January 16, 2010, a notice of default and intent to accelerate letter was sent; acceleration occurred on May 2, 2010,

12. *Id.* at 695.
13. *Id.* at 696.
14. *Id.*
15. *Id.* at 700–01 (citing Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 862 (Tex. 2010)). The court of appeals noted the elements of an affirmative defense of *res judicata* included proof of "(1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties are those in privity; and (3) a second action based on the same claims as were or could have been raised in the first action" *Id.*
16. *Id.* at 701.
17. *Id.*
18. *Id.*
19. 533 S.W.3d 44 (Tex. App.—San Antonio 2017, no pet.).

and foreclosure was sought in June 2010. On September 17, 2013, the note and deed of trust were assigned to Nationstar, which rescinded the March 27, 2014 acceleration of the debt, but subsequently accelerated the debt and intervened in the existing foreclosure suit on May 1, 2014. As is typical in many lien assignment transactions, Nationstar did not file its assignment document until July 1, 2014, after the intervention in the suit. Hinton argued that Nationstar did not have standing to intervene in the foreclosure suit because such assignment was filed after its intervention, so the legal right was vested in another party (i.e., the assignor).[20] The security instrument defined "lender" as "any holder of the Note who is entitled to receive payments under the Note."[21] Based on testimony from Nationstar's employees at trial, the court concluded that the delivery of the collateral file containing the original note gave Nationstar the status as the holder of the note with the standing and authority to enforce the note.[22]

Hinton also challenged the deed of trust validity under the Texas constitution requirement that the homestead owner must receive a "final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing."[23] There was a misrepresentation of the estimated monthly tax payments because the homestead had two separate lots and the estimate was based on only one of the two lots. So, the issue was whether the estimated property taxes breached the constitutional requirement of disclosure of items "charged at closing."[24] Relying primarily on Black's Law Dictionary, the San Antonio Court of Appeals concluded that charging means to "demand a fee" or "to bill"[25] and that "property taxes were not charged at closing but were assessed by the property taxing authority at a subsequent time with bills due and payable on January 31 of the subsequent year."[26] The court also found that the definition of "closing" in the context of a real estate home transaction, involved the final meeting of the parties at which documents are signed and delivered.[27] Therefore, such constitutional provision did not prohibit a foreclosure of a homestead when the owner received an inaccurate estimate of ad valorem tax payments made at the time of the closing of the real estate transaction.

D. Forcible Detainer after Foreclosure

1. Due Process Challenge

Reynoso v. Dibs US, Inc.[28] discussed a forcible detainer action after a

20. *Id.* at 49.
21. *Id.* at 48.
22. *Id.* at 49.
23. Tex. Const. Ann. art. XVI, § 50(a)(6)(M)(ii).
24. *Hinton*, 533 S.W.3d 50–51.
25. *Id.* at 51 (citing Tex. Const. Ann. art. XVI, § 50(a)(6)(M)(ii)).
26. *Id.*
27. *Id.* at 51 n.4 (citing 7 Tex. Admin. Code § 153.1(3)).
28. 41 S.W.3d 331 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

foreclosure sale. Reynoso signed a deed of trust encumbering her home, which contained a clause acknowledging that: (1) Reynoso's right to occupy the premises ceased upon the sale of the property; and (2) Reynoso had no rights to occupy the property without the new owner's consent. Dibs US, Inc. purchased the property at foreclosure and sent a notice to vacate. When Reynoso failed to do so, Dibs filed a forcible detainer action and right of possession was granted to Dibs by the justice court and affirmed by the county court. Reynoso appealed that ruling, claiming that the Texas forcible detainer provisions violated her due process rights and that she should be entitled to possession during the pendency of her suit for title in a district court. Texas law is well settled on these issues, but the court dutifully walked through each of Reynoso's issues.

First, Reynoso challenged subject matter jurisdiction of the justice court and county court; however, the forcible detainer action clearly grants subject matter jurisdiction to the appropriate justice court for forcible detainer actions relating to possession of property, and grants the county court jurisdiction for an appeal therefrom.[29] The only exception is when the resolution of the possession issue "cannot be adjudicated without first determining title."[30] However, in this case, the holdover/sufferance clause in the deed of trust specified the grantor of the deed of trust would become a tenant at sufferance, which allowed the trial court to "resolve possession without resort to title."[31] Next, Reynoso asserted due process clause violations based on the holdover/sufferance clause and the deprivation of her right to litigate possession concurrent with her wrongful foreclosure action. The Fourteenth Houston Court of Appeals recognized that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution[32] has both procedural and substantive components.[33] A substantive due process violation occurs when the government deprives an individual of a constitutionally protected right by an arbitrary use of power, such as legislative action. The court noted that "[w]hen neither a suspect classification nor fundamental right is involved," courts use "the deferential rational-basis test" to determine whether it is "'fairly debatable' that the statute or conduct rationally relates to a legitimate government interest."[34] On the other hand, procedural due process principles protect persons from a "mistaken or unjustified deprivation of life, liberty or property."[35] Therefore, procedural "[d]ue process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner with respect to a decision affecting an individual's property

29. *Id.* at 336; *see* TEX. PROP. CODE ANN. § 24.004.
30. *Reynoso*, 541 S.W.3d at 337.
31. *Id.* at 337–38.
32. U.S. CONST. amend. XIV, § 1 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).
33. *Reynoso*, 541 S.W.3d at 338 (citing *Daniels*, 474 U.S. at 331).
34. *Id.* at 339 (citing *In re* Estate of Touring, 775 S.W.2d 39, 42 (Tex. App.—Houston [14th Dist.] 1989, no pet.); Gatesco Q.M. Ltd. v. City of Hous., 503 S.W.3d 607, 618 (Tex. App.—Houston [14th Dist.] 2016, no pet.)).
35. *Id.* (citing Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)).

rights."[36] But, the due process protection guarantees "do not extend to private conduct abridging individual rights,"[37] as opposed to governmental actions. Consequently, the deed of trust with a holdover/sufferance clause did not trigger due process protections, because those actions were between individuals without state action.[38] The only possible state action was enactment of the Texas Property Code section on forcible detainer,[39] but due process does not override state court systems if there is a requirement for notice and an opportunity to be heard at a meaningful time and manner.[40] Thus, Reynoso received due process having received adequate notice and opportunity to be heard at a meaningful time and in a meaningful manner with respect to private conduct abridging individual rights.[41] A deed of trust with such holdover/sufferance clause does not trigger due process protections between individuals and without state action.

Reynoso also argued that denial of her right to litigate possession and title in the same court violated her due process rights for shelter and possession of property; however, the court held, using the rational basis test, that the claim for shelter and right to retain possession of one's home is not a fundamental interest protected in the Constitution.[42] Therefore, Reynoso had no right under the due process clause to litigate possession and title issues together in a state district court.

2. Jurisdiction on Title Issues

Praise Deliverance Church v. Jelinis, LLC[43] also involved a forcible detainer action after foreclosure. Praise Deliverance Church (the Church) granted a deed of trust on ten tracts of land, some of which were vacant land. At a non-judicial foreclosure sale, the property was acquired by Jelinis, LLC and HREAL Company, LLC (purchasers). The purchasers sent eviction notices and petitioned for possession, which was awarded. Initially, the Church challenged jurisdiction of the justice and county courts based on title issues, relying on a docket notation in the justice court indicating "title issues."[44] However, the First Houston Court of Appeals viewed such notation as inconsistent with the judgment for possession. The purchasers challenged the jurisdiction of the appellate court because possession was no longer an issue because the Church failed to file a supersedeas bond after the possession judgment, relying on Texas Property Code Section 24.007[45] to the effect that a county court final judgment in an eviction suit may not be appealed on the issue of posses-

36. *Id.*
37. *Id.*
38. *Id.* at 340.
39. *See* TEX. PROP. CODE ANN. § 24.002.
40. *Reynosa*, 541 S.W.3d at 341.
41. *Id.* at 342.
42. *Id.* at 343 (citing Lindsey v. Normet, 405 U.S. 56, 74 (1972)).
43. 536 S.W.3d 849 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).
44. *Id.* at 852.
45. TEX. PROP. CODE ANN. § 24.007.

sion unless the premises are being used for residential purposes only.[46] Based on the failure to file a supersedeas bond, the purchasers obtained a writ of possession and ultimately obtained possession, thereby dispossessing the Church and using such non-possession as the basis for alleging that the appeal was moot. The court of appeals concluded that the lack of possession of the property might result in a new forcible detainer action by the Church to evict the purchasers and, therefore, the appeal was not moot.[47] Despite this majority ruling, there is a vigorous dissent by Justice Keyes, suggesting this is a case of first impression under Texas Property Code Section 24.007 and Texas Rules of Civil Procedure, Rule 510.3(e), regarding appellate procedure on forcible detainer actions.[48] Justice Keyes believed the appellate court lacked jurisdiction because the property had a commercial use; therefore, the residential use exception did not apply.[49]

Paselk v. Bayview Loan Servicing, LLC[50] reaffirmed that issues of title are not to be litigated in a forcible detainer action brought in the justice court. Bayview, as the purchaser at a foreclosure sale, brought a forcible detainer action against Paselk for failure to surrender possession after foreclosure. Paselk appealed the judgment of possession in favor of Bayview based on "title issues" related to payment defaults.[51] The Texarkana Court of Appeals held that Bayview provided evidence satisfying all the forcible detainer elements: (1) that it owned the property by virtue of the substitute trustee deed; (2) that the occupants were a tenant at sufferance pursuant to the specific terms of the deed of trust; (3) that the occupants received notices to vacate; and (4) that the occupants failed to vacate the premises.[52] Having proven the elements of forcible detainer, Bayview prevailed on the issue of possession and the title issue would have to be brought in a separate district court action.[53]

3. Supersedeas Bonds

In a supersedeas bond case, *In re Invum Three, LLC*,[54] the purchaser at foreclosure brought a forcible detainer action. The county court judgment for possession was rendered on April 18, 2017, although the occupant was not present at the trial. A writ of possession was granted on May 1 and the constable posted the writ of possession at the property on May 4. That same day, the occupant filed a motion to stay the writ of possession and the trial court, on May 5, entered an order staying the writ of possession. The purchaser brought a writ of mandamus to force the court

46. *Jelinis*, 536 S.W.3d at 853.
47. *Id.* at 854.
48. *Id.* at 856; *see* TEX. PROP. CODE ANN. § 24.007; TEX. R. CIV. P. 510.3(e).
49. *Jelinis*, 536 S.W.3d at 858.
50. 528 S.W.3d 790 (Tex. App.—Texarkana 2017, no pet.).
51. *Id.* at 791.
52. *Id.* at 793.
53. *Id.* at 793–94.
54. 530 S.W.3d 748 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

to enforce its writ of possession, which the Fourteenth Houston Court of Appeals upheld based upon the strict requirement of Texas Rules of Civil Procedure Rule 510.13,[55] that a judgment of the county court cannot be stayed unless a supersedeas bond is filed within ten days from the judgment. The occupant missed that deadline; therefore, the order could not be stayed.[56]

4. Possession Determination

Jimenez v. McGeary[57] addressed two additional issues with regard to forcible detainer actions after a foreclosure. Jimenez's property was foreclosed in August 2010. Four years later, the Federal National Mortgage Association (FNMA) filed a forcible detainer action and before that proceeding was finally adjudicated, FNMA sold the property to McGeary and his son in June 2016. After a notice to vacate, McGeary filed a forcible detainer action and possession was granted to McGeary. Jimenez complained that McGeary's son was not a party to the forcible detainer action and was an indispensable party, thereby requiring the action to be dismissed. However, the Fort Worth Court of Appeals determined that the issue being addressed was a right of immediate possession and that McGeary's son was not an indispensable party with respect to such adjudication.[58] Jimenez also complained that the notice to vacate was insufficient under Texas Property Code Sections 24.002 and 24.005[59] because the notice was not on behalf of both owners, McGeary and his son. The court considered evidence from McGeary's attorney stating that both sent a notice and determined that it was evidence that the notice was sent by McGeary and his son.[60] Though not dictum, the court spent little effort in analyzing this issue; therefore, some caution should be exercised in using this as judicial precedent on this issue.

In yet another issue, Jimenez complained that the verifications in the pleadings were signed by McGeary's attorney instead of McGeary individually. The court of appeals cited numerous cases supporting the verification of a petition in a forceful detainer action involving a corporate party by that party's agent, and extended that reasoning to an individual plaintiff's attorney.[61] Supporting this conclusion, the court noted the provisions of various rules defining "plaintiff"[62] and a "party,"[63] and that

55. TEX. R. CIV. P. 510.13.

56. *In re Invum Three, LLC*, 530 S.W.3d at 750. This is consistent with *Hernandez v. U.S. Bank Trust*, 527 S.W.3d 307, 310 (Tex. App.—El Paso 2017, no pet.), which was reported during the prior Survey period, which denied an appeal because the supersedeas bond hearing occurred after the ten-day posting period.

57. 542 S.W.3d 810 (Tex. App.—Fort Worth 2018, pet. denied).

58. *Id.* at 812.

59. TEX. PROP. CODE ANN. §§ 24.002, 24.005.

60. *Jiminez*, 542 S.W.3d at 813.

61. *Id.*

62. TEX. R. CIV. P. 500.2(u).

63. *Id.* 500.2(s).

Rule 500.4[64] permits an authorized agent or attorney to represent an individual in an eviction case. The verification by McGeary's counsel stated his authority to make the verification and swore that the facts contained were "both within his personal knowledge and true and correct."[65] Finally, Jimenez claimed that McGeary could not rely on the tenancy at sufferance provision in the deed of trust because he was not in privity of contract. However, the court of appeals held that no contract is required for a party to be subject to a forcible detainer action.[66]

5. Landlord-Tenant Relationship

In *Jelinis, LLC v. Hiran*,[67] the Fourteenth Houston Court of Appeals addressed, in a post-foreclosure forcible detainer action, the requisites for the jurisdiction of the court to determine the issue of possession. Hiran signed a home equity note and mortgage and later defaulted on same. The note, originally made to Long Beach Mortgage, was transferred to Deutsche Bank, which filed suit in a district court for declaratory judgment and an order authorizing the foreclosure of the homestead property. The district court granted judgment to Deutsche Bank, which foreclosed and sold the property to Jelinis, which filed a forcible detainer action against Hiran. Hiran filed a second suit in the district court alleging title issues based upon a claim that the original mortgagee had switched pages in the note and deed of trust changing the rate of interest from a two percent fixed rate to an eight percent adjustable rate. The second district court granted a temporary injunction to Hiran enjoining Jelinis from its eviction action. Jelinis appealed, arguing the justice court had exclusive jurisdiction to determine possession of the property.

The jurisdiction of the justice court was the primary issue of the case and was summed up by the court of appeals in the following summary of the law: "The justice court has jurisdiction over its forcible detainer case and a district court may not enjoin a justice court from hearing a forcible detainer case if the justice court does not have to make a determination regarding title."[68] Jelinis relied upon the tenancy-at-sufferance clause contained in the deed of trust,[69] whereas Hiran alleged that the note and deed of trust were void due to the alteration of terms of the documents.[70] In order to avoid the combined and intertwined issues of possession and title requiring a district court determination, the court of appeals looked to see if, first, there was a landlord tenant relationship,[71] noting that the "lack of such a relationship indicates that the case may present a title

64. *Id.* 500.4(a).
65. *Jimenez*, 542 S.W.3d at 814.
66. *Id.* (citing Brooks v. Wells Fargo Bank, N.A., No. 05-1600616-CV, 2017 WL 3887296, at *9 (Tex. App.—Dallas Sept. 6, 2017, no pet.) (mem. op.)).
67. 557 S.W.3d 159 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).
68. *Id.* at 166.
69. *Id.*
70. *Id.* at 162.
71. *Id.* at 167.

issue."[72] The court found the deed of trust contained a tenancy-at-sufferance clause, and determined that it created an issue of possession separate and apart from the issue on title.[73] Hiran continued to assert that a landlord-tenant relationship could not be based on a void deed of trust.[74] Negating Hiran's argument, the court looked at both *Yarbrough v. Household Financial Corp. III*[75] and *Wade v. Household Financial Corp. III*.[76] In the *Yarbrough* case, the deed of trust contained a tenancy-at-sufferance clause; however, Yarbrough alleged the foreclosure sale was void because the deed of trust was forged.[77] The *Yarbrough* decision was based on the validity of the original deed of trust which established the tenancy-at-sufferance provision, unlike the *Hiran* case, which merely challenged a defective foreclosure processing.[78] The *Wade* case was deemed to support the court's decision because, in *Wade*, there was no challenge to the execution of the deed of trust, the validity of the tenancy-at-sufferance clause, or as to forgery.[79] Therefore, there was no intertwining of possession and title issues.[80]

III. CREDITOR/DEBTOR/GUARANTIES

A. Acknowledgement

DeRock v. DHM Ventures, LLC[81] is a reminder that the statute of limitation on a debt action is subject to a written acknowledgement of the debt which constitutes a separate cause of action on which the statute of limitation begins anew. DHM Ventures executed a note and deed of trust to secure a debt that had a two-year term and was not timely paid. However, the debtor continued to make principal and interest payments on the debt, which was acquired by DeRock four years after its maturity date. When principal and interest payments stopped, DeRock brought suit on the debt. In a motion for summary judgment, the debtor alleged the lapse of the four-year limitation on the debt, and the plaintiff alleged acknowledgement of the new debt.[82] While this may substantively be a warning to practitioners about acknowledging debt previously barred by limitation, this case was decided on procedural aspects of pleading the

72. *Id.*
73. *Id.* (citing Pinnacle Premier Props., Inc. v. Breton, 447 S.W.3d 558, 564 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (op. on reh'g.)).
74. *Id.*
75. 455 S.W.3d 277 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
76. No. 06-15-00074-CV, 2016 WL 741872 (Tex. App.—Texarkana Feb. 25, 2016, no pet.) (mem. op.).
77. *Hiran*, 557 S.W.3d at 168.
78. *Id.*
79. *Id.* at 169–70.
80. *Id.* at 170.
81. 556 S.W.3d 831 (Tex. 2018).
82. *Id.* at 833, 834. The supreme court noted the elements of acknowledgement were that it must "(1) be in writing and signed by the party to be charged; (2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligations; and (3) refer to the obligation and express a willingness to honor that obligation." *Id.* at 834 (citing Stine v. Stewart, 80 S.W.3d 586, 591 (Tex. 2002)).

acknowledgement cause of action. The defendant's recitation of facts for an acknowledgement was not included in the "causes of action portion of the pleadings" but rather in the "avoidance of defendants' limitation defense" section of the pleading.[83] Although the court of appeals held the defendant failed to properly plead the action, the Texas Supreme Court overruled and remanded because the plaintiff had used the word "acknowledgement" in the amended petition, detailed the evidence relied upon for the acknowledgement cause of action, and attached exhibits (emails, checks, bank statements and tax returns) relating to such cause of action.[84] This was sufficient to provide fair notice of an acknowledgement cause of action, and the place of insertion in the pleadings was immaterial.[85]

B. Material Breach

Leonard v. Knight[86] involved the determination of whether there was a material breach of a settlement agreement. To settle a prior lawsuit, Leonard and Knight entered into a settlement agreement whereby Leonard signed a note for four years of principal and interest payments with a single balloon payment and Knight agreed to dismiss the prior lawsuit with prejudice.[87] After signing the settlement agreement and the note, Leonard made all of his monthly payments except the final balloon payment. Knight never filed the required dismissal with prejudice for the prior lawsuit, although the trial court dismissed the underlying lawsuit without prejudice for lack of prosecution.[88] When Knight sued on the balloon payment default, Leonard responded that his performance was excused because of Knight's breach of a material obligation (being the dismissal with prejudice of the underlying suit). Knight's motion for summary judgment was granted and affirmed on appeal. In support of its conclusion, the Fourteenth Houston Court of Appeals noted that in determining materiality of a breach, courts should consider "the extent to which the nonbreaching party will be deprived of the benefit that it reasonably could have anticipated from full performance."[89] Although Knight admitted he failed to dismiss the prior lawsuit with prejudice, the court concluded that Leonard did not carry the burden of presenting evidence that the breach was of a material nature, because Leonard did not prove he was "deprived of the benefit he reasonably expected to receive from the settlement."[90] The court also noted that there was no evidence

83. *Id.* at 834.
84. *Id.* at 835.
85. *Id.* at 836.
86. 551 S.W.3d 905 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
87. *Id.* at 908.
88. *Id.*
89. *Id.* at 910 (citing Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 693 (Tex. 1994)).
90. *Id.* (citing FedGess Shopping Ctrs., Ltd. v. MNC SSP, Inc., No. 14-07-00211-CV, 2007 Tex. App. LEXIS 9802, at *3 (Tex. App.—Houston [14th Dist.] Dec. 18, 2007, no pet.) (mem. op.)).

that Knight had the ability to dismiss the claims in the prior lawsuit at the time Leonard failed to make final payments.

