NO. 12-0549

In the

Supreme Court of Texas

ALVIE CAMPBELL AND JULIE CAMPBELL,

Petitioner,

v.

Mortgage Electronic Registration Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns; Wells Fargo Bank, N.A.; Stephen C. Porter; David Seybold; Ryan Bourgeois; Matthew Cunningham, and John Doe 1-100,

Respondent,

On appeal from cause No. 03-11-00429-CV

Third District Court of Appeals

Austin, Texas

PETITION FOR REVIEW

Respectfully submitted,

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IDENTITY OF PARTIES & COUNSEL

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Respondent
Mortgage Electronic Registration Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns;
Wells Fargo Bank, N.A.
Stephen C. Porter
David Seybold
Ryan Bourgeois
Matthew Cunningham
John Doe 1-100

Counsel Representing

Mortgage Electronic Registration Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns;
Wells Fargo Bank, N.A., John Doe 1-100

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STATEMENT OF THE CASE

Nature of the Case:	This is a real property case filed by Alvie Campbell and Julie Campbell.
Trial Court:	The Honorable Burt Carnes, 368th Judicial District Court, Williamson County
Trial Court's Disposition:	Granted; No-Evidence Motion for Summary Judgment, Motion to Dismiss
Court of Appeals:	Third District Court of Appeals; Chief Justice Jones, Justices Pemberton and Rose. Alvie Campbell and Julie Campbell v. Mortgage Electronic Registration Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns; Wells Fargo Bank, N.A.; Stephen C. Porter; David Seybold; Ryan Bourgeois; Matthew Cunningham, and John Doe 1-100 - **03-11-00429-CV**
Court of Appeals' Disposition:	Affirmed

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Texas Government Code Section 22.001(a)(2), because the Court of appeals opinion holds differently from a prior decision from the same court of appeals and this Courts decisions;

(a) Subject-matter jurisdiction is a question of law, subject to de novo review. *Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex.2004)*

(b) *Texas Catastrophe Property Insurance Association v. Council of Co-Owner of Saida II Towers Condominium Association, 706 S.W.2d 644 (Tex. 1986).* ("because relevant cause of action derives from statute, not common law, statutory provisions are mandatory and exclusive and must be complied with in all respects'")

The Supreme Court has jurisdiction of this case under Texas Government Code Section 22.001(a)(3), because the Court of appeals committed errors of law in this case involving the construction of validity of a statute necessary to a determination of a case as this conflicts with the Courts decision in;.

(a) "Statutory provisions are mandatory and exclusive and must be complied with in all respects." e.g. *Employees Ret. Sys. of Tex. v. Blount, 709 S.W.2d 646, 647 (Tex. 1986*).

(b) "These statutes created a right not existing at common law and prescribed a remedy to enforce the right. Thus, the courts . . . [only

have jurisdiction according to the rules] provided by the statute which created the right." See, e.g., *Bullock v. Amoco Production Co., 608 S.W.2d 899, 901 (Tex. 1980).*

The Supreme Court has jurisdiction of this case under Texas Government Code Section 22.001(a)(4), because the Court of appeals committed errors of law in this case involving the construction of validity of a statute necessary to a determination of a case which possibly has or possibly could affect state revenue.

The Supreme Court has jurisdiction of this case under Texas Government Code Section 22.001(a)(6), because the Court of appeals committed errors of law that presents important issues of the states jurisprudence and of first impression to this Court that is likely to recur in future cases and therefore need correction. See Tex. Gov't Code §22.001(a)(6); Tex. R. App. P. 56.1(a)(5), (6); *Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 643 (Tex.1995)*

ISSUES PRESENTED

1. The Court of Appeals error concluded a conclusory opinion rather than an opinion in accordance to the procedural requirements of Texas Rule of Civil Procedure 166(a)(i)?
2. The Court of Appeals grossly erred in concluding a party(s) had constitutional standing to invoke the courts jurisdiction to make a claim to relief.

3. The Court of Appeals erred in concluding the Uniform Commercial Code Article 9 was applicable to this case whereas the same court previously opined the Uniform Commercial Code Article 9 is not applicable?

4. The Court of Appeals committed a gross error by opining a conclusory opinion based upon issues not brought before the court?
5. The trial court and court of appeals committed errors of common law in not properly applying law and protecting the Campbell's rights as guaranteed by the United States Constitution?
6. The Court of Appeals erred in their opinion and violated the Campbell's rights as guaranteed by the United States Constitution in violations of 18 USC §242 – Deprivation of Rights Under Color of Law?
7. The Court of Appeals erred in their opinion thus depriving Alvie Campbell and Julie Campbell the right to Due Process of Law by denying a determination of validity of a document or instrument pursuant to statutory law?

THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners, Alvie Campbell and Julie Campbell, herein ("Campbell's") pursuant to Texas Rules of Appellate Procedure, submits this Petition for Review of the decision of the Third District Court of Appeals at Austin which affirmed the trial court's decisions in this matter. As set forth in the following, this Honorable Court should grant this Petition.

I. STATEMENT OF FACTS

The memorandum opinion of the court of appeals incorrectly applies Texas Rules of Civil Procedure, 166a(i) causing grave error and thereby extending limited subject matter jurisdiction to defendants by affirming defendants no-evidence motion for summary judgment and a motion to dismiss. Defendants were allowed standing only to the degree of answering a complaint file by the Campbell's, nothing less and certainly nothing more.

The courts have misapplied Texas Rules of Civil Procedure, 166a(i) and this Court should address the serious misuse of this procedure as it affects many Texas courts and citizens across this state.

The procedures and process of this summary judgment method utilized by a party to misapply the rule thus allowing that party to obtain a false impression of jurisdictional standing to invoke the power of courts jurisdiction as this should be considered a serious matter that must be addressed. ―To establish standing, a person

must show a personal stake in the controversy. *In re B.I.V., 923 S.W.2d 573, 574 (Tex. 1996).*

In this instant suit is an outline of the method and means that defendants followed to mislead the court into believing the court had jurisdiction to hear the defendants no-evidence motion for summary judgment and motion to dismiss.

Texas Rules of Civil Procedure, 166a(i) provides that a party with standing would meet the requirement to file such no-evidence motion for summary judgment. Without standing the party has no such right and does not meet the requirements of Texas Rules of Civil Procedure, 166a(i).

When reviewing a summary judgment, we must examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *City of Keller v. Wilson, 168 S.W.3d 802, 824-25 (Tex. 2005)*.

To prevail on a traditional summary judgment motion, a movant must prove that there is no genuine issue regarding any material fact and that it is entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381 (Tex. 2004).* A party moving for summary judgment on one of its own claims must conclusively prove all essential elements of the claim. *See Rhone- Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223 (Tex. 1999)*.

Jurisdiction is the most fundamental issue for any court to decide. *Cotton v. Cotton, 57 S.W.3d 506, 509 (Tex. App. –Waco 2001, no pet.).* "Jurisdiction refers to a

court's authority to adjudicate a case. *Reiss v. Reiss, 118 S.W.3d 439, 443 (Tex. 2003).* A court must have jurisdiction to act or its acts are void. *Vance v. Davidson, 903 S.W.2d 83, 865 (Tex. App. –Houston [14th Dist] 1995, orig. proceeding).*Thus, standing is a threshold issue, and before determining the merits of a dispute, a trial court should determine whether a party has standing. *In re SSJ-J, 153 S.W.3d 132 at 134.*

The court of appeals was aware of another appeal "*In re Campbell, No. 03-11-00524-CV*" filed by the Campbell's in regards to a fabricated instrument purporting to create a claim against the Campbell's real property as both this instant case and the *In re Campbell* were opined on May, 18, 2012. The *In re Campbell* case is now before the Texas Supreme Court as No. 12-0534.

The only recourse of defense for the homeowners was to bring suit upon all known and suspected "John Doe" parties involved in an unlawful sale of the Campbell's real property. The Campbell's continue to pursue their rights to due process.

The court of appeals had jurisdiction pursuant to Texas Government Code §Sec.22.220, Texas Government Code §74.041-74.062, Texas Government Code.

II. SUMMARY OF ARGUMENT

This civil/criminal issue began when actions against Alvie Campbell and Julie Campbell being real property owners and unfavorably affected when unidentified third party's utilized an unknown instrument not provided by law or the deed of trust

to unlawfully sale Petitioner's, Alvie Campbell and Julie Campbell ("Campbell's") real property on September 7, 2010.

The memorandum opinion of the court of appeals incorrectly applies Texas Rules of Civil Procedure, 166a(i) causing grave error and thereby extending limited subject matter jurisdiction to defendants thus allowing them to file a no-evidence motion for summary judgment and a motion to dismiss.

The appellate court must "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." *Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992) (quoting Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986) (per curiam)); see also Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 288, 302 (5th Cir. 2000)* (reversing the grant of summary judgment when "reasonable and fair-minded persons" could conclude from the summary judgment evidence that the defendant was liable under ERISA for breach of fiduciary duty).

The court of appeals failed to observe Supreme Court opinions allowing the Campbell's to raise the issue of standing at any time. *Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex.2004); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000).* The court of appeals did not address a plea of standing in which the Campbell's did in record raise at the appellate level.

The Court of appeals erroneously held that the Defendants were entitled to a favorable decision of the appeal based upon Article 9, Uniform Commercial Code being a governing law to support what Defendants accomplished by utilizing a fabricated instrument purporting to create a claim against real property.

The trial court and court of appeals both failed to allow the Campbell's due process by denying to address the Campbell's pleadings in regards to Standing and argument that UCC Article 9 does not support Defendants erroneous claims. The court of appeals opined evidence assumptions in their opinion where such evidence was not introduced which in turn has upended previous case law set forth by both state and federal courts.

ARGUMENT

I. This Court must resolve conflicting Uniform Commercial Code opinions where the court of appeals has opined opposite of an opinion already opined by the same court of appeals. This Court should exercise jurisdiction to resolve the important questions that this case presents concerning the scope of procedures, statutory laws, Supreme Court Opinions and whether the same court of appeals can have contradicting or conflicting opinions of the same subject matter that affects many existing and future instant cases.

This petition presents an important core issue concerning contradictions and conflicting opinions from the same court of appeals and of other courts. Does Article 9, Uniform Commercial Code govern a deed of trust?

The court of appeals contradicted itself in regards to the deed of trust lien with two conflicting opinions in its own court, one recent, and another opinion in 2006. The court of appeals opinion conflicts with other courts opinions both state and federal. In 2006 the court of appeals opined in *Wesley Eugene Perkins v. Chase Manhattan Mortgage Corporation*, *No. 03-04-00741-CV*, that the Deed of Trust was not governed by Article 9, Uniform Commercial Code and cited;

> *However, real estate contracts are not governed by the UCC; the UCC applies only to sales of goods. See Tex. Bus. & Com. Code Ann. § 2.102 (West 1994); Gupta v. Ritter Homes, Inc., 633 S.W.2d 626, 627 (Tex. App.—Houston [14th Dist.] 1982) (cause of action under UCC was "unfounded because sales of realty . . . are not within the scope of the Code"), rev'd on other grounds, 646 S.W.2d 168 (Tex. 1983); see also Tex. Bus. & Com. Code Ann. § 9.109(d)(11) (West 2005) (chapter 9 of UCC does not apply to creation or transfer or interest in or lien on real property); Vogel v. Travelers Indem. Co., 966 S.W.2d 748,753 (Tex. App.—San Antonio 1998, no pet.) (discussing former UCC § 9.104, now § 9.109, and stating that because "Deed of Trust places a lien on real property, it is not governed by the UCC"); Long v. NCNB-Texas Nat'l Bank, 882 S.W.2d 861, 864 (Tex. App.—Corpus Christi 1994, no writ)*

In Long v. NCNB-Texas Nat. Bank, 882 SW 2d 861 - Tex: Court of Appeals, 13th Dist. 1994, the court stated;

> "*Although chapter 9 of the Business and Commerce Code regulates security interests in personal property and fixtures, it expressly omits governance over "the creation or transfer of an interest in or lien on real estate." Tex.Bus. & Comm.Code Ann. § 9.104(10) (Tex.UCC). In both parameter and underlying purpose, therefore, the notice requirement in chapter 9 evolves under jurisprudential strictures wholly irrelevant to the Property Code.*"

In Wilmer F. Tremble, et al. v. Wells Fargo Home Mortgage Inc., No. 11-41176, The United States Court of Appeals for the Fifth District cited;

> "*Texas incorporated the UCC under title 1 of the Texas Business and Commercial Code. See TEX. BUS. & 1 COM. CODE ANN. § 1.101. The UCC, however, does not govern the mortgage, a lien on real property. See TEX. BUS. & COM. CODE ANN. § 9.109(d)(11) (excluding "interest in or lien on real property"); Vogel v. Travelers Indem. Co., 966 S.W.2d 748, 753 (Tex. App. –San Antonio 1998, no pet. h.) ("Because the Deed of Trust places a lien on real property, it is not governed by the UCC.")*".

In Williams v. Countrywide Home Loans, INC., the court stated; "Article 9 of the UCC does not apply to the creation or transfer of a security interest in real property".

TEX. BUS. & COM.CODE § 9.109(d)(11); Kimsey v. Burgin, 806 S.W.2d 571, 576 (Tex.App.-San Antonio 1991, writ denied) ("Chapter 9 does not apply to the creation or transfer of an interest in or lien on real estate."); Huddleston v. Texas Commerce Bank–Dallas, 756 S.W.2d 343, 347 (Tex.App.-Dallas 1988, writ denied). The court also stated; "*Because this case involves the "creation or transfer of an interest in or lien on real property," Williams cannot recover under TEX.BUS. & COM.CODE §§ 9.101 et seq.*

However, in this instant case the court of appeals incorrectly opined that a deed of trust is governed by Article 9, Uniform Commercial Code and that a deed of trust automatically follows a note. This is clearly a contradicting and conflicting observation and this misapplication of law upended well established case law and such error required this appeal.

Texas follows the ''lien theory'' of mortgages and deeds of trust, under which the creditor or the trustee, despite granting language in the instrument, is not regarded

as the owner of the property securing the debt. *Taylor v. Brennan, 621 S.W.2d 592, 593 (Tex. 1981); NCNB Tex. Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358, 359 (Tex. App.– Dallas 1990, writ dism'd w.o.j.).* Legal title does not pass from the mortgagor, and the mortgagee receives only a lien or equitable title. *Flag–Redfern Oil Co. v. Humble Exploration Co., 744 S.W.2d 6, 8 (Tex. 1987); First Baptist Church v. Baptist Bible Seminary, 347 S.W.2d 587, 590–591 (Tex. 1961)*

In order to support a lien, there must be an underlying indebtedness. In the absence of a debt, there is no lien which can be foreclosed upon. *Easy Living, Inc. v. Cash*, *617 S.W.2d 781, 785 (Tex. Civ. App. Fort Worth 1981, no writ)*

The terms and conditions of a deed of trust must be strictly adhered to when conducting a sale of real estate. *Houston First Am. Sav., 650 S.W.2d at 768*. As such, only the lender under the deed of trust was allowed to appoint a substitute trustee and to move forward with foreclosure proceedings. *Don Alan Nicholson and Patricia Nicholson, V. Washington Mutual, F. A. F/K/A American Savings, F. A - 13-00-394-CV.*

A lien is a charge on the property of another person for the payment or discharge of a debt or obligation owed by the other person. A lien is an independent claim creating and existing as a security interest for some obligation. A lien does not confer or convey title to the other person's property. *Bankers Home Bldg. & Loan Ass'n. v. Wyatt, 139 Tex. 173, 162 S.W.2d 694 (Tex. 1942).*

A lien exists distinctly from the claim, debt, or obligation that it secures. *University Savings and Loan Ass'n. v. Security Lumber Company, 423 S.W.2d 287 (Tex. 1967).* A lien is merely an incident of the underlying claim or obligation. *Western M & I Company v. Jackman, 77 Tex. 622, 14 S.W. 305 (Tex. 1890); Inesco, Inc. v. Sears, 567 S.W.2d 827 (Tex. App. -- Beaumont 1978, writ ref'd n.r.e.).*

Liens, as legal rights, are created only by contract or by operation of law. *Horton v. Gibson, 274 S.W. 292 (Tex. Civ .App. 1925, no writ)*. Liens that arise by operation of law are broadly classified depending from the source from which they are derived. *Williams v. Greer, 122 S.W.2d 247 (Tex. Civ. App. 1938, no writ).*

When a debt is evidenced by a note and secured by a lien, the note and lien constitute separate obligations. The creditor may file suit on the note to obtain a personal judgment and later file suit on the lien if the personal judgment is not satisfied. *Taylor v. Rigby, 574 S.W.2d 833 (Tex. Civ. App. -- Tyler 1978, writ ref. n.r.e.).*

A mortgagee ordinarily has no right of possession. The mortgagor remains entitled to possession of the land and is entitled to use the land without being accountable to the mortgagee, except for waste. *State v. First Interstate Bank, 880 S.W.2d 427, 429–430 (Tex. App.–Austin 1994, writ denied); NCNB Tex. Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358, 359 (Tex. App.–Dallas 1990, writ dism'd w.o.j.).*

Generally applicable conveyancing rules govern mortgages and deeds of trust. A mortgage, deed of trust, or other contractual lien on real estate falls within the

statute of frauds. *Tex. Bus. & Com. Code Ann. § 26.01(a), (b)(4*); *West v. First Baptist Church, 71 S.W.2d*

Judgments or documents purporting to create a lien from a purported court not expressly created or established under the Texas or U.S. Constitution or not consented to by the debtor, are presumed fraudulent. For example, a document purporting to establish or assert a lien against real property and filed by a prison inmate is presumed fraudulent. *Tex. Civ. Prac. & Rem. Code Ann. §§ 12.001, 12.002; Tex. Gov't Code Ann. §§ 51.901(e) and (f).*

The deed of trust is regarded as a contract binding the mortgagor, the trustee, and the mortgagee, also referred to as the beneficiary. The deed of trust usually is executed by the mortgagor only and not the trustee and the beneficiary. If the deed of trust conflicts with the statute, the statute controls. The conditions to exercising the power of sale and the manner of exercising the sale may be made more restrictive or burdensome by contract than the statute provides. See *Ford v. Emerich, 343 S.W.2d 527 (Tex. Civ. App.—Houston 1961, writ refd n.r.e.); Fame v. Wilson, 192 S.W.2d 456 (Tex. Civ. App.—Galveston 1946, no writ).*

Although the deed of trust reads as if it were a conveyance of the title to the mortgaged property and perhaps the collateral to the trustee "in trust," Texas law recharacterizes the transaction as creating merely a nonpossessory lien on the mortgaged property in favor of the mortgagee. The mortgagee is granted a power of sale exercisable through the trustee. Neither the trustee nor the mortgagee is deemed

to have any present right of possession or legal title to the mortgaged property or collateral. *Johnson v. Snell, 504 S.W.2d 397 (Tex. 1973); Humble Oil & Refining Co. v. Atwood, 244 S.W.2d 637 (Tex. 1951*).

Additional authority on the nature of the deed of trust includes *Carroll v. Edmondson, 41 S.W.2d 64 (Tex. Comm'n App. 1931, judgm't adopted); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ refd n.r.e.); Tarrant Savings Association v. Lucky Homes, Inc., 379 S.W.2d 386 (Tex. Civ. App.—Fort Worth 1964), rev'd on other grounds, 390 S.W.2d 473 (Tex. 1965); Pioneer Building & Loan Association v. Cowan, 123 S.W.2d 726 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.); Texas Loan Agency v. Gray, 34 S.W. 650 (Tex. Civ. App. 1896, writ refd).*

While the negotiable notes themselves are personal property and may be transferred by unrecorded assignment, the negotiable quality of the note does not govern the lien securing it. The owner of a negotiable note secured by a lien on real estate shall record his interest in the lien pursuant to Tex. Local Government Code §192.001 and any subsequent secured party pursuant to Tex. Local Government Code §192.007 must record its interest in the lien.

Under the Recording Statute, an unrecorded senior conveyance is deemed "void" as to a subsequent creditor or innocent purchaser for value. *Id. at § 13.001(a). See also Permian Oil Co. v. Smith, 129 Tex. 413, 455, 107 S.W.2d 564, 570 (1937); Paris Grocer Co. v. Burks, 101 Tex. 106, 111, 105 S.W. 174, 175 (1907); Garner v.*

Boyle, 97 Tex. 464, 465, 79 S.W. 1066, 1068 (1904); Thorn v. Newsom, 64 Tex. 161, 164 (1885); McKamey v. Thorp, 61 Tex. 648, 651 (1884).

Assignment of the security instrument is not proof of ownership of the note and the naked assignment of a lien without express language as to the transfer of the note cannot support a foreclosure. *Shepard v. Boone, 99 S.W. 3d 263 (Tex.Civ.App.—Eastland 2003).*

The court of appeals published opinion involves important errors of constitution dimensions that merits correction by this Court. See TEX. R. APP. P. 56.1(a)(2),(3),(4),(6). If mere assumption that one purports to be a lawful party is sufficient without proof of standing for a court to make a determination such as the court of appeals held, then many other Texans will find themselves in precisely the same predicament as Alvie Campbell and Julie Campbell: forced to defend a lawsuit against a party whom had no standing to initiate such an action against them.

However, in this instant suit the court of appeals opined that the deed of trust is governed by Article 9 Uniform Commercial Code and that the deed of trust automatically follows the note. This is clearly a contradicting and conflicting observation and this misapplication of law upends established case law and such error required this appeal.

The due process guaranteed by the United States Constitution is the only process many Texans have to defend themselves against such third party's attempting unlawful actions against them. This is just one.

II. The court of appeals in line with the trial court erred in opinion as both "Bank Defendants" and "Attorney Defendants" by their own admissions lacked standing to invoke the trail court jurisdiction.

Both the trial court and court of appeals had jurisdiction to decide and opine an opinion based on Texas Supreme Court opinions, statutory law, procedural law, case law, and as presented both defendants lacked standing to invoke the courts jurisdiction to plead such motions.

The trail court and court of appeals failed to opine on the evidence or claims by the Campbell's in regards to defective procedures and fabricated documents. The Campbell's were denied Constitutional rights and due process of law by ignoring matters on record. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976); Cunningham v. Parkdale Bank, 660 S.W.2d 810, 813 (Tex. 1983).*

The court must look to the substance of a motion or a pleading, rather than its caption or format, to determine the nature of the filing. See *State Bar of Tex. v. Heard, 603 S.W.2d 829, 833 (Tex. 1980) (explaining that - we look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it).*

For a court to invoke its authority, the court must have been given jurisdiction by a party that has legal standing. *Tex. Natural Res. Conservation Comm'n v. IT–Davy, 74 S.W.3d 849, 855 (Tex. 2002); see Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998). Standing is a component of subject-matter jurisdiction. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445–46 (Tex. 1993); see also DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 304 (Tex. 2008) (A court has no jurisdiction over a claim made by a plaintiff without standing to assert it.)*

If a party lacks standing to bring an action, the trial court lacks subject-matter jurisdiction to hear the case. *Tex. Ass'n of Bus., 852 S.W.2d at 444–45.*

The issue of Standing focuses on the question of who may bring an action. *Patterson v. Planned Parenthood, 971 S.W.2d 439, 442 (Tex. 1998)*. The general test for standing is whether there is a real controversy between the parties that will actually be determined by the judgment sought. *Tex. Ass'n of Bus., 852 S.W.2d at 446*.

Standing to sue may be predicated upon either statutory or common law authority. *Nauslar v. Coors Brewing Co., 170 S.W.3d 242, 252 (Tex. App.— Dallas 2005, no pet.); see Williams v. Lara, 52 S.W.3d 171, 178–79 (Tex. 2001). The common law standing rules apply except when standing is statutorily conferred. SCI Tex. Funeral Servs., Inc. v. Hijar, 214 S.W.3d 148, 153 (Tex. App.—El Paso 2007, pet. denied).*

We may consider evidence that the parties have submitted and must do so when necessary to resolve the jurisdictional issues. *Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000)*

In a plea to the jurisdiction, a party may present evidence to negate the existence of a jurisdictional fact alleged in the pleadings, which we would otherwise presume to be true. *Miranda, 133 S.W.3d at 227; see also Combs v. Entertainment Publ'ns, Inc., 292 S.W.3d 712, 719 (Tex. App.—Austin 2009, no pet.).*

The U.S. Constitution and the Texas Constitution require parties to have standing to bring a claim in court, and the general test is whether there is a controversy between the parties that will actually be determined by the judicial declaration sought. *Stop the Ordinances Please v. City of New Braunfels, 306 S.W.3d 919, 925 (Tex. App.—Austin 2010, no pet.) (Citing Texas Ass'n of Bus., 852 S.W.2d at 446).*

PRAYER

For the reasons stated in this petition, Petitioners, Alvie Campbell and Julie Campbell moves this Court to grant their Petition for Review.

Respectfully submitted,

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PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, a true and correct copy of Petitioner's Petition for Review was delivered to Defendant's counsel listed below by U.S. mail:

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TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-11-00429-CV

Alvie Campbell and Julie Campbell, Appellants

v.

Mortgage Electronic Registration Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns; Wells Fargo Bank, N.A.; Stephen C. Porter; David Seybold; Ryan Bourgeois; Matthew Cunningham, and John Doe 1-100, Appellees

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 368TH JUDICIAL DISTRICT NO. 10-1093-C368, HONORABLE BURT CARNES, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Alvie Campbell and Julie Campbell appeal from the trial court's orders granting a no-evidence motion for summary judgment filed by Mortgage Electronic Registration Systems, Inc. ("MERS") and Wells Fargo Bank, N.A. and a motion to dismiss filed by Wells Fargo attorneys Stephen C. Porter, David Seybold, Ryan Bourgeois, and Matthew Cunningham (collectively "the Attorney Defendants"). We will affirm the trial court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

In order to purchase property located at 250 Private Road 947 in Williamson County, the Campbells borrowed $137,837 from American Mortgage Network, Inc. d/b/a AMNET Mortgage ("AMNET"). The loan is evidenced by a promissory note dated October 29, 2004 in the original principal amount of $137,837 payable to "Lender," which is defined as AMNET and its successors

and assigns. The note is secured by a deed of trust dated October 29, 2004, and recorded in the Official Public Records of Williamson County. The deed of trust secures repayment of the debt evidenced in the note, and for that purpose the Campbells granted and conveyed to the trustee, to hold in trust with power of sale, the property located at 250 Private Road 947. The beneficiary under the deed of trust is MERS, acting solely as a nominee for AMNET and its successors and assigns. The deed of trust states:

> [The Campbells] understand and agree that MERS holds only legal title to the interests granted by [the Campbells] in this Security Interest, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The reverse side of the note's signature page includes an endorsement signed by AMNET stating: "pay to the order of Wells Fargo Bank, N.A. without recourse." The summary-judgment evidence included the affidavit of Kyle N. Campbell, Vice President of Loan Documentation for Wells Fargo Bank, who averred that

> Wells Fargo became the holder and servicer of the Note on December 9, 2004. Since that time, Wells Fargo has remained the holder and servicer of the Note. Wells Fargo is in physical possession of the original Note, which is endorsed to Wells Fargo. The endorsement appears on the back side of the Original Note's signature page.

In August 2008, MERS assigned its interest in the deed of trust to Wells Fargo. This assignment was recorded in the Official Public Records of Williamson County on September 30, 2008.

In July 2010, counsel for Wells Fargo gave the Campbells notice of its intent to foreclose on the property securing the note, and in September 2010 the substitute trustee sold the property at a non-judicial foreclosure sale. The Campbells then sued MERS, Wells Fargo, and the Attorney Defendants, asserting a cause of action for wrongful foreclosure. The Campbells alleged that Wells Fargo lacked authority to foreclose under the deed of trust because it was not the holder of the note and because the note and deed of trust had been "bifurcated." They contended this bifurcation "rendered the secured debt unsecured," causing it to be unenforceable and, as a consequence, "the power of sale clause contained within the nullified security interest" was also unenforceable. The Campbells sought monetary damages and requested that the court set aside the sale and enter an injunction prohibiting any action that would interfere with their possession and enjoyment of the property.

Wells Fargo and MERS filed traditional and no-evidence motions for summary judgment, and the Attorney Defendants filed a motion to dismiss. The trial court granted the no-evidence motion for summary judgment and the motion to dismiss, and this appeal followed. In two issues, the Campbells contend that the trial court erred in granting those motions.

DISCUSSION

Did the trial court err in granting the no-evidence motion for summary judgment?

We review the trial court's summary-judgment rulings de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for summary judgment under rule 166a(i) must assert that, after adequate time for discovery, there is no evidence of one or more essential elements

of a claim or defense on which the adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i); *see Fort Worth Osteopathic Hosp. Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). To defeat a rule 166a(i) summary-judgment motion, the nonmovant must produce summary-judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i); *Ford Motor Co. v. Ridgway*, 135 S.W.2d 598, 600 (Tex. 2004). A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element. *Ford Motor Co.*, 135 S.W.3d at 600. More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *see also Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.2d 754, 755 (Tex. 2007). "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003) (quoting *Kindred v. Con/Chem. Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). Evidence that is so slight as to make any inference a guess is in legal effect no evidence. *Ford Motor Co.*, 135 S.W.3d at 601. If the nonmovant fails to produce more than a scintilla of evidence under that burden, there is no need to analyze whether the movant's proof satisfied the "traditional" summary-judgment burden under rule 166a(c). *Id.* at 600.

In their second issue, the Campbells contend that the trial court erred in granting the no-evidence motion for summary judgment because there were genuine issues of material fact as to whether Wells Fargo was the owner of a valid lien securing the property sold, as well as to whether the lien actually created a security interest in the property. They argue that their cause of action below was not one for wrongful foreclosure but instead was a complaint that Wells Fargo did not

have "the legal right to invoke the power of sale contained in an expired deed of trust much less not having been a proper agent for a note holder with rights to enforce" the note. In their petition, however, the Campbells alleged, under the caption "Count 1: Wrongful Foreclosure," that

> [the] foreclosure action was wrongful. The Deed of Trust is not enforceable due to that lack of ownership in the note by the Defendants and if such lawful owner of the indebtedness was to prove up a proper Note, bifurcation of the note and the security instrument has been proved by an assignment of the mortgage by an intrusive non-party that was not [a] "Holder in Due Course."

We understand the Campbells' claim in the court below to be that Wells Fargo and MERS lacked authority to foreclose on the property because (1) neither was the holder of the note, and (2) the deed of trust, by virtue of events transpiring after the note and deed of trust were executed, did not continue to create a security interest in the property. Therefore, in order to defeat the no-evidence motion for summary judgment, the Campbells were required to produce summary-judgment evidence creating a fact issue as to one of these stated bases for their allegation that the foreclosure was improper.

In their response to the no-evidence motion for summary judgment, the Campbells argued that Wells Fargo has not proven that it is the holder of the note. As an initial matter, we note that the Campbells, as plaintiffs alleging wrongful foreclosure, would have the burden of proof at trial to show that Wells Fargo was not the note's holder. *See Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.) ("To prevail in a wrongful foreclosure suit, a party must establish (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate

selling price."). In the context of a no-evidence motion for summary judgment, Wells Fargo was not required to present proof that it was the holder. Rather, the Campbells had the burden of proving this alleged defect in the foreclosure sale proceedings, i.e., that Wells Fargo was *not* the holder. To survive the no-evidence summary judgment motion, therefore, they were required to create a fact issue as to whether Wells Fargo was in fact the note's holder. They did not do so. The "evidence" attached to their response to the no-evidence motion consisted of (1) an order from a New Jersey proceeding involving unrelated parties; (2) an "exhibit" that consists of a composite of photocopies of portions of instruments purportedly related to this transaction, unsupported by any affidavit or attestation that would make it competent summary-judgment evidence; and (3) the affidavit of James McGuire, who averred that he overheard Mark Hopkins, counsel for the Attorney Defendants, tell a different trial judge in a different proceeding that a ruling in that proceeding could impact the outcome of the present case. None of this "evidence" created a fact issue as to whether Wells Fargo was the holder of the note.[1] The Campbells thus failed to produce any evidence creating a fact issue as to Wells Fargo's status as the note's holder.

We next consider whether the Campbells created a fact issue as to whether the deed of trust continued to create a valid security interest in the property. Again, it was the Campbells' burden to create a fact issue as to the invalidity of the security interest created by the deed of trust. While the Campbells did not produce any competent summary-judgment evidence in this regard,

[1] We observe that the uncontroverted summary-judgment evidence that Wells Fargo produced in connection with its traditional motion for summary judgment does establish conclusively that it was the holder of the note. This evidence included a copy of the note endorsed by AMNET to Wells Fargo proved up by the affidavit of Kyle N. Campbell, who averred that Wells Fargo became the note's holder in December 2004 and has since remained its holder and servicer.

they did point to evidence attached to Wells Fargo and MERS's traditional summary-judgment motion and argue that such evidence created a fact issue as to the validity of the deed of trust and Wells Fargo's right to foreclose on the property. Because the Campbells referenced this summary-judgment evidence in their response, the trial court could have considered it when ruling on the no-evidence motion for summary judgment. *See, e.g.*, *Dyer v. Accredited Home Lenders, Inc.*, No. 02-11-00046-CV, 2012 WL 335858, at *3 (Tex. App.—Fort Worth Feb. 2, 2012, no pet. h.) (mem. op.) (court required to ignore traditional summary-judgment evidence attached to combined summary judgment motion unless nonmovant directed trial court to that evidence in its response to no-evidence motion). In their response to Wells Fargo's no-evidence motion for summary judgment, the Campbells referred to the note, the deed of trust, and evidence of their assignments attached as evidence to Wells Fargo's traditional summary-judgment motion and asserted that, because the "transfer of the lien was not recorded into land records in Williamson County until almost four years after the alleged negotiation of the note . . . perfection was lost in the chain of title by not conforming to recordation laws of Texas." Presumably, the Campbells were referring to the fact that the note was transferred to Wells Fargo in December 2004, but the assignment of the deed of trust from MERS to Wells Fargo was not recorded in the Official Public Records of Williamson County until September 30, 2008. According to the Campbells, during the intervening time period the note and the deed of trust securing its payment became "bifurcated," and perfection of the security interest was lost, rendering its foreclosure provisions unenforceable. The Campbells' arguments do not create a fact issue as to whether there was a defect in the foreclosure proceedings. First, no "bifurcation" of the note and the deed of trust resulted from AMNET's assignment of the note to

Wells Fargo. When a mortgage note is transferred, the mortgage or deed of trust is also automatically transferred to the note holder by virtue of the common-law rule that "the mortgage follows the note." *J.W.D., Inc. v. Federal Ins. Co.*, 806 S.W.2d 327, 329-30 (Tex. App.—Austin 1991, no writ) (mortgage on real estate is said to "follow" promissory note it secures).[2] Therefore, when AMNET transferred the note to Wells Fargo, that transfer also served to transfer the deed of trust to Wells Fargo.

Second, perfection of the security interest was not lost due to the claimed "late" filing and recordation, as the Campbells appear to contend. The summary-judgment evidence shows that the deed of trust was filed and recorded in the Official Public Records of Williamson County on November 5, 2004, approximately one week after it was executed by the Campbells. Re-recordation was not required when the note was transferred to Wells Fargo in December of that year. MERS is a recognized "book entry system." *See* Tex. Prop. Code Ann. § 51.0001(1) (West 2007) ("book entry system" means national book entry system for registering beneficial interest in security interest that acts as nominee for grantee, beneficiary, owner, or holder of security instrument and its successors and assigns). The MERS system is an electronic mortgage registration and clearinghouse that tracks beneficial ownerships in, and servicing rights to, mortgage loans. *See In re Mortg. Elec. Registration Sys. (MERS) Litig.*, 659 F. Supp. 2d 1368, 1370 (J. P. M. L. 2009). When, as here, the

[2] In the context of personal property, this rule has been codified in section 9.203(g) of the business and commerce code. *See* Tex. Bus. & Com. Code Ann. § 9.203 cmt. 9 (West 2011) ("Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security or lien."). The fact that the rule has not been similarly codified as to real property does not diminish the force of the common-law real-property rule.

deed of trust names MERS as the nominee for the lender and its successor and assigns and the deed of trust is recorded in the local real-property records with MERS as the named beneficiary, MERS remains the mortgagee of record if the note is transferred between MERS members, and there is no requirement that the deed of trust be re-recorded each time it is transferred. *See Knighton v. Merscorp, Inc.*, 300 F. App'x 285, 286 (5th Cir. 2008) ("MERS members pay a one-time and nominal fee for each registered mortgage. With MERS as the permanent record mortgagee, rights to the mortgage loan can be bought and sold without any changes to the public land records."). When the note was transferred from AMNET to Wells Fargo in December 2004, MERS became the nominee for Wells Fargo and, consequently, there was no requirement that the deed of trust be re-recorded.

To the extent the Campbells argue that the assignment of the deed of trust from MERS to Wells Fargo in August 2008 was invalid, or that the involvement of MERS in the transaction somehow rendered it ineffective to preserve Wells Fargo's right to foreclose on the property, these arguments also fail. The role of MERS was clearly established in the deed of trust:

> Borrower understands and agrees that MERS holds any legal title to the interests granted by Borrower in this Security Interest, but, if necessary to comply with the law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender, including but not limited to, releasing and canceling this Security Interest.

Under Texas law, where, as here, a deed of trust expressly grants MERS the power of sale, then MERS has that power. *Athey v. MERS*, 314 S.W.3d 161, 166 (Tex. App.—Eastland 2010, pet. denied). MERS was the nominee for AMNET and its successors and assigns, which includes Wells

Fargo. MERS had the authority to transfer the rights and interests in the deed of trust to Wells Fargo. When MERS transferred the deed of trust to Wells Fargo, Wells Fargo obtained all MERS's rights and interests in the deed of trust, including the power to foreclose on the property. As in *Athey*, the mortgage documents provide for the use of MERS, and those provisions are enforceable to the extent provided by the terms of the documents. MERS's actions in this transaction were consistent with both the note and the deed of trust. MERS's involvement in these foreclosure proceedings does not render them defective. The Campbells have failed to raise a genuine issue of material fact regarding Wells Fargo's non-judicial foreclosure on the property.

With regard to MERS, the no-evidence summary judgment was proper because there was no evidence that MERS participated in the foreclosure sale. Rather, it had already assigned the deed of trust to Wells Fargo, and the foreclosure sale was conducted by Wells Fargo. We overrule the Campbells' second issue.

Did the trial court err in granting the Attorney Defendants' motion to dismiss?

In their petition, the Campbells did not allege a separate cause of action against the Attorney Defendants, but instead appeared to base their claim for damages on the Attorney Defendants' participation in what the Campbells asserted was a wrongful foreclosure. The Attorney Defendants filed a motion to dismiss based on attorney immunity from suit with regard to claims against them. The trial court granted the Attorney Defendants' motion to dismiss.

An attorney enjoys "qualified immunity," with respect to non-clients, for actions taken in connection with representing a client in litigation. *See, e.g.*, *Butler v. Lilly*, 533 S.W.2d 130, 131-34 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd). This qualified immunity generally

applies even if conduct is improper in the context of the underlying lawsuit. *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied) ("Under Texas law, attorneys cannot be held liable for wrongful litigation conduct."). An attorney's conduct, even if frivolous or without merit, while potentially sanctionable by the court, is not independently actionable if the conduct is part of the discharge of the lawyer's duties in representing his client. *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 441 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Bradt v. West*, 892 S.W.2d 56, 71-74 (Tex. App.—Houston [1st Dist.] 1994, writ denied). A lawyer's protection from liability arising out of his representation of a client is not, however, without limits. *See McCamish, Martin, Brown & Loeffler v. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999). For example, a cause of action could exist against an attorney who knowingly commits a fraudulent act outside the scope of his legal representation of his client. *See Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ). If a lawyer participates in independently fraudulent activities, his action is "foreign to the duties of an attorney." *Id.* Thus, a lawyer cannot shield his own fraudulent actions from liability simply on the ground that he is an agent of his client. *Id.*

In their motion to dismiss, the Attorney Defendants asserted that they were immune from suit because they could not be sued by the Campbells for actions taken within the scope of their representation of Wells Fargo. The Attorney Defendants were retained by Wells Fargo to assist in the foreclosure of the property located at 250 Private Road 947. Attached to the motion to dismiss was the affidavit of Stephen Porter, who averred that the Attorney Defendants had no contact with the Campbells that was not in their capacity as "legal counsel for Wells Fargo in an adverse

relationship with Alvie Campbell and Julie Campbell." The Campbells did not controvert the Porter affidavit, nor did they produce evidence or allege that the Attorney Defendants had any contact or communication with them that was not in their capacity as counsel for Wells Fargo assisting with the foreclosure proceedings. Neither the Campbells' petition nor their response to the motion to dismiss alleged that the Attorney Defendants committed any wrongful acts outside of the foreclosure proceedings. Moreover, we have already concluded above that the foreclosure proceedings were not defective in any discernable way. We hold, therefore, that the trial court did not err in dismissing the Campbells' claims against the Attorney Defendants. *See Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 408 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (affirming trial court's dismissal of claims against attorney on ground that because of attorney's immunity from suit, plaintiff failed to allege claim or plead cause of action for which relief could be granted). We overrule the Campbells' first appellate issue.

CONCLUSION

Having overruled the Campbells' two appellate issues, we affirm the trial court's order granting Wells Fargo and MERS's no-evidence motion for summary judgment and its order dismissing the Campbells' claim against the Attorney Defendants.

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J. Woodfin Jones, Chief Justice

Before Chief Justice Jones, Justices Pemberton and Rose

Affirmed

Filed: May 18, 2012

519 S.W.2d 673 (1975)

Rosendo ARMENTA et ux., Appellants,

v.

W. V. NUSSBAUM, Appellee.

No. 925.

Court of Civil Appeals of Texas, Corpus Christi.

February 27, 1975.
Rehearing Denied March 13, 1975.

674 *674 Mark S. Levin, Alice, for appellants.

Charles E. Hamilton, Brownsville, for appellee.

675 *675 **OPINION**

NYE, Chief Justice.

This is a suit to set aside a trustee's sale and to remove the trustee's deed as a cloud on plaintiffs' title. Appellants contend that Article 3810, Vernon's Tex.Rev.Stat.Ann. (1966) is unconstitutional on its face because it does not require personal notice and a hearing and is, therefore, in violation of plaintiffs' constitutional rights under the 14th Amendment of the United States Constitution as to due process of law. The case was submitted to a jury on special issues with the jury returning a verdict for the defendant. The trial court entered judgment for defendant dissolving the temporary injunction heretofore granted to the plaintiffs and awarded defendant title and possession of the premises in question. From this judgment, appellants Armentas have perfected their appeal.

On September 21, 1972, Rosendo **Armenta** and Rosie **Armenta** hereinafter referred to as plaintiffs purchased a house from Florence Barron. The plaintiffs assumed the unpaid balance due on a promissory note in the sum of $6,500.00, made payable to J. S. Gleason, Jr., as administrator of Veterans Affairs. The note was secured by a deed of trust to D. W. Nash as trustee.

The plaintiffs contemporaneously executed a second lien deed of trust to D. D. Henderson, trustee, securing a note payable to Florence Barron in the sum of $2,892.45 to be paid in monthly installments of $25.16, beginning November, 1972. This lien was subordinate to that lien securing the note payable to J. S. Gleason.

The transcript shows that written notice was sent to plaintiffs January 9, 1973, advising them that defendant W. V. **Nussbaum** had purchased the real estate lien note on the property and had received an assignment of the vendor's lien and deed of trust securing the same. The letter stated that the January 1, 1973 payment had not been received and advised the plaintiffs of the address to which all payments were thereafter to be made. On January 31, 1973, defendant again sent written notification to plaintiffs, this time by certified mail, advising that the plaintiffs' real estate lien note was past due and that all payments on the note be brought to date by February 10, 1973, so as to avoid legal procedures. The record shows that plaintiffs received such notice as Mrs. **Armenta's** signature appears on the return receipt.

On February 28, 1973, plaintiffs were again advised by certified mail, this time by Brownsville Title Company, that the holder of the note is William V. **Nussbaum**; that **Nussbaum** had advised them that the note was in default; that the property will be posted for a foreclosure on Tuesday, April 3, 1973, as indicated on the enclosed copy of the trustee's sale; and that if they did not wish their property to be sold at foreclosure to contract Mr. **Nussbaum**. This also was shown to be received by plaintiffs as their signatures appear on the return receipt. There appears nothing in the record showing that any payment by plaintiffs was made after January 1, 1973, nor was there any attempt by plaintiffs to cure such problem of their default.

On April 3, 1973, the trustee's sale took place. D. D. Henderson, as trustee, sold and conveyed to defendant W. V. **Nussbaum** said property in question.

The plaintiffs then brought suit against defendant **Nussbaum** seeking judgment setting aside the trustee's sale and removing the trustee's deed as a cloud on their title. Plaintiffs further sought judgment against the defendant for exemplary damages in the sum of $15,000.00 and asked that the trial court declare Art. 3810 unconstitutional on its face or in the alternative hold that the procedure utilized by defendant violated plaintiffs' constitutional rights.

The case was tried before a jury and all issues of fact were submitted on special issues. The jury found that: **Nussbaum** did not
676 conceal significant facts from plaintiffs *676 in connection with the foreclosure sale on April 3, 1973; that **Nussbaum** used means reasonably calculated to give plaintiffs actual notice that he was the transferee of the second lien note from plaintiffs to Florence Barron; that plaintiffs had actual notice that **Nussbaum** was the transferee of the second lien note from plaintiffs to Florence Barron and that he would require payment thereof; that **Nussbaum**, his agent, or attorney used means reasonably calculated to give Plaintiffs actual notice that their note was in default and their property would be posted for foreclosure; that the property in question was not sold for a grossly inadequate consideration at the trustee's sale on April 3, 1973; and that the reasonable monthly rental value of the premises in question during the period May 1, 1973, to April 1, 1974, is $130.00 per month. The trial court entered judgment accordingly for the defendant **Nussbaum** that he receive $1,430.00 as reasonable rental value of the premises from plaintiffs for the time plaintiffs were in possession without making payments; ordered the temporary injunction originally granted to the plaintiffs dissolved; and granted **Nussbaum** title and possession of the premises in question.

The plaintiffs failed to bring forward a statement of facts and none is filed in this case. It must be presumed that sufficient evidence was introduced to support all of the findings of the jury in absence of a statement of facts. Canion v. County of Jackson, 507 S.W.2d 814 (Tex.Civ.App.-Corpus Christi 1974, no writ); Red Arrow Freight Lines, Inc. v. Howe, 480 S. W.2d 281 (Tex.Civ.App.-Corpus Christi 1972, writ ref'd n. r. e.); Lane v. Fair Stores, 150 Tex. 566, 243 S.W.2d 683 (1951); City of Corpus Christi v. Gilley, 458 S.W.2d 124 (Tex.Civ.App.-Corpus Christi 1970, writ ref'd n. r. e.). Without a statement of facts appellate courts are limited in their review to generally those complaints involving (1) errors of law; (2) erroneous pleadings or rulings thereon; (3) an erroneous charge; (4) irreconcilable conflicts of jury findings; (5) summary judgments; or (6) fundamental error. Since appellants' complaint does not involve any of the first five (5) listed problems, we must assume appellants are complaining of fundamental error. Mercer v. Mercer, 503 S.W.2d 395 (Tex.Civ.App.-Corpus Christi 1973, no writ). It has been held that fundamental error is an error which directly and adversely affects the interest of the public generally as that interest is declared by the statutes or constitution of our State. Fundamental error can be reviewed on appeal even though not assigned. Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979 (1947) and McCauley v. Consolidated Underwriters, 157 Tex. 475, 304 S.W.2d 265 (1957).

Appellants' sole assignment of error is that the trial court erred in failing to hold that the procedure whereby plaintiffs' property was sold pursuant to Article 3810 violated plaintiffs' constitutional rights because they had never executed a valid consent the such procedure. The plaintiffs do not contend that they have a real defense to the foreclosure sale, only that they were denied the opportunity to contest the sale prior to the time it was held. During oral argument, the court asked the plaintiffs' attorney if there was any defense that they had to the sale that they were prevented from asserting in the trial court. Plaintiffs' attorney answered "No!"

Although it is essential to insure the collection of debts, the procedure for enforcing those commercial obligations is subject to the countervailing constitutionally protected interest of the individual. Even if a valid debt exists, the state cannot establish arbitrary or unfair procedures for the enforcement of that debt because of the procedural due process requirement of the Fourteenth Amendment. While procedural due process does not invalidate the underlying obligation, it does demand that the
677 obligation be pursued fairly. Article *677 3810, Tex.Rev.Civ.Stat.Ann. (1966), provides as follows:

> "All *sales of real estate made under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated.* Where such real estate is situated in more than one county then notices as herein provided shall be given in both or all of such counties, and the real estate may be sold in either county, and such notice shall designate the county where the real estate will be sold. Notice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said county or counties, one of which shall be made at the courthouse door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the courthouse door of each county in which said real estate may be situated, or the owner of such real estate may, upon written application, cause *the same to be sold as provided in said deed of trust or contract lien.* Such sale

> shall be made at public vendue between the hours of 10 o'clock a.m. and 4 o'clock p.m. of the first Tuesday in any month. When any such real estate is situated in an unorganized county, such sale shall be made in the county to which such unorganized county is attached for judicial purposes. Acts 1889, p. 143; G. L. vol. 9, p. 1171; Acts 1st C.S.1915, p. 32; Acts 1915, p. 84." (Emphasis added.)

The due process clause of the Fourteenth Amendment of the United States Constitution only prohibits "State action" as opposed to private action by providing that ". . . nor shall any State deprive any person of life, liberty, or property without due process of law." Although by private action, a party is not prohibited from seeking declaratory type relief before foreclosure, such individual right does not by constitutional law or by statute carry with it any obligation to give the debtor an opportunity to be heard as a matter of right on the probable validity of the underlying claim prior to the sale. Where such self-help action such as under a deed of trust sale does not constitute state action but rather only an individual invasion of individual rights, the alleged wrong cannot be remedied under the auspices of the Fourteenth Amendment.

Plaintiffs claim that such "statutory remedy" is carried out under color of state law. The concept of state action as required by the Fourteenth Amendment has been found to be virtually synonymous with the "under color of state law" requirement. See United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966).

The test then as to what constitutes "state action" is not merely that of state involvement, but rather significant state involvement. Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973); Moose Lodge v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Article 3810 delineates the rights of parties to a deed of trust agreement which reserves a power of sale in a trustee in the event of default. Where a deed of trust agreement complies with Article 3810, and a sale is made in accordance with the statute (notice and location of sale requirements), then a transfer of title to real estate is effected. Article 3810 recognizes the power of sale vested in a trustee by a deed of trust agreement, but that power exists only by virtue of the private contractual arrangements between the parties to the agreement. The power is not "possessed by virtue of the state law" and the trustee is not "clothed with the authority of state law". Article 3810 merely establishes a minimum level of requirements on powers of sale conferred or granted by a private contract.

Article 3810 is not a statutory remedy as plaintiffs contend. It was in fact enacted for the protection of the debtor. See Wylie v.
678 Hays, 114 Tex. 46, 263 S.W. 563 *678 (Tex.Comm'n App.1924, opinion adopted). It seemed apparent that both before and after 1889, the year in which the Texas Statute became a law, unrestricted powers of sale were being widely considered as an evil that was calculated to work against the public welfare, and were being progressively dealt with as such. There were instances reported in which deeds of trust dispensed with notice of sale, or provided for a place of sale beyond the boundaries of the county where the land was situated or left the selection of the place of sale to the trustee or mortgagee. These abuses and others called for the enactment of Article 3759 (Article 3810's predecessor).

The plaintiffs in their brief contend that the cases of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) and Hall v. Garson, 468 F.2d 845 (5th Cir. 1972) control this case. We disagree, such cases being clearly distinguishable from the case at bar. In Fuentes, supra, the court was dealing with prejudgment replevin statutes of Florida and Pennsylvania which gave the States the power to seize goods before final judgment to protect security interests of creditors. The Statutes were held unconstitutional because they denied the mortgagors the right or opportunity to be heard before chattels were taken from their possession. There was no question that there was state involvement in Fuentes. But we do not read Fuentes so broadly that it encompasses all private actions between individuals pursuant to their consensual undertakings. In Hall, supra, the court had before it the question of whether a statute giving a landlord a lien on personal goods of tenants and authorizing a landlord to enforce the lien by peremptory seizure of property was constitutional. Again, there was no question of state involvement in that such statute clothed the apartment owner with a clear statutory authority to enter into another's home and seize property therein without the individual's consent, waiver or notice. This makes his actions those of the state.

The fact that the trustee in the case at bar acted with knowledge of Article 3810 and said deed of trust had terms complying with Article 3810 is not sufficient to establish significant state action or involvement. Statutes and laws regulate many, many forms of our private activities. To hold that any conduct which conforms to state law is "state action" would subject nearly all private activities to the constitutional limitations of the Fourteenth Amendment. See Adams v. Southern California First National Bank, supra, for example.

679 The question before us as to "State Involvement" is analogous to those situations challenging the constitutionality of the self-help provisions of the Texas version of the Uniform Commercial Code, Section 9.503.[1] Six circuit courts of appeals to date

have sustained the constitutionality of Section 9.503 self-help repossession without notice or hearing, finding insufficient state action to raise a due process question. Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Gibbs v. Titelman, 502 F. 2d 1107 (3rd Cir. 1974); Shirley v. State National Bank of Connecticut, 493 F.2d 739 (2nd Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Calderon v. United Furniture Company, 505 F.2d 950 (5th Cir., opinion filed Dec. 30, 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974); Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973). The courts in the above cases criticized the fact that the appellants were trying to have them hold that the self-help repossession which takes place upon the default on a *private contract providing for such repossession* is an act under color of state law and thus constitutes state action within the scope of the Fourteenth Amendment. Turner v. Impala Motors, supra. *679 These courts concluded that it was clear that the state did not exert any control or compulsion over the creditor's decision to repossess.

Such situations are directly applicable to the case at bar. Here, the creditor (**Nussbaum**) simply relied upon the terms of the deed of trust agreement executed by the appellants pursuant to the private right of contract and did not seek to invoke any state machinery to his aid. The procedure challenged here involves only private actions arising out of the express written agreements between the parties.

There appears to be a further reason why plaintiffs cannot complaint that their Fourteenth Amendment rights were violated. In order to complain about the constitutionality of a statute (Article 3810), the facts must be such so as to invoke the constitutional question, (assuming significant state involvement exists). But that is not the case here. We cannot and will not set aside the acts of the legislature in a suit of one who does not suffer from the alleged unconstitutional provisions but merely assumes to champion the alleged wrongs of others. See Oil Well Drilling Co. v. Associated Indemnity Corp., 153 Tex. 153, 264 S.W.2d 697 (1954); Houston Oil Co. of Texas v. Lawson, 175 S.W.2d 716 (Tex.Civ.App.-Galveston 1943, writ ref'd); Corey v. City of Dallas, 492 F.2d 496 (5th Cir.1974).

We pause to note, however, the actual effect of striking down such a statute in these cases in which the sale under a deed of trust is challenged as violating a debtor's constitutional rights. If the statute (Article 3810) were held unconstitutional, a real disservice would be done to the debtor. It would not terminate or eliminate foreclosure by an exercise of power of sale. It would only eliminate the restrictions on that power of sale contained in the statute that are included for the benefit of the debtor. We would still have foreclosure pursuant to the contractual power of sale by consenting parties just as we had prior to the enactment of Article 3759 (Article 3810's predecessor). The end result would be less protection for the debtor, together with more expensive credit. We would obtain the opposite result to that which we are trying to and should try to attain.

The Courts of Texas have always sought to protect the individual debtor's rights against abuses while keeping in mind that the creditor also has rights that need protecting. In Crow v. Health, 516 S.W.2d 225, decided by this Court in November, 1974, we held under the facts of that case that since the mortgagee did not give the requisite notice to the mortgagor, such irregularity coupled with inadequacy of consideration were sufficient to set aside the sale. See also other cases from this Court. Kolbo v. Blair, 379 S.W.2d 125 (Tex.Civ.App.-Corpus Christi 1964, writ ref'd n. r. e.); Prudential Corporation v. Bazaman, 512 S.W.2d 85 (Tex.Civ.App.— Corpus Christi 1974, no writ); Rio Delta Land Company v. Johnson, 475 S.W.2d 346 (Tex.Civ.App.-Corpus Christi 1971, writ ref'd n. r. e.). The remedy of foreclosure under a deed of trust is a harsh remedy and should not exist without its limitations and safeguards provided by the Statute (Article 3810). Plaintiffs in essence have asked that we strike down such limitation on the power of sale, thus leaving the debtor in a very unfavorable position. This, we cannot do. We hold that Article 3810 is not unconstitutional as contended.

The judgment of the trial court is affirmed.

[1] Section 9.503, Vernon's Tex.Bus. & Comm. Code Ann., reads in relevant part:

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."

WestlawNext

RELATED TOPICS

Trespass to Try Title
Proceedings
Recovery of the Fee Simple Estate

Nature and Incidents
Enactment of the Various Lien Statutes

Appeal and Error
Review
Legal Effect of the Judgment

Bankers Home Bldg. & Loan Ass'n v. Wyatt
Commission of Appeals of Texas, Section B. | June 3, 1942 | 139 Tex. 173 | 162 S.W.2d 694 *(Approx. 5 pages)*

BANKERS HOME BLDG. & LOAN ASS'N et al.

v.

WYATT

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Action by R. O. Wyatt against the Bankers Home Building & Loan Association and others. Judgment for plaintiff was affirmed by Court of Civil Appeals, 153 S. W.2d 216, and defendant brings error.

Judgment of Court of Civil Appeals and judgment of district court reversed and judgment rendered.

West Headnotes (7)

Change View

1 **Trespass to Try Title** Judgment
Where judgment adjudicating to plaintiff title and possession of property purchased by plaintiff at foreclosure of a paving lien was not ambiguous, judgment was required to be construed as it had been written.

6 Cases that cite this headnote

2 **Trespass to Try Title** Judgment
Where terms of judgment adjudicating to plaintiff title and possession of property purchased by plaintiff upon foreclosure of a paving lien clearly showed what was finally determined by the trial court, there was no occasion for resort to the pleadings or to other parts of the record.

5 Cases that cite this headnote

3 **Appeal and Error** Pleadings and Issues, Evidence, and Verdict or Findings to Sustain Judgment, and Conformity Thereto
Supreme Court would assume on appeal that the issues determined by a judgment were within the scope of the pleadings in absence of any showing to the contrary.

1 Case that cites this headnote

4 **Judgment** Admissibility in General
A party who seeks to limit meaning and effect of a judgment by confining it to the scope of the pleadings should offer the pleadings in evidence.

5 **Liens** Nature and Incidents in General
A lienholder does not have title to the land, but for some purposes and within the meaning of certain statutes, a lien is not classified as an "interest in

land".

4 Cases that cite this headnote

6 **Trespass to Try Title** Judgment

The judgment adjudicating title and possession of realty purchased upon foreclosure to foreclosing pavement lienholder by use of the words "right, title and interest" preceded by the word "all" and followed by the phrase "now and heretofore held or claimed by the aforesaid defendants", disclosed trial court's intention to affect by the judgment every claim defendants might have asserted in the premises, and hence the judgment extinguished the lien of prior owner's judgment creditor who had filed a disclaimer in the suit, so that purchaser upon judgment creditor's subsequent execution proceeding against the land as that of prior owner, acquired no title against lienholder's grantee.

7 Cases that cite this headnote

7 **Trespass to Try Title** Identity and Description of Property

In "trespass to try title", evidence established that lot described in prior deeds and judgments by which defendant established a title superior to that of plaintiff was the same lot as that for which plaintiff sued, so as to entitle defendant to judgment.

Attorneys and Law Firms

***695** Jules Damiani, of Galveston, and ***174** B. C. Clark, John Broughton, and Walter C. Clemons, all of Houston, for plaintiff in error.

Able & Stokes, of Houston, for defendant in error.

Opinion

SMEDLEY, Commissioner.

The trial court's judgment in favor of defendant in error against plaintiffs in error for the title and possession of an ***175** improved lot in the City of West University Place in Harris County, with allowance of $3,210 in favor of plaintiffs in error Reynolds and wife for the value of improvements made in good faith, was affirmed by the Court of Civil Appeals. 153 S.W.2d 216, 218.

H. B. Schlesinger was the common source of title, the lot having been conveyed to him March 25, 1930. Marine Bank & Trust Company, on April 25, 1929, procured a judgment against Schlesinger and others and on December 24, 1930, caused an abstract of the judgment to be filed for record in the office of the county clerk of Harris County, thereby fixing a lien against the lot. A fourth execution issued on the said judgment was levied on the lot as the property of Schlesinger and it was sold thereunder and conveyed by the sheriff to defendant in error Wyatt on March 1, 1938. The foregoing is defendant in error's chain of title.

Plaintiffs in error claim title as follows: A paving lien against the lot was foreclosed by judgment rendered December 12, 1932, in a suit in which O. K. Willborg was plaintiff and H. B. Schlesinger and others were defendants, and at sheriff's sale under the judgment of foreclosure the lot was sold and conveyed to O. K. Willborg on February 7, 1933. In another suit in district court of Harris County brought by O. K. Willborg against Ples B. Kennerly, Marine Bank & Trust Company and others, judgment was rendered on December 21, 1935, divesting out of the defendants and vesting in the plaintiff O. K. Willborg all right, title and interest held or claimed by the defendants in and to the said lot. Willborg conveyed the lot to plaintiffs in error Reynolds and wife. Plaintiff in error Bankers Home Building & Loan Association is the owner of a note,

executed by Willborg and assumed by Reynolds, secured by deed of trust in renewal of a mechanic's lien note and contract.

The controlling question in the case is whether the judgment rendered in district court in the suit by Willborg against Ples B. Kennerly, Marine Bank & Trust Company and others cut off or extinguished Marine Bank & Trust Company's judgment lien against the lot. The Court of Civil Appeals held that "the judgment in that case did not impair to the least extent the abstract of judgment lien held by Marine Bank and Trust Company against the property in controversy."

***176** The contention made by defendant in error and sustained both by the trial court and by the Court of Civil Appeals is that the judgment rendered in the cause styled Willborg v. Kennerly et al. was a judgment in a trespass to try title suit and did not affect the judgment lien, because such suit litigates only the question of title and the right of possession and does not dispose of or attempt to adjudicate a lien. In our opinion both courts erred in sustaining the contention.

1 2 The judgment is not ambiguous and is to be construed as it is written. Since the terms of the judgment clearly show what was finally determined by the court, there is no occasion for resort to the pleadings or to other parts of the record. Permian Oil Co. v. Smith, 129 Tex. 413, 448, 449, 460, 467-469, 73 S.W.2d 490, 107 S.W.2d 564, 111 A.L.R. 1152; Freeman on Judgments, 5th Ed., Vol. 1, pp. 132-136, Secs. 76, 77.

Prior to the institution of the suit by Willborg against Kennerly and others and the rendition of the judgment therein Marine Bank & Trust Company held a judgment lien against the lot. The judgment in Willborg's suit against Kennerly and others names the bank and trust company as one of the parties defendant, recites that all defendants have been duly served with citations, that each of the defendants has filed disclaimer, that the court after hearing the evidence finds that the plaintiff Willborg is the owner in fee simple of the lot, describing it, and is justly entitled to title and possession thereof, and ***696** thereupon orders, adjudges and decrees that "all right, title and interest now and heretofore held or claimed by the aforesaid defendants in and to the land and premises aforesaid be and the same is hereby divested out of said defendants and is hereby vested in plaintiff O. K. Willborg". This clear, comprehensive language, in our opinion, is an adjudication by the court that the plaintiff's right and title to the lot is paramount and superior to any right or claim of any character that the defendants or any of them may have or assert in or to the lot and that it is the intention of the court by the judgment to invest the plaintiff, as against the defendants, with the full, unincumbered fee-simple title.

Defendant in error assumes from the form of the judgment that the suit was a formal action of trespass to try title. He cites cases which hold that a mortgagee has no right of possession and cannot recover in trespass to try title, and ***177** draws the conclusion that, because the lienholder does not have title and has no right of possession, his lien is not, and cannot be, in any way affected or impaired by a judgment in an action of trespass to try title.

3 4 The petition in the case was not offered in evidence. The only pleading offered, if it is correctly described as a pleading, was the disclaimer filed by Marine Bank & Trust Company. To it defendant in error objected because it was not listed in the abstract of title filed by plaintiffs in error. In the absence of evidence as to what the pleadings were it must be assumed that the issues or questions determined by the judgment were within the scope of the pleadings. The petition may have been a formal petition in trespass to try title against the party defendant in possession or claiming title, with added allegations that certain defendants, including Marine Bank & Trust Company, were asserting liens against the property that were inferior and subordinate to plaintiff's title and with prayer that plaintiff's title be adjudged to be superior to the claims of all of the defendants and that all rights, titles and interests claimed or asserted by them be divested out of them and vested in the plaintiff. A party who

seeks to limit the meaning and effect of a judgment by confining it to the scope of the pleadings should offer the pleadings in evidence.

It is not an uncommon practice for a plaintiff in an action of trespass to try title to join as defendants all persons who assert liens against or claims of any character in or to the premises, to the end that he may by the judgment obtain not only title and the right to possession, but also a clear and unincumbered title. If a defendant is the holder of an existing lien to which the plaintiff's title is subject or subordinate, proof that there is such lien will not defeat the plaintiff's title and right to possession, but it will cause the judgment, if correctly drawn, to provide that the plaintiff's recovery of title and possession is subject to the lien. Thus a valid existing lien may afford a partial defense against the plaintiff's suit for title in that it may prevent the recovery of an unincumbered title. If Marine Bank & Trust ***178** Company had not disclaimed in the suit by Willborg against Kennerly et al. and if the court had determined that Willborg's title was subordinate or subject to the bank and trust company's lien, the judgment awarding title and possession to Willborg would have provided for the continued existence of the lien. It contains no such provision, but on the contrary it divests Marine Bank & Trust Company of all right, title and interest which it holds or claims in or to the premises and vests the same in the plaintiff Willborg.

The conclusions stated are not inconsistent with Burks v. Burks, 141 S.W. 337, 339, application for writ of error refused. That case and the authorities which it cites hold that a mortgagor's right to recover title and possession against the mortgagee does not depend upon the extinction of the lien held by the mortgagee. They do not hold that the lien cannot be extinguished by a judgment in which the mortgagor recovers title and possession.

5 6 A lienholder does not have title to the land. For some purposes and within the meaning of certain statutes, a lien is not classified as an interest in land. And although the word “right” is broad enough to embrace whatever may be lawfully claimed, it has been held in another state that a judgment lien is not a proprietary right in land, but is merely a right given the judgment lien creditor to levy on land of the judgment debtor for the purpose of satisfying the judgment to the exclusion of any right which may have accrued to others since the attachment of the lien. Jones v. Hall, 177 Va. 658, 15 S.E.2d 108, 110. It is our opinion, however, that the judgment in the case of Willborg v. Kennerly et al., in its use of all three words, right, title and interest, preceded by the ***697** word “all” and followed by the phrase “now and heretofore held or claimed by the aforesaid defendants”, clearly discloses the intention of the court to embrace within and affect by the judgment every claim of whatever character the defendants may have had or asserted in, to or concerning the premises. We conclude that the judgment cut off and extinguished the lien and that defendant in error acquired no title under the foreclosure sale thereafter attempted to be made.

Defendant in error makes the further contention that the lot or tract of land described in the judgments and deeds through which plaintiffs in error claim title is not the same lot or tract as that for which he sues.

The petition describes the land sought to be recovered as the north half of lot 10 in block 29, West University Place Addition in the City of West University Place in Harris County. The sheriff's deed to defendant in error, executed in the attempted foreclosure sale under the judgment lien, contains the ***179** same description. The deed to Schlesinger, the common source of title, describes one of the lots conveyed as lot 10-A, block 29, West University Place Addition, Harris County, and the two judgments and the deeds in plaintiffs in error's chain of title describe the property as lot 10-A in block 29, University Park Realty Company's subdivision of said block of record in book 9, page 13, of the plat records of Harris County.

The trial court's findings with respect to the identity of the property are confusing and in a measure contradictory. At one place in them the statement appears that the court has “concluded as a proven fact that for all practical purposes lot 10-A is the north

half of lot 10, and is in fact the same land with respect to which this suit has been filed." Elsewhere in the findings the trial court states that it holds that the designation lot 10-A, block 29 in the second plat "does not in and of itself identify the lot as being the north half of lot 10, block 29", and that it finds as a matter of fact and as a matter of law that the deed from Willborg to Reynolds did not purport to convey the north one-half of lot 10, block 29.

7 Plaintiffs in error by assignments and propositions in their brief filed in the Court of Civil Appeals, challenging those parts of the trial court's findings with respect to the identity of the lots that are unfavorable to them, present the contention that the undisputed evidence shows that lot 10-A, block 29, described in the two judgments and in the deed from Willborg to Reynolds, is the same lot or tract of land as the north half of lot 10 in block 29 described in defendant in error's petition and in the sheriff's deed to him. This question was not discussed in the opinion of the Court of Civil Appeals, its judgment of affirmance being rendered on its decision that the judgment in the suit to which Marine Bank & Trust Company was a party did not impair the judgment lien. It is our opinion, after a careful examination of the evidence, including the testimony of the witnesses, the two plats, and the documentary evidence, that it conclusively appears therefrom that lot 10-A, block 29, as shown by University Park Realty Company's replatting and renumbering of certain of the lots in West University Place Addition is the same lot or tract of land as the north half of lot 10, block 29, of West University Place Addition described in the petition in this case.

It is sufficient to state in brief summary of the substance and effect of the evidence that it demonstrates conclusively ***180** that, after West University Place Addition had been divided into blocks and lots and a plat of the addition filed for record, University Park Realty Company became the owner of many of the lots 100 by 150 feet in dimension, including lot 10, block 29 in that addition, and caused to be made and filed for record a new plat by which each of the lots owned by the company was divided into two lots 50 feet by 150 feet in size and the lots renumbered, so that what had been the north half of the lots on the original plat was designated by its number given on the original plat with the letter "A" added and what had been the south half was designated by the same number with the letter "B" added, without changing the blocks or the streets and without affecting the location of the lots in the blocks. In this way the north half of lot 10, block 29 became lot 10-A, block 29.

Defendant in error relies upon a part of the testimony of a civil engineer, who was called as a witness by plaintiffs in error, as sufficient to raise an issue of fact. The substance of that part of the testimony of the witness is that he could not determine from the second plat itself the distance from the south line of lot 10-B to the corner ***698** of the block, because the plat was not drawn accurately to scale and because there was nothing on the plat showing that distance. This part of the testimony in our opinion neither contradicts nor discredits the testimony of the witness when the whole of his testimony is taken in consideration, for by it the witness clearly shows from work done by him on the ground and from the application of the results of that work to the two plats that lot 10-A delineated on the second plat is the same lot or tract of land as the north half of lot 10 on the first plat.

The trial court should have rendered judgment for plaintiffs in error. The judgment of the Court of Civil Appeals and the judgment of the district court are reversed and judgment is here rendered that defendant in error take nothing by his suit against plaintiffs in error, and that plaintiffs in error C. O. Reynolds and wife take nothing by their cross-action for damages for breach of covenant against plaintiff in error O. K. Willborg.

Opinion adopted by the Supreme Court.

Parallel Citations

162 S.W.2d 694

End of Document

804 F.2d 879 (1986)

BATON ROUGE BUILDING AND CONSTRUCTION TRADES COUNCIL AFL-CIO, et al., Plaintiffs-Appellants,

v.

JACOBS CONSTRUCTORS, INC., et al., Defendants-Appellees.

No. 86-3169.

United States Court of Appeals, Fifth Circuit.

November 28, 1986.

880 *880 Louis Robein, Gardner, Robein & Healey, Jerry L. Gardner, Jr., William Lurye, Metairie, La., for plaintiffs-appellants.

G. Michael Pharis, **Baton Rouge**, La., for **Jacobs**.

Gardner C. Courson, Atlanta, Ga., for UMC.

Lloyd H. Shenefelt, III, Deborah Brown Gentry, **Baton Rouge**, La., for Exxon Corp.

Before BROWN, RANDALL and HILL, Circuit Judges.

PER CURIAM:

The controversy in the instant case centers around the question whether non-signatory local unions can enforce the provisions of a collective bargaining agreement entitled the General Presidents' Project Maintenance Agreement by Contract, commonly referred to as the "orange book." An orange book is a standard form collective bargaining agreement entered into on a project-by-project basis between a maintenance contractor and the General Presidents' Committee on Contract Maintenance, a group of interested international unions. After a contractor's bid is accepted on a maintenance project, the contractor submits the details of the project and any requests for special provisions to the General Presidents' Committee. Sometimes the Committee asks the local unions for advice regarding the project, and sometimes the local unions contact the Committee to request that an orange book agreement as to a certain project not be granted. If the Committee is satisfied with the credentials of the contractor's client and the details of the project, the Committee will execute an orange book agreement for that project, granting or not granting any special provisions requested by the contractor.

The primary question raised on appeal is whether local unions, who have not signed an orange book agreement with the contractor, have a contractual relationship with the contractor sufficient to give them standing to sue for a violation of that
881 agreement under section 301 of the Labor Management Relations Act, 29 U.S.C. *881 § 185. A secondary question is also presented as to whether the local unions may bring a pendant suit for tortious interference with contractual relations under Louisiana law.

I.

In April of 1985, the **Baton Rouge** Building and Construction **Trades Council**, composed of local unions representing crafts related to construction and maintenance, and twelve of its constituent members ("plaintiffs" or "local unions") brought suit against the defendants. Plaintiffs allege that a collective bargaining agreement, more specifically, an orange book agreement, existed between themselves and defendant **Jacobs Constructors**, **Inc**. ("**Jacobs**"). Plaintiffs further allege that **Jacobs** created an alter-ego, non-union entity, defendant UMC of Louisiana, **Inc**. ("UMC"), and that, at the urging of defendant Exxon Corporation, **Inc**. ("Exxon"), **Jacobs** transferred its maintenance work at the Exxon site to UMC, thereby violating the orange book agreement.

In November of 1985, defendants filed motions to dismiss the complaint and for summary judgment. Defendants argued that the local unions were not parties to the orange book agreement and therefore lacked standing to enforce the agreement under section 301. Defendants further argued that claims for tortious interference with contractual relations were not recognized by

Louisiana law. In February of 1986, the district court dismissed plaintiffs' claims with prejudice, finding that plaintiffs lacked standing under section 301 and that no cause of action for tortious interference with contractual relations existed under Louisiana law.

On appeal, we find no genuine issue of material fact and affirm the judgment of the court below.

II.

Since the parties presented depositions and documentary evidence in support of their briefs on the motion to dismiss the section 301 claim, we will review the district court's dismissal of that claim as a grant of summary judgment. *See* Carpenter Local Union No. 1846 v. Pratt-Farnsworth, ***Inc***., 690 F.2d 489, 500 (5th Cir.1982) (review dismissal as grant of summary judgment when district court went beyond pleadings to address the question). Our review of the section 301 standing issue presents the questions (1) whether there is any issue of material fact in dispute, and if not (2) whether the moving party is entitled to judgment as a matter of law. *Id.;* Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir.1984). In making this determination, we must review the evidence and any inferences to be drawn therefrom in the light most favorable to the non-moving party. *Id.*

Since no evidence was presented regarding the claim for tortious interference with contractual relations, we review the dismissal of this cause of action as a simple dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In reviewing the dismissal of this claim, we may uphold the action of the trial court only if it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 2233, 81 L.Ed.2d 59 (1984). With these standards of appellate review in mind, we turn to the substantive questions presented.

III.

Section 301 of the Labor Management Relations Act reads in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

882 *882 29 U.S.C. § 185(a). "A section 301 claim must satisfy three requirements: (1) a claim of violation of (2) a contract (3) between an employer and a labor organization." Carpenters Local Union No. 1846 v. Pratt-Farnsworth, ***Inc***., 690 F.2d 489, 500 (5th Cir.1982). It is clear that "a section 301 suit may be brought for violation of a labor contract only against those who are parties to the contract at issue." *Id.* at 501; *see also* Dixie Machine Welding & Metal Works, ***Inc***. v. Marine Engineers Beneficial Ass'n, 243 F.Supp. 489 (E.D.La.1965). None of the plaintiffs has signed the orange book agreement in question. Plaintiffs assert nonetheless that they are parties to the agreement because their respective international unions acted as their agents and signed the agreement on their behalf, and, alternatively, that the parties have modified the agreement to include the plaintiffs, as indicated by their behavior with respect to the local unions.