Consequently, the court affirmed the trial court's holding because Leonard did not meet his evidentiary burden of proof on the issue of material breach.[91] Though this case was decided on procedural issues, the authors question some of the substantive provisions. Most notably, the failure of Knight to file the dismissal with prejudice was not only a breach of a condition of the settlement agreement, it was Knight's only obligation and condition under the settlement agreement. The authors consider the breach of Knight's sole obligation material. The court seemed influenced by Leonard's failure to make demand of Knight to file a dismissal with prejudice prior to Leonard's failure to make the final balloon payment.[92] The court acknowledged that the expected benefit was the termination of the prior lawsuit in a manner in which it could not be revived.[93] However, the court ignored the distinction between a dismissal with prejudice and a dismissal without prejudice.[94] In summary, this case represents only a narrow decision based on the procedural defects of Leonard in failing to specify the materiality of the breach; but nevertheless, the authors believe it should not be considered authoritative on the substantive issue of material breach and the distinction between dismissing with or without prejudice.

C. Effect of Bankruptcy Dismissal

The Tyler Court of Appeals discussed in *Badalich v. First National Bank of Winnsboro*[95] the enforceability of an agreement reached during bankruptcy but the bankruptcy was subsequently dismissed. Badalich executed numerous notes and deeds of trust to the bank over a period of time but defaulted on payment. When the bank filed suit on the debt, the debtor filed for a Chapter 13 bankruptcy (later converted to a Chapter 11 bankruptcy).[96] During the course of the Chapter 11 proceeding, the creditor and debtor entered into a refinance agreement which restructured the payments under the existing debt at a lower interest rate. After eighteen months in bankruptcy, the debtor dismissed the Chapter 11 proceeding, advising the court that a voluntary agreement among creditors could be obtained through the means of a new lending source. Upon dismissal, the bank filed suit for collection of the underlying debt evidenced by the notes and deeds of trust, as unmodified by the bankruptcy refinance agreement. Badalich contended that the refinance agreement was an ac-

91. *Id.* at 911.
92. *See id.* at 910.
93. *Id.* at 911.
94. *See id.* at 910 (citing Mossler v. Shields, 818 S.W.2d 752, 754 (Tex. 1991)). The court, although claiming Leonard presented no authority for such distinction, noted that a "dismissal with prejudice does operate as a determination on the merits . . . ."
95. 550 S.W.3d 676 (Tex. App.—Tyler 2017, pet. denied).
96. *Id.* at 678.

cord and satisfaction of the underlying debts and should continue after the bankruptcy dismissal.

However, the Tyler Court of Appeals concluded that the dismissal of the bankruptcy proceeding effected a return of the parties to their pre-petition status.[97] Specifically, the court quoted from a Northern District of Texas bankruptcy case noting that "[t]o the extent possible, dismissal of [a] bankruptcy petition reverses what has transpired during bankruptcy."[98] Consequently, because the bankruptcy refinance agreement was unenforceable, the bank could sue and enforce the original notes without regard to the bankruptcy refinance agreement.[99] This is instructive to practitioners who should take heed of contracts executed during bankruptcy before considering a dismissal of such bankruptcy proceeding.

D. Summary Judgment Affidavit Knowledge

Rogers v. RREF II CB Acquisitions, LLC[100] involved a suit on a breach of note but was decided on the sufficiency of affidavit evidence in support of a motion for summary judgment for the creditor. The most important aspects related to issues concerning the personal knowledge of the affiant in affidavits supporting a motion for summary judgment. In considering the various affidavits, the Corpus Christi Court of Appeals noted that Rule 166a(f)[101] requires affidavits supporting summary judgment to be made "on personal knowledge" which must "unequivocally represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge."[102] Further, the court noted the affidavit "must disclose the basis on which the affiant has personal knowledge of the facts asserted."[103]

Personal knowledge may be established by (1) the affiant's position or job responsibilities; (2) knowledge that can be reasonably assumed based on the affidavit sufficiently describing the relationship between the affiant and the case; (3) a pertinent review of the records establishing the requisite knowledge; and (4) the custodian of records with a relationship to the facts.[104] Sufficient personal knowledge was established here by the affidavits submitted by the creditor. The court noted how each affidavit referenced the following facts: (1) a representation of direct and unqualified claim of personal knowledge; (2) the details of the role in the company which made assumption of personal knowledge appropriate; (3) the direct control and custody over account and records; (4) control and review of the pertinent records; (5) custodial capacity over the records; and

97. *Id.* at 680 (citing Czyzewski v. Jevic Holding Court, 137 S. Ct. 973, 978 (2017)).
98. *Id.* (citing *In re* Keener, 268 B.R. 912, 919 (Bankr. N.D. Tex. 2001)).
99. *Id.* at 682.
100. 533 S.W.3d 419 (Tex. App.—Corpus Christi 2016, no pet.).
101. Tex. R. Civ. P. 166a(f).
102. *Rogers*, 553 S.W.3d at 428 (citing Humphreys v. Caldwell, 888 S.W. 2d 469, 470 (Tex. 1999) (per curiam) (orig. proceeding)).
103. *Id.*
104. *Id.* at 429.

(6) verification of the accounts.[105] But, Rogers argued that some of the documentation offered for summary judgment evidence were hearsay, alleging that the servicer's affidavits were insufficient as business records of the actual creditor.[106] The court recited the elements under Texas Rules of Evidence 803(6)[107] for the hearsay exception to be admissible, including that: "(1) the documents were made and kept in the regular course of business; (2) such recordkeeping was the regular practice of the business; (3) the records were made at or near the time of the event; and (4) the records were made by a knowledgeable person in the course of business."[108] Further, the hearsay exception for records from a third party were admissible if "(1) the document is incorporated and kept in the course of the testifying witness's business, (2) that business typically relies upon the accuracy of the document's content, and (3) the circumstances otherwise indicate the document's trustworthiness."[109] The servicer's affidavit clearly reflected how the servicing information was incorporated into its records, in the regular course of its business, and how that information was relied upon in both loan sales and in making demands for outstanding debt.[110] As to the trustworthiness prong of the third-party record test, the court stated that it could look at the totality of the affidavits and other supporting exhibits to satisfy such element.[111]

E. Anti-Deficiency—Fair Market Value

Silberstein v. Trustmark National Bank[112] discussed the determination of fair market value in an anti-deficiency suit. Silberstein owned ten residential properties subject to loans which were cross-collateralized and cross-defaulted. There was a default and a foreclosure. Silberstein appealed an adverse judgment on the fair market value of the property determined under the anti-deficiency statute in the Texas Property Code.[113] In this battle of appraisers, Silberstein's appraiser used gross rental income less expenses for an income valuation; the creditor's (Trustmark) appraiser used the annual rent adjusted by capitalization rates from 12% to 20%.[114] The jury determined the fair market value to be the exact numbers established by the creditor's appraiser and Silberstein attacked

105. *Id.* at 430.
106. *Id.* at 431.
107. Tex. R. Evid. 803(6).
108. *Rogers*, 553 S.W.3d at 432.
109. *Id.*
110. *Id.* at 433–34.
111. *Id.* at 434. Consider how the affidavits discussed in *Rogers* can be distinguished from *Villanova v. Fed. Deposit Ins. Corp.*, 511 S.W.3d 88 (Tex. App.—El Paso 2014, no pet.), discussed by the authors in the prior annual Survey. *See* J. Richard White et al., *Real Property*, 4 SMU Ann. Tex. Surv. 357, 364–65 (2018). In *Villanova*, the creditor's affidavit of its Vice President of Loan Servicing and Default Operations was deemed insufficient for failure to establish the personal knowledge of the affiant.
112. 533 S.W.3d 403 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).
113. Tex. Prop. Code Ann. § 51.003(b).
114. *Silberstein*, 533 S.W.3d at 406. The higher the cap rate, the lower the value of the property. *Id.*

the jury's verdict as being against the great weight and preponderance of the evidence. The Fourteenth Houston Court of Appeals agreed, noting that the term "fair market value" is not statutorily defined in the anti-deficiency statute.[115] Its common definition is a value determined by a willing buyer and seller, with neither being under an obligation to buy or sell, and that definition is approved under the Texas Tax Code.[116] However, the Texas Supreme Court has held that the fair market value definition in the anti-deficiency statute "does not equate precisely to the common, or historical, definition."[117] Fair market value in the anti-deficiency context means the historical definition as modified by other evidence which the Texas Property Code[118] authorizes.[119] Such other evidence includes: "(1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding cost; (4) cost of sale; and (5) a discount to be applied to future sales price or cash flow to arrive at a current fair market value (i.e., the discounted value)."[120] Of the three types of valuation methods (comparable sales, cost method and income method),[121] the court of appeals noted that the favored judicial method was the comparable sales approach.[122] Nevertheless, even using the comparable sales method, such "comps" must be based on (1) voluntary transitions; (2) near in time and vicinity to the subject sale and property; and (3) involve property with similar characteristics.[123] Otherwise, the cost approach (which tends to set the upper limit of true market value) and the income approach are acceptable valuation methodologies.[124]

Silberstein's appraiser's use of the income method was competent evidence because the appraiser testified as to why and the amount of the value reduction to accommodate for expenses, that such adjustments were based on his experience, and that the cap rate was a fair cap rate for the industry at the time of the foreclosure sale (being from 6% to 10%, and that the 6% cap rate was generally used for commercial properties, which justified his 8% cap rate).[125] On the other hand, Trustmark's appraiser's use of comparable sales approach was determined not probative evidence, because the comparable sales for six of the ten properties were based on foreclosure sales (not voluntary sales), and there was no adjustment in the appraisal amount based on the fact that the sales were not between willing buyers and sellers.[126]

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115. *Id.* at 410.
116. TEX. PROP. CODE ANN. § 1.04(7).
117. *Silberstein*, 533 S.W.3d at 410 (citing Plainscapital Bank v. Martin, 459 S.W.3d 550, 556–57 (Tex. 2015)).
118. TEX. PROP. CODE ANN. § 51.003(b).
119. *Silberstein*, 533 S.W.3d at 411.
120. *Id.* at 410–11.
121. *Id.* at 411.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 411–12.

For an expert opinion to have probative weight, the bases and reasons for the expert's opinion must be probative evidence not merely a conclusionary statement of the expert.[127] The value opinion offered in the Trustmark appraisal provided no evidentiary support and was a conclusionary statement not constituting probative evidence of market value.[128] However, Silberstein's position could not prevail if the jury's verdict was not supported by the preponderance of the evidence.[129] The court of appeals concluded that the Trustmark's appraisal testimony on replacement cost could establish a range of fair market value on a cost replacement basis, but the jury's finding as to fair market value did not fall within the range of fair market value on a cost replacement basis.[130] The jury's findings were "contrary to the overwhelming weight of the evidence."[131] Therefore, Silberstein had not established fair market value.

F. Statute of Limitations Waiver

Godoy v. Wells Fargo Bank[132] involved a new aspect of waivers under the Texas anti-deficiency statute.[133] Prior precedent is clear, as announced in *LaSalle Bank N. A. v. Sleutel*[134] and later announced by the Texas Supreme Court in *Moayedi v. Interstate 35/Chisam R.D., L.P.*,[135] that a general waiver of rights and defenses is sufficient to waive the offset claims under the Texas anti-deficiency statute.[136] This case dealt with whether such a generic waiver is sufficient for a waiver of the special two-year statute of limitations in the anti-deficiency statute.[137] Godoy guaranteed a note payable to Wells Fargo; Wells Fargo sued Godoy to collect the deficiency three years after the foreclosure sale. In defense, Godoy asserted the two-year limitation period under the anti-deficiency statute.[138] However, Wells Fargo asserted that the guaranty agreement contained a waiver of that special two year statute of limitation and asserted that it only needed to file its claim within the standard four year limitation period. The guaranty agreement read:

> Guarantor also waives any and all rights or defenses arising by reason of . . . (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations . . .[139]

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127. *Id.* at 412.
128. *Id.*
129. *Id.* at 413.
130. *Id.*
131. *Id.*
132. 542 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2017, pet. granted), *aff'd* 2019 WL 2064538 (Tex. May 10, 2019).
133. Tex. Prop. Code Ann. § 51.003.
134. 289 F.3d 837, 842 (5th Cir. 2002).
135. 438 S.W.3d 1, 6 (Tex. 2014).
136. *Godoy*, 542 S.W.3d at 52, 53.
137. *Id.* at 53.
138. *See* Prop. Code § 51.003(a).
139. *Godoy*, 542 S.W.3d at 52, 53.

In its analysis, the Fourteenth Houston Court of Appeals relied on *Moayedi*, in which the supreme court held that a broad general waiver was sufficient for a waiver of a right of offset under the anti-deficiency statute which is an "affirmative defense."[140] The court of appeals continued, reasoning that because a statute of limitations is also an affirmative defense, that the *Moayedi* decision would also encompass a waiver of the special two-year limitation defense under the anti-deficiency statute.[141] However, Chief Justice Frost stringently dissented, alleging that *Moayedi* did not overrule the long standing Texas Supreme Court's position announced in *Simpson v. McDonald*,[142] "that an agreement made in advance to completely waive the statute of limitations is void as against Texas public policy."[143] This case is subject to a filed petition and further clarification from the supreme court should be anticipated.

G. Garnishment—Bankruptcy Discharge

Leslie William Adams & Associates v. AMOCO Federal Credit Union[144] determined the effect of a bankruptcy discharge upon a garnishment action. The judgment debtor, Martinez, owed Adams & Associates attorneys' fees for handling a prior case; the law firm obtained a judgment against Martinez for such fees, and brought a garnishment action against the credit union. Two weeks after the judgment was entered in favor of the law firm, Martinez filed for Chapter 7 bankruptcy, which was prior to levy on the writ of execution. At issue was whether the bankruptcy discharge voided the underlying state court's garnishment judgment. The Fourteenth Houston Court of Appeals held that the discharge voided the underlying garnishment.[145] Under Texas law, a judgment in garnishment is not self-executing.[146] A writ of execution cannot be issued until thirty days after the judgment becomes final.[147] Consequently, "ownership of property subject to the judgment does not transfer until a writ of execution has been issued and levied."[148] Therefore, the bankruptcy discharge voided any judgment of personal liability of Martinez and operated as an injunction against the continuation of any action or employment of process to recover such debt.[149]

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140. *Id.* at 53.

141. *Id.*

142. 179 S.W.2d 239, 243 (Tex. 1944).

143. *Godoy*, 542 S.W.3d at 56.

144. 537 S.W.3d 571 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

145. *Id.* at 576.

146. *Id.* (citing Tex. R. Civ. P. 621 (judgments "shall be enforced by execution or other appropriate process")).

147. Tex. R. Civ. P. 627.

148. *Leslie Wm. Adams & Assocs.*, 537 S.W.3d at 576 (quoting Baytown State Bank v. Nimmons, 904 S.W.2d 902, 906 (Tex. App.—Houston [1st Dist.] 1995, pet. denied)); *see also* Tex. R. Civ. P. 622, 629, 637–43.

149. *Leslie Wm. Adams & Assocs.*, 537 S.W.3d at 576.

H. Guaranty—Construction of "Indebtedness"

Comerica Bank v. Progressive Trade Enterprises[150] involved a suit on a note and guaranty and the type of evidence required to prove same.[151] In proving the promissory note, Comerica's evidence included testimony from the vice president for special assets and custodian of records that the bank held the original note which it acquired by merger with Sterling Bank, the original lender, but only a copy was produced at trial. Progressive challenged Comerica for not producing the original note at trial. The court entered a take nothing judgment against Comerica. On appeal, the Fourteenth Houston Court of Appeals concluded that Comerica had demonstrated it was the legal owner and holder of the note based on: (1) sworn testimony of its custodian testifying that the note presented at trial was a true and correct copy of the original note; (2) Progressive was deemed the maker of the note because it did not dispute that fact; (3) evidence that the original note was located in Comerica's collateral department; (4) evidence that the note had not been transferred to any other entity; and (5) evidence that the note had been acquired in Comerica's merger with Sterling Bank.[152]

As to its suit on the guaranty,[153] Comerica failed to conclusively demonstrate it was entitled to recovery. The specific definition of "indebtedness" in the guaranty agreement applied only for future debts if the borrower did not meet lender's creditworthiness standards which would otherwise require a guaranty for its underwriting purposes.[154] The court determined that the guaranty was succeeded by numerous new promissory notes which were not supported by a new guaranty; therefore, the subject guaranty was no longer applicable because the borrower must have been creditworthy on its own without the need for a guaranty.[155]

I. Guaranty Acceptance

Norris v. Texas Development Co.[156] was a breach of guaranty case. A tenant, ARC Designs, fell behind in its rent payments to the landlord, Texas Development Company. In an effort to restructure the rental pay-

150. 544 S.W.3d 459 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

151. *Id.* at 463. The elements for recovery are proof of (1) the note; (2) the obligor's signature on the note; (3) the plaintiff's status as the owner or holder of the note; and (4) the balance thereof due and owing.

152. *Id.* at 463–64. This is just another nail in the coffin of the infamous "show me the note" defense.

153. The elements for recovery on a guaranty are proof of (1) the existence and ownership of the guaranty; (2) the terms of the guaranty; (3) occurrence of the conditions for liability under the guaranty; and (4) failure or refusal of performance by the guarantor. *Id.* at 465.

154. *Id.* at 466. The specific language was "[t]he term Indebtedness as used in this guaranty shall *not* include any obligations entered into between Borrower and Lender after the date hereof . . . for which Borrower meets the Lender's standard of creditworthiness based on Borrower's own assets and income without the addition of a guaranty . . . ." *Id.* (emphasis added).

155. *Id.*

156. 547 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

ments, the parties reached an oral agreement on the deferred base rent. Part of the agreement was for the tenant's owner, Norris, to guarantee such deferred base rent payments. The tenant attempted to memorialize the deferred base rent agreement and included such document in a letter (September letter) which attached a guaranty signed by Norris. The September letter included a signature block for the landlord that it did not sign at that time; rather, the landlord sent a counteroffer letter (October letter) and attached the guaranty signed by Norris and transmitted with the September letter. For reasons undiscussed in the opinion, the October letter was never agreed to, but after sending the October letter, the landlord purportedly accepted the original offer. In the suit by the landlord against the tenant and guarantor for failure to make payments under the September letter, Norris countered that the October letter voided the guaranty transmitted with the September letter. A summary judgment in favor of the landlord was granted and appealed by the guarantor. The Fourteenth Houston Court of Appeals affirmed the trial court, concluding, first, that Norris failed to argue that no contract existed, which was a procedural waiver by Norris.[157] The court construed the guaranty language as not being conditioned upon the execution of the deferred base rent agreement,[158] based on the premise that in the construction of guaranties, the court must construe strictly any guaranty according to its precise terms.[159] The guaranty identified "the amount guaranteed and the terms of payment,"[160] but the guaranty was "not conditioned upon the parties' acceptance of the specifics of the 'Deferred Base Rent Agreement.'"[161]

However, the exact language of the guaranty as quoted in the opinion[162] is contrary, in the authors' opinion, to the court's interpretation of the guaranty. Notwithstanding the court's conclusion that the guaranty was not conditioned upon the acceptance of the Deferred Base Rent Agreement, the authors disagree with that conclusion. Practitioners should take note of this case but rely mostly on the procedural aspects as to the guarantor's failure to plead the existence of a valid contract, rather than relying on such language in the guaranty not creating a condition to its effectiveness.

157. *Id.* at 662.
158. *Id.*
159. *Id.*
160. *Id.* at 663.
161. *Id.*
162. The applicable guaranty provision read: "FOR VALUE RECEIVED, and *in consideration for, and as an inducement to* THE TEXAS DEVELOPMENT COMPANY to enter into the attached Deferred Base Rent Agreement, [guarantor] hereby guarantees . . . ." *Id.* at 662 (emphasis added).

IV. LANDLORD/TENANT/LEASES

A. Security Deposits

In *Schneider v. Whatley*,[163] the El Paso Court of Appeals addressed for the first time the bad faith element of Section 92.103 of the Texas Property Code, which requires a landlord to "refund a security deposit to the tenant on or before the 30th day after the date the tenant surrenders the premises."[164] In this particular case, the tenant made a number of repairs and improvements to the lease during the term.[165] After the tenant moved out on June 30, 2013, the landlord arguably complied with the requirements of the Texas Property Code by sending the tenant a letter approximately ten days later itemizing the list of required repairs, and concluding that the tenant owed an additional $492.56 for such repairs.[166] By sending the letter, the landlord believed that it had complied with the requirements of the Texas Property Code, which presumes the landlord's bad faith if the landlord "fails either to return the security deposit or to provide a written description and itemization of the deductions on or before the 30th day after the date the tenant surrenders possession."[167] Unfortunately for the landlord, and landlords across the state of Texas, the tenant sued for the return of their security deposit, and despite the landlord's prima facie compliance with the requirements of the law, the trial court entered judgment against the landlord and found the landlord liable for three times the amount of the security deposit for wrongfully withholding the security deposit.[168]

The landlord appealed on the basis that there was no evidentiary support that it acted in bad faith in failing to return the security deposit during the requisite thirty day period.[169] The El Paso Court of Appeals upheld the finding of the trial court that the landlord acted in bad faith.[170] Although the landlord was able to overcome the presumption of bad faith by sending the tenant a letter within thirty days, the landlord was still held responsible for wrongfully withholding the security deposit beyond the statutory thirty day period because of the nature of the charges the landlord deducted from the security deposit.[171]

Although this case is very fact specific regarding the types of repairs the landlord deducted from the security deposit (i.e. normal wear and tear or pre-approved changes), it is an important warning for all residential landlords that merely sending an itemized statement within thirty days is not sufficient to avoid the treble damages under Section 92.109 of the Texas Property Code. The damages claimed by the landlord, and the

163. 535 S.W.3d 236 (Tex. App.—El Paso 2017, no pet.).
164. *Id.* at 240 (citing Tex. Prop Code Ann. § 92.103).
165. *Id.* at 239.
166. *Id.* at 238.
167. *Id.* at 241.
168. *Id.* at 238; *see* Tex. Prop. Code § 92.109(a).
169. *Schneider*, 535 S.W.3d at 240.
170. *Id.* at 242.
171. *Id.*

amount of the security deposit held, must also be reasonable to avoid the penalty. In this case, the tenant was able to prove that the landlord either consented to various improvements or that the improvements were beneficial and did not "damage" the property. Therefore, the court concluded that the landlord had not incurred any real damage and failure to return the security deposit within thirty days was bad faith under the statute.[172]

B. Non-Compete Clauses

Ho & Huang Properties, L.P. v. Parkway Dental Associates[173] is a complicated case that wound its way through the Texas court system for many years and was ultimately settled in late 2018 by the Texas Supreme Court denying the landlord's petition. The basic facts can be summarized as follows. In 2004, Parkway Dental Associates, the tenant, leased office space from Ho & Huang Properties, L.P., the landlord, for use as a dentist office.[174] The lease contained a restrictive covenant that provided "[u]nless a Default of this Lease has occurred and remains uncured upon the expiration of any grace or notice periods, Landlord covenants and agrees that Landlord shall not permit any portion of the Project to be used for a Competitive Business."[175] The lease defined "Competitive Business" as "Businesses practic[ing] . . . [g]eneral dentistry" and "Project" as "the complex in which the leased premises were located."[176] In 2006, the landlord sold a part of the Project's parking lot to a third party, who ultimately resold the property to another party, who constructed a building and leased it to a dental practice.[177] In 2007, the tenant sued the landlord for breach of the lease and anticipatory repudiation.[178] The trial court granted summary judgment in favor of the landlord and the tenant appealed. On appeal, the Houston Court of Appeals found that the trial court erred in granting summary judgment and remanded the case for findings of facts on certain materials issues.[179] On remand, the jury found in favor of the tenant with respect to the breach of the covenant by the landlord and the landlord appealed.[180] The court of appeals affirmed the judgment of the trial court.[181] The lesson in this case for all practitioners is to carefully (and narrowly) define non-compete clauses in leases or other restrictive covenants with an eye toward potentially foreseeable future transactions or events to avoid this type of situation.

172. *Id.*
173. 529 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).
174. *Id.* at 106.
175. *Id.* at 107.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 108.
180. *Id.*
181. *Id.*

C. Damages/Attorney's Fees

First Cash, Ltd. v. JQ-Parkdale, LLC[182] provides two important practice tips for practitioners when it comes to cases related to breach of contract.[183] First, in order to obtain attorney fees for a breach of contract case, including a lease, the contract or lease must explicitly authorize such fees or the case must be brought against an "individual or corporation" in order to fall within the parameters of the Texas Attorney's Fees Statute.[184] Limited liability companies, limited partnerships, trusts, and other organizations that are not "corporations" are specifically excluded by the Texas Attorney's Fee Statute.[185] Second, when proving damages related to a breach of a lease it is essential to present evidence of the rent differential, which is the "difference between (1) the agreed rent and (2) the actual market value of the remaining lease term."[186] In order to establish "market value," one must be able to present an "accepted offer," not merely the opinion of third parties on what the market value might be or offers on other potential comparable properties.[187]

V. PURCHASER/SELLER

A. Contractual Interpretation/Ambiguity

In *URI, Inc. v. Kleberg County*,[188] the Texas Supreme Court, as it seems to do several times a year, once again found the need to correct a lower court which found ambiguity in a contract where there was not any.[189] The case involves a settlement agreement between URI and Kleberg County over uranium mining operations. The settlement agreement provided in relevant part as follows:

> URI will not resume economic mining in KVD [Kingsville Dome] Production Area 3 before it has submitted to the County Judge of Kleberg County . . . [a sworn statement] that 90% or more of the combined total of TCEQ production area baseline wells in KVD Production Area 1 and any other wells in the production patterns that URI sampled and *for which baseline is available before mining begins*, . . . has been returned to suitability.[190]

URI had pre-mining samples from both 1985 and 1987, but only the 1985 data was publically available prior to the signing of the settlement agreement. All of the lower courts who heard the case agreed with Kleberg County that the obligations of URI under the settlement agreement had to be interpreted using only the 1985 publicly available data because

182. 538 S.W.3d 189 (Tex. App.—Corpus Christi 2018, no pet.).
183. *Id.* at 194 (citing Tex. Civ. Prac. & Rem. Code. Ann. § 38.001(8)).
184. *Id.*
185. *See* Tex. Civ. Prac. & Rem. Code. Ann. § 38.001(8).
186. *First Cash*, 538 S.W.3d at 200 (citing Design Ctr. Venture v. Overseas Multi-Projects Corp., 748 S.W.2d 469, 473 (Tex. App.—Houston [1st Dist.] 1988, writ denied)).
187. *Id.*; *see* Hanks v. Gulf, Colo. & Santa Fe Ry. Co., 320 S.W.2d 333, 337 (Tex. 1959).
188. 543 S.W.3d 755 (Tex. 2018).
189. *See id.* at 763.
190. *Id.* at 758–59 (emphasis added).

that is what Kleberg County *expected* to be used when they signed the settlement agreement.[191] The Texas Supreme Court overturned the lower court's findings and explicitly took the case to "reaffirm that the 'facts and circumstances'" in existence at the time a contract is executed are only relevant to inform the meaning of the language the parties chose to effectuate their accord if there is ambiguity.[192] In construing an unambiguous contract or in determining whether an ambiguity exists, courts may "not seek to use the parties' intent beyond the meaning the contract language reasonably yields when construed in context"[193] and "facts and circumstances cannot be employed to make the language say what it unambiguously does not say" or "to show that the parties probably meant, or could have meant, something other than what their agreement stated."[194]

In *XTO Energy, Inc. v. EOG Resources, Inc.*,[195] the San Antonio Court of Appeals interpreted the meaning of a "Disposition Clause" contained in both a Deed to Convey Property and a Deed of Trust used to secure the payment of the purchase price for the same property. The question at issue was whether the vendor's lien in the Deed and the lien of the Deed of Trust were against the entirety of the property conveyed or against only a 1/8th royalty interest. The language in question stated:

> It is further agreed and stipulated that grantee may make such disposition of seven-eighths [sic] (7/8) of the mineral rights as he may deem fit, however, it further provides [sic] that the usual one-eighth (1/8) royalty will be retained against the land for the protection of the holder or holders of the notes, until the entire balance against the land shall have been fully paid, with all interest thereon.[196]

The grantee later defaulted on repayment of the notes securing purchase of the property and the grantors foreclosed. The successors of the grantee argued that 7/8ths of the mineral interest were excluded from the lien of the Deed of Trust and vendor's lien in the Deed and that only 1/8 of the mineral interest were retained by the grantor until such time as the notes securing the purchase of the property were repaid in full. The heirs of the grantor argued that the notes securing payment of the purchase price were secured in three different ways: (1) with a vendor's lien in the granting Deed; (2) with a Deed of Trust; and (3) with a 1/8 mineral interest.

The majority of the court of appeals sided with the grantors.[197] The court relied on the longstanding interpretation of the courts in Texas that if a vendor's lien is inserted in a Deed, the seller retains superior title to

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191. *Id.* at 769.
192. *Id.* at 763.
193. *Id.*
194. *Id.* at 769 (citing Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 451 (Tex. 2011)).
195. 554 S.W.3d 127 (Tex. App.—San Antonio 2018, pet. filed).
196. *Id.* at 131.
197. *Id.* at 141.

the property and the purchase agreement remains executory until the terms of the purchase have been fulfilled.[198] As the court explained in some detail, when the grantee of an interest subject to a vendor's lien sells the property, prior to completion of the purchase terms, the conveyance of the property is "a transfer of an equitable interest susceptible to rescission [sic]."[199]

In a very interesting and somewhat compelling dissent, Justice Barnard argued that by construing the Disposition Clause as merely another avenue to secure repayment of the notes, the majority rendered the clause meaningless.[200] The dissent argued that if the vendor's lien clearly encumbered all of the property (mineral and surface) the 1/8 interest could not act as "additional security" unless the drafter intended the 7/8 to be carved out of the vendor's lien. If that were the case, the 1/8 secured repayment of the vendor's lien and the remaining 7/8s was free and clear of the vendor's lien.[201] The case has been appealed to the Texas Supreme Court and it will be interesting to see if they take up the case. Given the supreme court's emphasis in recent years on ensuring that all clauses in contract are interpreted together as one cohesive document, if at all possible, and the importance of not ignoring individual provisions to arrive at the desired conclusion, the authors would not be surprised to see the supreme court take the case and side with dissent's interpretation, which one might argue does a better job of interpreting the contracts in question by giving meaning to all, and not just a select part, of the language used by the original drafters.

B. Fiduciary Duty

In *Texas Outfitters Ltd. v. Nicholson*,[202] the trial court found that the holder of the executive rights for mineral interests owed a fiduciary duty to the non-executive interest holders and awarded the non-executive mineral interest holders monetary damages for breach of the fiduciary duty.[203] The San Antonio Court of Appeals upheld the trial court's finding,[204] but the Texas Supreme Court granted the executive rights holder's (Texas Outfitters) petition and executive rights holders across the state of Texas are undoubtedly on pins and needles awaiting the outcome of the petition. Given the facts of the case, explained in more detail below, the outcome reached by the court of appeals seems to be the right answer from an equity standpoint. However, arguably, the holding rather dra-

198. *Id.* at 138 (citing Glenn v. Lucas, 376 S.W.3d 268, 275 (Tex. App.—Texarkana 2012, no pet.)); *see also* Lusk v. Mintz, 625 S.W.2d 774, 775 (Tex. App.—Houston [14th Dist.] 1981, no writ) (citing State v. Forest Lawn Lot Owners Ass'n, 254 S.W.2d 87, 91 (1953)).

199. *XTO Energy, Inc*., 554 S.W.3d at 139 (citing Flag-Redfern Oil Co. v. Humble Expl. Co., 744 S.W.2d 6, 8 (Tex. 1987)).

200. *Id.* at 141.

201. *Id.* at 144.

202. 534 S.W.3d 65 (Tex. App.—San Antonio 2018, pet. granted), *aff'd*, 572 S.W.3d 647 (Tex. 2019).

203. *Id.* at 70.

204. *Id.* at 68.

matically expands the fiduciary duty of executive rights holders and will dramatically impact existing business practices of executive rights holders in the state of Texas. It will also, almost undoubtedly, open the floodgates to future litigation over breach of the executive rights holder's fiduciary duties.

The facts of the case are relatively straightforward. The Carter family sold the surface estate and the executive rights to Texas Outfitters while retaining the majority of the mineral interest.[205] The transaction was partially seller financed.[206] Texas Outfitters then received multiple seemingly competitive offers to lease the mineral interests that it turned down.[207] The Carter family attempted to negotiate with Texas Outfitters but Texas Outfitters refused to enter into a lease unless the Carter's made a number of concessions, including, but not limited to, giving up substantially more of their mineral interests, agreeing to non-market surface restrictions, and reducing the outstanding indebtedness on the seller financed promissory note.[208] Ultimately, the Carter family sued Texas Outfitters[209] seeking to compel a lease of the mineral interests. The holding by the San Antonio Court of Appeals, that Texas Outfitters breached their fiduciary duty, relied on a long line of Texas Supreme Court cases that have held that "the executive owes other owners of the mineral interests a duty of 'utmost fair dealing.'"[210]

In *Lesely v. Veterans Board of Texas*,[211] the Texas Supreme Court applied the standard to the refusal of an executive owner to lease property "[i]f the refusal to lease is arbitrary or motivated by self-interest to the non-executive's detriment."[212] However, in recent years, the Texas Supreme Court has qualified this precedent to clarify that although the duty is "fiduciary in nature" it does not require one to "place the interest of the other party before its own."[213]

It will be interesting to see if the Texas Supreme Court continues to further narrow the *Lesely* precedent, and the definition of fiduciary duty, with their holding in this case or swings back to a more traditional definition of fiduciary duty, which will arguably have significant impacts on how the holders of executive rights currently operate in the state of Texas.

C. Due Diligence/Compliance with Contract Terms

Freeman v. Harelton Oil & Gas, Inc.[214] is the classic tale of buyer be-

205. *Id.*
206. *Id.*
207. *Id.* at 68–69.
208. *Id.* at 70.
209. *Id.*
210. *Id.* at 71 (citing Lesley v. Veterans Bd. of Tex., 352 S.W.3d 479, 480–81 (Tex. 2011)).
211. *Lesley*, 352 S.W.3d at 480–81.
212. *Nicholson*, 534 S.W.3d at 71 (citing *Lesley*, 352 S.W.3d at 491).
213. *Id.* (citing KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 81 (Tex. 2015)).
214. 528 S.W.3d 708 (Tex. App.—Texarkana 2017, pet. denied).

ware and provides an important reminder to practitioners to always do their due diligence because the law will not protect us (or our clients) from our unilateral mistakes.[215] Although the fact pattern is long and involved (and somewhat disputed), the fundamental essence of the case is that Chesapeake Louisiana, L.P. paid to purchase what it thought was 100% of the working interests in the Geisler Unit. Unfortunately, although the contract explicitly stated that the seller "does not represent that it owns the rights . . . in all of the lands and leases described below, and Chesapeake agrees that it will perform its own title due diligence . . .",[216] Chesapeake essentially relied on the seller's disclosures regarding the state of title.[217] At closing, the executed assignments contained the classic "special" warranty language whereby the assignor agreed to defend the title from anyone "lawfully claiming or to claim the same or any part thereof, by through or under Assignor, but not otherwise."[218] Shortly after closing, it came to light that Chesapeake had actually only purchased 47% of the working interests and Chesapeake sued to recover "overpayments" under the purchase contract using the theory of unjust enrichment.[219]

As a general rule, Texas courts allow recovery under unjust enrichment and restitution theories for three fact patterns: "(1) by a defrauded party against the party who committed the fraud, (2) by a party that made an overpayment through mistaken accounting and (3) by a party that paid or credited money to the wrong person or account."[220] The Texarkana Court of Appeals did not find any of these circumstances to be applicable, and instead found that this was a case of unilateral mistake where "the party that must suffer the loss is the one that mistakenly created the situation and was in the best position to have avoided it."[221] The court went on to say that "[t]he doctrine of unjust enrichment does not operate to rescue a party from the consequences of a bad bargain, and the enrichment of one party at the expenses of the other is not unjust where it is permissible under the terms of an express contract."[222] The terms of the contract in question required Chesapeake to conduct their own due diligence, notify the seller of any "Title Defect," and if Chesapeake failed to notify the seller of the "Title Defect," the "Title Defect" was deemed to be conclusively waived.[223]

In a similar case of buyer beware, *JPMorgan Chase Bank, N.A. v. Orca*

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215. *Id.* at 742.
216. *Id.* at 720.
217. *Id.*
218. *Id.* at 721.
219. *Id.* at 716.
220. *Id.* at 742 (citing Casstevens v. Smith, 269 S.W.3d 222, 230 n.3 (Tex. App.—Texarkana 2008, pet. denied)).
221. *Id.*
222. *Id.* at 740 (citing First Union Nat'l Bank v. Richmont Capital Partners, L.P., 168 S.W.3d 917, 931 (Tex. App.—Dallas 2005, no pet.)).
223. *Id.* at 742.

Assets G.P., L.L.C.,[224] the Texas Supreme Court examined whether a mineral lessee justifiably relied on verbal representations made by a mineral lessor that negated the explicit representations contained within the lease.[225] In the case at issue, JP Morgan, acting as trustee, leased acreage to GeoSouthern Energy Corporation sometime in 2010. GeoSouthern did not record the leases for approximately six months. In early 2011, JP Morgan then leased some of the same acreage to Orca. When Orca notified JP Morgan of the title defect, JP Morgan immediately returned the $3.2 million bonus payment they had received for the leases. Despite being immediately repaid, Orca sued JP Morgan claiming breach of contract, fraud, and negligent misrepresentation. The trial court dismissed the claims against JP Morgan, finding that "the unambiguous terms of the letter of intent and the leases precluded Orca's contract claim" and that as "matter of law . . . Orca could not establish the justifiable-reliance element of its fraud and negligent-misrepresentation claims."[226]

The letter of intent referred to by the trial court was signed on December 6, 2010, and specifically stated that Orca "had caused a search to be made of the records . . . and has preliminarily determined that the interests were owned by the trust."[227] The letter of intent and the lease also included specific negation of warranty language that was a change from previous transactions entered into by the parties. The language relied on by the trial court stated as follows:

> Negation of Warranty. This lease is made without warranties of any kind, either express or implied, and without recourse against Lessor in the event of a failure of title, not even for the return of the bonus consideration paid for the granting of the lease or for any rental, royalty, shut-in payment, or any other payment now or hereafter made by Lessee to Lessor under the terms of this lease.[228]

The change in the language, to include the "Negation of Warranty" clause, was a specific point of discussion between the parties during negotiations, with a JP Morgan employee at one point stating that JP Morgan was concerned by the number of lessees who were not thoroughly examining title prior to entering into a transaction.[229] The letter of intent also contained a specific clause granting Orca thirty extra calendar days to examine title, which the parties seemed to agree was included to allow for the due diligence required to be performed as a direct result of the inclusion of the "Negation of Warranty" clause in the contract.[230]

The court of appeals disagreed with the trial court's findings and reinstated Orca's fraud and negligent misrepresentation claims.[231] The Texas

224. 546 S.W.3d 648 (Tex. 2018).
225. *Id.* at 650.
226. *Id.* at 652.
227. *Id.* at 651.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 652.

Supreme Court reversed the court of appeals on the basis that: (1) there were numerous "red flags" regarding the title issues before the parties signed the lease or the letter of intent; (2) Orca was sophisticated in the oil and gas business; and (3) because there was a direct contradiction between the oral representations and the letter of intent, Orca could not support its claim of justifiable reliance.[232] In a footnote, the supreme court went on to explain that "*either* red flags or direct contradiction alone are sufficient to negate justifiable reliance as a matter of law."[233]

In a contract for deed case, *Ferrara v. Nutt*,[234] Nutt and Ferrara entered into a "Contract for the Lease and Mandatory Purchase of Real Estate" in May 2011.[235] Pursuant to the terms of the Contract, Ferrara was to purchase a house from Nutt after paying Nutt $3,000 in earnest money and $847.17 over a period of approximately twelve years. The evidence at trial showed that Ferrara spent significant time and money improving the house.[236] In November 2011, Nutt lowered the rent payments and extended the term to fifteen years.[237] In order to recoup the money spent on the improvements, Ferrara testified that he moved out of the house and leased the house to Rodriguez for $850 per month commencing in 2012. In June 2013, Nutt sold the property to Dalu. Ferrara brought suit to quiet title.[238] The trial court awarded Ferrara damages for breach of contract but found that Ferrara was not entitled to the protective provisions of Section 5, Subchapter D of the Texas Property Code because Ferara did not live in the house and the provisions of Section 5, Subchapter D only apply to property intended to be as the purchaser's residence.[239] The First Houston Court of Appeals upheld the holding of the trial court.