In support of their contention that the international unions made the local unions parties to the agreement, plaintiffs point to article 1, section 1 of the orange book, which reads as follows:

> This Agreement is for the joint use and benefit of the contracting parties, and the provisions herein defined and set forth shall be construed as binding upon and effective in determining *the relations between the parties and/or subordinate sub-divisions thereof signing hereto:* and to set forth herein, the basic Agreement covering the rates of pay, hours of work, and conditions of employment to be observed by the parties hereto.

(emphasis added). Plaintiffs argue that the inclusion of the clause "and/or subordinate sub-divisions thereof" demonstrated the international unions' intention to make the agreement effective with respect to local unions. Defendants, on the other hand, emphasize the words "signing hereto," which modify the entire clause. Since the local unions did not sign the contract, the contract is not, by its very terms, effective with respect to them.

After having carefully reviewed the "four corners" of the orange book, we conclude that the local unions were not included in the orange book agreement by article 1.

Plaintiffs argue that an interpretation of this clause as applying only to subordinate subdivisions that sign the agreement would render the clause redundant and almost meaningless, because "parties" and "signatories" are synonymous terms. We agree that these terms are, in general contract application, synonymous; however, we find that the parties included these otherwise "redundant" terms simply to emphasize that the only way to become a party was to sign the agreement. Plaintiffs' "non-signatory party" argument is undercut by the language of article 1's second paragraph, which provides for modification of the contract in writing by "the parties signatory hereto." This language from the second paragraph indicates that, contrary to the plaintiffs' assertions, the words "signing hereto" were not a result of the drafters' oversight.[1]

Moreover, the structure of the agreement and its negotiation in particular cases all point to administration at the national level. While the local unions may, as a practical matter, have some input with the Committee as to the granting of an orange book
883 agreement, the contract negotiations are held exclusively at the national level *883 between the contractor and the Committee of General Presidents. Article VI, section 6 provides: "The Administration and interpretation of this article as well as the entire General Presidents' Project Maintenance Agreement by Contract is the responsibility and sole prerogative of the General President's [sic] Committee on Contract Maintenance at the National level." Article I creates a bargaining unit composed of employees working under the orange book that is distinct from all other units, and further sets out that the agreement "may be modified by mutual consent in writing by the parties signatory hereto." Since, were local unions indeed party to the agreement, modification of the orange book's terms in particular cases would be of almost exclusive interest to them, the provision for modification at the national level — by "parties signatory" — is inconsistent with plaintiffs' "non-signatory party" theory.

Because we find as a matter of law that the orange book requires signature by a party for it to be effective with regard to that party, we do not reach plaintiffs' arguments that parol evidence demonstrates that the parties intended non-signatory local unions to be included in the agreement. We turn, instead, to the contention that the parties to the orange book have modified the agreement to include the local unions.

We note that, as previously discussed, the orange book requires that any modification be "by mutual consent in writing by the parties signatory hereto." No written evidence of mutual consent to modify the agreement by including local unions is suggested in the record, and it is with some skepticism that we turn to the assertion, implicit in plaintiffs' argument, that the parties have modified the writing requirement as well as have included non-signatory local unions in the agreement. We first note that there is no question of material fact as to whether the international unions and **Jacobs** specifically modified the Exxon project agreement; no evidence of even discussion between the international unions and **Jacobs** appears with respect to this particular orange book agreement.

Somewhat more difficult to dispose of is plaintiffs' claim that the decade-long course of dealings between **Jacobs**, the international unions and the local unions indicates a general modification of the orange book's terms to include the plaintiffs. Plaintiffs argue, in essence, that it is not a particular orange book agreement governing a discrete job site that has been modified, but rather the standard orange book agreement between **Jacobs** and the Committee whenever such an agreement is entered into in their jurisdiction.

We need not address the question whether, as a matter of law, one may modify the terms of a form agreement for the purposes of all dealings between signatories and local unions, because we find that the record in the instant case presents no genuine issue of material fact and that the course of dealings alleged is insufficient to demonstrate modification of the orange book. Plaintiffs point to their widespread involvement in administering the orange book agreements. Yet the overwhelming majority of this involvement is explicitly provided for by the orange book and therefore could not be probative of modification. Pursuant to the orange book, fringe benefit contributions are paid directly to local union pension, health, and welfare funds, working dues are deducted from employee paychecks and are forwarded to the local union, and local unions participate in the first step of the orange book's grievance procedure and in disputes over local wages.

Local union activity not covered by the orange book falls into the following categories: a local union's advising the international union of its opinion that a particular contractor's request for an orange book agreement ought not to be granted (2 times); a contractor's request for the local unions' opinions as to whether a certain job would be characterized as "maintenance" and therefore make the orange book applicable to the relevant employees (many times); a contractor's request for a contractual
884 agreement with the local unions *884 that a certain job was maintenance, although it was clear to the unions that the job would

not be so considered were it to be brought before the Committee of General Presidents (once); and a contractor's request with respect to a particular job that the local unions work as a normal schedule what would have been considered an overtime schedule under the orange book (once).

With one exception, however, none of these activities could be probative as to modification. The repeated requests for the local unions' opinion as to whether a job was "maintenance" or "construction" are in accord with the roles of the parties under the orange book. Since the local unions would have jurisdiction if the job were construction work, rendering the orange book inapplicable, it is natural for the contractor to check whether there might be a jurisdictional dispute with the other interested party before bringing the question to the Committee. The communication of the local unions' opinion that the Committee should not enter into a particular agreement with a contractor is not probative of modification because it lacks the element of consent of the contractor. The same is true with respect to the contractual agreement between the contractor and the local unions characterizing a particular job as "maintenance"; the agreement not to exercise their "construction" jurisdiction by the local unions did not involve the consent of the Committee.[2] The agreement with respect to overtime, however, is probative as to the mutual consent of the signatories because the Committee knew about and acceded to the contractor's agreement with the local unions. Whatever its probative value as to modification of the orange book agreement for that particular project, this isolated incident is far from sufficient to establish a general modification of the terms of the standard orange book agreement. We find as a matter of law that the course of dealings cited by plaintiffs is insufficient to modify the agreement between the Committee and **Jacobs** with regard to the Exxon site.

Finding no contractual relationship between the plaintiffs and the defendants, we hold that plaintiffs have not satisfied section 301's requirements for standing to sue.

IV.

Plaintiffs further argue that the existence of a cause of action for tortious interference with contractual relations under Louisiana law is uncertain, and that we should therefore certify the question to the Supreme Court of Louisiana. Plaintiffs argue that Louisiana precedent on this question is not clear, pointing to dicta in a recent Louisiana Supreme Court decision that indicates that the court might reconsider its position on this cause of action at some later date. *Sanborn v. Oceanic Contractors, **Inc**.,* 448 So.2d 91, 95 n. 5 (La.1984) ("were plaintiff to allege and prove defendant intentionally and willfully interfered with plaintiff's contract ... he might well be entitled to relief."). Despite this suggestion that such a claim might later be accepted under Louisiana law, the *Sanborn* court did not overturn several decades of its precedent refusing to recognize such a cause of action. *See Tandy Brands, **Inc**. v. Harper,* 760 F.2d 648, 653 (5th Cir.1985); *Eximco, **Inc**. v. Trane Co.,* 737 F.2d 505, 511 (5th Cir.1984). Under these circumstances, we think it unlikely that the Supreme Court of Louisiana would accept certification on this issue at this time, and we decline the plaintiffs' invitation to certify.

V.

The judgment of the district court is AFFIRMED.

[1] Indeed, in the case of a standard collective bargaining agreement like the orange book, the drafters' emphasis that "parties" included only those signatory is perfectly understandable. Page two of the orange book sets out a list of fourteen international unions, who are referred to throughout the agreement as "the Unions." Yet the drafters clearly wanted to anticipate the event of a particular international union not wanting to join a particular orange book agreement, as is demonstrated by the following language from page eighteen of the orange book: "It is understood that International Unions not desiring to sign this specific Agreement are not a party thereto...." Given the possibility of confusion between "Unions" for the purposes of the agreement and "parties" to the agreement, the drafters' careful emphasis that parties must be signatories is well taken.

[2] Moreover, even if plaintiffs could show some knowledge of the arrangement on the part of the Committee, this incident, even viewed in connection with the overtime arrangement at the other project, would be insufficient to establish the consistent course of dealings required for implicit modification of a form contract.

34 S.W.3d 547 (2000)

The BLAND INDEPENDENT SCHOOL DISTRICT, et al., Petitioners,

v.

Douglas BLUE and Carolyn Blue, Respondents.

No. 99-0231.

Supreme Court of Texas.

Argued January 5, 2000.
Decided December 7, 2000.

549 *549 Robert L. Scott, Greenville, James B. Harris, G. Luke Ashley, John A. Mackintosh, Jr., Anna Marple Duboise, Thompson & Knight, Dallas, for petitioners.

Mark Heidenheimer, McKinney, for respondents.

Justice HECHT delivered the opinion of the Court, in which Justice OWEN, Justice BAKER, Justice ABBOTT, Justice O'NEILL, and Justice GONZALES joined.

Two taxpayers sued their school district to prohibit it from paying future installments due on a lease-purchase financing agreement they claim is illegal. The district filed a plea to the jurisdiction, challenging the taxpayers' standing to sue. The trial court heard evidence on the plea and sustained it in part but overruled it in part. On the district's interlocutory appeal, the court of appeals held that a ruling on a plea to the jurisdiction must be based solely on allegations in the plaintiff's pleadings unless the defendant asserts that those allegations have been fabricated in an attempt to confer jurisdiction where none exists.[1] Based on the pleadings, the court held that the taxpayers have standing to sue.[2] We disagree with both holdings, reverse the court of appeals' judgment, and dismiss the plaintiffs' action against the district for want of jusrisdiction.

I

In August 1996, the Bland Independent School District contracted for the construction of a new high school using what it describes as a pre-engineered metal building. BISD financed $1,050,000 of the project's total cost of $1,390,000 through a lease-purchase agreement with Citicorp, Inc. that covered the building, finish-out work, and furnishings. The agreement obligated BISD to make semiannual payments of $53,917 to Citicorp from 1997 through 2011. The new school building opened for classes in August 1997, and by the following November BISD had paid the contractor in full using the Citicorp proceeds, state funds, and local tax revenues. To date, BISD has paid Citicorp the installments that have become due under their agreement.

In March 1998, Douglas and Carolyn Blue brought suit as BISD taxpayers to enjoin BISD from making future payments to Citicorp. The Blues allege that the lease-purchase agreement is illegal because BISD entered into it without complying with two
550 provisions of the Public Property Finance Act.[3] Specifically, the Blues allege that BISD failed to give 60 *550 days' public notice of its intention to enter into an agreement with Citicorp[4] and did not submit the agreement to the attorney general to review its validity.[5] BISD does not dispute that it did not comply with the Act but contends that it was not required to do so because the lease-purchase agreement is not one "for the use or purchase or other acquisition of real property or an improvement to real property" to which the Act applies.[6] Rather, BISD argues, its agreement with Citicorp covers only personal property (furnishings and the like) and a transportable building. The Act excludes transportable buildings from its definition of "improvement".[7]

BISD filed a plea to the jurisdiction, asserting that the Blues had no standing to sue and therefore the trial court lacked subject-matter jurisdiction over the action. BISD argued that the Blues had not suffered any injury separate and apart from the general public that would give them standing to sue. The Blues conceded that they could not show any particularized injury to themselves, but they contended that such injury was unnecessary in a suit to enjoin a governmental entity from making future payments under an illegal contract. BISD acknowledged that such suits are an exception to the particularized-injury rule, but it

argued that the Blues' action does not fall within the exception because the transaction they challenge has been completed and all that remains is repayment of Citicorp's loan. BISD also argued that it used only state funds to repay Citicorp, and that the Blues had no standing as district taxpayers to challenge the expenditure of state funds. (The record does not reflect why the Blues did not attempt to assert standing as state taxpayers.)

At BISD's request, the district court conducted an evidentiary hearing on the plea to the jurisdiction, at which BISD's superintendent described the nature of the project and testified that BISD has used only state funds to repay Citicorp. The Blues did not cross-examine BISD's witness or offer evidence of their own, contending instead that the court could not consider BISD's evidence in ruling on the plea to the jurisdiction but was required to rule on the plea based solely on the Blues' pleadings. The district court appears to have agreed with the Blues on this issue. It sustained BISD's plea in part and overruled it in part, holding that the Blues had standing to challenge the Citicorp agreement but only insofar as it provided financing for the building itself and work done on it, which might arguably be improvements to real property within the meaning of the statute, and not as to financing for furnishings in the building that were clearly personal property. Thus, the court based its ruling on the agreement itself as described in the pleadings, rather than on BISD's evidence showing the status of the project and the source of funds used to repay Citicorp.

551 *551 Only BISD appealed.[8] The court of appeals held that the trial court was not permitted to look past the Blues' pleadings in ruling on BISD's plea to the jurisdiction.[9] The court observed that the Blues had alleged that they were district taxpayers, that the Citicorp lease-purchase agreement was illegal, and that BISD had not made all the payments due under that agreement.[10] The court held that these assertions, if true, were sufficient to give the Blues standing to sue.[11] Since BISD did not contend that the Blues fabricated these allegations to create standing, the court concluded that the trial court had properly overruled BISD's plea to the jurisdiction.[12]

We granted BISD's petition for review.[13]

II

Our jurisdiction does not extend to an interlocutory appeal like this unless there was a dissent in the court of appeals—and here there was not—or unless the court of appeals' holding conflicts with that of another court of appeals or this Court.[14] We must therefore determine at the outset whether such a conflict exists. We have previously established that "[f]or this Court to have jurisdiction on the ground of conflict it must appear that the rulings in the two cases are `so far upon the same facts that the decision of one case is necessarily conclusive of the decision in the other.'"[15] "The conflict must be on the very questions of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court."[16] It is also "essential that such conflict appear on the face of the opinions themselves".[17]

As we have just explained, the court of appeals held that a plea to the jurisdiction must be decided solely on the basis of the plaintiffs' pleadings and not on evidence, absent an assertion that an allegation in the pleadings is false and made only to confer jurisdiction that would otherwise not exist.[18] In reaching this conclusion, the court of appeals noted its disagreement with contrary statements by other courts of appeals as follows:

We acknowledge some of our sister courts of appeals have indicated, without specifically holding, that evidence may be considered when deciding a plea to the jurisdiction. However, to the extent these cases stand for this proposition, we decline to follow them.[19]

The court of appeals cited four cases, none of which, we agree, actually holds that evidence may be considered in deciding a
552 plea to the jurisdiction. In one, *Dolenz v. Texas State Board of Medical Examiners,* *552 the court observed that "[a] plea to the jurisdiction can ... challenge the accuracy or truth of jurisdictional facts pleaded by the plaintiff, in which case evidence of such facts must be presented."[20] The court added, however, that no such challenge had been made in the case.[21] In the second case, *Rodriguez v. American General Fire & Casualty Co.,* the court concluded that the pleadings as well as the extrinsic evidence offered in support of a plea to the jurisdiction showed that jurisdiction was lacking.[22] In the third, *Harkness v. Harkness,* lack of jurisdiction was demonstrated by the plaintiff's responses to requests for admissions and answers to interrogatories, but it is not clear whether the plaintiff's pleadings would have required the same result.[23] In the fourth case,

Laurito v. McVey, the court merely noted that the plea to the jurisdiction had referred to extrinsic evidence that was not in the record and concluded that jurisdiction was shown by the pleadings.[24] None of these cases so conflicts with the court of appeals' opinion in the present case as to invoke this Court's jurisdiction.

BISD has cited another case in conflict with the decision in the present case: *Law Offices of Yarborough & Pope, Inc. v. National Automobile & Casualty Insurance Co.*[25] There, the court of civil appeals assumed that evidence offered by the defendant showed a lack of jurisdiction because no record of the hearing was presented on appeal; the court did not consider whether the pleadings also showed a lack of jurisdiction.[26] We are also aware of two other intermediate court decisions that suggest that a plea to the jurisdiction need not be based solely on the pleadings. In one, *St. Paul Fire & Marine Insurance Co. v. Meador,* the court concluded that extrinsic evidence was properly considered but did not show a lack of jurisdiction.[27] In the other, *Hernandez v. Texas Department of Insurance,* the court held that a request for findings following an evidentiary hearing on a plea to the jurisdiction extended the time for perfecting appeal, but the court does not appear to have considered the evidence in concluding that the plea was correctly sustained.[28] Finally, in *Speer v. Stover,* we held that the trial court had correctly dismissed the case for want of jurisdiction after hearing evidence offered on a plea in abatement, concluding that the plea could be treated as a plea to the jurisdiction.[29] But we did not indicate whether the case could have been dismissed on the pleadings alone. Thus, in none of these cases was the propriety of extrinsic evidence essential to the result.

BISD argues that the court of appeals' opinion conflicts with our decision in *F/R Cattle Co. v. State.*[30] The court of appeals attempted to distinguish *F/R Cattle Co.,* but BISD argues that the attempt was unsuccessful. We agree.

The court of appeals correctly recited the circumstances presented in *F/R Cattle Co.* There, the State sued under the Texas
553 Clean Air Act to enjoin the emission of odors from a large commercial calf-raising *553 operation.[31] The defendant filed a plea to the jurisdiction, arguing that the Act did not afford jurisdiction for the State's suit because the odors complained of were produced by natural processes and the Act expressly did not apply to such odors.[32] The trial court sustained the plea after hearing evidence and making findings.[33] The court of appeals reversed, holding that as a matter of law the odors from the calf-raising operation were not produced by natural processes.[34] We concluded that the issue could not be determined as a matter of law. We reversed and remanded the case to the court of appeals to determine whether the evidence was factually sufficient to support the trial court's ruling.[35]

In the case before us, the court of appeals correctly observed that the State in *F/R Cattle Co.* did not object to the consideration of evidence, but the court erred in concluding that we merely "addressed the appeal in the procedural posture in which it was presented."[36] If the jurisdictional issue should have been governed solely by the State's pleadings, we would have been obliged to decide the issue. If the pleadings showed jurisdiction, we would have affirmed the court of appeals, and if they did not, we would have dismissed the case. If evidence could not be considered in deciding the jurisdictional issue, we would no more have remanded the case to the court of appeals to assess the factual sufficiency of the evidence merely because the State did not object than we would remand a summary judgment for a factual sufficiency review merely because no one objected. Although we did not discuss in *F/R Cattle Co.* whether evidence could be considered in deciding a plea to the jurisdiction, the propriety of such evidence was essential to our ruling on the face of the opinion. Our judgment would have been different if consideration of such evidence had been improper. The State could not, simply by waiving an objection to the consideration of evidence, require the courts to take such evidence into account if such evidence were impermissible.

The conflict between the court of appeals' holding in the present case and our decision in *F/R Cattle Co.,* is such that if the court of appeals were correct, then *F/R Cattle Co.* was wrongly decided. While the factual circumstances presented in the two cases are very different, factual similarity is not a prerequisite for our jurisdiction over an interlocutory appeal if the factual differences do not serve to legitimately distinguish the holdings of the two cases.[37] If the rule stated by the court of appeals in this case were correct, then *F/R Cattle Co.* should have been decided differently. If a rule of decision in one case would require a different result were it applied in another case, the conflict between the two cases is sufficient to invoke our jurisdiction over an interlocutory appeal.

III

We next consider *when* evidence can be considered in deciding a plea to the jurisdiction, and whether the trial court should

have considered BISD's evidence showing the structure of the transaction and the state source of funds to pay Citicorp.

554 Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's *554 power to decide a case.[38] The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction,[39] as well as by other procedural vehicles, such as a motion for summary judgment.[40] BISD has raised its challenge by a plea to the jurisdiction.

A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit.[41] The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case.[42] The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached. This does not mean that evidence cannot be offered on a dilatory plea; on the contrary, the issues raised by a dilatory plea are often such that they cannot be resolved without hearing evidence.[43] And because a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case. But the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction. Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.

Thus, for example, when a defendant asserts that the amount in controversy is below the court's jurisdictional limit, the plaintiff's pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction,[44] or the defendant can readily establish that the amount in controversy is insufficient, as for example when the issue in dispute is a license or right rather than damages.[45] A plea to the jurisdiction cannot be used to require the plaintiff to prove the damages to which he is entitled in order to show that they exceed the court's jurisdictional limits. The plaintiff's allegation of damages in excess of jurisdictional limits suffices to show the amount in controversy, even if damages cannot ultimately be proved at all. Were it otherwise, the plaintiff would be required to try his entire case to show an entitlement to damages in excess of the court's jurisdictional limits.

On the other hand, there are situations in which a plaintiff is required to prove facts that might be characterized as "primarily jurisdictional". For example, when a defendant asserts that a plaintiff organization does not have standing to assert claims on behalf of its members, an evidentiary inquiry into the nature and purpose of the organization sufficient to determine standing
555 does not involve a significant inquiry into the substance of the claims.[46] Rather, a determination of associational *555 standing is a prerequisite to the plaintiff's presentation of its substantive claims. Similarly, a challenge to personal jurisdiction by special appearance, which is a dilatory plea, almost always requires consideration of evidence, and the rules of procedure set out the process for adducing such evidence.[47] While that evidence may touch on the merits of the case, it focuses on the defendant's contacts with the forum, not whether the defendant may be liable as alleged.

The court of appeals cited *Firemen's Insurance Co. v. Board of Regents*[48] as authority for its conclusion that a plea to the jurisdiction must ordinarily be decided solely on the pleadings.[49] *Firemen's,* in turn, relied on our decision in *Brannon v. Pacific Employers Insurance Co.*[50] But the jurisdictional challenge in *Brannon* was based on the amount in controversy, an issue which, as we have explained, must ordinarily be decided solely on the pleadings. The court in *Firemen's* cited this limitation in the context of determining a plea to the jurisdiction based on sovereign immunity. To this extent we disapprove the language of *Firemen's.*

In sum, a court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. The court should, of course, confine itself to the evidence relevant to the jurisdictional issue. The evidence BISD offered here showed the basic nature of the finance arrangement for construction of the school building and the source of funds used to repay Citicorp. This evidence went not to the merits of the Blues' claims—whether the Public Property Finance Act was violated—but only to whether the Blues had standing to assert their claims. Accordingly, the trial court should have considered BISD's evidence in deciding its plea to the jurisdiction, and apparently did so.

In reliance on the trial court's decision not to consider extrinsic evidence, the Blues offered none of their own and did not cross-examine BISD's witness. They now argue that if such evidence is to be considered, they should be given an opportunity on remand to have a full evidentiary hearing. If the Blues' standing were dependent on the source of the funds BISD uses to repay

Citicorp, we would agree, since the Blues dispute the evidence BISD offered and argue that it is not conclusive. But the Blues do not dispute BISD's evidence that construction of the school building is complete, that the building is occupied, and that neither the contractor nor Citicorp owe BISD any further performance under their respective agreements. Accordingly, we consider whether this undisputed evidence concerning the status of the project defeats the Blues' claim of standing.

In general, taxpayers do not have a right to bring suit to contest government decision-making because, as we observed more than half a century ago in *Osborne v. Keith,* "[g]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review."[51] Unless standing is conferred by statute,[52] taxpayers must show as a rule that they have suffered a particularized injury distinct
556 from that suffered *556 by the general public in order to have standing to challenge a government action or assert a public right.[53] But in Texas law there is a long-established exception to this general rule: a taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury.[54] We have explained the justification for this broader grant of standing to challenge future expenditures as follows:

> When a taxpayer brings an action to restrain the illegal expenditure ... of tax money he sues for himself, and it is held that his interest in the subject-matter is sufficient to support the action; but when the money has already been spent, an action for its recovery is for the [taxing entity]. The cause of action belongs to it alone.[55]

The exception unquestionably impinges on the policies for restricting taxpayer lawsuits, but strictly limited, it provides important protection to the public from the illegal expenditure of public funds without hampering too severely the workings of the government.

BISD argues that this Court abolished the exception in *Hunt v. Bass,* where we wrote that the general rule "is applied in all cases absent a statutory exception to the contrary."[56] But *Hunt* did not involve an alleged illegal expenditure; rather, the plaintiffs there claimed that their lawsuits were being delayed because of the commissioners' court's failure to appropriate sufficient funds to operate the local courts. We had no reason in that case to refer to the law governing illegal expenditures, and the sentence to which BISD points cannot fairly be read to tacitly overrule the cases that had permitted taxpayer suits challenging such expenditures.

The Blues argue that their claim fits within the exception: they are taxpayers suing to enjoin future payments to Citicorp under its finance agreement with BISD. BISD argues that the financing arrangement must be viewed as only a part of the construction project, which has long since been completed. Because all the work has been done and BISD's obligation to pay for it has been fully incurred, BISD argues that the Blues' challenge is really to past expenditures, even though payments are due in future installments. In essence, BISD's argument is that taxpayer suits to enjoin future payments under an illegal contract should be restricted to instances in which the governmental entity has not yet received full performance under the contract. Here, construction of the BISD high school is complete, and the building is occupied. Citicorp has performed its obligations to BISD under their agreement, and it remains for BISD to repay the loan.

We have never extended the exception far enough to include the Blues' action against BISD. In *City of Austin v. McCall,* a taxpayer obtained an injunction prohibiting the City of Austin from consummating a proposed contract to purchase a water and power utility.[57] In affirming the injunction, we said that "`it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations
557 assume, in excess of their powers, to create burdens upon property holders.'"[58] In *Hoffman v. Davis,* *557 taxpayers sued the sureties on county officials' bonds for payment on the bonds due to the officials' misconduct.[59] Although we reaffirmed "[t]he right of a taxpaying citizen to go into a court of equity and enjoin public officials from the expenditure of public funds under an illegal contract",[60] we concluded that the action did not fit within this rule but was rather a suit for debt which properly belonged to the county. In *Osborne v. Keith,* a taxpayer sued to enjoin the county from paying for dirt it had purchased from its agent to be used in road construction.[61] It appears that the county had already taken and used some materials and may have had the right to take more.[62] We held that the county's agreement with its fiduciary to purchase such materials was not illegal but merely voidable.[63] Hence, we did not consider whether it was important that the county had already taken possession of some of the dirt it had purchased. Finally, in *Hulett v. West Lamar Rural High School District,*[64] taxpayers sued to enjoin their school district from constructing school buildings out of wood when the bonds authorized for financing of the construction called for buildings "of material other than wood".[65] The district court denied the plaintiffs' request for a temporary injunction, and the court of

appeals dismissed the appeal as moot because construction was "90 to 95 per cent complete".[66] We agreed to hear the appeal because "substantial sums remained to be paid under the contract and therefore ... the question involved was not moot."[67] At oral argument, however, respondent showed "that the contract had been fully performed, that the buildings had been accepted by the school authorities, and that the contract price had been fully paid by the school district to the contractor."[68] We therefore concluded that the case was moot.[69] Although *Hulett* did not involve future loan payments as the present case does, our opinion nevertheless suggests that once construction is complete the agreement for it can no longer be challenged in a taxpayer suit.

The Blues rely on a court of civil appeals' opinion, *Kordus v. City of Garland,*[70] but that case is consistent with our own precedents. There, taxpayers sued to recover money donated and dues paid by the City of Garland to the local chamber of commerce, and to prohibit the City from performing its agreement with the chamber to donate more money in the future. The trial court dismissed the case because the plaintiffs had failed to show any interest distinct from the general public's, but the court of appeals concluded that the taxpayers were entitled to sue to prohibit future payments by the City to the chamber. Although the City had already agreed to make $40,000 in future payments, the chamber had not yet rendered any service for such payments, and therefore the agreement remained, in that important respect, executory. In the present case, by contrast, nothing remains to be performed of the agreements for construction of BISD's high school but repayment of funds already advanced for work fully completed.

558 We are not inclined to extend the exception to taxpayer standing to include the Blues' suit. The jurisprudential justification *558 for taxpayer suits to enjoin performance of illegal agreements is that the interference such suits pose to government activities is slight in comparison to the protection afforded taxpayers from preventing the culmination of illegal agreements made by public officials. But the balance in costs and benefits shifts significantly once the governmental entity has received all that it bargained for and must simply pay for it. We need not decide here whether a governmental entity's receipt of something less than full performance under an allegedly illegal agreement is enough to preclude a taxpayer suit to prohibit future performance. When all that remains is a school district's repayment of a loan for work completed, allowance of a taxpayer action to prohibit such repayment threatens a substantial interference with governmental actions. The Blues' action not only threatens BISD's already substantial investment in its high school, and what by now are the settled expectations of other taxpayers in the district who are also served by the high school, but should the action succeed on the merits, it would signal increased risks to lenders and others in dealing with governmental entities. The potential for disruption of government operations is too great to allow a taxpayer with no special injury distinct from the general public's to sue to prohibit the government from paying for goods and services it has already received and placed in permanent use.

For these reasons we conclude that the Blues lack standing to sue and therefore that the trial court lacked subject matter jurisdiction over the action.

* * * * *

Accordingly, the judgment of the court of appeals is reversed and the Blues' action is dismissed for want of jurisdiction.

Chief Justice PHILLIPS filed a dissenting opinion, in which Justice ENOCH and Justice HANKINSON joined.

PHILLIPS, Chief Justice, dissenting, in which Justice ENOCH and Justice HANKINSON join.

Our jurisdiction to consider this interlocutory appeal depends on the existence of a conflict between the court of appeals' opinion below and some prior decision from another court of appeals or this Court. TEX.GOV'T CODE § 22.225. Such a conflict must be well-defined "upon a question of law involved and determined and such that one decision would overrule the other if both were rendered by the same court." *Garcia v. American Nat'l Ins. Co.,* 124 Tex. 466, 78 S.W.2d 170, 170 (1935); *see also Christy v. Williams,* 156 Tex. 555, 298 S.W.2d 565, 567 (1957) (rulings in the two cases must be so far upon the same state of facts that decision in one is necessarily conclusive in the other). Because the Court mistakenly concludes that the decision of the court below conflicts with our opinion in *F/R Cattle Company, Inc. v. State,* 866 S.W.2d 200 (Tex.1993), I respectfully dissent.

559 The court of appeals in this case holds that the trial court should determine its subject matter jurisdiction solely from the allegations in the plaintiffs' pleadings. The Blues' took this position in the trial court, and they objected when BISD attempted to use extrinsic evidence to show that the trial court lacked subject matter jurisdiction. In contrast, the plaintiff in *F/R Cattle* did not object when the defendant used extrinsic evidence to contest the plaintiff's allegations of subject matter jurisdiction. The court of

appeals distinguished *F/R Cattle* on this basis, noting that we decided the case only "in the procedural posture in which it was presented." 989 S.W.2d 441, 447. Because no one objected to the extrinsic evidence, we never considered whether it was proper or not. But this distinction does not necessarily foreclose conflicts jurisdiction. We recently explained that the conflicts standard does not require factual identity between the two opinions, so that factual distinctions that are immaterial to the respective *559 holdings may be ignored. *See* *Coastal Corp. v. Garza,* 979 S.W.2d 318, 320 (Tex. 1998).

The Court apparently considers the plaintiff State's failure to object to extrinsic evidence in *F/R Cattle* to be an immaterial factual distinction, irrelevant to the deciding legal pronouncements. In part, the Court reaches this conclusion by explaining that "[t]he State could not, simply by waiving an objection to the consideration of evidence, require the courts to take such evidence into account if such evidence were impermissible." 34 S.W.3d at 553. But the failure to object to "impermissible" evidence can have just that effect. For example, if the State failed to object to impermissible, hearsay testimony would we not "take such evidence into account"? Our rules say that we would. *See* TEX.R.EVID. 802. In a summary judgment appeal, on the other hand, we do not consider oral testimony on appeal, even if admitted without objection, because our summary judgment rule expressly forbids its use. TEX.R.CIV.P. 166a(c) ("No oral testimony shall be received at the hearing."); *see also* *Richards v. Allen,* 402 S.W.2d 158, 161 (Tex.1966) (supplementation of summary judgment evidence should be by affidavit or deposition rather than oral testimony). I am not sure which situation is closer to this case, but I would prefer some analysis to decision by fiat.

The Court also suggests today that *F/R Cattle* conflicts because "our judgment would have been different if consideration of such evidence had been improper." 34 S.W.3d at 553. Even if this were true, a judgment alone cannot create a conflict with another opinion or another judgment. We have never gone behind the opinions to determine whether a conflict exists; instead we have considered only the facts and law actually set out in the respective opinions. *See* *Boxwell v. Ladehoff,* 400 S.W.2d 303, 304 (Tex.1966); *Employers Cas. Co. v. National Bank of Commerce,* 140 Tex. 113, 166 S.W.2d 691, 693 (1942); *Dockum v. Mercury Ins. Co.,* 134 Tex. 437, 135 S.W.2d 700, 701 (1940). The Court here concedes that "we did not discuss in *F/R Cattle Co.* whether evidence could be considered in deciding a plea to the jurisdiction". 34 S.W.3d at 553. If we did not discuss this in *F/R,* how can there be a conflict apparent on the face of the two opinions? *See* *John Farrell Lumber Co. v. Wood,* 400 S.W.2d 307, 309 (Tex.1966); *Torrez v. Maryland Cas. Co.,* 363 S.W.2d 235, 236 (Tex.1962); *State v. Wynn,* 301 S.W.2d at 76, 79 (Tex.1957).

Whether or not we agree with the court of appeals' limited evidentiary view, its opinion does not necessarily conflict with *F/R Cattle,* and therefore we lack jurisdiction to consider the issue. I realize that it is difficult to resist "the desire to remedy significant errors" arising in interlocutory appeals. *Southwestern Refining Co. v. Bernal,* 22 S.W.3d 425, 441 (Tex.2000)(Enoch, J. dissenting). But as a Court of limited appellate jurisdiction, we must wait until issues are properly before us before we address them by judicial decision.

Because we do not have general appellate jurisdiction over interlocutory appeals of this nature and because any alternative basis for our jurisdiction has not been demonstrated, I would dismiss the petition for want of jurisdiction. For these reasons, I dissent.

[1] 989 S.W.2d 441, 447 (Tex.App.-Dallas 1999).

[2] *Id.*

[3] TEX.LOC. GOV'T CODE §§ 271.001-.009.

[4] *See id.* § 271.004(a) ("The board of trustees of a school district may execute, perform, and make payments under a contract under this Act for the use or purchase or other acquisition of real property or an improvement to real property. If the board proposes to enter into such a contract, the board shall publish notice of intent to enter into the contract not less than 60 days before the date set to approve execution of the contract in a newspaper with general circulation in the district. The notice must summarize the major provisions of the proposed contract. The notice shall estimate the construction and other costs, but the board shall not publish the first advertisement for bids for construction of improvements until 60 days has expired from the publication of the notice of intent to enter into the contract.").

[5] *See id.* § 271.004(g) ("A lease-purchase contract entered into by the district under this section and the records relating to its execution must be submitted to the attorney general for examination as to their validity.").

[6] *Id.* § 271.004(a).

[7] *Id.* § 271.003(10) ("`Improvement' means a permanent building, structure, fixture, or fence that is erected on or affixed to land but does not include a transportable building or structure whether or not it is affixed to land.").

[8] TEX.CIV.PRAC. & REM.CODE § 51.014(a)(8) ("A person may appeal from an interlocutory order of a district court ... that ... grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.").

[9] 989 S.W.2d at 447.

[10] *Id.* at 448.

[11] *Id.*

[12] *Id.*

[13] 42 Tex.Sup.Ct.J. 40 (Oct. 21, 1999).

[14] TEX.GOV'T CODE § 22.225.

[15] *Gonzalez v. Avalos,* 907 S.W.2d 443, 444 (Tex.1995) (quoting *Christy v. Williams,* 156 Tex. 555, 298 S.W.2d 565, 567 (1957)); *accord, Coastal Corp. v. Garza,* 979 S.W.2d 318, 319 (Tex.1998).

[16] *Christy,* 298 S.W.2d at 568-569.

[17] *State v. Wynn,* 157 Tex. 200, 301 S.W.2d 76, 79 (1957); *accord, John Farrell Lumber Co. v. Wood,* 400 S.W.2d 307, 309 (Tex.1966); *Torrez v. Maryland Cas. Co.,* 363 S.W.2d 235, 236 (Tex.1962); *Employers Cas. Co. v. National Bank of Commerce,* 140 Tex. 113, 166 S.W.2d 691, 693 (1942); *Dockum v. Mercury Ins. Co.,* 134 Tex. 437, 135 S.W.2d 700, 701 (1940).

[18] 989 S.W.2d at 447.

[19] *Id.* (footnote omitted).

[20] 899 S.W.2d 809, 811 n. 3 (Tex.App.-Austin 1995, no writ).

[21] *Id.*

[22] 788 S.W.2d 583, 585-586 (Tex.App.-El Paso 1990, writ denied).

[23] 709 S.W.2d 376, 378 (Tex.App.-Beaumont 1986, writ dism'd).

[24] 496 S.W.2d 656, 659 (Tex.Civ.App.-Austin 1973, no writ).

[25] 548 S.W.2d 462, 463-464 (Tex.Civ.App.-Fort Worth 1977, writ ref'd n.r.e.).

[26] *Id.*

[27] 990 S.W.2d 362, 365-366 (Tex.App.-Fort Worth 1999, no pet.).

[28] 923 S.W.2d 192, 194-195 (Tex.App.-Austin 1996, no writ).

[29] 685 S.W.2d 22 (Tex.1985) (per curiam).

[30] 866 S.W.2d 200 (Tex.1993).

[31] *Id.* at 201.

[32] *Id.*

[33] *Id.* at 201-202.

[34] *State v. F/R Cattle Co.,* 828 S.W.2d 303, 306-307 (Tex.App.-Eastland 1992), *rev'd,* 866 S.W.2d 200 (Tex.1993).

[35] 866 S.W.2d at 205.

[36] 989 S.W.2d at 447.

[37] *Coastal Corp. v. Garza,* 979 S.W.2d 318, 320 (Tex.1998).

[38] *Texas Ass'n of Business v. Texas Air Control Bd.,* 852 S.W.2d 440, 443 (Tex.1993).

[39] *Texas Dep't of Transp. v. Jones,* 8 S.W.3d 636, 637 (Tex.1999) (per curiam).

[40] *See, e.g., NME Hospitals, Inc. v. Rennels,* 994 S.W.2d 142, 144 (Tex.1999).

[41] *See* 5 WILLIAM V. DORSANEO III, Texas Litigation Guide § 70.03[1] (2000).

[42] *See Jud v. City of San Antonio,* 143 Tex. 303, 184 S.W.2d 821, 823 (1945).

[43] *See* 5 DORSANEO, *supra* note 41, § 70.03[1].

[44] *Hoffman v. Cleburne Bldg. & Loan Ass'n,* 85 Tex. 409, 22 S.W. 154, 155 (1893).

[45] *Cf. Tune v. Texas Dept. of Public Safety,* 23 S.W.3d 358 (Tex.2000) (holding as a matter of law that the amount in controversy in a case involving the denial of a license to carry a concealed handgun exceeds $100).

[46] *Cf. Texas Ass'n of Business v. Texas Air Control Bd.,* 852 S.W.2d 440 (Tex.1993) (setting out requirements for associational standing and illustrating how determination of those requirements may be made apart from the merits of the case).

[47] TEX.R.CIV.P. 120a.

[48] 909 S.W.2d 540, 541 (Tex.App.-Austin 1995, writ denied).

[49] 989 S.W.2d at 446.

[50] 909 S.W.2d at 541 (citing *Brannon v. Pacific Employers Ins. Co.,* 148 Tex. 289, 224 S.W.2d 466, 469 (1949)).

[51] 142 Tex. 262, 177 S.W.2d 198, 200 (1944).

[52] *Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex. 1984); *Scott v. Board of Adjustment,* 405 S.W.2d 55 (Tex.1966).

[53] *Pierce v. Southern Pac. Co.,* 410 S.W.2d 801, 802 (Tex.Civ.App.-Waco 1967, writ ref'd); *San Antonio Conservation Soc. v. City of San Antonio,* 250 S.W.2d 259, 263 (Tex.Civ. App.-Austin 1952, writ ref'd); *Yett v. Cook,* 115 Tex. 205, 281 S.W. 837, 840 (1926); *City of San Antonio v. Stumburg,* 70 Tex. 366, 7 S.W. 754, 755 (1888).

[54] *Osborne,* 177 S.W.2d at 200; *Hoffman v. Davis,* 128 Tex. 503, 100 S.W.2d 94, 95 (1937); *City of Austin v. McCall,* 95 Tex. 565, 68 S.W. 791, 793 (1902).

[55] *Hoffman,* 100 S.W.2d at 96.

[56] *Hunt,* 664 S.W.2d at 324.

[57] 68 S.W. at 792.

[58] *Id.* at 794 (quoting *Crampton v. Zabriskie,* 101 U.S. 601, 609, 25 L.Ed. 1070 (1879)).

[59] 100 S.W.2d at 94.

[60] *Id.* at 95.

[61] 177 S.W.2d at 199.

[62] *Id.*

[63] *Id.* at 201.

[64] 149 Tex. 289, 232 S.W.2d 669 (1950).

[65] *Id.* at 669.

[66] *Id.*

[67] *Id.* at 670.

[68] *Id.*

[69] *Id.*

[70] 561 S.W.2d 260 (Tex.Civ.App.-Tyler 1978, writ ref'd n.r.e.).

WestlawNext

Bullock v. Amoco Production Co.
Supreme Court of Texas. | October 1, 1980 | 608 S.W.2d 899 *(Approx. 4 pages)*

Bob BULLOCK, Comptroller of Public Accounts et al., Petitioners,
v.
AMOCO PRODUCTION COMPANY, Respondent.

Taxpayer sued to recover amount allegedly unlawfully withheld by Comptroller of Public Accounts as part of overpayment of franchise taxes. The District Court No. 53, Travis County, Charles D. Mathews, J., dismissed for want of jurisdiction. The Austin Court of Civil Appeals, Third Supreme Judicial District, O'Quinn, J., reversed and remanded, 584 S.W.2d 388. Appeal was taken. The Supreme Court, Campbell, J., held that although it was not until after franchise tax audit, which began in 1971, that it was concluded that taxpayer had underpaid its taxes for 1962 and had overpaid them for 1963 to 1971, the taxpayer, asserting that it had also overpaid for 1962, was required to comply with statutory requirement of written protest; statute was not unavailable on ground that comptroller credited overpayment to deficiency as suit was not filed within 90 days after offset was taken.

Judgment of Court of Civil Appeals reversed and judgment of trial court affirmed.

West Headnotes (2)

Change View

1 **Taxation** Right of Recovery of Taxes Paid
Since statutes establishing a special method to enable a taxpayer who questions validity of a tax to sue the state in an effort to recover taxes paid under protest creates a right not existing at common law and prescribes a remedy to enforce that right, the courts may act only in the manner provided by such statutes. V.A.T.S. Tax.–Gen. art. 1.05.

16 Cases that cite this headnote

2 **Taxation** Protest
Although it was not until after franchise tax audit which began in 1971 that is was concluded that taxpayer had underpaid its taxes for 1962 and had overpaid for 1963 to 1971, the taxpayer, asserting that it had also overpaid for 1962, was required to comply with statutory requirement of written protest; statute was not unavailable on ground that comptroller credited overpayment to deficiency as suit was not filed within 90 days after offset was taken; had taxpayer determined, when offset was taken, that review statute was not available because comptroller had paid himself, taxpayer should have complied with remaining statutory requirements and filed suit within 90 days. V.A.T.S. Tax.–Gen. arts. 1.032, 1.05, 1.11(2), 1.11A.

6 Cases that cite this headnote

Attorneys and Law Firms

***900** Mark White, Atty. Gen., Gilbert J. Bernal, Jr., Asst. Atty. Gen., Austin, for

petitioners.

McGinnis, Lochridge & Kilgore, C. Morris Davis, Austin, for respondent.

Opinion

CAMPBELL, Justice.

This is a franchise tax case. The trial court dismissed the cause for lack of jurisdiction. The Court of Civil Appeals reversed the trial court judgment and remanded the cause for trial. 584 S.W.2d 388. We reverse the judgment of the Court of Civil Appeals and affirm that of the trial court.

In 1971 the Comptroller began a franchise tax audit of Amoco for the years 1962 through 1971. The Comptroller concluded that Amoco had underpaid its taxes by $249,583 for 1961 and had overpaid $718,098.16 for 1963 through 1971. Penalty and interest for the deficit payment caused a total deficiency of $295,051.27 for 1962.

Amoco contended that the Comptroller was in error in assessing a deficiency for 1962 and that it had overpaid $108,856.92 for that year. Pursuant to Article 1.032 [1] of the Tax Statutes, Amoco initiated a request for redetermination. The Comptroller set the redetermination hearing for August 2, 1972.

The Comptroller, on July 10, 1972, pursuant to Article 1.11(2) tendered credit of $423,046.89 (the difference between the overpayment for 1963-1971 and the total deficiency for 1962) to Amoco. Article 1.11(2) allows the Comptroller, if he has determined that an overpayment was made, to credit the taxpayer with the amount of the overpayment; provided, the taxpayer consents to the credit. Amoco did not consent. It requested the money be refunded pursuant to Article 1.11A, Tax Refunds. This Article then provided: [2]

> (1) This Article applies to any . . . franchise . . . tax or fee collected or administered by the Comptroller of public Accounts ....
>
> > (2) When the Comptroller determines that any person, firm or corporation has through mistake of law or fact overpaid the amount due the State on any tax collected or administered by the Comptroller, the Comptroller may refund such overpayment by warrant on the State Treasury from any funds appropriated for such purpose. (emphasis added).

The hearing examiner, in the findings of the redetermination hearing for 1962 taxes, denied Amoco's request to set aside the deficiency and to refund the $295,051.27 withheld by the Comptroller. The Comptroller approved these findings and this order became final on March 21, 1975. On the same day Amoco brought suit to determine the money was unlawfully withheld and that it had overpaid the 1962 taxes by $108,856.92 and for a refund of that amount.

The State contends Amoco cannot maintain this suit because, among other things, Amoco has not complied with Article 1.05. This Article provides that a taxpayer may challenge the assessment of taxes if (1) the taxpayer pays the taxes, (2) accompanies the payment with a written protest setting out fully and in detail each and every ground or reason why it is contended that such demand is unlawful or unauthorized, and (3) files suit within 90 days after the payment in a court of competent jurisdiction in Travis County.

In Dan Ingle, Inc. v. Bullock, 578 S.W.2d 193 (Tex.Civ.App.-Austin 1979, writ ref'd), the taxpayer brought suit seeking to set aside the Comptroller's determination that the taxpayer was delinquent in payment of sales taxes. The taxpayer had not complied with Article 1.05 (payment of taxes accompanied by written protest) but attempted the judicial review under the provisions of section 19 of Article 6252-13a, T.R.C.S. (Administrative Procedure and Texas Register Act). The court held that because the

*901 taxpayer had not complied with Article 1.05, the trial court was without jurisdiction to hear and decide the merits of the case. See Robinson v. Bullock, 553 S.W.2d 196 (Tex.Civ.App.-Austin 1977, writ ref'd n.r.e.), cert. denied, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978).

1 2 By Article 1.05 and its predecessor statute, Article 7057b, the Legislature provided a special method to enable taxpayers, who question validity of a tax, to bring suit against the State in an effort to recover taxes paid under protest. These statutes created a right not existing at common law and prescribed a remedy to enforce the right. Thus, the courts may act only in the manner provided by the statute which created the right. Union Central Life Ins. Co. v. Mann, 138 Tex. 242, 158 S.W.2d 477 (1941). We hold the trial court was without jurisdiction to hear and decide the merits of Amoco's suit. [3]

Amoco contends it never had an opportunity to pay under protest as the Comptroller deducted the amount it claimed as an underpayment for 1962 from the overpayment for subsequent years. Therefore, it could not comply with Article 1.05 and had no way to seek judicial review. We do not agree. As to its inability to pay under protest, we quote from the deposition testimony of Mr. Marlar of Amoco's Tax Department:

> We did not concede the deficiency for '62. It would have been a useless act for us to pay the money that the deficiency set up for '62 and then turn around and receive the same amount of money under the $718,000 or whatever that number was. It was-you know, that was just changing hands, changing money for nothing.
>
> We were told-we were told that we were entitled to $718,000, which was the refund. They turned around and said, "Well, we're going to refund you $423,000." And we said, "Well, we're not conceding that we owe you that other money. It's useless for us to get the money back and turn around and pay it to you again just to satisfy this circuitous route of having to pay it under protest."

Amoco urges that Article 1.05 was unavailable to it because the Comptroller paid himself when it credited the overpayment of 1963 and following years to the deficiency, as determined by the Comptroller, for 1962. Also, Amoco had on file with the Comptroller when the credit was made, a detailed memorandum of the errors made by the Comptroller in computing the 1962 deficiency. We do not reach the question of whether the offset and filed memorandum would be sufficient to meet the first two requirements of Article 1.05 because suit was not filed within 90 days after the offset was taken. Had Amoco determined, when the offset was taken, that Article 1.05 was not available because the Comptroller paid himself, it should have complied with the remaining requirements of Article 1.05.

The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

Footnotes

1 All statutory references are to Vernon's Annotated Civil Statutes, Taxation General, unless otherwise indicated.

2 Article 1.11A has since been extensively amended.

3 Article 1.11A was amended, effective August 27, 1979, to provide an appeal from the final decision of the Comptroller.

End of Document

223 F.3d 286 (2000)

Robert A. BUSSIAN; James J. Keating, Plaintiffs-Appellants,

v.

RJR NABISCO, INCORPORATED, Defendant-Appellee.

No. 98-20867.

United States Court of Appeals, Fifth Circuit.

August 14, 2000.

288 *287 *288 Randall W. Wilson, Erica W. Harris (argued), Susman Godfrey, Houston, TX, for Plaintiffs-Appellants.

Willis J. Goldsmith (argued), Jones, Day, Reavis & Pogue, Washington, DC, Gerald L. Bracht, Mayor, Day, Caldwell & Keeton, Houston, TX, for Defendant-Appellee.

Stacey E. Elias, U.S. Dept. of Labor, Office of the Solicitor, Washington, DC, for Secretary of Labor, Amicus Curiae.

Carol Connor Flowe, Marc Alan Tenebaum, Arent, Fox, Kintner, Plotkin & Kahn, Washington, DC, for Association of Private Pension and Welfare Plans and Chamber of Commerce of the U.S. (Chamber), Amicus Curiae.

Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

KING, Chief Judge:

Plaintiffs-Appellants Robert A. **Bussian** and James J. Keating appeal from the district court's grant of summary judgment to Defendant-Appellee **RJR Nabisco**, **Inc**. and its denial of class certification. We reverse in part, vacate in part, and remand for further consideration by the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case is yet another litigating who must bear the cost of the collapse of Executive Life Insurance Company of California ("Executive Life") in the late 1980s and early 1990s. The issue before us is whether Defendant-Appellee **RJR Nabisco**, **Inc**. ("**RJR**") acted consistently with its fiduciary obligations under § 1104 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (1994) ("ERISA"), when it chose to purchase a single-premium annuity from Executive Life in August, 1987.

Because this case comes to us from a grant of **RJR's** motion for summary judgment, our presentation of the facts reflects in part the requirement that we view the evidence in the light most favorable to Plaintiffs-Appellants Robert A. **Bussian** and James J. Keating ("Appellants"). Many of the underlying facts are uncontested. **RJR's** involvement in this case comes about through its purchase, in 1976, of Aminoil USA, **Inc**. ("Aminoil"), a Houston-based oil company. Aminoil administered a pension plan for its
289 employees that *289 was governed by ERISA. **RJR** sold Aminoil in 1984, and the purchaser assumed the pension obligations for all then-current employees. At the time of the sale, other employees had ceased employment with the oil company and were either already receiving pension benefits or were vested in the Aminoil pension plan but were not yet eligible to receive benefits. **RJR** retained the obligation of administering pension benefits for these former employees, including Appellants, under an ERISA-defined benefit pension plan ("the Plan").[1]

On October 16, 1986, **RJR's** Board of Directors approved resolutions authorizing the termination of the Plan and several other plans of former **RJR** subsidiaries. The Board also approved the purchase of an annuity to cover all pension obligations to the participants and beneficiaries of all the plans. The Plan's documents provided that upon termination any excess funds would revert to **RJR**.[2] At the time the decision to terminate was made, the Plan was over-funded, and the Board was informed that a reversion could be expected. By December 1986, **RJR** was assuming that an annuity would cost about $62.5 million, and allowing for a $10 million cushion, was anticipating a reversion of about $55 million.

Members of **RJR's** Pension Asset Management Department were given the responsibility of selecting an annuity provider. Paul Tyner was involved from the beginning; Robert Shultz, hired in March, 1987 as **RJR's** Vice President of Pension Asset Management, had responsibility for making the final decision. In October, 1986, **RJR** hired Buck Consultants, **Inc**. ("Buck") to assist in the endeavor. William Overgard, an investment consultant with Buck Pension Funds Services, was asked to participate in the process in January, 1987.

Overgard was told that his role in the transaction was to identify insurance companies and to provide those companies with appropriate information in order to solicit the best bid from each one that was interested in the business so that **RJR** could select the carrier that was appropriate to its needs. Overgard compiled an initial list of insurance companies that could provide the annuity. That list included providers with which Buck was familiar, that had a reputation for providing good service to their clients, and that would have the capacity for a placement covering approximately 10,000 individuals. In January, 1987, a letter was sent to thirteen companies inviting comments on several issues related to the purchase of the annuity. In the letter, **RJR** was not identified as the buyer of that annuity.

Executive Life was not among those receiving the January letter.[3] This was because it was involved in a nontraditional investment strategy: its portfolio had a higher percentage of low-quality bonds and a lower percentage of other investments than other insurance companies. Low-quality bonds, which are also referred to as "high-yield" or "junk" bonds, are rated below investment grade, i.e., ratings agencies have determined that the issuing entity is a greater than average credit risk. In order to compensate for the increased risk of default, such bonds must offer a higher interest rate. *See, e.g.,* *Levan v. Capital Cities/ABC, **Inc**.,* 190 F.3d 1230, 1235 (11th Cir.1999). After Overgard discussed Executive Life's strategy with one of his
290 colleagues, the two decided that the *290 company should not be included on the initial list.

Overgard understood that by 1987, over 50% of Executive Life's portfolio was in low-quality bonds. In this Executive Life was indeed unusual compared to its competitors in the insurance industry. Information in the record suggests that the average percentage of low-quality bond holdings was on the order of 6% to 7%. Executive Life allegedly held the largest original issue low-quality bond portfolio ever assembled, with most of its acquisitions coming through Drexel Burnham Lambert ("Drexel"). Overgard understood Executive Life's low-quality bond holdings to be broadly diversified.

Based on his experience with Executive Life in the course of bidding he conducted for guaranteed investment contracts, and his desire to increase the competitiveness of the final bidding for the annuity contract, on or about April 3, 1987, Tyner requested that Executive Life be added to the list of carriers. In Tyner's opinion, Executive Life's inclusion would facilitate bringing other bidders down in price because it would come in with a lower quote. According to William J. Wolliver, a former Manager of Annuity Pricing for Prudential Insurance Company, Executive Life's low-quality bond portfolio enabled the company to underbid his firm. At the time he requested that Executive Life be added, Tyner did not think that the provider would be seriously considered in the final bidding process. Instead, he believed that **RJR** would go with a more well-known company.

To check up on Executive Life's solvency and financial health, Overgard reviewed the reports and ratings of four rating agencies (Standard & Poor's Corp. ("S&P"), Moody's Investor's Services ("Moody's"), A.M. Best ("Best"), Conning & Company ("Conning")). He reviewed the pros and cons of including Executive Life on the list of carriers to be contacted with Henry Anderson, an actuarial expert with Buck who, as the account executive, had brought Overgard in on the **RJR** purchase. They discussed the high-quality ratings that Executive Life had received, the company's interest in doing business, its reputation for providing good service and for being knowledgeable in the business, and its nontraditional investment portfolio. Overgard believed that a broadly diversified portfolio of low-quality bonds was a viable investment strategy. Based on his investigation, Overgard determined that Executive Life should be included on the bid list because the ratings the company received from S&P, Best, and Conning were high; its low-quality bond portfolio was broadly diversified and its investment strategy sound; and its administrative capabilities and reputation in the annuity business were strong.

On April 8, 1987, Buck solicited bids from fourteen potential annuity providers, including Executive Life. Buck had previously explained to **RJR** that companies would make initial bids and that Buck would select possibly three companies from which final bids would be solicited. In May, five potential providers submitted preliminary bids: AIG Life Insurance Company ("AIG"), Aetna Life Insurance ("Aetna"), Executive Life, Mutual Life Insurance Company of New York, and Prudential Asset Management Company ("Prudential").[4] The other companies declined to participate, primarily because of the complexity associated with the numerous plans.

Between May and August, Overgard provided additional information to the companies interested in bidding. The bulk of his time

was spent working with the companies to make sure they had correct data and enough data to enable them to submit a qualified bid, testing whether alternative strategies might be available for placing the bid on the final bid day, and assessing how hard he could push the companies in final negotiations.

291 *291 Sometime prior to August, 1987, Overgard learned that Moody's had given Executive Life a rating of A3, which was two grades below that of S&P's AAA rating for the company.[5] He also read media reports speculating that problems in the market for low-quality bonds might affect Executive Life. Overgard determined from a discussion with an individual at Moody's that the rating agency had not talked with Executive Life management prior to issuing its rating, and he pursued "industry intelligence" regarding the company. Overgard concluded that the lower Moody's rating was an attempt on the part of the agency to gain publicity, but did not recall a specific discussion with the individual at Moody's regarding why the agency rated Executive Life as it did, or how the agency viewed the provider's nontraditional portfolio. He found that the opinions of other insurance companies were mixed: "some were not concerned about Executive Life and some were willing to put the fear of God into us," the latter describing low-quality bonds as a bad investment strategy. Concerned about what would happen to the market for low-quality bonds should Drexel collapse, Overgard talked to investment bankers. In Overgard's opinion, those bankers were quite eager to move into the market for low-quality bonds. Overgard also viewed Executive Life as working the case harder and asking more questions during the bid solicitation process than the other companies. Overgard concluded that Executive Life should remain on the bid list.

Final bid day was set for August 12, 1987. On that day, Overgard met with representatives of **RJR** (Tyner, and representatives from **RJR's** Employee Benefits and Legal Departments) to review the preliminary bids. The sole documentation **RJR** had comparing providers was a listing of the final companies' ratings and their initial bids. Buck did not recommend any particular company; instead, it saw each of the four remaining companies as qualified and competent to provide the annuity. As a result, Overgard saw his role on final bid day as obtaining from each company its best (lowest) bid. Overgard negotiated with the four companies in one room; **RJR** representatives were in another room. Overgard determined midday that Aetna and AIG had given their best bid, and so concentrated for the remaining period on obtaining lower bids from Prudential and Executive Life. The following provides the final bids along with other information Buck supplied **RJR**:

INSURER	S&P	BEST	MOODY'S	CONNING	BID
Aetna	AAA	A+	AAA	102/104	$61.9 M
AIG	AAA	A	AAA	N/A	$60.2 M
Executive Life	AAA	A+	A3	100/106	$54 M
Prudential	AAA	A+	AAA	98/91	$56.7 M

Aetna's bid was the highest at $61.9 million, and Executive Life's was the lowest at $54 million. According to Overgard, the numeric Conning ratings reflected historical information on liquidity over two years. Thus, Aetna's rating of 102/104 reflected an improvement, while Prudential's ratings reflected a decline.

RJR had established three requirements that "at a minimum" the company providing the annuity would have to meet: (1) receipt of an AAA rating from S&P; (2) capacity to administer the plans; and (3) approval from Buck. On the final bid day, Shultz had a number of other things to do. Because he had full confidence in the **RJR** representatives present, and "because the dollar value of the assets involved in the transaction was insubstantial in comparison to **RJR's** total pension portfolio," he attended the meeting for about an hour and fifteen minutes at its outset. After the final bids came in, **RJR** representatives present identified Executive Life as the insurer from which to purchase the annuity, as it was the lowest bidder, had at least one AAA rating, and was capable of administering the annuity. Tyner telephoned Shultz to inform him of the recommendation. After a fifteen- or
292 twenty-minute *292 conversation, Shultz gave the go-ahead to select Executive Life.

Unlike Tyner, Shultz was aware of a number of facts regarding Executive Life, its chairman, Fred Carr, and the market for low-quality bonds. For example, Shultz was aware (1) of the percentage of Executive Life's portfolio that was devoted to low-quality bonds, (2) of allegations regarding a connection between Executive Life and Drexel's Michael Milken, (3) that Executive Life was one of Milken's largest customers, (4) that Drexel and Milken were the targets of SEC and Attorney General investigations of the 1986 insider trading scandal, (5) that Executive Life and Carr came within the scope of those investigations, and (6) that Executive Life of New York, a subsidiary of Executive Life, had been fined by New York insurance regulators due to the insurer's reinsurance practices, had $150 million of reinsurance disallowed, and had received from Executive Life $150 million to make up the difference.[6] Shultz had not seen as much negative press regarding Aetna's or Prudential's holdings of

low-quality bonds as he had seen with regard to the holdings of Executive Life, and he had not seen the diversity of reviews of the other companies that he had seen with respect to Executive Life. Shultz stated that he relied primarily on Tyner's input, and that his decision to concur in the purchase of Executive Life's annuity was made taking into account the fact that "Executive Life had the same S&P rating as did Prudential, had a reputation equal to or better than Prudential's for being able to service complex annuity contracts and was recommended by Buck."

On August 17, 1987, **RJR** caused $54 million to be wired to Executive Life. A letter agreement was signed November 23 of the same year. **RJR** formally terminated the Plan on June 30, 1988.[7] The total pre-tax reversion associated with the termination of all plans covered under the annuity was $82,080,000; this resulted in **RJR** receiving on May 27, 1989 a net reversion of $43,051,510.

Tyner was aware that by 1989, Executive Life was suffering financially. To his knowledge, however, no one at **RJR** considered extracting himself from the deal to buy Executive Life's annuity. **RJR** accepted the provider's annuity contract on December 13, 1989.

By late 1989, the low-quality bond market was suffering significant losses. Because well over half of Executive Life's portfolio consisted of low-quality bonds, it felt the brunt of those losses. In January, 1990, First Executive Corporation, the parent of Executive Life, announced that its low-quality bond portfolio had lost $1 billion in market value and that it would take a $515
293 million writedown. In April, *293 1991, California insurance regulators placed Executive Life in conservatorship, and for a period of time, certain Executive Life policyholders received reduced benefits. Eventually, the market for low-quality bonds rebounded, and Executive Life was taken over by a consortium of French companies, which formed Aurora National Life Assurance Company. Unfortunately, Appellants and some other Plan participants have not received their full benefits.

Appellants filed suit, on their own behalf and on behalf of a class, against **RJR** in Texas state court in 1991, alleging violations of **RJR's** fiduciary duties. **RJR** removed the case to federal court and moved for summary judgment in 1992. In 1998, the district court granted summary judgment and, consequently, denied Appellants' motion to certify a class. *See* ***Bussian v. RJR Nabisco, Inc.***, 21 F.Supp.2d 680 (S.D.Tex.1998). Appellants timely appeal.

II. SUMMARY JUDGMENT

A. Standard of Review

We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. *See Norman v. Apache Corp.,* 19 F.3d 1017, 1021 (5th Cir.1994); *Conkling v. Turner,* 18 F.3d 1285, 1295 (5th Cir.1994). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citations omitted). We must view all evidence in the light most favorable to the party opposing the motion and draw all reasonable inferences in that party's favor. *See id.* at 255, 106 S.Ct. 2505.

B. The Standard

Section 1104(a) sets forth the general duties imposed upon ERISA fiduciaries:[8]

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and
294 instruments are consistent with the provisions of this subchapter and subchapter III of this chapter. *294 29 U.S.C. § 1104(a)(1). We have recognized that this provision imposes several overlapping duties. *See, e.g., Metzler v. Graham,* 112 F.3d 207, 209 (5th Cir.1997) (involving the duty to diversify and the duty of loyalty); *Donovan v. Cunningham,* 716 F.2d 1455, 1464 (5th Cir.1983) ("Section [1104] imposes upon fiduciaries a duty of loyalty and a duty of care."). Appellants assert that the district court erred in holding that, as a matter of law, **RJR** satisfied its obligations under ERISA. They argue that **RJR** was required to attempt to select the safest available annuity to satisfy its duty of loyalty. They also contend that **RJR** failed to conduct an investigation that satisfied its duty of care, and that it acted inconsistently with its duty to diversify in selecting an insurance carrier that held 50% to 60% of its portfolio in low-quality bonds.

1. The Duty to Diversify

We first narrow the focus of our inquiry by disposing of one of Appellants' arguments. They assert that § 1104(a)(1)(C) imposes on a fiduciary selecting an annuity the duty to select an insurance provider whose portfolio is sufficiently diversified. We disagree. Section 1104(a)(1)(C) deals specifically with "investments of the plan." As **RJR** points out, the purchase of an annuity to facilitate plan termination is not an investment of the plan. It is, as 29 U.S.C. § 1341(b)(3) provides, a "final distribution of assets." Section 1104(a)(1)(C) therefore does not impose upon a plan fiduciary the obligation to investigate or ensure the adequate diversification of an annuity provider's portfolio. This is not to say that a plan fiduciary has no obligation to consider the diversification of an annuity provider's portfolio; such an obligation may exist under § 1104(a)(1)(B), a possibility we address *infra. Cf.* 29 U.S.C. § 1104(a)(2) (stating that the "diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B)" do not apply to certain transactions). We are therefore left to determine the proper standard to guide our inquiry into whether summary judgment is appropriate to dispose of Appellants' claims that **RJR** breached its duties of loyalty and care in purchasing Executive Life's annuity.

2. The Duty of Loyalty

ERISA's duty of loyalty is "the highest known to the law." *Donovan v. Bierwirth,* 680 F.2d 263, 272 n. 8 (2d Cir.), *cert. denied,* 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982); *cf. Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545, 546 (1928) (Cardozo, J.) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."). The Supreme Court recently had occasion to describe ERISA's duty of loyalty, in so doing again recognizing the duty's source in the common law of trusts. *See Pegram v. Herdrich,* ___ U.S. ___, 120 S.Ct. 2143, 2151-52, 147 L.Ed.2d 164 (2000) ("`The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty.... It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries.'" (quoting 2A A. SCOTT & W. FRATCHER, TRUSTS § 170, at 311 (4th ed.1987))).

Although ERISA's duties gain definition from the law of trusts, the usefulness of trust law to decide cases brought under ERISA is constrained by the statute's provisions. *See Varity Corp. v. Howe,* 516 U.S. 489, 497, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ("We also recognize ... that trust law does not tell the entire story."); *Cunningham,* 716 F.2d at 1464. Under ERISA, for example, a fiduciary may have financial interests adverse to beneficiaries, but under trust law a "trustee `is not permitted to place himself
295 in a position where it would be for his own benefit to violate *295 his duty to the beneficiaries.'" *See Pegram,* ___ U.S. ___, 120 S.Ct. 2143, 2152-53, 147 L.Ed.2d 164 (quoting 2A SCOTT & FRATCHER, § 170, at 311). Despite the ability of an ERISA fiduciary to wear two hats, "ERISA does require . . . that the fiduciary with two hats wear only one at a time, and wear the

fiduciary hat when making fiduciary decisions." *Id.* (citing *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 443-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999)); *see also Varity,* 516 U.S. at 497, 116 S.Ct. 1065.

That ERISA contemplates that a plan fiduciary may have multiple roles is reflected in the language of § 1104(a). That section begins with the phrase "[s]ubject to sections 1103(c) and (d), 1342, and 1344 of this title," which explicitly refers to ERISA provisions that allow plan assets to be returned to the employer under some circumstances. *See Borst v. Chevron Corp.,* 36 F.3d 1308, 1320 (5th Cir.1994), *cert. denied,* 514 U.S. 1066, 115 S.Ct. 1699, 131 L.Ed.2d 561 (1995); *District 65, U.A.W. v. Harper & Row, Publishers, **Inc**.,* 576 F.Supp. 1468, 1477-78 (S.D.N.Y.1983); Daniel Fischel & J.H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule,* 55 U. CHI. L.REV. 1105, 1154 (1988). As a result, although the balance of § 1104(a)(1) would appear to make a return of assets to an employer a violation of the duty to act "solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants," § 1104(a)(1)(A)(i), the provision's initial phrase precludes such an interpretation.

Under ERISA, neither the decision to terminate an overfunded plan, nor a reversion of plan assets that is consistent with § 1344(d), is a per se violation of § 1104(a)(1). *See* § 1108(a)(9) (exempting from prohibited transactions "[t]he making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under § [1344]...."); *Lockheed Corp. v. Spink,* 517 U.S. 882, 890-91, 135 L.Ed.2d 153, 116 S.Ct. 1783 (1996) (extending to pension benefit plans the notion that when employers terminate employee welfare plans, they do not act as fiduciaries and instead are analogous to settlors of a trust); *Izzarelli v. Rexene Prods. Co.,* 24 F.3d 1506, 1524 (5th Cir.1994). Prior to termination, a defined benefit plan, such as the one involved in the case before us, "consists of a general pool of assets," *Hughes Aircraft,* 525 U.S. at 439, 119 S.Ct. 755, and "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440, 119 S.Ct. 755. Instead, plan members have a right only to their accrued benefit—a plan's surplus[9] need not be made available for distribution to plan members. *See id.* at 440-41, 119 S.Ct. 755; *Borst,* 36 F.3d at 1315. Because an employer may, consistent with ERISA's provisions, receive a plan's surplus upon termination, the fact that the employer terminates a plan specifically to gain access to that surplus is not a violation. *See District 65,* 576 F.Supp. at 1478 (dismissing plaintiffs' breach of fiduciary-duty claim challenging a sponsor's termination of a plan in order to use the surplus to prevent a third party from taking control of the company).

However, simply because ERISA allows an employer to recoup surplus assets does not mean that a fiduciary's acts undertaken to implement a plan's termination may deviate from ERISA's command that a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." § 1104(a)(1). The question whether an employer has access to
296 a reversion because of a plan's termination is separate *296 from the issue of the size of that reversion. *See District 65,* 576 F.Supp. at 1478. Undertaking steps to maximize the size of the reversion with the direct result of reducing benefits would be a violation of ERISA's commands. *See Cooke v. Lynn Sand & Stone Co.,* 673 F.Supp. 14, 27 (D.Mass. 1986) (denying summary judgment where a material fact question existed regarding whether sponsor had used higher interest rate to maximize its reversion); *cf. Reich v. Compton,* 57 F.3d 270, 291 (3d Cir.1995) ("[T]rustees violate their duty of loyalty when they act in the interests of the plan sponsor rather than `with an eye single to the interests of the participants and beneficiaries of the plan'") (quoting *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.), *cert. denied,* 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982)).

The Secretary of the Department of Labor (the "Secretary"), as *amicus curiae,* urges us to hold that the duty of loyalty requires that a fiduciary disposing of plan assets as part of a termination purchase "the safest annuity available." Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA When Selecting an Annuity Provider, 29 C.F.R. § 2509.95-1(c) (1999) (hereafter "IB 95-1" or the "Bulletin"). Although the Bulletin was first published in March 1995 in response to the failure of Executive Life, the Federal Register notes an effective date for IB-95 of January 1, 1975. *See* Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974 (hereafter "IB-ERISA"), 60 Fed.Reg. 12328, 12328 (1995). According to the Secretary, we owe deference to the interpretation of ERISA's fiduciary duties expressed in IB-95, *see Chevron U.S.A., **Inc**. v. Natural Resources Defense Council, **Inc**.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and should apply it to **RJR's** selection of Executive Life's annuity.

In *Christensen v. Harris County,* 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), the Supreme Court rejected an argument that it should give "*Chevron* deference" to a Department of Labor opinion letter. Noting that such interpretations are not "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking" and "lack the force of law," *id.* at 1662, it concluded that interpretations in opinion letters and similar documents are instead "`entitled to respect' under [its] decision in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those

interpretations have the `power to persuade'." *Id.* at 1663; *see also* *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 157, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (noting that interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers.").

IB-95 is a Department of Labor interpretative bulletin that is not the product of notice-and-comment procedures established by the Administrative Procedure Act.[10] *See* 5 U.S.C. § 553 (1994). Although the Department gave advance notice of proposed rulemaking, *see* Annuitization of Participants and Beneficiaries Covered Under Employee Pension Plans (hereafter "Annuitization"), 56 Fed.Reg. 28638 (1991), the focus of that notice was not the proper application of § 1104 to a fiduciary's selection of an annuity provider as part of plan terminations. Instead, the notice described the possibility of amending existing
297 regulations defining the circumstances under which an individual is a participant covered under a plan.[11] *See id.* at 28639. *297 After receiving some responses, *see* IB-ERISA, 60 Fed.Reg. at 12329, the Department determined that "no regulatory action should be taken at this time to amend the minimum standards under the regulation at 29 CFR 2510.3-3(d)(2)(ii)." *Id.*

Rather than undertaking regulatory action, the Department, seeing a need for "further guidance regarding the selection of ... annuity providers by plan fiduciaries," published the Bulletin. IB-ERISA, 60 Fed.Reg. at 12328. The Department noted that the "bulletin concerns solely the fiduciary standard and is published in addition to and independent of the regulatory minimum standard at 29 C.F.R. 2510.3-3(d)(2)(ii)." *Id.* at 12329. The Secretary's position is that the Bulletin "announce[s] to the public the Department's legal view of ERISA." Secretary's Brief at 17-18. Because the Bulletin is not the product of notice-and-comment rulemaking, and does not have the force of law, we apply the standard referred to in *Christensen,* and determine the extent to which the Bulletin is "entitled to respect." *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161.

We begin our inquiry with a discussion of the Bulletin's provisions. Subsection (c) provides that in discharging its duty of loyalty in purchasing an annuity, a fiduciary "must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise."[12] 29 C.F.R. § 2509.95-1(c) (1999). Although this would appear to impose on fiduciaries an obligation to *attempt* to obtain the safest annuity, the Bulletin also states that "there are situations where it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity." *Id.* § 2509.95-1(d). In cases involving overfunded plans, the Bulletin provides that a fiduciary "must make diligent efforts to assure that the safest available annuity is purchased." *Id.* This language strongly suggests that the Secretary interprets ERISA's duty of loyalty as requiring that a fiduciary selecting an annuity for purposes of plan termination actually purchase *the* safest annuity, unless circumstances of the type indicated exist.[13] These circumstances include where the safest annuity is only marginally safer yet disproportionately more expensive and where the insurer offering the safest annuity is unable to administer the plan. *See id.*

298 The Secretary's brief also argues that a fiduciary under the circumstances of this *298 case is obligated to purchase the safest annuity available. The Secretary contends that the relevant issue before us is not whether Executive Life was a viable or sound candidate, as **RJR** argues, but instead "whether Executive Life's annuity was the safest available annuity." According to the Secretary, Shultz and Tyner acted consistently with their fiduciary duties only if they could answer this question in the affirmative.

We agree with the Bulletin and the Secretary that once the decision to terminate a plan has been made, the primary interest of plan beneficiaries and participants is in the full and timely payment of their promised benefits.[14] We agree that beneficiaries and participants whose plan is being terminated gain nothing from an annuity offered at a comparative discount by a provider that brings to the table a heightened risk of default. We would even add that the purchase of such an annuity can be considered an example of the imposition on annuitants of uncompensated risk—the risk of default is borne by the annuitants and, in those states that have guaranty associations, by those associations, while the benefit is granted to the sponsor in the form of a lower price and larger reversion.

However, we are not persuaded that § 1104(a) imposes on fiduciaries the obligation to purchase the "safest available annuity" in order to fulfill their fiduciary duties. We hold that the proper standard to be applied to this case is the standard applicable in other situations that involve the potential for conflicting interests: fiduciaries act consistently with ERISA's obligations if "their decisions [are] made with an eye single to the interests of the participants and beneficiaries." *Bierwirth,* 680 F.2d at 271; *see, e.g., Metzler,* 112 F.3d at 213; *Pilkington PLC v. Perelman,* 72 F.3d 1396 (9th Cir.1995); *Compton,* 57 F.3d at 291; *Deak v. Masters, Mates & Pilots Pension Plan,* 821 F.2d 572, 580 (11th Cir.1987), *cert. denied,* 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988); *Leigh v. Engle,* 727 F.2d 113, 125 (7th Cir.1984) ("*Leigh I*"). That standard does not require that a fiduciary

under the circumstances of this case purchase the "safest available annuity." *Cf. Riley v. Murdock,* No. 95-2414, 1996 WL 209613, at *1 (4th Cir. Apr.30, 1996) (unpublished) (rejecting the standard advocated by the Department of Labor).