D. Statute of Frauds

Burrus v. Reyes[240] was another contract for deed case, but in this particular case the parties disputed whether the arrangement between the parties was a lease arrangement or an oral contract for deed that fell within the partial performance exception for the statute of frauds. The owner of the property, Burrus, a licensed real estate agent for over forty years, contended that she was only leasing the property to the Reyes family.[241] The facts presented at trial established that the Reyes family had lived in a mobile home on the property for over seventeen years when Burrus sold the property to a third party.[242] During the seventeen-year

232. *Id.* at 660.
233. *Id.* at 660 n.2 (emphasis added).
234. 555 S.W.3d 227 (Tex. App.—Houston [1st Dist.] 2018, no pet.).
235. *Id.* at 232.
236. *Id.*
237. *Id.* at 233.
238. *Id.*
239. *Id.* at 234.
240. 516 S.W.3d 170 (Tex. App.—El Paso 2017, pet. denied).
241. *Id.* at 176.
242. *Id.* at 177.

period, the Reyes family made over $22,000[243] in improvements to the property, including adding a porch, several rooms, a shed, and a dog kennel.[244] Although the Reyes family did not move to the property in question until 1993,[245] the facts presented at trial also established that after Burrus bought a 10.75 acre plot of land in 1988 (which included the property in question),[246] Burrus approached many of the current residents of the various lots within the parcel and asked if they wanted to enter into an oral arrangement to purchase the property from her by paying monthly payments to her until they had paid for the full purchase price.[247] This type of purchase transaction is generally called a contract-for-deed transaction and all practitioners should be aware these transactions are heavily regulated by the Texas Property Code.[248]

On January 31, 2012, Burrus signed a purchase and sale agreement with a third party to sell the property where the Reyes family had lived for the last seventeen years.[249] Sometime thereafter, the purchaser hired workers to demolish some of the improvements that the Reyes family had installed.[250] The Reyes family filed suit in April 2012.[251] The purchaser filed a forcible detainer action against the Reyes family and a breach of contract action against Burrus.[252] After the trial court granted a temporary injunction, the purchaser and the Reyes family entered a settlement agreement whereby the Reyes family agreed to move in exchange for $64,600.[253] The Reyes family continued their suit against Burrus. The jury ruled in the Reyes family's favor, finding that Burrus and the Reyes family had an oral agreement that fell within the partial performance exception to the statute of frauds.[254] The jury also found that because Burrus had entered into two or more executory contracts within a year, and failed to provide the requisite annual statements required by Section 5.077(a) of the Texas Property Code, the Reyes family was entitled to liquidated damages pursuant to Section 5.077(d)(1) of the Texas Property Code.[255] Burrus appealed on the basis that there was insufficient evi-

243. *Id.* at 178.
244. *Id.* at 178–79.
245. *Id.* at 177.
246. *Id.* at 176.
247. *Id.*
248. *See* TEX. PROP. CODE ANN. § 5.072(a). Note, the current edition of § 5.072(a) of the Texas Property Code explicitly requires such executory contracts to be in writing.
249. *Burrus*, 516 S.W.3d at 178.
250. *Id.* at 179.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 180.
255. *Id.*; *see also* TEX. PROP. CODE ANN. § 5.077(d)(1) ("A seller who conducts two or more transactions within a 12-month period under this section who fails to comply with Subsection (a) is liable to the purchaser for: (1) liquidated damages in the amount of $250 a day for each day after January 31 that the seller fails to provide the purchaser with the statement, but not to exceed the fair market value of the property."). At trial, the Reyes family introduced evidence that another family had entered into a similar arrangement with Burrus in May 1994. *Burrus*, 516 S.W.3d at 195.

dence to support the finding that the partial performance exception applied.[256] Burrus argued that the Reyes family needed to show not just that improvements were made to the property, but that the improvements "were substantial and added materially to the value of the property."[257] Burrus's argument relied on the Texas Supreme Court's holding in *McGinty v. Hennen*,[258] in which a homeowner sued a contractor for the cost of repairing the contractor's poor work that led to water leaks and mold.[259]

In *McGinty,* the homeowner established the expenses related to the repairs but they failed to establish that the repairs were "reasonable and necessary."[260] The El Paso Court of Appeals distinguished *McGinty* from the case at hand and found that in order to support their partial performance claim, Reyes only needed to establish that the repairs were "valuable and permanent."[261] Burrus also argued that the Reyes family was not entitled to liquidated damages required by Chapter 5 because the contract was not in writing as required by Section 5.072.[262] However, the requirement that executory agreements must be in writing was added to the Texas Property Code in 2001, well after the agreement at issue in this case.[263]

In *Wells v. Hoisager*,[264] the Wells family argued that Arabella Mineral & Royalties breached an oral contract to purchase their surface estate. The facts are somewhat cumbersome, but the essentials are as follows: an employee for Arabella approached the Wells about purchasing their property. At the time of the conversation, the Arabella employee did not realize that Wells only owned a surface estate.[265] The parties settled on a price of $750,000, but Arabella believed all parties understood the price was subject to due diligence and the ability to garner investor participation. Impatient with the pace of the transaction, Mr. Wells showed up at Arabella's office unexpectedly one day, insistent upon closing the transaction. Arabella and Wells signed a deed for the purchase of the mineral estate. It later turned out that the mineral estate was not owned by the Wells, but instead by the state of Texas. The ownership of the mineral interest by the state of Texas presented a potential conflict of interest which may have prevented Arabella from purchasing the surface estate. After several months of repeatedly requesting a written agreement to memorialize their transaction, while Arabella was simultaneously attempting to work out the conflict issues with the State, Mr. Wells insisted

256. *Burrus*, 516 S.W.3d at 181.
257. *Id.* at 182.
258. 372 S.W.3d 625, 627–29 (Tex. 2012).
259. *Id.* at 626.
260. *Id.* at 629.
261. *Burrus*, 516 S.W.3d at 183.
262. *Id.* at 195.
263. *Id.*
264. 553 S.W.3d 515 (Tex. App.—El Paso 2018, no pet.).
265. *Id.* at 518.

that his accountant needed a letter outlining the transaction so that he could avoid capital gains taxes. Arabella provided the following letter:

> On November 13, 2012, Arabella Minerals & Royalties and Mr. Wells, came to the agreement of $750,000 for the purchase of surface property in the E/2 of Section 180, Bock 13, H&GN RR Co. Survey, containing 320 acres in Reeves County, Texas.
>
> Respectfully,
>
> /signed/
>
> Jason Hoisager[266]

One week later, an attorney for Wells sent Arabella a letter demanding Arabella close on the sale, as described in the letter, or face litigation. Arabella stopped all negotiations and Wells filed suit for breach of contract. At issue in the trial were arguably two different contracts: (1) the "oral" contract formed during the discussion; and (2) the letter from Arabella outlining the price. As every first year law student learns, there are five elements to contract creation: "(i) an offer; (ii) acceptance in strict compliance with the terms of the offer; (iii) a meeting of the minds; (iv) each party's consent to the terms; and (v) execution and delivery of the contract . . ."[267] The El Paso Court of Appeals found that with respect to both of the "contracts" (the oral agreement and the letter), there did not appear to be a meeting of the minds.[268] The only elements the parties agreed upon was the portion of the property owned by the Wells (one quarter) and the price ($750,000).[269]

E. Statute of Limitations

Although covered in last year's materials, the authors are again covering the *Tregallas v. Carol M. Archer Trust No. Three*[270] case because, as the authors stated in last year's review, the holding of the Amarillo Court of Appeals was not only extremely troubling for real estate transactional attorneys but it also created severe uncertainty for anyone who engages in the buying and selling of real estate. Luckily for all real estate practitioners, and more so for all of the participants in the real estate market, the clearly erroneous court of appeals holding was reversed by the Texas Supreme Court in November 2018. The case, and its many progeny, are very long and involved, so what follows is a condensed version of the case and the most relevant court holdings, including the reversal by the Texas Supreme Court.

At its core, the *Tregallas* case concerned a right of first refusal (ROFR) with respect to a mineral interest. In June 2003, a warranty deed trans-

266. *Id.* at 519.
267. *Id.* at 522 (citing Karns v. Jalapeno Tree Holdings, L.L.C., 459 S.W.3d 683, 692 (Tex. App.—El Paso 2015, pet. denied)).
268. *Id.*
269. *Id.*
270. 507 S.W.3d 423 (Tex. App.—Amarillo 2016), *rev'd*, 566 S.W.3d 281 (Tex. 2018).

ferred the surface of certain property located in Hansford, County Texas to the Archer Trustees. In a separate recorded agreement, entered into simultaneously, the Archer Trustees were granted a ROFR to purchase the minerals under the surface. The ROFR specifically provided that it was subordinate to mortgages and other encumbrances. Two of the original grantors (the Farbers) sold their mineral interests on March 28, 2007, to Tregallas. The Archer Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011. To further complicate matters, in 2008, heirs of one of the original grantors (the Smiths) sold their interest to Tregallas. After they learned of the Archer Trustee suit, the Smith transaction was restructured into a loan secured by a deed of trust with a note payable in ninety days on which the Smiths never made payment. In August 2012, Tregallas acquired the Smith interest at a non-judicial foreclosure sale.

Upon finding out about the foreclosure transaction, the Archer Trustees amended their petition and alleged that Tregallas "obtained the Smith minerals by subterfuge, artifice, or device."[271] The trial court granted specific performance to the Archer Trustees with respect to both the Farber and Smith ROFR interest.[272] Tregallas put forth a number of arguments on appeal, but, for the sake of brevity, the authors will focus on the issues most relevant to practitioners and the subject of the supreme court's recent opinion, specifically that the Archer Trustee's claim for specific performance, with respect to the Farber interest, was barred by the statute of limitations. Generally, when a grantor of a ROFR sells property in breach of a ROFR "there is created in the holder an enforceable option to acquire the property according to the terms of the sale."[273]

However, Section 16.004(a)(1) of the Texas Civil Practice & Remedies Code requires "a suit for specific performance of a contract for the conveyance of real property to be brought no later than four years after the cause of action accrues."[274] The court of appeals held that the breach occurred on March 28, 2007, when the Farbers sold their property to Tregallas and that the suit for specific performance was barred because it was filed outside the four-year statute of limitations period.[275] The court of appeals based their holding on the supreme court's holding in *S.V. v. R.V.*,[276] where the supreme court stated "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."[277]

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271. *Id.* at 428.

272. *Id.* at 426.

273. *Id.* at 430 (citing A.G.E., Inc. v. Buford, 105 S.W.3d 667, 673 (Tex. App.—Austin 2003, pet. denied)).

274. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(1); Gilbreath v. Steed, No. 12-11-00251-CV, (Tex. App.—Tyler 2013, no pet.) (mem. op. on mot. for reh'g)).

275. *Id.* at 433.

276. 933 S.W.2d 1 (Tex. 1996).

277. *Id.* at 4.

The Archer Trustees tried unsuccessfully to argue that with respect to rights of first refusal, the right is "dormant" until the holder is notified of a potential sale. The court of appeals disagreed and said that supporting the Archer Trustee's argument would result in profound uncertainty that was "inconsistent with the purpose of the statutes of limitation" which, according to the supreme court's holding in *S.V.*, is to "establish a point of repose and to terminate stale claims."[278]

The Archer Trustees went on to argue for application of the discovery rule, which tolls the accrual of a cause of action until the party learns of the injury or, through reasonable due diligence, could have learned of the injury. The court of appeals dismissed the Archers Trustees' arguments and relied on the supreme court's holding in *Cosgrove v. Cade*,[279] which the supreme court argued limited application of the discovery rule to injuries that are "inherently undiscoverable" and not ones that are discoverable by the exercise of reasonable due diligence such as a search of public records, including the county clerk's real property records or the tax rolls.[280] Furthermore, the court of appeals emphasized that the supreme court has specifically held that there are only rare instances where the discovery rule should be applied to breach of contract cases as each party to a contract is required to protect their own interests and "diligent contracting parties should generally discover any breach during a relatively long four-year limitations period."[281]

In response, the Archer Trustees argued that it is well settled in Texas that "owners of property are under no duty [to] routinely search the deed records for later-filed documents impugning their title."[282] The court of appeals distinguished the case at hand because, in the court's opinion, the Archer Trustees did not own the mineral interest—they only owned an option to acquire a mineral interest, which was a contract right.[283] The court of appeals reversed the trial court with respect to the Farber interest and upheld the trial court with respect to the Smith interest.[284]

In overturning the holding of the court of appeals, the Texas Supreme Court specifically found that:

> [A] grantor's conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor's intent to sell or the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder's cause of action until he knew or should have known of the injury.[285]

Although the supreme court in a footnote specifically limited its holding to the very narrow set of circumstances found in this case by stating

278. *Tregallas*, 507 S.W.3d at 432.
279. 468 S.W.3d 32, 36 (Tex. 2015).
280. *Tregallas*, 507 S.W.3d at 433.
281. *Id.* at 432 (quoting Via Net v. TIG Ins. Co., 211 S.W.3d 310, 315 (Tex. 2006)).
282. *Id.* at 433.
283. *See id.*
284. *Id.* at 437.
285. Tregallas v. Carol M. Archer Trust No. Three, 566 S.W.3d 281, 292 (Tex. 2018).

"[w]e limit our holding to this particular breach—conveyance with no notice of the intent to sell or the existence of an offer—of this particular type of right."[286] The holding is welcome news for real estate practitioners and holders of all forms of options or ROFRs in the state of Texas. As stated clearly in last year's review, the authors feel it is no exaggeration to state that if the court of appeals holding had been upheld, thousands (if not millions) of real estate deals across the state of Texas would have been thrown into a state of uncertainty and chaos with holders of ROFRs and options denied the benefit of their bargain and the rights they negotiated for (and often times paid handsomely for) at the time the bargain was struck. With a stroke of the pen, the court of appeals had suddenly rendered once valuable rights worth less than the paper they were written on.

Jarzombek v. Ramsey[287] is another interesting case revolving around the application of the discovery rule, this time with respect to a deed reformation case. In *Jarzombek*, the San Antonio Court of Appeals upheld the trial court's holding that the discovery rule did not apply to a deed reformation case filed seven years after the date the purchase transaction had closed.[288] In this case, the Jarzombeks sold the surface estate to the Ramseys. The Jarzombeks also owned 1/16 of royalty interest in Tract 1 and the entire mineral estate in Tract 2. The purchase contract provided that the Jarzombeks would convey 1/2 of the mineral interest to the Ramseys. Unfortunately, the deed prepared by the Jarzombeks' attorney provided for a reservation of 1/32 royalty interest. In refusing to apply the discovery rule to the case at hand, the court of appeals, like the Amarillo Court of Appeals in *Tregallas*, relied upon the Texas Supreme Court's holding in *Cosgrove*.

In *Cosgrove*, the Cades entered into a purchase contract stipulating that they would retain all mineral interests. The deed they executed failed to reserve the mineral rights. The supreme court relied upon its own holding in *McClung v. Lawrence*[289] that held "[a]t execution, the grantor is charged with immediate knowledge of an unambiguous deed's material terms."[290] The supreme court went on to say that the discovery rule is not intended to extend the statute of limitations to correct conspicuous and plainly evident mistakes.[291]

Unlike the holding in *Tregallas*, the authors feel that the court of appeals's holding is a correct interpretation of *Cosgrove* and provides the reassurance and certainty to practitioners and holders of all real estate rights that was intended to be given by statutes of limitation and is necessary for the smooth and efficient operation of the real estate market. Whether the holding would be extended to a material correction deed

286. *Id.* at 293 n.10.
287. 534 S.W.3d 534, 539 (Tex. App.—San Antonio 2017, pet. denied).
288. *Id.*
289. 430 S.W.2d 179, 181 (Tex. 1968).
290. *Jarzombek*, 534 S.W.3d at 537 (citing *McClung*, 430 S.W.2d at 181).
291. *Id.* at 539.

executed by agreement of the parties remains to be seen. It is the authors' opinion that it would not, but rather would extend only to a disputed error. But one should also take note of *Tanya L. McCabe Trust v. Ranger Energy LLC*,[292] finding that a correction instrument that makes material corrections must be executed by all of the affected parties and comply with the requirements of Section 5.029 of the Texas Property Code, otherwise it is ineffective. Care should be taken under the statute to determine if an error is material or non-material and the requirements followed.

F. Slander of Title

In *Allen-Pieroni v. Pieroni*,[293] the Texas Supreme Court addressed the issue of slander of title and the appropriate way in which to calculate damages. Legally, slander of title is a "false and malicious statement made in disparagement of a person's title to property which causes special damages."[294]

This particular case involved a divorced couple. In the divorce, the husband was awarded the family business and the wife was awarded $500,000 to be paid monthly in $10,000 installments. Although the husband had dutifully paid, the wife filed an abstract of judgment against the husband's home. When the husband tried to sell the house several years later, the wife refused to release the abstract of judgment and the sale fell through. The husband sued to quiet title and for slander of title. The court of appeals (and the trial court) held that the difference between the contract price for the piece of property and the mortgage balance was the correct calculation of damages and awarded $98,438.00 plus attorney fees.[295] The supreme court disagreed with the calculation of the damages and reversed.[296] The supreme court stated that "[t]the law does not presume damages as a consequence of slander of title; rather, the plaintiff must prove special damages."[297] What many practitioners may find surprising about this case is that although the supreme court held that the loss of a specific, pending sale qualifies for special damages, the measure of damages was not deemed equal to the lost profit.[298] Instead, the supreme court held that:

> In a case in which the plaintiff still owns the property at the time of trial, the amount of actual damages caused by the slander is generally the difference between the contract price (the amount the plaintiff would have received but for the defendant's title disparagement) and the property's market value at the time of trial with the cloud

292. 531 S.W.3d 783, 784 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
293. 535 S.W.3d 887 (Tex. 2017).
294. *Id.* at 887 (citing Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., 223 S.W.3d 1, 20 (Tex. App.—El Paso 2005, pet. denied)).
295. *Id.* at 888.
296. *Id.*
297. *Id.* at 889 (citing Ellis v. Watson, 656 S.W.2d 902, 905 (Tex. 1983)).
298. *Id.*

removed.[299]

In coming to this conclusion, the supreme court relied on their holding in *Reaugh v. McCollum Exploration Inc.*,[300] which relied upon the following comment from the Restatement of Torts for its holding:

> [T]he extent of the pecuniary loss caused by the prevention of a sale is determined by the difference between the sales price which would have been realized by it and the salable value of the thing in question after there has been a sufficient time following the frustration of the sale to permit its marketing. The depreciation of the thing from any cause after such time has elapsed is immaterial.[301]

VI. TITLE/CONVEYANCES/RESTRICTIONS

A. Conveyances

The Survey period also included a number of cases construing deed language. In one case that was first reported (and questioned) during the authors' last update, *Davis v. Mueller*,[302] the Texas Supreme Court reversed the Texarkana Court of Appeals[303] to find a general grant of "all" the property "owned by Grantor in Harrison County" was sufficient to grant all of the property owned by the grantor in Harrison County.[304] In this case, the specific granting clause listed ten vaguely described tracts in Harrison County, but the paragraph following the granting clause in the deed included a Mother Hubbard clause indicating that: "Grantor hereby conveys to grantee all of the mineral, royalty, and overriding royalty interest owned by grantor in Harrison County, whether or not same are herein above correctly described."[305]

The grantee of a subsequent conveyance to two of the tracts, also in Harrison County, brought the trespass-to-try title case to determine ownership of those tracts.[306] The supreme court reiterated Texas law that a general conveyance of all the grantor's property in a geographic area will be given effect.[307] The subsequent grantee challenged the deed and claimed it was ambiguous because the general granting clause was in the same paragraph as a Mother Hubbard clause, and it is well established[308] that a Mother Hubbard clause is not effective to convey a significant property interest not adequately described.[309] However, the supreme

299. *Id.* at 889 (citing Reaugh v. McCollum Expl. Inc., 163 S.W.2d 620 (Tex. 1942)).
300. 163 S.W.2d 620 (Tex. 1942).
301. *Id.* at 622 (quoting Restatement (First) of the Law of Torts § 633 cmt. D (1933)).
302. 528 S.W.3d 97 (Tex. 2017).
303. Mueller v. Davis, 485 S.W.3d 622 (Tex. App.—Texarkana 2016), *rev'd sub nom.* Davis v. Mueller, 528 S.W.3d 97 (Tex. 2017).
304. *Davis*, 528 S.W.3d at 103.
305. *Mueller*, 485 S.W.3d at 629.
306. *Davis*, 528 S.W.3d at 100.
307. *Id.* at 101.
308. *Id.* at 102.
309. *Id.*

court found meaning in the general grant stating "[a]ll means all."[310] The specific grant of all the property saved the earlier vague descriptions.[311]

Cochran Investments v. Chicago Title Insurance Company[312] may have drawn the most attention among the title cases during the Survey period, and it continues to draw debate. The title insurer was a party via contractual subrogation after paying the loss to the buyer/insured Ayers. Ayers had suffered a complete failure of title due to a mishandling of a bankruptcy earlier in the chain of title. The eventual owner, Cochran Investments, sold the property to Ayers and delivered a Special Warranty Deed. The Fourteenth Houston Court of Appeals found the special warranty was not breached—not a surprise—but also found that there was no implied covenant of seisin.[313] In order for a covenant of seisin to be implied, there must be a representation or claim of ownership by the grantor.[314] In this case, there was only the standard "grant, sell and convey" language, but there was no language about having the right and authority to sell and convey or similar language.[315] The "grant, sell and convey" language only implied a covenant that the property has not been encumbered or previously conveyed by the grantor.[316]

Moreover, the contract merged into the deed such that the breach of contract claim for failure to deliver title did not stand.[317] There is clearly a drafting lesson in this case, both for the contract and possibly the deed, as appropriate. As a result of poor drafting, the transaction suffered a complete failure of consideration, but the seller/grantor kept the payment for the property. Some commentators have noted the end result was the same as delivering a quit claim.