The Bulletin's standard focuses on the quality of the selected annuity. The standard we apply focuses instead on the fiduciary's conduct. It requires that fiduciaries keep the interests of beneficiaries foremost in their minds, taking all steps necessary to prevent conflicting interests from entering into the decision-making process. *See Metzler,* 112 F.3d at 213 (noting that steps necessary to reduce the effects of potential conflicts are dependent upon the circumstances); *Bierwirth,* 680 F.2d at 276 (stating that the conflicted trustees "were bound to take every feasible precaution to see that they had carefully considered the other side...."). Although a fiduciary's ultimate choice may be evidence that the duty of loyalty has been breached, the proper inquiry has as its central concern the extent to which the fiduciary's conduct reflects a subordination of beneficiaries' and participants' interests to those of a third party. *Cf. Leigh v. Engle,* 858 F.2d 361 (7th Cir.1988) ("*Leigh II*") ("[W]hether the investments were speculative is irrelevant. The administrators' breach did not consist of investment in speculative assets. Rather, the administrators breached their duties when they made investment decisions out of personal motivations, without making adequate provision that the trust's best interests would be served.").

3. The Duty of Care

299 We recently addressed an ERISA fiduciary's duty of care in *Laborers National* *299 *Pension Fund v. Northern Trust Quantitative Advisors, **Inc**.,* 173 F.3d 313 (5th Cir.), *cert. denied sub nom, Laborers Nat'l Pension Fund v. American Nat'l Bank & Trust Co.,* ___ U.S. ___, 120 S.Ct. 406, 145 L.Ed.2d 316 (1999). The issue in Laborers was whether a pension fund's investment manager violated its duty of care when it purchased interest-only mortgage-backed securities. Although the case before us arises in a different context, we find the discussion in *Laborers* instructive:

> In determining compliance with ERISA's prudent man standard, courts objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions. [ERISA's] test of prudence ... is one of conduct, and not a test of the result of performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed. Thus, the appropriate inquiry is whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.

Id. at 317 (alterations in original) (internal citations and quotation marks omitted); *see also In re Unisys Sav. Plan Litig.,* 173 F.3d 145, 153 (3d Cir.) ("*Unisys II*") (noting that the prudence requirement focuses on whether "a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment"), *cert. denied sub nom, Meinhardt v. Unisys Corp.,* ___ U.S. ___, 120 S.Ct. 372, 145 L.Ed.2d 290 (1999); *DeBruyne v. Equitable Life Assurance Soc'y,* 920 F.2d 457, 465 (7th Cir.1990) (agreeing with the lower court that ERISA's duty of care requires "prudence, not prescience"). What the appropriate methods are in a given situation depends on the "character" and "aim" of the particular plan and decision at issue and the "circumstances prevailing" at the time a particular course of action must be investigated and undertaken. 29 U.S.C. § 1104(a)(1)(B); *see also Cunningham,* 716 F.2d at 1467.

A fiduciary's duty of care overlaps the duty of loyalty. *See Bierwirth,* 680 F.2d at 271. The presence of conflicting interests imposes on fiduciaries the obligation to take precautions to ensure that their duty of loyalty is not compromised. As we have noted, "[t]he level of precaution necessary to relieve a fiduciary of the taint of a potential conflict should depend on the circumstances of the case and the magnitude of the potential conflict." *Metzler,* 112 F.3d at 213. To ensure that actions are in the best interests of plan participants and beneficiaries, fiduciaries under certain circumstances may have to "at a minimum" undertake an "intensive and scrupulous independent investigation of [the fiduciary's] options." *Leigh I,* 727 F.2d at 125-26 (citing *Bierwirth,* 680 F.2d at 272). In some instances, the only open course of action may be to appoint an independent fiduciary.[15] *See Leigh I,* 727 F.2d at 125; *Bierwirth,* 680 F.2d at 271-72.

With regard to the duty of care in the circumstances of this case, IB 95-1 states that ERISA "requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from
300 which to purchase annuities." *Id.* *300 § 2509.95-1(c). The Bulletin notes several factors that should be considered in the search, including the "quality and diversification" of an insurer's portfolio, the size of the insurer, the insurer's exposure to liability,

and the safety provided by the structure of the annuity contract. *See id.* § 2509.95-1(c)(1)-(5). "Reliance solely on ratings provided by insurance rating services would not be sufficient...." *Id.* § 2509.95-1(c). The Bulletin suggests that fiduciaries with a conflict of interest take special precautions in a reversion situation. It exhorts such fiduciaries "to obtain and follow independent expert advice calculated to identify those insurers with the highest claims-paying ability willing to write the business." *Id.* § 2509.95-1(e).

We view the Bulletin's description of the nature of the investigation to be undertaken in the circumstances of this case as fully consistent with ERISA's provisions and with courts' holdings, including our own. *See, e.g., Laborers,* 173 F.3d at 317. When selecting an annuity provider to facilitate the termination of a vastly over-funded defined benefit pension plan, the plan's fiduciary must structure and conduct a "careful and impartial investigation" aimed at identifying providers whose annuity the fiduciary may "reasonably conclude best to promote the interests of participants and beneficiaries" of the plan. *Bierwirth,* 680 F.2d at 271. Of course, many factors must be weighed in determining which provider or providers are best-suited to promote those interests.

In this regard, we find the factors enumerated in IB 95-1 instructive. The relevant inquiry in any case is whether the fiduciary, in structuring and conducting a thorough and impartial investigation of annuity providers, carefully considered such factors and any others relevant under the particular circumstances it faced at the time of decision. If so, a fiduciary satisfies ERISA's obligations if, based upon what it learns in its investigation, it selects an annuity provider it "reasonably concludes best to promote the interests of [the plan's] participants and beneficiaries." *Bierwirth,* 680 F.2d at 271. If not, ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation. *See Unisys II,* 173 F.3d at 153-54 (affirming district court's holding, after a bench trial, that a hypothetical prudent person would have invested in Executive Life guaranteed investment contracts for an ongoing plan); *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 919 (8th Cir.1994) ("Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.").[16]

A fiduciary must consider any potential conflict of interest, such as a potential reversion of plan assets, and structure its investigation accordingly. Engaging the services of an independent, outside advisor may serve the dual purposes of increasing the thoroughness and impartiality of the relevant investigation, and of relieving the fiduciary of any taint of a potential conflict. In the circumstances of this case, such purposes are served when the outside advisor's task is directed to identifying the provider or providers that best promote the beneficiaries' interests.

Fiduciaries investigating annuity providers to facilitate the termination of an over-funded defined benefit plan, like fiduciaries in other circumstances, are entitled to rely on the advice they obtain from independent experts. *See Cunningham,* 716 F.2d at
301 1474 ("ERISA fiduciaries need not become experts in the valuation of *301 closely-held stock—they are entitled to rely on the expertise of others."). Those fiduciaries may not, however, rely blindly on that advice. *See id.* ("An independent appraisal is not a magic wand that fiduciaries may simply waive over a transaction to ensure that their responsibilities are fulfilled. It is a tool and, like other tools, is useful only if used properly."); *Howard v. Shay,* 100 F.3d 1484, 1490 (9th Cir.1996) ("Conflicted fiduciaries do not fulfill ERISA's investigative requirements by merely hiring an expert."), *cert. denied,* 520 U.S. 1237, 117 S.Ct. 1838, 137 L.Ed.2d 1042 (1997); *Donovan v. Mazzola,* 716 F.2d 1226, 1234 (9th Cir.1983) ("[R]eliance on counsel's advice, without more, cannot be a complete defense to an imprudence charge."), *cert. denied,* 464 U.S. 1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984); *Bierwirth,* 680 F.2d at 272. In order to rely on an expert's advice, a "fiduciary must (1) investigate the expert's qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances." *Howard,* 100 F.3d at 1489 (citing *Cunningham,* 716 F.2d at 1467, 1474) (other citation omitted); *see also Hightshue v. AIG Life Insurance Co.,* 135 F.3d 1144, 1148 (7th Cir.1998); *In re Unisys Sav. Plan Litig.,* 74 F.3d 420, 435-36 (3d Cir.1996) (*"Unisys I"*) ("[W]e believe that ERISA's duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary.").

A determination whether a fiduciary's reliance on an expert advisor is justified is informed by many factors, including the expert's reputation and experience, the extensiveness and thoroughness of the expert's investigation, whether the expert's opinion is supported by relevant material, and whether the expert's methods and assumptions are appropriate to the decision at hand. *See, e.g., Hightshue,* 135 F.3d at 1148; *cf. Howard,* 100 F.3d at 1490 ("To justifiably rely on an independent appraisal, a conflicted fiduciary need not become an expert in the valuation of closely held corporations. But the fiduciary is required to make an honest, objective effort to read the valuation, understand it, and question the methods and assumptions that do not make sense."). The goal is not to duplicate the expert's analysis, but to review that analysis to determine the extent to which any

emerging recommendation can be relied upon. *Cf. Cunningham,* 716 F.2d at 1474 (holding that fiduciaries, who had information available to them indicating that assumptions underlying an expert's appraisal were no longer valid, breached their duties under ERISA by not analyzing the effect of changes in those assumptions).

Just as with experts' advice, blind reliance on credit or other ratings is inconsistent with fiduciary standards. *See Pilkington,* 72 F.3d at 1400 ("Legal authority does not support [the fiduciaries'] contention that a mere ratings scan satisfied their fiduciary duty of loyalty to the plan."); *Unisys I,* 74 F.3d at 436-37 (citing *Cunningham* in support of its determination that whether a "rating was a reliable measure of Executive Life's financial status under the circumstances and whether Unisys was capable of using the rating effectively" were matters to be decided at trial). Reviewing the ratings assigned by different rating agencies may be a good place to begin the inquiry, but it certainly is not a proper place to end it.

As with an expert's advice, fiduciaries must determine the extent to which reliance on ratings is reasonably justified under the circumstances. Some ratings agencies are more highly regarded than others. Ratings in general reflect an agency's evaluation of a company, not its evaluation of a company's particular product line. Different agencies' ratings reflect the application of different methodologies. At any given time, agencies' ratings will vary as to their recency. As evidence in the record before us
302 suggests, an agency's rating of a particular company may be *302 perceived by investors and industry insiders as incorrect. Reports accompanying ratings provide fiduciaries with a means of assessing the basis for the particular rating and of identifying what additional information may need to be considered. As with the use of experts, a fiduciary need not duplicate the analysis conducted by the ratings agencies. However, the duty of care imposes on the fiduciary an obligation to ascertain the extent to which the ratings can be relied upon in making the decision at hand.

Assuming a proper investigation has been conducted, a fiduciary does not violate its duties under ERISA simply because an action it determines best promotes participants' and beneficiaries' interests "incidentally benefits the corporation." *Bierwirth,* 680 F.2d at 271. Appellants charge that **RJR** selected Executive Life because it submitted the lowest bid and in so doing, violated its duty of loyalty. **RJR** does not deny that cost was a basis for its decision, and instead contends that it could choose the lowest-cost provider under the circumstances. Under the standard we apply, an annuity's price cannot be the motivating factor until the fiduciary reasonably determines, through prudent investigation, that the providers under consideration are comparable in their ability to promote the interests of participants and beneficiaries. Without such a prior determination, consideration of an annuity's price, because it directly benefits the employer, can be taken as evidence that a fiduciary has placed an interest in a reversion above the interests of plan beneficiaries.

Of course, the comparison of annuity providers must be made considering factors relevant to plan beneficiaries' and participants' interests.[17] As a general matter, we expect that a proper investigation of potential annuity providers will reveal that each has its own "warts." We do not view the presence of such blemishes, by itself, to be sufficient to cause a fiduciary to eliminate those providers from further consideration. The issue is whether a provider's warts, viewed qualitatively and quantitatively, are such that a prudent person in like circumstances would determine that the purchase of that provider's annuity was not in the best interests of plan beneficiaries and participants. Having concluded that all remaining providers are comparable in their ability to serve the best interests of plan beneficiaries and participants, a fiduciary does not violate ERISA's commands by subsequently considering which provider offers its annuity at a lower price.

C. RJR's Compliance with its Fiduciary Obligation

Keeping in mind the standards set forth above, we must determine whether reasonable and fair-minded persons could conclude from the summary judgment evidence that **RJR** breached its fiduciary duties in selecting Executive Life's annuity. Based upon a careful review of the record in this case, we conclude that it was inappropriate for the district court to grant summary judgment in favor of **RJR**. Viewing the evidence in the light most favorable to Appellants, a reasonable factfinder could conclude that **RJR** failed to structure, let alone conduct, a thorough, impartial investigation of which provider or providers best served the interests of the participants and beneficiaries. Even if the factfinder were to conclude that **RJR's** investigation was appropriate, it could
303 conclude, based on the evidence, that **RJR** could not reasonably determine that Executive *303 Life best promoted the interests of plan participants and beneficiaries. Finally, moving on to the hypothetical prudent person standard, a reasonable factfinder could also conclude that Executive Life was not an objectively reasonable choice based upon the information **RJR** should have gathered.

1. The Investigation

A reasonable factfinder could conclude that **RJR** did not structure or conduct an independent and impartial investigation directed to identifying a carrier that it could "reasonably conclude [was] best to promote the interests of participants and beneficiaries" of the plan.[18] *Bierwirth,* 680 F.2d at 271. Given the decision to terminate a defined benefit plan, the primary interest of participants and beneficiaries was in the full and timely payment of their promised benefits. The record shows that **RJR** employed Buck to assist it in selecting an annuity provider, and looked to Buck to assess the solvency and safety of the bidding companies.[19] Overgard, a Buck consultant, stated in his deposition that his analysis of the insurers' financial health was limited to a review of the rating agencies' ratings and reports. He also stated that he had spent less time on evaluating companies than, as Overgard put it, "on stuff that [Buck] had been hired to do, and that is to work with the insurance companies to get the best bids."

Overgard, who was responsible for compiling an initial list of insurance companies that could provide the annuity, determined, after a discussion with a colleague, that Executive Life ought not be included on that list because it used a nontraditional investment strategy that featured a high percentage of low-quality bonds. When the list compiled by its expert did not include Executive Life, Tyner specifically requested that the company be added because its expected lower bid could be used to drive down the bids of other providers. Tyner, at the time he requested Executive Life be included, did not think that "Executive Life should be seriously considered in the final bidding process." He anticipated that another, "more well-known" company would ultimately be selected.

The record contains evidence that Overgard undertook some investigation of Executive Life beyond his examination of the ratings (e.g., determining that Moody's had not talked with Executive Life management prior to assigning its rating, talking with investment bankers, pursuing industry intelligence).[20] He found opinions regarding Executive Life to be mixed, with some industry insiders viewing the company's investment strategy as bad. Again, Overgard did not review any of Executive Life's financial statements, reports, or disclosures, or conduct a special financial analysis of Executive Life or any other provider. The
304 record indicates that Overgard was not aware that California regulators *304 were looking into Executive Life's reinsurance practices, and did not recall whether he knew, prior to the final bid day, that states' regulators had capped, or were considering capping, insurance companies' investment in low-quality bonds. In Overgard's opinion, positive attributes, such as Executive Life working the case harder, being more professional, and asking more questions, kept the company on the list. A reasonable factfinder could conclude that Buck included Executive Life on the final list of bidders in spite of its nontraditional investment strategy specifically because of the request of **RJR**, its client. Executive Life's low bid could not be used to drive down the bids of other providers unless it was included on the final list.

The record also includes indications that **RJR** did not ascertain, prior to selecting Executive Life, what Overgard had done to assess the safety of the companies interested in **RJR's** business other than look at the ratings, which Overgard had provided to **RJR**.[21] It could be concluded based on evidence in the record that despite **RJR's** request that Executive Life be placed on the list to drive down other providers' bids, **RJR** did not ascertain the basis for Buck's statement that the company was "qualified." A reasonable factfinder could also conclude that **RJR** failed to assess the basis for Buck's statement that all four providers were "qualified" to provide the annuity, *cf. Unisys I,* 74 F.3d at 435-36 (concluding, when confronted with similar evidence, that summary judgment in favor of the defendant was inappropriate), and failed to ascertain whether Buck's statement meant that **RJR** could view each of the companies as comparable.

Focusing on whether **RJR** undertook activities to investigate the safety of the carriers interested in bidding, a reasonable factfinder could conclude that the company relied entirely on ratings that Buck provided it.[22] The record indicates that **RJR** looked to those ratings to examine the safety of Executive Life.[23] Both Shultz and Tyner stated that they had not read the accompanying reports. Tyner assumed that negative information that existed would be reflected in agency ratings. In his deposition, Tyner stated that to his knowledge, no one checked why Moody's had given Executive Life a lower rating. Tyner also stated that he did not look at Executive Life's annual reports or SEC filings. As with Buck's recommendation, a factfinder could conclude that **RJR** failed to assess the extent to which it was justified in relying upon the ratings assembled by Buck, and that the bulk of **RJR's** investigation was a review of those ratings.[24]

305 *305 A factfinder could conclude that the absence of an independent investigation by **RJR** is made more egregious by the fact that Shultz (who bore the responsibility for making the final decision on behalf of **RJR**) apparently possessed a good deal of

information about Executive Life and the emerging problems in the market for low-quality bonds. *See* Part I *supra.* Yet he did nothing to ascertain whether Tyner was in possession of that information, let alone whether he had conducted further investigation (either personally or through Buck) to determine that Executive Life was a provider qualified to be on the final list.

A factfinder could conclude that as far as **RJR** knew on August 12, 1987, its investigation of the providers involved (1) hiring Buck, which scanned the ratings, and (2) scanning the ratings itself. **RJR** asserts that this represents the normal investigation undertaken at the time by fiduciaries purchasing annuities from insurance companies that are heavily regulated by the states, and points to a statement of one of its experts, who had not acted as a fiduciary, for support for this contention. However, the record also contains statements from Appellants' experts, three of whom had acted as a fiduciary, that **RJR's** practices breached its fiduciary duties. Given this case is before us on summary judgment, we leave to the factfinder the task of making credibility assessments. *See Anderson,* 477 U.S. at 255, 106 S.Ct. 2505 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."). We note that a reasonable factfinder could conclude from the evidence that application of the "normal" investigation was not sufficient under the circumstances. Executive Life's investment strategy deviated significantly from the norm, was comparatively untested, and was the subject of debate among industry insiders. Moreover, evidence in the record suggests that some investors viewed Executive Life's S&P rating as incorrect.

In short, a reasonable factfinder could conclude from evidence in the record that **RJR** made an insufficient attempt to identify which provider or providers was best positioned to promote the interests of the participants and beneficiaries. Based upon its lack of understanding of the basis for Buck's statement that all four bidders on the final list were "qualified," its failure to assess the extent to which ratings could be reasonably relied upon, and its failure to consider factors beyond ratings provided by Buck, a reasonable factfinder could conclude that **RJR** failed to structure and conduct a prudent investigation. Even if it had long been the practice of those purchasing annuities to rely solely on a ratings scan, a factfinder could conclude that such an investigation was inappropriate in light of lack of experience that the industry, and its regulators, had with Executive Life's investment strategy. Were a factfinder to conclude that **RJR's** investigation was inadequate under the circumstances, **RJR** would no longer be entitled to rely on the reasonableness of its final selection based upon the information its investigation produced.

306 *306 Even if **RJR's** investigation were to be found proper, a reasonable factfinder could conclude that **RJR**, based on the information it had, was unreasonable in considering the four providers comparable in their ability to serve the interests of plan beneficiaries and participants. The record indicates that the four companies were identical in only one dimension—the ratings given by S&P. Beyond this, there was variation in the ratings given to the four companies, with Executive Life receiving a Moody's rating two grades lower than AAA. A factfinder could conclude that Shultz was aware of a number of facts regarding Executive Life, including that over 50% of its portfolio was in low-quality bonds, that in this way Executive Life was unusual among insurance companies, and that there was mixed opinion regarding both Executive Life's strategy (involving, as it did, investing over 50% of its portfolio in low-quality bonds) and the soundness of investing in low-quality bonds generally. Shultz understood the connection between Drexel and Executive Life, and that Executive Life came within the scope of then-ongoing government investigations. Shultz had not seen the same variation in views of the other companies as he had seen with Executive Life. There is evidence in the record that of the final four companies, **RJR** first used price to reduce the field to two, and then simply went with the lowest bidder. For example, Aetna was dropped from consideration midday because of price; Prudential and Executive Life were considered further because they were the low bidders. Executive Life was chosen over Prudential because of price. From this, and other evidence in the record,[25] a reasonable factfinder could conclude that **RJR** placed its interests in the reversion ahead of the beneficiaries' interests in full and timely payment of their benefits.

2. The Hypothetical Prudent Person Standard

Similarly, a reasonable factfinder could conclude that Executive Life was not an appropriate choice based upon the investigation that **RJR** should have conducted. There is evidence that many voices in the industry had concerns about Executive Life's investment strategy—a strategy that was substantially different from that used by the industry and that had not stood the test of time. As such, there was more uncertainty (and more associated risk) with Executive Life than with the other candidates. A factfinder could conclude on this basis alone that a prudent person would not select Executive Life's annuity over the annuities offered by those candidates.

307 The record supplies the factfinder with considerable additional evidence that leads to the same conclusion. A factfinder could

conclude from evidence in the record that the vast majority of insurance companies at the time rejected the type of investment strategy that Executive Life had adopted, despite Executive Life's ability to underbid other firms and their resulting economic incentive to adopt a similar strategy. Evidence in the record also suggests that some were critical of S&P giving a high rating to Executive Life, that Duff & Phelps gave the company its ninth rating, and that Moody's had assigned its lower rating to Executive Life in part because of the quality of its bonds. Moreover, Executive Life was, during the relevant period, *307 under investigation by both New York and California regulators. New York regulators had levied a hefty fine against Executive Life's New York subsidiary, and had placed a cap (of 20%) on the low-quality bond holdings of insurance companies that state regulated. Documentation filed by First Executive indicated that the company saw adoption of caps by New York regulators as threat to its future growth, competitiveness, and profitability. Other states' regulators, including those in California, were considering capping investment in such bonds. Although evidence was presented that investment banking firms (in addition to Drexel) were eager to make a market in low-quality bonds, there is also evidence that the low-quality bond market as a whole would suffer as a result of investigations of Drexel that were ongoing at the time **RJR** chose Executive Life. There is evidence that one reputable consultant had removed Executive Life from its Approved List in 1985. A reasonable factfinder could conclude that an appropriate investigation would have revealed this information and that such information, when weighed against the information that should have been gathered on other providers, would cause a fiduciary to eliminate Executive Life as a final candidate well before price could be legitimately considered. *Cf. Pilkington,* 72 F.3d at 1401-02 (holding that summary judgment in favor of defendant was inappropriate where evidence in the record indicated the investigation of Executive Life relied on a "mere ratings scan," that "voices in the insurance industry had expressed misgivings about the soundness of those ratings," and that "reversion maximization figured prominently in [the sponsor's] spin-off/plan termination decision"); *Unisys I,* 74 F.3d at 435-37 (holding that summary judgment in favor of the defendant was inappropriate given, *inter alia,* evidence that allowed a factfinder to infer that Unisys "failed to analyze the bases underlying [its expert's] opinion of Executive Life's financial condition and to determine for itself whether credible data supported [the expert's] recommendation," a subsequent investigation "consisted of nothing more than confirming that Executive Life's credit ratings had not changed," and evidence in the record that raised issues as to whether reliance on ratings was justified).

Given the factual differences between the two cases and the fact-specific nature of our inquiry, we do not view *Unisys II,* 173 F.3d 145 (3d Cir.1999), as dictating a different conclusion. In that case, the court affirmed the lower court's determination, after a bench trial and additional findings of fact, that the fiduciaries' purchase of Executive Life guaranteed investment contracts did not violate ERISA. We note that although those fiduciaries were buying products sold by Executive Life, they were not buying an annuity to facilitate the termination of a defined benefit pension plan. The investments at issue constituted only 15-20% of a fund that was just part of the retirement plan at issue in that case. *See id.* at 152 n. 10. As a result, we do not find *Unisys II*'s ultimate conclusion dispositive.[26]

For similar reasons, we also do not regard *Riley v. Murdock,* 890 F.Supp. 444 (E.D.N.C.1995), *aff'd,* No. 95-2414, 1996 WL 209613 (4th Cir. Apr.30, 1996) (unpublished), as dispositive. In that case, as in this, an Executive Life group annuity was purchased to facilitate the termination of an over-funded defined benefit pension plan. The *Riley* court explained that to assess prudence it first inquired "whether the fiduciary employed the appropriate methods to diligently investigate the transaction." 890 F.Supp. at 458. Next, it determined whether "the decision ultimately made was reasonable based upon the information resulting
308 from the investigation." *308 *Id.* The court detailed the extensive actions taken by the fiduciaries in that case, explained that the plaintiffs had presented no evidence that the fiduciaries should have known about problems with Executive Life in 1986, and concluded, "[a]ll of these efforts establish that [the fiduciaries] thoroughly investigated the purchase of the annuity from Executive Life and that the decision to purchase was reasonable *based on the results of that investigation*." *Id.* (emphasis added).

The *Riley* court's conclusion can not be translated into a pronouncement that the purchase of an Executive Life group annuity to facilitate plan termination was objectively reasonable in 1987 regardless of the investigation conducted. Not only did **RJR** have an additional year of information available to it, but the *Riley* court never addressed the objective prudence of a decision to invest in an Executive Life group annuity. Finding that the fiduciaries in that case conducted a prudent investigation and that their decision was reasonable based upon that investigation, the *Riley* court did not have cause to apply the hypothetical prudent person standard.

III. CLASS CERTIFICATION

The district court denied the motion to certify a class for the reason that "neither of the named plaintiffs will recover anything by this suit." ***Bussian***, 21 F.Supp.2d at 684. We have concluded that summary judgment was inappropriate. Under the circumstances, it seems appropriate to vacate the district court's order denying class certification and allow it to consider the issue more fully on remand.

IV. CONCLUSION

For the foregoing reasons, the grant of summary judgment in favor of **RJR** is REVERSED, and the order denying class certification is VACATED. The case is REMANDED to the district court. Costs shall be borne by **RJR**.

[1] Prior to April 22, 1987, **RJR's** Retirement Board was responsible for the Plan's administration; subsequent to that date, that responsibility fell to **RJR's** Employee Benefits Committee.

[2] **RJR's** decision to terminate was consistent with the provisions of the Plan and with ERISA. The Plan allowed **RJR** to terminate it by purchasing an annuity from an insurance company to provide benefits under the Plan. Upon doing so, the Plan provided that **RJR** could recover any residual assets.

[3] Overgard also did not send initial letters to three companies Tyner suggested be added to the list because those companies indicated they did not want to participate.

[4] At some point after May, Mutual Life of New York dropped out of the bidding.

[5] The top ten Moody's ratings are: Aaa, Aa1, Aa2, Aa3, A1, A2, A3, Baa1, Baa2, and Baa3. The top ten S&P's ratings are AAA, AA+, AA, AA-, A+, A, A-, BBB+, BBB, and BBB-.

[6] Neither Shultz nor Tyner was aware that regulators in California were looking into $188 million of Executive Life's reinsurance.

[7] The Pension Benefit Guarantee Corporation ("PBGC") later audited the termination of the Plan, and on February 7, 1989, found it to be "in accordance with the plan provisions and in compliance with the appropriate laws and regulations administered by the Pension Benefit Guarantee Corporation." The PBGC was established to administer and enforce Title IV of ERISA. *See Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 637, 110 L.Ed.2d 579, 110 S.Ct. 2668 (1990). "Title IV includes a mandatory Government insurance program that protects the pension benefits of over 30 million private-sector American workers who participate in plans covered by the Title. In enacting Title IV, Congress sought to ensure that employees and their beneficiaries would not be completely `deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.'" *Id.* (footnote omitted) (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 720, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984)). A statement that a termination is in accordance with the laws and regulations administered by the PBGC is not a statement that the PBGC considers the termination to be in accordance with fiduciary standards set forth in Title I of ERISA. *Cf. Waller v. Blue Cross,* 32 F.3d 1337, 1343-44 (9th Cir.1994) (holding that plan terminations must be consistent with both Title IV and Title I of ERISA and noting that the two Titles protect pension benefits in different ways).

[8] **RJR** does not argue that activities conducted in implementing a plan termination, such as the selection of an annuity provider, fall outside the standard set forth in § 1104(a). *Cf. Waller,* 32 F.3d at 1343-44 ("We find ERISA's failure to exempt purchasing annuities from § [1104]'s fiduciary obligations to be a powerful indicator of Congress' intent *not* to exempt the process for choosing annuity providers—possibly the most important decision in the life of the plan—from fiduciary scrutiny.").

[9] "Surplus assets, or `residual assets' as termed in ERISA, are `assets in excess of those necessary to satisfy defined benefit obligations....'" *Borst v. Chevron Corp.,* 36 F.3d 1308, 1311 (5th Cir.1994) (quoting *Wilson v. Bluefield Supply Co.,* 819 F.2d 457, 464 (4th Cir.1987)).

[10] The Secretary has the power to promulgate regulations. *See* 29 U.S.C. § 1135. Under 29 U.S.C. § 1137, the rulemaking provisions of the Administrative Procedure Act are applicable to Title I of ERISA.

[11] The Department indicated that its advance notice

was being published in order to obtain information and comments from the public for consideration by the Department in deciding whether to propose a regulation relating to the purchase of annuity contracts for plan participants and beneficiaries, and, if so, whether and to what extent any such regulation should provide minimum standards for determining whether the purchase of an annuity contract would relieve the plan of future liability with respect to the participant or beneficiary for whom the annuity is purchased.

Annuitization, 56 Fed.Reg. at 28639. It acknowledged that "one method for providing such minimum standards would be to amend 29 C.F.R. 2510.3-3(d)(2)(ii)(A). A consequence of such an approach would be that a participant would cease to be a participant covered under the plan only to the extent that prescribed minimum standards are satisfied." *Id.* The regulation at 29 C.F.R. 2510.3-3(d)(2)(ii) describes when an individual becomes a participant covered under an employee benefit plan.

[12] We note that nowhere in the Bulletin is the "safest available annuity" defined, and no-where are its identifying characteristics described.

[13] The Bulletin claims that a fiduciary could conclude "that more than one annuity provider is able to offer the safest annuity available." 29 C.F.R. § 2509.95-1(c). However, under the Bulletin's language, where distinctions are possible a fiduciary would be obligated to choose the "safest available annuity" unless limited exceptions apply. The Bulletin provides no guidance as to how that annuity is to be identified. Given this, and given variations among insurance companies, we see it as likely that distinctions between providers and the annuities they offer could always be made. As a result, we question whether a fiduciary could conclude that "more than one annuity provider is able to offer the safest annuity available" and not leave itself open to challenge by the Secretary.

[14] Because some beneficiaries in the Plan had not yet retired at the time of termination, completion of an obligation to pay in full all promised benefits could occur at a time twenty or more years in the future, when the last beneficiary died.

[15] The district court noted that "[a]lthough the statute lists loyalty separately from prudence, they certainly overlap; satisfying the prudence requirement may fulfill the duty of loyalty." ***Bussian v. RJR Nabisco, Inc.***, 21 F.Supp.2d 680, 685 (S.D.Tex.1998) (citing *Riley v. Murdock,* 890 F.Supp. 444, 459 (E.D.N.C.1995), *aff'd,* No. 95-2414, 1996 WL 209613 (4th Cir. Apr.30, 1996) (unpublished)). We agree that conducting an investigation that is structured to remove the taint associated with conflicting interests goes a long way toward satisfying the duty of loyalty.

[16] *But see Brock v. Robbins,* 830 F.2d 640, 646-47 (7th Cir.1987) (declining to apply the hypothetical prudent person standard in a case where injunctive relief was sought because "[w]hile monetarily penalizing an honest but imprudent trustee whose actions do not result in a loss to the fund will not further the primary purpose of ERISA, other remedies such as injunctive relief can further the statutory interests"). Therefore, the relief sought may impact whether the hypothetical prudent person standard is appropriate.

[17] Price alone is not a good indicator, one way or the other, of an annuity provider's ability to promote the interests of participants and beneficiaries. While a lower price may be related to the provider's belief that it will earn a higher rate of return on its portfolio, which may indicate that its portfolio contains riskier investments, its bid may also be indicative of its ability to administer the annuity more efficiently, of its willingness to write the business based on its business strategy, or of its view of how the proposed obligations will compliment its investment portfolio.

[18] It may be inferred from our conclusion that we reject the standard apparently applied below: "The plaintiffs could show imprudence only if [**RJR**] knew of the problems [of Executive Life] and what eventually would happen and then, without additional investigation or consideration, blindly charged ahead." ***Bussian,*** 21 F.Supp.2d at 686.

[19] It is unclear from the record whether **RJR** explicitly told Buck of its selection criteria. Tyner indicated that **RJR** required that Buck identify AAA companies. Overgard, on the other hand, stated that he assumed that **RJR** would want companies that received an AAA rating from at least one agency.

[20] Although Overgard stated in his affidavit that he also made inquiries into the reinsurance problems of Executive Life of New York because he had learned prior to August 12, 1987 that the company had been fined by New York regulators, he indicated in his deposition that he did not recall whether he was aware of the fine levied against the New York insurer, or of New York regulators disallowing $150 million of reinsurance prior to final bid day. He also stated in his deposition that he may have talked to someone at Executive Life about the reinsurance issue, but had no recollection of the conversation. Overgard's deposition was dated March 18, 1992; his affidavit was dated April 21, 1992.

[21] Although Executive Life's administrative capability is not challenged in this litigation, the record also contains indications that **RJR** did not ascertain what Overgard had done to assess that capability. Shultz's view that all four companies were able to perform the contract was based on the fact that Buck included each company on its final list.

[22] There is arguably a fact question as to which of the ratings **RJR** relied upon. For example, Tyner stated in his deposition (1) that all four ratings were used, (2) that the Moody's rating was ignored, and (3) that the S&P rating was the main criterion. Shultz suggested that three ratings were used: S&P's, Conning's and Best's.

[23] In evaluating Executive Life for purposes of the earlier bidding on guaranteed investment contracts, Tyner looked only to the provider's ratings.

[24] The court below suggested that the investigation undertaken by **RJR** was similar to that undertaken by the defendant in *Riley v. Murdock,* 890 F.Supp. 444 (E.D.N.C.1995). (*See* ***Bussian,*** 21 F.Supp.2d at 685. We disagree with this assessment. The defendant in *Riley* undertook an extensive independent investigation:

The committee also retained a law firm and conducted its own investigation of each insurance company that bid on the annuity contract. This investigation included: (1) a financial analysis; (2) personal contact with the companies' senior management; (3) a review of financial statements, quarterly reports and other relevant financial documents; (4) consultation with Conning & Company, a firm specializing in the evaluation of insurance companies; (5) consulting with independent sources about Executive Life; and, (6) consulting with other companies that had bought annuity contracts from Executive Life. The committee also relied on the fact that Executive Life had received a high rating in 1986 from A.M. Best, the preeminent authority rating insurance companies. The committee also knew that Executive Life received a AAA rating from Standard & Poor's, the highest rating that company gives, and the stock of its parent company was also highly rated. The committee also made certain that Executive Life had the administrative capabilities to oversee disbursement of Plan funds.

Riley, 890 F.Supp. at 458 (citations omitted). In reproducing this list of activities, we do not intend to suggest that a fiduciary must, in all circumstances, undertake each activity. We wish merely to highlight the substantial difference in the nature of the independent investigation undertaken in *Riley* and that undertaken by **RJR**.

[25] For example, when Tyner was asked if, taking price out of consideration and assuming that Aetna, Prudential and Executive Life had an AAA rating, he had also known of eight publicly available facts about Executive Life and the market for low-quality bonds (e.g., the percentage of Executive Life's portfolio in low-quality bonds, the relationship between First Executive and Drexel, the fine on Executive Life of New York, California regulators' examination of $188 million of Executive Life's reinsurance, that California regulators were considering capping insurance companies' investment in low-quality bonds), it would be prudent to choose Executive Life, Tyner responded, "Well, if all other things are equal, then it would obviously be better to go with another one but all other things weren't equal . . . There was a difference in price."

[26] For the same reasons, the district court's ultimate finding in *Bruner v. Boatmen's Trust Company,* 918 F.Supp. 1347, 1354 (E.D.Mo. 1996), that plan fiduciaries had breached their duties under ERISA by investing a significant portion of plan assets in Executive Life guaranteed investment contracts is not dispositive.

WestlawNext

Carroll v. Edmondson
Commission of Appeals of Texas, Section A. | July 22, 1931 | 41 S.W.2d 64 *(Approx. 5 pages)*

41 S.W.2d 64
Commission of Appeals of Texas, Section A.

Carroll et al.

v.

Return to list **1** of **33 results** Search term

No. 1480-5736 | July 22, 1931

Error to Court of Civil Appeals of Second Supreme Judicial District.

Suit by Ralph **Carroll** against H. **Edmondson** and another. To review judgment of Court of Civil Appeals [28 S.W.(2d) 250] reversing a judgment for plaintiff and remanding case for new trial, plaintiffs bring error.

Affirmed.

West Headnotes (11)

Change View

1 **Mortgages** Against Third Persons
In suit by holder of trust deed against purchaser buying elevator in mortgaged building, testimony that value of mortgaged property at foreclosure sale exceeded debt *held* erroneously excluded.

1 Case that cites this headnote

2 **Mortgages** Under Mortgages in General
Mortgages Possession or Control of Property
Mortgagee of land is not owner thereof, nor is he entitled to possession.

3 Cases that cite this headnote

3 **Mortgages** Nature of Mortgage in General
"Mortgage" of realty is not common-law conveyance on condition, but is merely security for debt.

2 Cases that cite this headnote

4 **Mortgages** Against Third Persons
Measure of damages to holder of trust deed for wrongful removal of elevator from mortgaged building *held* injury to security.

3 Cases that cite this headnote

5 **Mortgages** Trespass or Other Injury by Third Persons
If property as left was of sufficient value to secure debt, holder of trust deed suffered no injury by wrongful removal of elevator from mortgaged building.

1 Case that cites this headnote

RELATED TOPICS

Rights and Liabilities of Parties
Mortgagee or Beneficiary of Deed of Trust
Mortgagor Delivery of Possession of Mortgaged Premises

Foreclosure by Action
Residential Mortgage Foreclosure Proceedings

6 **Mortgages** Against Third Persons
Difference between value of property before wrongful removal of elevator and value after removal *held* measure of damages to security of holder of trust deed, if security left was insufficient to secure debt.

8 Cases that cite this headnote

7 **Mortgages** Persons Concluded and Persons Who May Set Up Conclusiveness of Decree
In suit by holder of trust deed against purchaser buying elevator in mortgaged building before foreclosure, purchaser of elevator, not being party to foreclosure suit, *held* not bound by sale price.

8 **Judgment** Persons Not Parties or Privies
Judgments are conclusive between parties and their privies only.

9 **Judgment** Persons Not Parties or Privies
Generally, judgment is binding only as to those party or privy to it.

10 **Mortgages** Under Mortgages in General
A mortgagor remains the owner, notwithstanding the mortgages.

1 Case that cites this headnote

11 **Mortgages** Possession or Control of Property
Mortgagee of land is not entitled to possession.

2 Cases that cite this headnote

Attorneys and Law Firms

O.K. Shannon, Slay & Simon, Cecil Rotsch, and E. E. Sanders, all of Fort Worth, for plaintiffs in error.

Charles T. Rowland, of Fort Worth, for defendant in error.

Opinion

CRITZ, J.

The opinion of the Court of Civil Appeals, 28 S.W.(2d) 250, makes a very clear and comprehensive statement of the facts and issues of this case, and in the interest of brevity we here adopt such statement. We, however, make the following abridged statement in order that this opinion may be complete within itself.

One W. T. Pittman was the owner of four lots of land in the city of Waxahachie, Ellis county, Tex., on which was situated a two-story brick business house, and in this house was located an elevator so constructed and installed in the building as to constitute it a part of the realty. Ralph **Carroll**, the plaintiff in error, held notes aggregating, exclusive of interest and attorney's fees, the sum of $10,000, secured by deed of trust liens against the above premises and improvements. The above notes were defaulted on, and **Carroll** filed suit against Pittman and several other parties to recover a personal judgment on his notes, and foreclose his liens on the mortgaged premises and improvements. This suit was prosecuted to final judgment, the property sold under order of sale, and bought in by **Carroll** for $249.80, leaving more than $11,000 unpaid on the debt.

Prior to the filing of the above foreclosure suit, H. **Edmondson**, the defendant in error

here, purchased from Pittman the elevator above mentioned, removed same from the building, and appropriated it to his own use. Also, the sale of the elevator to **Edmondson** was made without the knowledge or consent of **Carroll**, and none of the consideration paid therefor was received by him. **Edmondson** was never made a party to the foreclosure suit.

Subsequent to the judgment of foreclosure, but prior to the sale under the order of sale issued thereon, the present suit was instituted in the district court of Tarrant county, Tex., by **Carroll** against Pittman and **Edmondson**. The trial was had on amended and supplemental petitions, which sought recovery from **Edmondson** for the value of the elevator. Under these pleadings, the facts above stated were fully pleaded.

The case was tried in the district court with a jury. In answer to a question submitting that issue, the jury found the elevator was worth $1,250 on the date it was removed from the building. Based on such answer, the district court rendered judgment in favor of **Carroll** and against **Edmondson** for $1,250, and also rendered judgment for **Edmondson** ***65** over against **Carroll** for a like amount. **Edmondson** appealed from the above judgment to the Court of Civil Appeals for the Second district at Fort Worth, which court reversed the judgment of the district court and remanded the cause for a new trial. The case is in the Supreme Court on writ of error granted on application of **Carroll**.

1 On the trial of the case in the district court, the defendant, **Edmondson**, offered testimony to the effect that the market value of the lots with the improvements thereon, after the elevator had been removed therefrom, was $20,000. That testimony was excluded upon objections of the plaintiff, **Carroll**.

The Court of Civil Appeals held that the exclusion of the above testimony was error, and this holding is assigned as error here.

We are of the opinion that the trial court erred in refusing to admit the above testimony, and that the Court of Civil Appeals was correct in so holding.

2 3 It is the law of this state that a mortgagee of land is not the owner thereof, nor is he entitled to possession. A mortgage of real property is not regarded as a commonlaw conveyance on condition, but merely as security for debt, the legal estate existing only for that purpose. Carey v. Starr, 93 Tex. 508, 56 S. W. 324; Schalk v. Kingsley, 42 N.J. Law, 32. It would therefore follow that in an action by the holder of a lien on real property against one who has injured the mortgaged property, the lienholder would have no cause of action for damages to the property, but the injury to the security is the measure of his recovery. Carey v. Starr, supra; Schalk v. Kingsley, supra.

In the Carey Case, supra, our Supreme Court, speaking through Judge Brown, cites Schalk v. Kingsley, supra, and expressly approves and adopts the rule there announced. In the Schalk Case, the rule is clearly laid down by the Supreme Court of New Jersey that the mortgage is not regarded as a common-law conveyance on condition, but merely as security for debt, and that the measure of damages is not based upon the injury to the mortgaged premises, but upon the loss occasioned to the holder of the lien by the injury to his security. We quote the following from the opinion in the Schalk Case:

"It would seem to be in consonance with legal principles to hold that this action in this state must be based not upon the injury to the mortgaged premises, but upon the loss occasioned to the plaintiff by the partial destruction of his security, and that the extent of such loss must measure his damages."

4 5 It follows that in the case at bar the measure of **Carroll's** damage for the wrongful removal of the elevator in question is not the market value of the elevator itself, but the injury done to **Carroll's** mortgage by such removal, and if the property

as left was of sufficient value to secure the debt, then **Carroll** has suffered no injury.

6 From what we have said, it is evident that a finding by the jury as to the market value of the elevator can form no basis whatever for a judgment for **Carroll**. The finding would have to be as to the difference in the value of the mortgaged premises before and after the removal of the elevator; that is, the jury should find the value of the premises before the elevator was removed, and the value after such removal. In the present case, such difference would be the damage to the security if the security left be insufficient to secure the debt. Of course, if the jury finds the value of the premises with the elevator removed equal to or more than the mortgaged debt, no injury whatever has resulted, and the verdict would be for **Edmondson**.

7 8 It seems to be contended by **Carroll** that, since the mortgaged property with the elevator removed sold under order of sale in the former suit for less than the debt thereby secured, he is entitled to recover from **Edmondson** the value of the elevator, not exceeding the amount unpaid on the judgment. This contention is untenable. **Edmondson** was not a party to the judgment of foreclosure or any other proceeding had thereunder, and is therefore not bound by such judgment or sale price, as he would have been had he been made a party to that suit. It is the settled law of this state that judgments are conclusive between the parties and their privies only. Bertrand v. Bingham, 13 Tex. 266. **Edmondson** was undoubtedly guilty of a wrongful act towards **Carroll** if he injured his security; that is, if he injured the mortgaged property so as to impair the mortgage; but not being a party to the original foreclosure action, he is not bound by the sale price of the premises in that proceeding. Paddock v. Williamson, 9 S.W.(2d) 452, 454 (Tex.Civ.App. Writ Ref.).

Plaintiff in error contends that the holding of the Court of Civil Appeals in the instant case is in conflict with Paddock v. Williamson, supra. We think that case can give no comfort to plaintiff in error here, but, on the other hand, is direct authority against his contentions here. We quote the following from the opinion in the Paddock Case:

" * * * The mortgagor and his vendees remained the holders of the legal title until divested thereof by a judicial sale, effective against all necessary parties. But had the judgment against the Bybees and Johnson, Baldwin, and Cook been executed by selling the land, the purchaser would not have acquired title to the timber against Williamson and Strode & Pitts, since they were not parties to that suit, though they acquired the ***66** title to the timber before Johnson, Baldwin, and Cook were made parties to the suit."

It follows from what we have said that, since **Edmondson** was not made a party to the original foreclosure proceedings, and did not purchase and remove the elevator in question pendente lite, he is not bound by such foreclosure proceedings, and is entitled to show the value of such premises after the elevator was removed. It also follows that if the property as left was of a value equal to or more than **Carroll's** debt, he has suffered no injury.

We recommend that the judgment of the Court of Civil Appeals, which reverses the judgment of the trial court and remands the cause for a new trial, be affirmed.

CURETON, C. J.
The judgment of the Court of Civil Appeals, reversing that of the district court, is affirmed, as recommended by the Commission of Appeals.

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168 S.W.3d 802 (2005)

The CITY OF KELLER, Petitioner,

v.

John W. WILSON, Grace S. Wilson, Johnny L. Wilson and Nancy A. Wilson, Respondents.

No. 02-1012.

Supreme Court of Texas.

Argued October 19, 2004.
Decided June 10, 2005.
Rehearing Denied September 2, 2005.

807 *807 Dabney D. Bassel, Larry Bracken, Law Snakard & Gambill, P.C., Fort Worth, Douglas H. Conner III, L. Stanton Lowry, Boyle & Lowry, L.L.P., Irving, for petitioner.

James B. Barlow, Barlow & Garsek, Fort Worth, Robert L. Russell Bush, Bush & Morrison, Arlington, David R. Casey, Hurst, for respondents.

Jay Doegey, Assistant **City** Attorney for the **City** of Corpus Christi, Texas, Corpus Christi, Theodore P. Gorski Jr., Office of the **City** Attorney, Mark G. Daniel, Evans Gandy Daniel & Moore, Fritz Quast, Taylor Olson Adkins Sralla & Elam, LLP, Fort Worth, Monte Akers, Texas Municipal League, Austin, Michael A. Bucek, Senior Assistant **City** Attorney, Irving, Robert F. Brown, Brown & Hofmeister, L.L.P., Richardson, Bruce S. Powers, Assistant County Attorney, Michael A. Stafford, Harris County Attorney, Houston, for Amicus Curiae.

803 *803 Justice BRISTER delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice HECHT, Justice WAINWRIGHT, and Justice GREEN joined, and in which Justice O'NEILL and Justice MEDINA joined as to Parts I through IV.

Must an appellate court reviewing a verdict for legal sufficiency start by considering all the evidence or only part? Over the years, we have stated both as the proper scope of review. While some see the standards as opposing, we disagree; like a glass that is half-full or half-empty, both arrive at the same point regardless of where they start.

But both standards must be properly applied. Rules and reason sometimes compel that evidence must be credited or discarded whether it supports a verdict or contradicts it. Under either scope of review, appellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. As we find the evidence here meets neither standard, we reverse.

I. Factual and Procedural History

808 The **City** of **Keller** is one of several fast-growing communities on the outskirts of *808 Fort Worth.[1] As part of that growth, the **City** approved plans for two new subdivisions, Estates of Oak Run and Rancho Serena, including plans for storm water drainage.

The Wilsons own property southeast of the new subdivisions, with a tract owned by Z.T. Sebastian lying between. Before development, surface water flowed generally north to south from the land where the subdivisions were built, across the Sebastian and **Wilson** properties, and into the Little Bear Creek Watershed.

In 1991, the **City** adopted a Master Drainage Plan providing for drainage easements across both the Sebastian and **Wilson** properties, and thence into Little Bear Creek. The **City's** codes require developers to comply with the Master Plan, to provide drainage for a 100-year rain event, and to avoid increasing the volume or velocity of water discharged upon downhill properties.

The developers of Oak Run and Rancho Serena submitted plans to the **City** indicating they would buy a drainage easement and build a ditch forty-five feet wide and more than two hundred yards long across the Sebastian property, and deed both to the **City** upon completion.[2] The plans also included detention basins on the subdivision properties, but omitted any drainage

easement or ditch across the Wilsons' property. The **City's** director of public works approved the developers' plans, and the **City** accepted the works on completion.

In accordance with the Master Plan, the **City** built a box culvert south of the Wilsons' property. But as the developers' drainage ditch ended at the Wilsons' north property line, there was no link between the two. The Wilsons alleged and the jury found this omission increased flooding on the Wilsons' property, ruining eight acres of farmland the jury valued at almost $300,000.

To recover damages for inverse condemnation, the Wilsons had to prove the **City** intentionally took or damaged their property for public use, or was substantially certain that would be the result.[3] They do not allege the **City** intentionally flooded their land, but do allege it approved revised plans that it knew were substantially certain to have that effect.

The **City** contends no evidence supports the jury's finding of an intentional taking. It presented evidence that engineers for the developers, for the **City**, and for an outside firm the **City** retained all certified that the revised drainage plan complied with the **City's** codes and regulations — including the ban against increasing downstream runoff. Thus, the **City** asserts it had no reason to be substantially certain the opposite would occur, until it did.

A divided court of appeals rejected this contention.[4] In its legal sufficiency review, the court refused to consider the various engineers' certifications because "we are to consider only the evidence and inferences that tend to support the finding and
809 disregard all evidence and inferences to the contrary."[5] The **City** challenges *809 this omission as applying the wrong scope of review.

We have on many occasions stated the scope of review precisely as the court of appeals says (the "exclusive" standard).[6] But we have also stated that a reviewing court must consider "*all* of the evidence" in the light favorable to the verdict (the "inclusive" standard).[7] Sometimes we have mentioned neither reviewing all evidence nor disregarding some part of it.[8] Finally, we have sometimes expressly mentioned both.[9]

Although this Court has used both the exclusive and the inclusive standards interchangeably over the years, commentators say
810 the two are different.[10] Because this *810 important issue is dispositive here, we address it in some detail, and reserve for another day the **City's** arguments that a governmental entity cannot be liable for approving a developer's plans, or accepting rather than constructing the works at issue.

II. Contrary Evidence That Cannot Be Disregarded

The question presented here is not a new one. More than 40 years ago, then Justice Calvert[11] addressed the standards for reviewing legal and factual sufficiency in the most-cited law review article in Texas legal history.[12] Frustrated that despite this Court's efforts to explain those standards "a growing number of recent decisions indicate a continuing misunderstanding,"[13] the author summarized and attempted to clarify Texas law up to 1960.[14] The article's impact remains substantial today, having been cited more than 100 times by Texas courts in the last five years.

According to the article:

> "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.[15]

We have quoted a similar formulation on many occasions.[16]

Notably, Justice Calvert then proceeded to put the question before us in the proper context:

> It is in deciding "no evidence" points in situation (c) that the courts follow the further rule of viewing the evidence in its most favorable light in support of the finding of the vital fact, considering only the evidence and the inferences which support the finding and rejecting the evidence and the inferences which are contrary to the finding.[17]

Clearly, the traditional rule in Texas has never been that appellate courts must reject contrary evidence in every no-evidence
811 review. Instead, the traditional scope of review does not disregard contrary evidence if there is no favorable evidence *811 (situation (a) above), or if contrary evidence renders supporting evidence incompetent (situation (b) above) or conclusively establishes the opposite (situation (d) above).

As the following examples show, this has remained the rule since. We do not presume to categorize all circumstances in which contrary evidence must be considered in a legal sufficiency review. Evidence can be disregarded whenever reasonable jurors could do so,[18] an inquiry that is necessarily fact-specific. But it is important that when courts use the exclusive standard and disregard contrary evidence, they must recognize certain exceptions to it.

A. Contextual Evidence

In Justice Calvert's first situation — a complete absence of evidence of a vital fact — it is generally irrelevant whether a reviewing court considers contrary evidence.[19] If supporting evidence is absent, opposing evidence cannot change that result. But in a number of cases, the lack of supporting evidence may not appear until all the evidence is reviewed in context.

For example, publications alleged to be defamatory must be viewed as a whole — including accompanying statements, headlines, pictures, and the general tenor and reputation of the source itself.[20] A court reviewing legal sufficiency cannot disregard parts of a publication, considering only false statements to support a plaintiff's verdict or only true ones to support a defense verdict.[21]

Similarly, reviewing courts must construe contracts as a whole; we do not consider only the parts favoring one party and disregard the remainder, as that would render the latter meaningless.[22] Even writings executed at different times must be considered together if they pertain to the same transaction.[23]

It is not just writings that reviewing courts must consider in context. For example, in reviewing intentional infliction of emotional distress claims for legal sufficiency, "we consider the context and the relationship between the parties."[24] Acts that might
812 constitute outrageous conduct when dealing with a hearing-impaired consumer[25] may be legally insufficient between *812 business parties.[26] In our no-evidence reviews of successful claims, we have invariably reviewed not just evidence showing the conduct was outrageous, but also evidence showing that, in context, it was not.[27]

More generally, evidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did.[28] If a witness's statement "I did not do that" is contrary to the jury's verdict, a reviewing court may need to disregard the whole statement, but cannot rewrite it by disregarding the middle word alone.

Thus, if evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict. Either "evidence contrary to the verdict" must be defined to exclude material contextual evidence, or it must be an exception to the general rule.

B. Competency Evidence

It has long been the rule in Texas that incompetent evidence is legally insufficient to support a judgment, even if admitted without objection.[29] Thus, evidence showing it to be incompetent cannot be disregarded, even if the result is contrary to the verdict. If the rule were otherwise, incompetent evidence would *always* be legally sufficient, because the evidence showing it to be incompetent could never be considered.

Thus, for example, if an eyewitness's location renders a clear view of an accident "physically impossible," it is no evidence of what occurred, even if the eyewitness thinks otherwise.[30] Similarly, an employee's testimony that he was in the course and scope of his employment is legally insufficient to support a verdict against his employer if the evidence shows that legal conclusion to be incompetent.[31]

This exception frequently applies to expert testimony. When expert testimony is required, lay evidence supporting liability is
813 legally insufficient.[32] In *813 such cases, a no-evidence review cannot disregard contrary evidence showing the witness was

unqualified to give an opinion.[33] And if an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded.[34]

After we adopted gate-keeping standards for expert testimony,[35] evidence that failed to meet reliability standards was rendered not only inadmissible but incompetent as well.[36] Thus, an appellate court conducting a no-evidence review cannot consider only an expert's bare opinion, but must also consider contrary evidence showing it has no scientific basis.[37] Similarly, review of an expert's damage estimates cannot disregard the expert's admission on cross-examination that none can be verified.[38]

Thus, evidence that might be "some evidence" when considered in isolation is nevertheless rendered "no evidence" when contrary evidence shows it to be incompetent. Again, such evidence cannot be disregarded; it must be an exception either to the exclusive standard of review or to the definition of contrary evidence.

C. Circumstantial Equal Evidence

As noted above, Justice Calvert believed the exclusive standard applied only when a no-evidence challenge asserted the evidence was no more than a scintilla.[39] But he went on to note a "variation" that required contrary inferences to be considered when the equal-inference rule applied.[40]

In claims or defenses supported only by meager circumstantial evidence, the evidence does not rise above a scintilla (and thus is legally insufficient) if jurors would have to guess whether a vital fact exists.[41] "When the circumstances are equally consistent with either of two facts, neither fact may be inferred."[42] In such cases, we must "view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances."[43]

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Justice Calvert argued there was "no necessity for the variation" because drawing an inference based on meager evidence was unreasonable whether or not the reviewing court considered the opposing inferences.[44] Nevertheless, he recognized that "[t]he opposing inference is present and it does no harm to note its presence."[45]

In subsequent cases this Court has continued to note rather than disregard the presence of equal but opposite inferences, often because lower courts have overlooked them. Thus, for example, one might infer from cart tracks in spilled macaroni salad that it had been on the floor a long time, but one might also infer the opposite—that a sloppy shopper recently did both.[46] Similarly, when injury or death occurs without eyewitnesses and only meager circumstantial evidence suggests what happened, we cannot disregard other meager evidence of equally likely causes.[47]

Thus, when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well.

D. Conclusive Evidence

Next, Justice Calvert noted that Texas courts conducting a no-evidence review traditionally do not disregard contrary evidence that conclusively establishes the opposite of a vital fact.[48] He argued that this is to some extent not a "true" no-evidence claim, as proponents may have to show not only that no evidence supports the verdict but that the opposite was proved as a matter of law.[49] There are several types of conclusive evidence. First, an appellate court conducting a legal sufficiency review cannot "disregard undisputed evidence that allows of only one logical inference."[50] By definition, such evidence can be viewed in only one light, and reasonable jurors can reach only one conclusion from it. Jurors are not free to reach a verdict contrary to such evidence;[51] indeed, uncontroverted issues need not be submitted to a jury at all.[52]

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Reviewing legal sufficiency in such cases encompasses a general no-evidence review, because if some evidence supports the verdict then the contrary evidence was not "undisputed." But the review does not stop there; the evidence must also have only one logical inference. Undisputed evidence that reasonable jurors could disbelieve has two: (1) it is true, or (2) it is not.

Most often, undisputed contrary evidence becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied. Thus, no evidence supports an impaired-access claim if it is undisputed that access remains along

90 percent of a tract's frontage.[53] Evidence that a buyer believed a product had been repaired is conclusively negated by an accompanying letter to the contrary.[54] And an insured's liability has not been determined by an "actual trial" if the insured did not appear, present evidence, or challenge anything presented by his opponent.[55]

Undisputed contrary evidence may also become conclusive when a party admits it is true. Thus, a claimant's admission that he was aware of a dangerous premises condition is conclusive evidence he needed no warning about it.[56] Similarly, an ex-employee's admission that she obtained other employment may prove conclusively that she did not detrimentally rely on a defendant's promise to re-hire her.[57] And jurors may not find that an indictment was based on a defendant's misleading report when the district attorney admits it was his own mistake.[58]

It is impossible to define precisely when undisputed evidence becomes conclusive. For example, an injured employee's return to work may prove conclusively that an injury was not total,[59] or it may not.[60] Circumstances in which a body is found may
816 conclusively establish suicide,[61] or allow *816 jurors to infer otherwise.[62] Evidence is conclusive only if reasonable people could not differ in their conclusions,[63] a matter that depends on the facts of each case.

There is another category of conclusive evidence, in which the evidence *is* disputed. Undisputed evidence and conclusive evidence are not the same — undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed.

Thus, for example, in *Murdock v. Murdock,* we found no evidence to support a verdict establishing the defendant's paternity when blood tests conclusively proved he was not the child's father.[64] The evidence was directly disputed — the child's mother testified she had conjugal relations with no one else during the relevant time.[65] Nevertheless, we held there was no evidence to support the paternity verdict because of conclusive evidence to the contrary.[66]

Similarly, in *Texas & New Orleans Railroad Co. v. Compton,* we found no evidence that a railroad's negligence caused an automobile to slam into the sixtieth car of a slow-moving train.[67] Again, the evidence was hotly disputed — while railroad witnesses testified that warning signs were in place at the crossing, the car's driver and a passenger testified they saw nothing, and would have been able to stop if they had.[68] Nevertheless, we held there was no evidence to support the claim because, if the driver could not see the side of a train before he hit it, he could not have seen a crossing sign either.[69]

Of course, there are few instances in which disputed evidence is conclusive, and many instances in which undisputed evidence is not. As our sister court has noted, testimony by a paid informant is legally sufficient to support a conviction, even if "[t]wenty nuns testify that the defendant was with them at the time, far from the scene of the crime . . . [and] [t]wenty more nuns testify that they saw the informant commit the crime."[70] But a more famous clerical hypothetical by Judge Learned Hand shows the opposite limit:

> If, however, it were proved by twenty bishops that either party, when he used the words [in a contract], intended something else than the usual meaning which the law imposes upon them, he would still be held. . . .[71]

While jurors may generally believe either sinners or saints, their discretion is limited when it is proved beyond question that an "eyewitness" was actually far away in prison or totally blind on the day of the crime.

817 Proper legal-sufficiency review prevents reviewing courts from substituting *817 their opinions on credibility for those of the jurors, but proper review also prevents jurors from substituting their opinions for undisputed truth. When evidence contrary to a verdict is conclusive, it cannot be disregarded.

E. Clear-and-Convincing Evidence

Since the time of Justice Calvert's article, new claims and burdens of proof have arisen that require additions to the four types of no-evidence review Justice Calvert considered exhaustive. Beginning with the United States Supreme Court's opinion in *Jackson v. Virginia,* appellate courts have recognized that, while "one slender bit of evidence" may be all a reviewing court needs to affirm a verdict based on the preponderance of the evidence, a higher burden of proof requires a higher standard of review.[72] As we recently stated, the standard for legal sufficiency works in tandem with the standard of review — "whenever

the standard of proof at trial is elevated, the standard of appellate review must likewise be elevated."[73] If the rule were otherwise, legally sufficient evidence to support a preponderance-of-the-evidence verdict would satisfy the higher burdens as well, thus rendering their differences meaningless.[74]

Accordingly, we have held that a legal sufficiency review must consider *all* the evidence (not just that favoring the verdict) in reviewing cases of parental termination,[75] defamation,[76] and punitive damages.[77] In such cases, again, evidence contrary to a verdict cannot be disregarded.

F. Consciousness Evidence

Further, we have had to particularize legal-sufficiency review in cases involving what a party knew or why it took a certain course, as they are not amenable to review under the exclusive standard.

Long before gross negligence had to meet a clear-and-convincing burden, we recognized in *Burk Royalty Co. v. Walls* that no-evidence review of such findings had to include "all of the surrounding facts, circumstances, and conditions, not just individual elements or facts."[78] As then Chief Justice Greenhill noted in concurring, speeding and running a red light may not be legally sufficient evidence of gross negligence if one's wife and daughter are bleeding to death in the back seat.[79] Reviewing courts assessing evidence of conscious indifference cannot disregard part of what a party was conscious of.[80]

818 For the same reasons, the exclusive standard of review has proven problematic in insurance bad-faith cases. Liability in *818 such cases requires proof that the insurer denied coverage after it became reasonably clear.[81] But that standard will always be met if reviewing courts must disregard any evidence that coverage was unclear.[82] Subsequent cases show that reviewing courts are in fact looking at *all* the evidence to determine whether coverage was reasonably clear.[83]

This problem arises in other contexts as well. In discrimination cases, discharged employees will never have to prove that the reason given for termination was a pretext if no-evidence review must disregard that reason.[84] Government officials will never be entitled to immunity if we consider only evidence suggesting they should have acted differently.[85] And limitations will never run under the discovery rule if reviewing courts must disregard all evidence that claimants knew of their claims.[86]

This is not to say a reviewing court may credit a losing party's explanations or excuses if jurors could disregard them. For example, while an insurer's reliance on an expert report may foreclose bad faith recovery,[87] it will not do so if the insurer had some reason to doubt the report.[88] But a reviewing court cannot review whether jurors could reasonably disregard a losing party's explanations or excuses without considering what they were.

III. Contrary Evidence That Must Be Disregarded

819 As trials normally focus on issues that jurors could decide either way, reviewing *819 courts must disregard evidence contrary to the verdict far more often than they must consider it. Just as no-evidence review that starts by disregarding contrary evidence often must end up considering considerably more, no-evidence review that begins by considering all the evidence must usually end up considering considerably less.

Again, we do not presume to categorize all circumstances in which contrary evidence must be disregarded; a few examples serve to demonstrate that even under the inclusive standard, viewing all the evidence in a light favorable to the verdict often requires that much of it be disregarded.

A. Credibility Evidence

Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony.[89] They may choose to believe one witness and disbelieve another.[90] Reviewing courts cannot impose their own opinions to the contrary.[91]

Most credibility questions are implicit rather than explicit in a jury's verdict. Thus, reviewing courts must assume jurors decided all of them in favor of the verdict if reasonable human beings could do so. Courts reviewing all the evidence in a light favorable

to the verdict thus assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it.[92]

For example, viewing the evidence in the light favorable to the verdict means that if both parties in a traffic accident testify they had the green light, an appellate court must presume the prevailing party did and the losing party did not. If the parties to an oral contract testify to conflicting terms, a reviewing court must presume the terms were those asserted by the winner. When all the evidence is viewed in the light most favorable to the jury verdict, some of it must be completely discounted. Though not disregarded at the outset, the end result is the same.

This has always been our practice in cases using the inclusive scope of review. Thus, we have concluded that a bailee sold cotton without the bailor's consent, despite the former's denials, because the jury verdict favored the latter.[93] And we have affirmed a gross negligence verdict based on testimony that the defendant's speed was 80 miles per hour, without mentioning his own testimony to a speed half that.[94]

820 Nor is it necessary to have testimony from both parties before jurors *820 may disbelieve either. Jurors may disregard even uncontradicted and unimpeached testimony from disinterested witnesses.[95] Thus, an architect's uncontradicted testimony that he relied on a 20-year warranty was not binding on jurors when the bid specifications he prepared included only much shorter warranties.[96] Nor was an insured's uncontradicted testimony about lost furnishings binding on jurors when the fire scene contained several indications of arson but few of burnt furniture.[97] Even uncontroverted expert testimony does not bind jurors unless the subject matter is one for experts alone.[98]

Of course, "[t]he jury's decisions regarding credibility must be reasonable."[99] Jurors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted.[100] And as noted above, they are not free to believe testimony that is conclusively negated by undisputed facts. But whenever reasonable jurors could decide what testimony to discard, a reviewing court must assume they did so in favor of their verdict, and disregard it in the course of legal sufficiency review.

B. Conflicting Evidence

It is the province of the jury to resolve conflicts in the evidence.[101] Accordingly, courts reviewing all the evidence in a light favorable to the verdict must assume that jurors resolved all conflicts in accordance with that verdict.[102]

Again, this has always been the case even in those cases using the inclusive scope of review. For example, in such cases we have sometimes detailed only the evidence that supported a jury's fraud finding.[103] We have affirmed a bad-faith verdict for
821 legal sufficiency despite "significant evidence" that the insurer acted in *821 good faith.[104] We have found some evidence of lost profits, even though income tax returns showed the contrary.[105] And we have affirmed a jury's negligence finding despite a defendant's evidence asserting it could not have prevented the accident.[106]

In none of these cases did we state that the scope of review required us to disregard evidence contrary to the verdict; instead, we started by considering the entire record in each. But in each case we either discounted or never mentioned conflicting evidence contrary to the verdict because viewing the evidence in the light favorable to the verdict required us to do so.

Of course, it is not always clear whether evidence is conflicting. Evidence is not conflicting just because the parties cannot agree to it. For example, evidence that a hospital controlled a doctor's rotation and patient assignments raises no material conflict with evidence that a different entity controlled the details of medical treatment, as only the latter is material in a malpractice case.[107] Similarly, evidence showing the terms of one loan does not conflict with undisputed evidence that the parties never reached an agreement regarding the terms of another.[108]

But in every circumstance in which reasonable jurors could resolve conflicting evidence either way, reviewing courts must presume they did so in favor of the prevailing party, and disregard the conflicting evidence in their legal sufficiency review.

C. Conflicting Inferences

Even if evidence is undisputed, it is the province of the jury to draw from it whatever inferences they wish, so long as more than

one is possible and the jury must not simply guess. Thus, in product liability cases jurors may find evidence of a defect from subsequent modifications, even if there were plenty of other reasons for the changes.[109] Even if a defendant admits approaching an intersection from the wrong way on a one-way street, jurors may infer the plaintiff failed to keep a proper lookout, as that is one possible inference from the accident itself.[110] Similarly, jurors may infer that relatives tore down posters of a missing child to assist the child's father, even though another inference was that the signs simply embarrassed them.[111]

Accordingly, courts reviewing all the evidence in a light favorable to the verdict must assume jurors made all inferences in favor of their verdict if reasonable minds could, and disregard all other inferences in their legal sufficiency review.

IV. Reconciling the Standards

Having noted the dual lines of authority stating the scope of no-evidence review, and the proper application and exceptions to
822 each, we turn to the question of which one is correct. For the reasons *822 discussed below, we believe the answer is both.

A. Goals: The Standards Must Be The Same

Whether a court begins by reviewing all the evidence or disregarding part in a legal-sufficiency review, there can be no disagreement about where that review should end. If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so.[112] A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement.[113]

Similarly, there is no disagreement about how a reviewing court should view evidence in the process of that review. Whether a reviewing court starts with all or only part of the record, the court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it.[114] But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it.[115]

Given these premises, it is no coincidence that the two standards should reach the same result — indeed they *must.* Any scope of appellate review smaller than what reasonable jurors could believe will reverse some verdicts that are perfectly reasonable; any scope of review larger than what reasonable jurors could believe will affirm some verdicts that are not.

Further, the two must coincide if this Court is to perform its constitutional duties. Although factual sufficiency has been the sole domain of the intermediate appellate courts in Texas since 1891, our jurisdiction has always included legal sufficiency, as that is a question of law, not of fact.[116] Construing either standard to require us to do less would be just as unconstitutional as construing either to allow us to do more.

823 This is not to say judges and lawyers will always agree whether evidence is legally *823 sufficient. As discussed more fully below, reasonable people may disagree about what reasonable jurors could or must believe. But once those boundaries are settled, *any* standard of review must coincide with those boundaries — affirming jury verdicts based on evidence within them and reversing jury verdicts based on evidence that is not. Any standard that does otherwise is improperly applied.

B. Other Motions: The Standards Must Be The Same

Just as the scope of no-evidence review must coincide with its goals, the scope of review should not depend upon the motion in which it is asserted. Judgment without or against a jury verdict is proper at any course of the proceedings only when the law does not allow reasonable jurors to decide otherwise. Accordingly, the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review.

Our statements of the standard for reviewing a directed verdict present the same mixed bag found with general no-evidence review. We have most often used the exclusive standard, stating that courts reviewing directed verdicts must consider only evidence supporting the nonmovant's case and disregard all contrary evidence.[117] But we have also stated that reviewing courts should use the inclusive standard, considering all the evidence in a light contrary to the directed verdict.[118] And we have sometimes stated both, requiring reviewing courts to consider all the evidence in a light contrary to the directed verdict and then

to disregard all conflicting evidence that supports it.[119]

By contrast, cases concerning judgments non obstante verdicto most often utilize the inclusive scope of review. Beginning with the 1931 amendment authorizing trial judges to grant them,[120] we have generally reviewed such orders by considering all the
824 evidence in a light favorable to the *824 verdict that was set aside.[121] In later years we have sometimes adopted the exclusive standard,[122] but our opinions doing so usually cite to general no-evidence cases in which no judgment n.o.v. was involved.[123]

The one exception in which both standards do not expressly appear is in the scope of review for summary judgments. Here, there is only one standard — a reviewing court must examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.[124] Reviewing courts do *not* disregard the
825 evidence supporting the motion; *825 if they did, all summary judgments would be reversed.

In practice, however, a different scope of review applies when a summary judgment motion is filed without supporting evidence.[125] In such cases, evidence supporting the motion is effectively disregarded because there is none; under the rule, it is not allowed. Thus, although a reviewing court must consider all the summary judgment evidence on file, in some cases that review will effectively be restricted to the evidence contrary to the motion.

The standards for taking any case from the jury should be the same, no matter what motion is used. If only one standard were proper, we would not expect both to appear in cases reviewing directed verdicts, judgments notwithstanding the verdict, and summary judgments. But both do.

C. Federal Courts: The Standards Are The Same

The federal courts have had a similar split of authority between the inclusive and exclusive standards for scope of review. But no longer — the United States Supreme Court recently concluded in *Reeves v. Sanderson Plumbing Products, Inc.* that the two tests are the same.[126]

Under Rule 50 of the federal rules of procedure, a court should render judgment as a matter of law when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."[127] In deciding whether all or only part of the evidence should be considered, the Supreme Court stated:

> The Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion. Some decisions have stated that review is limited to that evidence favorable to the nonmoving party, while most have held that review extends to the entire record, drawing all reasonable inferences in favor of the nonmovant.
>
> On closer examination, this conflict seems more semantic than real. Those decisions holding that review under Rule 50 should be limited to evidence favorable to the nonmovant appear to have their genesis in *Wilkerson v. McCarthy*[128]. In *Wilkerson,* we stated that "in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of" the nonmoving party.[129] But subsequent decisions have clarified that this passage was referring to the evidence to which the trial court should *give credence,* not the evidence that the court should *review.* In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." It therefore follows that, in entertaining a motion for
> 826 judgment as a *826 matter of law, the court should review all of the evidence in the record.[130]

We address the Supreme Court's conclusion as to the most appropriate standard below; the relevant point here is its conclusion that differences between the inclusive and exclusive standards are more semantic than real.

D. Objections: The Standards Are Not The Same

While we have used the two standards for the scope of review interchangeably for many years in many different contexts,

several arguments suggest they are not the same.

First, the courts of appeals often use the two standards in illustrations of the difference between legal and factual sufficiency, with the exclusive standard tied to the former and the inclusive standard to the latter:

> When [reviewing] legal sufficiency, we consider *only* the evidence and inferences that tend to support the award of damages and disregard all evidence and inferences to the contrary.... When we review factual sufficiency, we consider and weigh *all* of the evidence and will set aside the verdict only if it is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust.[131]

But there have always been exceptions to this distinction.[132] As demonstrated in Parts II and III above, it is generally true that the *result* of legal-sufficiency review is to disregard contrary evidence, but there are exceptions when a reviewing court cannot. It is not surprising that in drawing the general distinction between legal and factual sufficiency, courts have not complicated that distinction by listing the several exceptions in which the scope of review — though not the standard of review — may overlap.

Second, it has been argued that the exclusive standard "is an important prophylactic" against invasion of the jury's province, as appellate judges are less likely to consider contrary evidence when they should not if the exclusive standard is used.[133] But if that is true, the opposite should also be the case — appellate courts are less likely to consider contrary evidence *when they must* (as shown in Part II) if the exclusive standard is used. No matter which standard is used, appellate courts must take care not to consider or disregard too little or too much.

827 *827 Conversely, several factors appear to favor application of the inclusive standard. First, when we have said "we must look only at that evidence which tends to support the judgment,"[134] we could not have been speaking literally; no glasses filter evidence, and judges cannot abandon such judgments to law clerks or litigants. It is often hard to say whether evidence does or does not support a verdict — the same facts may support different conclusions,[135] or may support one part of a verdict but not another.[136] Nor can evidence supporting a verdict be identified by which party offered it — parties depend on admissions and cross-examination during their opponent's case, and minimize damaging evidence by presenting it during their own. As a practical matter, a court cannot begin to say what evidence supports a verdict without reviewing it all.

Second, an appellate court that begins by disregarding one party's evidence may strike many citizens as extending something less than justice for all. Concerns about open government and open courts suggest an appellate process that considers all the evidence, though deferring to the jury's verdict. While there is some dispute whether Lady Justice should wear a blindfold,[137] the metaphor was surely never intended to suggest that justice disregards the facts.

In sum, the exclusive standard is helpful in recognizing the distinctive roles of judge and jury, intermediate and supreme court. By contrast, the inclusive standard is helpful in recognizing what courts actually do, and must be seen to do. Both are important; we should avoid choosing between them if we can.

E. Conclusion: The Standards Are The Same

As both the inclusive and exclusive standards for the scope of legal-sufficiency review have a long history in Texas, as both have been used in other contexts to review matter-of-law motions, as the federal courts have decided the differences between the two are more semantic than real, and as both — properly applied — must arrive at the same result, we see no compelling reason to choose among them.

The key qualifier, of course, is "properly applied." The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

828 While judges and lawyers often disagree about legal sufficiency in particular cases, *828 the disagreements are almost always about what evidence jurors can or must credit and what inferences they can or must make. It is inevitable in human affairs that reasonable people sometimes disagree; thus, it is also inevitable that they will sometimes disagree about what reasonable people can disagree about. This is not a new problem; Justice Calvert noted it almost fifty years ago:

> The rule as generally stated is that if reasonable minds cannot differ from the conclusion that the evidence lacks probative force it will be held to be the legal equivalent of no evidence. The application of the rule can lead to strange results. It is theoretically possible, and sometimes not far from actual fact, that five members of the Supreme Court will conclude that the evidence supporting a finding of a vital fact has no probative force, and in reaching the conclusion through application of the rule will thus hold, in effect, that the trial judge who overruled a motion for instructed verdict, the twelve jurors who found the existence of the vital fact, the three justices of the Court of Civil Appeals who overruled a "no evidence" point of error and four dissenting justices of the Supreme Court are not men[138] of "reasonable minds."[139]

It is not hubris that occasionally requires an appellate court to find a jury verdict has no reasonable evidentiary basis. As Justice Frankfurter stated long ago:

> Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree whether proof in a case is sufficient to demand submission to the jury. The fact that [one] thinks there was enough to leave the case to the jury does not indicate that the other [is] unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.[140]

V. Application to the Facts

It remains to apply the scope of review to the facts presented.

A majority of the court of appeals affirmed the verdict for the Wilsons, finding legally sufficient evidence that the **City** knew increased flooding on the Wilsons' property was substantially certain to occur.[141] The majority pointed to the following proof.
829 First, the Wilsons' expert testified that the revised plan was certain to *829 create flooding.[142] Second, as the **City** admittedly knew that development would increase runoff and the Sebastian ditch would channel it toward the Wilsons, so it knew "with absolute certainty" that flooding would be the result.[143] Third, the **City** "did not explain" why the Master Plan required a drainage ditch across the Wilsons' property but the revised plan did not, thus allowing jurors to infer that the **City** knew this omission would cause flooding.[144]

Of course, the **City** *did explain* why it approved the new plan — because three sets of engineers said the omitted ditch was unnecessary — but the court felt compelled by the scope of review to disregard that evidence.

For several of the reasons stated earlier, we believe the court of appeals did not properly apply the scope of review. The critical question in this case was the **City's** state of mind — the Wilsons had to prove the **City** *knew* (not should have known) that flooding was substantially certain. A reviewing court cannot evaluate what the **City** knew by disregarding most of what it was told.

Moreover, when a case involves scientific or technical issues requiring expert advice (as this one does), jurors cannot disregard a party's reliance on experts hired for that very purpose without some evidence supplying a reasonable basis for doing so.[145] Here, it was uncontroverted that three sets of engineers certified that the revised plans met the **City's** codes and regulations — and thus would not increase downstream flooding. The same firm that drew up the original Master Plan certified the revised one; unless the **City** had some reason to know the first certification was true and the second one was false (of which there was no evidence), there was only one logical inference jurors could draw.

None of the evidence cited by the court of appeals showed the **City** knew more than it was told by the engineers. The Wilsons' expert testified that flooding was (in his opinion) inevitable, but not that *the **City*** knew it was inevitable. The Wilsons' expert gave no opinion on the latter point.

Second, ending a ditch at a neighbor's property line may be evidence that a defendant was substantially certain of the result in some cases, but not in the context of this one. **City** witnesses admitted knowing development would increase runoff at the head

of this drainage system, but not flooding at its foot. Calculating the effect of detention ponds and absorption in a grassy drainage ditch forty-five feet wide and over two hundred yards long required hydrological formulas, computer models, and mathematical calculations. The omission of the ditch across the Wilsons' property obviously raised concerns that the **City** investigated, but was no evidence that the **City** knew the advice it received in response was wrong.

The Wilsons also point to a letter Sebastian's attorney wrote the **City** demanding indemnity in case the new ditch flooded the
830 Wilsons. But attorneys must protect a client from potential liability whether it is *830 real or imagined — and justly so. In the letter, the attorney never purports to be an expert in hydrology, or cite the opinions of anyone who was. This letter may have required the **City** to investigate, but again is no evidence it knew the advice it received was wrong.[146]

Our concurring colleagues believe reasonable jurors could nevertheless disregard what all the engineers certified because the **City** had a financial incentive to believe them rather than pay the Wilsons. Of course, defendants have a financial incentive to avoid paying damages in every case; if that incentive alone is some evidence of liability, then plaintiffs create enough evidence to go to the jury every time they file suit.

But more important, this ignores what the Wilsons had to prove — not that the **City** *might* have disbelieved the engineers' reports, but that it *did.* This requires evidence of "objective indicia of intent" showing the **City** knew identifiable harm was occurring or substantially certain to result.[147] Jurors' doubts about the engineers' reports or the **City's** motives could not supply them with objective indicia that the **City** knew flooding would occur. Constitutional concerns about the roles of judge and jury do not allow either to make such evidence up.

We agree with the court of appeals that the Wilsons presented some evidence that the **City** damaged their property, and that in drawing up and approving drainage plans it was acting for a public purpose. The missing piece in the evidence here is proof that the **City** knew the plans it approved were substantially certain to increase flooding on the Wilsons' properties. While the **City** certainly knew that fact after the flooding started, the Wilsons never pleaded or submitted to the jury any takings theory other than the **City's** initial approval.

Crediting all favorable evidence that reasonable jurors could believe and disregarding all contrary evidence except that which they could not ignore, we hold there was no evidence the **City's** approval of the revised drainage plan was an intentional taking.

Accordingly, we reverse the court of appeals' judgment against the **City** under article I, section 17 of the Texas Constitution. Because the court of appeals declined to address the jury's alternate verdict for the Wilsons on a claim under the Texas Water Code, we remand the case to that court to determine that issue.

Justice O'NEILL filed a concurring opinion in which Justice MEDINA joined.

Justice JOHNSON did not participate in the decision.

Justice O'NEILL, joined by Justice MEDINA, concurring.

The Court does an excellent job of explaining the appropriate scope of no-evidence review: the reviewing court "must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." 168 S.W.3d at 807. I agree with this standard and join Parts I through IV of the
831 Court's opinion. But I cannot join Part V, because the Court misapplies the standard that it so carefully *831 articulates by crediting evidence the jury could reasonably disregard.

The **City** of **Keller's** Master Drainage Plan required it in part to condemn a 2.8-acre drainage easement on the **Wilson** property for construction of an earthen channel forty-five feet wide and five feet deep that would funnel water from the adjoining Sebastian property over the **Wilson** property into the Little Bear Creek Watershed. The **City** chose not to proceed with this portion of the plan, though, claiming reliance on engineers' assurances that the developers' installation of retention ponds on neighboring land could prevent flooding. The drainage channel that was actually built ended at the edge of the Sebastian property and funneled water directly onto the Wilsons' land, destroying eight acres of farmland worth almost $300,000. The Court holds that the jury was required to believe the **City's** testimony that it relied on the engineers' assurances and thus did not know flooding was substantially certain to occur, stating that when a case requires expert testimony "jurors cannot disregard a party's reliance on experts hired for that very purpose without some evidence supplying a reasonable basis for doing so." 168 S.W.3d at 829. Even if this were an appropriate review standard — which it hasn't been until today — I believe the jury had a

reasonable basis upon which to disregard the **City's** professed reliance; the **City** had a financial incentive to disclaim knowledge of the flooding, and the Wilsons presented some evidence that the **City** had independent knowledge flooding was substantially certain to occur. In my view, the jury was the proper body to weigh the witnesses' credibility and resolve these disputed fact issues. I nevertheless agree that the **City** cannot be liable for a taking in this case because I believe that a **city's** mere act of approving a private development plan cannot constitute a taking for public use. Accordingly, I concur in the Court's judgment but not its reasoning.

I

Questions of intent are generally proved only by circumstantial evidence; as the court of appeals in this case aptly noted, "defendants will rarely admit knowing to a substantial certainty that given results would follow from their actions," and therefore the jury must be "free to discredit defendants' protestations that no harm was intended and to draw inferences necessary to establish intent." 86 S.W.3d 693, 704. I agree with the Court that the jury's ability to disbelieve the **City's** protestations is not itself "evidence of liability." 168 S.W.3d at 830. Instead, the jury's ability to weigh the witnesses' credibility means that the **City's** testimony did not conclusively establish its lack of liability. Because liability is not conclusively negated, we must examine the record to see if there is legally sufficient evidence from which the jury could infer that the **City** knew flooding was substantially certain to occur. I would hold that the evidence of intent that was presented in this case allowed the jury to draw such an inference.

At trial, the Wilsons presented evidence that the **City** had independent sources of knowledge that flooding was substantially certain to occur. First, they demonstrated that the developers' plan itself was flawed. Rather than incorporate a drainage ditch running across the **Wilson** property, as the **City's** Master Plan required, the developers' plan ended the drainage ditch abruptly at the edge of the **Wilson** property. The Wilsons' expert testified that the plan's implementation would necessarily "increase the volume and flow of water across the **Wilson** property from the rate of fifty-five cubic feet per second to ninety-three cubic feet
832 per second." 86 S.W.3d at *832 703. Second, the **City** was aware that water flowed across the **Wilson** property before the development commenced, and, as the court of appeals pointed out, the **City's** Director of Public Works admitted that the **City** knew the development would increase the water's flow and velocity; specifically, he testified that "the **City** knew the upstream water would be absorbed less and would flow faster due to the removal of trees and vegetation from the developments and from the forty-five-foot-wide earthen channel" that ended at the **Wilson** property's edge. *Id.* at 705. Finally, there was evidence that the **City** received a letter warning that the developers' plan would subject the **Wilson** property to flooding.

While I believe there is some evidence that the **City** knew flooding was substantially certain to occur, there is also some evidence that it did not. **City** officials testified that they relied on the representations of engineers who assured them retention ponds could substitute for a drainage easement and the **Wilson** property would not be damaged. If the jury accepted this evidence as true, I agree that the intent element would be negated, which would preclude the **City's** takings liability. But I do not agree that the jury was bound to accept the **City's** testimony as true. The Court itself notes that jurors "may choose to believe one witness and disbelieve another," and that "[c]ourts reviewing all the evidence in a light favorable to the verdict thus assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it." 168S.W.3d at 819. This statement mirrors our prior jurisprudence, which has long provided that a jury "has several alternatives available when presented with conflicting evidence" because it "may believe one witness and disbelieve others," "may resolve inconsistencies in the testimony of any witness," and "may accept lay testimony over that of experts." *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 697 (Tex.1986) (citations omitted).

As the Court itself states, jurors are required to credit undisputed testimony only when it is "clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." 168 S.W.3d at 820. The **City's** testimony does not meet this standard. The **City** Manager did testify that the **City** "would not have approved the developments unless [it was] assured that the developments did not increase the velocity of water or the flow of water" onto the neighboring property. 86 S.W.3d at 706. But the Wilsons disputed whether the **City's** protestations were credible, pointing out that the **City** had a powerful incentive to profess a lack of knowledge through reliance on the engineers' assurances because it would then avoid the considerable expense of compensating the Wilsons for the property that would otherwise have been condemned under the Master Drainage Plan. *See id.* at 705.

Moreover, the Court's conclusion that juries cannot disregard a party's reliance on expert opinions is not consistent with our jurisprudence. The Court cites two cases for this proposition, but neither supports the Court's analysis; instead, both cases

support the conclusion that the jury, as the finder of fact, should appropriately resolve factual disputes regarding a party's reliance on hired experts. *Provident Am. Ins. Co. v. Castañeda,* 988 S.W.2d 189, 194-95 (Tex.1998); *State Farm Lloyds v. Nicolau,* 951 S.W.2d 444, 448-50 (Tex.1997).

In *Castañeda,* a bad-faith insurance case, there was no question that the insurer had relied on an expert's assurances and thus
833 no dispute about whether the *833 jury could have disregarded that evidence. *Castañeda,* 988 S.W.2d at 194-95. In that case, we performed a traditional legal sufficiency analysis and concluded there was no evidence that the defendant acted in bad faith. *Id.* at 194. We did state that reliance on an expert's opinion will not preclude a finding of bad faith if the expert's opinion was "unreliable and the insurer knew or should have known that to be the case." *Id.* However, we did not hold that the jury must credit a party's testimony that it relied on an expert.

We reiterated this point in *Nicolau,* another bad-faith insurance case. There, the Court noted "we have never held that the mere fact that an insurer relies upon an expert's report to deny a claim automatically forecloses bad faith recovery as a matter of law," and again concluded that purported "reliance upon an expert's report, standing alone, will not necessarily shield" the defendant from liability. *Nicolau,* 951 S.W.2d at 448. The Court conceded that "[w]ere we the trier of fact in this case, we may well have concluded that [the insurer] did not act in bad faith," but concluded that the "determination is not ours to make" because "the Constitution allocates that task to the jury and prohibits us from reweighing the evidence." *Id.* at 450 (citing TEX. CONST. art. I, § 15, art. V, §§ 6, 10).

The same is true in this case. The jury was not required to believe that the **City** did not know flooding was substantially certain to occur because it relied on assurances to the contrary; as a reviewing Court, we should "assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it." 168 S.W.3d at 819. Such credibility determinations are uniquely suited and constitutionally committed to the fact finder. *See* TEX. CONST. art. I, § 15, art. V, § 6; *see also Nicolau,* 951 S.W.2d at 450.

II

Although I disagree with the Court's conclusion that the jury was required to credit the **City's** testimony, I agree with its judgment in the **City's** favor because, in my view, the **City's** mere approval of the private development plans did not result in a taking for public use, as the constitutional standard requires for a compensable taking. TEX. CONST. art. I, § 17. The **City** did not appropriate or even regulate the use of the Wilsons' land, nor did it design the drainage plan for the proposed subdivisions. Instead, the **City** merely approved subdivision plans designed by private developers, and that design included inadequate drainage capabilities. The **City** argues, and I agree, that its mere approval of private plans did not transfer responsibility for the content of those plans from the developers to the **City**. Municipalities review subdivision plats "to ensure that subdivisions are safely constructed and to promote the orderly development of the community." ***City** of Round Rock v. Smith,* 687 S.W.2d 300, 302 (Tex.1985); *see* TEX. LOC. GOV'T CODE § 212.002. Such a review is intended to protect the **city's** residents; it is not intended to transfer responsibility for a flawed subdivision design from the developers to the municipality. *See, e.g., **City** of Round Rock,* 687 S.W.2d at 302; *see also Cootey v. Sun Inv., Inc.,* 68 Haw. 480, 718 P.2d 1086, 1091 (1986) (holding that "[t]he permit process by which the County approves or disapproves the development of a proposed subdivision reflects an effort by government to require the developer to meet his responsibilities under the subdivision rules, regulations, and laws," and that "the primary responsibility of providing an adequate and safe development rests with ... the developer, and not with the County").

834 Because the primary responsibility for a development's design rests with the developer, *834 and because the plat-approval process does not transfer such responsibility to the municipality, mere plat approval cannot be a basis upon which to predicate takings liability. We have held that, to be liable for a taking, a governmental entity must "perform certain acts in the exercise of its lawful authority ... which resulted in the taking or damaging of plaintiffs' property, and which acts were the *proximate cause* of the taking or damaging of such property." *State v. Hale,* 136 Tex. 29, 146 S.W.2d 731, 736 (1941) (emphasis added). In this case, flooding resulted from the developers' defective drainage design, not from the **City's** approval of the plat; thus, the **City's** approval was not the proximate cause of the damage to the **Wilson** property.

Other courts, faced with similar facts, have also concluded that a governmental entity cannot be liable for a taking when its only action is to approve a private development plan. *See Phillips v. King County,* 136 Wash.2d 946, 968 P.2d 871, 879 (1998); *see also Pepper v. J.J. Welcome Constr. Co.,* 73 Wash.App. 523, 871 P.2d 601, 606 (1994). In *Phillips,* the Washington Supreme

Court observed that there is no public aspect to a private development and concluded that "[i]f the county or **city** were liable for the negligence of a private developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties." *Phillips,* 968 P.2d at 878. The court in *Pepper* similarly examined an inverse condemnation claim based upon a county's approval of private developments with defective drainage plans; it, too, concluded that the county's approval did not cause the resultant flooding and did not result in an unconstitutional taking. *Pepper,* 871 P.2d at 606. The court noted that the flooding was "not the result of the County appropriating or regulating their use of the land," and held that "[t]he fact that a county regulates development and requires compliance with road and drainage restrictions does not transform a private development into a public project." *Id.* The court concluded that because "land use regulation of [the plaintiffs'] property did not cause the damages, no inverse condemnation was involved." *Id.* I am persuaded by the reasoning of the courts in *Phillips* and *Pepper,* and would similarly conclude that the **City's** plat approval in this case did not amount to an unconstitutional taking as a matter of law.

The court of appeals in this case advanced an alternative reason for affirming the trial court's judgment, suggesting that even if the **City** could not be liable for merely approving a subdivision plat, it could nevertheless be held liable for failing to condemn a drainage easement across the **Wilson** property. 86 S.W.3d at 707. The court of appeals stated that "the **City** chose not to condemn any of the **Wilson** property," but instead "allow[ed] the water flowing from the Sebastian easement to discharge, uncontrolled, across the **Wilson** property." *Id.* As noted above, however, it was the developers' plan — not the **City's** actions — that allowed the water to flood the **Wilson** property. Because the **City's** action did not cause the flooding, I disagree that the **City's** failure to condemn an easement is relevant to takings liability. If the **City** were responsible for the flooding but chose not to condemn the property, it might be subject to inverse-condemnation liability. *See Tarrant County Reg'l Water Dist. v. Gragg,* 151 S.W.3d 546, 554 (Tex.2004) ("When the government takes private property without first paying for it, the owner may recover
835 damages for inverse condemnation."). However, if a governmental entity's actions are not the *835 "proximate cause of the taking or damaging" of the property, then the entity cannot be liable for a taking. *Hale,* 146 S.W.2d at 736. Accordingly, the entity need not condemn property merely because a private entity is causing damage. This rule does not leave owners of flooded property without a remedy; when a private development floods neighboring land, the owner of the damaged property will ordinarily have recourse against the private parties causing the damage. *See* Tex. Water Code § 11.086(a), (b) (providing that "[n]o person may divert or impound the natural flow of surface waters in this state ... in a manner that damages the property of another by the overflow of the water diverted or impounded" and that "[a] person whose property is injured by an overflow of water caused by an unlawful diversion or impounding has remedies at law and in equity and may recover damages occasioned by the overflow"). Because the developers' design of the plat — not the **City's** approval — caused the flooding damage in this case, I would hold that the **City** cannot be held liable for an unconstitutional taking under Article I, Section 17 of the Texas Constitution.

III

Because I believe the Court fails to give due regard to the jury's right to make credibility determinations, I cannot join Part V of the Court's opinion. But because I conclude that the **City's** mere act of approving a private development plan did not cause the **Wilson** property to be "taken, damaged or destroyed for or applied to public use," TEX. CONST. art. I, § 17, I agree that the **City** cannot be held liable for a taking in this case. Accordingly, I concur in the Court's judgment.

[1] The **City** of Fort Worth asserts in an amicus brief that in 2001 alone it approved 325 subdivision plats creating 5,857 residential lots within its extraterritorial jurisdiction, which of course excludes surrounding communities.

[2] Evidence at trial and briefs by amici indicate that cities normally acquire title to these easements to ensure they are properly mowed and maintained after the developers' departure.

[3] TEX. CONST. art. I, § 17; ***City*** *of Dallas v. Jennings,* 142 S.W.3d 310, 313-14 (Tex.2004).

[4] 86 S.W.3d 693, 715, 717.

[5] *Id.* at 700.

[6] *See, e.g., Wal-Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 739 (Tex.2003) (per curiam); *Bradford v. Vento,* 48 S.W.3d 749, 754 (Tex.2001); ***City*** *of Fort Worth v. Zimlich,* 29 S.W.3d 62, 69 (Tex.2000); *Wal-Mart Stores, Inc. v. Gonzalez,* 968 S.W.2d 934, 936 (Tex.1998); *Cont'l Coffee Prods. Co. v. Cazarez,* 937 S.W.2d 444, 450 (Tex.1996); *Burroughs Wellcome Co. v. Crye,* 907 S.W.2d 497, 499 (Tex.1995); *Browning-Ferris, Inc.*

v. Reyna, 865 S.W.2d 925, 928 (Tex.1993); *Holt Atherton Indus., Inc. v. Heine,* 835 S.W.2d 80, 84 (Tex.1992); *Weirich v. Weirich,* 833 S.W.2d 942, 945 (Tex.1992); *Havner v. E-Z Mart Stores, Inc.,* 825 S.W.2d 456, 458 (Tex.1992); *Lewelling v. Lewelling,* 796 S.W.2d 164, 166 (Tex.1990); *Burkard v. ASCO Co.,* 779 S.W.2d 805, 806 (Tex.1989) (per curiam); *Brown v. Edwards Transfer Co.,* 764 S.W.2d 220, 223 (Tex.1988); ***City** of Gladewater v. Pike,* 727 S.W.2d 514, 518 (Tex.1987); *King v. Bauer,* 688 S.W.2d 845, 846 (Tex.1985); *Tomlinson v. Jones,* 677 S.W.2d 490, 492 (Tex.1984); *Glover v. Tex. Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex.1981) (per curiam); *Holley v. Adams,* 544 S.W.2d 367, 370 (Tex.1976); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex.1965); *Wininger v. Ft. Worth & D.C. Ry. Co.,* 105 Tex. 56, 143 S.W. 1150, 1152 (1912).

[7] *See, e.g., St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 519 (Tex.2002) (plurality op.); *Associated Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 285-86 (Tex.1998); *State Farm Lloyds Ins. Co. v. Maldonado,* 963 S.W.2d 38, 40 (Tex.1998); *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 48 (Tex.1998); *Merrell DowPharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997); *White v. Southwestern Bell Tel. Co.,* 651 S.W.2d 260, 262 (Tex.1983); *Burk Royalty v. Walls,* 616 S.W.2d 911, 922 (Tex.1981); *Harbin v. Seale,* 461 S.W.2d 591, 592 (Tex.1970); *De Winne v. Allen,* 154 Tex. 316, 277 S.W.2d 95, 97 (1955); *Hall v. Med. Bldg. of Houston,* 151 Tex. 425, 251 S.W.2d 497, 498 (1952).

[8] *Tarrant Reg'l Water Dist. v. Gragg,* 151 S.W.3d 546, 552 (Tex.2004); *Bostrom Seating, Inc. v. Crane Carrier Co.,* 140 S.W.3d 681, 684 (Tex.2004); *Lozano v. Lozano,* 52 S.W.3d 141, 144 (Tex.2001) (per curiam); *La.-Pac. Corp. v. Andrade,* 19 S.W.3d 245, 247 (Tex.1999); *Latham v. Castillo,* 972 S.W.2d 66, 68 (Tex.1998); *Brown v. Bank of Galveston, Nat'l Ass'n,* 963 S.W.2d 511, 513 (Tex.1998).

[9] *See, e.g., Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 234 (Tex.2004); *Szczepanik v. First S. Trust Co.,* 883 S.W.2d 648, 649 (Tex.1994) (per curiam); *compare Biggers v. Cont'l Bus Sys., Inc.,* 157 Tex. 351, 303 S.W.2d 359, 363 (1957) ("We may consider *only* that evidence, if any, which, viewed in its most favorable light, supports the jury findings, and we must disregard all evidence which would lead to a contrary result.") (emphasis added), *with Biggers v. Cont'l Bus Sys., Inc.,* 157 Tex. 351, 298 S.W.2d 79, 81 (1956) ("[T]he duty of this Court [is] to examine and consider *all* of the evidence bearing on the controlling issues, and having done so to decide whether there is evidence of probative value to support the answers made by the jury to the issues.") (quotation omitted) (emphasis added), *and Cartwright v. Canode,* 106 Tex. 502, 171 S.W. 696, 698 (1914) ("[W]e must reject all evidence favorable to the plaintiffs in error, and consider only the facts and circumstances which tend to sustain the verdict. . . . In considering this question, we must take into account all of the facts and circumstances attending the transaction.").

[10] *See, e.g.,* W. Wendell Hall, *Standards of Review in Texas,* 34 ST. MARY'S L.J. 1, 159-62 (2002); William V. Dorsaneo, III, *Judges, Juries, & Reviewing Courts,* 53 SMU L.R. 1497, 1498, 1507-11 (2000); Phil Hardberger, *Juries Under Siege,* 30 ST. MARY'S L.J. 1, 40-41 (1998). *But see* William Powers, Jr., *Judge & Jury in the Texas Supreme Court,* 75 TEX. L.REV. 1699, 1699-1700, 1704-19 (1997) (concluding the Court is not changing the no-evidence standard of review but is moving away from broad definitions of duty and toward particularized definitions of duty).

[11] Robert W. Calvert was an associate justice of this Court from 1950 to 1960, and Chief Justice from 1961 to 1972.

[12] Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error,* 38 TEX. L.REV. 361 (1960).

[13] *Id.* at 361.

[14] "Most of what has been said here is repetitious of what has been said before in the cited cases and articles. The purpose of the writer here has been to try to bring former writings on the subject into compact form and under somewhat closer analysis." *Id.* at 371.

[15] *Id.* at 362-63.

[16] *See, e.g., King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 751 (Tex.2003); *Marathon Corp. v. Pitzner,* 106 S.W.3d 724, 727 (Tex.2003) (per curiam); *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 334 (Tex.1998); *Mar. Overseas Corp. v. Ellis,* 971 S.W.2d 402, 409 (Tex.1998); *Merrell DowPharm., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997); *Anderson v. **City** of Seven Points,* 806 S.W.2d 791, 795 n. 3 (Tex.1991); *Cecil v. Smith,* 804 S.W.2d 509, 510 n. 2 (Tex.1991); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.,* 793 S.W.2d 660, 666 n. 9 (Tex.1990).

[17] Calvert, *supra* note 12, at 364.

[18] *See In re J.F.C.,* 96 S.W.3d 256, 266 (Tex.2002); *Uniroyal,* 977 S.W.2d at 340; *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.,* 644 S.W.2d 443, 446 (Tex.1982).

[19] Calvert, *supra* note 12, at 364 ("If there is an absolute absence of evidence of a vital fact . . . an appellate court has no occasion to concern itself with an abstract rule such as how minds of reasonable men might view the situation.").

[20] *NewTimes, Inc. v. Isaacks,* 146 S.W.3d 144, 158-59 (Tex.2004); *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 114 (Tex.2000); *Guisti v. Galveston Tribune,* 105 Tex. 497, 150 S.W. 874, 877-78 (1912).

[21] *Bentley v. Bunton,* 94 S.W.3d 561, 581 (Tex.2002) (considering remarks in context of series of talk-show programs); *Turner,* 38 S.W.3d at 115 (holding defamation includes story in which details are right but gist is wrong).

[22] *Shell Oil Co. v. Khan,* 138 S.W.3d 288, 292 (Tex.2004).

[23] *DeWitt County Elec. Co-op., Inc. v. Parks,* 1 S.W.3d 96, 102 (Tex.1999).

[24] *Tiller v. McLure,* 121 S.W.3d 709, 714 (Tex.2003) (per curiam); *see also Tex. Farm Bureau Mut. Ins. Cos. v. Sears,* 84 S.W.3d 604, 610-11 (Tex.2002); *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605, 612 (Tex.1999).

[25] *See George Grubbs Enters., Inc. v. Bien,* 881 S.W.2d 843, 852-53 (Tex.App.-Fort Worth 1994) (holding that efforts to pressure deaf-mute consumer to buy car were legally sufficient evidence of intentional infliction), *rev'd on other grounds,* 900 S.W.2d 337, 338 (Tex.1995).

[26] *See Tiller,* 121 S.W.3d at 714 (holding efforts to pressure widow of contracting party to complete project were legally insufficient evidence of intentional infliction).

[27] *See, e.g., id.* at 713-14 (discussing contrary evidence showing defendant's reasonable concerns about timeliness of plaintiff's work); *Sears,* 84 S.W.3d at 612 (discussing contrary evidence that defendant believed claimant was involved in suspicious dealings).

[28] *Bostrom Seating, Inc. v. Crane Carrier Co.,* 140 S.W.3d 681, 684, 685 (Tex.2004) (holding no evidence supported defect as comments from deposition "were read out of context").

[29] *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 232 n. 1 (Tex.2004) (citing *Henry v. Phillips,* 105 Tex. 459, 151 S.W. 533, 538 (1912)). This rule was changed for hearsay evidence in 1983. *See* TEX.R. EVID. 802 ("Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.").

[30] *Tex. & P. Ry. Co. v. Ball,* 96 Tex. 622, 75 S.W. 4, 6 (1903).

[31] *Minyard Food Stores, Inc. v. Goodman,* 80 S.W.3d 573, 579 (Tex.2002) (holding defamation was not in course and scope of employment as duties required employee to cooperate in investigation but not to lie); *Robertson Tank Lines, Inc. v. Van Cleave,* 468 S.W.2d 354, 360 (Tex.1971) (holding truck driver was not in course of employment during social visit to his father).

[32] *Bowles v. Bourdon,* 148 Tex. 1, 219 S.W.2d 779, 782-83 (1949) (affirming directed verdict against malpractice claim as inadequate expert testimony from doctor of same school or practice as defendant rendered proof legally insufficient).

[33] *See Leitch v. Hornsby,* 935 S.W.2d 114, 119 (Tex.1996).

[34] *See Burroughs Wellcome Co. v. Crye,* 907 S.W.2d 497, 499-500 (Tex.1995) (holding opinion that spray caused frostbite was legally insufficient as it assumed absence of redness when plaintiff admitted the contrary); *Roark v. Allen,* 633 S.W.2d 804, 809 (Tex.1982) (holding opinion that physician should have warned of possible skull fracture was legally insufficient as it assumed physician was aware of fracture when there was no proof he was).

[35] *See E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 556 (Tex.1995) (adopting reasoning of *Daubert v. Merrell DowPharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

[36] *Merrell DowPharms., Inc. v. Havner,* 953 S.W.2d 706, 714, 720 (Tex.1997).

[37] *Id.* at 711, 724-30.

[38] *Kerr-McGee Corp. v. Helton,* 133 S.W.3d 245, 254-57 (Tex.2004).

[39] Calvert, *supra* note 12, at 364.

[40] *Id.* at 364-65.

[41] *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 601 (Tex.2004) (holding evidence that truck caught fire unaccompanied by proof identifying any defect did not exceed a scintilla, as jurors would have to guess cause); *Marathon Corp. v. Pitzner,* 106 S.W.3d 724, 729 (Tex.2003) (per curiam); *Hammerly Oaks, Inc. v. Edwards,* 958 S.W.2d 387, 392 (Tex.1997); *W. Tel. Corp. v. McCann,* 128 Tex. 582, 99 S.W.2d 895, 900 (Tex.1937); Calvert, *supra* note 12, at 365.

[42] *Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.,* 819 S.W.2d 801, 805 (Tex.1991); *see also Litton Indus. Prods., Inc. v. Gammage,* 668 S.W.2d 319, 324 (Tex.1984) (citing *Tex. Sling Co. v. Emanuel,* 431 S.W.2d 538, 541 (Tex.1968)).

[43] *Lozano,* 52 S.W.3d at 167.

[44] Calvert, *supra* note 12, at 365.

[45] *Id.*

[46] *Wal-Mart Stores, Inc. v. Gonzalez,* 968 S.W.2d 934, 938 (Tex.1998).

[47] *See Marathon Corp. v. Pitzner,* 106 S.W.3d 724, 729 (Tex.2003) (per curiam); *McCann,* 99 S.W.2d at 900.

[48] Calvert, *supra* note 12, at 363-64. But other commentators disagree. *See* Powers, *supra* note 10, at 1703-10. We have held that a "conclusively and as a matter of law" point may be asserted under a "no evidence" point. *O'Neil v. Mack Trucks, Inc.,* 542 S.W.2d 112, 113 (Tex.1976). And the cases in this section note that conclusive proof is often asserted by parties that do *not* carry the burden of proof. *See also* *DowChem. Co. v. Francis,* 46 S.W.3d 237, 241 (Tex.2001) (per curiam) (court must first examine record for evidence supporting verdict, ignoring all evidence to the contrary; if there is no such evidence, the court then examines the entire record to see if the contrary finding is established as a matter of law).

[49] Calvert, *supra* note 12, at 363-64. *But see, e.g., Cecil v. Smith,* 804 S.W.2d 509, 510 n. 2 (Tex.1991) ("Cecil's points that (1) there was no evidence to support the findings and (2) the contrary of each finding was established as a matter of law will hereinafter collectively be referred to as her "no evidence" points.").

[50] *St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 519-20 (Tex.2002) (plurality op.) (quoting *Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 51 n. 1 (Tex.1997)).

[51] *Tex. & N.O.R Co. v. Burden,* 146 Tex. 109, 203 S.W.2d 522, 528, 530 (1947); *see also* *Prudential Ins. Co. of Am. v. Krayer,* 366 S.W.2d 779, 783 (Tex.1963) (finding evidence of suicide undisputed after disregarding disputed portion of facts).

[52] *Sullivan v. Barnett,* 471 S.W.2d 39, 44 (Tex.1971); *Wright v. Vernon Compress Co.,* 156 Tex. 474, 296 S.W.2d 517, 523 (1956) ("[T]he trial court is required to submit only controverted issues. No jury finding is necessary to establish undisputed facts."); *Clark v. Nat'l Life & Accident Ins. Co.,* 145 Tex. 575, 200 S.W.2d 820, 822 (1947) ("Uncontroverted questions of fact need not be and should not be submitted to the jury for its determination."); *S. Underwriters v. Wheeler,* 132 Tex. 350, 123 S.W.2d 340, 341 (Tex.1939).

[53] *County of Bexar v. Santikos,* 144 S.W.3d 455, 460-61 (Tex.2004).

[54] *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship,* 146 S.W.3d 79, 97-98 (Tex.2004).

[55] *State Farm Lloyds Ins. Co. v. Maldonado,* 963 S.W.2d 38, 40 (Tex.1998).

[56] *Wal-Mart Stores, Inc. v. Miller,* 102 S.W.3d 706, 709-10 (Tex.2003) (per curiam).

[57] *See* *Johnson & Johnson Med., Inc. v. Sanchez,* 924 S.W.2d 925, 930 (Tex.1996).

[58] *King v. Graham,* 126 S.W.3d 75, 78-79 (Tex.2003) (per curiam) (holding no evidence supported malicious prosecution claim as district attorney admitted prosecution was due to item he overlooked rather than any false statements by defendants).

[59] *Travelers Ins. Co. v. Seabolt,* 361 S.W.2d 204, 206 (Tex.1962) (return to regular job in which use of hand was required conclusively established claimant did not suffer total loss of use).

[60] *Navarette v. Temple Indep. Sch. Dist.,* 706 S.W.2d 308, 309-10 (Tex.1986) (return to work did not conclusively establish injury was not total as claimant could not do regular work and employer voluntarily accommodated her with lesser duties).

[61] *See, e.g., Prudential Ins. Co. of Am. v. Krayer,* 366 S.W.2d 779, 783 (Tex.1963).

[62] *See* *Republic Nat'l Life Ins. Co. v. Heyward,* 536 S.W.2d 549, 552 (Tex.1976).

[63] *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 340 (Tex.1998); *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.,* 644 S.W.2d 443, 446 (Tex.1982).

[64] 811 S.W.2d 557, 560 (Tex.1991).

[65] *Id.* at 558.

[66] *Id.* at 560. In defense of jurors, it should be noted that the trier-of-fact in *Murdock* was a judge.

[67] 135 Tex. 7, 136 S.W.2d 1113, 1115 (1940).

[68] *Id.*

[69] *Id.*

[70] *Clewis v. State,* 922 S.W.2d 126, 133 n. 12 (Tex.Crim.App.1996) (en banc) (citation omitted).

[71] *Hotchkiss v. Nat'l* ***City*** *Bank,* 200 F. 287, 293 (S.D.N.Y.1911).

[72] 443 U.S. 307, 320 n. 14, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[73] *Southwestern Bell Tel. Co. v. Garza,* 164 S.W.3d 607, 627 (Tex.2004).

[74] Our sister court reviews the legal sufficiency of criminal convictions by considering "*all evidence* which the jury was permitted, whether rightly or

wrongly, to consider" in the light most favorable to the prosecution. *Moff v. State,* 131 S.W.3d 485, 488 (Tex.Crim.App.2004); *see also Vodochodsky v. State,* 158 S.W.3d 502, 509 (Tex.Crim.App.2005).

[75] *In re J.F.C.,* 96 S.W.3d 256, 266 (Tex.2002).

[76] *Bentley v. Bunton,* 94 S.W.3d 561, 596 (Tex.2002); *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 120 (Tex.2000).

[77] *Garza,* 164 S.W.3d at 627.

[78] 616 S.W.2d 911, 922 (Tex.1981).

[79] *Id.* at 926 (Greenhill, C.J., concurring).

[80] *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 234-35 (Tex.2004).

[81] *Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 55-56 (Tex.1997).

[82] *See id.* at 51 (noting same problem with previous test whether insurer had reasonable basis for denying claim).

[83] *See Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.,* 77 S.W.3d 253, 262-63 (Tex.2002) (finding no evidence of bad faith based in part on defendant's correspondence showing misunderstanding regarding settlement terms); *State Farm Fire & Cas. Co. v. Simmons,* 963 S.W.2d 42, 45 (Tex.1998)(affirming bad-faith verdict after noting that insurer gave contradictory reasons for not interviewing potential arsonists); *Minn. Life Ins. Co. v. Vasquez,* 133 S.W.3d 320, 330 (Tex.App.-Corpus Christi 2004, pet. filed) (finding some evidence of bad faith because, though insurer showed hospital stymied its efforts to obtain records, insurer failed to seek same information from other sources); *Allstate Tex. Lloyds v. Mason,* 123 S.W.3d 690, 704-06 (Tex.App.-Fort Worth 2003, no pet.) (reversing bad-faith verdict for legal insufficiency because insurer reasonably relied on expert report); *Allison v. Fire Ins. Exch.,* 98 S.W.3d 227, 249-50 (Tex.App.-Austin 2002, pet. granted, judgm't vacated w.r.m.) (affirming bad-faith verdict after reviewing insurer's reasons for delay and insured's responsive evidence); *Oram v. State Farm Lloyds,* 977 S.W.2d 163, 167 (Tex.App.-Austin 1998, no pet.) (reversing bad-faith verdict for legal insufficiency because insurer's interpretation of exclusion was reasonable though incorrect).

[84] *Wal-Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 740 (Tex.2003) (per curiam) (noting liability may be established by proof of discrimination plus proof employer's reason was pretext); *Cont'l Coffee Prods. Co. v. Cazarez,* 937 S.W.2d 444, 452 (Tex.1996) (same).

[85] *See, e.g., Univ. of Houston v. Clark,* 38 S.W.3d 578, 583 (Tex.2000) (noting good-faith test considers *all* circumstances on which official acted).

[86] *See, e.g., PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship,* 146 S.W.3d 79, 94 (Tex.2004) (holding no evidence supported jury verdict applying discovery rule based on contrary evidence that claimant's predecessor knew 3,000 windows had failed).

[87] *See, e.g., Provident Am. Ins. Co. v. Castaneda,* 988 S.W.2d 189, 194-95 (Tex.1998) (finding no evidence insurer denied claim in bad faith due to conflicting medical evidence).

[88] *See, e.g., State Farm Lloyds v. Nicolau,* 951 S.W.2d 444, 448 (Tex.1997) (holding some evidence showed expert report was pretext and thus denial of claim had no reasonable basis).

[89] *Golden Eagle Archery, Inc. v. Jackson,* 116 S.W.3d 757, 761 (Tex.2003); *Jaffe Aircraft Corp. v. Carr,* 867 S.W.2d 27, 28 (Tex.1993); *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 697 (Tex.1986); *Edrington v. Kiger,* 4 Tex. 89, 93 (1849).

[90] *McGalliard,* 722 S.W.2d at 697; *Silcott v. Oglesby,* 721 S.W.2d 290, 293 (Tex.1986); *Ford v. Panhandle & Santa Fe Ry. Co.,* 151 Tex. 538, 252 S.W.2d 561, 563 (1952) (holding it was up to jurors "to resolve conflicts and inconsistencies in the testimony of any one witness as well as in the testimony of different witnesses"); *Houston, E. & W.T. Ry. Co. v. Runnels,* 92 Tex. 305, 47 S.W. 971, 972 (1898).

[91] *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 120 (Tex.2000).

[92] *Runnels,* 47 S.W. at 972.

[93] *Cochran v. Wool Growers Cent. Storage Co.,* 140 Tex. 184, 166 S.W.2d 904, 907 (1942) (noting the Court "read the entire statement of facts").

[94] *Harbin v. Seale,* 461 S.W.2d 591, 594 (Tex.1970); *compare Harbin v. Seale,* 454 S.W.2d 271, 272 (Tex.Civ.App.-Dallas 1970) (reporting defendant's testimony that he was traveling only 40 miles per hour), *rev'd,* 461 S.W.2d 591 (Tex.1970).

[95] *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.,* 995 S.W.2d 647, 653-54 (Tex.1999) (holding evidence allowed jurors to disbelieve defendant's experts' testimony even though plaintiff's expert's testimony was shown to be in error); *Runnels,* 47 S.W. at 972; *Cheatham v. Riddle,* 12 Tex. 112, 118 (1854).

[96] *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship,* 146 S.W.3d 79, 100 (Tex.2004).

[97] *Anchor Cas. Co. v. Bowers,* 393 S.W.2d 168, 169-70 (Tex.1965).

[98] *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 338 (Tex.1998); *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 697 (Tex.1986).

[99] *Bentley v. Bunton,* 94 S.W.3d 561, 599 (Tex.2002).

[100] *See* TEX.R. CIV. P. 166a(c); *Wal-Mart Stores, Inc. v. Reece,* 81 S.W.3d 812, 817 (Tex.2002) (finding no evidence that store knew of puddle based in part on uncontradicted testimony by only employee in the area); *In re Doe 4,* 19 S.W.3d 322, 325 (Tex.2000); *WFAA-TV, Inc. v. McLemore,* 978 S.W.2d 568, 574 (Tex.1998) (holding reporter's detailed explanation of foundation of report established lack of malice as matter of law).

[101] *See, e.g., Dresser Indus., Inc. v. Lee,* 880 S.W.2d 750, 754 (Tex.1993); *Lyons v. Millers Cas. Ins. Co.,* 866 S.W.2d 597, 601 (Tex.1993); *Biggers v. Cont'l Bus Sys., Inc.,* 157 Tex. 351, 303 S.W.2d 359, 365 (1957); *Howard Oil Co. v. Davis,* 76 Tex. 630, 13 S.W. 665, 667 (1890) (holding reviewing court must uphold jury verdict despite strong evidence to the contrary if evidence is conflicting).

[102] *See, e.g., Gen. Motors Corp. v. Sanchez,* 997 S.W.2d 584, 592 (Tex.1999); *Caller-Times Publ'g Co. v. Triad Communications, Inc.,* 826 S.W.2d 576, 580 (Tex.1992); *Bendalin v. Delgado,* 406 S.W.2d 897, 899 (Tex.1966).

[103] *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 48-49 (Tex.1998).

[104] *Associated Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 286 (Tex.1998).

[105] *White v. Southwestern Bell Tel. Co.,* 651 S.W.2d 260, 262-63 (Tex.1983).

[106] *Hall v. Med. Bldg. of Houston,* 151 Tex. 425, 251 S.W.2d 497, 502 (1952).

[107] *St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 542-43 (Tex.2002) (plurality op.).

[108] *T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218, 221 (Tex.1992).

[109] *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 341-42 (Tex.1998).

[110] *De Winne v. Allen,* 154 Tex. 316, 277 S.W.2d 95, 98-99 (1955).

[111] *Lozano v. Lozano,* 52 S.W.3d 141, 144 (Tex.2001) (per curiam); *id.* at 162-63 (Hecht, J., concurring and dissenting).

[112] *See Tarrant Reg'l Water Dist. v. Gragg,* 151 S.W.3d 546, 552 (Tex.2004); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 234 (Tex.2004); *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 601 (Tex.2004); *Mobil Oil Corp. v. Ellender,* 968 S.W.2d 917, 922 (Tex.1998); *Merrell DowPharm., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997); *Burroughs Wellcome Co. v. Crye,* 907 S.W.2d 497, 499 (Tex.1995); *Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 25 (Tex.1994); *Orozco v. Sander,* 824 S.W.2d 555, 556 (Tex.1992); *Kindred v. Con/Chem, Inc.,* 650 S.W.2d 61, 63 (Tex.1983); *Corbin v. Safeway Stores, Inc.,* 648 S.W.2d 292, 297 (Tex.1983) (per curiam).

[113] *See* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" & "Insufficient Evidence,"* 69 TEX. L.R. 515, 517-20 (1991).

[114] *Gragg,* 151 S.W.3d at 552; *St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 519 (Tex.2002) (plurality op.); *Southwestern Bell Mobile Sys., Inc. v. Franco,* 971 S.W.2d 52, 54 (Tex.1998) (per curiam); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 48 (Tex.1998); *Havner,* 953 S.W.2d at 711; *Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 75 (Tex.1997) (Hecht, J., concurring); *Preferred Heating & Air Conditioning Co. v. Shelby,* 778 S.W.2d 67, 68 (Tex.1989) (per curiam); *Burk Royalty Co. v. Walls,* 616 S.W.2d 911, 922 (Tex.1981); *Harbin v. Seale,* 461 S.W.2d 591, 592 (Tex.1970); *W. Tel. Corp. v. McCann,* 128 Tex. 582, 99 S.W.2d 895, 898 (Tex.1937).

[115] *See St. Joseph Hosp.,* 94 S.W.3d at 519-20 (Tex.2002) (plurality op.); *Giles,* 950 S.W.2d at 51 n. 1 (citing *Wininger v. Ft. Worth & D.C. Ry. Co.,* 105 Tex. 56, 143 S.W. 1150, 1152 (1912) and *Tex. & N.O. Ry. Co. v. Rooks,* 293 S.W. 554, 556-57 (Tex.Comm'n.App.1927)).

[116] *Southwestern Bell Tel. Co. v. Garza,* 164 S.W.3d 607, 620 (Tex.2004) (citing *Choate v. San Antonio & A.P. Ry.,* 91 Tex. 406, 44 S.W. 69, 69 (1898); *Muhle v. N.Y., T. & M. Ry.,* 86 Tex. 459, 25 S.W. 607, 608 (1894)).

[117] *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 234 (Tex.2004); *Qantel Bus. Sys., Inc. v. Custom Controls Co.,* 761 S.W.2d 302, 303 (Tex.1988); *Hart v. Van Zandt,* 399 S.W.2d 791, 793 (Tex.1965); *Triangle Motors v. Richmond,* 152 Tex. 354, 258 S.W.2d 60, 61 (1953); *Ford v. Panhandle & Santa Fe Ry. Co.,* 151 Tex. 538, 252 S.W.2d 561, 562 (1952); *Anglin v. Cisco Mortgage Loan Co.,* 135 Tex. 188, 141 S.W.2d 935, 938 (1940).

[118] *Bostrom Seating, Inc. v. Crane Carrier Co.,* 140 S.W.3d 681, 684 (Tex.2004); *S.V. v. R.V.,* 933 S.W.2d 1, 8 (Tex.1996); *Colvin v. Red Steel Co.,* 682 S.W.2d 243, 245 (Tex.1984); *White v. Southwestern Bell Tel. Co.,* 651 S.W.2d 260, 262 (Tex.1983); *Seideneck v. Cal Bayreuther Assocs.,* 451 S.W.2d 752, 753 (Tex.1970); *Dunagan v. Bushey,* 152 Tex. 630, 263 S.W.2d 148, 153 (1953); *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256, 258 (1951); *Kelly v. McKay,* 149 Tex. 343, 233 S.W.2d 121, 122 (1950); *White v. White,* 141 Tex. 328, 172 S.W.2d 295, 296 (1943); *McAfee v. Travis Gas Corp.,* 137 Tex. 314, 153 S.W.2d 442, 445 (1941); *Wellington Oil Co. v. Maffi,* 136 Tex. 201, 150 S.W.2d 60, 61 (1941); *Chicago, R.I. & G. Ry. Co. v. Carter,* 261 S.W. 135, 135 (Tex.Com.App.1924, judgm't adopted); *Charles v. El Paso Elec. Ry. Co.,* 254 S.W. 1094,

1094-95 (Tex.Com.App.1923, holding approved, judgm't adopted).

[119] *Szczepanik v. First S. Trust Co.,* 883 S.W.2d 648, 649 (Tex.1994) (per curiam); *Vance v. My Apartment Steak House of San Antonio, Inc.,* 677 S.W.2d 480, 483 (Tex.1984); *Corbin v. Safeway Stores, Inc.,* 648 S.W.2d 292, 295 (Tex.1983); *Jones v. Tarrant Util. Co.,* 638 S.W.2d 862, 865 (Tex.1982); *Collora v. Navarro,* 574 S.W.2d 65, 68 (Tex.1978); *Henderson v. Travelers Ins. Co.,* 544 S.W.2d 649, 650 (Tex.1976); *Jones v. Nafco Oil & Gas, Inc.,* 380 S.W.2d 570, 574 (Tex.1964).

[120] Act of April 25, 1931, 42d Leg., R.S., ch. 77, § 1, 1931 Tex. Gen. Laws 119; *Myers v. Crenshaw,* 134 Tex. 500, 137 S.W.2d 7, 13 (Tex.1940); *Hines v. Parks,* 128 Tex. 289, 96 S.W.2d 970, 971 (Tex.1936). *Cf. Deal v. Craven,* 277 S.W. 1046, 1047 (Tex.Com.App.1925, judgm't adopted) ("It has long been settled in this state that the judgment must follow the verdict, and that the courts are without power to enter a judgment notwithstanding a verdict upon a material issue.").

[121] *Brown v. Bank of Galveston, Nat'l Ass'n,* 963 S.W.2d 511, 513 (Tex.1998) ("[W]e consider the evidence in the light most favorable to the verdict and reasonable inferences that tend to support it."); *Trenholm v. Ratcliff,* 646 S.W.2d 927, 931 (Tex.1983) ("In acting on the motion [for judgment notwithstanding the verdict], *all* testimony must be viewed in a light most favorable to the party against whom the motion is sought, and every reasonable intendment deducible from the evidence is to be indulged in that party's favor.") (emphasis added); *Dowling v. NADW Mktg., Inc.,* 631 S.W.2d 726, 728 (Tex.1982) (same); *Douglass v. Panama, Inc.,* 504 S.W.2d 776, 777 (Tex.1974) (same); *Leyva v. Pacheco,* 163 Tex. 638, 358 S.W.2d 547, 550 (1962) (same); *Houston Fire & Cas. Ins. Co. v. Walker,* 152 Tex. 503, 260 S.W.2d 600, 603-04 (1953) (affirming trial court's implied disregard of one jury answer based on "consideration of the transcript as a whole"); *Burt v. Lochausen,* 151 Tex. 289, 249 S.W.2d 194, 199 (1952) ("[W]e must consider *all the testimony in the record* from the standpoint most favorable to the plaintiff.") (emphasis added); *Neyland v. Brown,* 141 Tex. 253, 170 S.W.2d 207, 211 (Tex.1943) (considering judgment non obstante veredicto "in the light of the record as a whole"); *Le Master v. Fort Worth Transit Co.,* 138 Tex. 512, 160 S.W.2d 224, 225 (1942) ("[W]e must view LeMaster's testimony, *as well as all other testimony in the record,* from a standpoint most favorable to him.") (emphasis added); *McAfee v. Travis Gas Corp.,* 137 Tex. 314, 153 S.W.2d 442, 445 (1941) ("[W]e must regard the evidence contained in this record in its most favorable light for McAfee ... because of the instructed verdict and judgment non obstante veredicto."); *see also Ballantyne v. Champion Builders, Inc.,* 144 S.W.3d 417, 424-29 (Tex.2004) (upholding judgment non obstante veredicto based on conclusive evidence contrary to verdict).

[122] *See Tiller v. McLure,* 121 S.W.3d 709, 713 (Tex.2003) (per curiam); *Wal-Mart Stores, Inc. v. Miller,* 102 S.W.3d 706, 709 (Tex.2003) (per curiam); *Mancorp, Inc. v. Culpepper,* 802 S.W.2d 226, 227 (Tex.1990); *Best v. Ryan Auto Group, Inc.,* 786 S.W.2d 670, 671 (Tex.1990) (per curiam); *Navarette v. Temple Indep. Sch. Dist.,* 706 S.W.2d 308, 309 (Tex.1986); *Tomlinson v. Jones,* 677 S.W.2d 490, 492 (Tex.1984); *Williams v. Bennett,* 610 S.W.2d 144, 145 (Tex.1980); *Freeman v. Tex. Comp. Ins. Co.,* 603 S.W.2d 186, 191 (Tex.1980); *Dodd v. Tex. Farm Prods. Co.,* 576 S.W.2d 812, 814-15 (Tex.1979); *Campbell v. Northwestern Nat'l Life Ins. Co.,* 573 S.W.2d 496, 497 (Tex.1978); *Miller v. Bock Laundry Mach. Co.,* 568 S.W.2d 648, 650 (Tex.1977); *Sobel v. Jenkins,* 477 S.W.2d 863, 865 (Tex.1972); *C. & R. Transp., Inc. v. Campbell,* 406 S.W.2d 191, 193 (Tex.1966).

[123] *See Tiller,* 121 S.W.3d at 713 (citing *Bradford v. Vento,* 48 S.W.3d 749, 754 (Tex.2001)); *Miller,* 102 S.W.3d at 709 (same); *Best,* 786 S.W.2d at 671 (citing *King v. Bauer,* 688 S.W.2d 845, 846 (Tex.1985)); *Tomlinson,* 677 S.W.2d at 492 (citing *Glover v. Tex. Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex.1981)); *Campbell,* 573 S.W.2d at 497 (citing *Martinez v. Delta Brands, Inc.,* 515 S.W.2d 263, 265 (Tex.1974)); *Campbell,* 406 S.W.2d at 193 (citing *Cartwright v. Canode,* 106 Tex. 502, 171 S.W. 696, 697-98 (1914)).

[124] *IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason,* 143 S.W.3d 794, 798 (Tex.2004); *Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215-16 (Tex.2003); *Wal-Mart Stores, Inc. v. Rodriguez,* 92 S.W.3d 502, 506 (Tex.2002); *Gonzalez v. Mission Am. Ins. Co.,* 795 S.W.2d 734, 736 (Tex.1990); *Bayouth v. Lion Oil Co.,* 671 S.W.2d 867, 868 (Tex.1984).

[125] *See* TEX.R.CIV.P. 166a(i).

[126] 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

[127] FED.R.CIV.P. 50(a)(1).

[128] 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949).

[129] *Id.* at 57, 69 S.Ct. 413.

[130] *Reeves,* 530 U.S. at 149-50, 120 S.Ct. 2097 (citations omitted).

[131] *Carter v. Steverson & Co.,* 106 S.W.3d 161, 166 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (emphasis added) (citation omitted); *accord Long v. Long,* 144 S.W.3d 64, 67 (Tex.App.-El Paso 2004, no pet.); *Gore v. Scotland Golf, Inc.,* 136 S.W.3d 26, 29 (Tex.App.-San Antonio 2003, pet. denied); *Exxon Corp. v. Breezevale Ltd.,* 82 S.W.3d 429, 438 (Tex.App.-Dallas 2002, pet. denied); *N. Am. Van Lines, Inc. v. Emmons,* 50 S.W.3d 103, 113 n. 3 (Tex.App.-Beaumont 2001, pet. denied); *Molina v. Moore,* 33 S.W.3d 323, 329 (Tex.App.-Amarillo 2000, no pet.); *Wal-Mart Stores, Inc. v. Itz,* 21 S.W.3d 456, 470 n. 3 (Tex.App.-Austin 2000, pet. denied); *see also In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951) (per curiam) (holding court of appeals erred in failing to distinguish between legal and factual sufficiency review by not weighing all the evidence when conducting the latter).

[132] *Burk Royalty Co. v. Walls,* 616 S.W.2d 911, 922 (Tex.1981) (noting that review of gross negligence finding by considering all the evidence appeared to but did not conflict with traditional no-evidence test).

[133] Dorsaneo, *supra* note 10, at 1503; *see also* Hardberger, *supra* note 10, at 17 (arguing exclusive standard is "designed to afford high deference to jury verdicts").

[134] *State v. Biggar,* 873 S.W.2d 11, 13 (Tex.1994).

[135] *See, e.g., CMH Homes, Inc. v. Daenen,* 15 S.W.3d 97, 102 (Tex.2000) (noting plaintiff argued defendant's frequent inspections of stairs showed knowledge of inherent danger, while court held it showed the opposite as inspections found nothing); *State Farm Fire & Cas. Co. v. Simmons,* 963 S.W.2d 42, 45 (Tex.1998) (affirming bad-faith verdict after noting insurer's reasons for denial were contradictory).

[136] *See, e.g., Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 327 (Tex.1993) (noting evidence of single previous minor stumble supported negligence finding but not gross negligence).

[137] *See* Judith Resnik, *Managerial Judges,* 96 HARV. L.R. 374, 382-83 (1982) (noting that images of justice appeared blindfolded only within the last four hundred years).

[138] Justice Calvert's use of the masculine in 1960 may perhaps be forgiven, for although Hattie Hennenberg, Hortense Ward, and Ruth Brazzil served temporarily on this Court in 1925, and Sarah T. Hughes was appointed as a state district judge ten years later, it was not until 1954 that the Texas Constitution was amended to allow women to serve as jurors, and not until 1973 that Mary Lou Robinson became the first women to serve as a state appellate judge. See James T. "Jim" Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas,* 46 S. TEX. L.REV. 33, 75 (2004); Robert L. Dabney, Jr. *We Were There,* HOUSTON B.J. Nov.-Dec.1999, at 42, 44.

[139] Calvert, *supra* note 12, at 364.

[140] *Wilkerson v. McCarthy,* 336 U.S. 53, 65, 69 S.Ct. 413, 93 L.Ed. 497 (1949) (Frankfurter, J., concurring).

[141] 86 S.W.3d 693, 709.

[142] *Id.* at 703, 705.

[143] *Id.* at 705.

[144] *Id.* at 704-05.

[145] *Provident Am. Ins. Co. v. Castañeda,* 988 S.W.2d 189, 194-95 (Tex.1998); *see also State Farm Lloyds v. Nicolau,* 951 S.W.2d 444, 448 (Tex.1997) (holding reliance on expert report did not foreclose bad-faith claim because claimant "presented evidence from which a fact-finder could logically infer that Haag's reports were not objectively prepared, that State Farm was aware of Haag's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual.").

[146] *Cf. Nissan Motor Co. Ltd. v. Armstrong,* 145 S.W.3d 131, 140 (Tex.2004) (holding complaint letters may require manufacturer to investigate, but are not evidence complaints are true).

[147] *Tarrant Reg'l Water Dist. v. Gragg,* 151 S.W.3d 546, 555 (Tex.2004) (emphasis added).

292 S.W.3d 712 (2009)

Susan COMBS, Comptroller of Public Accounts of the State of Texas, Appellant

v.

ENTERTAINMENT PUBLICATIONS, INC., Appellee.

No. 03-08-00474-CV.

Court of Appeals of Texas, Austin.

June 12, 2009.
Rehearing Overruled August 27, 2009.

714 *714 William E. Storie, Assistant Attorney General, Austin, TX, for Appellant.

Carl R. Galant, McGinnis, Lochridge & Kilgore, LLP, Austin, TX, for Appellee.

Before Chief Justice JONES, Justices PURYEAR and HENSON.

715 *715 ***OPINION***

J. WOODFIN JONES, Chief Justice.

Appellee **Entertainment** Publications, **Inc**. ("**Entertainment**") sued Susan **Combs**, Comptroller of Public Accounts of the State of Texas (the "Comptroller"), for declaratory and injunctive relief to prevent the Comptroller from implementing a new rule that would require **Entertainment** to collect and remit tax on the sales of products sold through school fundraising activities. The trial court denied the Comptroller's plea to the jurisdiction and granted a temporary injunction in favor of **Entertainment**, enjoining the Comptroller from implementing and enforcing a new rule governing the tax treatment of fundraising sales. In this interlocutory appeal, the Comptroller complains of the denial of her plea to the jurisdiction, *see* Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(8) (West 2008), and the grant of the temporary injunction, *see id.* § 51.014(a)(4). The Comptroller argues that the policy statement **Entertainment** complains of is not a "rule" that may be challenged under the Administrative Procedures Act ("APA"), *see* Tex. Gov't Code Ann. §§ 2001.021-.041 (West 2008); that the court lacked jurisdiction to grant declaratory relief under the Uniform Declaratory Judgments Act ("UDJA"), *see* Tex. Civ. Prac. & Rem.Code Ann. §§ 37.001-.011 (West 2008); and that injunctive relief is improper. We will affirm the orders of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Entertainment is a brochure-fundraising firm that contracts with schools and related organizations, some tax-exempt, to sell merchandise and food products in order to raise funds for student groups. The fundraising products are sold by the school groups to third-party consumers using **Entertainment's** brochures and order forms at retail prices suggested by **Entertainment** in its catalogs. According to **Entertainment**, its initial sales to the school groups are separate transactions from the ultimate sales of items by the school groups to the end consumers. In **Entertainment's** view, this "two-sale transaction" system dictates that the school groups themselves are the actual "sellers" of goods for the following reasons:

> The school [group] purchases sales inventory from a vendor [such as **Entertainment**] for a certain price (first transaction) and then resells the taxable items at its own profit or loss for a price the organization determines (second transaction).
>
> The school [group] assumes the responsibility and risk.
>
> The school [group] does not receive a commission on sales, nor does it share or split the proceeds with the vendor in any way.

716 Thus, **Entertainment** argues that the school groups, not **Entertainment**, are the "sellers" and therefore are responsible for

collecting and remitting any sales tax due on the items sold to the end consumers. *See* Tex. Tax Code Ann. § 151.052(a)-(b) (West 2008) (requiring that "seller" of taxable item collect sales tax). Furthermore, when the school groups claim an intention to resell the fundraising products, **Entertainment** maintains that, based on the "sale for resale" exemption in section 151.302 of the tax code, it is not responsible for collecting sales tax on its initial sales to the school groups. *See id.* § 151.302(a) (providing that "sale for resale" of taxable item is exempted from sales tax); *see also id.* § 151.006(a)(1) (defining "sale for resale" of tangible personal property). Accordingly, **Entertainment** asserts that it accepts resale or exemption certificates in lieu of charging sales tax to schools that claim an intention to resell the *716 fundraising products. Only when schools do not provide a resale or exemption certificate does **Entertainment** charge sales tax, based on the "wholesale" price that schools pay **Entertainment** for the products.

In marketing itself to school groups, **Entertainment** relies on a further exemption in the tax code, which provides that a tax-exempt organization such as a school may hold two one-day, tax-free sales per year, at which the sale of an item priced $5,000 or less is exempted from sales tax. *See id.* § 151.310; 34 Tex. Admin. Code § 3.322(h)(2) (2008). Such sales are permissible, however, only if the school—not **Entertainment**—is regarded as the actual "seller" of the fundraising products. According to **Entertainment**, its business model "allows schools to utilize the tax advantages of the two-sale scenario" because the schools can resell the fundraising products without having to calculate the sales tax due on the items or collect sales tax from the end consumers.

The alternative to viewing these types of transactions as two distinct sales is to characterize them as a single sale, wherein the fundraising firm is the seller and the school or school group acts as the seller's agent. In these circumstances, the fundraising firm bears the responsibility of collecting and remitting sales tax on the products, which may not be sold tax-free during one of the school's tax-free sales days.

Entertainment asserts that it developed its understanding that the transactions at issue were two distinct sales from what it refers to as the Comptroller's "long-standing rule" stated in a 2007 letter ruling identified as Accession No. XXXXXXXXXL. The so-called Factual Criteria Rule, as described in that letter,[1] provided the following guidelines for determining whether the fundraising firm or the school organization was the "seller" for purposes of collecting sales tax:

> The PTA is the seller when it purchases sales inventory from a vendor for a certain price (first transaction) and then resells the taxable items at its own profit or loss for a price the PTA determines (second transaction). The PTA assumes all responsibility and risk.
>
> The PTA is the seller when it does not share/split the proceeds with the vendor/distributor.
>
> . . . .
>
> The PTA is not the seller when it takes orders for the vendor and receives a commission from the vendor, such as a share or split of the proceeds. This is true regardless of who is setting the sales price.
>
> . . . .
>
> Whether the payment, such as a check, is made to the PTA or the vendor may not be an indicator of the seller. For example, a check could be made to the PTA, but if the PTA is receiving a commission from a vendor, the PTA is not the seller.[2]

717 *717 According to the testimony of the Comptroller's representative, this letter accurately stated, at that time, the Comptroller's policy as to brochure fundraising.

On March 18, 2008, the Comptroller sent a letter to the Executive Director of the Association of Fundraising Distributors and Suppliers (the "March 2008 letter"), stating the following:

> The Comptroller's office has consistently held that sales will not qualify as one of a non-profit organization's tax-free sales days when a school group raises funds by acting as sales representatives or agent for a for-profit retailer. In these cases, the retailer is the seller of the goods.

The March 2008 letter, which was signed by the Comptroller, Susan **Combs**, went on to explain that her office had conducted a review of fundraising firms and found that a number of them had not been following the applicable statutes and guidelines her

office had promulgated. The letter stated, "Our office has reviewed the situation and determined that fundraising firms should not be allowed to mischaracterize their relationships with the schools." Specifically, the Comptroller expressed concern that fundraising firms had been modifying their contracts with schools to "include language concerning sellers' responsibilities and recharacterizing commission payments as markup." As a result, "non-profit school groups would be forced to analyze and review each contract with its vendors to determine who is responsible for collecting and remitting sales tax and whether it must expend one of its tax-free sales days for the sales under that contract."

The March 2008 letter further stated that section 151.024 of the tax code had been "applied to direct marketing firms operating in Texas for several years." Section 151.024, entitled "Persons Who May Be Regarded As Retailers," provides:

> If the comptroller determines that it is necessary for the efficient administration of this chapter to regard a salesman, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates or from whom he obtains the tangible personal property that he sells, whether or not the sale is made in his own behalf or for the dealer, distributor, supervisor, or employer, the comptroller may so regard the salesman, representative, peddler, or canvasser, and may regard the dealer, distributor, supervisor, or employer as a retailer or seller for purposes of this chapter.

Tax Code § 151.024. The March 2008 letter concluded, "For the efficient administration of the tax and to create certainty for the non-profits that tax would be collected and paid by the fundraising firm and not the school organization, we believe we need to utilize this section of the statute."

According to the Comptroller's witness, the effect of "utilizing" section 151.024 was to do away with the fundraising firm's ability "to contractually change the responsibilities of the buyer and the seller. We—the Comptroller just determined that the [fundraising firm] would be the seller regardless of these factors [listed in Accession No. XXXXXXXXXL]." On cross-examination, the Comptroller's representative further testified:

718 > Q. But under what we call the old rule, you went through these factors and you could make a determination *718 whether the school was the seller or the school was the agent.
>
> A. That is correct.
>
> Q. Okay. And then, in March, the Comptroller invoked 151.024 and said, "We're not going to do this analysis anymore. If you're a brochure fundraising firm, the school is your agent."
>
> A. That is correct.
>
> . . . .
>
> Q. Okay. And I think you just told me but—this [March 2008 letter] is the document that you would say instituted the—what we call the new rule, but it does away with the seller versus the agent for seller analysis. Right?
>
> A. That is correct.
>
> . . . .
>
> Q. Well—okay. But if you look at the whole transaction, the fact of the matter is, since March 18th, 2008, you no longer look at any part of the transaction if you're a brochure fundraiser; isn't that correct?
>
> A. That's correct. We're going to say that they are subject to tax and that the vendor needs to collect the tax.

Less than a month later, on April 14, 2008, the Comptroller's office submitted a follow-up letter (the "April 2008 letter") to the Executive Director of the Texas PTA and counsel for **Entertainment**, stating:

> This office has consistently held that school fundraising firms taking orders through brochures and sales forms were considered the actual sellers of the fundraising items and responsible for the sales tax on the full sales price. The PTAs or other nonprofit associations act as representatives for the fundraising firms in taking the orders and earning a commission and are not responsible for the sales tax on these sales.
>
> . . . .

> To resolve these issues, for clarity, and the efficient administration of the tax, the Comptroller will regard the PTAs or other nonprofit entities as the sales agent for the fundraising firm and will apply § 151.024 of the Texas Tax Code.

The April 2008 letter was signed by the "Assistant Director of Tax Administration" of the Comptroller's office and referenced a meeting that had taken place that morning between officers of the Texas PTA and "the Comptroller and staff." In this appeal, the Comptroller does not contend that the signer of the letter was acting with anything less than her full authority.

Shortly thereafter, **Entertainment** filed suit seeking declaratory and injunctive relief against enforcement of the Comptroller's "New Rule." Specifically, **Entertainment** sought a declaration under the APA that the rule embodied in the March and April 2008 letters was invalid and a further declaration under the UDJA that the Comptroller exceeded her statutory authority under section 151.024 of the tax code in adopting the rule and applying section 151.024 to **Entertainment**. The Comptroller filed a plea to the jurisdiction, asserting that the trial court lacked subject-matter jurisdiction over **Entertainment's** claims. With respect to **Entertainment's** rule challenge, the Comptroller argued that the policy in question is not a "rule" that can be challenged under the APA; alternatively, the Comptroller asserted that even if the policy is a rule, the APA does not permit a challenge to rules that affect the assessment or collection of a tax. In addition, the Comptroller's plea urged that **Entertainment's** request for declaratory relief under the UDJA is barred by sovereign immunity because she was acting within her discretionary authority in
719 applying section 151.024 of the tax code to **Entertainment**. The *719 Comptroller further asserted that because the tax code provides the exclusive remedy for taxpayers who wish to enjoin assessment, collection, or enforcement of a tax, the trial court also lacked jurisdiction over **Entertainment's** request for injunctive relief; additionally, the Comptroller argued that **Entertainment's** UDJA claim was not yet ripe.

After a hearing, the trial court denied the Comptroller's plea to the jurisdiction and granted **Entertainment's** application for a temporary injunction. The order denying the plea specified that the trial court had jurisdiction "over the declaratory judgment cause of action under Section 2001.038 of the APA in its entirety," finding that the Comptroller had adopted a new rule with respect to fundraising firms but had failed to comply with the procedural requirements to adopt a new administrative rule. In its order granting the temporary injunction, the trial court directed the Comptroller to "desist and refrain from implementing and enforcing the New Rule described by the Comptroller's letters dated March 18, 2008 and April 14, 2008 unless and until the Comptroller properly enacts the New Rule according to the procedural requirements of the APA" or until the Court renders its final judgment.

On appeal, the Comptroller argues that (1) the trial court lacked subject-matter jurisdiction under the APA; (2) **Entertainment** cannot establish subject-matter jurisdiction under the UDJA; (3) injunctive relief is barred by the tax code; and (4) injunctive relief is improper under general principles of equity.

STANDARDS OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law. *Texas Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex.2004).

A plea to the jurisdiction often may be determined solely from the pleadings and sometimes must be. *See Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554-55 (Tex.2000). Such a determination is reviewed de novo. *Miranda,* 133 S.W.3d at 226. When a plea to the jurisdiction challenges the existence of jurisdictional facts, however, a court should consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *Id.*

Where the jurisdictional issue or facts do *not* implicate the merits of the case, and the facts are disputed, the court—not the jury—must make the necessary fact findings to resolve the jurisdictional issue. *See id.* ("`Whether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case.'") (quoting *Cameron v. Children's Hosp. Med. Ctr.,* 131 F.3d 1167, 1170 (6th Cir.1997)). If, however, the facts relevant to jurisdiction are undisputed, the court should make the jurisdictional determination as a matter of law based solely on those undisputed facts. *Id.* at 228. Because a court should not proceed with a case over which it has no jurisdiction, it should make the jurisdictional determination as soon as practicable, but has discretion to defer the decision until the case has been more fully developed. *Id.* at 227.[3]

720 *720 In an appeal from an order granting or denying a request for a temporary injunction, appellate review is confined to the validity of the order that grants or denies the injunctive relief. *See* *Walling v. Metcalfe,* 863 S.W.2d 56, 58 (Tex.1993). Whether to grant or deny a temporary injunction is within the trial court's sound discretion. *Butnaru v. Ford Motor Co.,* 84 S.W.3d 198, 204 (Tex.2002). A reviewing court must not substitute its judgment for that of the trial court unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Id.* A trial court abuses its discretion when it acts without reference to any guiding rules or principles, not when it simply exercises that discretion in a manner different from how a reviewing appellate court might. *Low v. Henry,* 221 S.W.3d 609, 620 (Tex.2007). As a reviewing court, we must view the evidence in the light most favorable to the trial court's order and indulge every reasonable inference in its favor. *Brammer v. KB Home Lone Star, L.P.,* 114 S.W.3d 101, 105-06 (Tex.App.-Austin 2003, no pet.).

DISCUSSION

Subject-Matter Jurisdiction

In issues one and two, the Comptroller asserts that the trial court erred in denying her plea to the jurisdiction because the trial court lacked subject-matter jurisdiction over **Entertainment's** suit. The trial court's order denied the Comptroller's plea to the jurisdiction on the specific basis that it had jurisdiction over **Entertainment's** "cause of action for declaratory judgment under Section 2001.038 of the Texas Government Code, Administrative Procedures Act." The APA allows a person to challenge the validity or applicability of an agency rule pursuant to a declaratory judgment action if it is alleged that the rule or its threatened application interferes with or impairs a legal right or privilege of the plaintiff. APA § 2001.038(a). As this Court has consistently held, the APA declaratory-judgment vehicle of section 2001.038 is a legislative grant of subject-matter jurisdiction. *See, e.g., Keeter v. Texas Dep't of Agric.,* 844 S.W.2d 901, 902 (Tex.App.-Austin 1992, writ denied); *Lopez v. Public Util. Comm'n,* 816 S.W.2d 776, 782 (Tex.App.-Austin 1991, writ denied); *Rutherford Oil Corp. v. General Land Office,* 776 S.W.2d 232, 235 (Tex.App.-Austin 1989), *aff'd sub nom. State v. Flag-Redfern Oil Co.,* 852 S.W.2d 480 (Tex.1993).

In the present case, the parties submitted evidence relevant to the jurisdictional issue, but that evidence does not implicate the merits of **Entertainment's** case: the jurisdictional inquiry concerns whether the Comptroller's March and April 2008 letters constitute a rule under the APA and, if so, whether that rule or its threatened application interferes with or impairs **Entertainment's** legal rights or privileges, whereas the merits concern whether the rule was validly adopted. The relevant jurisdictional facts were undisputed; accordingly, we review the trial court's decision de novo.

The Comptroller contends that the statements contained in the March and April 2008 letters do not constitute a "rule" that can be challenged under the APA. Rather, the Comptroller argues that these statements are merely advisory opinions, not binding
721 instructions, concerning *721 her future use of section 151.024 of the tax code in the enforcement of sales tax. We disagree.

The APA defines "rule" as follows:

> "Rule":
>
> (A) means a state agency statement of general applicability that:
>
> (i) implements, interprets, or prescribes law or policy; or
>
> (ii) describes the procedure or practice requirements of a state agency;
>
> (B) includes the amendment or repeal of a prior rule; and
>
> (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

APA § 2001.003(6). There is no question in this case that the March and April 2008 letters are statements implementing, interpreting, or prescribing law or policy. As the Comptroller's witness testified, these letters communicated the Comptroller's intention to apply section 151.024 in all cases involving brochure fundraising firms, thereby interpreting the tax code to mean that such firms are, for purposes of collecting and remitting sales tax, always the "sellers" of the taxable items.