The result in *Cochran* is supported by *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*[318] (discussed previously in more detail),[319] in which the Texas Supreme Court declined to imply any covenants when the contract (an oil and gas lease) allocated risk to the lessee and warranties were expressly disclaimed.[320]

Another drafting lesson can be found in *Gonzalez v. Janssen*.[321] The use of "subject to" has always been a problem for drafters and, in this case, the San Antonio Court of Appeals looked to the entirety of the

310. *Id.*
311. *Id.*
312. 550 S.W.3d 196 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).
313. *Id.* at 205.
314. *Id.*
315. *Id.*
316. *Id.* at 204 (citing Lykken v. Kindsvater, No. 02-13-00214-CV, 2014 WL 5771832 (Tex. App.—Fort Worth Nov. 6, 2014) (mem. op.); Maness v. Purnell Morrow Co., No. 05-98-01828-CV, 2001 WL 637818, at *1 (Tex. App.—Dallas June 11, 2001, no pet.) (mem. op., not designated for publication); Fender v. Farr, 262 S.W.2d 539, 540 (Tex. Civ. App.—Texarkana 1953, no writ)).
317. *Id.* at 205–06.
318. 546 S.W.3d 648 (Tex. 2018) (mot. for reh'g denied).
319. *See infra* Section V.C.
320. *See Orca*, 546 S.W.3d at 655.
321. 553 S.W.3d 633 (Tex. App.—San Antonio 2018, pet. filed).

deed—the "four corners"—to interpret its meaning.[322] This has clearly become the rule for the courts, with the area of oil and gas seemingly being the last vestige of strict construction. In *Gonzalez*, a series of deeds conveyed property with a legal description but "subject to" prior deeds.[323] Each deed conveyed "all of the following described real property."[324] In this case, the "subject to" language was not tied to the grant but rather was found to simply follow the property description.[325] Considering the deeds as a whole, the court of appeals held that "the 'subject to' clause did not exclude anything from the conveyances, but instead merely refer to encumbrances on the properties and explain and clarify the nature of the title being conveyed."[326] Thus, no interests were withheld but rather passed to the grantee.[327]

The Texas Supreme Court heard yet another mineral deed interpretation case with *Perryman v. Spartan Texas Six Capital*,[328] and its holding will be of interest to many real estate practitioners because it focused on a rarely discussed distinction between a deed reservation and an exception.[329] The supreme court held that the same identical language when used in the first deed in a chain of title was a reservation and in successive deeds was an exception.[330]

As the supreme court stated in its opening paragraph, the issue at hand in *Perryman* was the meaning of a clause in a deed that "saves and excepts 1/2 of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor," when the deed does not disclose that the grantor does not own all of the royalty interests and does not except any other royalty interests from the conveyance.[331] This same language was used in three of the seven subsequent deeds, thereby creating a domino effect where one could argue that the subsequent grantor was granting more than they owned. The supreme court disagreed with the interpretation of the deeds by both the trial court and the appeals court.[332]

Although complex, the facts can be adequately summarized as follows. The grantor under the first deed, Ben Perryman, at the time of the deed (which the court referred to as "Ben's Deed") owned the entire surface and mineral estate. All parties to the case agreed, and the supreme court concurred, that after Ben's Deed, Ben retained 1/2 of the mineral royalties and the grantees, Gary and Nancy, owned 1/2 the mineral royalty and the entire surface estate. Ben died intestate in 1980 and the mineral inter-

322. *Id.* at 637.
323. *Id.* at 635–36.
324. *Id.*
325. *Id.* at 640.
326. *Id.* at 642.
327. *Id.*
328. 546 S.W.3d 110 (Tex. 2018).
329. *Id.* at 119.
330. *Id.* at 124.
331. *Id.* at 113.
332. *Id.*

est passed, 1/2 to his brother Gary and 1/2 to Wade, which left Gary and Nancy with 3/4 of the mineral interests. In 1983, Gary and Nancy then reconveyed the tract of land they received from Ben to GNP using the same language from Ben's Deed. The deed did not mention that Wade's heir, Leasha, owned 1/4 of the royalty interest. That interest was not excepted from the grant. GNP granted a deed of trust to Gainesville National Bank (Bank) using the same language. GNP defaulted and the Trustee's deed to the successful lender on a credit bid referred to the premises "now owned by Gary Perryman."[333] The Bank conveyed the property to Menser (and her to be divorced husband) without the "save and except" language but with language excluding recorded instruments from the conveyance and warranty.[334] When Menser conveyed the property to Johnson, she reserved to herself 1/2 of the minerals. She also made her conveyance subject to any prior valid mineral severance. Johnson conveyed a majority of the property to Spartan and excepted recorded instruments. Spartan and Menser entered into a lease with EOG and a subsequent lease dispute brought the title issues to light.

The supreme court declined to use a *Duhig* analysis and did not find a breach of warranty because a party might have sought to retain more than it had to reserve and convey.[335] In this case, the deeds "excepted" 1/2 of the royalty interests "which are now owned by grantor."[336] The "less, save and except" clause created an exception from the grant, not a reservation for the grantor.[337] The supreme court found no language creating a reservation.[338] "The most reasonable grammatical construction of this deed is the clause excepts 1/2 of all royalties from the minerals produced from the "premises which are now owned by Grantor . . .[a]nd since each of the grantors owned all of the premises in each deed, the clause excepted 1/2 of all the royalties produced from those premises."[339]

In addition, the "now owned by Grantor phrase" was part of the "save and except" and not the interest being conveyed.[340] The clause at issue described the interest excepted and not the interest conveyed.[341] As a result, the deeds conveyed 1/2 and excepted 1/2 of the royalty interests—not just 1/2 of the royalty interest the grantors then owned.[342] Ultimately, the parties—Menser, Leasha, Gary and Nancy, and Spartan—held a 1/4 interest in the royalties.[343]

In *BNSF Railway Company v. Chevron Midcontinent, L.P.*,[344] the El

333. *Id.* at 114.
334. *Id.* at 115.
335. *Id.* at 120.
336. *Id.*
337. *Id.* at 115.
338. *Id.* at 121.
339. *Id.* at 121 (citing *In re* C.J.N.-S., 540 S.W.3d. 589 (Tex. 2018)).
340. *Id.* at 123.
341. *Id.*
342. *Id.* at 124.
343. *Id.* at 133.
344. 528 S.W.3d 124 (Tex. App.—El Paso 2017, no pet.).

Paso Court of Appeals used a similar approach to the *Mueller* court in determining whether a grant of a right of way was an easement or fee simple. The court of appeals specifically used a "Four Corners Rule" to determine the intent of the parties rather than using "arbitrary" construction rules.[345] The court made an effort to interpret the deeds so that no clause was rendered meaningless and found that the use of the phrase "right of way" did not automatically convey an easement or a fee simple.[346] In the *BNSF* case, the determining feature was the description of the property which referenced a line traced by surveyors that went over, though, and across various sections of land.[347] Moreover, the language of the grant suggested that the conveyance was intended to be an easement.[348] The court found the following factors to be persuasive: (1) the opening recitals of the deed recognized that the grantor would receive valuable benefits if the railroad passed over the land he was conveying; (2) the phrase for a "right of way" appeared directly in the granting clause in front of the phrase "that strip of land" (this was a defining phrase limiting the estate being granted); (3) the conveyance was described by reference to a line traced by a surveyor over, though, and across the land; (4) the deed specified that the conveyance came with the rights to take wood, water, stone, timber and other materials used for convenience in the construction and maintenance of the railway (if the grant was a fee simple estate these would not need to be specified as they are inherently the right of the property owner); and (5) the court found that the use of the term "premises" suggested that conveyance transferred only an easement.[349] Interestingly enough, the term "fee simple" was used in the habendum clause, but the court found that not to be determinative.[350]

In *Knopf v. Gray*,[351] the Texas Supreme Court examined a will to determine if it contained a bequest of a life estate or fee simple. Both the trial court and Waco Court of Appeals found that the words in the will that "the land is not to be sold" were an invalid disabling restraint on sale and that the will, therefore, bequeathed a fee simple estate.[352] The supreme court reversed.[353] The will provision in question stated in part as follows: "NOW BOBBY I leave the rest to you, everything, certificates of deposit, land, cattle and machinery. Understand the land is not to be sold but passed on down to your children, ANNETTE KNOPF, ALLISON KILWAY, AND STANLEY GRAY. TAKE CARE OF IT AND TRY

345. *Id.* at 128 (citing Clayton Williams Energy, Inc. v. BMT O & G TX, L.P., 473 S.W.3d 341, 348 (Tex. App.—El Paso 2015, pet. denied)).
346. *Id.* at 130.
347. *Id.*
348. *Id.* at 133.
349. *Id.* at 133–34.
350. *Id.* at 135.
351. 545 S.W.3d 542 (Tex. 2018).
352. *Id.* at 544–45.
353. *Id.* at 547.

TO BE HAPPY."[354]

Section 5.001(a) of the Texas Property Code provides that "[a]n estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words."[355] However, Texas jurisprudence does not require the use of any specific words to create a life estate, only the intent of the party that such an estate be created.[356] The supreme court felt that it was clearly the intent of the grantor that a life estate be created and reversed the holding of the lower courts.[357]

The Houston Court of Appeals used the guidance from the Texas Supreme Court in *Knopf* in its analysis of the issues presented by *Gutierrez v. Stewart Title Co.*[358] Gutierrez involved the interpretation of a clause in a will which stated that:

> [n]one of the real property is to be sold or mortgaged, all property is to be kept in the Gutierrez family. When one of my children dies, that individual's property is to be divided equally among the survivors. When the last of my children is the only one remaining, then the property can be sold or do whatever that individual desires, without restrictions.[359]

The decedent had five living children and the will also bequeathed two separate properties (the Church Street Property and the Winnie Street Property) to two specific children in equal shares. The will was probated in 1999. In 2000, the recipients of the Church Street and Winnie Properties sold the properties. In 2015, one of the remaining children, Olga, sued the purchasers of the property and the title company alleging that the sales were void because they violated the will. The title company argued that the claims were barred because Olga lacked standing and by the statute of limitation. Although the case was ultimately found to be barred because of the statute of limitations, the Houston Court of Appeals relied upon *Knopf* to hold that Olga did have standing in the case, as Angel and Esteban were only granted life estates pursuant to the will.[360] The title company wrongly argued that Angel and Esteban were granted fee simple estates and the limitation in the will was void as a "disabling restraint on sale."[361] The court of appeals held that such an interpretation would require one to not give effect to all of the words contained in the will which is a cornerstone of will construction.[362]

Having decided it was a life estate, the court noted that a "life tenant must protect a remaindermen's interest and preserve the estate and is therefore prohibited from disposing of the property, unless expressly au-

354. *Id.* at 545–46.
355. *Id.* at 545 (citing TEX. PROP. CODE ANN. § 5.001(a)).
356. *Id.*
357. *Id.* at 547.
358. 550 S.W.3d 304 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).
359. *Id.* at 308.
360. *Id.* at 315.
361. *Id.* at 316.
362. *Id.*

thorized by the will."[363] Unfortunately, although the court ruled in favor of Olga on the standing issues, she discovered the sale in January 2013 and did not file the case until March 2015. Although the court did not say the discovery rule definitively applied in this case, if it had been applied, the latest date Olga could file her case was January 2015.[364]

B. Trespass-to-Try-Title

ConocoPhillips Co. v. Ramirez[365] is a somewhat complicated case involving a long history of transactions which ultimately are not relative to the holding. A simplified version of the fact pattern is that going back to the early 1900s, the Ramirez family owned an undivided (mineral and surface) fee simple title to approximately 7,016 acres in Zapata County, Texas.[366] Somewhere around 1941, Leon Juan Ramirez and his sister inherited an undivided 1/2 interest in the minerals and surface of the ranch. Over the years, the family engaged in a series of swaps and partitions of the surface estate, all the while intentionally reserving their mineral interests from all transactions. When Leon Juan died in 1966, he passed 1/2 of his 1/2 interest in the minerals and the surface estate tracts to his wife, Leonor, and the other 1/2 to his three children (the Older Generation).[367] When Leonor died in 1990, she passed to her son Leon Oscar, Sr., "all my right, title and interest in and to Ranch 'Las Piedras' . . . during the term of his natural life" and after his death "the title shall vest in his children [(the Grandchildren)] then living in equal shares."[368] The remainder of Leonor's estate passed to the Older Generation.[369]

Over the years, the family had continued to carve up the surface estate (while always reserving the mineral interests) and had names for all of the various parcels. It is undisputed what land was meant by "Ranch Las Piedras." What was disputed is whether that land included the mineral estate as well as the surface estate. In 1993 and 1997, three oil and gases leases were signed between the Older Generation and ConocoPhillips.[370] Leon Oscar, Sr. died in 2006.[371] In 2010, the Grandchildren filed a trespass-to-try-title case claiming that the ConocoPhillips leases were not binding on their 1/4 mineral interests because they had not signed the leases as remaindermen.[372] The trial court found in the Grandchildren's favor and invalidated the leases as to each grandchild's 1/12 interest in the mineral interests and awarded attorney fees.[373] ConocoPhillips ap-

363. *Id.* at 317 (citing Knopf v. Gray, 545 S.W.3d 542, 546, (Tex. 2018); Hill v. Hill, 623 S.W.2d 779, 780 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.)).
364. *Id.* at 318.
365. 534 S.W.3d 490 (Tex. App.—San Antonio 2017, pet. filed).
366. *Id.* at 496.
367. *Id.* at 497.
368. *Id.*
369. *Id.*
370. *Id.* at 498.
371. *Id.* at 497.
372. *Id.* at 498.
373. *Id.*

pealed and presented many different arguments to defeat the grandchildren's claim. The four arguments of most interest to the real estate practitioner are: (1) this was not a trespass-to-try-title case but instead a will construction case; (2) the will was ambiguous; (3) the case was limited by the statute of limitations; and (4) the award of attorney fees was improper.

The San Antonio Court of Appeals held that the case was in fact a title dispute which involves the interpretation of a will as well as other documents and that trespass-to-try-title was the appropriate method to "clear problems in chains of title."[374] Furthermore, the court found that the language used in the will clearly conveyed all of the "right, title and interest" to the ranch to the Grandchildren and the law has always held, "absent an express reservation conveyance of land includes both the surface and the underlying minerals."[375] The court of appeals went on to state "[e]xtrinsic evidence may not be used to create doubt as to the meaning . . . when the words used in the [w]ill are unambiguous."[376]

With respect to the statute of limitations, the court held that the statute did not start to run when Leonor died in 1990 and bequeathed the interest to the Grandchildren, but in 2006, when their rights vested upon Leon senior's death.[377] There is a well-established line of authority in Texas that "[t]he statutes of limitation as to an interest in land, which one owns as a remainderman, subject to the life estate in another, do not begin to run in favor of one in possession until the death of the life tenant."[378] Finally, the court acknowledged that although as a general rule, attorney fees are not available for trespass-to-try-title case, in this particular case, the Grandchildren also brought a claim to recover the unpaid portion of oil and gas proceeds, and attorney fees are recoverable under Section 91.406 of the Texas Natural Resources Code.[379]

In *Roberson v. Odom*,[380] the Texarkana Court of Appeals provided the practitioner with an important reminder on the difference between a suit to quiet title and an action for trespass-to-try-title. A suit to quiet title is an equitable proceeding to remove a "cloud" against title which focuses on the weakness of defendant's claim and requires three elements: "(1) the plaintiff has an interest in a specific property; (2) title to the property is affected by the defendant's claim; and (3) the defendant's claim, although facially valid, is invalid or unenforceable."[381] A trespass-to-try-

374. *Id.* at 499 (quoting Martin v. Anerman, 133 S.W.3d 262, 265 (Tex. 2004)).

375. *Id.* at 502 (citing Sharp v. Fowler, 252 S.W.2d 153, 154 (1952)).

376. *Id.* (citing Longora v. Lasater, 292 S.W.3d 156, 165 (Tex. App.—San Antonio 2009, pet. denied)).

377. *Id.* at 505.

378. *Id.* (citing Estate of McWorter v. Wooten, 622 S.W.2d 844, 846 (Tex. 1981); Garza v. Cavazos, 221 S.W.2d 549, 553 (Tex. 1949); Evans v. Graves, 166 S.W.2d 955, 958 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.)).

379. *Id.* at 512–13 (citing Prize Energy Resources, L.P. v. Clif Hoskins, Inc., 345 S.W.3d 537, 570–71 (Tex. App.—San Antonio 2011, no pet.)).

380. 529 S.W.3d 498 (Tex. App.—Texarkana 2017, no pet.).

381. *Id.* at 502.

title claim is a statutory remedy that focuses on the strength of the plaintiff's claim to possession not the weakness of the defendant's.[382] To prevail, a plaintiff must show one of four sources of title "(1) a regular chain of conveyance form the sovereign, (2) a superior title out of common source, (3) title by limitations or (4) prior possession, which possession has not been abandoned."[383]

Lance v. Robinson[384] is a complex case that deals with who owns the property between the dam spillway and the high water mark on Medina Lake. This case is of particular interest to the real estate practitioner because the Texas Supreme Court addressed for the first time in some detail the difference between a trespass-to-try-title claim, a quiet-title claim, and a declaratory-judgment claim, and which vehicle is appropriate for a particular circumstance. Citing various appellate decisions, the supreme court explained that "a suit to 'quiet title' and a 'trespass-to-try-title claim' are both to recover possession of land unlawfully withheld, though a quiet-title suit is an equitable remedy whereas a trespass-to-try-title suit is a legal remedy afforded by statute."[385] For this reason, a person cannot use the trespass-to-try-title statute to establish an easement because they do not have a possessory right.[386] The supreme court held that because the plaintiffs in the case, the Robinsons, were not claiming "any ownership or possessory rights to the disputed area, and are instead seeking only to protect their alleged easement" a suit under the Declaratory Judgment Act was the appropriate procedure to deploy.[387]

In *Bush v. Lone Oak Club, LLC*,[388] the issue at stake involved a somewhat obscure 1929 law commonly known as the "Small Bill" which granted rights to patentees to "all of the lands and minerals therein contained, lying across, or partly across watercourses or navigable streams"[389] and whether the "watercourses" in question included tidal watercourses.[390] Generally, in the State of Texas, water is classified as either (1) diffuse surface water which belongs to the land owner; or (2) water in a watercourse which is the property of the State.[391] In 1837, the State enacted a statute (since repealed) which prevented land surveys from crossing navigable streams. In effect, the statute deprived landowners who had purchased property from the State before the law was enacted of the land they had purchased.[392] In order to cure the title defect this law created, the State passed the Small Bill, returning to the land-

382. *Id.*
383. *Id.* (citing Kennedy Con, Inc. v. Forman, 316 S.W.3d 129, 135 (Tex. App.—Houston [14th Dist.] 2010, no pet.)).
384. 543 S.W.3d 723 (Tex. 2017).
385. *Id.* at 738–39 (quoting Cameron Cty. v. Tompkins, 422 S.W.3d 789, 797 (Tex. App.—Corpus Christi 2013, pet. denied)).
386. *Id.* at 736 (citing City of Mission v. Popplewell, 294 S.W.2d 712, 714 (Tex. 1956)).
387. *Id.* at 734.
388. 546 S.W.3d 766 (Tex. App.—Houston [1st Dist.] 2018, pet. filed).
389. *Id.* at 777 (citing TEX. REV. CIV. STAT. ANN. art. 5414a).
390. *Id.* at 777–78.
391. *Id.* at 778.
392. *Id.*

owners the land they had already purchased.[393]

In the *Bush* case, the Lone Oak Club was trying to prevent duck hunters from building duck blinds along the bed of the Lone Oak Bayou, which the Lone Oak Club had acquired in a regular chain of conveyance from an 1872 grant by the State. The Texas Land Commission took the position that the Small Bill only applied to non-tidal bodies of water and that the State owned the Lone Oak Bayou up to the mean high tide mark. Therefore, that portion was open to public use. The club filed a trespass-to-try-title case against the Land Commissioner. The court sided with the Lone Oak Club by finding that the term "watercourse or navigable stream" did not exclude watercourse or navigable streams that are "tidally affected."[394]

C. Restrictions

In *Tarr v. Timberwood Park Owners Association*,[395] the San Antonio Court of Appeals interpreted the "residential" restrictions contained in restrictive covenants which arguably prohibited short-term rentals of homes. In *Tarr*, a homeowner entered into thirty-one short term rental arrangements which totaled 102 days over five months.[396] The deed restrictions for the Timberwood Park Owners Association (the HOA) provided that homes should be "used solely for residential purposes."[397] The HOA notified Tarr that renting out his home was a commercial use and a violation of the deed restrictions.[398] Tarr filed a declaratory judgment action seeking a declaration that leasing the house was a residential purpose and there was no "durational" requirement in the deed restrictions.[399] Tarr and the HOA both filed motions for summary judgment and the trial court granted the HOA's motion.[400]

On appeal, Tarr argued the following: (1) the HOA allows rentals and does not require that a homeowner personally occupy his home; and (2) the individuals that Tarr rented to were using the house for residential purposes.[401] Relying on the court of appeal's opinion in *Munson v. Milton*,[402] the HOA argued that short-term renters were not residents but "transients."[403] The court of appeals agreed with the HOA.[404] Although the appeals court noted that "[c]ovenants restricting the free use of land

393. *Id.*
394. *Id.* at 779.
395. 510 S.W.3d 725 (Tex. App.—San Antonio 2016), *rev'd and remanded*, 556 S.W.3d 274 (Tex. 2018).
396. *Id.* at 727.
397. *Id.* at 729.
398. *Id.* at 728.
399. *Id.*
400. *Id.*
401. *Id.* at 729.
402. *Id.* (citing Munson v. Milton, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied)).
403. *Id.* (citing *Munson*, 948 S.W.2d at 817).
404. *Id.* at 730.

are not favored by the courts, [they] will be enforced if they are clearly worded and confined to a lawful purpose."[405] Furthermore, Section 202.003(a) of the Texas Property Code requires that "a restrictive covenant be liberally construed to give effect to its purposes and intent."[406] In this case, the court of appeals found the restrictive covenant to be unambiguous.[407] The court went on to note that, as stated by the *Munson* court, the "Texas Property Code draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like."[408] The court also agreed with the *Munson* court that the term "'residence' generally requires both physical presence and an intention to remain."[409]

The Texas Supreme Court strongly disagreed with the court of appeals and clearly stated that the lower courts' obsession with Section 202.003(a) of the Texas Property Code was misplaced.[410] In its eyes, the issue was not one of "strict" construction or "liberal" construction of the covenants; instead, the covenant at issue simply did not address the use contemplated by the case at hand and it was improper to read into the restrictive covenant a prohibition not directly addressed in the express language.[411] The distinction came down to this: the lower courts held that Tarr had leased to groups consisting of "multiple" families at one time, thereby violating the "single-family" residence restrictions.[412] The supreme court held that the restriction referred to the type of housing that could be constructed rather than the composition of the family or individuals that could inhabit the home.[413]

With respect to the second argument put forth by the association, that "residential" use did not include transient use, the supreme court noted that the HOA was once again focused on the wrong language.[414] The covenant stated that "no business shall be conducted on any of the tracts which is noxious or harmful," thereby focusing on what is happening on the property rather than how the owner is using the property.[415] Furthermore, the supreme court directly addressed their disapproval of findings of other courts in similar cases that "impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements."[416] With these words, the supreme court firmly settled what had been a split between the San Antonio, Austin, and Fort Worth Courts of Appeals

405. *Id.* at 728.
406. TEX. PROP. CODE ANN. § 202.003.
407. *Tarr*, 510 S.W.3d at 731.
408. *Id.* at 730 (quoting *Munson*, 948 S.W.2d at 817).
409. *Id.* (quoting *Munson*, 948 S.W.2d at 816).
410. Tarr v. Timberwood Park Owner's Ass'n, 556 S.W.3d 274, 284–85 (Tex. 2018).
411. *Id.* at 285.
412. *Id.*
413. *Id.* at 287.
414. *Id.* at 288–89.
415. *Id.* at 289.
416. *Id.* at 291.

with respect to the interpretation of restrictive covenants that limit use of homes to "residential" purposes and whether renting such homes out on a nightly basis violates those restrictive covenants. For practitioners, the message is clear: if you intend to prohibit residents from utilizing their homes for temporary rentals, the restrictions must expressly state the intent.

EWB-I, LLC v. Plazamericas Mall Texas[417] presents an interesting and instructive case study on restrictive covenants that no longer serve their original purpose. In *Plazamericas*, the plaintiff owned five parking lots surrounding the outskirts of a mall. The lots were subject to restrictive covenants that limit their use to uses that benefit the mall. The plaintiff claimed the lots are under-utilized and filed a declaratory judgment suit seeking to have the restrictive covenants declared unenforceable under the changed conditions or waiver doctrines.[418] The trial court granted summary judgment for the mall owners and the First Houston Court of Appeals reversed and remanded.[419]

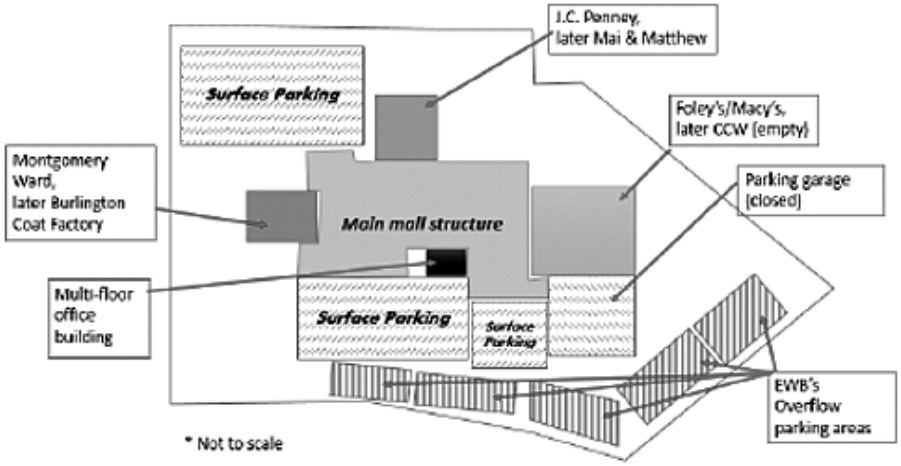
The history of the dispute arose from the fact that one entity never owned the entirety of the mall when it was originally developed. Every owner owned at least one building and some parking lots. In 1979, all of the owners entered into a Restated Operating Agreement (ROA) that contained restrictive covenants binding on all parties until 2035 or earlier written agreement of the parties. The ROA required that the parking area contain five parking spaces for each 100 square foot of floor area (regardless of the use of that area). Owners were prohibited from placing any restrictions or permanent improvements in the parking area. In 2004, ownership of some of the parking was transferred to an entity that did not own any portion of the mall. The lots were then used as collateral for a loan and, after the borrower defaulted, were foreclosed on by the lender. Over the years, the mall declined and all of the anchor stores closed. The mall turned into an indoor flea market. One structure owner closed the major parking garage. The plaintiff began to allow traveling carnivals to use the parking lots. Several other components of the ROA were also no longer enforced.

The court of appeals first examined the plaintiff's contention that the changed conditions at the mall made the restrictive covenants incapable of achieving their purpose. Over the years, Texas courts have accepted the idea that changed conditions can support the nullification of a covenant. However, they have insisted that the changed conditions must be

417. 527 S.W.3d 447 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).
418. *Id.* at 455.
419. *Id.* at 451.

"radical" not "minor"[420] and must consider the balance of all equities.[421] The court laid out six requirements to be considered when examining the lifting of a restrictive covenant: "(1) the size of the restricted area; (2) its location with respect to where the change has occurred; (3) the type of change that has taken place; (4) the character and conduct of the parties or their predecessors in title; (5) the purpose for which the restrictions were imposed; and (6) to some extent the unexpired term of the restrictions."[422] The court of appeals held that the trial court's grant of summary judgment was inappropriate because the standard laid out above required an intensive fact analysis of each factor[423] and the evidence on record was not sufficient to support a grant of summary judgment.

Figure 1



D. Private Transfer Fee Obligations

The Attorney General of Texas, Ken Paxton, issued an opinion on April 23, 2018, regarding the limitations imposed on private transfer fee obligations pursuant to Section 5.201 of the Texas Property Code. A "private transfer fee" is defined by the Texas Property Code as "an amount of money, regardless of the method of determining the amount that is payable on the transfer of an interest in real property or payable for a right to make or accept a transfer."[424] The legislation was effective on September 1, 2011, and made any transfer fee obligation created after the effective

420. *Id.* (citing Simon v. Henrichson, 394 S.W.2d 249, 254 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.)); *see also* Lebo v. Johnson, 349 S.W.2d 744, 749–50 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); Hemphill v. Cayce, 197 S.W.2d 137, 141 (Tex. Civ. App.—Fort Worth 1946, no writ).

421. *Plazamericas*, 527 S.W.3d at 451 (citing Gunnels v. N. Woodland Hills Cmty. Ass'n, 563 S.W.2d 334, 338 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ)).

422. *Id.* (citing *Simon*, 394 S.W.2d at 254) (internal quotations omitted)).

423. *Id.* at 460.

424. Tex. Prop. Code Ann. § 5.201.

date of the legislation void and unenforceable.[425] To the extent a private transfer fee obligation was in existence prior to the legislation, the recipient of the fee was required to file a "Notice of Private Transfer Fee Obligation" (complying with the requirements provided in the legislation) in the real property records on or before January 31, 2012, and at certain regular intervals.[426] The legislation also requires a seller of property to provide notice to the purchaser of the private transfer fee obligation.[427] The attorney general issued the following opinions with respect to the legislation:

1. Failure to strictly comply with the notice requirement in all respects voids the private transfer fee obligation.[428]
2. Although failure to provide notice to a purchaser does not void the obligation, the purchaser may attempt to void the transaction.[429]

E. Correction Instruments

Tanya L. McCabe Trust v. Ranger Energy[430] construed the relatively new "correction instruments" statutes.[431] The issue addressed in this case was whether the addition of new property in a corrected deed of trust constituted a non-material or material correction. Because the facts are complex, the following is a liberal summary. In 2011, the Trust obtained a conveyance of overriding royalty interests of various percentages in various different assignments, some excluding and some including the disputed McShane Fee and Bruce Lease. However, a correction instrument in December 2011 included these disputed tracts. The prior owner, Mark III, obtained six of the eight overriding royalty interests (inadvertently omitting the McShane and Brice tracts) from Tomco in 2008. Mark III obtained a mortgage in late 2008 from Peoples Bank that covered only the six properties (also omitting the McShane and Brice tracts). Ultimately, when these errors were discovered, Tomco and Mark III executed a correction assignment in December 2011, which was after the conveyances to the Trust. Mark III defaulted on the Peoples Bank loan and entered into a 2012 settlement agreement and a renewal deed of trust containing only the six properties, omitting McShane and Brice. However, the error was eventually discovered by Peoples Bank and a corrected deed of trust (including the McShane and Brice tracts) was unilaterally filed by Peoples Bank in January 2013. Thereafter, Mark III defaulted and Peoples Bank foreclosed under its corrected deed of trust claiming that such foreclosure wiped out the Trust's overriding royalty interests. The Trust objected and brought suit.

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425. *Id.* § 5.202.
426. *Id.* § 5.203.
427. *Id.* § 5.205.
428. Ken Paxton, Opinion No. KP-0195 3 (2018).
429. *Id.* at 4.
430. 531 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
431. *See generally* Tex. Prop. Code Ann. §§ 5.027–5.030.

At issue was the effect of the various correction instruments on the state of title concerning the interests of the Trust. The correction instrument statute divides correction instruments into those dealing with non-material corrections[432] and material corrections.[433] A non-material correction includes the correction of "a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted from the original instrument."[434] The majority of the court concluded the corrected deed of trust was a material correction because it "add[ed] . . . land to a conveyance that correctly conveys other land."[435] As to a material correction, the statute required the corrected instrument to have been executed by each party. In the subject case, Peoples Bank had independently made the correction, filed it, and provided a copy and notice to the debtor. Therefore, the Trust alleged the correction instrument was invalid and not effective because it did not comply with the statutory requirement for execution of a material correction. The First Houston Court of Appeals agreed and found the correction instrument invalid.[436]

Further, the correction instrument statute provided that the correction instrument replaces and is a substitute of the original instrument and may be relied upon by a bona fide purchaser, but the correction instrument is subject to the interests of an intervening creditor or subsequent purchaser for valuable consideration without notice acquired after the date of the original instrument but prior to the date of the correction instrument.[437] Because the court determined that the correction instrument was invalid, the correction instrument did not constitute "notice to a subsequent buyer."[438] Consequently, the interest of the Trust (in the McShane and Brice tracts) was not extinguished by the Peoples Bank foreclosure.[439]

In a factually intense case, *Heredia v. Zimprich*,[440] which was more about fraud than conveyance deeds, the El Paso Court of Appeals demonstrated how a boundary dispute could be facilitated by a misuse of Subdivision Plats and correction deeds.[441] Signing off on both the deeds and plats without understanding their purpose ultimately facilitated changes in a boundary line. The party who executed the documents was essentially estopped from arguing about their validity.[442] A dissenting opinion argued otherwise, also noting that a plat is not an instrument of conveyance.[443]

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432. *Id.* § 5.028.
433. *Id.* § 5.029.
434. *Id.* § 5.028(a-1)(1).
435. *Ranger Energy*, 531 S.W.3d at 797 (citing TEX. PROP. CODE ANN. § 5.029(a)(1)(C)).
436. *Id.* at 798.
437. *See generally* TEX. PROP. CODE ANN. § 5.030(b), (c).
438. *Ranger Energy*, 531 S.W.3d at 798.
439. *Id.* at 799.
440. 559 S.W.3d 223 (Tex. App.—El Paso 2018, no pet.).
441. *Id.* at 225.
442. *Id.* at 231–32.
443. *Id.* at 242.

F. Adverse Possession

Two cases during the Survey period addressed adverse possession. In *Hardway v. Nixon*,[444] the Korth heirs asserted they acquired 147.5 mineral acres in Karnes County from their mineral co-tenants through constructive ouster and adverse possession.[445] The trial court agreed and granted the Korth heirs' motion for summary judgment. The San Antonio Court of Appeals found the trial court erred in granting summary judgment because the Korth heirs had not established constructive ouster as a matter of law and reversed the trial court's holding.[446] The case is a good reminder to practitioners of the much higher standards applicable to adverse possession by a co-tenant.

The court of appeals began by outlining the standard elements of an adverse possession claim: "(1) actual possession of the dispute property, (2) that it is open and notorious, (3) peaceable, (4) under a claim of right, (5) that it is consistently and continuously adverse or hostile to the claim of another person for the duration of the relevant statutory period."[447] The court then went on to examine the higher burden of proof required for co-tenants, because the fundamental element of co-tenancy is that each party has the right to fully occupy and use the property so one must prove not only "his possession was adverse, but must also prove some sort of ouster—actual or constructive."[448] Relying on the Texas Supreme Court's holding in *Tex-Wis Co. v. Johnson*,[449] the court of appeals outlined the elements of ouster: "(1) long-continued possession under a claim of ownership[;] and (2) non-assertion of claim by the titleholder."[450] Although arguably the Korth heirs presented some evidence of these points, the court concluded that such a finding required the finder of fact to draw an inference that was inappropriate for a summary judgment motion.[451]

In *Brown v. Snider Industries, LLP*,[452] the requirement of "hostility" arose. Of particular interest, the Texarkana Court of Appeals appeared to be persuaded that an offer to purchase the property interrupted the adverse possession.[453] The court held the same to be an admission of title and contrary to a "repudiation" of title.[454] The court also found that an

444. 544 S.W.3d 402 (Tex. App.—San Antonio 2017, pet. denied).
445. *Id.* at 404–05.
446. *Id.* at 412.
447. *Id.* at 409 (citing Estrada v. Cheshire, 470 S.W.3d 109, 123 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); Glover v. Union Pac. R.R. Co., 187 S.W.3d 201, 213 (Tex. App.—Texarkana 2006, pet. denied); Villarreal v. Guerra, 446 S.W.3d 404, 410 (Tex. App.—San Antonio 2014, pet. denied)).
448. *Id.* (citing BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 70 (Tex. 2011) (quoting Todd v. Bruner, 365 S.W.2d 155, 160 (Tex. 1963))).
449. 534 S.W.2d 895 (Tex. 1976).
450. *Hardaway*, 544 S.W.3d at 409 (citing *Tex-Wis Co.*, 534 S.W.2d at 901; Rife v. Kerr, 513 S.W.3d 601, 617 (Tex. App.—San Antonio 2011, pet. denied)).
451. *Id.*
452. 528 S.W.3d 620 (Tex. App.—Texarkana 2017, pet. denied).
453. *Id.* at 629.
454. *Id.*

"Affidavit of Use and Possession" was meaningful.[455] In the authors' opinion, this case sends a lot of wrong messages, including discouraging an attempt to settle a dispute and encouraging clogging the county records with self-serving affidavits. Regardless, one should be careful with couching how any offer to resolve an adverse possession dispute is framed.

G. Rule Against Perpetuities

In *ConocoPhillips Co. v. Koopmann*,[456] the Texas Supreme Court addressed the rule against perpetuities with respect to a reservation of a future interest in a non-participatory royalty interest. In this case, the supreme court essentially found that although the rule against perpetuities technically would invalidate the interest in question, the supreme court did not invalidate the interest because it felt that such a holding would not serve the purpose of the rule.[457] The courts in Texas have long held that the purpose of the rule against perpetuities is to prevent "landowners from using remote contingencies to tie up land title and remove it from commerce indefinitely."[458] With respect to oil and gas mineral interests, restraint on alienability is not an issue. The holding, although significant, is specifically limited to "future interests in the oil and gas context in which the holder of the interest is ascertainable and the preceding estate is certain to terminate."[459]

VII. HOMESTEAD/HOME EQUITY LENDING

A. Abandonment of Homestead

Drake Interiors, Inc. v. Thomas[460] involved the factual question of whether a husband and wife abandoned their homestead at Asbury prior to their final decree of divorce such that the creditor's judgment (Drake Interiors, Inc. (hereinafter Drake)), which was solely against the husband, could attach to the Asbury home. Andrea and Rob Thomas lived at Asbury together until February 2008, when they separated and Rob moved out. On August 1, 2008, Andrea and Rob entered into a mediated settlement agreement (MSA) pursuant to which Rob agreed that Andrea should be awarded sole ownership of the Asbury home. Prior to this time (in 2006), Andrea purchased a second home in her name only, demolished the home, and built a new luxury custom home referred to as Queenswood. Andrea and the couple's children moved out of the Asbury home in August 2008 and began living at Queenswood. On December 31, 2008, the divorce was finalized and became effective as of January 1,

455. *Id.* at 630.
456. 547 S.W.3d 858 (Tex. 2017).
457. *Id.* at 873.
458. *Id.*
459. *Id.*
460. 544 S.W.3d 449 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

2009. Andrea switched her homestead to Queenswood effective January 1, 2009.

Andrea and Drake both moved for summary judgment, as to whether Andrea and Rob abandoned the Asbury home prior to their divorce decree on December 31, 2008. In order to show abandonment, the homestead claimant must stop using the property (i.e., discontinued use) and form an intent to forsake the homestead (i.e., to never return). In this case, both Rob and Andrea must have both (1) discontinued use; and (2) had the intent to never return, for Rob and Andrea to be deemed as having abandoned their homestead at Asbury.[461] As to the first element, the Fourteenth Houston Court of Appeals found that there was no genuine issue of material fact as to whether there was discontinued use, as both had stopped living in Asbury as of August 2008 (i.e., approximately five months prior to the divorce decree).[462]

As to the second element of forsaking the homestead, the court found that the intent element is difficult to show on summary judgment and that both Andrea and Drake presented evidence of intent as part of their motions, including the MSA, in which Rob gave full ownership of Asbury to Andrea and agreed to pay taxes and insurance on Queenswood until Andrea remarried or the children reached the age of maturity.[463] Rob's statements in the MSA could be forward looking. The court of appeals found that when only part of the family relocates to a new home, evidence of abandonment can be ambiguous.[464] As a result, neither Andrea nor Drake were entitled to summary judgment on the issue of abandonment.[465]

In *Alexander v. Wilmington Savings Fund Society*,[466] the Dallas Court of Appeals construed language in the Texas constitution that when only one spouse was the borrower but both spouses signed the security agreement, the constitutional requirement that the lien be created with the consent of both spouses was satisfied.[467] The result complies with federal law that only one spouse may be a borrower on a real estate loan and fulfills the constitutional purposes for home equity loans.[468]

In *Paull & Partners Investments, LLC v. Berry*,[469] the authors are reminded that a transfer of a homestead, signed by both spouses, can be legitimate even if to a closely held entity. In this case, a transfer to an entity was not a pretended sale, even though it was conducted in connection with a purchase money loan, largely because there was no condition of defeasance once the loan was paid.[470] The Fourteenth Houston Court

461. *Id.* at 457.
462. *Id.* at 456.
463. *Id.* at 457.
464. *Id.*
465. *Id.* at 456, 459.
466. 555 S.W.3d 297 (Tex. App.—Dallas 2018, no pet.).
467. *Id.* at 299–300.
468. *Id.* at 300.
469. 558 S.W.3d 802 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
470. *Id.* at 813–14.

of Appeals found that the transfer was a legitimate intended sale and the entity had the authority to transfer title to others.[471]

B. Compliance with Home Equity Loan Formalities

1. Lender Cured Licensure Issue

In *Worthing v. Deutsche Bank National Trust Co.*,[472] Howard and Lisa Worthing refinanced their homestead in Marble Falls, Texas with a home equity Note and Deed of Trust from Argent Mortgage Company, LLC (Argent). In a complicated series of assignments, the original was ultimately endorsed to Deutsche Bank and the Argent Note servicing was assigned to Homeward Residential, Inc. (Homeward). The Worthings stopped making payments after July 2009, and in July, 2012, the property was sold at a foreclosure sale. The Worthings claimed, among other things, that the foreclosure was wrongful and that there were violations of Chapter 51 of the Texas Property Code, Chapter 392 of the Texas Finance Code, and the Texas Deceptive Trade Practices Act. The trial court granted summary judgement in favor of Deutsche Bank and the Worthings appealed.

The court of appeals affirmed the trial court's finding that, despite the fact that Argent was not licensed to make a home equity loan in August 12, 2003, at the time the loan was entered into, Article XVI, Section 50(a)(6)(Q)(x) of the Texas constitution allowed for a lender to cure such a deficiency.[473] The language at issue was changed in September 13, 2003. Because there was no statement of intent in the amendments for the removal of the cure rights to apply retroactively, the court adhered to the general rule that constitutional amendments and statutes operate prospectively, absent an expressly provision otherwise. Because Argent had cured its licensure issue relatively soon after the loan was made, the court rejected the Worthings' claim that Argent was an unauthorized lender. The court of appeals also affirmed the trial court's finding that the fact that Deutsche Bank was in possession of a non-conforming promissory note, which was different than the original note in that it was not endorsed, did not create a fact issue over the ownership of the note.[474] The court reasoned that because there were multiple different holders and servicers of the loan over a ten-year period, it was not entirely surprising that a non-conforming copy of the note was in the file.[475] This situation

471. *Id.* at 813.

472. 545 S.W.3d 127 (Tex. App.—El Paso 2017, no pet.).

473. *Id.* at 132 (citing Tex. Const. art. XVI, § 50(a)(6)(Q)(x)). At the time, this section read, in relevant part, that "a lender shall "forfeit all principal and interest . . . if the lender . . . fails to comply . . . within a reasonable time after the lender or holder is notified by the borrower of the lender's failure to comply." *Id.* Argent became licensed as a Texas Mortgage Banker on December 17, 2003. On September 13, 2003, this language was substantially changed to remove the cure language for an unlicensed lender. *Id.*

474. *Id.* at 137.