As the Comptroller correctly points out, however, "[n]ot every statement by an administrative agency is a rule for which the APA prescribes procedures for adoption...." *Brinkley v. Texas Lottery Comm'n,* 986 S.W.2d 764, 769 (Tex. App.-Austin 1999, no pet.) (quoting *Texas Educ. Agency v. Leeper,* 893 S.W.2d 432, 443 (Tex.1994)). In order to constitute a rule, the statements must be generally applicable and may not pertain only to the internal management of the agency without affecting private rights or procedures.

"The term `general applicability' under the APA references `statements that affect the interest of the public at large such that they cannot be given the effect of law without public input.'" *El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n,* 247 S.W.3d 709, 714 (Tex. 2008) (quoting *Railroad Comm'n v. WBD Oil & Gas Co.,* 104 S.W.3d 69, 79 (Tex. 2003)). "The definition does not reference statements made in determining individual rights, even if the number of individuals is large and they can be described as falling within a defined class." *WBD Oil,* 104 S.W.3d at 79.[4]

We conclude that the Comptroller's statements in the March and April 2008 letters that the Comptroller will uniformly regard brochure-fundraising firms as the sellers and nonprofit entities as the sellers' agents, without regard to the individual factors considered under the Comptroller's previous guidelines, are "generally applicable" statements for purposes of the APA. These interpretations apply not only to **Entertainment** and the tax-exempt groups with which it conducts business, but to all brochure-
722 fundraising firms engaging in *722 business across the state.[5] *Compare Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Tex., **Inc**.,* 997 S.W.2d 651, 660 (Tex.App.-Austin 1999, pet. dism'd w.o.j.) (holding that statements contained in agency memoranda were rules because they imposed binding instructions affecting private rights of all similarly situated persons), *with Beacon Nat'l Ins. Co. v. Montemayor,* 86 S.W.3d 260, 269 (Tex.App.-Austin 2002, no pet.) (declining to view agency correspondence as stating rule when policy was directed only at plaintiff and did not implicate rights of any party other than plaintiff).

Moreover, construing the statements in the March and April 2008 letters as "rules" is consistent with the supreme court's instruction that we consider the intent of the agency, the prescriptive nature of the guidelines, and the context in which the agency statement was made. *See Leeper,* 893 S.W.2d at 443 (holding that statements evincing intent to urge action by legislature did not constitute rule under APA and noting that guidelines "were only recommended, not prescriptive"). In this case, the March and April 2008 letters informed interested parties of the Comptroller's intention to regard all school groups as agents of the fundraising firms and the firms themselves as the sellers for purposes of applying the sales-tax provisions of the tax code. The statements in the letters are also prescriptive, unambiguously expressing an intent to apply this interpretation of section 151.024 in all future cases involving brochure-fundraising firms, regardless of whether the particular circumstances of each transaction might have resulted in different tax treatment under the "seller versus agent-for-seller" analysis the Comptroller had previously applied.

The statements in the March and April 2008 letters are also consistent with subsection (c) of the APA's definition of "rule": while the interpretation would bind agency employees to apply the rule in analyzing the tax responsibilities of parties to these sales, it is not directed "only" to "the internal management or organization of a state agency." *See* APA § 2001.003(6)(c). Rather, it is aimed at placing the regulated public on notice of the Comptroller's prospective, blanket application of section 151.024 of the tax code.

Finally, we decline to adopt the Comptroller's position that a declaratory-judgment action can never be available to challenge a Comptroller rule. As support for her position, the Comptroller cites this Court's decision in *First State Bank v. Sharp,* 863 S.W.2d 81 (Tex.App.-Austin 1993, no writ). But the primary holding of *First State Bank* was rejected by the supreme court in *R Communications v. Sharp,* 875 S.W.2d 314, 318 (Tex.1994) (reversing court of appeals opinion relied on by *First State Bank* court and declaring unconstitutional section 112.108 of tax code "insofar as it would preclude a taxpayer from obtaining judicial review of its tax liability by means of a declaratory action"). Whether *First State Bank* is still good law for some purposes is an
723 issue we need not decide, as the current version of section 112.108 does not bar **Entertainment's** suit *723 under the *R Communications* decision. Section 112.108 purports to prevent a court from issuing a declaratory judgment regarding the "applicability, assessment, collection, or constitutionality of a tax or fee ... or the amount of the tax or fee due." Tax Code § 112.108. The legislature did not intend section 112.108 to bar all declaratory actions involving the assessment and collection of taxes, as the next sentences read: "The court may grant such relief as may be reasonably required by the circumstances. *A grant of declaratory relief against the state* or a state agency shall not entitle the winning party to recover attorney's fees." *Id.* (emphasis added). **Entertainment** did not seek declaratory relief regarding the tax itself, but regarding the *validity of the rule* promulgated by the Comptroller in violation of the APA, for which the legislature has expressly permitted suit by a declaratory-

judgment action. *See* APA § 2001.038.

In light of the preceding, we hold that the Comptroller's statements in the March and April 2008 letters that she would henceforth regard a school group or other nonprofit entity doing business with a brochure-fundraising firm as the sales agent for the fundraising firm and apply section 151.024 of the tax code constitute a "rule" under the APA. Therefore, we conclude the trial court correctly determined that section 2001.038 conferred subject-matter jurisdiction over **Entertainment's** claim and properly denied the Comptroller's plea to the jurisdiction on this basis.[6] We overrule the Comptroller's first and second issues.[7]

When an agency promulgates a rule without complying with the statutory rule-making procedures, the rule is invalid. *See* APA § 2001.035(a); *El Paso Hosp. Dist.,* 247 S.W.3d at 715. It is undisputed in this case that the Comptroller did not comply with the APA's procedural requirements for promulgating agency rules before issuing the March and April 2008 letters; accordingly, the rule announced by those letters is invalid. A court, on finding an agency rule invalid, may remand the rule to the agency to allow
724 "reasonable time for the agency to *724 either revise or readopt the rule through the established procedures." APA § 2001.040; *El Paso Hosp. Dist.,* 247 S.W.3d at 715. We will therefore affirm the trial court's order denying the Comptroller's plea to the jurisdiction and abating consideration of the substantive matters raised in **Entertainment's** petition "pending the Comptroller's determination as to whether she will seek to properly enact the administrative rule under the APA, and what the terms of that administrative rule would be."[8]

Temporary Injunction

In issues three and four, the Comptroller argues that injunctive relief is barred by the tax code and contrary to general principles of equity. The Comptroller maintains that **Entertainment** was required to comply with the statutory requirements for pursuing a tax injunction, as stated in section 112.101 of the tax code. *See* Tax Code § 112.101. We disagree.

The Comptroller's arguments misunderstand the nature of the injunctive relief granted by the trial court. **Entertainment** did not seek, and the trial court did not grant, a "tax injunction." By its order, the trial court enjoined the Comptroller "from implementing and enforcing the New Rule described by the Comptroller's letters dated March 18, 2008 and April 14, 2008 unless and until the Comptroller properly enacts the New Rule" in compliance with APA procedures. This situation is analogous to that presented by *Texas Alcoholic Beverage Commission v. Macha,* 780 S.W.2d 939 (Tex.App.-Amarillo 1989, writ denied), in which the taxpayer claimed that the Commission's suspension of his liquor permits for failure to remit taxes allegedly due violated his right to due process. After the trial court enjoined the suspension, the Commission argued on appeal that the injunction was improper because the taxpayer failed to prepay the taxes allegedly due or post a bond as required by section 112.101. *Id.* at 941. Affirming the order granting the injunction, the court of appeals held that, since the trial court's order "does not prohibit the collection of a state tax, license, registration or filing fee, section 112.101 does not control." *Id.* Similarly, here **Entertainment** has not sought to prohibit the assessment or collection of a tax or fee. Indeed, no tax had yet been assessed that the trial court could have enjoined.

The purpose of a temporary injunction is to preserve the status quo of the subject matter of a suit pending final disposition of the case on its merits. *See Davis v. Huey,* 571 S.W.2d 859, 862 (Tex. 1978). Because of this limited purpose, the trial court has broad discretion to determine whether to issue a temporary injunction. *Amusement & Music Operators,* 997 S.W.2d at 654. In this case, the trial court found that **Entertainment** had presented evidence that, if its application was not granted, it would likely suffer "imminent and irreparable injury" because implementation of the "New Rule" would disrupt its business and subject it to financial liability. The trial court further found that the threat of immediate and irreparable injury to **Entertainment** substantially outweighed the harm, if any, that the Comptroller would suffer as a result of having to reassess its administrative rule and adopt
725 a rule that complied with the procedural requirements of the APA. Based on the record before us, we conclude *725 that the trial court did not abuse its discretion. We overrule the Comptroller's third and fourth issues.

CONCLUSION

Having overruled the Comptroller's issues on appeal, we affirm the orders of the trial court denying the Comptroller's plea to the jurisdiction and granting a temporary injunction in favor of **Entertainment**.

Concurring Opinion by Justice HENSON.

DIANE M. HENSON, Justice, concurring.

I concur in the judgment and reasoning of the majority opinion, with the exception of the discussion of the four-part test for defining an "interpretive rule," found in footnote six. In light of our determination that the Comptroller's statements in the March and April 2008 letters constitute a rule under section 2001.003(6) of the APA, we need not address the issue of whether they might also be considered interpretive rules under the four-part test suggested by Professor Beal, or the impact, if any, of an "interpretive rule" designation under the test. Because this test has never been adopted by this Court or the Texas Supreme Court and is not necessary for disposition of the appeal, I decline to join footnote six of the majority opinion.

[1] The inquiry to which Accession No. XXXXXXXXXL responded was submitted by an unidentified vendor seeking clarification of the same issues involved in this appeal. The vendor specifically asked about sales to parent-teacher organizations, and thus the Comptroller's response refers only to "PTAs." (All of the Comptroller's accessions are available through http://cpastar2.cpa.state.tx.us.)

[2] These guidelines are similar to and consistent with the Comptroller's statements in other documents referenced in Accession No. XXXXXXXXXL. *See, e.g.,* Accession No. XXXXXXXXXL (Apr. 5, 2002) (noting that in situation when exempt organization is merely acting as sales representative, seller is responsible for collecting and remitting sales tax); Accession No. 9808714L (Aug. 4, 1998) (stating that distributor does not need to collect sales tax if exempt organization is purchasing taxable items for its own use or to sell); Accession No. 8609H0755E02 (Sept. 17, 1986) (applying rule that if school assumes responsibility for activity and/or sales, school is responsible for ensuring tax is paid).

[3] Here, the trial court's order denying the plea to the jurisdiction did not indicate that the court was deferring its jurisdictional determination until the case was more fully developed. Nor did **Entertainment** urge a deferral of the issue in its response to the Comptroller's plea to the jurisdiction. Accordingly, because the trial court did not purport to exercise its discretion in this regard, we will not attempt to apply an abuse-of-discretion standard in reviewing the trial court's denial of the plea. In any event, as discussed below, the relevant facts before the trial court were undisputed and conclusive, so fuller development of the case would have served no purpose.

[4] The supreme court's analysis in *WBD Oil,* overruling this Court's decision that the Railroad Commission's field rules were "rules" under the APA, *see* *WBD Oil & Gas Co. v. Railroad Comm'n,* 35 S.W.3d 34 (Tex. App.-Austin 1999), *rev'd,* 104 S.W.3d 69 (Tex.2003), turns on the fact that the field rules had been promulgated through trial-type proceedings rather than through the APA's rulemaking provisions. 104 S.W.3d at 79. Thus, the court's comments regarding "statements made in the determination of individual rights" must be read in light of its holding that the field rules in question had been adopted in a contested case that adjudicated the individual rights of the parties and could not, therefore, be challenged as generally applicable "rules" in a declaratory-judgment action under section 2001.038. *See id.*

[5] The Comptroller's representative confirmed that the rule would be uniformly applicable during his testimony on cross-examination:

Q. And does this new — does Exhibit No. 8 [the March and April 2008 letters] — is it in your mind — does this apply to all brochure fundraising firms who operate in Texas?

A. Yes, under this model.

Q. What model is that?

A. Well, the model with the taking of the sales orders and with the brochures and — if that's what you're talking about when you say brochure fundraising firms.

Q. It is.

[6] Professor Ron Beal has defined an "interpretive rule" as an agency statement made under the following conditions:

(1) it is issued by an agency board, commissioner, executive director or other officer vested with the power to act on behalf of the agency;

(2) it is issued with the intent of the agency to notify persons or entities that are similarly situated or within a class described in general terms;

(3) it is issued to notify those persons or entities of the agency's interpretation of a statutory provision that has been crystallized following reflective examination in the course of the agency's interpretive process; and

(4) such interpretation was not labeled as tentative or otherwise qualified by arrangement for consideration at a later date.

Ron Beal, *A Miry Bog Part II: UDJA and APA Declaratory Judgment Actions and Agency Statements Made Outside a Contested Case Hearing Regarding the Meaning of the Law,* 59 Baylor L. Rev. 267, 270 (2007); *see also* Ron Beal, *The APA and Rulemaking: Lack of Uniformity Within a Uniform System,* 56 Baylor L. Rev. 1, 29-46 (2004).

Although we need not place the label "interpretive rule" on the Comptroller's March and April 2008 letters, we note that they satisfy all the elements of Professor Beal's four-part test.

[7] On appeal, the Comptroller reurges each of the jurisdictional arguments raised in her plea to the jurisdiction regarding the declaratory relief

sought by **Entertainment**, including several challenges regarding whether the trial court had jurisdiction under the UDJA; because we conclude that the trial court had jurisdiction under the APA, however, we need not address the additional grounds. *See* Tex. R.App. P. 47.1.

[8] Our holding does not prevent the Comptroller from making an individualized determination, on a case-by-case basis, that a tax-exempt organization should be regarded as a fundraising firm's agent, after having determined that it is "necessary for the efficient administration" of chapter 151 of the tax code to do so. *See* Tax Code § 151.024.

57 S.W.3d 506 (2001)

Albert Ray COTTON, Appellant,

v.

Michele Ann COTTON, Appellee.

No. 10-00-338-CV.

Court of Appeals of Texas, Waco.

August 22, 2001.

508 *508 Albert Ray **Cotton**, Pampa, Pro Se.

Christopher Chance, Heart of Texas Legal Services, Inc., Waco, for Appellee.

John B. Worley, Assistant Attorney General, Child Support Division, Austin, Intervenor.

Before Chief Justice DAVIS, and Justices VANCE and GRAY.

OPINION

GRAY, Justice.

Michele Ann **Cotton** filed a petition to divorce Albert Ray **Cotton**. She sought child support. The Attorney General intervened seeking retroactive child support during the period after Albert and Michele separated but prior to the divorce. The trial court rendered judgment that Albert must pay child support and awarded the Attorney General a judgment for retroactive child support from the time Albert went into prison until the date of the judgment. Albert complains on appeal that the evidence is insufficient to support the judgment. Because we have determined that the trial court never obtained personal jurisdiction of Albert, we reverse the trial court's judgment and remand the case for further proceedings.

JURISDICTION—COURT OF APPEALS

We must first address our jurisdiction. The trial court signed the judgment on August 29, 2000. No motion or request was filed with the trial court that would extend the time within which a notice-of-appeal must be filed. Tex.R.App. P. 26.1(a). Thus, absent the application of some other rule, the notice-of-appeal was due September 28, 2000.

Albert filed his notice of appeal on October 9, 2000. The notice-of-appeal was filed within 15 days after it was due, but no
509 motion for extension of time to file the notice-of-appeal was filed within that 15 day period. Tex.R.App. P. 26.3. Under *509 the Texas Supreme Court's holding in *Verburgt,* the notice-of-appeal may invoke our jurisdiction to review the matter if the appellant reasonably explains the failure to file the notice-of-appeal within the time provided. *Verburgt v. Dorner,* 959 S.W.2d 615 (Tex.1997). In discussing the application of the former rule requiring the posting of a cost bond to invoke the court of appeals jurisdiction, the Court held "... that a motion for extension of time is necessarily implied when an appellant acting in good faith files a bond beyond the time allowed by Rule 41(a)(1), but within the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline under Rule 41(a)(2) [now 26.3]." *Id.* at 617. This holding does not eliminate the need to reasonably explain the late filing. Albert has failed to reasonably explain his failure to file the notice-of-appeal within the time provided as required by the rules. Therefore we do not have jurisdiction of this appeal under Rule 26.1(a).

Under the rule for bringing a restricted appeal, the notice-of-appeal is timely if it is filed within six months after the judgment or order is signed. Tex. R.App. P. 26.1(c). The notice-of-appeal states that Albert did not participate in the trial in any manner. This assertion has not been controverted by any other party nor have we found anything contrary to this assertion in the record. Thus, Albert's notice-of-appeal is timely for purposes of bringing a restricted appeal. Therefore we have jurisdiction of this appeal.

JURISDICTION—TRIAL COURT

Lack of personal jurisdiction was not assigned by Albert as error. We are cognizant that, as a general rule, we cannot address unassigned complaints of error. *Allright, Inc. v. Pearson,* 735 S.W.2d 240, 240 (Tex.1987). However, our Supreme Court also recognizes the concept of "fundamental error" in very limited circumstances:

Generally, our civil rules of procedure and our decisions thereunder require a party to apprise a trial court of its error before that error can become the basis for reversal of a judgment. [footnote omitted] In a civil case, judicial economy generally requires that a trial court have an opportunity to correct an error before an appeal proceeds.

> Another reason for requiring a litigant in a civil case to lay a predicate in the trial court before pursuing an appeal is that "one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his [or her] opponent on appeal by stating [a] complaint for the first time." [footnote omitted] We explained in *Pirtle v. Gregory,* in the context of a purely civil matter, that instances of fundamental error are few:
>
> *Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction* or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.

In re C.O.S., 988 S.W.2d 760, 765 (Tex. 1999) (citing *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex.1982)) (emphasis added).

The most fundamental issue for any court to determine is jurisdiction. "A judgment is void ... when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Mapco, Inc. v. Forrest,* 795 S.W.2d 700, 703 (Tex.1990). Because jurisdiction is
510 necessary for the court to have power to act, it may be questioned at *510 any time by any party or the court itself. *McCauley v. Consolidated Underwriters,* 157 Tex. 475, 304 S.W.2d 265, 266 (1957); *Ramsey v. Dunlop,* 146 Tex. 196, 205 S.W.2d 979, 983 (1947). It would be a waste of judicial resources if we could not raise the issue of jurisdiction on our own and were otherwise required to conduct a review of a void judgment simply because the parties did not identify a jurisdictional issue. Thus, because rendering judgment without jurisdiction is fundamental error, the courts of appeals retain power to consider whether the trial court had jurisdiction whether or not it is assigned as error by the parties.

THE "JURISDICTIONAL" FACTS

Christopher S. Chance, an attorney with the Heart of Texas Legal Services, Inc., represented Michele in her petition for divorce. The address for Heart of Texas Legal Services as shown by the petition is "900 Austin Ave., 7th Floor, P.O. Box 527, Waco, TX 76703." The petition gives Albert's address as: "TDCJ, 1992 Hilton Road, Pampa, Texas 79065." Michele listed two children as being fathered by Albert. In an "Affidavit of Financial Condition" which is in the record, Michele stated that four children lived with her. She indicated two were Albert's children and that two were born "before marriage," presumably indicating that she did not believe them to be Albert's children.

The petition indicates that no service on Albert was needed because a waiver of service-of-process was anticipated. No waiver was ever filed. There is no return of service-of-process in the record. The docket sheet does not reflect that citation was issued or served.

When the Attorney General intervened, the Attorney General listed Albert's address as simply "Pampa, Texas." The petition in intervention gave the Attorney General's address as: "Child Support Division, PO Box 1969, Waco, TX 76703-1969." The petition indicates that it was served on Albert pursuant to Rule 21a on March 27, 2000. Tex.R. Civ. P. 21a.

After the petition was filed and the Attorney General had intervened, a letter from Albert was filed with the district clerk. Because the copy in the clerk's record did not appear to be addressed to the court nor did it appear to be the type of document a pro-se defendant would file with a court as an answer to the petition, we requested that the clerk prepare and file a supplemental transcript containing the original letter and the envelope in which it arrived.

Albert's letter is dated April 2, 2000. It has the cause number at the top, but no case style. There is no certificate of service on the letter. The envelope is postmarked April 3, 2000. It is addressed as follows:

Attorney General Office Att. Christopher S. Chance P.O. Box 527 Waco, Texas XXXXX-XXXX

The letter does not contain the statement regarding alternative dispute resolution required to be included in a party's first pleading. Tex. Fam.Code Ann. § 102.0085 (Vernon Supp.2001).

How and why was Albert's letter filed with the district clerk? Did Albert file this with the district clerk, intending it to be a general appearance in the case? Or, did Albert write a letter to the attorney representing his wife, who then filed it with the district clerk? Or, did Christopher Chance forward the letter to the Attorney General's office, who then filed it with the district clerk? The pivotal
511 question is simply, will the record support the conclusion that with this letter Albert intended to make a general appearance in *511 the pending suit. We have concluded that the answer is: No.

APPLICABLE LAW—*In Personam Jurisdiction*

For any court to obtain in personam jurisdiction over a person, the person must be given notice of the suit. But it is more than simply notice in the traditional sense. Notice to a person that they have been sued must comply with constitutional and statutory requirements. *Steve Tyrell Productions, Inc. v. Ray,* 674 S.W.2d 430, 434 (Tex.App.-Austin 1984, no writ) (citing 2 McDonald, Texas Civil Practice §§ 9.01.1-9.01.4 (1982); 2 Wicker and Benson, Texas Lawyer's Guide § J.2.39 (1981)).

A failure to satisfy the notice component of in personam jurisdiction may be waived. *Id.* By waiving notice the person is said to have made a "general appearance." *Id.* Without notice via the required service of citation or a waiver thereof, nothing short of a general appearance will confer upon the trial court jurisdiction over a person. *C.W. Bollinger Ins. Co. v. Fish,* 699 S.W.2d 645, 655 (Tex. App.-Austin 1985, no writ).

To constitute an answer or appearance, the act must seek a judgment or a decision by the court on some question. *United Nat'l Bank v. Travel Music of San Antonio, Inc.,* 737 S.W.2d 30, 32 (Tex. App.-San Antonio 1987, writ ref'd n.r.e.) (citing *Investors Diversified Services, Inc. v. Bruner,* 366 S.W.2d 810, 815 (Tex.Civ. App.-Houston 1963, writ ref'd n.r.e.)). A general appearance is normally in the form of an answer to the claims made in the suit. In *United Nat'l Bank,* after reviewing a letter from an assistant cashier of the garnishee-bank addressed to the district clerk, the San Antonio Court concluded that the letter did not constitute an answer or appearance by the bank. *Id.* at 33.

The Amarillo Court has explained the concept of an appearance as follows:

To determine whether a party has made a voluntary appearance, the nature and quality of the party's activities must be examined. The general rule, stated many years ago in *St. Louis & S.F.R. Co. v. Hale,* 109 Tex. 251, 206 S.W. 75 (1918), is that a general appearance occurs when the party "invokes the judgment of the court in any way on any question other than that of the court's jurisdiction, without being compelled to do so by previous ruling of the court sustaining the jurisdiction." *Accord, Toler v. Travis County Child Welfare Unit,* 520 S.W.2d 834, 836 (Tex.Civ. App.-Austin 1975, writ ref'd n.r.e.); 2 R. McDonald, Texas Civil Practice § 9.04.C (1982).

Smith v. Amarillo Hosp. Dist., 672 S.W.2d 615, 617 (Tex.App.-Amarillo 1984, no writ). The Amarillo Court concluded:

> In this case, we must conclude that Smith did not make a general appearance. He did nothing except sit at the counsel table, at the court's request, after being called forward, apparently from the audience. He filed no pleadings, neither took nor requested affirmative action and did not participate in anything that occurred. He was, at best, a silent figurehead observing the proceedings. Thus, the trial court did not have personal jurisdiction over him and its judgment against him is a nullity.

Id.

APPLICATION

There is nothing in the record that explains why or how Albert's letter, which was mailed to Michele's attorney, was ultimately filed in this cause with the district clerk.

512 First, the letter is dated April 2 and the envelope is postmarked April 3. But the *512 letter was not filed by the district clerk until April 18, over two weeks after it was mailed.

Second, the letter has no case heading and no certificate of service like an answer would have, nor does it contain the

statutorily required statement regarding alternative dispute resolution.

Third, the salutation is "Dear People" rather than "Dear Judge." It says "you" have two children under my name, a reference which, at that time, could be to Michele's petition, to the "Affidavit of Financial Condition" signed by Michele, or to the Attorney General's petition in intervention. From this record, it appears that Albert may have never seen a copy of the petition.

Fourth, and probably the most significant, the envelope is addressed to the Attorney General, to the attention of Michele's attorney. The post office box to which it was addressed is Michele's attorney, not the district clerk's.

We hold that Albert's letter was not a general appearance. Furthermore, the trial court did not rely on the letter as an answer or general appearance. The judgment recites, "Respondent, Albert Ray **Cotton**, although duly and properly cited, did not appear and wholly made default." But the record before us refutes that recitation.

CONCLUSION

In summary, there is simply no citation, return, waiver of service, or general appearance in the record. Thus, we find no basis for in personam jurisdiction of Albert that would give the trial court authority to render any judgment against him. Accordingly, we reverse the judgment and remand this cause to the trial court for further proceedings.

660 S.W.2d 810 (1983)

Maston Nixon CUNNINGHAM, Petitioner,

v.

PARKDALE BANK et al., Respondents.

No. C-2024.

Supreme Court of Texas.

November 30, 1983.

811 *811 Charles R. **Cunningham**, Corpus Christi, for petitioner.

Head & Kendrick, Richard E. Fling, Corpus Christi, for respondents.

BARROW, Justice.

This is an appeal from a personal judgment rendered by the Nueces County Court, sitting in probate, against Maston Nixon **Cunningham** (Maston), the resigned independent administrator of the Estate of Nancy Nixon **Cunningham**. The judgment of the probate court was based upon an alleged deficiency in the assets of the estate, which deficiency resulted from two advancements made by Maston to his sister and himself. The court of appeals, with one justice dissenting, affirmed. 650 S.W.2d 484. We hold that the probate court erred in rendering a personal judgment against Maston and, accordingly, reverse the
812 judgments of the lower courts and *812 remand this proceeding to the probate court.

Nancy Nixon **Cunningham** died testate on February 14, 1980, but both of the executors named in her will predeceased her. Her three children, who were her only heirs, agreed upon the appointment of her son, Maston, as independent administrator of the estate. *See* Tex.Prob.Code Ann. § 145(d) (1980). Paul Pearson, III, an attorney, was hired to assist in the administration and distribution of the estate. Eventually, an application to resign and an order accepting same were filed on behalf of Maston. A detailed account of the estate's claims and assets was prepared and filed also. After these documents were filed with the court, notice was posted for the benefit of all interested parties.

The basis for the judgment of the probate court is the advancement, by Maston, of $26,938.79 to himself and $10,668.78 to his sister Nancy. These advancements were properly reflected in the final account filed on behalf of Maston as claims of the estate. No evidentiary hearing was held to consider the propriety of the final account nor was Maston present to submit evidence in support thereof. Rather, the probate court, upon the motion of Mr. Pearson, rendered a personal judgment against Maston for the total sum of $37,607.57. This judgment was rendered in favor of the successor administrator, **Parkdale Bank**, despite the fact that **Parkdale Bank** filed no pleadings praying for such a judgment and never assumed the status of a party plaintiff.

In his motion for new trial and in the court of appeals, Maston urged that the judgment of the probate court was void or voidable because there were no pleadings seeking a judgment against him and because no citation was issued to him personally. He also urged there was no basis in law for rendition of the judgment against him because he is entitled to more funds from the distribution of the estate than the amount advanced to him.[1] Both lower courts found no merit in these contentions. The dissenting justice in the court of appeals concluded that the probate court exceeded its jurisdiction in summarily rendering a personal judgment because of the absence of pleadings, notice, opportunity for hearing, and other procedural irregularities. We agree.[2]

The Texas Rules of Civil Procedure govern proceedings in probate matters except in those instances in which a specific provision has been made to the contrary. Tex.R.Civ.P. 2. In Texas, "[a] civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk." Tex.R.Civ.P. 22. "The office of pleadings is to define the issues at trial," *Murray v. O & A Express, Inc.,* 630 S.W.2d 633, 636 (Tex.1982) and to "give the opposing party information sufficient to enable him to prepare a defense." *Roark v. Allen,* 633 S.W.2d 804, 810 (Tex.1982). Also, the judgment of the court must conform to the pleadings of the parties. Tex.R.Civ.P. 301.

813 The probate court is vested with substantial potential jurisdiction regarding "matters incident to an estate," Tex.Prob. Code Ann.

§ 5(d) (1980). This jurisdiction is activated and becomes actual jurisdiction over a party only after the filing of a petition the subject matter of which is within the jurisdiction of the court. *Hughes v. Atlantic Refining Co.,* 424 *813 S.W.2d 622, 625 (Tex.1968). Further, a judgment must be supported by the pleadings and, if not so supported, it is erroneous. *City of Fort Worth v. Gause,* 129 Tex. 25, 101 S.W.2d 221, 223 (1937). Thus, a party may not be granted relief in the absence of pleadings to support that relief. *Stoner v. Thompson,* 578 S.W.2d 679, 682 (Tex.1979); Tex.R.Civ.P. 301.

In the instant case, we are unwilling to construe the final account filed by Maston as being sufficient to empower the probate court to render a judgment against Maston in his individual capacity. The final account fails to set forth a plaintiff and defendant, states no cause of action, alleges no statutory basis upon which a personal judgment may be based and, in fact, was prepared for Maston by Mr. Pearson, who currently serves as counsel for **Parkdale Bank**. To hold that the mere filing of the exhibit and account is sufficient to support the judgment herein rendered would be untenable.

Equally as important as the absence of any pleadings to invoke the jurisdiction of the trial court is the apparent disregard by the court of rudimentary requirements of notice and the right to be heard. Pursuant to Maston's request in his application for discharge, the trial court set a hearing for May 25, 1981. The record is devoid of any evidence that a formal hearing was, in fact, held on that date. The trial court's order adjudging Maston liable for the deficiency was "entered" June 4, 1981. Maston disputes that he was notified of the date on which the actual hearing was held, that he had notice of the court's intention to render judgment against him, or that he had an opportunity to object to such action.

The Probate Code sets forth numerous provisions governing the necessity and sufficiency of notice and citation in probate matters. Tex.Prob.Code Ann. § 33 (1980). We have been directed to no section of the Code that authorizes the action of the trial court in this case. "The general rule is that the legislature in its discretion may prescribe what notice shall be given to a defendant in a suit, subject to the condition that the notice prescribed must conform to the requirement of due process of law. The requirement of due process of law is met if the notice prescribed affords the party a fair opportunity to appear and defend his interests." *Mexia Independent School Dist. v. City of Mexia,* 134 Tex. 95, 133 S.W.2d 118, 121 (1939); *Sgitcovich v. Sgitcovich,* 150 Tex. 398, 241 S.W.2d 142, 146 (1951).

Those sections of the Code that specifically concern personal representatives guilty of misapplication of estate property require that the guilty party be personally served before action may be taken against him. *See* Tex.Prob.Code Ann. §§ 149C(a)(2), 222(b)(1) (1980).[3] This undoubtedly is based upon the postulate that procedural due process "requires notice that is reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." *City of Waco v. Roddey,* 613 S.W.2d 360, 365 (Tex.Civ.App.—Waco 1981, writ dism'd); *see also City of Houston v. Fore,* 412 S.W.2d 35, 39 (Tex.1967); *Martinez v. Texas State Bd. of Medical Examiners,* 476 S.W.2d 400, 405 (Tex.Civ.App.—San Antonio 1972, writ ref'd n.r.e.), *cert. denied,* 409 U.S. 1020, 93 S.Ct. 463, 34 L.Ed.2d 312 (1972). Similarly, fundamental fairness dictates that a party must be given a reasonable opportunity to be heard on the merits of his case; such an opportunity must be granted at a meaningful time and in a meaningful manner. *See Read v. Gee,* 551 S.W.2d 496, 501 (Tex.Civ.App.—Fort Worth 1977), *writ ref'd n.r.e. per curiam,* 561 S.W.2d 777 (Tex.1977); *accord Ex Parte Gordon,* 584 S.W.2d 686, 688 (Tex.1979); *cf. Brown v. McLennan County Children's Protective Svs.,* 627 S.W.2d 390 (Tex.1982). Under this record, we conclude that Maston did not
814 have fair notice of the proposed action of the probate court so as to afford him the opportunity to be present and to *814 explain or defend his actions at the hearing, before judgment against him was rendered. *Cf. Clanton v. Clark,* 639 S.W.2d 929 (Tex. 1982).

The probate court erred in rendering a personal judgment against Maston without pleadings, notice, and an opportunity to be heard. The judgments of the lower courts are set aside and the proceedings remanded to the probate court to conclude the administration of the estate.

[1] We find it difficult to understand the substitute administrator's vigorous pursuit of this matter. The principal asset of the estate, to-wit, the residence of the deceased, has been sold, the debts paid, and administrator's attorney concedes that there are more than enough funds on hand to satisfy these advancements. Furthermore, there has been no controversy at any time in the proceedings among the heirs. The general purpose of independent administration is to free the independent executor from "the often onerous and expensive judicial supervision" and thereby "to effect the distribution of the estate with a minimum of cost and delay." *Corpus Christi **Bank** and Trust v. Alice National **Bank**,* 444 S.W.2d 632, 634 (Tex.1969).

[2] Both the majority and the dissent in the intermediate court concluded that the probate court had jurisdiction, under Tex.Prob.Code Ann. § 221 (1980), over a resigning independent administrator. This is a question of jurisdiction that we need not today decide.

[3] **Parkdale Bank** has now filed a suit in district court seeking a personal judgment against Maston for misapplication of these estate funds.

RELATED TOPICS

Pretrial Procedure
Dismissal
Ignorant of Name or Identity of Proper Party

Rights to Open Courts, Remedies, and Justice
State Constitutional Right of Access

Courts
Nature, Extent, and Exercise of Jurisdiction
Jurisdiction of Second Cause of Action

DaimlerChrysler Corp. v. Inman
Supreme Court of Texas. | February 1, 2008 | 252 S.W.3d 299 | Prod.Liab.Rep. (CCH) P 17, 919 *(Approx. 22 pages)*

252 S.W.3d 299
Supreme Court of Texas.

DAIMLERCHRYSLER CORPORATION, Petitioner,

v.

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and on Behalf of all others Similarly Situated, Respondents.

No. 03–1189. | Argued Jan. 6, 2005. | Decided Feb. 1, 2008. | Rehearing Dismissed April 4, 2008.

Synopsis

Background: Vehicle owners brought action against vehicle manufacturer, alleging a design defect in seatbelt buckles that rendered them unreasonably dangerous and unfit for use in automobile passenger restraint systems, i.e., seatbelts were dangerously subject to accidental release by inadvertently pressing the buckle, and asserting claims for negligence, negligent misrepresentation, violations of Deceptive Trade Practices–Consumer Protection Act (DTPA), breach of express warranty, breach of implied warranty of fitness for particular purpose, and breach of implied warranty of merchantability. The County Court at Law No. 3, Nueces County, Hector De Pena, J., certified two nationwide classes of owners who had suffered only economic damages. Manufacturer brought interlocutory appeal. The Corpus Christi - Edinburg Court of Appeals, 121 S.W.3d 862, reversed and remanded. Review was granted.

Holding: The Supreme Court, Nathan L. Hecht, J., held that possibility of concrete injury to named plaintiffs was extremely remote, and thus, named plaintiffs lacked standing to bring a class action.

Court of Appeals reversed; case dismissed for want of jurisdiction.

Wallace B. Jefferson, C.J., filed a dissenting opinion, in which O'Neill, Green, and Johnson, JJ., joined.

West Headnotes (10)

Change View

1 **Action** Moot, hypothetical or abstract questions
Courts must not decide hypothetical claims.

2 **Products Liability** Economic losses; damage to product itself
A person who buys a defective product can sue for economic damages.

1 Case that cites this headnote

3 **Courts** Acts and proceedings without jurisdiction
If the trial court lacks subject matter jurisdiction, it should not render judgment that the plaintiffs take nothing; it should simply dismiss the case.

5 Cases that cite this headnote

4 **Constitutional Law** Conditions, Limitations, and Other Restrictions on Access and Remedies
Constitutional Law Nature and scope in general
The requirement in Texas that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision of the Texas Constitution, which provides court access only to a "person for an injury done him." Vernon's Ann.Texas Const. Art. 1, § 13; Art. 2, § 1.

5 Cases that cite this headnote

5 **Action** Persons entitled to sue
A court has no subject matter jurisdiction over a claim made by a plaintiff without standing to assert it.

25 Cases that cite this headnote

6 **Action** Persons entitled to sue
For standing to sue, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical.

30 Cases that cite this headnote

7 **Action** Persons entitled to sue
A plaintiff does not lack standing to sue simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress.

18 Cases that cite this headnote

8 **Parties** Tort cases; environmental interests; mass or toxic tort
Possibility of concrete injury to the named plaintiffs was extremely remote, and thus, three vehicle owners lacked standing to bring a putative nationwide class action against vehicle manufacturer, alleging a design defect in seatbelt buckles that rendered them unreasonably dangerous and unfit for use in automobile passenger restraint systems, i.e., seatbelts were dangerously subject to accidental release by inadvertently pressing the buckle; two vehicle owners had never experienced anything like what they claimed might happen, and the third was not sure whether he had or not, but he had never been injured.

8 Cases that cite this headnote

9 **Constitutional Law** Nature and scope in general
The denial of a claim on the merits is not an alternative to dismissal for want of subject matter jurisdiction merely because the ultimate result is the same, because the assertion of jurisdiction carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. Vernon's Ann.Texas Const. Art. 2, § 1.

10 **Pretrial Procedure** Parties, Defects as to
If the named plaintiffs in a putative class action do not have standing to assert their own individual claims, the entire actions must be dismissed.

4 Cases that cite this headnote

Attorneys and Law Firms

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Deborah J. La Fetra, Pacific Legal Foundation, Sacramento CA, James J. White, Ann Harbor MI, John H. Beisner, O'Melveny & Myers LLP, Washington DC, for Amicus Curiae.

Justice HECHT delivered the opinion of the Court, in which Justice WAINWRIGHT, Justice BRISTER, Justice MEDINA, and Justice WILLETT joined.

Opinion

NATHAN L. HECHT, Justice.

Three plaintiffs have sued for themselves and a nationwide class of some ten million owners and lessees of **DaimlerChrysler** vehicles, equipped with Gen–3 seatbelt buckles, and sold over the course of a decade. They allege that it is too easy to press the release button on the buckle and unlatch it without intending to do so. They do not contend that this is unavoidable, probable, or even eventual, only that it is possible. Two of the plaintiffs have never experienced anything like what they claim might happen, and the third is not sure whether he has or not, but he has never been injured. They have sued to have the buckles replaced with ones that are harder to unlatch. At least two similar class actions have been brought in other states without success. [1]

***301** Of course, the risk that seatbelt buckles will be unlatched accidentally can be eliminated by making them more difficult to operate, but that would discourage people from using them at all, resulting in more injuries. In designing seatbelt buckles, the risk of injury from accidental release of easy-to-unlatch buckles must be balanced against the risk of injury from non-use of hard-to-unlatch buckles, for either way, there is risk. The National Highway Traffic Safety Administration is charged with being sure that balance is struck in the right place for vehicles sold throughout the country. The decision is not one for a jury in one state or another to make for the rest of the nation. NHTSA has never required that the Gen–3 buckles be recalled and replaced.

The trial court granted class certification. The court of appeals reversed and remanded for further proceedings, holding that "the trial court still has significant pre-certification work to do" to determine which jurisdictions' laws would govern class members' claims. [2] But the court of appeals rejected **DaimlerChrysler's** broader argument: that the plaintiffs' fear of possible injury from an accidental release of a seatbelt is so remote that they lack standing to assert their claims. [3] That is, **DaimlerChrysler** argues not merely that the plaintiffs' claims will fail but that the court lacks jurisdiction to hear them. We agree, reverse the judgment of the court of appeals, and order the case dismissed.

I

Three Nueces County residents, Bill L. **Inman**, David Castro, and John Wilkins, bought Dodge vehicles manufactured by **DaimlerChrysler Corp**., equipped with Gen–3 seatbelt buckles—respectively, a new 1997 Dodge Caravan, a new 1995 Dodge Ram 1500, and a used 1999 Dodge Intrepid. Castro and Wilkins testified that they had never experienced any problems with the buckles and had never heard of anyone who had. Wilkins had been in one accident and the seatbelt worked properly. **Inman** testified that his seatbelt might have released twice when it should not have, but he was "not a hundred percent sure of this because [he] didn't pay any attention at the time". The first time, he did not know how he hit the release button, but "all at once" his seatbelt was loose. The second time, he said, he thought he bumped the button while trying to replace the lid on a cooler sitting between the seats of his van. He was not hurt or endangered either time, and he does not know of anyone who was ever harmed because of a Gen–3 buckle.

In June 2000, **Inman** sued **DaimlerChrysler** in the county court at law in Nueces County, alleging that the Gen–3 buckles were defective. Castro and Wilkins joined as plaintiffs in January 2002. In depositions, the plaintiffs explained why they decided to sue even though they had never been hurt because of their seatbelts. **Inman** testified that he had run into his ***302** lawyer on the street, who told him "there could be a problem with the seatbelt", and "some way or another [they] got around to sort of discussing a lawsuit." According to Castro's testimony, he became involved in this lawsuit after hearing that the seatbelts in his Dodge truck were defective from his cousin, an investigator working for the law firm representing **Inman**. Wilkins testified that he was informed by a friend who worked for the same firm that there was litigation over whether the Gen–3 buckle was defective. And so the three decided to sue on behalf of ten million vehicle owners and lessees across the nation.

In their seventh amended petition, the plaintiffs alleged that the Gen–3 buckle is "dangerously subject to accidental release, far more dangerous than other buckle designs", that it is "subject to release at any time, and especially in the event of a collision", and that the buckle "design does not minimize the possibility of accidental release". The plaintiffs do not contend that the buckle will release by itself; it must be pressed. They contend only that it is too easy for the button to be pressed inadvertently, either by the wearer or something else in the vehicle. The plaintiffs allege negligence, negligent misrepresentation, breach of express warranty that the vehicles are safe and meet all safety requirements,[4] breach of the implied warranties of merchantability[5] and fitness for a particular purpose,[6] and violations of the Texas Deceptive Trade Practices–Consumer Protection Act.[7] They do not contend that the Gen–3 buckles made their vehicles worth less than they paid for them, and they expressly "do not seek damages for personal injury, property damage or death." They claim damages only for the cost of replacing the buckles with ones that are harder to unlatch, which they "believe [ ] to be not in excess of $75 per buckle", and any lost use while repairs are made, "believed not to exceed $500.00 per vehicle." Thus, if we assume four seatbelts per vehicle, plaintiffs claim no more than $2,400 for themselves and no more than $8 billion for the class.

DaimlerChrysler moved for summary judgment on the ground that the plaintiffs' pleadings failed to state a viable cause of action. The plaintiffs offered evidence of the defect they allege in the Gen–3 buckles. They contended that the buckle design violates a Federal Motor Vehicle Safety Standard requiring that a "[b]uckle release mechanism shall be designed to minimize the possibility of accidental release."[8] The plaintiffs offered evidence that the buckles failed "ball tests" used by the industry to determine the force required to press the release button, but they offered no evidence that there was any governmental requirement that the buckles pass such tests. They also offered evidence that **DaimlerChrysler** received fifty complaints documenting over one hundred instances when Gen–3 buckles unlatched, and that the buckles unlatched in two NHTSA crash tests and in crash tests conducted by the Canadian government and **DaimlerChrysler** itself, but they offered no evidence that any determination has ever been made that the buckles unlatched more easily than they

should. The trial court denied **DaimlerChrysler's** motion. In certifying the class, the court found:

> Plaintiffs' claims are not based on any hypothetical defect in the Gen–3 buckle that may, or may not, manifest itself in ***303** the future. Instead, Plaintiffs' allege that the sale of Gen–3 buckles breached warranties and consumer remedies because each buckle was sold in violation of federal standards, industry standards, and Defendant's internal standards and that each Gen–3 buckle has manifested this breach from the moment it was sold until the present.

The trial court certified two classes. One was for:

> All United States resident persons (except residents of California or Nevada) who own or lease new vehicles, model year 1993–2002, manufactured and/or sold by Daimler/Chrysler and equipped with Gen–3 seat belt buckles ... [excluding] any person who has an action for damages for personal injury or death or property damage against Defendants.

The other class was identical except for the word “used” in place of “new”. On appeal, **DaimlerChrysler** argued that the case should be dismissed because the plaintiffs had not sustained any legally cognizable injury and therefore lacked standing to assert their claims. Alternatively, **DaimlerChrysler** argued that the class should be decertified because the trial plan adopted by the trial court was flawed and incomplete, the plaintiffs were inadequate class representatives, and they had not satisfied the predominance, superiority, and manageability requirements for class certification contained in Rule 42(b)(3) of the Texas Rules of Civil Procedure. Specifically, **DaimlerChrysler** argued that the trial court would be required to apply the laws of 48 states and adjudicate issues peculiar to individual class members. The court of appeals rejected **DaimlerChrysler's** standing argument but agreed that the trial court had not fully examined what law should govern the class claims.[9] There it stopped; without addressing **DaimlerChrysler's** other arguments, the court reversed the class certification and remanded the case for further proceedings.[10]

We granted **DaimlerChrysler's** petition for review to consider its argument that the plaintiffs lack standing to assert their claims.

II

1 The parties agree that the plaintiffs cannot succeed on any of their claims without showing they have suffered legally compensable injury. But the plaintiffs argue that they need not show that they can prove the requisite injury until after class certification has been decided and the trial court reaches the merits of their claims.[11] **DaimlerChrysler** argues that the claimed injury is so hypothetical, so iffy, that the plaintiffs do not have standing to assert it and the court does not have jurisdiction to hear it.[12] The issue is important because ***304** courts must not decide hypothetical claims.[13] Practically speaking, the timing is important, because a disagreement over $2,400 is one thing and a disagreement over $8 billion is quite another.

2 A person who buys a defective product can sue for economic damages,[14] but the law is not well developed on the degree to which the defect must actually manifest itself before it is actionable. For example, in *Compaq Computer **Corp**. v. Lapray,* we observed that “the law in most states (including Texas) is unclear” on “whether to permit express warranty claims for unmanifested defects”.[15] The plaintiffs here argue that this issue cannot be resolved until the trial court determines whether a class should be certified. Nor, they say, can the court consider at this stage whether the defect they allege in the Gen–3 seatbelt buckle has manifested itself sufficiently for them to recover damages on their other claims for negligence, negligent misrepresentation, breach of implied warranties, or DTPA violations.

3 But **DaimlerChrysler** does not argue here that the plaintiffs' claims cannot

succeed (although that is certainly their position). Rather, it argues that whatever the plaintiffs' causes of action may require, they have not suffered the kind of injury to give them standing to invoke the trial court's subject-matter jurisdiction. If there is no injury sufficient for jurisdiction, surely there is no injury sufficient for a cause of action. But if the plaintiffs have no standing, the trial court has no more jurisdiction to deny their claims than it does to grant them. Without jurisdiction, the trial court should not render judgment that the plaintiffs take nothing; it should simply dismiss the case. [16]

4 5 6 7 The requirement in this State that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a "person for an injury done him". [17] A court has no jurisdiction over a claim made by a plaintiff without standing to assert it. [18] For standing, a plaintiff must be personally aggrieved; [19] his alleged injury must be concrete and particularized, [20] actual ***305** or imminent, not hypothetical. [21] A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress.

We have drawn this distinction in a recent case, *M.D. Anderson Cancer Center v. Novak.* [22] Attorney Novak received a form letter from the M.D. Anderson Cancer Center soliciting donations and stating that "well over 50%" of its cancer patients "return home cured". [23] Novak did not contribute; instead, he sued the hospital on behalf of everyone who received the letter, alleging that the stated cure-rate was false and the letter therefore fraudulent. [24] This Court held that he lacked standing to assert his individual claim:

> Even if Novak was an intended victim of a "completed" mail fraud for purposes of governmental prosecution, he was not actually defrauded. His lack of any actual or threatened injury prevents him from being "personally aggrieved" such that he has any personal stake in the litigation. Therefore, Novak lacks standing as an individual.... [25]

It was irrelevant whether M.D. Anderson's fund-raising letter was false, or whether recipients might have been deceived into giving when they would not otherwise have done so. The point was that Novak was not himself deceived or injured, and therefore he did not have standing individually to assert fraud. Accordingly, we dismissed the entire action for want of jurisdiction. [26]

M.D. Anderson is different from the present case in that once Novak decided the letter was false, he could never be deceived and therefore could never be injured, other than out of concern for others. In this case, the plaintiffs could accidentally unlatch their Gen–3 seatbelt buckles and subject themselves to harm, though that has never happened to two of them and the third is unsure. M.D. Anderson is important because it shows that standing, and the concrete injury it requires, is quite distinct from the merits of a claim and the injury required to prove it.

Two decisions from the Fifth Circuit illustrate this point. In *Rivera v. Wyeth–Ayerst Laboratories,* Rivera used Duract, a prescription painkiller manufactured by Wyeth. [27] Wyeth had instructed that the drug should not be used for more than ten days generally and not by anyone with preexisting liver conditions. [28] Over the course of a year, before Wyeth voluntarily withdrew Duract from the market, twelve users reportedly suffered liver failure. [29] Eleven of them had used the drug for more than ten days, and the twelfth had a history of liver disease. [30] Although Rivera suffered no physical or emotional harm herself, she sued for a refund of the purchase price on behalf of all other users of the drug who also had not been harmed, ***306** alleging that the product was defective. [31] She sued only for breach of an implied warranty of merchantability and sought only economic damages. [32] The court concluded that the kind of injury Rivera alleged did not give her standing to sue. [33] Accordingly, it dismissed the action for want of jurisdiction.

Contrast *Rivera* with *Cole v. General Motors* ***Corp***.[34] There, GM determined that a defect in side-impact-air-bag sensing modules would improperly trigger inflation. As the court explained:

> GM sent a voluntary recall notice to all DeVille record owners and lessees explaining that GM
>
> > has decided that a defect which relates to motor vehicle safety exists and may manifest itself in your 1998 or 1999 model year Cadillac DeVille. [GM] ha [s] learned of a condition that can cause the side impact air bags in your car to deploy unexpectedly, without a crash, as you start your car or during normal driving.
>
> GM indicated that it had received 306 reports of inadvertent deployment out of approximately 224,000 affected vehicles.[35]

Three plaintiffs sued for economic damages because repairs to the vehicles were unreasonably delayed. GM argued that they lacked standing, based on *Rivera.* The court disagreed.[36]

An important difference between these two cases is that the *Cole* plaintiffs alleged a defect that would cause GM's side-impact air bags to deploy by itself unexpectedly during normal operation, something GM conceded in its voluntary recall, while the *Rivera* plaintiffs alleged a defect in medication which had caused injury only when taken by someone contrary to Wyeth's instructions. In *Cole,* injury was a matter of time; in *Rivera,* it might never happen. The air bags in Cole's vehicle might deploy improperly regardless of what she did, just as they might in the other vehicles in which they were installed. Taking Duract had not hurt Rivera, and there was almost no chance that the defect she alleged in the drug ever would injure her, given that she was fully aware of the restrictions on its use.

8 Any possibility of injury to the plaintiffs in the present case is even more remote than it was in *Rivera.* There, Wyeth received twelve complaints over a year before it voluntarily withdrew the drug from the market. Here, according to the plaintiffs themselves, **DaimlerChrysler** received only fifty complaints from ten million vehicle owners and lessees over ten years—five per year, one for every 200,000 owners and lessees. By comparison, in *Cole,* GM received 306 reports in two years, one for every 732 owners and lessees. In any event, evidence of such complaints cannot prove defect.[37] The plaintiffs contend that ball tests showed how easily the Gen–3 buckle release button could be pressed and that crash tests showed that the buckle could somehow be unlatched, but there is nothing to indicate that the design of the buckle failed to minimize the risk of accidental release versus the risk of non-use so as to pose any concrete threat of injury to the plaintiffs.

***307** The dissent criticizes us for assuming that Texas law governs, but it unquestionably does—over the issue of standing, a part of subject-matter jurisdiction, which is the only issue we decide. The dissent argues that we have improperly focused our standing analysis on the plaintiffs' claims rather than on the plaintiffs themselves, but that is incorrect. We do not rule out the possibility that somewhere there may be owners or lessees of vehicles with Gen–3 seatbelt buckles that can allege concrete injury. Our focus is on **Inman**, Castro, and Wilkins, and they have not shown that they can. The dissent argues that standing requires only, one, a real controversy that, two, will be determined. Those are requirements for standing,[38] but so is concrete injury, because if injury is only hypothetical, there is no real controversy.[39] The dissent argues essentially that our conclusion that the plaintiffs lack standing is nothing more than a summary judgment on the merits of their claims, that we have "equate[d] standing with an unsuccessful claim",[40] but this is simply wrong. We agree that the allegations in *Cole* gave the plaintiff standing, regardless of whether she could prevail on the merits of her claim, and even though the Fifth Circuit denied class certification.[41] We do not render judgment that the plaintiffs take

nothing, as we would if their claims failed on the merits; we dismiss the case for want of jurisdiction. We do not decide the degree to which a defect must manifest itself in a product before a warranty is breached. Standing in this case is a separate inquiry, just as it was in *M.D. Anderson* and *Rivera.*

9 Both of those cases show that when a claim of injury is extremely remote, the jurisdictional inquiry cannot be laid aside in an expectation that the claimant will also lose on the merits. A court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority, even if the claim is denied. As the United States Supreme Court has warned, the denial of a claim on the merits is not an alternative to dismissal for want of jurisdiction merely because the ultimate result is the same because the assertion of jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." [42]

The dissent charges that our decision "suggests a visceral distaste of class actions". We disagree. We simply think that the rights of ten million vehicle owners and lessees across the United States should not be adjudicated in an action brought by three plaintiffs who cannot show more than the merest possibility of injury to themselves. To hold that **Inman**, Castro, and Wilkins have standing would drain virtually all meaning from the requirements that a plaintiff must be "personally aggrieved" and that his injury must be "concrete" and "actual or imminent".

* * * * * *

10 If the named plaintiffs in a putative class action do not have standing to assert their own individual claims, the entire actions must be dismissed. [43] Accordingly, ***308** the judgment of the court of appeals is reversed and the case is dismissed for want of jurisdiction.

Chief Justice JEFFERSON, joined by Justice O'NEILL, Justice GREEN, and Justice JOHNSON, dissenting.

Chief Justice JEFFERSON, joined by Justice O'NEILL, Justice GREEN, and Justice JOHNSON, dissenting.

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the procedural rule governing class actions] are met. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (quoting *Miller v. Mackey Int'l,* 452 F.2d 424, 427 (5th Cir.1971)). [1]

This case comes to us on appeal of a trial court's order certifying a nationwide [2] class action against **DaimlerChrysler**. The trial court had previously denied **DaimlerChrysler's** motion for summary judgment, which asserted that the class allegations failed to state a cause of action. [3] In the court of appeals, Chrysler—for the first time—asserted that the plaintiffs lacked standing to sue. Today, the Court agrees and, in doing so, improperly equates standing with the merits of the plaintiffs' claim. Because this contravenes fundamental tenets of the standing doctrine, our rules of procedure, and the statute governing interlocutory appeals, I respectfully dissent.

I

Standing

The Court never reaches the choice-of-law issue, instead dismissing the entire action based on its conclusion that the plaintiffs lack standing. But standing "focuses on the party seeking to get his complaint before a ... court and not on the issues he wishes to have adjudicated." *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (quoting *Flast v. Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Today the Court inverts traditional standing doctrine,

focusing not on the party but on the issues to be adjudicated.

Putative class representatives, like any other plaintiffs, must demonstrate standing to sue. *M.D. Anderson Cancer Ctr. v. Novak,* 52 S.W.3d 704, 710 (Tex.2001). Here, each named plaintiff has alleged a personal interest in the case and a type of injury that is generally redressable under Texas law, which requires *only "(1)* a real controversy between the parties, that (2) will be actually determined by the judicial declaration sought." *Austin Nursing Ctr., Inc. v. Lovato,* 171 S.W.3d 845, 849 (Tex.2005) (quoting *Nootsie, Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 662 (Tex.1996)); *see also* ***309** *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)(noting that "[f]or purposes of ruling on a motion to dismiss for want of standing, ... reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party"); *Brown v. Todd,* 53 S.W.3d 297, 305 n. 3 (Tex.2001) ("Because standing is a component of subject matter jurisdiction, we consider [it] as we would a plea to the jurisdiction, construing the pleadings in favor of the plaintiff."). As both of those conditions are satisfied here, the class representatives have standing to prosecute their claims.

As the Court notes, in most states (including Texas), the law on warranty claims based on unmanifested defects is unclear. 252 S.W.3d at 304 (citing *Compaq Computer* ***Corp****. v. Lapray,* 135 S.W.3d 657, 679 (Tex.2004)). Absent a full record, in which the claim's contours can be thoroughly vetted, I am not prepared to say the plaintiffs' claims of economic injury are conclusively unsound. At least one court has distinguished between no-injury product liability claims, which are based in tort, and warranty claims based on unmanifested defects, which are contractually based. As the Fifth Circuit noted in a class-action case in which boat owners sought benefit of the bargain damages:

> The key distinction between this case and a "no-injury" product liability suit is that the Coghlans' claims are rooted in basic contract law rather than the law of product liability: the Coghlans assert they were promised one thing but were given a different, less valuable thing. The core allegation in a no-injury product liability class action is essentially the same as in a traditional products liability case: the defendant produced or sold a defective product and/or failed to warn of the product's dangers. The wrongful act in a no-injury products suit is thus the placing of a dangerous/defective product in the stream of commerce. In contrast, the wrongful act alleged by the Coghlans is Wellcraft's failure to uphold its end of their bargain and to deliver what was promised. The striking feature of a typical no-injury class is that the plaintiffs have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it. Therefore, the plaintiffs in a no-injury products liability case have not suffered any physical harm or out-of-pocket economic loss. Here, the damages sought by the Coghlans are not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain.

Coghlan v. Wellcraft Marine ***Corp****.,* 240 F.3d 449, 455 n. 4 (5th Cir.2001).

The Fifth Circuit also noted that "the determination that there has been no injury in [cases like this] must be an evidentiary one." *Id.* at 455 (holding that district court acted prematurely by dismissing case on the pleadings). Most courts recognize that the failure to state a cause of action is best addressed outside the context of class certification. Indeed, one court has noted that "the substantive question of whether the implied warranty of merchantability protects against an unanticipated diminution in secondary market values" is better reserved for "another, more appropriate time—i.e., outside the context of rulings on Rule 23 motions for class certification." *Carlson v. Gen. Motors* ***Corp****.,* 883 F.2d 287, 297 (4th Cir.1989)[4]; *see also Briehl v.*

Gen. Motors ****310 Corp.***, 172 F.3d 623, 628 n. 8 (8th Cir.1999) (noting that, in evaluating the trial court's ruling on a motion to dismiss for failure to state a claim, class certification decisions are "singularly unhelpful since none of the cases address[ ] the substantive question of whether a plaintiff claiming only lost resale value damages states a valid claim" and noting that most courts "explicitly reserve [ ] the question for a decision outside the context of a Rule 23 motion to certify a class") (citations and quotations omitted). Not only that, but because Rule 42, like its federal counterpart, requires certification "at an early practicable time," TEX.R. CIV. P. 42(c)(1)(A); *see also* FED.R.CIV.P. 23(c)(1)(A), trial courts will generally face class certification decisions before a case is ripe for summary judgment. *See Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (D.C.Cir.2001); *Cowen v. Bank United of Tex., FSB,* 70 F.3d 937, 941 (7th Cir.1995); *see also* 7B CHARLES ALAN WRIGHT, ARTHURR. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE (3d ed.2005) § 1798 (noting that, in class action cases, trial courts should be "very careful" in ruling on early summary judgment motions "to make certain that all the available evidence is before [them]").

The Court notes—accurately—that two similar class actions have been brought in other states "without success." 252 S.W.3d at 300. But that is only part of the story. While both cases involved putative class actions involving the Gen–3 buckles, neither was decided on the basis of standing. The Quacchia court held that common issues did not predominate, and thus the trial court did not abuse its discretion in refusing to certify the class. *Quacchia v.* ***DaimlerChrysler Corp.***, 122 Cal.App.4th 1442, 19 Cal.Rptr.3d 508, 515 (2004). Similarly, in *Hiller*, the trial court found that class certification was inappropriate, as class members had not demonstrated predominance. *Hiller v.* ***DaimlerChrysler Corp.***, No. 02–681, 2007 Mass.Super. LEXIS 442, 2007 WL 3260199, *4–5 (Mass.Super.Ct. Sept. 25, 2007). But neither court held, as this Court does, that trial courts lacked subject matter jurisdiction over the plaintiffs' claims. Indeed, in concluding that a plaintiff suing for allegedly defective Gen–3 buckles stated a cognizable claim, a Florida court noted:

> This case turns on a relatively simple question, at least as to damages—Is a car with defective seatbelt buckles worth less than a car with operational seatbelt buckles? Common sense indicates that it is, but, at this stage of the case, we need not decide that issue. Rather, we ****311*** only determine that Collins is entitled to go forward with her case.

Collins v. ***DaimlerChrysler Corp.***, 894 So.2d 988, 989–90 (Fla.Dist.Ct.App.2004) (holding that Florida consumer protection statute did not require that "a defect manifest itself by failing to operate in an emergency or by causing injury"—actual injury in form of insufficient product value was enough, and whether "allegations have merit remain[ed] to be decided").

The Court relies in part on *Rivera v. Wyeth–Ayerst Labs.*, 283 F.3d 315 (5th Cir.2002). But the Fifth Circuit's recent decision in *Cole v. General Motors* ***Corp.***, 484 F.3d 717 (5th Cir.2007), shows why *Rivera* is inapposite. In *Cole,* Cadillac DeVille owners sued General Motors, alleging that the DeVilles had a defect that caused the airbags to deploy inadvertently and that GM had failed to repair or replace the airbags within a reasonable time. None of the class plaintiffs had actually experienced an inadvertent deployment, and GM (which had previously recalled the vehicles) challenged their standing to sue. *Cole,* 484 F.3d at 719–20. The Fifth Circuit, distinguishing *Rivera,* concluded that the plaintiffs had standing to pursue their claims:

> In *Rivera,* purchasers of a prescription drug sought recovery of economic damages after learning that the manufacturer had withdrawn the drug from the market because the drug had caused liver damage to other patients. We concluded that the *Rivera* plaintiffs lacked standing because they described their claim as emanating from the drug manufacturer's failure to warn and sale of a defective product, but the plaintiffs did not claim that the drug had caused them any physical or emotional

> injury. Although the plaintiffs quantified their injury in terms of economic damages, we concluded that merely asking for economic damages failed to establish an injury in fact because the plaintiffs never defined the source of their economic injury. The plaintiffs could not assert benefit-of-the-bargain damages because they had no contract with the manufacturer. Due to these factors, we determined that the injuries that the plaintiffs alleged were suffered not by them, but rather, by the non-party plaintiffs suffering liver damage. And we referred to the *Rivera* plaintiffs' claim as a "no-injury products liability" suit.
>
> *Rivera* is distinguishable from the instant case. In *Rivera,* the plaintiffs sought damages for potential physical injuries; because they never suffered actual physical injuries, they could only allege injuries that were suffered by non-parties. The *Rivera* plaintiffs did not assert economic harm emanating from anything other than potential physical harm. Here, although plaintiffs do not assert physical injuries (either their own or those of other persons), they do assert their own actual economic injuries. Plaintiffs allege that each plaintiff suffered economic injury at the moment she purchased a DeVille because each DeVille was defective. Plaintiffs further allege that each plaintiff suffered economic injury arising from GM's unreasonable delay in replacing their defective [airbags]. Plaintiffs seek recovery for their actual economic harm (e.g., overpayment, loss in value, or loss of usefulness) emanating from the loss of their benefit of the bargain. Notably in this case, plaintiffs may bring claims under a contract theory based on the express and implied warranties they allege. ***Whether recovery for such a claim is permitted under governing law is a separate question; it is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered.*** *See Parker v. District of Columbia,* 478 F.3d 370, 377(D.C.Cir.2007) ("The Supreme ****312*** Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume arguendo the merits of his or her legal claim.") (citing *Warth v. Seldin,* 422 U.S. 490, 501–02, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). ***We therefore conclude that plaintiffs have established a concrete injury in fact and have standing to pursue this class action.***

Id. at 722–23 (emphasis added) (citations omitted).[5]

This Court's attempt to distinguish *Cole* reveals the extent to which it has misread that case. In its discussion of *Cole* and *Rivera,* the Court asserts that:

> An important difference between these two cases is that the *Cole* plaintiffs alleged a defect that would cause GM's side-impact air bags to deploy by itself unexpectedly during normal operation, something GM conceded in its voluntary recall, while the *Rivera* plaintiffs alleged a defect in medication which had caused injury only when taken by someone contrary to Wyeth's instructions. In *Cole,* injury was a matter of time; in *Rivera,* it might never happen. The air bags in Cole's vehicle might deploy improperly regardless of what she did, just as they might in the other vehicles in which they were installed. Taking Duract had not hurt Rivera, and there was almost no chance that the defect she alleged in the drug ever would injure her, given that she was fully aware of the restrictions on its use.
>
> Any possibility of injury to the plaintiffs in the present case is even more remote than it was in *Rivera.*

252 S.W.3d at 306. Based on this description, one would think that *Cole* turned on the likelihood of personal injury to the plaintiffs. As seen above, however, the *Cole* panel distinguished *Rivera* on very different grounds. The Fifth Circuit found that the plaintiffs in *Cole* had standing not because unexpected air bag deployment was inevitable[6] or otherwise more likely to cause harm to the plaintiffs than the drug in *Rivera,* but because the plaintiffs alleged that the defect—and GM's failure to cure it in a reasonable time—deprived them of the benefit of their bargain. The plaintiffs here, like those in *Cole,* have made a claim for economic damages—replacement cost and loss of use—arising from, among other things, an alleged breach of warranty. This is

sufficient to establish the plaintiffs' standing, *Cole,* 484 F.3d at 722–23, and neither the Court's dim view of their ability to prove a defect nor its disdain for their bid to adjudicate the rights of "ten million vehicle owners and lessees across the nation" in Nueces County deprives them of it. 252 S.W.3d at 307.

Similarly, the Court's analogy to *M.D. Anderson* misses the mark. In that case, we held that a plaintiff who was never defrauded lacked standing to sue on behalf of those who were. *See M.D. Anderson Cancer Ctr. v. Novak,* 52 S.W.3d 704, 707–11 (Tex.2001). In this case, by contrast, each of the plaintiffs purchased a vehicle equipped with Gen–3 buckles, and they ***313** allege economic damages equal to the cost of replacing the defective buckles. Their injury—as alleged—is complete. [7] Perhaps *M.D. Anderson* would be applicable if the plaintiffs did not own the vehicles but were suing on behalf of those who did, but that's not the case here. Taking their pleadings as true, as we must, [8] it is the plaintiffs—not some unrelated third parties—who have suffered an economic injury. For standing purposes, they need not show that the seat belts "fail[ed] to operate in an emergency or ... caus[ed] injury." *Collins,* 894 So.2d at 990. Their injury, as alleged, is manifest today, because the economic value of the product they purchased is not as warranted. [9]

The Court correctly notes that standing is a prerequisite to subject matter jurisdiction. 252 S.W.3d 304. It may be raised not only by a plea to the jurisdiction, but by any number of procedural methods, including summary judgment. *Bland I.S.D. v. Blue,* 34 S.W.3d 547, 554 (Tex.2000). This rule facilitates review of subject matter jurisdiction, which is so important that it can be raised for the first time on appeal. It makes little sense, however, to stretch this reasoning to permit review of ordinary merits-based issues that are raised in a motion for summary judgment. [10] We have never before held that any time a plaintiff's claims fail as a matter of law, the trial court is deprived of jurisdiction. [11]

Moreover, crafting new standing rules creates a host of problems, not the least of which involves collateral attacks on judgments. Without standing, a court lacks subject matter jurisdiction to hear the case. *Id.* at 553–54; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 443 (Tex.1993). Because "a judgment will never be considered final if the court lacked subject-matter jurisdiction," *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 76 (Tex.2000), the Court's holding "opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment." RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b (1982); *see also Dubai,* 12 S.W.3d at 76. Additionally, by holding that standing requires the plaintiff ***314** to establish the validity of its claim, and because standing may be raised for the first time on appeal, a class-action defendant could—on interlocutory appeal of a certification order—seek dispositive rulings on all of the plaintiffs' claims, even without first asking the trial court to determine the merits of the claims and absent any sort of evidentiary record. Defendants who lose at trial may now, under the guise of standing, raise affirmative defenses that were never pleaded in, or considered by, the trial court.

We have recognized that "[i]f ... no class member can state a viable claim, dispositive issues should be resolved by the trial court before certification is considered." *State Farm Mut. Auto. Ins. Co. v. Lopez,* 156 S.W.3d 550, 557 (Tex.2004). Here the trial court did precisely that, by denying **DaimlerChrysler's** summary judgment motion, which alleged that the class members had not suffered damages, an essential element of their claims. Even if **DaimlerChrysler** were entitled to summary judgment on the grounds asserted, the trial court's denial of the motion, a patently interlocutory ruling, is referable to the merits rather than the plaintiffs' standing to assert their claims. The Legislature in 2003 enlarged our interlocutory appellate jurisdiction in class action cases, by (among other things) broadening our conflicts jurisdiction, but it did not confer appellate jurisdiction over all interlocutory orders. Instead, the Legislature confined that jurisdiction in class actions to specific cases. *See, e.g.,* TEX. CIV. PRAC. & REM.CODE § 26.051 (permitting interlocutory appellate

review—"as part of an appeal of the order certifying the class action"—of pleas to the jurisdiction in class action cases in which it is alleged that a state agency has exclusive or interlocutory jurisdiction). Nor did this Court enact rules governing dispositive motions in class action cases as part of the Legislature's mandate that we "adopt rules to provide for the fair and efficient resolution of class actions." *Id.* § 26.001(a); *see also* Order of Supreme Court of Texas Adopting Amendments to Rules of Civil Procedure (Oct. 9, 2003, eff.Jan.1, 2004) (available at http://www.supreme.courts.state. tx.us/MiscDocket/03/03916000.PDF).

We require that trial courts, in certifying or denying certification, comply with the detailed requirements of Rule 42. That rule requires, among other things, that the court delineate the elements of each claim or defense asserted in the pleadings; any issues of law or fact common to the class members; any issues affecting only individual class members; those issues that will be the object of most of the efforts of the litigants and the court; other available methods of adjudication; why common issues do or do not predominate; why a class action is or is not superior; and how class and individual claims will be tried in a manageable, time efficient manner. TEX.R. CIV. P. 42(c)(1)(D). Moreover, trial courts must conduct a "rigorous analysis" before ruling on class certification to determine "whether all prerequisites to class certification have been met." *Bernal,* 22 S.W.3d at 435.

But we have never before held that if class representatives cannot prove their case at the class-certification stage, the trial court lacks jurisdiction. While "[t]he court may require plaintiff to supplement the pleadings with outside material in order to determine whether to certify [a class action] .... this does not mean that the litigant bringing the action as a representative must establish the merits of the case before a preliminary determination of the class-action question can be made." 7B WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE § 1798. Indeed "although a preliminary evidentiary hearing may be utilized [prior to class certification], that hearing is directed toward examining the underlying facts to determine ***315** whether they are susceptible to common proof and is not to determine the probability of success on the merits." *Id.* The class action is "a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment," but "[p]rocedural devices may 'not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.' " *Henry Schein, Inc. v. Stromboe,* 102 S.W.3d 675, 693 (Tex.2002) (quoting TEX.R. CIV. P. 815).

We have followed the United States Supreme Court's directive in *Eisen,* holding that "[d]eciding the merits of the suit in order to determine the scope of the class or its maintainability as a class action is not appropriate." *Intratex Gas Co. v. Beeson,* 22 S.W.3d 398, 404 (Tex.2000) (citing *Eisen,* 417 U.S. at 177, 94 S.Ct. 2140). Prior to *Eisen,* the Fifth Circuit held that, in determining whether a purchaser's action against an issuer for alleged violations of the securities law could be maintained as a class action, the trial court improperly considered whether the petition stated a cause of action or whether the purchaser would succeed on the merits. The Fifth Circuit vacated the order denying class-action status and remanded the case, stating:

> The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action. Rule 23 delineates the scope of inquiry to be exercised by a district judge in passing on a class action motion. Nothing in that Rule indicates the necessity or the propriety of an inquiry into the merits. Indeed, there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of the plaintiff's claims at this stage of the proceedings. Failure to state a cause of action is entirely distinct from failure to state a class action.

Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427–28 (5th Cir.1971) (citations omitted). Even if we were to change course and disavow *Eisen,* the better practice would be to do so through our rulemaking procedure. Several commentators have suggested just such a solution with regard to the Federal Rules of Civil Procedure. *See, e.g.,* Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits,* 51 DUKE L.J. 1251, 1254–55 (2002)(submitting that Fed.R.Civ.P. 23 be amended to require preliminary merits-related inquiries in class-action cases); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims,* 69 Tenn. L.Rev. 1, 4 (2001) (proposing amendment to Rule 23 to permit adjudication of the merits of class claims prior to full-fledged certification); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits,* 168 F.R.D. 366 (1996) (advocating amendment to Rule 23 so that an assessment of the merits would be included in the Rule 23(b)(3) analysis of the superiority of class action treatment).[12] After all, Eisen was based in ***316** part on the absence of any provision in the Federal Rules of Civil Procedure that would "give[ ] a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen,* 417 U.S. at 177, 94 S.Ct. 2140. But even such a reform would not go as far as the Court does here—stripping trial courts of jurisdiction if a claim lacks merit. Because the plaintiffs have standing, the trial court has subject matter jurisdiction, and the Court errs in concluding otherwise.

II

Choice of Law

A threshold question in any appellate review of an order certifying a multistate class action must be an analysis of whose law governs the class claims. *See Compaq,* 135 S.W.3d at 672. In this case, the trial court certified a multistate class but did not perform a choice-of-law analysis, concluding that it was unnecessary.[13] Noting this deficiency, the court of appeals held that "the trial court still ha[d] significant work to do on choice-of-law issues" and that our decision in *Henry Schein* "compel[led] reversal" of the class certification order on that basis. 121 S.W.3d at 886. After the court of appeals issued its judgment in this case, we decided *Compaq,* in which we mandated a detailed choice-of-law analysis in multistate class actions like this one, and we held that the lower courts erred by failing to conduct such an analysis. *Compaq,* 135 S.W.3d at 673 (noting that the lower "courts never assessed the substance of other states' laws but instead concluded that the theory was sound under Texas law. A proper review would have analyzed the relevant law of each state and the variations among states.").

We have recognized that "[i]n the context of a nationwide class action, the determination of the applicable substantive law is of paramount importance. If the court does not know which states' laws must be applied, it cannot determine whether variations in the applicable laws would defeat predominance in a [Rule 42](b)(3) class action...." *Id.* at 672. Moreover, "[i]f the laws of fifty-one jurisdictions apply in [a] class action, the variations in the laws of the states and District of Columbia 'may swamp any common issues and defeat predominance.' " *Id.* (quoting *Castano v. Am. Tobacco Co.,* 84 F.3d 734, 741 (5th Cir.1996)).