475. *Id.* at 136.

could simply have been the result of someone making a copy of the note prior to it being endorsed.

2. Statute of Limitations not Applicable to Invalid Home Equity Loan

In *Morris v. Deutsche Bank National Trust Company*,[476] Mattie T. and Joseph K. Morris refinanced their homestead in 2004 with a home-equity loan, and further refinanced the home-equity loan in January 2006 with PHM Financial Incorporated. The PHM Financial loan was assigned multiple times and finally assigned to Deutsche Bank National Trust Company (the Bank) in December 2010. In 2012, after the Morrises stopped making payments, the Bank conducted a non-judicial foreclosure sale. There is no dispute that the loan was a home-equity loan or that the Deed of Trust failed to include the requisite provisions for a valid home-equity loan pursuant to Section 50(a)(6) of the Texas constitution.

Furthermore, Texas law is settled that a home-equity lien may be foreclosed upon only by court order.[477] The Morrises filed suit alleging, among other things, wrongful foreclosure, that their homestead was protected from forced sale because the lien did not satisfy the requirements of Section 50(a) of the Texas constitution, and slander of title/wrongful eviction. The trial court granted summary judgment in favor of the Bank on all of the foregoing causes of action, primarily on the basis that the Morrises' claims were barred by the four-year statute of limitations (i.e., the Morrises failed to bring suit within four years after executing the note and deed of trust).

While this case was being appealed, the Texas Supreme Court decided *Wood v. HSBC Bank USA, N.A.*,[478] holding that liens securing constitutionally noncompliant home-equity loans remain invalid until cured and thus are not subject to any statute of limitations.[479] The dispute in *Wood* involved a quiet title action rather than wrongful foreclosure. However, the court of appeals in *Morris* found *Wood* to be controlling because the supreme court's holding in *Wood* was grounded in the conclusion that a lien that was invalid at origination remains invalid until cured, and did not state that the holding was limited to quiet title actions.[480] Accordingly, to the extent that the trial court granted summary judgment on the basis that the applicable claims brought by the Morrises were barred by the statute of limitations, the court of appeals reversed the trial court's decision.[481]

476. 528 S.W.3d 187 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
477. *Id.* at 194.
478. 505 S.W.3d 542 (Tex. 2016).
479. *Id.* at 545.
480. *Morris*, 528 S.W.3d at 197.
481. *Id.*

VIII. CONDOMINIUM/OWNER ASSOCIATIONS

A. Duty to Maintain Common Areas

The setting for *Lakeside Village Homeowners Association v. Belanger*[482] was the gated townhome community of Lakeside Village in which Alfred "Corky" Belanger and Michael Drennon each owned townhomes and each had issues with water leaks, flooding, tilting of the homes, rotating of the cripple wall, separating drywall, and other damage. Belanger's and Drennon's townhomes shared an interior wall and a foundation wall, and were thus a duplex. Railroad tie retaining walls were located on three sides of the duplex property. The duplex was built with a cripple wall down the middle, which was used to extend the top grade beam in order to level the two units, so that it did not look like a split level dwelling from the outside. A drainage pipe connected to the duplex carried water from the retaining wall to the crawl space under the foundation of the duplex.

The original lawsuit was filed in November 2001 against the Lakeside Village Homeowner's Association (Lakeside) and its management company, Principal Management Group, Inc. (Principal). A jury trial returned verdicts in favor of plaintiffs Belanger and Drennon for damages and attorneys' fees. The claims on which plaintiffs prevailed were breach of contract, Texas Water Code violations, trespass, and negligence claims.

The contracts between the owners and Lakeside consisted of: (1) the Declaration of Covenants, Conditions & Restrictions (CC&Rs); (2) the Articles of Incorporation; (3) the By-laws of the Lakeside Village association; and (4) other miscellaneous agreements. The trial court found a duty was owed by Lakeside and by Principal with respect to the maintenance, repair, improvement, use, and construction (collectively, the Maintenance) of the common areas in the community, and it was undisputed that the retaining walls were part of the common areas.[483] The jury found that Lakeside and Drennan failed to maintain the retaining walls.[484] The El Paso Court of Appeals determined that there was sufficient evidence to support a finding of failure of the retaining walls, citing that (1) there were reserves available to pay for repairs; (2) expert testimony that the foundation damage to the duplex resulted from the improperly built retaining wall that had no weep holes to allow water to seep out; and (3) that lateral pressure on the foundation was the result of the ineffective drainage.[485] Ineffective drainage further caused the cripple wall to rotate, resulting in additional structural and other damage.

A violation under Section 11.086(a) of the Texas Water Code is found if a person diverts or impounds the natural flow of surface waters that results damages to the property of another by the overflow of water di-

482. 545 S.W.3d 15 (Tex. App.—El Paso 2017, pet. denied).
483. *Id.* at 29.
484. *Id.*
485. *Id.* at 33.

verted or impounded.[486] To satisfy the causation element, the act or omission must be a "substantial factor" in causing the damage, without which harm would not have occurred.[487] Even though there was contradicting evidence (the expert engineer for Lakeside and Principal claimed the construction of the foundation was the cause of the damage), there was enough evidence to support the jury's conclusion that the diversion of surface water resulting from the condition of the retaining wall was a substantial factor in the resulting damage.[488]

The trespass claim required the owners to establish three elements (1) the plaintiff is lawfully in ownership or possession of real property; (2) the defendant enters into the land and the entry was physical, intentional, and voluntary; and (3) the trespass caused injury to plaintiff.[489] The engineer recommended that a pier-supported wall be installed and found evidence that the retaining wall behind this duplex was in the worst condition of any in the community.[490] Lakeside engaged an engineer to perform drainage work and repair retaining walls in 2011 for $49,455, but the work ultimately was not performed by Lakeside, which decided the bid was too expensive.[491] This established the element of intent. In addressing a counter argument from appellants that a lower landowner has a duty to receive the natural flow of surface water, the court of appeals stated that flow of water must be unhindered by the hand of man for this to apply, and the evidence supported a finding that the improper drainage of the retaining wall caused the resulting water damage.[492]

Establishing negligence required establishing a legal duty, breach, and damages.[493] Negligence was supported by the fact that (1) Lakeside and Principal had duties to maintain common elements; (2) a 2005 study revealed issues with the retaining walls; and, after receiving bids for remediation, (3) Lakeside and Principal never acted on them and did not repair the retaining walls until almost a decade later.[494] Although the defendants claimed faulty construction of the home, based on uncertified plans that showed a different design for the duplex, the court of appeals determined there was sufficient factual evidence to support a negligence finding.[495]

B. Enforcement of Deed Restrictions

Garden Oaks Maintenance Organization v. Chang[496] involved the enforcement of a deed restriction. The subdivision was recorded together

486. *Id.* at 34 (citing Tex. Water Code Ann. § 11.086(a)).
487. *Id.* at 35.
488. *Id.* at 35–36.
489. *Id.* at 36.
490. *Id.*
491. *Id.* at 27.
492. *Id.* at 37.
493. *Id.* at 38.
494. *Id.* at 39.
495. *Id.* at 39–40.
496. 542 S.W.3d 117 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

with a deed restriction in 1939, limiting the construction on any lot to one detached single-family dwelling with a one- or two-car garage. In 2010, Garden Oaks Maintenance Organization (GOMO) filed a subdivision management certificate. The Changs wanted to build a new home and submitted plans for approval to GOMO that were rejected for having more than a two-car garage. The plans were amended and were approved by GOMO on the condition that the garage label be removed from the attic space over the studio (based on the idea that the studio could be converted to a garage). In fact, the Changs did convert the studio to a garage after construction and removed a wall to install a garage door. GOMO sought injunctive relief and civil penalties under Section 202.004(c) of the Texas Property Code based on violation of the deed restriction.[497] The Changs claimed that the deed restriction had been abandoned and waived by GOMO and that GOMO's exercise of authority was unreasonable.[498] The trial court ruled that GOMO had no authority or standing to pursue any legal action against the Changs for violations of the deed restriction.[499] With respect to the authority of GOMO to enforce the deed restriction, the Changs asserted that the documents establishing GOMO as a property owners association (POA) under Section 201.005 and 204.006 of the Texas Property Code were invalid and thus it could not enforce the deed restriction.[500]

In 2000, three owners filed a notice of formation of a POA, but did not receive the requisite votes and it was dissolved. Another petition was filed to form GOMO in July 2001, one year after the prior POA was dissolved. Section 201.006 of the Texas Property Code provides that another POA cannot be formed within five years of the dissolution of the prior POA.[501] Section 204.005(f) provides, in relevant part, that if a petition is not approved by the required percentage of owners within one year of the creation of the petition, it is void and another committee may be formed.[502] The Fourteenth Houston Court of Appeals found the argument that the owners could circumvent the five-year waiting period unpersuasive because the statute suggests a legislative intent to cause a long waiting period after a POA is dissolved before a new committee can be formed to alter the governance of the subdivision.[503] Therefore, the POA was not properly formed.[504]

In order for GOMO to have standing to sue, (1) its members must have standing to sue in their own right; (2) the interests must be germane to the organization's purpose; and (3) the claim asserted or relief sought must not require participation of the individual members.[505] On this is-

497. *Id.* at 122.
498. *Id.* at 121.
499. *Id.* at 122.
500. *Id.* at 127.
501. *Id.* at 133.
502. *Id.* at 132 (citing TEX. PROP. CODE ANN. § 204.006(b)).
503. *Id.* at 134.
504. *Id.*
505. *Id.* at 137.

sue, the court of appeals found that (1) the owners of the subdivision have the right to prevent a breach; (2) GOMO is a neighborhood association whose purpose is to maintain neighborhood integrity; and (3) the relief sought would benefit the owners.[506] Therefore, GOMO did have standing to sue.[507] Similarly, because GOMO, although not properly formed, did have Bylaws giving it authority to sue, the trial court erred in finding that there was no authority of GOMO to sue.[508]

C. Restrictive Covenants and Negative Easements

1. Non-Access Easement is Valid and Enforceable

Teal Trading and Development, LP v. Champee Springs Ranches Property Owners Association[509] involved a declaration of CC&Rs that included a non-access easement. The declaration essentially provided that the declarant reserved, for the exclusive use of declarant and its successors and assigns, a one-foot easement for precluding and prohibiting access to the property and other nearby roads by adjacent property owners. It reserved one access entrance across the restrictive easement for the Champee Ranches Subdivision, and no one else was to be granted access without the consent of the declarant. After several transfers and a foreclosure, Teal Trading acquired title to the 660-acre tract referred to as the Privilege Creek Tract which was subject to the declaration. Teal Trading also acquired the contiguous 1,173 acres that were not subject to the declaration. However, the non-access easement effectively divided the 1,173 acres owned by Teal Trading from the Privilege Creek Tract it acquired. The prior owner of the Privilege Creek Tract (Champee Springs) brought suit to enforce the non-access easement and to prevent the development of the road crossing the non-access easement.[510]

At trial, Champee Springs sought enforcement of the non-access easement by declaratory judgment. Teal Trading denied it was bound by the restriction and sought a declaratory judgment that the non-access easement was an unreasonable restriction against alienation, and that Champee Springs had waived its right to enforce the same.[511]

Texas has adopted the Restatement of Property as to what constitutes an unreasonable restraint on alienation, which can be summarized as follows: (1) a disabling restraint (attempt by a conveyance to make a later conveyance void); (2) a promissory restraint (attempt to cause a later conveyance to impose contractual liability on a subsequent conveyance, where liability results from breach of an agreement not to convey); and (3) forfeiture restraint (attempt to terminate all or part of the interest in property conveyed). There was no direct restraint on alienation by virtue

506. *Id.* at 138.
507. *Id.*
508. *Id.* at 140.
509. 534 S.W.3d 558 (Tex. App.—San Antonio 2017, no pet.).
510. *Id.* at 569.
511. *Id.*

of the non-access easement; the evidence presented at trial showed, at best, an indirect restraint.[512] An indirect restraint can only be stricken if it bears some relationship to the evil which the rules prohibiting restraints on alienation are designed to prevent. The Restatement of Property further provides that indirect restraints are valid unless they lack a rational justification, an issue on which Teal Trading failed to present any evidence.[513]

Ultimately, the judgment that the non-access easement was valid and enforceable was affirmed based on the fact that negative easements and restrictive covenants are expressly recognized as valid by the Restatement of Property.[514]

D. Homeowners Association's Authority to Compel

In *C.A.U.S.E. v. Village Green Homeowners Association, Inc.*,[515] the Village Green Homeowners Association (Association) sought to streamline trash delivery services to residents of the subdivision by entering into a contract with Vaquero Waste & Recycling (Vaquero). This contract made Vaquero the exclusive provider of waste collection services to the community and required individual residents to pay for services directly to Vaquero. Section 3.20 of the declaration governing the subdivision and the Association provided that "[a]ll refuse garbage and trash shall be collected or disposed of by Owner, at his expense."[516] The underlying issue in this case was whether the Association was authorized to compel residents to use and pay for the services of a particular waste provider to the exclusion of others. The Association argued that its powers under the declaration to operate, maintain, and manage the common areas (including streets) and, pursuant to its bylaws and articles, to generally maintain the community cannot be read to render meaningless the more specific language in section 3.20. The trial court granted the Association's motion, holding that the Association had the authority to compel owners or residents to use a particular provider. The San Antonio Court of Appeals reversed on the grounds that the declaration was unambiguous and clear, and the intent was for the individual owners (and not the Association) to arrange for and pay the cost of trash collection.[517]

IX. CONSTRUCTION AND MECHANICS LIENS

A. Recovery of Attorneys' Fees under the TCTFA

In *Dudley Construction, Inc. v. ACT Pipe & Supply, Inc.*,[518] the Texas Supreme Court decided the issue of whether a prevailing party in a claim

512. *Id.* at 575.
513. *Id.*
514. *Id.*
515. 531 S.W.3d 268 (Tex. App.—San Antonio 2017, no pet.).
516. *Id.* at 270.
517. *Id.*
518. 545 S.W.3d 532 (Tex. 2018).

under the Texas Construction Trust Fund Act (TCTFA) is entitled to attorney's fees from the non-prevailing party. The supreme court held that neither the TCTFA nor the Texas Civil Practice and Remedies Code Section 38.001 expressly provide for the award of attorney's fees to a prevailing party for a successful TCTFA claim.[519] Therefore, although Section 38.001 of the Texas Civil Practice and Remedies Code makes attorney's fees recoverable for a claim that could form the basis of a TCTFA claim, because the TCTFA is a stand-alone statutory scheme, recovery of attorney's fees under this statute must be express for recovery to be permitted.[520]

B. Construction Defects

1. Mere "Puffing" not Basis for Fraud Claim

In *Fitzgerald v. Water Rock Outdoors, LLC*,[521] Timothy and Wynne Fitzgerald entered into a contract to purchase a newly constructed home from Water Rock Outdoors, LLC d/b/a Artisan Homes (Artisan). The Fitzgerald family moved into the home and notified Artisan of several defects, some of which were repaired by Artisan. The Fitzgerald family were not satisfied with the repairs but refused continued offers by Artisan to repair the remaining defects.

The trial court granted partial summary judgment in favor of Artisan on the Fitzgeralds' common law claims of fraud, fraud in the inducement, and unjust enrichment.[522] Common law fraud requires a material misrepresentation which (1) was false; (2) was either known to be false when made or was asserted without knowledge of whether it was true; (3) was intended to be acted upon; (4) was relied upon; and (5) caused damages.[523] Fraud in the inducement involves the same elements of fraud, and also requires a contract as part of its proof and a promise of future performance made with no intention of performing.[524] Finally, unjust enrichment is an implied-in-law contractual basis upon which an aggrieved party may be awarded restitution when it would be an injustice to allow the applicable benefits to be retained by the other party.[525]

The basis for the fraud claims were statements made by Artisan that it was a high-quality custom homebuilder with years of experience, and that Artisan was hard working, honest, and employs top-quality subcontractors. The Amarillo Court of Appeals found these statements to be mere "puffing" and that the Fitzgerald family failed to raise a genuine issue as to whether any such statements (if proven to be untrue) were material.[526] While materiality is typically reserved to the trier of fact, if a statement is

519. *Id.* at 541.
520. *Id.* at 542.
521. 536 S.W.3d 112 (Tex. App.—Amarillo 2017, pet. denied).
522. *Id.* at 117.
523. *Id.*
524. *Id.*
525. *Id.*
526. *Id.* at 118.

obviously immaterial such that reasonable minds cannot differ, it is appropriate for the court to find that the claim is not actionable as a matter of law.[527] Furthermore, unjust enrichment will generally not be a basis for recovery where a valid, express contract covers the subject matter of the parties' dispute. The Fitzgerald family failed to explain how any of these exceptions to this rule would apply in this case.[528]

C. Licensed or Registered Professionals—Certificates of Merit

1. Court May Dismiss with Prejudice for Failure to File Certificate of Merit

The primary issue in *Pedernal Energy, LLC v. Bruington Engineering, Ltd.*[529] was Section 150.002 of the Civil Practice and Remedies Code, which requires a plaintiff to file an expert affidavit (i.e., a Certificate of Merit) in a lawsuit or arbitration for damages arising out of the licensed or registered professional services provision of the section. Pedernal sued Bruington and others for damages with respect to a fracturing operation on Pedernal's gas well, alleging substandard engineering services, but failed to file a Certificate of Merit. Section 150.003(e) of the Civil Practice and Remedies Code provides that if the Certificate of Merit is not filed, the trial court *shall* dismiss the claim and the dismissal *may* be with prejudice.[530]

The case involved a nonsuit, a decision denying Bruington's motion to dismiss, and finally a motion to dismiss without prejudice at the trial court level. The court of appeals first remanded the decision denying the motion to dismiss with instructions, and finally ruled on the second appeal that the dismissal must be with prejudice. Because the plain language of the statute indicates that the trial court may dismiss with prejudice, the Texas Supreme Court found that the provision is discretionary and that the court of appeals erred in ruling that the dismissal must be with prejudice.[531]

2. Requirement for Certificate of Merit May be Waived

In *Gosnell v. LaLonde*,[532] the Fort Worth Court of Appeals once again addressed the Certificate of Merit statute. In the case at hand, the Gosnells filed suit in September 2011 for structural damage to their home allegedly caused by the destabilization of the foundation after a chemical was injected into the soil.[533] After mediation and discovery, the engineers

527. *Id.* at 117.
528. *Id.* at 118–19.
529. 536 S.W.3d 487 (Tex. 2017).
530. *Id.* at 492 (citing Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e) (emphasis added)).
531. *Id.* at 497.
532. 559 S.W.3d 559 (Tex. App.—Fort Worth 2016, pet. granted) (mem. op.), *aff'd sub nom.* LaLonde v. Gosnell, No. 16-0966, 2019 WL 2479172 (Tex. June 14, 2019).
533. *Id.* at 560.

filed a motion to dismiss in January 2015 based on the failure of the Gosenells to abide by the Certificate of Merit Statute when they filed their initial suit.[534] The trial court agreed and dismissed the case. The court of appeals reversed. The Texas Supreme Court addressed this very issue in *Crosstex Energy Service, L.P. v. Pro Plus, Inc.*,[535] finding that there was no one factor that would result in waiver and that courts must look at the totality of the circumstances. However, the lower courts are struggling to follow the guidance put forth by the supreme court that defendant may be considered to have waived the right to dismissal for failure to file a certificate of merit when, under the totality of circumstances, the defendant has substantially invoked the judicial process.[536] In the case at hand, the court of appeals found that the over three-year delay in filing for dismissal, the participation in the discovery process, and attempts to settle the case informally were all indications that "paint[ ] the picture of defendants who did not intend to take advantage of their right to dismissal."[537] The supreme court has granted the defendant's petition so we will have to see if the supreme court agrees with the court of appeals interpretation of the *Crosstex* holding.

X. MISCELLANEOUS

A. Premises Liability/Nuisance

1. Actual Knowledge of Owner

In *Cuevas v. Endeavor Energy Resources, L.P.*,[538] the Eastland Court of Appeals relied on the Texas Supreme Court's interpretation of Chapter 95 of the Texas Civil Practice and Remedies Code and *Ineos USA LLC v. Elmgreen*[539] to find that the owner and operator of an oil and gas well was not liable for the death of a contractor because the owner did not have "actual knowledge" of the dangerous condition.[540] Distinguishing between actual knowledge and constructive knowledge, the court stated that a requirement of actual knowledge is knowledge that "the dangerous condition existed at the time of the accident."[541] Cuervas alleged common ownership between the owner and drilling contractor to

534. *Id.* at 561.
535. 430 S.W.3d 384 (Tex. 2014).
536. *Id.* at 393–94 (citing Murphy v. Gutierrez, 274 S.W.3d 627, 635 (Tex. App.—Fort Worth 2012, pet. denied)).
537. *Id.* at 567.
538. 531 S.W.3d 375 (Tex. App.—Eastland 2017, pet. granted), *rev'd sub nom.* Endeavor Energy Resources, LP v. Cuevas, No. 17-0925, 2019 WL 1966625 (Tex. May 3, 2019). It is a premises liability case addressing the actual knowledge requirement for liability. *Id.*
539. 505 S.W.3d 555 (Tex. 2016).
540. *Cuevas*, 531 S.W.3d at 380–81. In relevant part, Chapter 95.003 provides: A property owner is not liable . . . unless: . . . (2) the property owner had *actual knowledge* of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn (emphasis added). Tex. Civ. Prac. & Rem. Code Ann. § 95.003.
541. *Id.* at 380 (citing Vanderbeek v. San Jacinto Methodist Hosp., 246 S.W.3d 346, 352 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

show actual knowledge of the contractor's use of dangerous equipment and procedure, but the court of appeals held such general knowledge did not establish the required actual knowledge of the subject event.[542] There were no owner employees or agent present at the time of the injury or who knew the repair work was being performed.[543] The court of appeals reiterated the Texas Supreme Court's holding in *Ineos* which rejected the premise that "general knowledge of a potentially dangerous condition constituted actual knowledge of the dangerous condition that resulted in the claimants' injury."[544]

2. Invitee Knowledge of Danger

Wallace v. ArcelorMittal Vinton, Inc.[545] discussed whether an injured party has a claim if the hazard is known to both the premises owner and the injured party. In this particular case, Wallace was a night security guard at a steel mill for over two years before the accident occurred. Wallace was performing her nightly rounds of the machine shop when she heard a noise in the driveway and tripped over an object that was lying outside the machine shop. The record established that there were a variety of materials lying on the ground outside the machine shop waiting to be utilized. Wallace claimed invitee status and that the metal object she fell over was a dangerous condition that the mill owner should have known of and failed to correct or warn. The trial court granted summary judgment in favor of the mill owner on the grounds that Wallace knew of the condition as it was a daily occurrence and, therefore, there was no duty to warn. The El Paso Court of Appeals sustained. Texas law clearly establishes a landowner's duty to an invitee as being one, but not both, of the following: (1) to "eliminate or mitigate the condition so that it is no longer unreasonably dangerous"[546]; or (2) subject to two exceptions,[547] to "provid[e] an adequate warning of the danger to the invitee."[548] In this case, the invitee was clearly aware of the danger so the owner had no duty to make the premises safe or to warn.[549] This is based on the legal principle that the landowner is generally in a better position to know of the danger but, if the invitee is aware of the danger, then the law will assume that the invitee should take appropriate caution to protect himself.[550]

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542. *Id.* at 381.
543. *Id.* at 378.
544. *Id.* at 381.
545. 536 S.W.3d 19 (Tex. App.—El Paso 2016, pet. denied).
546. *Id.* at 23 (citing Gen. Elec. Co. v. Moritz, 357 S.W.3d 211, 216 (Tex. 2008); Shell Oil Co. v. Khan, 138 S.W.3d 288, 295 (Tex. 2004)).
547. *Id.* There are two exceptions. The first is the criminal activity exception. *Id.* (citing Timberwalk Apartments Partners, Inc. v. Cain, 972 S.W.2d 749 (Tex. 1998)); *see also* J. Richard White et al., *Real Property*, 4 SMU ANN. TEX. SURV., 357, 414–16 (2018). The second is the necessary-use exception. *Wallace*, 536 S.W.3d at 23 (citing Parker v. Highland Park, Inc., 565 S.W.2d 512, 513–14 (Tex. 1978)).
548. *Wallace*, 536 S.W.3d at 23.
549. *Id.*
550. *Id.*

3. Premises Liability vs. General Negligence

United Scaffolding, Inc. v. Levine[551] was a premises liability case in which the Texas Supreme Court distinguished pleadings based on general negligence theory and premises liability theory. Levine, a pipefitter working at Valero Energy Corporation's Port Arthur Refinery, fell through a hole caused by unsecured planks in scaffolding erected by an independent contractor, United Scaffolding, Inc. (USI). The basis for USI's appeal was that Levine submitted evidence for, and the court gave jury charges based on, a general negligence theory, even though all of the evidence presented related to a premises liability cases. The majority ruling strenuously affirmed the supreme court's prior holdings, including in *Clayton W. Williams, Jr., Inc. v. Olivo*,[552] which stated that "a premises defect case improperly submitted to the jury under only a general negligence question, without the elements of premises liability as instructions or definitions, causes the rendition of an improper judgment."[553] This is necessary, as the supreme court explains, because a general negligence theory relates to "negligent activity encompass[ing] a malfeasance . . . based on affirmative, contemporaneous conduct by the owner that caused the injury,"[554] whereas a premises liability theory "encompass[es] a nonfeasance theory based on the owner's failure to take measures to make the property safe."[555] Furthermore, for a premises liability case, the complaining parties are required to additionally prove the elements discussed in *Corbin v. Safeway Stores, Inc.*:[556]

> (1) that [the defendant] had actual or constructive knowledge of the condition on the premises; (2) that the condition posed an unreasonableness risk of harm . . . ; (3) that [premises owner] did not exercise reasonable care to reduce or eliminate the risk; and (4) that [premises owner's] failure to use such care proximately caused . . . personal injuries.[557]

Levine's injury was a typical slip and fall case, which historically had been treated as a premises defect rather than an ordinary general negligence case. The deciding issue here was whether the premises were under the control of USI, as the owner of the scaffolding equipment, which assembled, erected, and supervised the scaffolding, or Valero, which owned the refinery premises and determined when scaffolding was to be used.[558] The supreme court concluded that USI was in control of the scaffolding based upon contractual obligations to erect, construct, and supervise the scaffolding, as well as the various scaffolding policies enacted by Valero

551. 537 S.W.3d 463 (Tex. 2017).
552. 952 S.W.2d 523 (Tex. 1997).
553. *Levine*, 537 S.W.3d at 469–70.
554. *Id.* at 471 (citing Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762, 776 (Tex. 2010)).
555. *Id.*
556. 648 S.W.2d 292, 296 (Tex. 1983).
557. *Levine*, 537 S.W.3d at 471.
558. *Id.* at 473.

that required the contractor to insure the scaffolding was inspected before each work shift, and that the contractor had sole authority to authorize Valero employees' use of the scaffolding, even though USI did not have a Valero employee inspect the scaffolding on the day of its use.[559] The supreme court determined that such put USI in control of the scaffolds.[560] However, there was a three-justice dissenting opinion. The continuing authority of the *Levine* majority must be understood in the context of the current court makeup and that its opinion may change with subsequent changes in the court.

4. Off-Property Injury

Nichols v. McKinney[561] involved a negligence claim brought because wild bees located in the adjacent property owner's garage caused death to the neighboring property owner. Melody Nichols was the owner of property adjoining McKinney's property, where bees had infiltrated into his garage wall. Nichols was attacked by a swarm of bees from this hive when she stopped her lawnmower between her house and McKinney's garage. Although Nichols ran into her home, she fell unconscious and medical personnel could only revive her on life support. She ultimately died after three months on life support. The heirs of Nichols sued McKinney for various causes of negligence. McKinney asserted as his defense the doctrine of *ferai naturai*, precluding any duty to Nichols. The Waco Court of Appeals noted Texas law was well established that a landowner is not liable for actions of indigenous wild animals except in certain specified instances.[562] Further, the court noted that the doctrine of *ferai naturai* could be used as a defense to negate premises liability claims.[563] But the court deemed it was a matter of first impression in Texas as to whether to apply the *ferai naturai* doctrine as a defense "in a general negligence case where the act occurred somewhere other than on the defendant's property."[564] The initial threshold question in a common law negligence case is whether a duty is owed. Factors such as risk, foreseeability, and likelihood of injury, compared to the social utility of the conduct, the magnitude of burden against injury, and the consequences of assessing such burden, are to be considered.[565] In addressing these factors, the court stated that, while foreseeability of bee stings is an appropriate factor, the magnitude of the duty on property owners to control indigenous wild animals would be too substantial a burden.[566] Consequently, the court held there was no such duty of a landowner to protect adjoining landowners from the activities of indigenous wild animals originating on the owner's

559. *Id.* at 475–76.
560. *Id.* at 478–79.
561. 553 S.W.3d 523 (Tex. App.—Waco 2018, pet. denied).
562. *Id.* at 528.
563. *Id.*
564. *Id.*
565. *Id.* (citing Greater Hous. Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).
566. *Id.* at 529.

property.[567]

The Nichols heirs also alleged negligent undertaking because McKinney had attempted to eliminate the bees but was unsuccessful. In defense, McKinney alleged only the lack of duty, which the court held did not negate the duty element for negligence undertaking claims.[568] There are three types of nuisance causes of action: negligently-caused nuisance, intentional nuisance, and strict liability nuisance.[569] In the negligence nuisance claim, McKinney's "no duty" defense would have been sufficient to negate such a cause of action.[570] However, the proof of common law duty is not applicable to intentional nuisance and strict liability nuisance claims.[571] The appropriate inquiry in intentional nuisance is directed to the actual intent to cause the interference and not in the intent to engage in conduct which results in the interference.[572]

In the strict liability nuisance claim, there must be a showing that liability arose out of "abnormally dangerous activity" or "abnormally dangerous substance" which involves a "high degree of risk."[573] Because McKinney failed to negate any elements of such intentional nuisance or strict liability nuisance claims, summary judgment in his favor was not appropriate.[574] Finally, the Nichols heirs alleged negligence *per se* based on a City of Midlothian ordinance regarding breeding places for bees.[575] McKinney introduced testimony of a city code enforcement official, noting that the breach of the statute only occurs after notice of the condition and failure to correct the condition, rather than just the existence of the condition (breeding place for bees).[576] Consequently, the heirs were unable to prove a negligence per se claim based upon violation of the ordinance.[577]

5. Improvements

Rawson v. Oxea Corp.[578] was a premises liability case arising from injuries sustained from an electrical backfeed problem at Oxea's power substation. The injuries arose from an electrical power shortage in a transformer at the electrical substation owned by Oxea. Oxea's employee called a subcontractor to replace the damaged insulator (separating the bare electrical wire from a steel beam). Oxea's employee attempted to

567. *Id.*
568. *Id.* at 530 (noting that "'nuisance' refers not to a defendant's conduct or to a legal claim or cause of action but to a type of legal injury involving interference with the use or enjoyment of real property") (citing Crosstex N. Tex. Pipeline L.P. v. Gardiner, 505 S.W.3d 580, 588 (Tex. 2016)).
569. *Id.*
570. *Id.*
571. *Id.*
572. *Id.*
573. *Id.* at 531.
574. *Id.*
575. *Id.*
576. *Id.* at 532.
577. *Id.*
578. 557 S.W.3d 17 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd).

shut down power to this section of the electrical substation to allow Rawson to work in safety. However, Oxea's employee failed to turn off two "top pole switches," and there was a "backfeed" or "backflow" of electricity into the section of the electrical substation where Rawson was working, causing injury. The trial court awarded summary judgment to Oxea, which Rawson appealed. Oxea asserted a defense under the owner premises liability statute.[579] The exclusionary provision of the premises liability statute provides a defense for liability for "injury, death, or property damage to a contractor, subcontractor or employee of a contractor or subcontractor who constructs, repairs, renovates or modifies an improvement to real property . . . unless (1) the property owner exercises or retains some control . . . and (2) the property owner had actual knowledge of the danger or condition . . . ."[580]

Rawson alleged that Oxea did not meet its burden to prove the "condition" or "use" requirements under the statute. But the First Houston Court of Appeals, relying upon a prior Texas Supreme Court decision[581] stating that "all negligence claims that arise from either a premises defect (a 'condition') or a property owner's negligent activity (a 'use')"[582] met this burden, concluded that the premises liability statute was applicable.[583] The electrical substation was across the street from a chemical plant owned by Oxea, which is the location of the top pole switches that were not appropriately switched off in order to prevent the backfeed electrical shock. Therefore, Rawson alleged that his injury occurred at the substation while the defective condition or negligence occurred across the street at the plant where the top poles' switches were located.[584]

The court of appeals rejected this argument, relying on *Ineos*.[585] The broad definition of the term "improvement" in the statute requires that the insulator on which Rawson was working was part of the substation which constituted the "improvement" for purposes of the statute.[586] This squares with the supreme court's decision in *Ineos*, where damages occurred from a furnace explosion, which rejected the notion that the furnace should be considered the improvement, rather than the entire plant consisting of three furnaces and other system improvements.[587]

Additionally, Rawson attempted to avoid application of the premises liability statute by suggesting that he was at the premises to replace the insulators, not to repair them. However, the court viewed his work as being a repair of the entire electrical substation of which the insulator

579. *Id.* at 25.
580. TEX. CIV. PRAC. & REM. CODE ANN. § 95.003.
581. Abutahoun v. Dowell Chemical Co., 463 S.W.3d 42 (Tex. 2015).
582. *Rawson*, 557 S.W.3d at 25.
583. *Id.* at 27.
584. *Id.*
585. *Id.* at 27–28; *see also* Ineos U.S. LLC v. Elmgreen, 505 S.W.3d 555 (Tex. 2016); *see also* J. Richard White et al., *Real Property*, 4 SMU ANN. TEX. SURV. 357, 412–13 (2018) (discussing *Ineos*).
586. *Rawson*, 557 S.W.3d at 28.
587. *Id.*

was a component part.[588] Finally, Rawson attempted to prove that Oxea had actual knowledge of the condition, which would have avoided premises liability protection. In this respect, the court found the knowledge requirement meant actual knowledge and not any constructive or imputed knowledge.[589] There was sufficient evidence at trial from the deposition and testimony to prove that Oxea did not have actual knowledge of the top pole switches being incorrectly set. Therefore, Rawson did not satisfy the legal requirement of actual knowledge as opposed to what a reasonable person could have or should have known as it relates to the dangerous condition.[590]

B. Ad Valorem Taxes

1. Appeal—Appraisal Value v. Denial of Exemption

Vitol Inc. v. Harris County Appraisal District[591] involved a failure to timely file an appraised value protest. Vitol received a notice of valuation of his petroleum storage inventory, which did not include an exemption for interstate commerce as allowed under the statute. Rather than filing a timely protest, Vitol had conversations and correspondence with the appraisal district to no avail. Vitol filed a late protest with the appraisal review board, which denied the protest as being untimely filed. Vitol appealed. The appraisal district filed a plea to the jurisdiction that the trial court granted. Vitol received notice that the appraised value notice pursuant to Chapter 25 of the Texas Tax Code, which has specific protest requirements, failed the requirements, depriving the court of jurisdiction. However, Vitol claimed the protest deadline should be determined by the date of his receipt of a letter denying a specific exemption under Chapter 11 of the Texas Tax Code.

The Fourteenth Houston Court of Appeals held that the "failure to file a timely protest for an exemption based on interstate commerce is not a procedural error but is a jurisdictional one because it implicates exhaustion of remedies."[592] The notice of the appraised value, which contained a reference to zero dollars was sufficient notice as to the denial of the exemption to start the timeframe for the protest. The court specifically held that the "failure to timely pursue and exhaust the administrative remedies available to it under the Texas Tax Code to protest the [appraisal valuation] Notice is not excused by any alleged failure by [the appraisal district] to provide or timely deliver any requisite [exemption denied] no-

588. *Id.* at 28–29. The supreme court also relied upon *Montoya v. Nichirin-Flex. U.S.A., Inc.*, 417 S.W.3d 507, 512 (Tex. App.—El Paso 2013, no pet.), which acknowledged the lack of a statutory definition for "repairs," but nevertheless, defined it to mean "to restore to a good or sound condition after decay or damage; . . . to restore or renew by any process of making good, strengthening, etc. . . ."

589. *Id.* at 30.

590. *Id.* at 32–33.

591. 529 S.W.3d 159 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

592. *Id.* at 167.

tice under Chapter 11."[593]

2. Commerce Clause—Interstate Commerce Exemption

ETC Marketing. v. Harris County Appraisal District[594] was another case dealing with ad valorem taxes for storage of natural gas in the state of Texas and taxes under the Texas Tax Code. The question presented was whether the Commerce Clause of the United States Constitution, which limits a state's power to tax interstate commerce, prohibits the state of Texas from taxing natural gas stored in Texas while awaiting future resale in the course of interstate commerce. ETC Marketing bought natural gas at the Katy Marketing Hub and transported it via Houston Pipe Line Company (HPL) pipes, storing it in an underground storage facility known as the Bammel Facility in Harris County. Gas is accumulated during the summer months when demand is low and is sold into interstate commerce during the winter months when gas demand is higher. Harris County taxed ETC's gas at the Bammel Facility as personal property not in interstate commerce. ETC claimed the gas was within the stream of interstate commerce and should be exempt from taxation.

The appraisal review board denied ETC's challenge. Texas Tax Code Section 11.01(c)(1) allowed taxation of personal property located in the state longer than a "temporary period," and Texas Tax Code Section 21.02(a)(1), known as the taxable situs requirement, prohibits taxation where the personal property is located within the taxing jurisdiction for only a temporary period.[595] The Texas Supreme Court, recognizing the principle of constitutional avoidance, considered the Texas statutory scheme prior to addressing the Commerce Clause challenged under the Unites States Constitution. The supreme court determined that ETC failed to plead under the Texas Tax Code, arguing only with respect to the Commerce Clause.[596] Therefore, ETC waived its right on appeal to raise issues concerning this Texas Tax Code.[597]

In addressing the Commerce Clause (or rather the dormant Commerce Clause) as discussed in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*,[598] the supreme court noted that the current test as announced in *Complete Auto Transit, Inc. v. Brady*[599] is a four prong test: (1) substantial nexus; (2) fairly apportioned; (3) non-discrimination against interstate commerce; and (4) fairly related.[600] The supreme court further indicated that it thought the prior U.S. Supreme Court "in transit test," established in *Minnesota v. Blasius*,[601] might still be applicable having not been ex-

593. *Id.* at 170–71.
594. 528 S.W.3d 70 (Tex. 2017), *cert. denied*, 138 S. Ct. 557 (Dec. 2017) (mem.).
595. *Id.* at 74.
596. *Id.* at 75.
597. *Id.*
598. 514 U.S. 175 (1995).
599. 430 U.S. 274 (1977).
600. *ETC Marketing*, 528 S.W.3d at 76.
601. 290 U.S. 1 (1933).

pressly negated by *Complete Auto*.[602]

Prior to reaching the *Complete Auto* test, the supreme court first had to determine whether the gas was in interstate commerce. The supreme court concluded that the gas entered interstate commerce because when the gas enters the HLP system, the gas connects to an interstate pipe line network.[603] Under the *Complete Auto* test, the supreme court determined that there was a substantial nexus based on the relationship of the subject property (gas) and the state.[604] The supreme court expressed its disapproval of a prior decision which focused on the physical presence in the state of the taxpayer, taxpayer's office, employees, representatives, or physical facilities.[605]

Secondly, the fair apportionment element of the *Complete Auto* test was satisfied if the tax was internally consistent, meaning that if every state were to impose an identical tax, there would not be multiple taxation. This was satisfied here because the Texas Tax Code had a specific date of the year for the property tax that made it clearly in compliance.[606] The interstate commerce discrimination element was also satisfied because there was no different treatment by the taxing authority of intrastate as compared to interstate gas.[607] Finally, the reasonable relationship test was considered applicable based on the relationship of the gas to the state tax. Rejecting ETC's contention that its extra gas at the Bammel Facility created no new state burdens, and rejecting ETC's argument that the entrustment of the gas pursuant to a storage agreement with HPL, should have relieved ETC of any tax burden.[608]

This opinion was subject to one concurrence, which accepted the result but complained of the court's continued judicial activism by creating the "dormant Commerce Clause,"[609] and one dissent by Chief Justice Hecht, who believed that the gas was in interstate commerce even with its interim storage.[610] Writ of certrorari to the United States Supreme court was denied, so this is the current Texas law on this issue.

XI. CONCLUSION

Attacks on due process under the Texas forcible detainer in a post-foreclosure tenancy-at-sufferance scenario continued this Survey period, but *Reynoso* reiterated the U.S. Constitutional due process protection limitation requiring state action and not contractual provisions between parties.

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602. *ETC Marketing*, 528 S.W.3d at 76.
603. *Id.* at 78.
604. *Id.* at 72.
605. *Id.*; *see also* Peoples Gas, Light, and Coke Co. v. Harrison Cent. Appraisal Dist., 270 S.W.3d 208 (Tex. App.—Texarkana 2008, pet. denied).
606. *Id.* at 86.
607. *Id.* at 87.
608. *Id.* at 88–89.
609. *Id.* at 90–91.
610. *Id.* at 93.

Refinements in the jurisprudence on derivative actions in closely held limited liability companies was addressed in *Lone Star*, requiring membership at the time of the suit. And in relief to all nature-loving property owners, wild bees living in the owner's property and attacking a person "off-premises" will not cause liability under the premises liability statute according to *Nichols*.

The Texas Supreme Court has accepted petition in a tenancy-at-sufferance case with issues on the justice court jurisdiction; so, perhaps the supreme court will attempt to bring further clarity to these issues. The *Godoy* case petition has been accepted, so the *Moayedi* waiver expansion for statute of limitations waiver will get a final analysis. Petition from *Armour Pipe Line* has been filed, with the possibility that the Texas Supreme Court may reconsider whether domestic and foreign entities should be treated differently under forfeiture to do business statutes.

As can be seen, the courts continue to use a reasonable language approach within deeds and documents to discern the intent of the parties. Moreover, the courts seem very willing to use legislative intent and purpose to construe statutes and the Texas constitution, such as when dealing with homestead, to reach a reasonable result. Only in the areas of restrictions and ad valorem taxation were the courts found to strictly apply procedural and statutory requirements.