It is settled that in reviewing a class certification order, we must evaluate " 'the claims, defenses, relevant facts, and applicable substantive law.' " *Bernal,* 22 S.W.3d at 435 (quoting *Castano,* 84 F.3d at 744). In so doing, we have required "trial courts [to] abandon the practice of postponing choice-of-law questions until after certification, *as courts can hardly evaluate the claims, defenses, or applicable law without knowing what that law is."* *Compaq,* 135 S.W.3d at 672 (citing ***317** *Tracker Marine, L.P. v. Ogle,* 108 S.W.3d 349, 351–52 (Tex.App.-Houston [14th Dist.] 2003, no pet.)) (emphasis added); *see also Spence v. Glock,* 227 F.3d 308, 313 (5th Cir.2000) (holding that "the district court is required to know which law will apply before it makes its predominance determination"); *Citizens Ins. Co. of Am. v. Daccach,* 217 S.W.3d

430, 441 (Tex.2007). In light of our recent cases on this issue, the court of appeals correctly held that the case must be remanded to the trial court for further proceedings.

III

Conclusion

Proposals to modify class action procedure present serious questions of policy. Standing is different. It implicates a court's fundamental power to adjudicate a claim, rather than an assessment of whether the claim will ultimately succeed. Today, the Court conducts an extraordinary and unworkable reading of both pleading and precedent to conclude that the plaintiffs "lack[s] standing because [their] claim of injury is too slight for a court to afford redress." 252 S.W.3d at 305. We have never before stretched the doctrine this far. The Court's opinion reveals a visceral distaste for class actions, *see* *Mejdrech v. Met–Coil Sys.* ***Corp.***, 319 F.3d 910, 912 (7th Cir.2003), but that distaste should not upend our substantive law of standing and subject matter jurisdiction which, even more than the right of trial by jury, is fundamental to our system of justice. I would affirm the court of appeals' judgment.

Parallel Citations

Prod.Liab.Rep. (CCH) P 17,919, 51 Tex. Sup. Ct. J. 422

Footnotes

1 *Quacchia v.* ***DaimlerChrysler Corp.***, 122 Cal.App.4th 1442, 19 Cal.Rptr.3d 508 (2004) (affirming the trial court's refusal to certify a class); *Hiller v.* ***DaimlerChrysler Corp.***, No. 02–681, 2007 Mass.Super. LEXIS 442, 2007 WL 3260199 (Mass.Super.Ct. Sept. 25, 2007) (refusing class certification). In remanding *Hiller* to state court after removal, the United States District Court could not help but observe that "plaintiffs' lawsuit appears to be as manufactured as defendant's cars". *Hiller v.* ***DaimlerChrysler Corp.***, No. Civ.A. 02–10533–RWZ, 2004 U.S. Dist. LEXIS 4578, at *3, 2004 WL 574331 (D.Mass. Mar.23, 2004). Two other state court class actions have been removed and remanded. *Coker v.* ***DaimlerChrysler Corp.***, 220 F.Supp.2d 1367 (N.D.Ga.2002); *Sylvester v.* ***DaimlerChrysler Corp.***, No. 1:02CV0567, 2002 U.S. Dist. LEXIS 17989, 2002 WL 32005242 (N.D.Ohio Mar.25, 2002).

2 121 S.W.3d 862, 886 (Tex.App.-Corpus Christi 2003).

3 *Id.* at 885.

4 *See* TEX. BUS. & COM.CODE § 2.313.

5 *Id.* § 2.314.

6 *Id.* § 2.315.

7 *Id.* §§ 17.41–.63.

8 49 C.F.R. § 571.209, S4.1(e).

9 121 S.W.3d 862, 885–886 (Tex.App.-Corpus Christi 2003).

10 *Id.*

11 *See* *Intratex Gas Co. v. Beeson,* 22 S.W.3d 398, 404 (Tex.2000) ("Deciding the merits of the suit in order to determine the scope of the class or its maintainability as a class action is not appropriate.... However, in determining whether the class-certification requirements have been satisfied, the trial court may look beyond the pleadings."); *see*

also *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the procedural rule governing class actions] are met." (quoting *Miller v. Mackey Int'l,* 452 F.2d 424 (5th Cir.1971))).

12 *See* *Texas Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444 (Tex.1993) ("An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury.").

13 *See* *id.*

14 *E.g.* *Plas–Tex, Inc. v. U.S. Steel* ***Corp.***, 772 S.W.2d 442, 443–445 (Tex.1989).

15 135 S.W.3d 657, 679 (Tex.2004) (footnote omitted). *Cf.* *Collins v.* ***DaimlerChrysler Corp.***, 894 So.2d 988 (Fla.Dist.Ct.App.2004) (holding that plaintiff's complaint that the value of her car was less because it was equipped with Gen–3 seatbelt buckles is actionable under the state consumer protection law even though the alleged defect has never manifest itself in an emergency or caused damages).

16 *See, e.g.,* *Martinez v. Second Injury Fund of Tex.,* 789 S.W.2d 267, 277 (Tex.1990) (Hecht, J., dissenting) ("Rendition of judgment on the merits is inappropriate in an action over which the trial court lacks jurisdiction."); *West v. Brenntag Sw., Inc.,* 168 S.W.3d 327, 339 (Tex.App.-Texarkana 2005, pet. denied) ("Having found that West lacked standing to sue for negligence or nuisance, the judgment as to those claims is reversed and judgment is rendered that those claims be dismissed for want of jurisdiction. The judgment as to the remaining claims is reversed and judgment is rendered that West take nothing.").

17 *Texas Ass'n of Bus.,* 852 S.W.2d at 444; TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

18 *Texas Ass'n of Bus.,* 852 S.W.2d at 444.

19 *Nootsie, Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 661 (Tex.1996) ("A plaintiff has standing when it is personally aggrieved.").

20 *Brown v. Todd,* 53 S.W.3d 297, 305 (Tex.2001) (stating that for a plaintiff to have standing he " 'must establish that he has a "personal stake" in the alleged dispute' and that the injury suffered is 'concrete and particularized' ", quoting *Raines v. Byrd,* 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

21 *Texas Ass'n of Bus.,* 852 S.W.2d at 444.

22 52 S.W.3d 704 (Tex.2001).

23 *Id.* at 706.

24 *Id.*

25 *Id.* at 707–708 (citations and emphasis omitted).

26 *Id.* at 711.

27 283 F.3d 315, 316–317 (5th Cir.2002).

28 *Id.* at 316–317.

29 *Id.* at 317.

30 *Id.*

31 *Id.* at 317, 319–320.

32 *Id.* at 319–320.

33 *Id.* at 321–322.

34 484 F.3d 717 (5th Cir.2007).

35 *Id.* at 718–719.

36 *Id.* at 722–723.

37 *Nissan Motor Co. v. Armstrong,* 145 S.W.3d 131, 140 (Tex.2004) ("we have never held that mere claims of previous accidents can prove a product is defective").

38 *Austin Nursing Ctr., Inc. v. Lovato,* 171 S.W.3d 845, 849 (Tex.2005); *Nootsie, Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 662 (Tex.1996); *Texas Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 446(Tex.1993).

39 *Texas Ass'n of Bus.,* 852 S.W.2d at 444.

40 *Ante* at 313.

41 484 F.3d 717, 730 (5th Cir.2007).

42 *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

43 *M.D. Anderson Cancer Ctr. v. Novak,* 52 S.W.3d 704, 711 (Tex.2001) ("Accordingly, if the named plaintiff lacks individual standing, the court should dismiss the entire [class action] suit for want of jurisdiction.").

1 Texas Rule of Civil Procedure 42 is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority. *Sw. Ref. Co., Inc. v. Bernal,* 22 S.W.3d 425, 433 (Tex.2000) (citations omitted).

2 In fact, the case is nearly nationwide, encompassing forty-eight states. California and Nevada residents were excluded from the proposed class definition.

3 The motion nowhere asserts that the trial court lacked jurisdiction based on standing and seeks not dismissal, but a take-nothing judgment. Rather, **DaimlerChrysler** moved for summary judgment on the pleadings, alleging that the plaintiffs sustained no damages, an essential element of each claim, and that **DaimlerChrysler** was therefore entitled to judgment on the merits. **DaimlerChrysler** later supplemented its motion with excerpts from the class representatives' depositions. The trial court denied the motion.

4 That court noted:

> In *Walsh v. Ford Motor Co.,* 106 F.R.D. 378 (D.D.C.1985), for example, the trial court certified an "all owners" class of plaintiffs,

notwithstanding the defendant's protestation that many of the class members' cars had "performed as warranted and therefore [were] merchantable." *Id.* at 396. The court specifically noted, however, that it was certifying the class solely on the basis of the "commonality" of the prospective members' interests, and that it was *not* determining separately whether the plaintiffs had stated a "viable" cause of action for breach of the implied warranty of merchantability. *Id.* at 397. Essentially the same can be said for each of the remaining cases on which the plaintiffs principally rely. *See In re Cadillac V8–6–4 Class Action,* 93 N.J. 412, 461 A.2d 736, 743 (1983) (approving certification of "all owners" class where plaintiffs charged breach of implied warranty of merchantability on account of "common defect"; court holds that allegation of "loss-of-bargain" damages is sufficient to state cause of action, but relies on cases where such loss occurred as result of manifest defects in *plaintiffs'* cars); *Landesman v. General Motors* ***Corp.,*** 356 N.E.2d 105, 107–08, 42 Ill.App.3d 363, 1 Ill.Dec. 105, 107–08 (1st Dist.1976) (court certified class of plaintiffs claiming damages partly attributable to diminished resale value, but specifically declined to decide question of whether allegations supported viable cause of action); *Anthony v. General Motors* ***Corp.,*** 33 Cal.App.3d 699, 109 Cal.Rptr. 254 (2d Dist.1973) ("all owners" class certification; no discussion of viability of underlying cause of action).

Carlson, 883 F.2d at 297.

5 Ultimately, the court concluded that the district court abused its discretion in certifying the class, as the plaintiffs "failed to adequately address, much less 'extensively analyze,' the variations in state law ... and the obstacles they present to predominance." *Cole,* 484 F.3d at 730.

6 It is far from clear that injury to the *Cole* plaintiffs was merely "a matter of time." In that case, GM indicated that "it had received 306 reports of inadvertent deployment out of approximately 224,000 affected vehicles." *Cole,* 484 F.3d at 719. Further, "[a]ccording to GM ... the likelihood of inadvertent deployment decreased significantly over time." *Id.* at 720 n. 2.

7 The court of appeals recognized this, noting that " '[r]isk of injury' [was] an inaccurate characterization" of the alleged harm. 121 S.W.3d at 879. Rather, the court noted that "[e]ach plaintiff claim[ed] injury in the form of insufficient product value" and "[o]n the basis of these allegations, each plaintiff claims a concrete and particularized injury in fact sufficient to confer standing to sue." *Id.*

8 *Brown,* 53 S.W.3d at 305 n. 3.

9 The Court asserts that the plaintiffs "do not contend that the Gen–3 buckles made their vehicles worth less than they paid for them." While the plaintiffs may not use these exact words, they do allege concrete economic harm stemming from breach of express and implied warranties. *See* TEX. BUS. & COMM.CODE § 2.714(b); *Nobility Homes of Tex., Inc. v. Shivers,* 557 S.W.2d 77, 78 n. 1 (Tex.1977) (stating that "direct economic loss may be 'out of pocket'-the difference in value between what is given and received—or 'loss of bargain'—the difference between the value of what is received and its value as represented. Direct economic loss also may be measured by costs of replacement and repair.") (citations omitted).

10 The Court states, in response to the argument that it is incorrectly considering the merits in determining standing, that "[w]e do not render

judgment that the plaintiffs take nothing, as we would if their claims failed on the merits; we dismiss the case for want of jurisdiction." 252 S.W.3d 307. This is quite true, but utterly non-responsive. The troubling part of the Court's opinion is, of course, not the disposition in and of itself, but how it was reached.

11 Indeed, standing is typically challenged in a plea to the jurisdiction, which is a "dilatory plea, the purpose of which is to defeat a cause of action *without regard to whether the claims asserted have merit." Bland,* 34 S.W.3d at 554 (emphasis added).

12 The Advisory Committee on the (federal) Civil Rules "also considered, but did not propose for formal review, a new provision of Rule 23(b)(3) that would have required a preliminary hearing on the merits prior to certification." DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 500 n. 2 (2000). That provision "encountered opposition from both plaintiff and defense bars." *Id.* As one commentator has noted:

> Defendants were torn between the attraction of drawing trial judges' attention to the merits of proposed class actions and the possibility that such an early merits determination would simply provide more opportunity for adversarial procedure at a time when the record had not yet been sufficiently developed to support a sound judicial assessment. Defendants' disagreement among themselves on the issue of a preliminary merits determination subsequently led the Advisory Committee to abandon this proposal.

Id. at 44 n. 103.

13 The class certification order stated that "[a] class certification order need not address choice of law.... In the absence of a proper choice of law motion, the Court will continue to presume, as it is entitled to presume, that the law of other jurisdictions is the same as Texas law."

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NUMBER 13-00-394-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

DON ALAN NICHOLSON AND PATRICIA NICHOLSON, Appellants,

v.

WASHINGTON MUTUAL, F. A. F/K/A AMERICAN SAVINGS, F. A. , Appellee.

On appeal from the 101st District Court

of Dallas County, Texas.

O P I N I O N

Before Chief Justice Valdez and Justices Yañez and Castillo

Opinion by Chief Justice Valdez

Appellants, Don Alan Nicholson and Patricia Nicholson ("Nicholsons"), originally brought a wrongful foreclosure suit against Appellee, Washington Mutual, F.A., formerly known as American Savings Bank, F.A. ("American"). Both the Nicholsons and American moved for summary judgment. The trial court denied the Nicholsons' motion but granted American's motion. The Nicholsons now appeal from the trial court's grant of summary judgment in favor of American. The trial court found American to be the holder of the Nicholsons' loan note ("Nicholson note") and deed of trust, allowing American to lawfully foreclose on the Nicholsons' property. The issues on appeal are: 1) whether American was, indeed, the owner and holder of the Nicholson note and deed of trust at the time of foreclosure and, if not, whether American had the power to foreclose on the Nicholson property in any other capacity; and 2) whether the Nicholsons are precluded by the doctrine of *res judicata* from raising any further issue regarding any damages sustained

from their alleged wrongful eviction within their wrongful foreclosure action. We find that the trial court erred in granting summary judgment, and therefore, we reverse the trial court's judgment.

Background

According to facts stipulated to by both parties, the Nicholsons assumed responsibility for a loan note on February 27, 1985, in order to purchase real estate in Plano, Texas. American became the owner and holder of the Nicholson note on December 20, 1988.

On March 24, 1995, American and Lehman Brothers ("Lehman") entered into a Loan Sale Agreement, under which Lehman purchased approximately 3800 loans from American. One of the loans sold to Lehman was the Nicholson note. Lehman and Bankers Trust Company of California ("Bankers") subsequently entered into a custodial agreement, whereby Bankers was to act as custodian for a number of loans owned by Lehman. The Nicholson note and deed of trust were endorsed in blank by American and delivered to the custodian, Bankers. Bankers remained in custody of the Nicholson note and the deed of trust during all times relevant to this case. On May 1, 1995, American and Lehman executed a "flow servicing agreement," which stated that American was to act as servicer for Lehman. Throughout this time period, the Nicholsons paid timely on the note balance; however, in August of 1995, the Nicholsons defaulted on the loan.

In order to initiate acceleration proceedings on the Nicholson mortgage, American appointed a substitute trustee, Jack Hagar, on March 12, 1996. After sending timely notice to the Nicholsons, American's substitute trustee followed through with the foreclosure sale on the Plano property on May 7, 1996. American purchased the real estate at the foreclosure sale, but later conveyed the property to UMLIC-10 Corporation. Thereafter, the Nicholsons brought this wrongful foreclosure suit.

Standard of Review

In a traditional summary judgment proceeding, the movant bears the burden of demonstrating that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). All evidence favorable to the nonmovant must be taken as true, and any doubts must be resolved in favor of the nonmovant. *Id.* at 548-49.

American moved for summary judgment on two grounds: 1) American, as a designee of Lehman, was a constructive owner and holder of the Nicholson note and deed of trust and therefore had the right to foreclose; and 2) through the execution of the flow servicing agreement, Lehman named American as its servicer, thus authorizing American to conduct the foreclosure sale of the Nicholson property. The trial court issued a general order granting American's motion. If a summary judgment order does not specify the ground or grounds relied on for the ruling, the summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. *State Farm Fire and Casualty Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993). We will first address American's status as owner and holder of the Nicholson note and deed of trust.

Analysis

Was American the Owner and Holder of the Nicholson Note?

A holder is defined as a person who is in possession of an instrument payable to him or to bearer. Tex. Bus. & Com. Code Ann. § 1.201(20) (Vernon Supp. 2001). An instrument which is indorsed in blank is payable to the bearer. Tex. Bus. & Com. Code Ann. § 3.204 (Vernon Supp. 2001). An indorsement in blank is an indorsement which does not identify the person to whom the instrument is payable. *Id.* An instrument which is payable to bearer is negotiated by transfer of possession. Tex. Bus.& Com. Code Ann. § 3.201 (Vernon Supp. 2001); *Behring Int'l,Inc. v. Greater Houston Bank*, 662 S.W. 2d 642, 650 (Tex. App.-Houston 1983, writ dism'd w.o.j.)*; Texas Sporting Goods Co. v. Texas Gulf Sulphur Co.*, 81 S.W. 2d 805, 807 (Tex. App.-Galveston, 1935, no writ).

Possession is the key element to being a holder of an instrument which is indorsed in blank. Tex. Bus. & Com. Code Ann. § 1.201(20) (Vernon Supp. 2001). Before one can be the holder of an instrument which is payable to bearer, he must have possession of the instrument. In the suit at hand, American claims it had possession of the Nicholson note and deed of trust during all times relevant to this suit. Several Texas courts have held that possession of a note or instrument can be either physical or constructive. *See*, *e.g.*, *Boyd v. Diversified Financial* Syaytems, 1 S.W.3d 888, 891 (Tex. App.-Dallas 1999, no pet); *Busbice v. Hunt*, 430 S.W.2d 291, 292 (Tex. Civ. App.-Tyler 1968, writ ref'd n.r.e.). Physical possession of legal documents by one's agent constitutes constructive possession. *Lazidis v. Goidl*, 564 S.W.2d 453, 455 (Tex. Civ. App.-Dallas 1978, no writ). Constructive possession also results when an instrument is delivered to

an agent of the payee. *Miller-Rogaska, Inc. v. Bank One, N.A.*, 931 S.W. 2d 655, 660 (Tex. App.-Dallas, 1996, no writ). When American sold the Nicholson note to Lehman, both the note and deed of trust were indorsed in blank and the documents were delivered to Bankers. According to the custodial agreement ("agreement") which existed between Lehman and Bankers, Bankers was to "take possession of the Mortgages and Mortgage Notes. . .as the custodian of the Purchaser." "Purchaser" is defined in the agreement as Lehman Brothers, or its successor in interest or assigns. The agreement makes clear that Bankers was to serve as the custodian/agent of Lehman. As noted above, "possession may be in the hands of an authorized agent of the owner and the owner may still aver that he is the owner and holder of the note." *Lazidis v. Goidl*, 564 S.W.2d at 456. Bankers, serving as the exclusive agent of Lehman, retained physical possession of the Nicholson note and deed of trust, while Lehman had constructive possession of the same. Upon delivery of the indorsed note and deed of trust, American transferred its rights as owner and holder to Lehman, the sole "Purchaser."

American, however, claims that it was a designee of Lehman, and as such, maintained possession of the note and deed of trust. The agreement contains a section which states, "Custodian shall hold the Custodial Files for the exclusive use and benefit of the Purchaser, its designee or assignee. . . ." American argues that it is a designee of Lehman, and therefore was entitled to retain Bankers as its agent. If American's argument is correct, then Bankers is an agent for American, and American would have constructive possession of the Nicholson note and deed of trust. However, we find no evidence to support American's contention. The agreement does not name American as a designee of Lehman, therefore, there is no evidence to establish that American was Lehman's designee. Accordingly, we find that the summary judgment evidence does not establish that American was in possession of the Nicholson note and deed of trust, nor does the evidence establish that American was a designee of the holder.

Did American Have the Power to Foreclose in Any Other Capacity?

In its motion for summary judgment, American also argues that it was authorized by Lehman, through the execution of the flow servicing agreement, to conduct the foreclosure on the Nicholsons' property. The question here is whether Lehman could authorize another party to appoint a substitute trustee and, ultimately, to foreclose on the Nicholson real estate. A person's authority to conduct a foreclosure under a deed of trust is governed by the language found in the deed of trust. *Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942). Additionally, the property code provides that the ability to conduct a foreclosure sale of real property is derived from "a power of sale conferred by a deed of trust. . . ." Tex. Prop. Code Ann. § 51.002(a) (Vernon 1995). The Court in *Slaughter* held that a "trustee has no power to sell the debtor's property, except such as may be found in the deed of trust; and the powers therein must be strictly followed." *Slaughter*, 162 S.W. 2d at 675; *See also Houston First Am. Sav. v. Musick*, 650 S.W. 2d 764, 768 (Tex. 1983); *Univ. Sav. Ass'n v. Springwoods Shopping Ctr.* 644 S.W. 2d 705, 706 (Tex. 1982). Accordingly, in the present case, the trustee and the owner of the Nicholson note and deed of trust, Lehman, were bound by the language of the deed of trust.

The deed of trust to the Nicholsons' property specifically gives the lender, or trustee, the right to appoint a substitute trustee and to move forward with foreclosure proceedings:

18. . . .Lender prior to acceleration shall mail notice to borrower. . . . If Lender invokes the power of sale, Lender or Trustee shall give notice of the time, place and terms of sale by posting notice at least 21 days prior to the day of sale. . . .

* * * * *

23. Substitute trustee. Lender at Lender's option, with or without cause, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Deed of Trust is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power, and duties conferred upon the Trustee herein and by applicable law.

American claims that it was authorized by the flow servicing agreement to conduct such actions as foreclosure and debt collection. However, under the deed of trust, as referenced above, only the lender was authorized to perform these tasks, and there is no authority for the lender to delegate these tasks to a third person. The terms and conditions of a deed of trust must be strictly adhered to when conducting a sale of real estate. *Houston First Am. Sav.*, 650 S.W.2d at 768. As such, only the lender under the deed of trust was allowed to appoint a substitute trustee and to move forward with foreclosure proceedings.

Alternatively, American claims that it was the "lender" under the deed of trust, arguing that the deed of trust was assigned by the original lender to American, but was never assigned by American to Lehman. We find American's argument without merit. The mortgage of a property is an incident of the debt; and as long as the debt exists, the

security will follow the debt. *J.W.D., Inc. v. Federal Ins. Co.*, 806 S.W.2d 327, 329-30 (Tex. App.-Austin 1991, no writ); *Lawson v. Gibbs*, 591 S.W.2d 292, 294 (Tex. Civ. App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.). Accordingly, while the deed of trust may never have been assigned to Lehman, it followed the debt. Because the Nicholson note was indorsed in blank by American and delivered into Lehman's constructive possession, Lehman became the holder of both the note and the deed of trust which followed the note. Under these facts, we find that Lehman, as holder of the note and deed of trust, stood in the place of the original lender. Under the terms of the deed of trust, Lehman, as lender, was the only party allowed to appoint a substitute trustee and to foreclose on the Nicholson property. Any attempt by American to appoint a substitute trustee or foreclose on the Nicholson property was ineffective. *Slaughter*, 162 S.W. 2d at 675.

Therefore, we find that the summary judgment evidence does not establish, as a matter of law, that American was authorized to appoint a substitute trustee and foreclose on the Nicholson property. We, therefore, sustain this issue in favor of the Nicholsons.

Because we have sustained the Nicholsons' first issue, we need not address the remaining issue. Tex. R. App. P. 47.1.

The judgment of the trial court is REVERSED and this cause is REMANDED for further proceedings.

ROGELIO VALDEZ

Chief Justice

Do not publish.

Tex. R. App. P. 47.3(b).

Opinion delivered and filed

this 31st day of August, 2001.

617 S.W.2d 781 (1981)

EASY LIVING, INC., et al., Appellants,

v.

Dr. Charles E. CASH, et al., Appellees.

No. 18460.

Court of Civil Appeals of Texas, Fort Worth.

May 28, 1981.
Rehearing Denied June 25, 1981.

782 *782 Law, Snakard, Brown & Gambill and Alan Wilson, Fort Worth, Robert B. Bain, Dallas, for appellants.

Garrett & Settle and Rufus S. Garrett, Jr., Fort Worth, for appellees.

OPINION

HUGHES, Justice.

Dr. Charles E. **Cash** and Dr. James H. Simmons (hereinafter referred collectively as the plaintiffs) instituted this suit against **Easy Living**, **Inc**., G. J. Roberts, Jr., John W. Hastings and Dudley Beadles (hereinafter collectively referred as the defendants) for injunctive relief and for monetary recoveries to which they were allegedly entitled under the Deceptive Trade Practices Act before its amendment in 1979. (Tex. Bus. & Comm.Code § 17.41 et seq., 1977) in connection with a construction contract. **Easy Living** counterclaimed for the balances allegedly due it under the contract and for foreclosure of its mechanic's lien. Judgment in the trial court was rendered in favor of the plaintiffs and the defendants have appealed.

We reform the judgment of the trial court and affirm.

In April 1977 **Easy Living** contracted to remodel the dental offices leased by the plaintiffs at an original contract price of $57,596.00. **Easy Living** is a Texas Corporation specializing in remodeling jobs. Defendants Hastings and Roberts, respectively, are the president and vice president of **Easy Living**. The contract contained a schedule of payments based upon certain progress events. The final payment of $15,596.00 was due upon substantial completion. The contract also provided that if **Easy Living** stopped work "through act" of the plaintiffs, **Easy Living** could stop work and recover from the plaintiffs payment for all work executed and any loss sustained plus reasonable profit and damages.

The plaintiffs also executed a "Builder's & Mechanic's Lien (With Power Of Sale) Note" and a "Builder's & Mechanic's Lien Contract (With Power of Sale)". Defendant Beadles is the named trustee in these instruments.

Pursuant to the terms of the contract certain changes in the contract specifications were made resulting in a net increase in the total contract price. The plaintiffs have paid **Easy Living** $46,210.00.

As work progressed on the improvements discord developed between the plaintiffs and **Easy Living** which culminated in the abandonment of the project by **Easy Living** and its subcontractors.

Easy Living thereafter caused the trustee, Beadles, to send a letter to the plaintiffs alleging substantial completion of the work contracted for and demanding payment of $12,726.70 as the amount due under the original contract and $5,795.40 as the amount due on the allegedly substantially completed changed orders. A foreclosure sale of the leasehold interest was threatened in the event the demand of payment was not satisfied.

The plaintiffs then filed suit against the defendants seeking: (1) damages against **Easy Living** for the costs necessary to hire another contractor to rework/complete the job attempted by **Easy Living** and for the loss of use of the facilities; (2) recovery under the DTPA of treble damages against **Easy Living** (plus costs and attorneys' fees) arising from **Easy Living's** deceptive trade practices, breach of warranty and unconscionable course of conduct—the abandonment of the work and the false

unilateral declaration of substantial completion with an accompanying demand for payment and threatened foreclosure in bad faith with the intent of coercing plaintiffs to accept incomplete and defective work at the risk of further disruption of the practice of their profession; (3) recovery jointly and severally against Roberts and Hastings under the DTPA for the assertions made against **Easy Living**; and (4) injunction of the defendants from foreclosing upon the plaintiffs' leasehold.

783 *783 The defendants denied the plaintiffs' allegations and filed a counterclaim alleging substantial completion of the contract and seeking satisfaction of the demands made in the trustee's letter to the plaintiffs plus attorneys' fees, costs and interest.

The case was tried before a jury with 26 special issues submitted. Motions for judgment on the verdict were submitted by the plaintiffs and defendants.

The trial court rendered judgment awarding the plaintiffs $33,000.00 (three times the amount the jury found as the reasonable and necessary expense to plaintiffs to "repair, replace or correct" the work performed by **Easy Living**), permanently enjoining the defendants from selling the leasehold, denying the relief sought in the counterclaim, awarding attorneys' fees to plaintiffs under the DTPA and assessing court costs against the defendants (excluding Beadles).

The first point of error is that the trial court erred in holding **Easy Living** liable for the cost to plaintiffs to complete the contract because the cost to complete was less than the unpaid contract balance.

The jury findings relevant to this point of error are that **Easy Living** made and breached an express warranty that the work and services to be performed under the contract would be performed in a good and workmanlike manner and the breach was a proximate cause of $11,000.00 of "reasonable and necessary expense to plaintiffs to repair, replace or correct such work" as was performed by **Easy Living**. The jury also found that the work was not substantially completed.

Easy Living insists that the plaintiffs' measure of recovery is the excess of the reasonable and necessary costs of completion over and above the unpaid portion of the contract price.

The submission of issues concerning the breach of the express warranty that the work and services would be performed in a good and workmanlike manner and the award based thereupon evinces that the plaintiffs' recovery was not for the benefit of their bargain to have the building substantially completed but rather to have the work which was completed performed in a good and workmanlike manner.

Obviously there is an intent that the contract be severable in the "Work Stoppage" clause (which provided that payment would be due for "all work executed" in cases which as this) and the payment schedule (which allowed the plaintiffs to withhold payment of $15,596.00 until the work was substantially completed). **Easy Living's** measure of recovery treats the contract as an entirety.

We hold that the trial court was justified in awarding the plaintiffs $11,000.00 as actual damages for the expense to repair, replace or correct the work which had been performed. *Young v. DeGuerin,* 591 S.W.2d 296 (Tex.Civ.App.—Houston [1st Dist.] 1979, no writ). We overrule the first point of error.

It being our holding that actual damages of $11,000.00 were justified we also overrule second point of error which asserts that the trial court erred in awarding treble damages under the DTPA. *Woods v. Littleton,* 554 S.W.2d 662 (Tex.1977).

Roberts and Hastings argue that the trial court erred in holding them personally liable for attorneys' fees because the plaintiffs failed to obtain jury findings establishing that they were damaged or "adversely affected" under the provisions of § 17.50(a) of the DTPA. Although the trial court permanently enjoined all the defendants from foreclosing upon the plaintiffs' leasehold, no personal liability for actual damages was adjudged against Roberts or Hastings. Beadles was not held accountable for attorneys' fees.

It is the plaintiffs' position that they prevailed insofar as it is necessary to entitle them to attorneys' fees under the DTPA by obtaining injunctive relief against Roberts and Hastings as individuals.

In order for the plaintiffs to recover attorneys' fees from Roberts and Hastings there must be a violation of the DTPA established.
784 *View-Caps Water Supply Corporation* *784 *v. Purcell,* 613 S.W.2d 353 (Tex. Civ.App.—Eastland 1981, no writ).

The relevant provisions of section 17.50 before its amendment in 1979 read as follows:

"Sec. 17.50. Relief for Consumers

"(a) A consumer may maintain an action if he has been adversely affected by any of the following:

"(1) the use or employment by any person of an act or practice declared to be unlawful by Section 17.46 of this subchapter;

"(2) breach of an express or implied warranty;

"(3) any unconscionable action or course of action by any person; or

"(4) the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended.

"(b) In a suit filed under this section, each consumer who prevails may obtain:

"(a) ...

"(2) an order enjoining such acts or failure to act; ...."

In answer to special issues the jury found that: Hastings and Roberts caused **Easy Living** to abandon the work in question, represent that the work in question was substantially complete and threaten to foreclose its mechanic's lien on the plaintiffs' leasehold; these acts were done in bad faith; and this conduct did *not* constitute an unconscionable action or course of action.

There was no contention made that Roberts or Hastings as individuals breached an express or implied warranty under § 17.50(a)(2) and the jury's finding that neither the acts of Roberts nor of Hastings constituted an unconscionable action or course of action eliminated § 17.50(a)(3) as a ground of violation. Section 17.50(a)(4) is obviously not involved here. Thus, in order for the plaintiffs to recover attorneys' fees from Roberts and Hastings as individuals, one of the acts enumerated in § 17.46(b) must be the ground for violation.

The plaintiffs specifically alleged a violation of § 17.46(b)(12) which reads as follows:

"(b) The term `false, misleading, or deceptive acts or practices' includes, but is not limited to, the following acts:

"...

"(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; ...."

We hold that § 17.46(b)(12) has no application to the facts before us. There is no dispute that if there had been substantial completion and the plaintiffs had refused to make the payment due, the terms of the mechanic's lien contract would have conferred the remedy of foreclosure. The cases we have found which address § 17.46(b)(12) have, as a common thread, a false assertion made of a right or remedy conferred by the contract. See in particular *Leal v. Furniture Barn, **Inc**.,* 571 S.W.2d 864 (Tex.1978) where a defendant falsely asserted that a remedy was conferred by a contract.

We sustain the allegations of error relating to the personal liability of Roberts and Hastings for attorneys' fees. No violation of § 17.50(a) was proved. The fact that the plaintiffs obtained an injunction against Roberts and Hastings does not necessarily mean that they prevailed under § 17.50(a).

The fourth, fifth and sixth points of error relate to the counterclaim asserted by **Easy Living**. Specifically, it is argued that the trial court erred in denying recovery by **Easy Living** for the unpaid contract balance less the cost to plaintiffs to complete the contract and in permanently enjoining the foreclosure upon the plaintiffs' leasehold estate.

We first dispose of the contention that the trial court erred in enjoining Hastings and Roberts from foreclosing upon the
785 leasehold estate. The "Builder's & Mechanic's Lien Contract" was executed between *785 **Easy Living** and the plaintiffs. Beadles was the named trustee. Although Roberts and Hastings are officers of **Easy Living** their argument that they personally enjoy any of the rights incident to any existent lien is untenable.

The language relied upon by **Easy Living** is found in the "Builder's & Mechanic's Lien Contract":

"In the event that the improvements herein mentioned to be erected, fail for any reason to be completed, or fail to be completed according to the contract, or all of the labor and materials used in erection thereof fail to be provided by Contractor, then Contractor or other owner and holder of the herein described indebtedness and note shall have a valid and subsisting lien for said contract price, less such amount as would be reasonably necessary to complete said improvements according to said plans and specifications, ..."

We have already alluded to the typewritten addendum to the "Home Improvement Contract" which provides for a final payment of $15,596.00 upon the substantial completion of the project. We construe the "Home Improvement Contract," and the "Builder's & Mechanic's Lien Note" as a single instrument. *Harris v. Rowe,* 593 S.W.2d 303 (Tex.1979). In doing so we give effect to the typewritten addendum to the "Home Improvement Contract" over the printed provision quoted from the "Builder's & Mechanic's Lien Contract". *Southland Royalty Company v. Pan American Petroleum Corporation,* 378 S.W.2d 50 (Tex. 1964). Therefore, in view of the jury's finding that there was no substantial completion we hold that **Easy Living** is not entitled to recover the funds rightfully withheld by the plaintiffs. It follows then that in the absence of a debt there is no lien which can be foreclosed upon.

We overrule the fourth, fifth and sixth points of error as well as the points raised by Hastings in a separate brief.

The seventh point of error is that the trial court erred in denying recovery by **Easy Living** of the value of extra work performed plus attorneys' fees. The jury's answers to the special issues relating to this point of error were disregarded by the trial judge.

A typewritten provision of the "Home Improvement Contract" reads as follows:

"1. EXTRA WORK: During progress of construction the owner may order extra work. The amount for such extra work shall be determined in advance if possible or may be charged for at actual cost of labor and materials plus 20% for Contractor's overhead and fee. All sums for extras shall be due and payable upon completion of each extra."

It is apparent that the parties contractually provided a measure of recovery for extras.

Special issue no. 25, as submitted to and answered by the jury, reads as follows:

"Find from a preponderance of the evidence the reasonable value in Tarrant County, Texas, of the extra work furnished by **Easy Living**, **Inc**. or its subcontractors to the project in question, at the time it was performed.

> "Answer in dollars and cents, if any.
>
> "ANSWER: $2936.90"

Obviously this issue was submitted to the jury on a *quantum merit* measure of recovery. The contract expressly covered the subject matter of the measure of damages; thus, the jury's finding was justifiably disregarded by the trial court. *Black Lake Pipe Line Company v. Union Construction Company,* 538 S.W.2d 80 (Tex.1976); *Dallas Electric Supply Co. v. Branum,* 143 Tex. 366, 185 S.W.2d 427 (1945).

It is the judgment of this court that the trial court's judgment should be affirmed except insofar as it holds G.J. Roberts, Jr. and John W. Hastings personally liable for the attorneys' fees incurred by the plaintiffs. We reform the judgment by deletion of the adjudication of this liability.

The judgment of the trial court is affirmed as reformed.

WestlawNext

Employees Retirement System of Texas v. Blount
Supreme Court of Texas. | May 14, 1986 | 709 S.W.2d 646 *(Approx. 2 pages)*

Original Image of 709 S.W.2d 646 (PDF)

709 S.W.2d 646
Supreme Court of Texas.

EMPLOYEES RETIREMENT SYSTEM OF TEXAS and Metropolitan

v.

Joyce M. BLOUNT, Respondent.

No. C–3448. | May 14, 1986.

Widow brought action against insurer and Employees Retirement System seeking benefits under her deceased husband's life policy. The 147th Judicial District Court, Travis County, Peter Lowry, P.J., entered judgment that widow take nothing, based on evidentiary record compiled in Employees Retirement System, and widow appealed. The Court of Appeals, Powers, J., 677 S.W.2d 565, reversed and remanded and widow petitioned for writ of error. The Supreme Court held that Employees Retirement System trustees had final binding authority to adjudicate claims of contested cases.

Judgment of Court of Appeals reversed; judgment of trial court affirmed.

West Headnotes (1)

Change View

1 **Insurance** Matters Subject to Arbitration
Employees Retirement System trustees have final binding authority to adjudicate claims of contested cases. V.A.T.S. Insurance Code, art. 3.50–2; Vernon's Ann.Texas Civ.St. art. 6252–13a, § 19.

11 Cases that cite this headnote

Attorneys and Law Firms

***646** Gary A. Thornton, Small, Craig & Werkenthin, Austin, Rena Friedlander, and William Toppeta, New York City, Susan Henricks, Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, for petitioners.

Joseph Hunter, Alvin, for respondent.

Opinion

ON MOTION FOR REHEARING

PER CURIAM.

After her husband's death, Joyce M. Blount sued Employees Retirement System of Texas ("ERS") and Metropolitan Life Insurance Company in Travis County District Court, seeking a trial de novo for a contested insurance claim arising under a uniform group insurance program for state employees. Metropolitan paid $4,000 in basic life insurance but denied payment of her $46,000 claim for optional accidental death benefits. In December of 1981, the ERS Board of Trustees recommended a denial of

the accidental death benefits. The trial court reviewed the record under substantial evidence review, and found that substantial evidence did exist to support the agency's decision. The court of appeals reversed the judgment of the trial court and remanded in the interest of justice, holding that the case was tried under the wrong standard, as Blount had a common law right to bring her action in district court as a trial de novo. 677 S.W.2d 565. We grant the motion for rehearing and the applications for writ of error, and, pursuant to Tex.R.Civ.P. 483, without hearing oral argument, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

The primary issue on appeal is whether the ERS trustees have been granted the final binding authority to adjudicate claims of contested cases pursuant to its enabling statute, Tex.Ins. Code Ann. art. 3.50–2 (Vernon 1981) and the Administrative Procedure and Texas Register Act, Tex.Rev.Civ.Stat.Ann. art. 6252–13a (Vernon Supp.1986) ("APTRA"). We hold that the agency does have such authority pursuant to Article 3.50–2 and APTRA § 19, and that the trial court properly reviewed the record under the substantial evidence standard.

The court of appeals' decision conflicts with Article 3.50–2, § 4(e), which gives the trustees full power to promulgate rules and procedures necessary to carry out the purposes and provisions of this act, including:

> establishment of grievance procedures by which the trustee shall act as an appeals body for complaints by insured employees regarding the allowance and ***647** *payment of claims, eligibility* and other matters ... (emphasis added)

The bill analysis for the 1985 amendment to Article 3.50–2, Senate Bill 771 makes it clear that its purpose was to emphasize that the agency has always maintained this power and has acted accordingly to provide for free and expedited hearings before the trustees without being "forced to resolve any differences with the carrier in the courts." Thus, the court of appeals erred in holding that proceedings before the ERS trustees were not judicial in nature.

Because Blount's cause of action is derived from statute, not common law, the statutory provisions are mandatory and exclusive and must be complied with in all respects. *Mingus v. Wadley,* 115 Tex. 551, 285 S.W. 1084, 1087 (1926); *Texas Catastrophe Property Insurance Association v. Council of Co-Owners of Saida II Towers Condominium Association,* 706 S.W.2d 644 (Tex.1986). The trial court, therefore, properly reviewed the case under substantial evidence review, pursuant to APTRA, § 19(e).

Therefore, we grant the motion for rehearing and the applications for writ of error, and, without hearing oral argument, the majority of the court reverses the judgment of the court of appeals and affirms the judgment of the trial court. Tex.R.Civ.P. 483.

End of Document

WestlawNext

RELATED TOPICS

Mortgages
- Foreclosure by Exercise of Power of Sale
  - Tenant or Foreclosure Sale Purchaser
  - Actual Market Value of Trust Deed Property

Foreclosure by Exercise of Power of Sale
- Notice of Mortgage Foreclosure Sale

Faine v. Wilson
Court of Civil Appeals of Texas, Galveston. | January 16, 1946 | 192 S.W.2d 456 *(Approx. 5 pages)*

FAINE et ux.

v.

WILSON et al.

Return to list **1** of **20 results** Search term

Appeal from District Court, Anderson County; V. M. Johnston, Judge.

Suit in trespass to try title by Lucille Cummings **Wilson** and husband against Frank Faine and wife for a tract of land. From a judgment for plaintiffs, the defendants appeal.

Reversed and remanded.

West Headnotes (7)

Change View

1 **Mortgages** Possession and Rents
Where principal defense, in trespass to try title action, was that substitute trustee's deed to plaintiffs' predecessor in title was void, burden was upon plaintiffs of establishing that default upon which foreclosure was predicated, and substitute trustee's deed executed, occurred prior to foreclosure.

2 **Mortgages** Power as Authority for Sale in General
A trustee has no power to sell debtor's property except such as may be found in deed of trust, and the powers therein conferred must be strictly followed.

3 **Mortgages** Possession and Rents
Recitals occurring in written refusal of trustee in deed of trust to act and appointment of a substitute trustee, and recitals in substitute trustee's deed of occurrence of facts required to effectuate such substitute trustee's deed, when taken in connection with provision of deed of trust providing that such recital shall establish the truth thereof prima facie, make out a prima facie case of the regularity and validity of the sale, if not rebutted.

3 Cases that cite this headnote

4 **Mortgages** Under Trust Deed
Assignee of deed of trust, by reason of provisions of deed that all terms set forth should be binding upon and inure to benefit of assigns of several parties, succeeded to right originally possessed by grantee to request trustee to foreclose upon default and upon his refusal or resignation to appoint a substitute trustee, and hence original grantee's joinder with assignee with his request to foreclose was surplusage.

1 Case that cites this headnote

5 **Mortgages** Power as Authority for Sale in General

The power of a trustee in a deed of trust to sell out property covered thereby must be strictly construed.

1 Case that cites this headnote

6 **Mortgages** Form and Requisites

Where power of trustee in deed of trust to sell out property covered thereby provided for foreclosure after notices had been posted in public places in county at least three consecutive weeks prior to date of sale, and deed further required appointment of a substitute trustee to be filed in office of county clerk, notices of proposed sale by substitute trustee had no force until his appointment had been filed in office of county clerk, and hence failure to file appointment until less than three weeks prior to sale nullified the sale. Vernon's Ann.Civ.St. art. 3810.

2 Cases that cite this headnote

7 **Mortgages** Grantees or Mortgagees of Purchasers

If defendants attorned to plaintiffs' predecessor in title after foreclosure sale by substitute trustee pursuant to powers contained in deed of trust and remained in premises, paying rent, upon sale being held invalid, plaintiffs would be mortgagees in possession.

1 Case that cites this headnote

Attorneys and Law Firms

***457** Alton King, of Palestine, for appellants.

Justice, Moore & Justice, of Athens, for appellees.

Opinion

CODY, Justice.

This is a formal trespass to try title action by appellees against appellants for a tract of land in Anderson County, described by metes and bounds in appellees' petition. The principal defense urged by appellants was that the substituted trustee's deed to Mrs. J. J. Cummings (who was appellees' predecessor in title) was void. The grounds advanced by appellants for claiming that said substitute trustee's deed was void will hereinafter be discussed. At the conclusion of the evidence the court withdrew the case from the jury and rendered judgment for title and possession of the land to appellees.

The agreed common source of title was Eliza Roberts. By mesne conveyances, title became vested in appellant Frank Faine, on September 15, 1925, burdened with an indebtedness of one W. H. Miller to the Oklahoma Farm Mortgage Company in the sum of $1,000, which said indebtedness is described in a deed of trust given by the said W. H. Miller and wife to Andrew Kingkade, trustee, under date of January 29, 1923; and which is further described in the assignment thereof from said Oklahoma Farm Mortgage Company to Mrs. J. J. Cummings, on May 3, 1923; and said indebtedness is further described and referred to in the aforesaid deed conveying the land to said appellant, Frank Faine, as becoming due October 1, 1932.

It was made to appear that on June 1, 1928, the Oklahoma Farm Mortgage Company was adjudged to be an insolvent corporation by a district court of the State of Oklahoma, and a receiver was appointed to take over and manage its business and assets, and its officers, agents and attorneys were enjoined from thereafter performing any act in the name of said corporation. (This was after said corporation

had parted with all interest in said indebtedness and lien securing it.)

***458** Thereafter, by an instrument which was dated May 7, 1929, and which was executed by Andrew Kingkade, and by the Oklahoma Farm Mortgage Company through its Vice-President and attested by its Secretary, which said instrument was also executed by Mrs. J. J. Cummings (who was a widow at all material times), it was declared that a default had been made in the payment of the aforesaid $1,000 indebtedness, and that the aforesaid trustee named in the deed of trust securing the payment thereof had been requested to perform his duties under the trust and to make sale of the property, but had refused so to do, and said instrument then provides:

'Now, therefore, the said Andrew Kingkade does hereby resign said trusteeship and Oklahoma Farm Mortgage Company, original payee of said indebtedness, and Mrs. J. J. Cummings, present owner and holder thereof, hereby designate and appoint John W. Easterwood as substitute trustee under the terms and conditions of said instrument, and the said John W. Easterwood is hereby vested with all the former rights, and title by the said deed of trust conferred upon the said original trustee, and shall execute the said trust.' Said resignation of trustee and appointment of substitute trustee was filed for record May 21, 1929.

By substitute trustee deed dated June 4, 1929, said John W. Easterwood, as substitute trustee, conveyed the land to Mrs. J. J. Cummings as the highest bidder for cash. The relevant terms of the deed of trust and of the substitute trustee's deed will be given hereafter.

Thereafter Mrs. J. J. Cummings died intestate and left her sole and surviving heir, appellee, Mrs. Lucille Cummings **Wilson**.

Appellants predicate their appeal upon six points. The first such point is in substance:

That the undisputed evidence shows that the indebtedness, which was secured by the deed of trust under which appellees claim (and which was purportedly foreclosed on June 4, 1929), did not become due until October 1, 1932.

1 2 3 Of course, the burden was upon appellees to establish that the default upon which the foreclosure was predicated occurred prior to such foreclosure. A trustee has no power to sell the debtor's property, except such as may be found in the deed of trust, and the powers therein conferred must be strictly followed. Michael v. Crawford, 108 Tex. 352, 193 S.W. 1070; Bemis v. Williams, 32 Tex.Civ.App. 393, 74 S.W. 332; Smith v. Allbright, Tex.Civ.App., 279 S.W. 852; 29 Tex.Jr. 975; Slaughter v. Qualls, 139 Tex. 340, 162 **S.W.2d** 671. No good purpose would be served in reviewing the evidence by which a prima facie case was made out that an installment of interest in the sum of $70 became due on said indebtedness on October 1, 1928, and same was not paid whereupon the holder of the indebtedness exercised her option to accelerate the maturity of the indebtedness. Suffice it to say that such prima facie case was made out by the recitals of the substitute trustee's deed. And it was provided by the eighth paragraph of the deed of trust that recitals made in the trustee's deed as to the nonpayment of the money secured by the deed of trust (as well as other enumerated facts) should establish the truth thereof prima facie. It is well settled that recitals occurring in the written refusal of the trustee to act and appointment of the substitute trustee, and the recitals in the substitute trustee's deed of the occurrence of the facts required to effectuate such substitute trustee's deed, when taken in connection with the provisions of the deed of trust providing that such recitals shall establish the truth thereof prima facie, do in fact make out a prima facie case of the regularity and validity of the sale, if not rebutted. Chandler v. Guaranty Mortgage Co., Tex.Civ.App., 89 **S.W.2d** 250; Whittaker v. Schlanger, Tex.Civ.App., 139 S.W. 177. We overrule appellants' first point.

4 Appellants' second point is to the effect that there was no evidence that the Oklahoma Farm Mortgage Company ever requested the original trustee to sell the

property in question. We understand by said point that appellants mean to contend that, even though the record may show and the original trustee's designation may show that said original trustee was duly requested by Mrs. Cummings, the owner of the indebtedness at the time of the foreclosure, and was likewise requested by the Oklahoma Farm Mortgage Company, to sell the property in question, such request must in law be treated as a nullity. This, because the Farm Mortgage Company was then in receivership, and its officers incapacitated to act in its name. That therefore ***459** such request, insofar as it was made by the Farm Mortgage Company, was in legal contemplation a nullity. Conceding this to be true, it follows that the action by the Farm Mortgage Company in making such request and appointing a substitute trustee had no legal effect. But when the Farm Mortgage Company assigned said indebtedness and deed of trust to Mrs. Cummings, it had the legal competence to do so.

As pointed out by appellee, the tenth paragraph of the deed of trust provides: 'All the terms, conditions, covenants, agreements, stipulations and obligations herein set forth and contained, shall be binding upon and inure to the benefit of the heirs, successors, executors, administrators, representatives and assigns of the several parties hereto.' Mrs. Cummings, as the assignee of the Farm Mortgage Company, and the owner of the indebtedness, by reason of the quoted provision, succeeded to the right originally possessed by said Farm Mortgage Company in connection with said indebtedness, to accelerate its maturity, and to request the original trustee to foreclose upon default, and upon his refusal or resignation, to appoint a substitute trustee. And under said quoted provision the Farm Mortgage Company parted with the power to appoint a substitute trustee. Said Mortgage Company's joinder with Mrs. Cummings was surplusage.

Enough has been said to indicate that appellants' second point is without merit, and it is overruled.

Appellants' third point is to the effect that the record here shows that the appointment of John W. Easterwood as substitute trustee was invalid. As heretofore indicated, appellants labored under the impression that in order to validly appoint a substitute trustee it was first necessary for the Farm Mortgage Company to request the original trustee to make the sale, and then upon his refusal, or resignation, to make the appointment. However, said Company had no interest in the indebtedness at the time of the default, and its joinder with Mrs. Cummings, as also hereinabove indicated, was surplusage. The third point is overruled.

5 6 Appellants' fourth point is to the effect that the proof adduced by appellees failed as a matter of law to establish title in themselves.

The assignment tendered by appellants under this point is unusual, at least in Texas. The point arises under the ninth paragraph of the deed of trust, the particular relevant portion of which we have supplied emphasis to. 'It is further agreed that in the event of the death of the trustee (his successor or substitute) or his refusal, failure or inability to fully execute the trust, or in the event of any vacancy in said office, the said party may by writing, *to be filed in the office of the County Clerk of the County* in which the premises hereby conveyed are situated, designate and appoint a successor, substitute or new trustee, *who upon filing such appointment shall succeed to the title and all the rights, duties*, privileges and liabilities of the original trustee.'

The fourth paragraph of the deed of trust provides for foreclosure sale after notices being posted in three public places in the county, etc., for at least three consecutive weeks prior to the day of sale. In other words, the notice provision conformed to the requirement of R.C.S. Art. 3810. The appointment of the substitute trustee though executed on May 7, 1929, was not filed for record with the County Clerk until May 21, 1929. The notice of sale was posted on May 11, 1929, and the sale was held on the 4th day of June 1929. The gist of appellants' said point is that the stipulated and statutory notice was not given as required by the deed of trust because the

appointment of substitute trustee was not filed in the office of the County Clerk until May 21, which was less than three weeks prior to the sale. From May 11th to June 4th was more than 21 days, but from May 21st to June 4th was less than 21 days. If the notice which was posted had no force and effect until the appointment had been filed in the office of the County Clerk, then obviously the statutory and stipulated notice was not given for the sale counting the time from and after the substitute trustee became vested with power to make sale by posting notice, by filing such appointment in the County Clerk's office.

Appellees cite Stone v. Watt, Tex.Civ.App., 81 **S.W.2d** 852, writ refused, as establishing the proposition that it is not necessary to the validity of a trustee's sale to file the resignation of the original trustee and appointment of substitute with the County Clerk. The cited authority is itself based upon Browne v. Investors' Syndicate, Tex.Civ.App., 60 **S.W.2d** 1047. Said authorities undoubtedly support the proposition ***460** that where there is no provision in the deed of trust making the power of the substitute trustee depend upon filing his appointment of record, his authority to act is not dependent upon his doing what is neither required by the deed of trust nor by statute. But said authorities do not go further. The power of a trustee in a deed of trust to sell out the property covered thereby must be strictly construed. Michael v. Crawford, supra.

We must sustain appellants' fourth point.

Appellants' fifth and sixth points, raising the questions of the admission of hearsay in evidence, and the action of the court withdrawing the case from the jury are, as presented, without merit and must be overruled.

7 There was evidence from which it might develop upon another trial that appellants had attorned to Mrs. Cummings, and remained in the premises as tenants, paying rent. If this is true, then appellees were mortgagees in possession. We therefore remand the cause for a new trial.

Reversed and remanded.

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347 S.W.2d 587 (1961)

FIRST BAPTIST CHURCH OF FORT WORTH, Petitioner,
v.
BAPTIST BIBLE SEMINARY et al., Respondents.

No. A-8158.

Supreme Court of Texas.

May 3, 1961.
Rehearing Denied July 19, 1961.

H. Joe Loe, Fannin & Fannin, Fort Worth, for petitioner.

Brewster, Pannell, Leeton & Dean, Fort Worth, for respondents.

GREENHILL, Justice.

The **First Baptist Church** of Fort Worth brought this suit against the **Seminary** and others. The question is which of the two has title to a tract of land known as the Sweet Dormitory tract. The **Seminary**, by ordinary warranty deed, conveyed the property to the **Church**. The **Seminary** contends that a resolution of its directors shows as a matter of law that the deed was not intended to convey title to the property but was in the nature of a mortgage to secure an indebtedness. The trial court
588 instructed the jury to return a verdict for the **Church**. That judgment was reversed *588 and the cause was remanded by the Court of Civil Appeals for a new trial on the ground, as we understand it, that an issue of fact existed as to whether the deed was intended to be a mortgage or an instrument in the nature of a mortgage given to secure a debt. 339 S.W.2d 710. We here reverse the judgment of the Court of Civil Appeals and affirm that of the trial court.

The suit, instituted by the **Church**, was in the statutory form of trespass to try title. The **Seminary** and others (herein referred to as the **Seminary**) filed only a plea of not guilty. Two other defendants, the Continental National Bank of Fort Worth and an insurance company, filed disclaimers.

Except for stipulations of the parties, all of the evidence which was introduced was documentary and was introduced by the **Church**. The **Seminary** introduced no evidence, and no witnesses took the stand. When the **Church** had finished introducing its documents, it rested. The **Seminary** thereupon announced that it also rested. Both made motions for instructed verdict, and that of the **Church** was granted. The reasons assigned in the motions will be set out later herein.

The land, and the only land, here in question is the South half of Lot No. 1 in Block 76 of the original town of Fort Worth. The tract is also called the Sweet Dormitory tract.

The proof which was introduced by the **Church** was as follows:

In 1941, the **Church** deeded the south half of Lot 1, Block 76, the Sweet Dormitory tract, to Miss Jane Hartwell. Miss Hartwell appears otherwise in the record as clerk or secretary of the **Church** and of its Board of Trustees. The consideration recited is $10. The **Church** owned other property nearby in downtown Fort Worth which is described as the south half of Lot 1 and all of Lots 2, 3, and 4, in Block 75.

In May, 1945, Jane Hartwell, for a recited consideration of $15,000, deeded the Sweet Dormitory tract to the **Seminary**.

It was stipulated that Jane Hartwell held fee simple title to the south half of Lot 1, Block 76, the Sweet Dormitory tract, in May of 1945 when she deeded it to the **Seminary**. It was also stipulated that the **Church** has fee simple title to the other property (the south half of Lot 1 and Lots 2, 3, and 4 in Block 75) subject to the claim of the **Seminary** that it has a 199-year lease on the **Church's** land in Block 75. The 199-year lease is not involved here.

On July 20, 1947, the Board of Directors of the **Seminary** met and passed a resolution substantially as follows: whereas the **Church** has, from the beginning, sponsored the work of the **Seminary** and has contributed to it, "and said [**Seminary**]

corporation is in reality a part of the activities and work of said **church**"; and whereas the **Seminary** is obligated in the amount of $150,000 for the completion of a building on the south half of Lot 1, Block 76, and is unable to finance the completion of the building, and the **Church** has agreed to assume the indebtedness and pay it off if the corporation will convey the property to the **church**; therefore "be it resolved that the President of this corporation, J. Frank Norris, do hereby convey said property of this [**Seminary**] corporation to the said **church** in consideration of the assumption and payment by said **church** of said indebtedness against said property." [J. Frank Norris appears as President of the **Seminary** Corporation and also as pastor of the **Church**.]

On July 24, 1947, the **Seminary** conveyed the Sweet Dormitory tract to the **Church** for a recited consideration of $10 and the assumption of the indebtedness. The **Church**, in a congregational meeting and by resolution of its board, accepted the deed and the assumption of the indebtedness. This resolution also recited that the **Seminary** had been sponsored by the **Church**,
589 that the **Seminary** owed $150.000 *589 for construction on the tract for which the **Seminary** could not pay, and that the **Church** was willing to accept a deed to the property and assume the payment of the debt. The resolution was attested by Jane Hartwell, Secretary of the **Church**.

Also on July 24, 1947, the **Church** in a congregational meeting, and the Board of the **Church** by resolution, authorized J. Frank Norris, its pastor, to borrow from the Continental National Bank of Fort Worth the sum of $250,000 "for the purpose of paying off the existing indebtedness on the **church** property and to pay off the indebtedness against the property acquired from **Baptist Bible Seminary**. * * *" The loan was to be secured by a deed of trust from the **Church** on the Sweet Dormitory tract (the south half of Lot 1, Block 76) and also on the south half of Lot 1 and all of Lots 2, 3, and 4, in Block 75 in Fort Worth. On July 30, 1947, the **Church** executed its note for $242,000 to the bank and executed a deed of trust on *all* the property mentioned above. The note and lien was assigned by the bank to an insurance company in 1948. In that transaction, the **Church** executed a new note to the insurance company for $250,000; and the **Church** warranted that it was the owner of all the property. The **Seminary** was not obligated in any way in the note or mentioned in the deed of trust. At this time, the insurance company also took a chattel mortgage on **Church** property to secure the note.

In 1949, the **Church** borrowed from the insurance company an additional $27,168.33 which it combined with its old note to make a new balance of $266,000. Again all of the property above mentioned was mortgaged by the **Church**, and a new deed of trust and chattel mortgage were executed by it.

On May 11, 1949, the **Church** conveyed the Sweet Dormitory tract back to the **Seminary**. The consideration recited was $10 and other good and valuable consideration. The **Seminary** did not assume the indebtedness on the property, but took it "subject to any existing indebtedness against the same." No resolution supports the granting or acceptance of this conveyance.

Thereafter the **Seminary** deeded the Sweet Dormitory property back to the **Church**. This deed and the resolution of the **Seminary** supporting it are the crux of this lawsuit. The substance of the resolution of the Board of the **Seminary**, dated August 2, 1950, reads:

> "Whereas, the **Seminary** is desirous of obtaining additional dormitory space to house and take care of students who are attending the **seminary**, and the **seminary** has a lease from The **First Baptist Church** of Fort Worth of a portion of the **Church** property situated on Blk. 75, of the City of Fort Worth, and it is planned to add a floor to a portion of said building on 4th and Throckmorton streets, and to make certain changes in other portions of the building so that the said added floor and the other portions of such building may be divided into dormitory rooms to house students attending the **Seminary** and it is necessary to borrow $60,000.00 for the purpose of making such changes and improvements and that the **Seminary** is unable to borrow such sum and amount without the aid of the **First Baptist Church** of Forth Worth and in order to secure such loan, it is necessary that the **Seminary** join with the **Church** in making said loan by deeding to the **Church** the dormitory building being a part of Block 76 of the City of Fort Worth, South ½ of Lot One (1), Block 76 (76), of the original town of Fort Worth, in Tarrant County, Texas, and the dormitory building situated on West Second Street [known as the Neely Apartments, which are not involved in this lawsuit] * * * [here follows a description of the Neely tract, omitted
> 590 here] so that the **Church** may add such property to the property of the **Church** *590 in making a loan sufficient to furnish said $60,000.00 to make said improvements.
>
> "Now Therefore Be It Resolved that the **Baptist Bible Seminary** acting through its trustees is authorized and directed to deed to the **First Baptist Church** of Fort Worth the said dormitory building located in Block 76 and

> the said dormitory building located on West Second Street so that the **Church** may use said property together with the **church** property in making said loan and providing said funds to be used in said construction work."

It is noted that the $60,000 addition was to be on property of the **Church** in Block 75 on which the dormitory claims a 199-year lease and not on the building on the Sweet Dormitory tract.

Almost six months later, on January 30, 1951, the **Seminary** executed a general warranty deed of the Sweet Dormitory tract to the **Church**. The deed is brief and in ordinary form. The consideration recited is "$10 and other good and valuable consideration." The deed does not refer to a resolution, an indebtedness, a mortgage, or anything else. It is just a plain general warranty deed.

On May 16, 1951, the board of the **Church** authorized J. Frank Norris to borrow $54,353.44 which was combined with the balance on the **Church's** old note, making a new balance of $250,000. Accordingly on that date, the **Church** executed its note for $250,000 to the insurance company. The note recited that it was to renew the old note and for additional advances. The **Church** executed a new chattel mortgage and a new deed of trust on its property in Block 75 and on the Sweet Dormitory tract. The **Church** warranted that it was the fee simple owner of all the property. The **Seminary** was not obligated in the note and is not mentioned in the deed of trust.

After the introduction of these instruments, the parties rested.

The **Church** filed a motion for instructed verdict because "the only evidence offered in this case consists of written instruments which are part of the chain of title to The **First Baptist Church** beginning with Jane Hartwell, the admitted common source," and there is no issue of fact. This was granted.

The **Seminary** filed a motion for instructed verdict based on these grounds:

1. The conveyance of the Sweet Dormitory tract to the **Church** on January 30, 1951, was "for the sole purpose to enable the **Church** to use such property as security for a loan" and therefore the title did not pass to the **Church**.

2. The undisputed evidence of the above is the resolution of the Directors of the **Seminary** dated August 2, 1950. The motion of the **Seminary** was refused. Judgment was for the **Church** based on the instructed verdict.

In the Court of Civil Appeals, the **Seminary**, as appellant, had only two points. They both had the same preamble. In substance, they were: since the conveyance from the **Seminary** to the **Church** was given, under the undisputed evidence, for the purpose of securing the payment of a debt, the trial court erred: (1) in rendering judgment for the **Church**, and (2) in failing to render judgment in favor of the **Seminary** that the **Church** take nothing.

Under the record made in the trial court, we think that court correctly instructed a verdict for the **Church**.

For an instrument to be a mortgage, title does not pass from the grantor to the grantee. The grantee gets only a lien. Under the Texas law, if the title passes, the instrument is not a mortgage. Humble Oil and Refining Co. v. Atwood, 1952, 150 Tex. 617, 244
591 S.W.2d 637. We *591 think that as a matter of law, under the record before us, it was the intention of the parties that title to the Sweet Dormitory tract pass to the **Church**. This assumes that the resolution of August 2, 1950, is binding upon the **Church** and is to be read in connection with the deed.

We think that the wording in the resolution explained why the deed was being executed. Words in a deed showing the purpose of the grant and the use to which the property is to be put do not change the effect of the conveyance or limit the grant. Texas Electric Ry. Co. v. Neale, 1952, 151 Tex. 526, 252 S.W.2d 451.

As we understand the record, the evidence showed that the **Seminary** owned or claimed a 199-year lease on the **Church's** property; that it wanted dormitory space added on one of the **Church's** buildings, on which it had the long-term lease, to be used in connection with the **Seminary**; that it was willing to convey its heavily encumbered property to the **Church** to get the **Church** to borrow the money which the **Seminary** could not borrow in order to make the improvements on the leased property. The **Seminary** had owed $150,000 on its tract which it had been unable to pay, and the **Church** had taken the property and assumed all the debt in 1947. The **Church** borrowed the money to pay the debt. Then the **Church** had reconveyed the dormitory tract to the **Seminary**. But the **Seminary** did not assume the debt; it took the property subject to the indebtedness. When again the **Seminary** desired improvements, it was willing for the **Church** to have the property and the debt. So it

reconveyed the property. We think, at least, it must have intended for the title to the property to pass to the **Church** so that the **Church**, with the full title, could borrow money on it. It did so.

Moreover, for an instrument to be a mortgage, there must be a debt. McMurry v. Mercer, Tex.Civ.App., 73 S.W.2d 1087 (writ refused, 1934). There is no evidence that the **Seminary** is obligated to anyone as a result of the particular transaction in question. The lender bank looked squarely to the **Church** which warranted that it owned the property in fee simple. Ordinarily a mortgage is from the borrower to the lender. This Court has held, however, that it is permissible to show that the mortgagor is using his property as surety for the debt of another; i. e., to secure the debt of a third person. The **Seminary** relies heavily on such cases: Wilbanks v. Wilbanks, 1960, Tex., 330 S.W.2d 607, and Austin v. Austin, 1944, 143 Tex. 29, 182 S.W.2d 355. We regard these cases as distinguishable. In Wilbanks, a brother got in trouble and needed money. The father called on a second son for financial help. The second son put up the money and got a deed from his father to property worth many times more than the debt owed by the **first** brother and which the second son paid. There was a good deal of evidence, written and oral, that the father gave the second son a deed to secure the loan made by the second son to the **first** brother. It was held that an issue of fact was raised as to whether the father's deed was a mortgage. It was a suretyship arrangement.

Similarly, in the Austin case, the father was indebted to J. S. Shivers. Shivers demanded payment and suggested that the father "deed" his homestead to a son in return for the son's promissory notes which could be assigned to and held by Shivers as security. This was done, and the father and his wife ultimately paid the debt to Shivers who returned the notes. There was a good deal of other evidence that the son did not claim the land as his own and that the parents did. After the death of the parents, in a suit among the children for partition, the son claimed the land as his own under the deed. It was held that a fact
592 issue was raised that the deed from the father to the son was a mortgage. But it was to secure a debt which the father *592 owed Shivers. In none of these cases has the conveyance been to the *borrower.*

The **Seminary** also relies upon Bell v. Ramirez, Tex.Civ.App., 299 S.W. 655 (writ refused, 1927). There, Ramirez ran afoul of the liquor laws and employed Bell as attorney to represent him. Bell said his fee would be $3,000. Ramirez and wife, uneducated people, signed an instrument represented to them to be a mortgage to secure the payment of the fee but which was a deed to their homestead. Bell promptly thereafter borrowed money on the place and represented in the loan application that the property was worth $16,750. It was worth a good deal more than $3,000. There were other circumstances not reflecting credit on Bell. It was held that the burden was on Bell, as an attorney, to prove that there was no fraud and that he had dealt fairly with the Ramirezes, and that a fact issue was raised as to whether the deed was intended to be a mortgage. Again, there was a debt owed from Ramirez to Bell to support a mortgage.

As has been indicated, we think the title to the property did pass to the **Church**. Neither the deed nor the resolution contained any promise, express or implied, to reconvey the property. The **Seminary** had no pleadings invoking the court's equitable powers. This Court has held that a litigant could not try issues involving an equitable right (as distinguished from an equitable title) under the statutory trespass to try title pleading. Ayres v. Duprey, 27 Tex. 593, 594, at page 604; Moore v. Snowball, 98 Tex. 16, 81 S.W. 5, 66 L.R.A. 745; 41-A Tex.Jur. 630, Trespass to Try Title § 103. In the **first** suit mentioned in Moore v. Snowball, the usual allegations by a plaintiff in trespass to try title and a plea of not guilty by the defendant were involved. That is the case here. See also Wheeler v. Haralson, 1937, 128 Tex. 429, 99 S.W.2d 885.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

744 S.W.2d 6 (1987)

FLAG-REDFERN OIL COMPANY et al., Petitioners,

v.

HUMBLE EXPLORATION COMPANY, INC., et al., Respondents.

No. C-6014.

Supreme Court of Texas.

December 9, 1987.
Rehearing Denied February 24, 1988.

7 *7 Michael J. Kaine, George J. Carson, Benjamin F. Youngblood, III, Morrison, Kaine & Carson, San Antonio, for petitioners.

Anne T. Moody, Randall C. Grasso, Robertson & Miller, Dallas, for respondents.

OPINION

CAMPBELL, Justice.

Humble Exploration Company brought this declaratory judgment suit against **Flag**-**Redfern Oil** Company to determine ownership of an undivided one-half mineral interest. The trial court granted summary judgment declaring **Humble** the fee simple owner of the mineral interest. The court of appeals, in affirming the trial court judgment, held that a deed from a debtor to a creditor cut off the rights of **Flag**-**Redfern**, an intervening purchaser. We reverse the judgment of the court of appeals.

To secure payment of an $840 promissory note, Ped and Emma Scott, on January 12, 1922, executed a deed of trust to J.L. Kocurek. On January 15, 1931, eight and one-half months before the final payment of the note was due, the Scotts conveyed to **Flag**-**Redfern Oil** Company's predecessors in title an undivided one-half interest in the minerals on the same property. On November 29, 1932, the Scotts, with their note past due, conveyed the property and all of the minerals to Kocurek for the stated consideration of satisfaction of the original debt. The deed did not mention the previous conveyance. After various conveyances, this property was eventually conveyed to **Humble**.

8 *8 Our question is whether the conveyance from Scott to Kocurek extinguished the one-half mineral interest previously conveyed by Scott to **Flag**-**Redfern**. **Humble** argues the deed from the Scotts to Kocurek was a "deed in lieu of foreclosure", as was found by the court of appeals, and this conveyance cut off the rights of the intervening purchaser, **Flag**-**Redfern**. **Humble** cites *North Texas Building & Loan Association v. Overton,* 126 Texas 104, 86 S.W. 2d 738 (1935), and *Karcher v. Bousquet,* 672 S.W.2d 289 (Tex.Civ.App.—Tyler 1984, no writ.) for the proposition that a deed in lieu of foreclosure cuts off the rights of intervening purchasers and junior lien holders. **Humble** also insists this principle is applicable in all situations, whether the potential foreclosure would be based on a vendor's lien or other lien.

Flag-**Redfern** contends that a conveyance by a mortgagor to a mortgagee, after default of a note secured by a deed of trust, does not operate as a foreclosure and does not cut off the rights of an intervening purchaser of a fee simple interest. **Flag**-**Redfern** grounds its arguments in the distinction between a vendee and a mortgagor. A mortgagor, as the owner of the legal estate, can convey legal title of mortgaged property. A foreclosure proceeding is required to divest the rights of the owner of a legal interest. *Bradford v. Knowles,* 25 S.W. 1117 (Tex.1894). On the other hand, if a vendor's lien encumbers the land, legal title does not pass to the vendee. A vendee owns the equitable interest along with a contract for the purchase of land. Therefore, if the vendee sells all or part of the interest, the conveyance is actually a transfer of an equitable interest susceptible to recission. *Texas Osage **Co**-Op Royalty Pool v. Benz,* 93 S.W. 2d 196, 198 (Tex.Civ.App.—Texarkana 1935, writ dism'd.).

The court of appeals erred in labeling the Scott to Kocurek deed a "deed in lieu of foreclosure." This deed is a warranty deed with the stated consideration being the cancellation and delivery of notes held by Kocurek. There is no such deed as a deed in lieu of foreclosure. A deed given in satisfaction of a debt may serve as a convenient, efficient transfer of title upon default of a debt. *North Texas Building & Loan Assoc. v. Overton,* 126 Texas 104, 86 S.W.2d 738 (1935).

The Scott to Kocurek deed of trust covered the property owned by Scott when the deed of trust was executed, *Dickason v. Matthews,* 335 S.W.2d 658 (Tex.Civ.App.— Amarillo 1960, writ ref'd n.r.e.). Thus the entire surface and mineral estate was susceptible to foreclosure by Kocurek. The Scotts, however, as owners of the legal estate, conveyed to **Flag**-**Redfern** an undivided one-half of the minerals. The Scotts could not convey to Kocurek a legal interest which they no longer owned. The legal estate conveyed by the Scotts to Kocurek was less than that to which Kocurek would have been entitled under foreclosure proceedings.

When a mortgagor executes a deed of trust the legal and equitable estates in the property are severed. The mortgagor retains the legal title and the mortgagee holds the equitable title. Texas has always followed this lien theory of mortgages. Under this theory, the mortgagee is not the owner of the property and is not entitled to its possession, rentals or profits. *Taylor v. Brennan,* 621 S.W.2d 592, 593 (Tex. 1981). Another type severance occurs when the mineral estate is severed from the surface estate. This is accomplished through various means such as a grant of the minerals, a grant of the surface and a reservation or exception of the minerals, or by an **oil** and gas and mineral lease. *Humphreys-Mexia **Co**. v. Gammon,* 254 S.W. 296 (Tex.1923).

In our case, several estates **co**-exist. First, the legal and equitable estates were severed by the mortgage. Kocurek held the entire equitable estate. Then the Scotts severed an undivided one-half of the mineral estate from the surface estate. At this point, the Scotts owned in fee simple the legal estate in the surface and the legal estate in an undivided one-half of the minerals.
9 **Flag**-**Redfern** owned in fee simple the legal estate in an undivided one-half of the minerals. Kocurek owned the entire *9 equitable estate. When the Scotts conveyed the property to Kocurek, they did not own the legal title to one-half mineral interest. They had conveyed that estate to **Flag**-**Redfern**.

The legal and equitable estates in the one-half mineral estate did not merge by the deed from the Scotts to Kocurek. For the doctrine of merger to apply, the following elements must be present:

1. There must be a greater and lesser estate.

2. Both estates must unite in the same owner.

3. Both estates must be owned in the same right.

4. There must not be an intervening estate.

5. Merger must not be contrary to the intention of the owner of the two estates.

6. Merger must not be disadvantageous to the owner of the two estates.

McElroy, *Adverse Possession of Mineral Estates,* 11 Baylor L.Rev. 253. An intervening estate, as in the conveyance to **Flag**-**Redfern**, stops a merger from occurring. In *Silliman v. Gammage,* 55 Tex. 365 (1881), the Supreme Court held that an intervening purchaser at an execution sale possessed superior title against the mortgagee, who had taken a deed from the mortgagor in satisfaction of the debt. The court held that the intervening purchaser's superior title and right of possession was subject to the equitable interest still owned by the mortgagee. As applied to this case, **Flag**-**Redfern's** one-half mineral interest is superior to the interest owned by Kocurek or his successors, but subject to the equitable interest held under the deed of trust.

Humble relies on a line of cases holding that a voluntary reconveyance operates as a foreclosure for the mortgage holder and for both junior creditors and intervening purchasers. *Jones v. Ford,* 583 S.W.2d 821 (Tex.Civ.App.—El Paso 1979, writ ref'd n.r.e.), *North Texas Building and Loan Assoc. v. Overton,* 86 S.W. 2d 738 (Tex.1935), *Yett v. Houston Farms Development **Co**.,* 41 S.W.2d 305 (Tex.Civ. App.—Galveston 1931 writ ref'd). The distinction between these cases and the one before us is that Kocurek held a deed of trust mortgage, not a vendor's lien mortgage. Nor was **Flag**-**Redfern** an intervening creditor. An intervening creditor receives a junior lien, an equitable interest which is subordinate to the mortgage. An intervening purchaser of a legal interest is granted legal title which is superior to the mortgage although subject to the mortgagee's rights. A deed conveying land but coupled with a lien for the unpaid purchase money equates an executory contract that will ripen into a title in the purchaser when the obligation to pay the purchase money is met. *Whiteside v. Bell,* 347 S.W.2d 568 (Tex. 1961). Default can lead to recission of the contract. This can be accomplished through foreclosure, or privately when the vendee executes a deed reconveying the property. But this is not the case here. Kocurek held only a mortgage. The deed of trust did not vest him with title to the property. The Scotts, who held legal title, conveyed title to **Flag**-**Redfern** of one-half of the mineral estate, although subject to that deed of trust lien.

It would be unfair to allow parties to make private conveyances, although judicially efficient, to the detriment of unknowing parties by foreclosing their right to bid at a trustee sale; to redeem their interests; to insist on the marshalling of assets; or to set forth the affirmative defense of merger or extinguishment of the debt. An intervening purchaser does not have to exercise these rights, or waive them, until formal foreclosure proceedings are instituted and the interest owner is made a party or given notice. *Bradford v. Knowles,* 25 S.W. 1117 (Tex.1894); *Paddock v. Williamson,* 9 S.W.2d 452, 454 (Tex.Civ.App.— Beaumont 1928, writ ref'd.). Notice is an integral part of judicial foreclosure and foreclosure under a deed of trust. *See* Texas Prop.Code § 51.002 et seq. and Tex. R.Civ.P. 647. Notice provides interest holders, subject to a mortgage, opportunity to protect their interests.

10 *10 The deed given by Scott to Kocurek in satisfaction of a mortgage debt did not cut off **Flag-Redfern's** legal title to the one-half mineral interest rights. We reverse the judgment of the court of appeals and render judgment that **Humble Exploration** Company, Inc. et al. take nothing by its motion for summary judgment. This cause is remanded to the trial court for further proceedings consistent with this opinion.

343 S.W.2d 527 (1961)

Anna B. FORD, Appellant,

v.

Clyde B. EMERICH et al., Appellees.

No. 13606.

Court of Civil Appeals of Texas, Houston.

February 2, 1961.
Rehearing Denied March 2, 1961.

529 *529 Gerald S. Gordon, Houston, Milton Schwartz, Houston, of counsel, for appellant.

Wm. F. Jackson, J. C. McEvoy, Hempstead, for appellees.

WERLEIN, Justice.

This is a trespass-to-try title suit. The original parties-plaintiff were dismissed in the court below prior to trial, and the case proceeded to trial on the cross-action of Clyde B. **Emerich** et al. (appellees), against cross-defendant, Anna B. **Ford** (appellant), individually and as sole devisee and independent executrix of the estate of Julia May Anderson, deceased, and various other parties and their unknown heirs. The nonappearing cross-defendants cited by publication were represented by E. R. Stonecipher, attorney ad litem. Only Anna B. **Ford** individually appeals from the judgment of the court, based upon the jury verdict, decreeing that appellees recover from the cross-defendants the title and possession of the tract sued for, a part of the R. O. Lusk Survey, Abstract 212, consisting of 80 acres in Waller County, Texas, and 301 acres in Grimes County, Texas, being the land described in deed dated September 10, 1929 from Percy Allam et al. to T. L. McNeill, subject to a 1/16 of 1/8 of the gravel and mineral rights reserved in deed dated June 19, 1931 from Maurice Horowitz and wife to Mathilda Schoenfeld.

Appellant first complains that the trial court erred in denying appellant's motion for an instructed verdict based upon appellees' failure to prove record title. T. L. McNeill is the agreed common source of title immediately prior to January 3, 1930. Appellant claims record title under that certain trustee's deed from H. C. Sisco, substitute trustee. Appellees assert that such deed is void and that they have record title through a regular chain of title from the common source. In order to pass upon the question, it is necessary to consider the evidence relating thereto.

On March 30, 1927, T. S. Masterson conveyed to appellant and her husband, Jack H. **Ford**, certain property in Houston. The unpaid purchase money evidenced by twelve notes aggregating the sum of $48,000 executed and delivered by the Fords to Masterson were additionally secured by a deed of trust of the same date from the Fords to Jas. L. Shepherd, Trustee for Masterson. On January 7, 1930, the Fords were delinquent in the payment of $47,000 due on said notes, and on such date a deed of trust was given by the Fords, joined by Leroy J. Boutte, their son-in-law, covering the 381 acres involved in this suit and also a 193 acre tract not involved herein, both such tracts being then owned by said Leroy J. Boutte and wife. The January 7, 1930 deed of trust was given as additional and collateral security for the payment of the balance of the indebtedness in the sum of $47,000 due on the 1927 notes owed by the Fords, all of which had been declared and become due at that time. Thereafter, on March 4, 1930, Shepherd as trustee sold the Houston property under the 1927 deed of trust and it was bought in by Masterson for $37,000 which was credited on the indebtedness evidenced by said notes.

530 *530 After the 1930 foreclosure and sale under the 1927 deed of trust, in an effort to obtain possession of the Houston property from the Fords who were not inclined to move therefrom, a deal was worked out in August of 1930 under which the Fords agreed to move and vacate the property and give Masterson a quitclaim deed thereto and bill of sale for whatever furniture was left there, and in consideration therefor Masterson agreed to release the balance due on said notes. This agreement was carried out on the part of the Fords by execution of a quitclaim and bill of sale to Masterson, and by Masterson executing a release of the 1930 deed of trust and lien on the 381 acres involved in this suit and said 193 acres, and also an instrument cancelling the balance of the indebtedness. Both the release and instrument cancelling the indebtedness were delivered to Mr. and Mrs. **Ford** personally by Mr. Shepherd as Masterson's agent on or about September 18, 1930.

Prior to the execution and delivery of the 1930 release, Boutte and wife by general warranty deed dated June 5, 1930 conveyed the property in question to appellant's son-in-law, Maurice Horowitz, and wife, Helen Horowitz. By general warranty deed dated June 19, 1931, after the execution and delivery of said release and cancellation instrument, Horowitz and wife conveyed the property subject to said mineral reservation, to Mathilda Schoenfeld as her separate property; no lien was reflected by such deed.

Despite the fact that appellant received the 1930 release and instrument cancelling the indebtedness, she apparently induced Julia May Anderson to procure an assignment from Masterson on July 3, 1939 of what had been the unpaid balance of the indebtedness after sale under the 1927 deed of trust although at such time such indebtedness did not exist and had not existed for nearly nine years, since it and the lien securing it had been unconditionally cancelled and released. In her deposition Mrs. **Ford**, herself, testified that the entire indebtedness had been paid off by giving him (Masterson) the house.

The 1930 release given appellant was not filed in Grimes County until January 15, 1940, which was after appellant and Julia May Anderson had procured the assignment from Masterson. On April 15, 1940, nearly 10 years after Boutte and wife had conveyed the property by general warranty deed to Horowitz and wife, the Bouttes executed an ex parte affidavit in which they made several erroneous statements such as that they had signed the Masterson notes and that the $37,000 for which the Harris County property sold at trustee's sale was credited on the *judgment,* and that such property was sold about September, 1930, whereas the sale was March 4, 1930. Actually, the release and cancellation were executed and delivered to appellant in September, 1930. They then stated in their affidavit that they and Jack H. **Ford** and wife, Anna B. **Ford** (appellant and mother of Mrs. Boutte), the makers of the notes acknowledged in writing the validity of $10,000 balance due on the notes and promised to pay the same to Masterson or order on or before the due date of the last two of the Masterson notes. It is significant that this affidavit was executed after Masterson had assigned the nonexisting balance of the indebtedness to Julia May Anderson, mother of the wife of appellant's son, William **Ford**. Moreover, the Bouttes never signed any notes whatever and had conveyed the property, as stated, nearly ten years before execution of the affidavit.

The substitute trustee's deed, under which appellant claims, bears date March 9, 1942 and was filed for record March 25, 1942. Mathilda Schoenfeld conveyed the property to appellees, Clyde B. **Emerich** and wife, by deed dated April, 1952. Appellant claims as sole devisee under the will of Julia May Anderson, which will she caused to be admitted to probate in 1955 in Bexar County. No inventory was filed in such estate, and appellant testified no inventory was necessary because the testatrix did not own anything.

531 *531 Mathilda Schoenfeld, under whom appellees deraign title, was not a party to the 1930 deed of trust, nor was she ever indebted to Masterson or anyone else in connection with the lands involved in this law suit. She did not assume or take subject to any indebtedness, since none existed at the time she purchased the property. The 1930 deed of trust under which appellant claims title was given as collateral security for a debt owed by appellant and her husband, and not owed by the Bouttes who owned the property in question at such time. The substitute trustee's deed covers only the 301 acres of land in Grimes County, and does not purport to cover the 80 acres in Waller County.

The jury found in answer to special issues, (1) the lien created by the deed of trust dated January 7, 1930, was released by T. S. Masterson in September of 1930, and (2) such instrument dated September 10, 1930, signed by T. S. Masterson, was actually delivered to Jack H. **Ford** and wife, Anna B. **Ford**, prior to July 3, 1939 (the date of the assignment from Masterson to Julia May Anderson). Such findings are not attacked by appellant in this Court.

We have concluded that the trustee's sale under the deed of trust of January 7, 1930, was void, and not merely voidable, and, therefore, no title passed thereunder. The rule has long been established in this State that where a deed is absolutely void a suit at law in trespass-to-try title may be maintained to recover the land without setting the deed aside, and the statutes of limitation governing actions for the recovery of land apply. The fact that the trustee's deed may appear regular on its face and it was necessary for appellees to go behind the deed and show by parol testimony the invalidity of the sale is immaterial. Slaughter v. Qualls, 1942, 139 Tex. 340, 162 S.W.2d 671.

A trustee has no power to sell a debtor's property, except such as may be found in the deed of trust. The sale is authorized only upon default by the debtor. In the instant case the cancellation of the balance of the indebtedness and release of the lien on the 381 acres terminated the power of the trustee to sell the same, so that the subsequent sale made by the substitute trustee was void and conferred no title upon Julia May Anderson. Schneider v. Sellers, 98 Tex. 380, 84 S.W. 417. In such case the deed is subject to collateral attack. Smith v. Allbright, Tex.Civ.App., 279 S.W. 852, reversed on other grounds, Tex.Com.App., 5 S.W.2d

970.

In Bowman v. Oakley, Tex.Civ. App., 212 S.W. 549, 552, writ ref., cited with approval in Slaughter v. Qualls, supra, it was held that where the appellants had made no inquiry as to whether the substitute trustee had been empowered to make the sale by having been requested so to do, they assumed at their peril that the trustee had such power. Since the trustee did not have such power, the court held the sale void. The court stated the general rule is stated in 39 Cyc. 1892, "* * * A purchaser under a power purchases at his peril, and if there is no subsisting power or authority to sell, no title is acquired by the purchaser."

Appellant contends that the ex parte affidavit signed by Leroy J. Boutte and wife, Mabel Boutte, on April 15, 1940 is a renewal and extension by the Fords and Bouttes of said balance of the indebtedness and lien securing the same, and that since at the time the Horowitzes sold the property to Mrs. Schoenfeld such balance of indebtedness, though then past due and payable, was not barred by limitation, Mrs. Schoenfeld purchased the property subject to such balance of indebtedness which could be renewed and extended without her joining in or consenting to the extension. They rely upon the case of Texas Land & Mortgage Co. v. Cohen, Tex.Com.App. 1942, 138 Tex. 464, 159 S.W.2d 859, 861. That case is distinguishable from the instant case in
532 several particulars. In the *532 first place, the extension agreement entered into in the Cohen case was executed prior to the 1931 amendment of Article 5520, V.A.T.S. Acts 1931, 42nd Leg., p. 230, ch. 136, § 2. The amendment provides:

> "The lien created by deeds of trust or other mortgages may be extended by an agreement in writing by the *party or parties primarily liable for the payment of such indebtedness,* and filed and recorded in the manner provided for the acknowledgment and record of conveyance of real estate." (Emphasis supplied.)

Prior to this amendment the extension agreement could be executed "by the party or parties obligated to pay such indebtedness *as extended* * * *" (Emphasis supplied.)

The ex parte affidavit in question, if it could possibly be construed as an extension agreement, was not signed by the Fords who were the parties primarily liable for the payment of the indebtedness. Moreover, Article 5520, V.A.T.S., has no application whatever to the present case in which appellant must rely upon a renewal and extension of an indebtedness which had been paid in full and unconditionally released, and was not in existence at the time the property was purchased by Mrs. Schoenfeld. Such Article has to do only with lien debts, which though barred by limitation still exist, and which may be extended, except as to bona fide third persons dealing with the property without actual notice thereof. It surely does not authorize or permit as against a third party with no notice thereof and not a party thereto the resurrection of a debt extinct and nonexistent at the time the property was acquired by such third party for a valuable consideration.

Furthermore, it is our view that the ex parte affidavit cannot be construed as a renewal and extension agreement, not only because it was not signed by the Fords, but also because it merely refers to some other writing which was never produced or introduced in evidence, and does not in itself contain any promise to pay the alleged indebtedness. It would be utterly ineffective to extend an existing indebtedness, much less an indebtedness and lien that had been extinguished. As to Mrs. Schoenfeld, it is merely an ex parte hearsay statement which was inadmissible in evidence. It will be noted also that the affidavit does not state when the Fords and Bouttes are supposed to have acknowledged in writing the validity of the $10,000 balance due and promised to pay the same. If they ever did execute such writing, which is not in evidence, it could have been prior to the execution and delivery of the cancellation instrument and release.

Under the authorities hereinabove cited, the trustee's deed to Julia May Anderson is void so that she could not be a bona fide purchaser. See also Stubbs v. Lowrey's Heirs, Tex.Civ.App., 253 S.W.2d 312, writ ref., n. r. e., in which it was held that where a debt is barred by limitation, the authority of the trustee to sell expires and a sale made by him is void. A fortiori would a sale made by a trustee after the entire indebtedness has been paid and released be void. Mrs. Anderson was not even a bona fide purchaser of the indebtedness since at the time of the assignment to her on July 3, 1939, the notes had all been declared due more than nine years previously and were barred by the four year statute of limitation. Vernon's Ann.Civ.St. art. 5527. She had notice thereof through the 1930 deed of trust under which, according to appellant, she acquired title to the property, since such deed of trust recites that the notes had been declared and become due. Continental Nat. Bank of Fort Worth v. Conner, 1948, 147 Tex. 218, 214 S.W.2d 928; art. 5935, § 52, V.A.T.S.

Under no circumstances could appellant, devisee under Mrs. Anderson's will, be a bona fide purchaser. She knew that the
533 indebtedness had been satisfied in full and that the lien had been unconditionally released. She was a party to that transaction *533 and also a party to procuring the assignment from Masterson of an indebtedness that did not exist.

Appellant also asserts that cross-plaintiff's suit, which was not filed within ten years of the trustee's sale, was barred under Article 5523a. We do not agree. As stated in Campsey v. Jack County Oil & Gas Association, Tex.Civ.App., 328 S.W.2d 912, 916, writ ref., n. r. e.:

> "Article 5523a, as shown by the emergency clause, 41st Leg., Acts 1929, Chap. 181, P. 394, was for the purpose of establishing a period of limitation in which suits may be brought for the recovery of lands on `technical defects.'"

In the instant case suit was brought in trespass-to-try title to recover property allegedly sold by a substitute trustee long after the indebtedness and lien had been completely discharged and extinguished, so that the trustee had no power or authority to execute the trustee's deed. Such is not a "technical defect" as is barred by Article 5523a. See also 28 Tex.Jur., § 126, p. 290; Slaughter v. Qualls, supra. Moreover, appellant did not plead limitation under Article 5523a, and therefore may not now urge the same. Rule 789, Texas Rules of Civil Procedure; 28 Tex.Jur., p. 290, § 196.

We overrule appellant's contention that the trial court erred in denying her motion for new trial on the ground of jury misconduct in answering issues in support of a preconceived determination of the case.

Juror Haney testified there was discussion that if the jurors voted on the first issue in one way, then the other issues would have to be voted on to coincide with it; that more of the discussion was on the first issue and very little on the other issues; that he thought he knew the results of the answers to the issues; that practically all were discussed prior to voting on the first issue; and that there was some discussion as to how the ownership would be as to the outcome of the issues. He also testified that he wasn't actually taking into full consideration the result as to the outcome of answers to the issue; that his consideration was in answering the questions in the way "we thought they should be answered, as far as to say who got the land, I do not know either party"; that they discussed slightly the issue on limitation; that he answered each and every issue separately based on the evidence discussed; that in voting on each issue the jurors could vote any way they pleased; and that the answers reflected their verdict.

Jury foreman Wallingford testified that in answering the issues they talked and voted on each issue separately as they came to them, and that there was quite a bit of discussion on all the issues; that they were not unanimous at first on Issue No. 1; that after voting unanimously on Issue No. 1, they read Issue No. 2, and that there was more discussion on Issues 4 and 5 (the adverse possession issues) "than on any I ever was in a jury room on. We really discussed it"; that he knew who was going to get the land; and that the issues were all voted unanimously on and the answers reflected the jury verdict, and his.

We think the foregoing testimony amply supports the trial court's implied finding that there was no preconceived determination of the case or jury misconduct. There were only four very simple issues numbered 1, 2, 4 and 5. The fact that juror Wallingford thought he knew who was going to get the land, is of no significance. We think any individual of average intelligence after hearing the case tried and answering the issues, would have an idea as to who was going to get the land. There seems to be no reason why a juror should be expected to have less than average intelligence. The affidavit and testimony of Haney consist largely of generalizations, opinions and conclusions, without an iota of testimony of any agreement entered into by any of the jurors that they would vote on the other issues in a manner to coincide with their answer to Special Issue No. 1.

534 *534 As to whether any jury misconduct occurred, is a question of fact for the trial court. Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462. Rule 327, Texas Rules of Civil Procedure, casts the burden on the party asserting misconduct to establish the same and probable injury therefrom. City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259. Of course, the effect of proven misconduct is a question of law for the trial and appellate courts.

After a careful examination of the entire record in the case, we are of the opinion that appellant has failed to establish either jury misconduct or probable injury. The cases of Prudential Fire Ins. Co. v. United Gas Corporation, 1946, 145 Tex. 257, 199 S.W.2d 767; Bauguss v. Bauguss, Tex. Civ.App., 186 S.W.2d 384, writ ref., w. m., relied upon by appellant are distinguishable. They involve agreements between jurors in advance as to which party should prevail and then the answering of special issues in such way as to effectuate such agreement. See Lyons v. Cope, Tex.Civ.App., 217 S.W. 2d 116; Trousdale v. Texas & New Orleans Railroad Co., 1955, 154 Tex. 231, 276 S.W. 2d 242.

Appellant's Point No. 5 with respect to improper argument is overruled. There is nothing in the record setting out the argument complained of or any objection or exceptions thereto. Hence, there is nothing before this Court.

We have carefully read the statement of facts and record, and have concluded that there is no evidence which warranted the submission of Special Issue No. 4 involving adverse possession by appellees for a period of ten years or longer. It follows that the jury's finding that there was such adverse possession is so against the great weight and preponderance of the evidence as to be manifestly wrong. This conclusion, however, does not in any way affect our holding that appellees have established a good record title to the property in question.

Appellant asserts that the trial court erred in taxing against her the fee of the attorney ad litem and publication costs. The court in its decree, entered November 28, 1959, taxed against appellant all costs of suit accruing after May 16, 1959, the date the original plaintiffs were dismissed from the case. In her brief, appellant states that "The Trial Court taxed publication and attorney ad litem costs against the appellant, and subsequently overruled appellant's motion to retax the costs to the plaintiffs." Appellees in their brief in effect deny that publication costs were taxed against appellant. They state that all costs prior to May 16, 1959 have been paid by appellees, including costs of two citations by publication. There is nothing in the record to show that there were more than two citations by publication. Appellees do not deny, however, that the fee for the attorney ad litem was taxed against appellant. Under Rule 419, T.R.C.P., this Court may accept as correct appellant's statement with respect to the attorney ad litem fee since not challenged by appellees. While we do not find in the record any motion to retax costs, the court in overruling the motion for new trial stated that it also overruled the motion to retax costs. Appellant duly excepted.

It is our view that under the decision of our Supreme Court in Bruni v. Vidaurri, 140 Tex. 138, 166 S.W.2d 81, the fee decreed the attorney ad litem should be taxed against appellees who, as cross-plaintiffs, recovered the land in question.

Judgment of the trial court is accordingly reformed so as to adjudge that appellees have and recover of and from appellant, Anna B. **Ford**, all costs of suit accruing after May 16, 1959, with the exception of the $300 fee allowed the attorney ad litem, which fee is taxed against appellees. The judgment of the trial court, as reformed, is affirmed.

Reformed and affirmed.

957 F.2d 1268 (1992)

Maria Del Rosario C. FRAIRE, Individually and as Next Friend for Myra Fraire and Juan Antonio Fraire, Minor Children, and Josefa Esquivel Fraire, Plaintiffs-Appellants,

v.

CITY OF ARLINGTON and James W. Lowery, Jr., Defendants-Appellees.

No. 91-1597 Summary Calendar.

United States Court of Appeals, Fifth Circuit.

April 10, 1992.
Rehearing Denied May 7, 1992.

1269 *1269 Lawrence L. Mealer, Charles Montemayor, Dallas, Tex., for plaintiffs-appellants.

Gregory S. Norris, Arlington City Attorney's Office, Arlington, Tex., for City of Arlington.

Ernest E. Figari, Jr., Gary D. Eisenstat, Figari & Davenport, Dallas, Tex., for Lowery.

Before JONES, DUHÉ, and WIENER, Circuit Judges.

WIENER, Circuit Judge:

In this 42 U.S.C. § 1983 action, the Plaintiffs-Appellants, successors of the late Javier Fraire (Fraire), appeal from the decision of the district court dismissing their claims against Defendants-Appellees, police officer James W. Lowery, Jr. (Lowery) and the City of Arlington, Texas (Arlington), for Lowery's alleged use of unconstitutionally excessive force in the shooting death of Fraire. Agreeing with the district court that Lowery was qualifiedly immune, and that the Plaintiffs failed to plead their claims against Arlington with sufficient particularity or to present summary judgment evidence to place material facts in issue, we affirm.

I.

FACTS AND PROCEEDINGS

1270 Almost all excessive force cases are very fact intensive; this one is certainly no exception. *1270 And, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact. Our decision today is not dependent on the resolution of those discrepancies. We do, however, acknowledge our duty, in the context of summary judgment, to view the facts in the light most favorable to the nonmovants — here the Plaintiffs. Moreover, when there are discrepancies between versions of the facts, we shall note them.

A. Operable Facts

Early on a Sunday afternoon, Lowery, a warrants officer for the Arlington police department, was driving on a major road in that city. He was driving an unmarked police car and was dressed in plain clothes.

In front of Lowery, a pickup truck turned onto the road from the parking lot of a convenience store on the east side of the street. As the pickup entered the thoroughfare, it made an extremely wide right turn, swinging into the inside lane and nearly colliding with oncoming traffic. Someone (not Lowery) honked at the pickup, in response to which the driver stuck his hand out of the window and made a "familiar gesture." The truck was traveling in the same direction as Lowery, who noticed that each of its two occupants, both male, held an open can of beer in his hand.[1] The driver was Fraire and the passenger was Jose Rodriguez. Lowery followed the pickup for about one-half mile. He observed that Fraire failed to maintain a single lane of traffic, often swerving into other lanes. Lowery called his dispatcher, provided a description of the truck and its license number, and requested that a marked patrol car stop the truck.

Just as Lowery completed his first radio request for assistance, Fraire made a sudden right turn off the main road onto a residential street, then turned immediately into the driveway of the first residence and stopped without any prompting from Lowery. Following Fraire onto the side street, Lowery stopped across the street. As Rodriguez told the police in an interview he gave shortly after the incident, Fraire stopped in the driveway in an attempt to trick Lowery into believing that Fraire was going into the garage of the house where they had stopped. Lowery advised his dispatcher of the location where he and the suspects had stopped and that he intended to speak with the occupants of the truck.

Lowery states that at that point he removed his badge from his belt, placed it face open in his hand, and showed it to Fraire and Rodriguez. He also orally identified himself as a police officer and then approached the truck. As Lowery reached the passenger's side of the truck, he re-identified himself as a police officer. Lowery saw that Fraire had an open can of beer, which he then put on the floor. Lowery identified himself for a third time as a police officer and told Fraire to put the truck in park and turn off the ignition. Fraire then stated, "I am sorry, I didn't mean to do it. It won't happen again, I promise." Lowery repeated his request for Fraire to park the truck and turn off the ignition. Instead, Fraire put the truck in reverse and backed it out of the driveway. Rodriguez denied that this conversation ever took place.[2]

Fraire sped down the side street into the residential neighborhood. Lowery returned to his car, and radioed the dispatcher again. Believing that the side street was a dead end, Lowery followed Fraire slowly. As he drove, Lowery continued to advise the dispatcher of his location. Fraire continued to pull away from Lowery, and when the truck rounded the crest of a small hill, Lowery momentarily lost sight of it. Rodriguez recalled that about this time Fraire turned to Rodriguez and admitted that he had
1271 had legal problems with a "DWI."[3] Fraire asked Rodriguez *1271 to drive the pickup, which Rodriguez declined to do.

Seconds later, Lowery's car reached the top of the small hill, just in time for Lowery to see that Fraire, who was now driving so fast that he could not negotiate the turn at the bottom of the hill, had slammed the truck against the curb and skidded several feet up onto a lawn. As Rodriguez told police immediately after the incident, once the truck had stopped on the lawn, "I also recall that he [Fraire] was scared and he told me to throw a beer away."

Lowery believed that the truck had wrecked and so advised his dispatcher. But when Lowery was only about 50 feet away from where the truck was stopped, Fraire put the truck in reverse and backed toward Lowery's car, nearly ramming it. Again, Fraire sped off.

Lowery followed Fraire down the residential street to its intersection with a cul-de-sac. Fraire turned. Just as Lowery reached the intersection, Fraire, who had apparently not realized that the cul-de-sac was a dead end, skidded to a stop, again striking the curb and causing the truck to die. Lowery slowly pulled into the cul-de-sac and parked his car about 25 to 30 feet away from Fraire a few feet away from the left side of the curb without, however, blocking the entrance to the street with his car.

After advising the dispatcher of his new location, Lowery left his car on foot and walked around to the passenger side. Lowery says that he pulled his badge and held it up in his left hand, face open, so that it was visible to Fraire and Rodriguez, and yet again identified himself as a police officer. A number of eye-witnesses recalled Lowery's oral identification, though none saw him display his badge. Rodriguez claims that he never saw Lowery display a badge, and that he did not know Lowery was a police officer until after the incident. Nevertheless, Fraire re-started the truck and began to drive away.

Lowery stated that after yelling, "Stop, Police Officer" or essentially identical words several times, and seeing that Fraire was indeed not stopping as he continued around the cul-de-sac, Lowery retreated to the relative safety of the rear of his car. But witnesses on the scene place him several feet away from his car, toward the middle of the street. Lowery insists that he was not blocking the entrance of the cul-de-sac, and that it would not have been difficult for Fraire to drive past him.

The following passage is an eye-witness description of what transpired next:

1272 > He [Lowery] was standing about ten feet or so away from the passenger side of his detective car. By this time the truck had gone to the end of the court and had turned back around heading toward the detective. The truck was still going fast and squealing its tires. The truck was heading right toward the detective and it looked like the driver of the truck was trying to run over the detective with the truck. I saw the detective holding a hand-gun with both hands out in front of him. I heard the detective shout "hault" (sic). I couldn't hear what else the detective might have said for the noise of the truck and the squealing of the tires of the truck. The detective didn't shoot at first. He stood there for a while with his gun pointed at the truck while the truck was still headed right for the detective at a fast speed. The truck got closer and closer to the detective and the detective shot his gun one time

> at the truck when the truck was about ten or fifteen feet away from the detective. The truck was going to run right over the detective if the detective didn't do something and I don't know if the detective would have had time to even jump out of the way or not because the truck was going so fast and was so close to hitting the detective. After the detective shot at the truck, the truck lost control and changed directions *1272 so that the truck didn't run over the detective. The truck jumped a curb and went up into somebody's yard and hit a tree and stopped.

Several other witnesses to the incident recalled that Lowery yelled "Stop, police," or "Halt, police," several times, that the truck headed straight for him such that they believed he was going to be run over, and that Lowery waited until the last possible moment before he pulled the trigger.

Lowery recalled that after he fired his weapon, he jumped to his left expecting to be hit by the oncoming truck. He states that he did not realize that his bullet had hit Fraire. After Fraire's vehicle veered to its left (Lowery's right) and ran up on the lawn of a house, Lowery ran to the truck and instructed the occupants to get out. Only when Rodriguez complied was it apparent to Lowery that Fraire was shot. Lowery instructed one of the bystanders to call 911 and the police dispatcher on Lowery's car radio. Fraire later died of a gun shot wound to the head.

The Arlington Police Department conducted an internal affairs investigation of the incident, and exonerated Lowery of the allegation that he used excessive force. The report of the investigation found that "Officer Lowery was within the Texas Penal Code and the City of Arlington's use of force policy to use deadly force to protect himself and effect the lawful arrest. A review of Officer Lowery's actions show no policy violations, however, there were tactical errors that might have possibly effected [sic] the outcome of the incident." Specifically, the investigation found that there was never any need for Lowery to follow the truck into the subdivision because it was a dead end, and that there was never any need for Lowery to get out of his vehicle: "[W]hen he got out of his car and stood in the cul-de-sac, he invited the truck to aim for him." Lowery was not disciplined in any way for his actions.

B. Proceedings

The Plaintiffs originally filed this § 1983 action in Texas State Court alleging that Lowery deprived Fraire of his constitutional rights under the Fourth and Fourteenth Amendments by using deadly force in a situation in which such force was unwarranted. In addition, the Plaintiffs alleged that Arlington had failed to implement policies and procedures pertaining to the utilization of deadly force by plain clothes officers, and that such failure deprived Fraire of his constitutional rights.[4] The complaint was later amended to allege that Arlington ratified Lowery's acts through their investigation and exoneration of Lowery because Arlington officials were aware that Lowery had not told the truth about how the shooting occurred.

Lowery and Arlington removed the action to the United States District Court. After discovery, Arlington and Lowery filed separate motions to dismiss, or in the alternative, for summary judgment. Lowery claimed the defense of qualified immunity.

The district court dismissed the § 1983 action against Lowery. The court found that Lowery was qualifiedly immune in his individual capacity because

> [t]here is no summary judgment evidence that would support a conclusion that *no reasonable officer,* taking relevant factors into account, would have had the belief that his conduct was unlawful when responding as Lowery did. On the other hand, there is summary judgment evidence that leads to a conclusion that the actions Lowery took were actions that a reasonable officer could have believed lawful.

The court also dismissed all claims against Arlington because the Plaintiffs had made only general accusations against the city and failed to plead with particularity, and because the Plaintiffs presented no evidence sufficient to counter Arlington's motion for summary judgment.

1273 *1273 Finding that the district court did not err in dismissing the claims against Lowery and Arlington, we affirm.

II.

STANDARD OF REVIEW

As the district court considered summary judgment evidence in deciding these motions to dismiss or, in the alternative, motions for summary judgment, we must treat the decision as one for summary judgment.

This court reviews the grant of summary judgment motion de novo, using the same criteria used by the district court in the first instance.[5] We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party."[6] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7] Fed.R.Civ.P. 56(e) requires that when a proper motion for summary judgment is made, the non-moving party must set forth specific facts showing that there is a genuine issue for trial.[8] The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[9] "Material facts" are "facts that might affect the outcome of the suit under the governing law."[10]

III.

ANALYSIS

A. *The Claims Against Lowery*

Lowery is a public safety official entitled to assert a qualified immunity defense,[11] and he did so. Substantively, qualified immunity shields government officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[12] Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law.[13] The Supreme Court explained that when a plaintiff invokes a clearly established right, the appropriate inquiry is whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right."[14] If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity.[15] Thus, even when a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable.[16]

1274 The Plaintiffs allege that Lowery employed excessive force to effect an arrest.[17] *1274 The objective reasonableness of Lowery's conduct must be measured with reference to the law as it existed at the time of the conduct in question.[18] The conduct in question occurred in 1987. At that time, the standards set forth in *Shillingford v. Holmes*[19] were the clearly established law in this circuit with respect to excessive force in the context of the Fourth Amendment.

In *Shillingford,* we held that to maintain an excessive force claim a plaintiff must prove that the defendant's action "caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience. ...."[20] In this case, Lowery is entitled to qualified immunity against the Plaintiffs' claims if a reasonable police officer could conclude that conduct such as Lowery's would not violate the right of a person such as Fraire to be free from excessive force as enunciated in *Shillingford.*[21]

There is no question that Fraire's injury was "severe." Moreover, if we determine that Lowery's acts were not "grossly disproportionate to the need for action under the circumstances," we need never reach the "malice" prong of the *Shillingford* test. Therefore, we focus our inquiry on the second prong of *Shillingford's* conjunctive, tripartite test — force grossly disproportionate to that needed under the circumstances.

The Plaintiffs characterize this case as one in which Lowery employed excessive force to effect an arrest of a misdemeanant. In response, Lowery insists that, even as late as the time he entered the cul-de-sac, he had no intention of stopping Fraire to arrest him,[22] but was forced to shoot Fraire in self-defense because Fraire was attempting to run Lowery down with the pickup. Lowery's contentions are borne out by both his and Rodriguez's account of the "chase" and by the eye-witness accounts of the shooting. After Lowery entered the cul-de-sac and left his car, he was clearly in personal danger of being injured or killed.

Statements of eye-witnesses included:

> "The truck was still moving and headed straight for the man in the blue car."
>
> "I heard the officer yell: halt. The truck was within a car length of the officer when he fired his gun."
>
> "I saw the man pull out a gun and yell, `Police, stop!' The truck just kept coming right at him, and he fired the gun."
>
> "[H]e ordered the pickup to stop by saying, `Police officer, halt!' The truck kept coming at him and accelerated [at] him. The officer had his gun drawn and he waited until the very last second before he fired. If he had waited any longer, they would have run over him."
>
> "The driver in the pickup started to pull forward, and the man in the Chevrolet pulled out a gun and yelled `Stop' again. The driver of the pickup kept coming straight at him, and the man shot the driver."
>
> "He drew his gun and yelled, `Police, stop!' The pickup kept coming right at him, and at the last possible second the man fired."

1275 In his statement to the police later that afternoon, Rodriguez was asked whether *1275 Fraire's truck was going to hit Lowery. Even in his hostility he admitted, "It was close."

For the purposes of our inquiry under *Shillingford,* the question becomes not whether Lowery's actions were grossly disproportionate to the need for action in arresting Fraire for a misdemeanor offense, but whether his actions were grossly disproportionate to the need to defend himself from attack. On one hand, the Plaintiffs have not offered any summary judgment evidence supporting their contention that Lowery's use of force *in defending himself* was grossly disproportionate to the need. On the other hand, the undisputed facts demonstrate conclusively that Lowery did not use force grossly disproportionate to his self defense need. Specifically, it is undisputed that Lowery observed Fraire and Rodriguez drinking and driving on the principal thoroughfare; that Fraire turned onto a residential street and pulled into the first driveway in an attempt to evade Lowery through trickery; that when this ploy failed Fraire backed out of the driveway and sped down the residential street into the residential neighborhood; that Fraire then crashed the truck, told Rodriguez to throw the beer out the window, and backed up, nearly ramming Lowery's car; that Fraire then sped away and turned into the cul-de-sac, hitting the curb and killing the engine of the truck; that, instead of remaining stopped as lawfully ordered, he started the truck, turned around and headed out; and that, with Lowery on foot and yelling "Police, Stop!", Fraire drove straight at Lowery showing no sign of attempting to stop or drive around him. It was only at the moment when it became imminently clear to Lowery, as it was to the eye-witnesses, that Fraire was going to run Lowery down, that he fired a single shot in self-defense. Although all of the final action occurred in a matter of seconds, there can be no doubt that Lowery's act was one of virtual instinctive self-preservation in no way related to his original concerns with the open container laws, a concern by then long since evaporated.

The question, then, is whether under these circumstances a reasonable officer could conclude that Lowery used force grossly disproportionate to need when he shot Fraire in the belief that Fraire was trying to kill Lowery or cause great bodily harm by running over him with the truck.

Our holding in *Young v. City of Killeen*[23] is instructive. In that case a police officer observed a drug transaction between Young and another person. The officer approached the suspects in his car with the light flashing. Young attempted to flee in his car, but the officer blocked Young's path. The officer left his car and told Young to get out of his. When Young reached under his seat for what appeared to be a weapon, the officer shot and killed him. Under those facts, the court found that the actions of the officer were not excessive to the need. In so holding, the court stated that if Young's action gave the officer cause to believe that he was under a threat of serious harm, then the officer's use of deadly force was not a constitutional violation.[24]

Young is pertinent to the instant case for another reason. The Plaintiffs have charged that the force Lowery employed was excessive, at least in part because Lowery may not have followed established police procedures in displaying his badge and identifying himself while in plain clothes. The implication is that Lowery thereby manufactured the circumstances that gave rise to the fatal shooting.[25] We rejected a similar argument in *Young.* There, the district court found that the officer had acted negligently and contrary to good police procedure. On appeal, we noted that "[t]he sense in which [the district court] finds
1276 excessive force is that the force would have been avoided if [the policeman] had approached Young as required *1276 by

proper police procedures."[26] We found to the contrary, however, that regardless of what had transpired up until the shooting itself, Young's movements gave the officer reason to believe, at that moment, that there was a threat of physical harm. We said:

> The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest. There is no question about the fundamental interest in a person's own life, but it does not follow that a negligent taking of life is a constitutional deprivation.[27]

We do not mean to imply that we in any way find Lowery's actions leading up to the shooting to be negligent. We merely explain that even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections.

We are also guided by the Supreme Court's conclusion in *Tennessee v. Garner*[28]:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon ... deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[29]

At the moment of the shooting, Lowery does not appear to have been trying to hinder Fraire's escape. Rather, as Lowery avers, he clearly appears to have been trying to prevent his own serious injury or death. Certainly then, because under the rationale of *Garner* Lowery could have used deadly force to prevent Fraire's escape, considering Fraire's actions leading up to the shooting[30] Lowery must have been justified in firing to prevent his own death or great bodily harm.

Finally, Lowery's actions cannot be viewed as grossly disproportionate because he acted well within his rights under § 9.51(c) of the Texas Penal Code, which governs the use of deadly force. This statute provides in pertinent part that:

> A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) of this section and:
>
> . . . . .
>
> (2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.[31]

Subsection (a) provides that the use of force is justified if (1) the police officer reasonably believes the arrest is lawful, and (2)
1277 before using force, the officer manifests his purpose to make an arrest and *1277 identifies himself as a police officer, unless he reasonably believes that his purpose and identity are already known by or cannot reasonably be made known to the arrestee.[32]

Here, Lowery satisfied the requirements of both subsections 9.51(a) and (c). Specifically, Lowery had probable cause to stop Fraire because Fraire was observed by Lowery to be drinking and driving. Lowery had more than a reasonable basis to believe that Fraire might cause death or serious bodily injury to himself or others based on the facts that (1) in attempting to flee, Fraire drove recklessly and at a high speed into and around a residential neighborhood on a Sunday afternoon, and (2) attempted to run Lowery down.

Lowery's actions cannot be said to be grossly disproportionate to his self defense need under the circumstances. The eyewitness accounts confirm that Lowery was in mortal danger of being run over by Fraire's pickup, and that Lowery waited to fire until the last second when the truck was dangerously close. In fact, had the truck not veered to the left when Fraire was shot, Lowery might still have been severely injured or killed. We cannot say that a reasonable police officer in Lowery's place would have understood his actions to be unlawful. All things considered, we find as did the district court that Lowery is entitled to qualified immunity.

B. *The Claims Against the City*

In *Monell v. New York City Department of Social Services,*[33] the Supreme Court held that municipalities may be liable for damages under § 1983, but only when an official policy or governmental custom of the municipality causes the deprivation or violation of the constitutional rights complained of by the plaintiff. The municipal policy or custom must cause the employee to violate another's constitutional rights:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.[34]

Thus, § 1983 liability attaches "only where the municipality *itself* causes the constitutional violation at issue."[35]

In their amended complaint, the Plaintiffs made certain allegations against the City of Arlington:

> 20. Plaintiffs would further allege that the rules, regulations and policies of Defendant City of Arlington, as well as the training program in existence prior to and at the time of the shooting of Javier Fraire did not emphasize that the use of lethal force against a person or citizen should be exercised only as a last resort when all other methods of apprehension have failed, in accordance with and pursuant to the requirements of the Fourth Amendment of the United States Constitution, made applicable to Defendants by the Fourteenth Amendment to the United States Constitution. As a result of the failure of Defendant City of Arlington to implement such policies, procedures and training programs designed to educate police officers in the utilization of deadly force only as a last resort, Decedent Javier Fraire was killed while other means of apprehension were readily available to Defendant Lowery and other employees of Defendant City of Arlington.
>
> 21. Plaintiffs would allege and prove that it was the custom and practice both before and after [the date of the shooting] for employees and officers of the City of Arlington to utilize deadly force in contravention of the standards and guidelines which comport with the Fourth and Fourteenth Amendments to the United States
> 1278 Constitution. In this regard, Plaintiffs would allege and prove *1278 that the investigation into the shooting of Javier Fraire by Defendant City of Arlington and the ultimate exoneration of Defendant James W. Lowery, Jr. in justifying his use of said force is direct evidence on the existence of such custom or practice. Specifically, Plaintiffs would allege that representatives of Defendant City of Arlington were aware that Defendant James W. Lowery, Jr. was not telling the truth in his explanation of how the shooting of Javier Fraire occurred in that his version of the incident conflicted with every eyewitness to the occurrence.

The district court found that these allegations were insufficient to satisfy the standards for stating a cause of action against a municipality under § 1983. We agree. We have consistently required a plaintiff to plead "specific facts, not merely conclusory allegations."[36] A § 1983 plaintiff must plead specific facts with sufficient particularity to meet all the elements of recovery.[37] This heightened pleading requirement applies to allegations of municipal custom or policy.[38]

The Plaintiffs did not come close to the degree of particularity required to plead a § 1983 claim adequately. The "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints"[39] are wholly insufficient to state a § 1983 claim. They state no facts to support their bald assertions that Arlington's policies, or its failure to implement policies, in any way violated Fraire's constitutional rights and contributed to his unfortunate death.

Moreover, even if we were to conclude that the Plaintiffs had met their burden of pleading this § 1983 claim with particularity, we could not find that they overcame their burden of producing specific facts showing a genuine issue of material fact for trial. Just as they did with respect to their complaints, the Plaintiffs have failed to come forward with specific facts sufficient to counter Arlington's contentions that its policies and customs were not constitutionally deficient. They merely argue that the city ratified Lowery's actions because it refused to discipline him, and because it allegedly knew that Lowery's version of the incident was untrue. Such allegations are wholly insufficient to satisfy the nonmovants' summary judgment burden.

Allegations of an isolated incident are not sufficient to show the existence of a custom or policy.[40] "Isolated violations are not the persistent, often repeated constant violations that constitute custom and policy."[41] To demonstrate a municipal custom or policy under § 1983, a plaintiff must at least allege:

> a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy

misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.[42]

This the Plaintiffs did not do.

The Plaintiffs allege, however, that an unconstitutional custom or policy can be inferred from the city's failure to discipline Lowery. We are not persuaded by this argument. In fact, we rejected a similar argument advanced in *Berry v. McLemore.*[43]
1279 There we found that a city's custom or policy authorizing or encouraging police misconduct "cannot be inferred from *1279 a municipality's isolated decision not to discipline a single officer for a single incident of illegality."[44]

Moreover, the Plaintiffs present nothing but conjecture when they allege that Arlington must have known Lowery was lying. They base this conjecture on the fact that the eye-witnesses placed Lowery away from his car toward the middle of the cul-de-sac at the time of the shooting, while Lowery said that he was using his car as a shield. Plaintiffs also contend that the initial conversation between Lowery and the occupants of the truck while it was in the driveway could not have taken place in the 24 seconds between Lowery's radio transmissions.

Under the circumstances of this fast moving and rapidly changing incident, we are not surprised that there are relatively minor discrepancies among the stories told by Lowery, Rodriguez and the bystanders on the cul-de-sac. We have learned to expect that, given the tension and heat of the pursuit and the element of surprise in such a stressful situation, the versions of the facts related by the protagonists and the witnesses will almost always differ somewhat in the myriad details of the action. But in this case, such differences are insufficient to place facts at issue. And they are especially lacking in significance when used in an effort to "prove" that the city knew Lowery was lying and that, therefore, the city must have intended to ratify Lowery's actions. The minor factual discrepancies are far too petty to constitute genuine issues of material fact.

Furthermore, the Plaintiffs made no attempt to counter the City's evidence of the policies actually in effect at the time of the shooting. The City's chief of police[45] testified by affidavit in support of the City's motion to dismiss regarding the policies, rules and regulations of his department. He averred that the conduct of Arlington police officers is primarily controlled by the police department's General Orders, first issued at least two years prior to the instant shooting. All Arlington officers are issued copies of the General Orders, are trained in their application, and are required to comply with them.

The police chief also averred that Arlington's police officers have never been permitted to use unnecessary, unreasonable or excessive force in the performance of their duties. General Order 317.00, entitled "Use of Force", was in effect on the date of the shooting. It states that a police officer is afforded only a limited degree of discretion in determining the amount and degree of force used in particular cases. Those discretionary areas are described in General Order 317.02, and include situations in which the police officer is acting in self-defense against unlawful violence to his person. Officers are admonished in General Order 317.03 that under no circumstances will the force used be greater than necessary. An Arlington police officer is responsible for exhausting every reasonable means of employing the minimum amount of force before escalating to a more severe application of force.

Arlington police are authorized to use deadly force only under the specific circumstances listed in 317.05(B), which expressly authorizes officers to use deadly force only when doing so reasonably appears immediately necessary to protect themselves from substantial risk of death or serious bodily injury. Furthermore, General Order 317.05(C)(5) specifically prohibits officers from discharging their firearms in a misdemeanor case unless such discharge is necessary to defend life, including the officer's
1280 life. General Order 317.05(C)(6) prohibits officers *1280 from shooting at moving or fleeing vehicles, except when necessary to protect the officer's life and all other means of defense have failed.

To prevail in their claims against the City of Arlington, the Plaintiffs must show that these policies are constitutionally deficient or that they authorize unconstitutional behavior. Further, the Plaintiffs must show that the deadly force policy caused Lowery to use excessive force against Fraire.

The bellwether case regarding a police officer's use of deadly force is *Tennessee v. Garner.*[46] In that case, a police officer shot and killed a burglary suspect when, after being told to halt, the suspect fled over a fence at night in the backyard of the house he was suspected of burglarizing. The police officer never attempted to justify his actions on any basis other than the need to prevent an escape. The Supreme Court found that there was no reason to believe that the burglary suspect posed any danger to the police officer or to others. The Court held that the use of deadly force solely to prevent the escape of a felony suspect,

whatever the circumstances, is constitutionally unreasonable:

> Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.... A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.[47]

The Court further declared, however, that when a police officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, the use of deadly force is not constitutionally unreasonable to prevent an escape.[48] Nothing in *Garner* prohibits an officer from using deadly force in self-defense when the officer has probable cause to believe that the suspect poses a threat of serious physical injury or death to the officer.

Arlington's deadly force policy in effect on the date of the incident is consistent with, and in fact is more restrictive than the standards required by *Garner.* Arlington's General Order 317.05(B) authorizes the use of deadly force only (1) when such force reasonably appears immediately necessary to protect the officer or others from substantial risk of death or serious bodily injury, (2) to prevent a crime or make an arrest when the suspect's actions place persons in jeopardy of serious bodily injury, (3) to apprehend an offender for a crime involving the use or attempted use of deadly force or when there is a substantial risk that the person whose arrest is sought will cause death or serious bodily injury to others if apprehension is delayed, or (4) to prevent escape from custody when the officer or others are in imminent danger of death or serious bodily injury.

General Order 317.05(C) further restricts the use of deadly force in several specific situations. Arlington police officers are prohibited from discharging their firearms in any misdemeanor case, except in defense of life. Officers are also prohibited from firing their weapons at a moving or fleeing vehicle, again unless necessary to defend life and all other reasonable means of defense have failed.

Plaintiffs make much of the fact that three months after the Lowery incident, Arlington amended its deadly force policy to prohibit an officer from intentionally or recklessly placing himself in front of an ongoing vehicle when the utilization of force is a likely outcome. The Plaintiffs assert that had this amended version of the policy been in effect at the time, Lowery would have been prohibited from making the maneuver he used when he shot Fraire, and that this amendment is direct evidence in support of the Plaintiffs' allegation that Arlington's policies, procedures and regulations were constitutionally defective at the time of the shooting. Such reasoning defies logic. As we just observed, Arlington's policies, procedures and regulations comported with and
1281 were even more restrictive *1281 than those required by *Garner.* The plaintiffs have pointed to no authority showing that the new restriction is constitutionally mandated. Furthermore, just because Arlington amended its policies to make them more restrictive, it does not follow that the prior policies were constitutionally deficient. Moreover, the Plaintiffs engage in mere speculation when they posit that if the new restriction had been in effect on the day Fraire was killed, the shooting would not have occurred; ergo the absence of the restriction caused the shooting. As we stated above, a direct causal connection must exist between the policy and the alleged constitutional deprivation. This connection must be more than a mere "but for" coupling between cause and effect.[49] To form the basis of liability under § 1983, a municipal policy must be affirmatively linked to the constitutional violation and be the moving force behind it.[50]

The Plaintiffs have presented no summary judgment evidence that would place at issue any material facts with respect to the constitutionality of the Arlington deadly force policy. They have pointed to no provision in that policy that could be construed to authorize an officer to use deadly force unnecessarily or unjustifiably. Neither is there any evidence that Arlington's deadly force policy in effect at the time of the shooting caused Lowery to use deadly force in violation of the Constitution. We find that the Plaintiffs' claims against Arlington are unfounded.

IV.

CONCLUSION

Officer Lowery acted in self defense when he fired a fatal shot at Fraire. Under the circumstances of this case, a reasonable police officer could have believed that in firing he was not violating Fraire's constitutional right to be free of excessive force. Consequently, Lowery is entitled to the defense of qualified immunity for his actions in defending his life.

In addition, the Plaintiffs failed to plead with sufficient particularity the facts and allegations necessary to present a claim against

the City of Arlington under 42 U.S.C. § 1983. Neither did the Plaintiffs proffer summary judgment evidence that Arlington's deadly force policy condones the unjustifiable and unnecessary use of deadly force.

For the foregoing reasons, the district court's judgment dismissing the claims against Lowery and the City of Arlington is AFFIRMED.

[1] Tex.Rev.Civ.Stat.Ann. art. 6701d, § 107E (Vernon supp.1991) prohibits drinking and driving.

[2] Police dispatch records indicate that less than 30 seconds elapsed between the time that Lowery radioed that he had stopped to the time that he radioed that he was on the move again.

[3] Fraire was on probation for a prior conviction for driving while intoxicated. When Rodriguez was questioned by the police investigators following the accident, he was asked whether Fraire knew that Lowery was a police officer. Rodriguez responded, "I think so because in the manner he was scared." Later, when asked how Fraire knew that Lowery was an officer, Rodriguez said, "I really don't know maybe because of the vehicle." In his affidavit, Rodriguez claimed not to have known that Lowery was a police officer until after the shooting occurred.

[4] The Plaintiffs also alleged that Lowery's conduct constituted negligence and gross negligence for which they sought to impose liability against Arlington under the Texas Tort Claims Act and the Texas Wrongful Death Act. The district court dismissed those pendent state claims, and the Plaintiffs do not challenge that decision on appeal.

[5] *Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir.1988).

[6] *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.,* 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing *Southmark Properties v. Charles House Corp.,* 742 F.2d 862, 873 (5th Cir.1984)).

[7] Fed.R.Civ.P. 56(c).

[8] *Id.; See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[9] *Id.* at 248, 106 S.Ct. at 2510.

[10] *Id.*

[11] *See Gagne v. City of Galveston,* 805 F.2d 558, 559 (5th Cir.1986), *cert. denied,* 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987).

[12] *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

[13] *See id.,* 483 U.S. at 639, 107 S.Ct. at 3038.

[14] *Id.* at 640, 107 S.Ct. at 3039.

[15] *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

[16] *See Melear v. Spears,* 862 F.2d 1177, 1188 (5th Cir.1989) (Higginbotham, J., concurring).

[17] Regardless of whether Lowery was attempting to, or at the very least intended to arrest Fraire, the Fourth Amendment prohibition against unreasonable searches and seizures is implicated because "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). *See also Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

[18] *See Harlowv. Fitzgerald,* 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982).

[19] 634 F.2d 263 (5th Cir. Unit A Jan. 1981).

[20] *Id.* at 265.

[21] *See Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

[22] Lowery had already called for a marked police car for that purpose.

[23] 775 F.2d 1349 (5th Cir.1985).

[24] *Id.* at 1353.

[25] Of course, Lowery disputes this. He maintains that he prominently displayed his badge to Fraire and Rodriguez when the pair stopped in the driveway on the side street and when he exited his car in the cul-de-sac.

[26] *Id.* at 1352.

[27] *Id.* at 1353.

[28] 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

[29] *Id.* at 11-12, 105 S.Ct. at 1701. In *Garner,* the court found excessive use of force by a police officer who shot an unarmed fleeing felony suspect who posed no danger to the officer. The Plaintiffs urge that the result in *Garner* should dictate our decision here because Garner was a felony suspect and Fraire was only an unarmed misdemeanant. We do not agree. First, we do not accept that Fraire was unarmed. Vehicles can be classified under certain circumstances as "deadly weapons." *See* Tex.Penal Code Ann. § 1.07(a)(11)(B) (West 1974); *Parrish v. State,* 647 S.W.2d 8, 10 (Tex.App. — Houston 1982). Second, the Court noted in *Garner* that "the highly technical felony/misdemeanor distinction is ... difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense." *Garner* at 20, 105 S.Ct. at 1706. The important distinction in *Garner* is not whether the suspect is suspected of committing a felony or a misdemeanor, but whether he is dangerous or benign.

[30] I.e., drinking while driving, erratic driving, high speed through a residential subdivision, twice crashing the car.

[31] Tex.Penal Code 9.51(c) (West 1974).

[32] *Id.* § 9.51(a).

[33] 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[34] *Id.* at 694, 98 S.Ct. at 2037.

[35] *City of Canton v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) (emphasis in original).

[36] *Elliott v. Perez,* 751 F.2d 1472, 1479 (5th Cir. 1985).

[37] *Id.* at 1482.

[38] *Rodriguez v. Avita,* 871 F.2d 552 (5th Cir. 1989), *cert. denied* 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d 114 (1989); *Palmer v. City of San Antonio,* 810 F.2d 514 (5th Cir.1987).

[39] *Elliott,* 751 F.2d at 1476.

[40] *Rodriguez,* 871 F.2d at 554; *Palmer,* 810 F.2d at 516.

[41] *Bennett v. City of Slidell,* 728 F.2d 762, 768 n. 3 (5th Cir.1984), *cert. denied,* 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

[42] *Languirand v. Hayden,* 717 F.2d 220, 227 (5th Cir.1983), *cert. denied,* 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984).

[43] 670 F.2d 30 (5th Cir.1982) (overruled on other grounds, *International Woodworkers of America v. Champion International Corporation,* 790 F.2d 1174, 1181 (5th Cir.1986)).

[44] *Id.* at 33. Other circuits have taken the same position. *See Santiago v. Fenton,* 891 F.2d 373, 380-82 (1st Cir.1989); *Batista v. Rodriguez,* 702 F.2d 393, 397-8 (2nd Cir.1983); *Harris v. City of Pagedale,* 821 F.2d 499 (8th Cir.), *cert. denied,* 484 U.S. 986, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987); *Davis v. City of Ellensburg,* 869 F.2d 1230, 1233-35 (9th Cir.1989); *Depewv. City of St. Marys,* 787 F.2d 1496, 1499 (11th Cir.1986).

[45] The chief of police is the principal policy maker for the Arlington Police Department. As such he promulgates all orders, rules and regulations for the department. He is also ultimately responsible for the supervision of the investigation of complaints made against police officers, and has the right to discipline or terminate any police officer for just and reasonable cause.

[46] 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

[47] *Id.* at 11, 105 S.Ct. at 1701.

[48] *Id.*

[49] *See City of Canton,* 109 S.Ct. at 1204-05; *Oklahoma City v. Tuttle,* 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985).

[50] *Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981).

WestlawNext

RELATED TOPICS

Construction and Operation

Prior Unrecorded Purchase Money Mortgage

Deed of the Property

Garner v. Boyle
Supreme Court of Texas. | April 4, 1904 | 97 Tex. 460 | 79 S.W. 1066 *(Approx. 3 pages)*

GARNER et al.

v.

BOYLE et al.

Return to list **1** of **20 results** Search term

Certified Questions from Court of Civil Appeals, First Supreme Judicial District.

Action by F. T. **Garner** and others against John T. **Boyle** and others. A judgment in favor of defendants was affirmed by the Court of Appeals, and a rehearing denied (77 S. W. 987), after which such denial was set aside, and questions certified to the Supreme Court.

West Headnotes (3)

Change View

1 **Deeds** Time of Taking Effect

Where a power of attorney conveyed an undivided half interest in certain lands in consideration of the attorney's services, and described the land as belonging to the separate estate of a married woman, such phrase being intended to distinguish the land conveyed from that which might belong to the grantor's husband, did not prevent it from taking effect as a conveyance on its delivery.

5 Cases that cite this headnote

2 **Deeds** Particular Description

Where a power of attorney conveyed an undivided half interest in certain lands in consideration of the attorney's services, and described the land as "belonging to the separate estate of P." a married woman, such phrase was intended to distinguish the land conveyed from that which might belong to the grantor's husband, and did not qualify the conveyance.

6 Cases that cite this headnote

3 **Mortgages** Subsequent Bona Fide Purchasers or Mortgagees

Where an attorney, acting under a power authorizing him to clear the title to lands belonging to a married woman, and conveying to him a half interest therein in consideration of his services, expended time and money in performing his part of the contract without knowledge or notice of the rights of others under a prior unrecorded trust deed, such attorney and his grantee, who was also without notice, were bona fide purchasers, and therefore took a superior title to that of the beneficiaries under the trust deed, under Rev.St.1895, art. 4640, Vernon's Ann.Civ.St. art. 6627, providing that all conveyances of land not recorded are void as to subsequent purchasers for value without notice.

7 Cases that cite this headnote

Attorneys and Law Firms

***460 **1066** Mark G. Fakes, for appellants.

***462** P. E. McMahon, McKinney & Hill, and Otto Pape, for appellees.

Opinion

***463** BROWN, J.

This is a certified question from the Court of Civil Appeals of the First Supreme Judicial District. The statement and question are as follows:

'In the above-styled cause pending in this court on appeal from the district court of Harris county, the record shows that on January 8, 1901, appellant, Mrs. Anna M. Paschal, joined by her husband, executed and delivered to appellee John T. **Boyle** the following power of attorney:

"State of **Texas**, County of Harris. Know all men by these presents: That we, Annie M. Paschal, joined by her husband, John S. Paschal, residents of the city of Houston, Harris county, **Texas**, have made, constituted and appointed, and by these presents do make, constitute and appoint John T. **Boyle**, our true and lawful attorney for us, and in our name, place and stead, to ask, demand, recover and receive all and any lots, parcels of tracts of land, located and situated in any county in the state of **Texas**, ***1067** belonging and being the separate property of Annie M. Paschal; and we do hereby authorize our said attorney, to institute in our name, any and all suits that may be necessary to be instituted in that behalf, giving and granting to our said attorney full power and authority to do and perform all and every act and think whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might, or could do if personally present, hereby ratifying and confirming whatsoever our said attorney shall and may do by virtue hereof in the premises.

"And we do hereby agree and by this instrument hereby bargain, grant, sell, alien and convey a one-half interest in and to all these certain lots, parcels or tracts of land, located and situated in any county in the state of **Texas**, belonging to the separate estate of Annie M. Paschal, said interest being transferred and conveyed for the services heretofore rendered and hereafter to be rendered by the said John T. **Boyle**; it being expressly understood that the said John T. **Boyle** will personally be responsible and pay all expenses connected with the recovery of said lands.

"Witness our hands at Houston, this the 8th day of July, A. D. 1901.

"[Signed] John S. Paschal.

"Annie M. Paschal.'

'At the time this power of attorney was executed Mrs. Paschal claimed to own various tracts of land in Polk and San Jacinto counties, including the land in controversy in this suit. The deed records of San Jacinto county, where the land in controversy is situate, showed the title to be in Arthur P. **Garner**, deceased, and Mrs. Paschal, as the heir of said **Garner**, became the owner of same as her separate estate. There were conflicts in the boundary lines of this land and adjoining ***464** surveys, and the owners of said adjoining surveys were asserting claims to the land adverse to Mrs. Paschal. Acting under said power of attorney **Boyle** went to San Jacinto county, and had the land claimed by Mrs. Paschal surveyed and its boundaries established, and secured quitclaim deeds from the adverse claimants, which he placed upon record. In addition to the labor and time expended by him in clearing Mrs. Paschal's title to the land in controversy and other lands claimed by her, he incurred expenses in the sum of $1,000 or more, which he paid. After clearing Mrs. Paschal's title to the land in controversy, he sold and conveyed the one-half interest therein conveyed to him by the power of attorney to the appellee McMurry. The deed from **Boyle** to McMurry is

not a quitclaim, but a conveyance of the land, and the cash consideration of $400 recited in the deed was paid by the vendee. In 1895, Mrs. Paschal conveyed all of the land owned by her in Polk and San Jacinto counties to appellant F. T. **Garner**, in trust for the use of the then minor children of the vendor, who are also appellants herein. This deed was not placed upon record until 1902, some time after the conveyance from **Boyle** to McMurry. Neither **Boyle** nor McMurry had any notice of this conveyance or of any claim to the land by the trustee or beneficiaries in said trust deed until after McMurry had purchased the land. This suit was brought by Mrs. Paschal and her husband and F. T. **Garner** and the beneficiaries in said trust deed against **Boyle** and McMurry to cancel the power of attorney and the deed from **Boyle** to McMurry and recover the land thereby conveyed. The defendants filed separate answers, and each pleaded that he had purchased the land for a valuable consideration and without any notice of appellants' claim. This court on the 10th day of December, 1903, affirmed the judgment of the court below in favor of defendants, on the ground that the appellee **Boyle**, having performed his contract under the power of attorney without any notice of the claim of appellants under the unrecorded deed, could hold the interest in the land conveyed to him by the power of attorney as an innocent purchaser. On the 7th day of January, 1904, we overruled a motion for rehearing; but our attention having since been called to the decision of this court in the case of Patrick v. Badger (**Tex**. Civ. App.) 41 S. W. 539, we have set aside our order overruling the motion for rehearing, and respectfully certify for your decision the following question: Do the facts in this case support the defendants' pleas of innocent purchaser?'

We answer the question in the affirmative. The services rendered by **Boyle** under the contract constituted a valuable consideration sufficient to support the plea of innocent purchaser ***465** as to the land in question, there being no notice, actual or constructive, to him of the former conveyance.

The second paragraph of the contract conveyed to **Boyle** an undivided one-half interest in all the lands, lots, etc., in the state of **Texas**, 'belonging to the separate estate of Annie M. Paschal.' The conveyance took effect upon its delivery, and was not executory in its character of a conveyance. Witt v. Harlan, 66 **Tex**. 660, 2 S. W. 41; Taylor v. Taul, 88 **Tex**. 665, 32 S. W. 866. The phrase, 'belonging to the separate estate of Annie M. Paschal,' was intended to and did distinguish the land conveyed from that which might belong to her husband, and did not have the effect to qualify the conveyance. If the conveyance had been of the entire interest of all lands in **Texas**, the case would be strictly within the authority of Witt v. Harlan, before cited, in which all of the lands were conveyed, and this court held that it was operative to pass the entire title to all of the land that the party had in this state. There can be no substantial difference in the legal effect of a deed which conveys an undivided one-half and ****1068** another that conveys the whole, except as to the quantity of land conveyed.

Under article 4640, Rev. St. 1895, all conveyances of land that are not recorded as required by law are void as to subsequent purchasers for value without notice. To **Boyle** all land which the record showed to be the property of Mrs. Paschal was land belonging to her 'separate estate' unless a conveyance from her appeared upon the record, or a knowledge of it was otherwise brought home to him. Such deed, being void as to him, was as if no deed had existed. White v. Frank, 91 **Tex**. 72, 40 S. W. 962; Hitchler v. Scanlan (**Tex**. Civ. App.) 39 S. W. 633. There being nothing in the terms of the conveyance which indicated that Mrs. Paschal might have sold any of her lands in **Texas**, and nothing to suggest to **Boyle** that her title, as it appeared upon the record, was not true and correct, the conveyance had the effect to vest in him one-half interest of all the land which the record showed to belong to her at the time. In Patrick v. Badger (**Tex**. Civ. App.) 41 S. W. 538, referred to by the court in the certificate, the honorable Court of Civil Appeals held that the claim of innocent purchaser could not be maintained under a verbal contract for the sale of the land, because it could not be superior to a quitclaim deed. That case was rightly decided, and does not conflict with our answer to this question.

WILLIAMS, J., not sitting.

Parallel Citations

79 S.W. 1066

End of Document

633 S.W.2d 626 (1982)

Vijai P. GUPTA, Appellant,

v.

RITTER HOMES, INC., Appellee.

No. A2979.

Court of Appeals of Texas, Houston Fourteenth District.

April 15, 1982.

Larry Anderson, Anderson & Anderson, Crosby, for appellant.

Paul J. McConnell, III, Delange, Hudspeth, Pitman & Katz, Houston, for appellee.

Before J. CURTISS BROWN, C. J., and JUNELL and PRICE, JJ.

OPINION

PRICE, Justice.

This is an appeal from a summary judgment granted in favor of the original homebuilder, appellee **Ritter Homes**, **Inc**., in a suit brought by the second owner of a used home, appellant Vijai P. **Gupta**. Appellant brought suit against appellee on three theories: implied warranty under the Deceptive Trade Practices Act, implied warranty under the Texas Business and Commerce Code and negligence. The trial court sustained the appellee's motion for summary judgment, holding that no implied warranty exists on a used home or in other words, a homebuilder makes no implied warranty to a second owner who purchases a home from the original owner. On appellant's theory of negligence, the trial court held that appellee owed no duty to appellant since no privity existed between appellant and appellee. We agree that in Texas no implied warranty exists on the sale of a used home, but we reverse and remand on the issue of negligence because privity is not required under the alleged cause of action for negligence.

Appellant, Vijai P. **Gupta**, purchased a home for investment purposes on September 29, 1977, from James Wobig, the original homeowner. Wobig had in turn purchased the home new from the appellant homebuilders three months earlier on June 17, 1977. Appellant had no contact, agreement or dealings with appellee prior to his purchase of the house from Wobig. Shortly
627 after his purchase, appellant noticed cracks *627 appearing in the wall, driveway and garage slab. Appellant came out to the home and made some minor repairs. Thereafter, the cracks increased in severity and the appellants, after inspecting the home, refused to repair the alleged defects.

Appellant then sued appellee seeking economic damages sustained by reason of implied warranty under the Texas Deceptive Trade Practices Act and section 2.314 and 2.315 of the Texas Business and Commerce Code and negligence. Other theories of recovery under the Texas Deceptive Trade Practices Act and express warranty were alleged but they have been either disposed of or severed from this cause in a manner not made entirely clear in the record. In any event, complaint on appeal has been limited to the summary judgment motion and ruling on the issues of implied warranty and negligence.

Appellee filed a motion for summary judgment showing the undisputed facts of the purchase of a used home by appellant from Wobig and the lack of privity between appellant and appellee. Therefore, appellee urged, no cause of action for implied warranty existed in favor of appellant and no duty was owed under the negligence theory by appellee to appellant because privity did not exist between them. The trial court granted the summary judgment on both points and it is from this action of the trial court that appellant perfects this appeal.

In his first point of error, appellant contends that the trial court erred in holding that no cause of action existed for implied warranty. Appellant urges that this case is one of first impression in Texas and that the rule enunciated in two prior civil appellate cases are inapplicable. We disagree. Two Courts of Civil Appeals have decided cases relating to implied warranty and its

application to purchases of used **homes**. The first of these, *Cheney v. Parks,* 605 S.W.2d 640 (Tex.Civ.App. — Houston [1st Dist] 1980, writ ref'd n.r.e.), involved the sale of a used home for which damages were sought pursuant to the Texas Deceptive Trade Practices Act. The court held in that case that the Texas Deceptive Trade Practices Act did not create an implied warranty:

> "Under Texas law there is no implied warranty that used goods are fit for the purpose for which they were purchased. *Chaq Oil Co. v. Gardner Machinery Corp.,* 500 S.W.2d 877 (Tex.Civ.App. — Houston [14th Dist.] 1973, no writ). We find that this holding is equally applicable to the purchase of a used dwelling. A buyer of a used house takes the same subject to wear and tear of use just as does the buyer of a used automobile..."

The second case, *Thornton **Homes**, **Inc**. v. Greiner,* 619 S.W.2d 8, 9 (Tex.Civ.App. — Eastland 1981, writ ref'd n.r.e.), was a venue case in which the court held that "Texas courts have consistently held that an implied warranty does not attach to the sale of used goods where the purchaser knows they are used," reiterating the principle of *Cheney v. Parks, supra,* that such a conclusion is equally applicable to the sale of a used dwelling. *Thornton **Homes**, **Inc**. v. Greiner, supra* at 9, citing *Valley Datsun v. Martinez,* 578 S.W.2d 485 (Tex.Civ.App. — Corpus Christi 1979, no writ) and *Chaq Oil Company v. Gardner Machinery Corp.,* 500 S.W.2d 877 (Tex.Civ.App. — Houston [14th Dist.] 1973, no writ). The court in that case further stated that the appellees had failed to plead a claim for relief under the Deceptive Trade Practices Act because they had purchased a used home.

It is thus well established that appellant has no cause of action against appellees under the Deceptive Trade Practices Act in that no implied warranties flowed to appellant since appellant knowingly purchased a used home. Appellees further rely upon *Turner v. Conrad,* 618 S.W.2d 850 (Tex.Civ.App. — Fort Worth, 1981) in oral argument but that case is distinguishable since it involved an "as is" purchase. Appellant's assertion that he had a cause of action for implied warranties under the Uniform Commercial Code is unfounded because sales of realty, in this case a used home, are not within the scope of the Code.
628 Tex.Bus.& Com.Code Ann. § 2.102 (Vernon 1968). The trial court was correct in rendering *628 summary judgment in favor of appellees with respect to the implied warranty allegations and appellant's first point of error is overruled.

In his second point of error, appellant asserts that the trial court erred in granting appellee's motion for summary judgment by ruling that, as a matter of law, no privity existed between appellant and appellee and therefore, appellee owed no duty to appellant. As a result of the absence of privity, the trial court reasoned that the home buyer, appellant, had no cause of action against the appellee for negligence. We conclude that the trial court erred in this respect.

Appellees cite no authority nor can we locate any for the proposition that privity of contract is a prerequisite to an action for damages based upon a negligence theory. The Texas Supreme Court has held to the contrary in two cases, stating that privity is not a requirement to maintain an action for damages based upon a negligence theory of recovery. In *Nobility **Homes** of Texas, **Inc**. v. Shivers,* 557 S.W.2d 77, 83 (Tex.1977), the Supreme Court upheld a jury verdict based upon negligence in favor of a mobile home purchaser against the manufacturer with whom the purchaser was not in privity. Again in *Cameron v. Terrell & Garrett, **Inc**.,* 618 S.W.2d 535 (Tex.1981), the Texas Supreme Court, in determining that the legislature did not intend to restrict the application of the Deceptive Trade Practices Act to those who furnish goods and services, stated: "[I]n contrast, privity requirements have been dispensed with altogether in negligence suits..." *Cameron v. Terrell and Garrett, supra* at 541, citing *Nobility **Homes** of Texas, **Inc**. v. Shivers, supra.*

We hold that privity of contract is not a prerequisite for establishing a duty owed to appellant by appellees. We believe that a homebuilder contemplates sales of the home beyond the initial purchaser and thusly, a homebuilder owes a duty to exercise ordinary care in the construction of the home. This duty is not limited to the first purchaser of the home. Since this suit was brought in a timely manner, we do not pass on any question as to the nature of the alleged defects, whether latent or obvious, and the accrual of a cause of action for limitation purposes.

Appellees contend that the summary judgment should be sustained since appellant failed to bring up the complete record. Appellant submits that the absence of appellees' request for admissions and appellant's answer to this request requires us to presume that the absent record supports the summary judgment. *DeBell v. Texas General Realty, **Inc**.,* 609 S.W.2d 892 (Tex.Civ. App. — Houston [14th Dist.] 1980). The instant case is distinguishable in that the basis for the summary judgment was the absence of privity and a purchase of a used home by appellant. The basis of the motion and the court's ruling was on these points of law as to whether a cause of action existed for implied warranty and negligence under these undisputed facts. No other facts were material or necessary to this determination and therefore, the holding of *DeBell v. Texas General Realty, **Inc**.*

supra, does not apply.

The trial court properly granted Summary Judgment on the issue of implied warranty, but the case is reversed and remanded for trial on the issue of negligence.

WestlawNext

Horton v. Gibson
Court of Civil Appeals of Texas, Waco. | June 4, 1925 | 274 S.W. 292 *(Approx. 5 pages)*

HORTON
v.
GIBSON ET AL.

Return to list **1** of **36 results** Search term

Appeal from District Court, Hamilton County; J. R. McClellan, Judge.

Suit by C. E. **Horton**, trustee, for benefit of the McKinley-Corrigan Company, against Emma **Gibson** and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

West Headnotes (11)

Change View

1 **Mental Health** Guardian Ad Litem or Next Friend
Statute providing for guardian ad litem applicable to justice court.

2 **Mental Health** Execution and Enforcement of Judgment
Judgment against ward represented by guardian ad litem enforceable only by execution against his property.

3 **Judgment** Transcript from Justice Court
Justice court judgment recorded before death of incompetent defendant without regular guardian is lien on his non-exempt property.

1 Case that cites this headnote

4 **Appeal and Error** Necessity of Setting Forth Evidence Bearing on That Admitted or Excluded
Whether court erred in excluding justice court judgment records not determined, where bill of exception does not show whether abstract of judgment was properly recorded and indexed.

5 **Liens** Nature and Incidents in General
Arise only under contract or statute.

6 **Descent and Distribution** Nature and Form of Remedy
Creditor has no lien on debtor's property which can be foreclosed in court.

1 Case that cites this headnote

7 **Descent and Distribution** Parties
All heirs of deceased debtor should be made parties by name in suit to foreclose judgment lien.

RELATED TOPICS

Mental Health
Guardian Ad Litem or Next Friend
Guardian Ad Litem of Alleged Incompetent

Descent and Distribution
Debts of Intestate and Incumbrances on Property
Real Estate of Deceased Person
Rights and Liabilities of Heirs and Distributees
Ordinary Judgment Creditor of Decedent

8 **Descent and Distribution** Liens and Incumbrances Created by Intestate

District court may direct sale of deceased debtor's property to satisfy judgment, lien of which did not attach.

9 **Homestead** Family Relation in General

Judgment debtor, his sister, and her children held entitled to homestead exemption while occupying his property as family.

2 Cases that cite this headnote

10 **Descent and Distribution** Execution and Enforcement of Judgment

Court's duty to prorate proceeds of property sold to satisfy judgment between claims of judgment creditor and judgment debtor's heirs making improvements enhancing value of property.

1 Case that cites this headnote

11 **Justices of the Peace** Suspension, Enforcement, Revival, and Satisfaction

Justice court judgment correctly directed that execution issue, and prevented judgment from becoming dormant for ten years after date.

Attorneys and Law Firms

***292** H. E. Chesley, of Hamilton, for appellant.

P. M. Rice and S. R. Allen, both of Hamilton, for appellees.

Opinion

Statement.

STANFORD, J.

On August 24, 1903, H. T. Newton purchased a house and lot in Hamilton, Tex. On October 17, 1908, he was duly adjudged to be of unsound mind, and was ordered confined in the lunatic asylum at Terrell, Tex. On the 19th day of November, 1909, he was again adjudged to be of unsound mind, but was not ordered to be placed under restraint, the jury finding same was not necessary. On December 16, 1909, he executed a note for $76.70 to McKinley-Corrigan Company, due October 1, 1910. ***293** This note was given for groceries and dry goods, etc. H. T. Newton was 35 years of age. He had spells of insanity or epilepsy, and had so had since he was 9 years of age. He and his mother and a widowed sister and her three children all lived together in the place bought by Henry, and he seems to have been their principal support. The note above referred to was not paid, and suit was brought on same by McKinley-Corrigan & Co. against H. T. Newton in the justice court, and on April 3, 1914, judgment was rendered against him for the amount of said note, $120.95.

This judgment recites that H. T. Newton was duly cited, and recites further:

> "And it appearing to the court that the defendant, Henry Newton, is a non compos mentis, and has no guardian of his person or estate, Hon. Jesse Shipman is appointed guardian ad litem for said defendant, etc."

On May 5, 1914, execution was issued on above judgment, which was duly returned unsatisfied, and without any levy having been made, on June 6, 1914. Afterwards an abstract of said judgment is alleged to have been duly placed of record and properly

indexed in the abstract of judgment records of Hamilton county, Tex. On April 8, 1916, H. T. Newton died intestate, leaving as his sole heirs a brother and Emma **Gibson**, the widowed sister above referred to, his mother having died in February, 1915. This suit was brought August 28, 1923, by C. E. **Horton** as trustee, acting under a power of attorney, for the benefit of McKinley-Corrigan Company, who formerly did business in Hamilton county, in the final winding up of their business, against Emma **Gibson** and the other unknown heirs of H. T. Newton, deceased, alleging there was no administration upon his estate and no necessity for administration; that plaintiff's debt was the only debt against said estate; that said house and lot was of the value of about $250, and was the only property belonging to said estate; that more than 4 years had elapsed since the death of Henry Newton, and that no administration had ever been taken out on his estate, and that none could now be taken out; that the heirs had taken possession of said property without administration, and were claiming it, etc.; that plaintiff had the right to have his claim satisfied out of said property; that he had both a creditor's lien and also a judgment lien against said property, and was entitled to have same foreclosed and said property sold in satisfaction of his claim, etc. The court instructed a verdict for defendants, and from the judgment rendered on said instructed verdict plaintiff prosecutes this appeal.

Opinion.

1 2 In the case of McKinley-Corrigan Company v. H. T. Newton, in the justice court, wherein defendant was sued on a note for $76.70, a guardian ad litem having been appointed to represent the defendant, and having represented him in said cause, the judgment rendered against the said H. T. Newton was a valid judgment. We think the article of our statutes providing for the appointment of a guardian ad litem for litigants who are minors, lunatics, idiots, or non compos mentis applies to the justice court as well as to the county and district courts. Article 1942, Revised Statutes. There is a vast difference between a regularly appointed and qualified guardian, appointed by the county court, the only court which can appoint such guardian, who is in charge of and administering his ward's estate subject to the orders of the probate court, and a guardian ad litem. They are controlled by different provisions of our statutes. In the former, that is, where the ward appears by a regular or permanent guardian, the court rendering judgment has no authority to direct execution against the ward's property, but should direct that such judgment, if against the ward, be certified to the probate court to be paid by the guardian of such ward in the administration of such ward's property. But a guardian ad litem is appointed by any trial court to look after the interests of his ward only in the trial of the particular case in which such appointment is made, and, when such trial is terminated, his duties under such appointment are fully performed. In such case, the ward having no regularly appointed guardian of his estate, in case judgment is rendered against him, unless some one qualifies as guardian, the only way it can be enforced is by execution against the ward's property. Our statutes have provided no other remedy. Laughter v. Seela, 59 Tex. 177; Alston v. Emmerson, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Simmons v. Arnim, 110 Tex. 309, 220 S. W. 66.

3 4 In this case, there being no guardian appointed for H. T. Newton, the justice court judgment correctly directed that execution issue, and the execution, issued May 6, 1914, was sufficient to prevent said judgment from becoming dormant for 10 years after the date of same. And, the above being true, the proper recording and indexing of an abstract of said judgment, if recorded before the death of H. T. Newton, would create a lien on the house and lot in question, provided it was not exempt as homestead. However, as appellant's bill of exception No. 1 fails to show what the judgment records would have disclosed, if same had been admitted, as to appellant having an abstract of judgment of record and as to its being properly recorded and indexed, and, if so, when it was so recorded, etc., we are unable to determine whether or not the trial court erred in excluding said judgment records.

On the other branch of the case as pleaded ***294*** by appellant we will say article 3235, as applied to the facts here, provides:

"Whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, and [except such as may be exempt by law from payment of debts] shall still be liable and subject in their hands to the payment of the debts of the intestate." Article 3235, Revised Statutes.

Our statute providing that the title to the property of the intestate shall immediately vest in his heirs at law, but that the non-exempt property shall be subject to the payment of the debts of the intestate, etc., our Supreme Court holds, in effect, that it is proper and lawful for said heirs to take possession of the property on the death of the intestate, and that such heirs, by so doing, do not become liable for the debts of the intestate nor for the value of the property so received by them, unless they have converted it, but the only remedy the creditor has is to subject such nonexempt property in the hands of the heirs to the payment of his debt, and this may be done through the medium of a statutory trustee, to wit, an administrator, or, in a proper case, where no administration has been taken out and none is necessary, through the medium of the proper court having jurisdiction to establish such debt and to order the sale of such property of the intestate to pay same. Blinn et al. v. McDonald, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931; Moore v. Moore, 89 Tex. 29, 33 S. W. 217.

5 6 7 8 In the above cases, and other cases, our Supreme Court says much about the creditor's lien on the nonexempt property of his deceased debtor, but we do not think by these expressions is meant a lien, as that term is generally understood. A lien on either personal property or real estate arises only by virtue of a contract or some statutory provision. A creditor has a quasi lien or interest in the nonexempt property of his debtor, that is, he has the right to have it applied to the payment of his debt, and the fact the debtor dies does not create any additional rights in such nonexempt property. Our Supreme Court has never held that the lien here referred to is such a one as can be foreclosed in court, as liens are usually foreclosed. At the time H. T. Newton died, the title to the house and lot immediately vested in his heirs. None of these heirs are named in the plaintiff's pleading except Emma **Gibson**, and none of them are named in the defendant's pleading. According to the evidence of Emma **Gibson**, the other heirs are a brother and the descendants of a deceased half-brother. These heirs should all be made parties by naming them, and not as unknown heirs. However, if the property was not exempt, appellant's judgment lien attached, if properly abstracted during his lifetime, and if, by reason of a failure to properly abstract or record or index said abstract of judgment during his life, a lien did not attach, then said property, if not exempt, was still chargeable, in the hands of his heirs, with the payment of said judgment, and the district court, it appearing there was no need of an administration, under its broad equitable powers, would have the right to adjudicate the validity of the justice court judgment and order said house and lot sold to pay same, but to direct the sale of same in such way as not to permit it to be sacrificed. We think this suit was properly brought and in the proper court.

9 Some interesting questions arise in regard to the homestead exemption. The record discloses that H. T. Newton, his mother, and his widowed sister, Emma, with three small children, lived on the property, and while they did so they constituted a family entitled to homestead exemption. After the mother died, the brother and widowed sister and children continued to be a family, entitled to homestead exemption. If the family here referred to was occupying the property at the time the abstract of judgment was filed, if it was filed, then a judgment lien would not attach so long as said family continued to occupy said property.

10 The question of improvements in good faith, as pleaded, was inapplicable. However, if appellee Emma **Gibson** intended to plead as a fact that she expended $315 for improvements on said property, and that said improvements enhanced the value of said property, stating the amount the value was so enhanced, and if she sustained said allegations by proof, then, in case the property is sold, we think it would be the duty of the court, under his equitable powers, in case the property failed to

bring enough to satisfy both claims, to prorate the proceeds between the claim of appellant and the enhanced value of the property in favor of appellee Emma **Gibson**.

For the errors involved in the questions above discussed, we reverse and remand this case for further proceedings in accordance with this opinion.

End of Document

650 S.W.2d 764 (1983)

HOUSTON FIRST AMERICAN SAVINGS, et al., Petitioners,

v.

Vann MUSICK and C.C. Divine, et al., Respondents.

No. C-1370.

Supreme Court of Texas.

April 20, 1983.
Rehearing Denied June 15, 1983.

765 *765 Anderson, Brown, Orn & Jones, Nelson Jones, **Houston**, for petitioners.

Heath & Associates, Robert A. Heath, Gladys R. Goffney, **Houston**, for respondents.

RAY, Justice.

This is a trespass to try title case. **Houston First** American Savings Association, successor to American Savings & Loan
766 Association of **Houston**, filed suit in 1966 to recover possession of 618.7 acres in Harris *766 County. Named as defendants were Vann Musick,[1] who claims an undivided 1/3 interest in the 618.7 acres, and C.C. Divine,[2] who claimed a specific 27 acres. The trial court rendered judgment non obstante veredicto in favor of **Houston First** American Savings (American). The court of appeals reversed the judgment of the trial court and remanded the cause with instructions to render judgment for Vann Musick and C.C. Divine consistent with the jury's verdict.[3]

We reverse the judgment of the court of appeals and render judgment that American take nothing from defendant Vann Musick and that the judgment of the trial court be affirmed in all other respects. American's claims against the respective defendants are unrelated and will be discussed separately.

I. American v. Vann Musick

In 1951, W.O. Bartle conveyed the 618.7 acres in controversy to Ted and Levoy Musick, the brothers of Vann Musick. In 1952 Ted Musick and Levoy, joined by his wife Mary Ann Musick, conveyed an undivided 1/3 interest in the property to Vann Musick. On March 14, 1961, Vann Musick, joined by her brothers, executed a deed of trust covering the 618.7 acres to secure a note of the same date payable to Theodore Lucas, trustee of the J.B. Lucas Trust. This note was subsequently purchased by TWI Development Company, a corporation wholly owned by Levoy Musick and his wife. Thereafter, TWI appointed B.J. Brown, substitute trustee, to replace the trustee originally named in the deed of trust. At the trustee's sale held on July 2, 1963, Brown, as substitute trustee, conveyed the 618.7 acres to TWI. In June 1964, TWI conveyed the land to Harry Holmes, Jr. and W.M. Wheless, Sr., reserving an option to repurchase. Four months after this conveyance Levoy Musick died. Under the terms of his will, Mary Ann Musick became owner of all TWI stock and the repurchase option. Subsequently, TWI agreed to a plan for exercising its repurchase option. Pursuant to this plan, TWI repurchased the land and conveyed the 618.7 acres to Meyer Jacobson and T.S. Kent who used the land as collateral to secure a loan from American. On December 18, 1964, three transactions occurred:

1) TWI exercised its option and Holmes and Wheless executed a warranty deed to TWI;

2) Mary Ann Musick, as president of TWI conveyed the land to Kent and Jacobson by general warranty deed;

3) Kent and Jacobson executed a deed of trust to Ralph B. Lee as trustee for the benefit of American.

The deed of trust secured a loan of $150,000 from American to Kent and Jacobson. No payments were ever made on the promissory note. At a trustee's sale held on February 6, 1966, the property was sold to American for $25,000.

American initiated its trespass to try title action in 1966, naming as defendants several members of the Musick family who were already litigating their respective rights in the property. American's lawsuit and the Musick family litigation were consolidated in 1968. Thereafter, American's claims against Vann Musick and C.C. Divine were severed and a separate trial ordered. Before this case was tried, a separate trial was held between American, Levoy Musick, Mary Ann Musick, TWI and others who claimed an interest in the 618.7-acre tract. As between the parties to that suit, this Court rendered judgment for American. *American Savings and Loan Ass'n of **Houston** v. Musick,* 531 S.W.2d 581 (Tex.1975).

767 In January, 1980, American's trespass to try title claim against Vann Musick and C.C. Divine came to trial. At the close of *767 evidence American moved for an instructed verdict. The trial court denied American's motion and submitted twenty-four special issues requested by Vann Musick. All of the jury's answers to these issues favored Vann Musick. Vann Musick thereafter moved for judgment on the verdict. American filed an opposing motion for judgment non obstante veredicto. The trial court granted American's motion, finding that the jury's verdict was not supported by the pleadings or evidence and was immaterial.

The court of appeals reversed the judgment of the trial court and remanded the cause for entry of judgment on the jury's verdict. Although the court of appeals found evidence to support the verdict, the court did not specifically discuss the evidence or address which issue or issues served to defeat American's title.

American argues that the court of appeals has erred in remanding the cause for entry of judgment on the jury's verdict, because the special issues are immaterial and unsupported by the pleadings and evidence. American submits that the trial court correctly rendered judgment in its favor because it established superior title out of a common source.

American's claim of superior title depends upon the foreclosure of a deed of trust signed by Vann Musick and her brothers on March 14, 1961. This deed of trust was given to secure a note payable to Theodore Lucas, Trustee of the J.B. Lucas Trust. This deed of trust granted the trustee the power to sell the property at the request of the holder or payee of the note in the event of default. The deed of trust further set forth the conditions of the Trustee's power of sale which included, among others, that notice of the sale be posted in three public places in Harris County for at least twenty-one days prior to the sale. The deed of trust also contained the customary provisions authorizing the trustee, or a duly appointed substitute trustee, to recite in the trustee's deed the facts concerning the sale, and that such recitals should be prima facie evidence of the truth of the facts recited.

In order to connect this deed of trust to a substitute trustee's deed which purported to convey the 618.7-acre tract to TWI, American introduced in evidence a document entitled "Appointment of Substitute Trustee." This document recited that TWI was the owner and holder of the note and deed of trust, dated March 14, 1961. Although there was no other evidence in the record confirming that TWI bought the note and deed of trust from the J.B. Lucas Trust, none was necessary. Vann Musick admitted as a fact that Levoy Musick "bought the note and deed of trust in the name of TWI Development Company, a corporation" in a pleading which she entitled "Cross-Plaintiff's **First** Amended Petition." Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. Any fact admitted is conclusively established in the case without the introduction of the pleadings or presentation of other evidence. *Kirk v. Head,* 137 Tex. 44, 152 S.W.2d 726 (1941); 1A R. Ray, *Texas Law of Evidence,* § 1144 (Texas Practice 3d ed. 1980).

American next introduced in evidence the deed by which the substitute trustee conveyed the property to TWI. This deed recited compliance with all conditions of the deed of trust. American argues that the recitals in the substitute trustee's deed establish that the foreclosure sale at which TWI acquired the property conformed to the conditions set out in the deed of trust.

While we agree that these recitals are prima facie evidence that the terms of the trust were fulfilled, we note that the recitals in a trustee's deed only give rise to a presumption of validity and relate only to matters of evidence. *Slaughter v. Qualls,* 139 Tex. 340, 162 S.W.2d 671, 676 (1942). The presumption of the validity of the sale is not conclusive and may be rebutted. *Hart v. Eason,* 159 Tex. 375, 321 S.W.2d 574, 575 (1959). Although Vann Musick admitted in her "cross-claim" that TWI purchased the
768 note and deed of trust and *768 thereby conceded TWI's authority to appoint a substitute trustee, Vann Musick nevertheless did rebut the presumption that the substitute trustee complied with the conditions contained in the deed of trust.

The "Appointment of Substitute Trustee" recites that B.J. Brown was appointed substitute trustee on May 21, 1963. The appointment, however, refers to the volume and page where the deed of trust is recorded. Since the deed of trust was not recorded until June 17, 1963, the volume and page could not have been known on May 21, 1963. The jury found that B.J. Brown was not appointed substitute trustee until some time after June 17, 1963. Since Brown sold the property to TWI on July

2, 1963, it is apparent that notice of the sale was not given for twenty-one days prior to sale as required by the deed of trust and Article 3810.[4]

The maker of a deed of trust with power of sale may condition the exercise of the power upon such conditions as he may prescribe. *Slaughter v. Qualls, supra*. The trustee must strictly adhere to the terms of the power for the power "admits of no substitution and no equivalent." *Michael v. Crawford,* 108 Tex. 352, 193 S.W. 1070 (1917). In *Fuller v. O'Neal,* 69 Tex. 349, 6 S.W. 181 (1887) we wrote:

> The course marked out for the trustee to pursue must be strictly followed by him: for the method of enforcing the collection through such deeds is a harsh one. The grantor of the power is entitled to have his directions obeyed; to have the proper notice of sale given; to have it to take place at the time and place, and by the person appointed by him.

Compliance with the notice condition contained in the deed of trust and as prescribed by law is a prerequisite to the right of the trustee to make the sale. *Goode v. Davis,* 135 S.W.2d 285, 292 (Tex.Civ.App. — Fort Worth 1939, writ dism'd judgmt cor.); *Childs v. Hill,* 20 Tex.Civ.App. 162, 49 S.W. 652 (Tex.Civ.App.1898, no writ).

American argues, however, that the jury finding that the substitute trustee was not appointed by TWI until sometime after June 17, 1963 is immaterial because Vann Musick admitted in her pleadings that the appointment of the substitute trustee was made on May 21, 1963. In "Cross-Plaintiff's **First** Amended Petition," Vann Musick alleged:

> "On the 21st day of May, 1963, conspiring with B.J. Brown and Pat Towery, a purported appointment of Substitute Trustee was executed by A.R. Morris, as president attested by Pat Towery, Secretary of the TWI Development Company."

In her amended answer she alleged:

> "The TWI Development Company obtained title to the 618.7 acres in question by an invalid substitute trustee sale from B.J. Brown who was appointed trustee by A.R. Morris purported president of TWI Development Company on the 21st day of May, 1963."

Assuming for the sake of argument that Vann Musick's pleadings do admit as fact that TWI appointed the substitute trustee on
769 May 21, 1963,[5] American has nevertheless waived its right to rely on the admission. *769 American's only objection to the special issue regarding the appointment of B.J. Brown as substitute trustee was "there is no evidence which raises such an issue and it is irrelevant." American's objection did not indicate that it was relying on Vann Musick's pleadings as a judicial admission. Furthermore, American's own chain of title, and hence its own evidence, establishes that B.J. Brown was not appointed substitute trustee on May 21, 1963. Although the "Appointment of Substitute Trustee" recites that the appointment was executed on May 21, 1963, when this instrument is considered together with the deed of trust to which it refers by volume and page, it is evident that the May 21 date is erroneous.

The facts alleged or admitted in the live pleadings of a party are accepted as true by the court and jury and are binding on the pleader. 1A R. Ray, *Texas Law of Evidence,* § 1127 (Texas Practice 3d ed. 1980). The party relying on his opponent's pleadings as judicial admissions of fact, however, must protect his record by objecting to the introduction of evidence contrary to that admission of fact and by objecting to the submission of any issue bearing on the fact admitted. *Starks v. City of **Houston**,* 448 S.W.2d 698 (Tex.Civ.App. - **Houston** [1st Dist.] 1969, writ ref'd n.r.e.); *Restelle v. Williford,* 364 S.W.2d 444 (Tex.Civ. App. - Beaumont 1963, writ ref'd n.r.e.); *Dallas Transit Co. v. Young,* 370 S.W.2d 6 (Tex.Civ.App. - Dallas 1963, writ ref'd n.r. e.).

Although the substitute trustee's deed was invalid as between TWI and Vann Musick, it did give the appearance of good title in TWI. Were American a bona fide purchaser of the property, Vann Musick would be estopped to assert the invalidity of the trustee's sale. *Slaughter v. Qualls,* 162 S.W.2d at 675. The jury, however, found that American was neither a bona fide purchaser, nor a bona fide mortgagee. Both terms were defined as requiring the purchaser or mortgagee to acquire its interest in the property in good faith, for value and without notice of the claim or interest of a third party. ***Houston** Oil Co. of Texas v. Hayden,* 104 Tex. 175, 135 S.W. 1149 (1911). There is evidence in the record from which the jury could reasonably have concluded that American was aware of the Musick family litigation at the time it acquired its interest in the 618.7-acre tract. This land was the subject of a lawsuit filed in May, 1962. Vann Musick, Ted Musick, Levoy Musick, TWI and other members of the Musick family were all parties to the litigation. In 1963, a notice of lis pendens was filed in the lis pendens records of Harris

County. American did not take its deed of trust on the property until December, 1964, and did not foreclose on the property until 1966.

In summary, we hold that the substitute trustee's deed conveying the property to TWI is invalid because the trustee failed to give the notice required by law and by the terms of the deed of trust. We further hold that American is not a bona fide purchaser and, hence, has no better title than its grantor. *See Hartel v. Dishman,* 135 Tex. 600, 145 S.W.2d 865 (1940).

II. American v. C.C. Divine

C.C. Divine claimed a specific 27 acres out of the 618.7-acre tract. Levoy Musick is the common source of title. American's title is identical to that traced above with respect to its claim against Vann Musick.

On December 13, 1961, Levoy and his wife conveyed the 27 acres to C.C. Divine. On October 25, 1962, C.C. Divine and H.G. Divine placed certain property in trust. The corpus of the trust included the 27 acres in controversy. The purpose of the trust
770 was to serve as security for the posting *770 of bail bonds. The trust required the signatures of at least two trustees for a valid conveyance of property from the trust. C.C. Divine, H.G. Divine and A. Divine were named trustees. On July 27, 1963, C.C. Divine, individually, executed a general warranty deed conveying the 27 acres to Levoy Musick and his wife. The other two trustees did not join in this conveyance.

On September 5, 1963, all three trustees conveyed the 27 acres to Fred Divine who, on March 19, 1964, conveyed the property to W.E. Whitter and G.D. Peyton. On June 15, 1965, Whitter and Peyton, by general warranty deed, conveyed the 27 acres to C.C. Divine.

Over the objections of American, C.C. Divine was permitted to testify that he did not intend to convey the 27 acres by his warranty deed of July 27, 1963. The jury apparently believed Divine's testimony, because all special issues were answered in Divine's favor. The trial court, however, disregarded the jury's verdict and rendered judgment for American.

The court of appeals reversed the judgment of the trial court and remanded the cause for entry of judgment on the verdict. The court of appeals concluded that there was evidence to support the jury verdict and that American had waived any error by failing to file cross-points.

American argues that it was not required to file cross-points in the court of appeals. American further argues that under the doctrine of after-acquired title, the title conveyed to C.C. Divine by Whitter and Peyton on June 15, 1965, flowed immediately into Levoy Musick and wife, and their assigns because of Divine's general warranty deed dated July 27, 1963.

We agree with both arguments. In *Jackson v. Ewton,* 411 S.W.2d 715, 717 (Tex. 1967) we explained that "cross-points" are used to preserve error committed by the trial court and "are the means by which an appellee may bring forward complaints of some ruling or action of the trial court which the appellee alleges constituted error as to him." The judgment non obstante veredicto rendered by the trial court is exactly the judgment requested by American. In fact, the trial court judgment incorporates by reference American's entire motion for judgment non obstante veredicto. Hence, it was unnecessary for American to file cross-points, because American had no complaint with the judgment of the trial court.

The court of appeals' erroneous "cross-point" holding apparently caused the court to conclude that American had waived its argument under the doctrine of after-acquired title. We hold that American is entitled to rely on the doctrine. The rule is that "when one conveys land by warranty of title, or in such a manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land will pass eo instante to his warrantee, binding both the warrantor and his heirs and subsequent purchasers from either." *Caswell v. Llano Oil Co.,* 120 Tex. 139, 36 S.W.2d 208, 211 (Tex.Comm'n App.1931, opinion adopted), citing *Baldwin v. Root,* 90 Tex. 546, 40 S.W. 3, 6 (1897).

The judgment of the court of appeals is reversed. We render judgment that American take nothing from Vann Musick. The judgment of the trial court is affirmed in all other respects.

[1] Vann Musick has conveyed a part of her interest in the 618.7 acres to her attorney, Bob Heath.

[2] C.C. Divine is deceased.

[3] The court of appeals decision is unpublished. Tex.R.Civ.P. 452.

[4] Tex.Rev.Civ.Stat.Ann. art. 3810 (1966) provided in part:

"* * * Notice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said county or counties, one of which shall be made at the courthouse door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the courthouse door of each county in which said real estate may be situated, or the owner of such real estate may, upon written application, cause the same to be sold as provided in said deed of trust or contract lien. * * *"

[5] We doubt that Vann Musick judicially admitted as fact that TWI appointed B.J. Brown substitute trustee on May 21, 1963. Both the answer and cross-petition use "purported" which is synonymous with "rumored." We do not view the sentence from either the cross-petition or answer as being so clear and unequivocal as to rise to a judicial admission. *American Savings and Loan Ass'n of **Houston** v. Musick, supra,* at 589. Furthermore, the answer includes a plea of not guilty and a general denial. Allegations in a defendant's answer which includes a general denial are not a waiver of the general denial and may not be used by the plaintiff as admissions. *Climatic Air Distributors v. Climatic Air Sales, Inc.,* 162 Tex. 237, 345 S.W.2d 702 (1961); *Hynes v. Packard,* 92 Tex. 44, 45 S.W. 562, 564 (1898).

Huddleston v. Texas Commerce Bank-Dallas, N.A.
Court of Appeals of Texas, Dallas. | July 12, 1988 | 756 S.W.2d 343 *(Approx. 6 pages)*

Dallas.

Albert D. HUDDLESTON, Appellant,

v.

TEXAS COMMERCE BANK–DALLAS, N.A., Appellee.

Lender brought action against borrower on real estate notes for deficiency judgment after lender had foreclosed on the real property, and borrower counterclaimed for usury. The 68th Judicial District Court, Dallas County, Gary Hall, J., granted summary judgment for lender, both for deficiency and on usury counterclaim, and borrower appealed. The Court of Appeals, Enoch, C.J., held that: (1) dismissal of property transferee's bankruptcy petition did not reinstate foreclosure sale held in violation of bankruptcy stay, such that amount of borrower's debt should have been credited with amounts received at that foreclosure sale, and that lender's subsequent demand for payment which failed to credit amounts received at foreclosure sale constituted charging of interest in violation of usury statutes; (2) doctrine of estoppel by deed could not be used by borrower to preclude lender from denying that foreclosure sale occurred on date when property transferee had filed bankruptcy petition, where record did not show timely filed pleadings asserting defense of estoppel by deed on behalf of borrower; and (3) Business and Commerce Code chapter including requirement that secured party dispose of collateral in commercially reasonable manner and cases concerning disposition of collateral under that chapter did not apply to creation or transfer of interest in or lien on real estate, so as to require lender secured by deed of trust to real property to establish that foreclosure sale occurred in commercially reasonable manner.

Affirmed.

West Headnotes (5)

Change View

1 **Bankruptcy** Validity of Acts in Violation of Injunction or Stay
Dismissal of property transferee's bankruptcy petition did not reinstate foreclosure sale that was held in violation of stay, such that amount of borrower's debt to lender secured by deed of trust to real property should have been credited with amounts received at foreclosure sale and that lender's demand for payment which failed to credit amounts received at the foreclosure sale constituted charging of interest in violation of usury statutes; when bankruptcy case was dismissed by bankruptcy court, that court took no action to annul or otherwise recognize invalidity of stay, so sale that occurred after transferee filed for bankruptcy was void and of no legal effect. Bankr.Code, 11 U.S.C.A. § 362(a).

11 Cases that cite this headnote

2 **Bankruptcy** Notice to Creditors; Commencement
Bankruptcy stay is effective upon filing of petition even though the parties

have no notice of its existence. Bankr.Code, 11 U.S.C.A. § 362(a).

9 Cases that cite this headnote

3 **Estoppel** Necessity

Estoppel was affirmative defense which had to be specifically pleaded, but with respect to which record did not show timely filed pleadings asserting defense of estoppel by deed on behalf of borrower, and accordingly, borrower was precluded from asserting that doctrine of estoppel by deed precluded lender from denying that foreclosure sale occurred on date trustee's deeds stated foreclosure sale occurred, a date when property transferee had filed bankruptcy petition. Vernon's Ann.Texas Rules Civ.Proc., Rules 63, 94, 166a(c).

1 Case that cites this headnote

4 **Appeal and Error** Specification of Errors

Defendant, whose late filed pleadings had not been considered, and who had not raised by point of error issue that trial court abused its discretion by failing to consider untimely amended answer, had failed to preserve error on claim that doctrine of estoppel by deed precluded lender purchaser from denying foreclosure sale occurred on particular date.

2 Cases that cite this headnote

5 **Mortgages** Deficiency and Personal Liability

Business and Commerce Code chapter including requirement that secured party dispose of collateral in commercially reasonable manner and cases concerning disposition of collateral under that chapter did not apply to creation or transfer of interest in or lien on real estate, so as to require lender secured by deed of trust to real property to establish that foreclosure sale of real property occurred in commercially reasonable manner as part of lender's burden of proof in deficiency judgment action against borrower brought after lender had foreclosed on the real property. V.T.C.A., Bus. & C. §§ 9.101 et seq., 9.104(10), 9.504(c).

6 Cases that cite this headnote

Attorneys and Law Firms

***344** Tom Thomas, Geoffrey G. Tudor, Kolodey & Thomas, Dallas, for appellant.

Vera R. Bangs, Edwin R. DeYoung, C. Kent Adams, Liddell, Sapp, Zivley, Hill & Laboon, Dallas, for appellee.

Before ENOCH, C.J., and McCLUNG and BAKER, JJ.

Opinion

ENOCH, Chief Justice.

This is a summary judgment case. Appellee, Texas Commerce Bank–Dallas, N.A., sued Appellant, Albert D. Huddleston, on two real estate notes for a deficiency judgment after it had foreclosed on the real property. Huddleston counterclaimed for usury. The trial court granted summary judgment in favor of Texas Commerce both for the deficiency and on Huddleston's usury counterclaim. Huddleston appeals.

In four points of error, Huddleston urges that: (1) the district court erred in ruling that a foreclosure sale conducted in violation of the automatic stay imposed under 11 U.S.C. § 362 was void; (2) Texas Commerce is estopped to deny the validity of the foreclosure sale; (3) Texas Commerce's demand for payment constituted a charging

of usurious interest as a matter of law; and (4) a fact issue exists as to whether Texas Commerce conducted a second foreclosure sale in a commercially reasonable manner. For the reasons below, we affirm the trial court.

Texas Commerce loaned Huddleston $7,500,000.00 and $7,158,253.00. Each loan was evidenced by a promissory note and secured by a deed of trust to real property. Huddleston failed to repay the notes when due, and Texas Commerce requested the substitute trustee to proceed with foreclosure sale of the properties. The substitute trustee posted notices for the sale to occur on May 6, 1986.

Huddleston was the sole shareholder and president of Trebla Resources, Inc. On ***345** May 5, 1986, Huddleston transferred the properties scheduled for foreclosure to Trebla. On May 6, prior to the foreclosure sale, Trebla filed a petition in bankruptcy. Unaware of these actions, the substitute trustee conducted the sale, and Texas Commerce purchased the properties. Thus, the May 6th foreclosure sale occurred in violation of the stay which arises automatically upon the commencement of a bankruptcy proceeding. 11 U.S.C. § 362(a).

On June 6, 1986, the bankruptcy court granted Texas Commerce's motion to dismiss Trebla's bankruptcy proceeding on the grounds that Trebla's filing was in bad faith. The bankruptcy court did not, however, specifically annul the automatic stay in its dismissal.

Following dismissal of Trebla's petition, Texas Commerce repeated foreclosure proceedings against the properties. On or about June 10, 1986, Texas Commerce demanded payment on the notes from Huddleston in an amount exceeding $14,500,000.00. This amount gave Huddleston no credit against the notes for the amounts tendered for the properties at the May 6th foreclosure sale. The substitute trustee again posted the properties, and they were again sold to Texas Commerce at a second foreclosure sale held on July 1, 1986.

After crediting the amount received for the properties at the July 1st sale against Huddleston's debt, Texas Commerce instituted this suit to recover the deficiency. Huddleston answered, asserting an affirmative defense of usury and a counterclaim for usury.[1] As mentioned, the trial court granted judgment for Texas Commerce on its deficiency claim and against Huddleston on his claim of usury.

1 In his first and third points of error, Huddleston argues that, although the May 6th foreclosure sale was held in violation of the automatic stay, the subsequent dismissal of Trebla's bankruptcy petition reinstated that sale. Therefore, according to Huddleston, the amount of his debt should have been credited with the amounts received at the May 6th foreclosure sale. Consequently, Texas Commerce's demand for payment on June 10th, which failed to credit those amounts, constituted a charging of interest in violation of Texas usury statutes. We disagree.

2 The filing of a petition in bankruptcy operates to stay actions and proceedings against the debtor. 11 U.S.C. 362(a). The actions stayed include foreclosure sales such as the May 6th sale in this case. 11 U.S.C. § 362(a)(4). The stay is effective upon the filing of the petition even though the parties have no notice of its existence. *In re Scott,* 24 B.R. 738 (Bankr.M.D.Ala.1982).

In general, acts taken in violation of the automatic stay are void and without legal effect. *Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); *In re Scott,* 24 B.R. 738 (Bankr.M.D.Ala.1982). This is the law in this jurisdiction. *Continental Casing Corp. v. Samedan Oil Corp.,* 751 S.W.2d 499 (Tex.1988) (per curiam); *but see In re Oliver,* 38 B.R. 245 (Bankr.D.Minn.1984) (acts taken in violation of the automatic stay are voidable rather than void). The bankruptcy court may take some action, such as annulling the stay, to retroactively validate actions taken in violation of the stay. *In re Albany Partners,* 749 F.2d 670 (11th Cir.1984); *Claude Regis Vargo Enterprises, Inc. v. Bacarisse,* 578 S.W.2d 524 (Tex.Civ.App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). Absent such an action by the bankruptcy

court, however, the mere termination of the stay does not validate actions taken in violation of it. *Goswami v. Metropolitan Savings and Loan Association,* 751 S.W.2d 487, 489 (Tex.1988); *see In re Eden* ****346*** *Associates,* 13 B.R. 578, 585 (Bankr.S.D.N.Y.1981).

In this case, the May 6th foreclosure sale occurred during the pendency of the automatic stay. When the bankruptcy court dismissed Trebla's case, it took no action to annul or otherwise recognize the invalidity of the stay. Therefore, the May 6th sale was void and of no legal effect. Because the May 6th sale was void, it was ineffective to pass title to the property and title remained with Trebla.

Our conclusion is also supported by 11 U.S.C. 349(b)(3). That section provides that, unless the court orders otherwise, dismissal of a bankruptcy case revests property in the entity in which the property was vested immediately before the commencement of the case. 11 U.S.C. 349(b)(3); *see also In re Eden Associates,* 13 B.R. at 585 (dismissal of petition terminated automatic stay and restored rights of creditor to their position as of commencement of the case).

Huddleston urges that we adopt the reasoning of *In re Linton,* 35 B.R. 695 (Bkrtcy.D.Idaho 1983), and hold that the subsequent dismissal of Trebla's case reinstated the May 6th sale. We decline the invitation. *Linton* involved the effect of a subsequent dismissal on a creditor's attempt, during the pendency of the stay, to perfect his security interest in personal property. Those are not the facts of this case. Irrespective of this distinction, our opinion that the foreclosure sale is void unless the bankruptcy court takes some action to annul the stay or to recognize that the stay was invalid *ab initio* is consistent with the reasoning adopted by Texas cases. *Goswami v. Metropolitan Savings and Loan Association,* 751 S.W.2d 487, 489 (Tex.1988) (where bankruptcy court took no action to annul stay or recognize its invalidity, subsequent termination of temporary stay did not automatically validate foreclosure sale conducted during pendency of stay); *Southern County Mutual Insurance Co. v. Powell,* 736 S.W.2d 745, 748 (Tex.App.—Houston [14th Dist.] 1987, orig. proceeding) (default judgment, if entered during pendency of stay, was void); *Community Investors IX, Ltd. v. Phillips Plastering Co.,* 593 S.W.2d 418 (Tex.Civ.App.—Houston [14th Dist.] 1980, no writ) (judgment of state court foreclosing lien during pendency of automatic stay is void); *Claude Regis Vargo Enterprises, Inc. v. Bacarisse,* 578 S.W.2d 524, 528 (Tex.Civ.App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (stating in dictum that a foreclosure sale conducted in violation of the automatic stay remains invalid unless the bankruptcy court annuls the stay).

Because the May 6th foreclosure sale was void, Texas Commerce was not required to consider that sale in calculating the amount of Huddleston's debt in its June 10th demand for payment. Huddleston's first and third points of error are overruled.

3 In his second point of error Huddleston asserts that because the trustee's deeds state that the foreclosure sale occurred on May 6th, the doctrine of estoppel by deed precludes Texas Commerce from denying that the foreclosure sale occurred on that date. In response, Texas Commerce notes that estoppel is an affirmative defense that must be specifically pleaded under Texas Rule of Civil Procedure 94. Texas Commerce argues that the trial court did not err in granting summary judgment because, at the time of the summary judgment hearing, Huddleston's pleadings did not assert this affirmative defense. We agree.

Under Texas Rule of Civil Procedure 63, amended pleadings offered within seven days of the date of trial or thereafter may be filed only with leave of the court. A summary judgment hearing is a trial for purposes of Rule 63. *Goswami v. Metropolitan Savings and Loan Association,* 751 S.W.2d 487 (Tex.1988). The trial court's refusal to allow amendments that are untimely under Rule 63 can be overturned only if the complaining party clearly shows an abuse of discretion. *Hardin v. Hardin,* 597 S.W.2d 347 (Tex.1980).

In this case, the only defensive pleading on record before this Court is Huddleston's second amended original answer. This answer, which asserts the affirmative defense ***347** of estoppel, was filed *after* the summary judgment hearing. The record reflects that Texas Commerce objected to this late filed pleading on the ground that it operated as a surprise by adding the new legal theory of estoppel by deed. The trial court's judgment states that the trial court considered those pleadings on file *at the time* of the summary judgment hearing. It is clear from the record that the trial court refused to consider Huddleston's untimely answer.

Texas Rule of Civil Procedure 166a(c) authorizes the trial court to grant summary judgment if "the *pleadings* ... [and summary judgment evidence] ... *on file at the time of the hearing, or filed thereafter and before judgment with permission of the court,* show that ... there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response." TEX.R.CIV.P. 166a(c) (emphasis added).

4 From the record before us, there were no timely filed pleadings asserting the defense of estoppel by deed on behalf of Huddleston. The trial court specifically did not consider Huddleston's late filed pleadings. Huddleston has not raised by point of error the issue that the trial court abused its discretion in failing to consider his untimely amended answer. Consequently, Huddleston has failed to preserve error on this point. *Energo International Corp. v. Modern Industrial Heating, Inc.*, 722 S.W.2d 149 (Tex.App.—Dallas 1986, no writ). Huddleston's second point of error is overruled.

5 In his fourth point of error, Huddleston asserts that the district court erred in granting summary judgment because a fact issue exists as to whether Texas Commerce's sale of the real property occurred in a commercially reasonable manner. Huddleston argues that Texas Commerce must establish the commercial reasonableness of its sale as part of its burden of proof. In support of this position, Huddleston cites two cases, each concerning disposition of collateral under Chapter 9 of the Texas Business and Commerce Code. Section 9.504(c) of the Texas Business and Commerce Code requires that the secured party dispose of collateral in a commercially reasonable manner. Chapter 9, however, does not apply to the "creation or transfer of an interest in or lien on real estate...." TEX.BUS. & COM.CODE § 9.104(10) (Vernon Supp.1988). Huddleston's fourth point of error is overruled.

The judgment of the trial court is AFFIRMED.

Footnotes

1 The record in this case is incomplete. Huddleston's *Second* Amended Original Answer and Counterclaim is his only pleading before us. According to the record, this document was filed *after* the hearing on the motion for summary judgment. The record does not show which claims of Huddleston's were before the trial court at the summary judgment hearing. However, by their briefs, both parties apparently agree that Huddleston had raised the usury issue in earlier pleadings and the judgment affirmatively states that the court considered these earlier pleadings.

End of Document

244 S.W.2d 637 (1951)

HUMBLE OIL & REFINING CO. et al.
v.
ATWOOD et al.

No. A-3126.

Supreme Court of Texas.

October 31, 1951.
Rehearing Denied January 16, 1952.

Rex G. Baker, R. E. Seagler, Felix A. Raymer and M. P. Pearson, all of Houston, Leroy G. Denman, Jr., and Robert Lee Bobbitt, Jr., San Antonio, S. L. Gill, Roger F. Robinson and S. P. Nielson, all of Raymondville, Jones, Hardie, Grambling & Howell, El Paso, for petitioners-respondents, **Humble Oil** & **Refining** Company et al.

Thomas Hart Fisher, Chicago, Illinois, Black & Stayton (Charles L. Black and John W. Stayton), of Austin, Cix, Wagner, Adams & Wilson, of Brownsville, for respondents-petitioners, Edwin K. **Atwood** and Alice B. **Atwood**.

WILSON, Justice.

The parties will be identified as in the trial court where the Atwoods were plaintiffs and the defendants were the **Humble Oil** & **Refining** Company, the King Ranch, a corporation, and various members of the King and Kleberg families.

The principal question is: Can an **oil** and gas lease be adjudicated to be both a mortgage and a grant of minerals under a line of cases begining with Stamper v. Johnson, 3 Tex. 1, and continuing through Bradshaw v. McDonald, 147 Tex. 455, 216 S.W.2d 972? The answer is "No."

We reach this question as a result of long and involved litigation between the Atwoods and other heirs who jointly inherited the King Ranch. This ranch was administered for a period under a trust established by an ancestor of all parties. Becoming
638 dissatisfied with the administration of the trust, the Atwoods filed and prosecuted *638 to judgment three suits in the U. S. District Court for the Southern District of Texas, styled, respectively: **Atwood** v. Kleberg, Equity Action No. 74, Main Case and Ancillary, on appeal 163 F.2d 108; **Atwood** v. Kleberg, Equity Action No. 102; and **Atwood** v. Kleberg Equity Action No. 101, on appeal 133 F.2d 69, on rehearing 135 F.2d 452. That portion of this Federal litigation material to this case consisted of an attack upon **oil** and gas leases executed by the trustees. In the Federal litigation it was determined that the minerals had not been served prior to the creation of the trust; that the trustees had authority to execute the **oil** and gas leases; that the leases as executed did not violate the trustees' duty to the cestui que trust; and that the **oil** and gas leases involved here were valid.

Following these adverse decisions, the Atwoods brought this suit in the Texas courts seeking: (1) an adjudication that the **oil** and gas lease on that portion of the ranch partitioned to them is a mortgage, and for redemption; (2) cancellation of the **oil** and gas lease "because extending 18½ years and longer beyond the end of a limited ten-year trust form;" (3) reformation; (4) an accounting; (5) damages; (6) and general relief. The King Ranch corporation and other defendants joined **Humble** in resisting the attacks.

Both sides plead res adjudicata and estoppel by reason of the Federal litigation and both vigorously argue that Moore v. Snowball, 98 Tex. 16, 81 S.W. 5, 66 L.R.A. 745, supports their contention. On Item (1), plaintiffs contend that the debt was not finally paid until after the judgments in the Federal cases, so that the case at bar neither could nor should have been urged in that litigation. The trial court severed the issues of res adjudicata and estoppel and upon them rendered judgment for defendant that plaintiffs take nothing.

In the case at bar the Court of Civil Appeals held, 239 S.W.2d 412:

(a) That in the Federal litigation plaintiffs sought to have the leases declared *invalid* for a number of reasons, all of which were determined against them;

(b) that in the case at bar plaintiffs do not seek to have the leases declared invalid but instead seek to have them declared *valid as mortgages;*

(c) that the cause of action asserted in the case at bar could not and should not have been raised in the Federal litigation because an action to redeem from a mortgage may not be brought prior to the satisfaction of the obligation, which did not occur until after the termination of the Federal litigation.

(d) that the issue of mortgage *vel non* was not determined for either party in the Federal litigation.

(e) that the judgment of the trial court should be reversed and the cause remanded for trial on the issue of mortgage.

Items (2) and (3) above were determined against plaintiffs in **Atwood** v. Kleberg, 133 F.2d 69, and we do not pass upon them other than to hold that they were there decided. Since we have determined that no cause of action is asserted in Item (1), plaintiffs are not entitled to either damages or general relief under Items (5) and (6).

Upon Item (1) we do not reach Moore v. Snowball, supra. Defendants contend that the Federal courts have three times adjudicated the leases under attack here to be valid mineral leases and an instrument cannot be at the same time both a lease and a mortgage. Plaintiffs reply that: "This argument ignores the fact that, while a given conveyance may be a lease in truth and in fact, yet it may also have been executed as security for a debt and for that reason in equity `be treated as a mortgage."

Clearly such an attack as that alleged in Item (1) is barred by the parol evidence rule unless the attack comes within the exception that a deed absolute may be proved to have been intended to serve as security for a debt and adjudicated to be a mortgage.

In Bradshaw v. McDonald, supra [147 Tex. 455, 216 S.W.2d 974], is found the statement that "the rule allowing an absolute deed to be proved a mortgage * * * relates to that one type of document and to that sole purpose." Plaintiffs contend, to the contrary, that this exception to the parol evidence rule should operate upon any estate in land, should not be limited to a deed of
639 the entire fee, and governs the case at bar, citing Stephens v. Sherrod, 6 Tex. 294; *639 De Bruhl v. Maas, 54 Tex. 464; Nugent v. Riley, 1 Metc. 117, 42 Mass. 117; Lanfair v. Lanfair, 18 Pick. 229, 35 Mass. 299; Barnett v. Williams, 101 S.W. 1191, 31 Ky.Law Rep. 255; Johnson v. Hataway, 155 Ala. 516, 46 So. 760; Mostyn v. Lancaster, 23 Ch.D. 583. These citations require an analysis of the basic elements of a mortgage in Texas and its legal effect.

The early common law recognized two kinds of landed securities. Blackstone in Sec. III of Chap. X (of Estates Upon Condition) p. 156, identifies these as "* * * *vivum vadium,* or living pledge; and *mortuum vadium,* dead pledge, or mortgage." He defines a mortgage as a grant of fee upon condition of repayment of a debt and this has come down as the traditional language used in most mortgage forms.

Originally, possession passed by livery of seizin to the mortgagee. And back of this lies one of the historical reasons for the use of language of grant in a mortgage. Because the distinction between interest and usury was a slow growth, the emergency of the concept of a return upon money capital (as distinguished from land) brought on an intense conflict between the ecclesiastical and common law courts. During a long period any return upon a loan might be declared usury, the parties to it caught in the friction between the common law and the ecclesiastical jurisdictions, and the unfortunate creditor subjected to fine, imprisonment, ransom at the King's pleasure, and exposure on the "pillaire, to their open rebuke and shame." So the creditors sought refuge in the feudal tenures and secured a return upon their loans in the form of rents and profits accompanying the right of possession. As the concept of usury changed and the law recognized interest as "toothless" usury,[1] and as Chancery developed the equity of redemption, possession remained with the mortgagor, but the form of the conveyance continued in general use, and often plagues the courts to this day. Osborne, *On Mortgages,* Sec. 5.

Because the *mortuum vadium* was a use of legal machinery to accomplish a purpose for which it had not been designed, many harsh results flowed from it, for "* * * the common law knew of no better way to treat debtors than to make them live upon to their bargains, * * *." Thomas, *On Mortgages,* p. 6. To the common law judges, thoroughly drilled in the formal discipline of Traditional Logic, the law often became an exercise in logic. Walled in by the rigidity of their syllogisms, they were untouched by the currents of empirical thought which turned Chancery towards the Civil Law. The result is described by Coote in his *On Mortgages,* Chap. I, (ii), p. 4. "Thus mortgages stood at common law, and it is difficult to conceive, if the Courts of Law had been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could

not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled landmarks of property."

To remedy this situation, Chancery evolved the equity of redemption by holding that although "* * * they could not alter the legal effect of the forfeiture at common law, they operated on the conscience of the mortgagee, and, acting *in personam,* they declared it unreasonable that he should retain for his own benefit what was intended as a mere security; and they adjudged * * * that the mortgagor had an equity to redeem on payment * * * notwithstanding the forfeiture at law. * * * The judges of common law strenuously opposed the introduction of this novelty; and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture, * * *." Coote, *On Mortgages,* Chap. II, (iii) pp. 12, 13. See also Osborne, *On Mortgages,* Sec. 1, p. 6.

There followed a period of confusion caused by jealousy between the Courts of Law and Equity. "* * * For a number of years
640 both law and equity courts exercised *640 concurrent jurisdiction over mortgages, resulting in great confusion, more especially while the courts of the common law continued to be presided over by men whose early training had led them to regard the interference of the courts of equity as an offensive innovation. But in course of time the justness of the decrees of the chancellors gradually came to be recognized by the common-law courts and were acquiesced in by them." Jones, *On Mortgages,* Sec. 9, p. 11.

The equitable views finally made their way into the common law in the opinions of Lord Mansfield who was, however, criticized for having "on his mind prejudices derived from his familiarity with the Scottish law, where law and equity are administered in the same courts. * * *." Powell, *On Mortgages,* p. 267.

In America, the states are split into two main groups on mortgages. Some states give effect to the language of grant in a mortgage and are referred to as "title" states for the reason that they hold title passes. The other group are called "lien" states for they hold that neither title nor possession passes. There are many variations between them.

Our Texas mortgage developed in a blended system of Law and Equity administered in one court. In Stephens v. Sherrod, supra, it is recognized, upon authority of Kent and Story, that our mortgage grew out of sales upon condition of non-payment of a debt, or accompanied by a defeasance. One of the differences between the *mortuum vadium* and the Texas mortgage is that if the condition were not faithfully complied with under the *mortuum vadium,* the land was forever lost, while generally under our Texas mortgage it was early determined that the legal title remains in the mortgagor and can only be transferred by foreclosure, or by sale where power of sale is contained in the instrument. Although to this day the early form of an absolute grant with a defeasance is in common use, now by statute and court decision a mortgage is a mere lien regardless of the language used in the instrument itself. Duty v. Graham, 12 Tex. 427; Willis v. Moore, 59 Tex. 628; Hudson v. Eisenmayer, Sr., Milling & Elevator **Co**., 79 Tex. 401, 15 S.W. 385; Carroll v. Edmondson, Tex. Com.App., 41 S.W.2d 64. As a result of Chancery action in developing the equity of redemption, the common law courts were forced to superimpose upon the parol evidence rule an exception allowing a deed absolute to be adjudicated a mortgage if the parties intended that it be security for a debt.

We reach now our immediate problem: What is the result of equitable action upon a deed declared to be a mortgage? The answer can only be that it becomes a line regardless of the language of grant in the deed just as a mortgage is declared to be a lien regardless of its language of grant.

The nature of the equitable action involved is not clear. The phrase *equity of redemption* meant originally the equitable right of the mortgagor to recover his property upon payment of his debt. Subsequently it was applied to the mortgagor's rights before default as an equitable estate, and then again loosely to the difference in value between the debt and the security. Pomeroy, *Equity Jurisprudence,* Sec. 1180. Osborne, supra, Sec. 7. Here we are concerned only with the nature of the equitable cause of action. The transition from a written defeasance separate from the deed to a verbal defeasance presents the main difficulty because of the Statute of Frauds. Some writers treat this cause of action as one for specific performance of a promise to execute a legal mortgage. Osborne, supra, Sec. 27, but this clearly does not fit the case at bar. Some writers treat it as specific performance of a verbal promise to hold as security. Osborne, supra, Sec. 28. In the *Restatement of the Law,* the problem of declaring a deed to be a mortgage is discussed under Restitution, Chap. 10, where it is treated as a problem in constructive trust, Sec. 182, pp. 735, 736; or again it is treated as a question of unjust enrichment. Glenn, *On Mortgages,* Sec. 171. In some jurisdictions it is approached as a question of reformation. Glenn, supra, Sec. 11. Perhaps one basis might be, in the main, historical, or stated another way, a refusal to retrogress. The courts will not allow a creditor to go back of the evolution of the law
641 and take advantage of a form of *641 conveyancing which anteceded the development of the mortgage. A creditor may not turn

back the pages of legal history and force the court to re-fight the old battle between law and equity. When he tries to do so he will be brought up to date by having his deed declared to be a mortgage even though a portion of the transaction be verbal. The same reasons prevent a retrogression which impelled the development of the equity of redemption.

This equitable doctrine has been used in Texas primarily to prevent an overreaching although there may have been no misrepresentation of fact at the execution of the instrument. In the case which introduced this exception to the parol evidence rule into Texas jurisprudence, Stamper v. Johnson, 3 Tex. 1, the Court recognizes that the exception is truly an equitable doctrine.

In Eckford v. Berry, 87 Tex. 415, 28 S.W. 937, 938, it is stated that one of the reasons for this exception to the parol evidence rule was that "the skill of the conveyancer, aided by the stern rule of evidence, would have enabled the exacting creditor to overreach, and finally crush, the necessitous and defenseless debtor in a court of law despite the equity of redemption, created and cherished alone by the courts of equity for the protection of the debtor."

Without specifying the exact nature of the equitable remedy, the Texas courts in this situation have from the first disregarded the acts of the parties in executing the instrument and raised a lien just as they have disregarded the actual language of the ordinary mortgage. It is clear that in Texas when a deed absolute on its face is declared to be a mortgage it is not a grant of title but is instead from its inception a mere lien. In Mann's Ex'x v. Falcon, 25 Tex. 271, the Court said: "* * * the verdict * * *. * * * establishes that the supposed title relied on by the plaintiffs for a recovery, was a mortgage, and the consequence is that the rights and remedies of mortgagor and mortgagee attach to the parties to the instrument, and to the parties to the suit, * * *."

That the Court has power to look beyond the instrument to the entire factual situation in determining whether or not plaintiffs assert an equity of redemption has been true from its earliest development in Chancery. Coote, *On Mortgages,* Chap. II, (iv) p. 13. This is the law in Texas. In Loving v. Milliken, 59 Tex. 423, the Court said: "In determining whether an instrument is to be construed as an absolute conveyance or a mortgage when there is no defeasance expressly agreed upon equity looks to all the circumstances preceding and attending the execution of the instrument, and sometimes to those which have subsequently occurred."

The transaction at bar in no way resembles the line of cases beginning with Stamper v. Johnson, supra. Here the trustees of the King Ranch were unable in 1933 to borrow a very large sum of money they needed from any concern in the business of lending money. **Humble**, a company whose business is the production, **refining**, and sale of **oil** and its products and not the lending of money, had a subsisting **oil** and gas lease covering a portion of the King Ranch. **Humble** agreed to cancel this **oil** and gas lease and to loan the King Ranch $3,500,000. The trustees of the King Ranch executed one note for $500,000, bearing interest at the rate of five per cent. per annum, payable annually, and a second note for $3,000,000. Both of these notes were secured by a deed of trust in favor of **Humble**. At the same time the trustees granted to **Humble** two separate **oil** and gas leases, one of which covered in excess of 900,000 acres and the other in excess of 76,000 acres. Both were for a term of 20 years. Simultaneously, the parties executed a separate contract reciting the execution of the two **oil** and gas leases and stipulating an agreed annual rental for a 20-year period of $127,824.60 per year. They also agreed that the $3,000,000 note was to bear interest at the rate of five per cent. per annum (subsequently reduced to three percent.). Instead of **Humble** paying the annual rental in cash and the King Ranch paying the interest in cash, they agreed that the annual rental should be offset against the
642 interest, with a provision for the difference. The King Ranch agreed to pay $150,000 upon the principal each year *642 during the second ten years of the 20-year period, with the privilege of paying the notes before maturity. **Humble** agreed to pay the King Ranch Trust five per cent. interest upon any prepayments made before maturity. The King Ranch agreed that **Humble** might, during the first 10 years, apply the proceeds of any royalties accruing under the two **oil** and gas leases upon the principal indebtedness except that the King Ranch Trust could demand enough of the royalties to pay that portion of its income tax due by reason of the royalties.

Simultaneously with the execution of these instruments the parties entered into another agreement in the form of a letter providing that **Humble** was not obligated to do exploratory work during the first five years, but that during the remaining 15 years **Humble** should explore the entire area by approved geophysical and geologic techniques. **Humble** was not required to drill wildcat wells but was required to drill any offset wells. **Humble** agreed to develop any productive structure found with reasonable diligence and to produce from such structures under the orders of the Railroad Commission a quantity of **oil** that was equal to approximately that portion of their total production in Texas that the proven reserves on the leased premises bore to the total **Humble** proven reserves in Texas.

The leases themselves provided that at the termination of the 20-year period **Humble** might designate and define in writing the areas from which **oil** was being produced and retain them so long as **oil** and gas were produced, it being contemplated that **Humble** would retain an entire geological structure.

The King Ranch trustees used the money borrowed from **Humble** to pay pressing short-term loans, Federal estate, and State Inheritance taxes. The balance was expended in operation. The deed of trust covered substantially all of the King Ranch lands and was made subject to the **oil** and gas mineral leases.

The original King Ranch Trust lasted by its terms 10 years and expired on March 30, 1935, at which time the lands were partitioned, subject to both the mineral leases and the **Humble** deed of trust.

All of these facts are plead by plaintiffs and copies of the instruments are attached as exhibits to their petition.

There stands out from this transaction the fact that **Humble** secured an **oil** and gas lease which obligates it to pay a total rental over a 20-year period in excess of $2,500,000. At the same time it loaned the King Ranch $3,500,000 at interest and took as security a deed of trust with the proviso that the rentals and royalties from the **oil** and gas lease should be credited on the debt.

In order to make clear plaintiffs' contention that an instrument they say is a mortgage also operated as a grant of minerals, we copy from their brief:

"* * * Even if the leases did vest a determinable fee simple title in **Humble**, it can be shown by parol that such title was vested simply as part of the security for a debt.

"* * * * * *

"The entire argument presented by * * * **Humble** * * * is based upon the reiterated use of the word `mortgage' and the references made to the various rights and covenants of the leases, including the so-called correlative rights, obligations to drill, etc. None of these provisions are inconsistent with the idea that the leases, however conditioned, may have been executed and delivered as security for a debt. If they were, then so long as the debt remained unpaid and they remained security for its payment, all of their provisions were in full force and effect, including the provisions defining drilling obligations, correlative rights, etc. But these provisions could not survive the payment of the debt for which they were in fact security. With the payment of the debt, they failed because all of these provisions, being mere security for a debt, could not survive payment of the debt."

This contention remotely resembles the ancient *vivum vadium* which Blackstone defines as: "*Vivum vadium,* or living pledge, is
643 when a man borrows a sum (suppose £200) of another; and grants him an *643 estate, as of £20 *per annum,* to hold till the rents and profits shall repay the sums so borrowed.

The *vivum vadium* early fell into disuse. A trace of it survives in an obscure form of pledge known as a Welsh mortgage where the mortgagee has possession in lieu of interest upon his debt. It seems to have been "substantially the same as an ordinary mortgagee in possession under the later English law who must account in equity for the rents and profits." Osborne, *On Mortgages,* Sec. 1, p. 4. Any such conception is wholly inconsistent with the actualities of an **oil** and gas lease.

If plaintiffs' contention be considered against the right and risk of development arising from an **oil** and gas lease, it is readily apparent that the very nature of an **oil** and gas lease is inconsistent with such a mortgagor-mortgagee relationship, because, unlike a deed absolute, it imposes positive obligations running from the lessee to the lessor which must be performed under a determinable fee estate, else the estate terminates. The expense of exploration, the payment of rental, the outlay of capital and the time required to pay for development, the duty to protect against drainage, and all of the correlative rights between the parties which arise upon the discovery of **oil** present an entirely different factual situation from that in which a deed is pledged to secure a debt. If **Humble** took the risk of drilling a well which turned out to be dry, it might lose the cose of drilling; but if the well produced, royalty from it would be applied upon the debt and, under plaintiffs' contention, thus shorten the life of the lease.

The statement quoted from Bradshaw v. McDonald, supra, should not be given the construction that an absolute deed is the only instrument which can be shown to have been intended to be a mortgage. Such a construction is not supported by the authorities. In that case this Court held that it made no difference in proving a deed to be a mortgage that the deed recited a contractual consideration. Our holding here is not in conflict with that case because plaintiffs here seek to insert an additional condition into a determinable fee—that the lease shall last *until the debt be paid,* instead of *so long as **oil** and gas be produced.*

A condition terminating the life of the estate is altogether different from a contractual consideration. As we understand plaintiffs' contention, if they prevailed, they would end up with an instrument which would be during the life of the debt (and consequently the lease) still an **oil** and gas lease imposing obligations upon the lessee of development, of the payment of rental, etc.,—obligations entirely foreign to our previous conception of the position of a mortgages and the retention of title by the mortgagor. Normally the mortgagee expends his money when the debt is created and is seeking security for its recovery. He does not lend his money for the purpose of obligating himself to his debtor, nor to search for **oil** at great risk in the hope that if he strikes **oil** he will recover his debt and expenses and allow the debtor who has taken no risk the profits. So in reality that which plaintiffs seek to establish here is not a mortgage but a different **oil** and gas lease which is the very thing the parol evidence rule was devised to prevent, for clearly this is an attempt to insert by parol an additional condition into a determinable fee. As such, it is barred by the parol evidence rule for under Texas law if the instrument be a grant of minerals it cannot at the same time be a mere lien or mortgage. Willis v. Moore, supra; Tittle v. Vanleer, 89 Tex. 174, 29 S.W. 1065, 34 S.W. 715, 37 L.R.A. 337. And it cannot change its nature in mid-stream. From the equity maxim "once a mortgage always a mortgage" it follows that the instrument must have been a mortgage at its inception or not at all. Pomeroy, supra, Sec. 1193. Plaintiffs cannot come into equity and assert that what they have admitted to be a grant is not a grant but is something less, a lien, and seek to have the instrument adjudicated a lien. Thus stated, their position is untenable. Recognizing this, they do not seek an adjudication that the instrument is a mere lien, but instead seek an adjudication that the instrument is a grant coupled with a determining condition, something altogether different from a lien.

644 *644 It is true that in McLean & Curry v. Ellis, 79 Tex. 398, 15 S.W. 394, it is stated that the right to prove a deed to be a mortgage is a substantial one "not to be varied or defeated by any form of expression or character of recitals contained in the instrument itself." We are not in conflict with that case because our ruling here is bases not upon recitals alone but upon the entire factual situation, including the obligations imposed upon the lesses which have been carried out. Loving v. Milliken, supra; Coote, *On Mortgages,* Chap. II, (iv) p. 13.

Most of the cases plaintiffs rely upon are from jurisdictions holding a mortgage to be a grant of fee accompanied by a defeasance. Originally in England there was a grant of the fee. For Coote says that although the Chancery "could not alter the legal effect of the forfeiture at common law," i. e., could not prevent the grant of the fee from finally vesting upon condition broken, still, acting *in personam* they "operated on the conscience of the mortgagee" and forced restitution. So plaintiffs' contention that the instruments at bar could be held both a grant of minerals and at the same time a mortgage under Mostyn v. Lancaster, 23 Ch. D. 583, might have been good in England before 1925. Since 1925 by statute a mortgage in England is a charge upon the land comparable to the American concept of a lien. Osborne, supra, Sec. 12. For the same reason the Massachusetts cases of Nugent v. Riley, supra, and Lanfair v. Lanfair, supra, are not in point. Pomeroy, *Equity Jurisprudence,* Sec. 1187. See also Ewer v. Hobbs, 5 Metc., Mass., 1, and Howard v. Robinson, 5 Cush., Mass., 119.

And again for the same reason the Alabama case of Johnson v. Hataway, 155 Ala. 516, 46 So. 760, where a lease of the timber on the described land to use for turpentine, saw mill and other purposes was held to be a mortgage, is not in point. See Pomeroy, supra, Sec. 1187. See also Mallory v. Agee, 226 Ala. 596, 147 So. 881, 88 A.L.R. 1107. The Alabama view that a mortgage passes both title and possession was urged in 1854 in the argument of the first Texas case raising this subject, Duty v. Graham, supra, and was rejected.

Plaintiffs do not allege a conditional delivery of the **oil** and gas lease or contend that the mineral estate was not to vest until the King Ranch trustees defaulted in payment of the debt. Plaintiffs do not here contend that **Humble** has made a fraudulent use of the instrument by drilling, producing and marketing **oil** and gas under it and thus bring themselves within the reasoning of Mead v. Randolph, 8 Tex. 191, or Redwine v. Coleman, Tex.Civ.App.1934, 71 S.W.2d 921, writ refused, and indeed they could not because of the Federal litigation. Landa v. Isern, 141 Tex. 455, 174 S.W.2d 310.

The debt continued after the execution of the **oil** and gas lease so plaintiffs do not allege a conditional sale of the **oil** and gas lease within Ruffier v. Womack, 30 Tex. 332.

In discussing the powers of the trustees in the motion for rehearing, 135 F.2d 452, 453, the Circuit Court of Appeals said: "The proof establishes beyond controversy that the lease was an incident to and a part of the consideration for a loan or mortgage secured under difficult and trying conditions to save the estate and made under the express authority given in the will to borrow money and mortgage the property."

645 Upon the adverse termination of that case, the Atwoods construed the language quoted just above to mean that the **oil** and gas

lease was itself a mortgage. Following final payment of the debt, they brought this action to redeem the mineral estate under their lands from it. Our holding here is not in conflict with the Federal case, because when the entire opinion and the judgment are examined in that case it becomes clear that the point under discussion was the authority of the trustees to execute an **oil** and gas lease. Clearly the meaning of the above language is that since the trustees had the authority to borrow money and mortgage the property, they had also the authority to grant an **oil** and gas lease as a part of the consideration *645 for a loan. We do not pass upon the point of law involved. We do overrule plaintiffs' contention that **Atwood** v. Kleberg, 135 F.2d 452, adjudicated the **oil** and gas leases to be a mortgage. The only conclusion which the opinion and the facts of that case will warrant is that **Humble** made the loan in exchange for the **oil** and gas leases.

Having determined that plaintiffs plead no cause of action, it is unnecessary for us to determine whether it was, or either could or should have been adjudicated in the Federal litigation. Plaintiffs' petition is full and we do not believe that plaintiffs can add to it. Accordingly, the judgment of the Court of Civil Appeals is reversed and the judgment of the trial court that plaintiffs take nothing is affirmed without prejudice to plaintiffs' right to an accounting for any money which may be due them as royalty owners under the **oil** and gas lease. Since plaintiffs prayed for an accounting and that portion of the case was severed before appeal, the trial court may proceed with that portion of the case, but only for the purpose of an accounting.

Costs of appeal are taxed against respondents (plaintiffs below).

[1] J. B. C. Murray, History of Usury, Chap. II.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-11-00524-CV

In re: A Purported Lien or Claim Against Alvie Campbell and Julie Campbell

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT
NO. 11-341-C26, HONORABLE BILLY RAY STUBBLEFIELD, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellants Alvie Campbell and Julie Campbell, pro se, appeal the trial court's order denying their request to declare fraudulent an instrument assigning the note evidencing their mortgage loan and deed of trust securing that note from Mortgage Electronic Registration Systems, Inc.("MERS") to Wells Fargo Bank, N.A. We will affirm.

BACKGROUND

In March 2011, and purportedly pursuant to Texas Government Code section 51.903(a), the Campbells filed in the trial court a "Motion for Judicial Review of Documentation or Instrumentation Purporting to Create a Lien or Claim." *See* Tex. Gov't Code Ann. § 51.903(a) (West 2005). Attached to the motion was an instrument titled "Assignment of Note and Deed of Trust." The assignment was executed on September 10, 2008, and filed in the Official Public Records of Williamson County on September 30, 2008. The essence of the Campbells' motion was that the assignment was fraudulent because the assignor did not have the right to transfer either the note or

the deed of trust. In May 2011, the trial court denied the relief requested by the Campbells.[1] Thereafter, the Campbells filed a "Motion to Reconsider Denial," which was denied by an order signed in July 2011. This appeal followed.

DISCUSSION

In one issue, the Campbells contend that the trial court erred by failing to comply with the statutory requirement that, after reviewing the challenged document, the trial court must enter an appropriate finding of fact and conclusion of law as to whether the document does or does not create a valid lien. The Campbells appear to challenge both the trial court's denial of their request to determine that the assignment was fraudulent as well as its failure to make any findings of fact or conclusions of law as required by the statute. *See id.*§ 51.903(e) (after reviewing documentation or instrument district judge shall enter appropriate finding of fact and conclusion of law), (g) (providing suggested form for finding and conclusion).

Section 51.903(a) "authorizes a person or entity that owns real property, and has reason to believe that another has filed a document purporting to create a lien against that property, to file a motion with the district clerk alleging that the instrument in question is fraudulent, as defined by section 51.901(c), and therefore should not be accorded lien status." *In re Purported Liens or Claims Against Samshi Homes, L.L.C.*, 321 S.W.3d 665, 666 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing Tex. Gov't Code Ann. §§ 51.901(c) (West Supp. 2011), .903(a)). As applicable here, an instrument filed in the real property records is presumed to be fraudulent if:

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[1] Although the court did not sign an order, the docket contains the following entry dated May 11, 2011: "Relief denied. Stubblefield."

(2) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and;

(A) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

(B) is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or

(C) is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

Tex. Gov't Code Ann. § 51.901(c)(2). The Campbells appear to believe the assignment from MERS to Wells Fargo was invalid because the assignor did not have authority to make the assignment. In their brief they argue that the assignment "did not identify or demonstrate upon the face of the instrument that an agency relationship existed with the note holder or proper party to the Deed of Trust and Note."

The Campbells' reliance on government code section 51.903 to challenge the assignment's validity is misplaced. Section 51.903 does not apply to assignments; rather, it applies only to documents or instruments "purporting to *create* a lien or claim" against property. *See id.* § 51.903(a) (emphasis added). The assignment at issue in the present case does not purport to create a lien or claim, it merely purports to *transfer* an existing deed of trust from one entity to another. We conclude that the Campbells cannot rely on government code section 51.903 to challenge the validity of an assignment of a deed of trust based on an alleged lack of authority to make the

assignment. *See In re: A Purported Lien or Claim Against James McGuire*, No. 02-11-00140-CV, 2012 WL 254066, at *1 (Tex. App.—Fort Worth Jan. 26, 2012, no pet.) (mem. op.) (section 51.903 could not be used to challenge validity of assignment of security interest for alleged failure to sufficiently identify security interest being assigned). We therefore overrule the Campbells' sole issue.

CONCLUSION

Having overruled the Campbells' sole issue, we affirm the trial court's order.

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J. Woodfin Jones, Chief Justice

Before Chief Justice Jones, Justices Pemberton and Rose

Affirmed

Filed: May 18, 2012

WestlawNext

In re SSJ-J
Court of Appeals of Texas, San Antonio. | November 24, 2004 | 153 S.W.3d 132 *(Approx. 8 pages)*

San Antonio.

In the Interest of **SSJ–J.**

No. 04–03–00741–CV. | Nov. 24, 2004.

Background: After child's mother died, maternal grandmother and step-grandfather filed suit against father, seeking to be appointed managing conservators of child. The 150th Judicial District Court, Bexar County, Pat J. Boone, J., granted father's motion to dismiss. Grandparents appealed.

Holding: The Court of Appeals, Karen Angelini, J., held that maternal grandmother and step-grandfather had standing to file suit to be appointed managing conservators for child.

Reversed and remanded.

West Headnotes (7)

Change View

1 **Child Custody** Parties; intervention
The question of who has standing to bring an original suit affecting the parent-child relationship seeking managing conservatorship is a threshold issue.

16 Cases that cite this headnote

2 **Action** Persons entitled to sue
Before determining the merits of a dispute, a trial court should determine whether a party has standing.

4 Cases that cite this headnote

3 **Action** Persons entitled to sue
Standing is implicit in the concept of subject-matter jurisdiction.

12 Cases that cite this headnote

4 **Action** Persons entitled to sue
Standing presents a question of law.

2 Cases that cite this headnote

5 **Appeal and Error** Dismissal or nonsuit in general
As with an order of dismissal for lack of subject-matter jurisdiction, the Court of Appeals reviews an order of dismissal for lack of standing by construing the pleadings in favor of the plaintiff and looking to the pleader's intent.

5 Cases that cite this headnote

6 **Pleading** Scope of inquiry and matters considered in general
Pleading Petition, complaint, declaration or other pleadings
When considering a plea to the jurisdiction, the trial court should look solely at the pleadings and must take all allegations in the pleadings as true.

7 **Child Custody** Parties; intervention
Maternal grandmother and step-grandfather had standing to file suit to be appointed managing conservators for child, following the death of mother; grandparents asserted in their pleadings that they had actual care, control, and possession of child for at least six months preceding the filing of the petition, and grandparents alleged that appointment of father as sole managing conservator of child would impair child's physical health and emotional development. V.T.C.A., Family Code §§102.003(a)(9).

6 Cases that cite this headnote

Attorneys and Law Firms

***133** John D. Wennermark, Law Office of John D. Wennermark, San Antonio, for appellant.

Charles K. Tabet, Law Office of Charles K. Tabet, Cedric L. Johnson, San Antonio, for appellee.

Sitting: CATHERINE STONE, Justice, SARAH B. DUNCAN, Justice, KAREN ANGELINI, Justice.

Opinion

OPINION

Opinion by KAREN ANGELINI, Justice.

Charles and Beverly Johnson, maternal step-grandfather and natural grandmother of **SSJ–J**, filed suit against Cedric Johnson, **SSJ–J's** biological father, seeking to be appointed managing conservators of **SSJ–J**. The death of **SSJ–J's** mother prompted the filing of the suit. The trial court granted Cedric's motion to dismiss for lack of standing. Charles and Beverly appeal. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Charles Johnson is **SSJ–J's** step-grandfather by virtue of his marriage to **SSJ–J's** maternal grandmother, Beverly. **SSJ–J's** natural parents are Beverly's daughter, Shanequa L. Johnson, and Cedric Johnson. Although Shanequa and Cedric never married, there is a court order establishing paternity between **SSJ–J** and Cedric. In addition to establishing paternity, the trial court's order appointed Shanequa and Cedric joint managing conservators of **SSJ–J**, with Shanequa having the right to establish **SSJ–J's** primary residence. Upon Shanequa's death, Charles and Beverly filed an Original Petition in Suit Affecting the Parent–Child Relationship seeking to be named managing conservators of **SSJ–J**. **SSJ–J** was eleven years old at the time the suit was filed. In an affidavit attached to the petition, Beverly stated that **SSJ–J** had lived in her home and under her care, custody and control since she was born. Cedric filed a plea in abatement contending that Charles and Beverly lacked standing to bring suit.

Thereafter, Charles filed a First Amended Original Petition in Suit Affecting Parent–Child Relationship, dropping Beverly as a party. In his amended petition, Charles alleges that appointment of Cedric as sole managing conservator or joint managing conservator with exclusive right to establish the child's residence would not

be in the child's best interest and would significantly impair the child's physical health or emotional development. Charles also filed an affidavit similar to the one previously filed by Beverly stating that **SSJ–J** had lived in his home and under his care, custody and control since she was born. ***134** He also stated that the child's physical health or emotional development would be significantly impaired if she were placed in the primary care and custody of Cedric. Beverly then filed a Petition in Intervention of Grandparent in Suit Affecting the Parent–Child Relationship. [1] She also alleged that appointment of Cedric as sole managing conservator or joint managing conservator with exclusive right to establish the residence of the child would not be in the child's best interest because it would significantly impair the child's physical health or emotional development. And, Beverly filed an affidavit with similar allegations. Cedric then filed another plea in abatement and a motion to dismiss for lack of standing. The trial court considered Cedric's plea in abatement and motion to dismiss at a hearing in which no live testimony was taken. Thus, the trial court had before it the affidavits of Charles and Beverly and arguments of counsel. At the conclusion of the hearing, the trial court granted Cedric's plea in abatement and motion to dismiss for lack of standing. Charles and Beverly appeal.

DISCUSSION

1 2 3 4 5 6 The question of who has standing to bring an original suit affecting the parent-child relationship seeking managing conservatorship is a threshold issue. *In re Pringle,* 862 S.W.2d 722, 724 (Tex.App.-Tyler 1993, no writ). Before determining the merits of a dispute, a trial court should determine whether a party has standing. *Id.* Standing is implicit in the concept of subject-matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 443 (Tex.1993). And, standing presents a question of law. *Brunson v. Woolsey,* 63 S.W.3d 583, 587 (Tex.App.-Fort Worth 2001, no pet.). As with an order of dismissal for lack of subject-matter jurisdiction, we review an order of dismissal for lack of standing by construing the pleadings in favor of the plaintiff and looking to the pleader's intent. *Tex. Ass'n of Bus.,* 852 S.W.2d at 446. When considering a plea to the jurisdiction, the trial court should look solely at the pleadings and must take all allegations in the pleadings as true. *Wash. v. Fort Bend Indep. Sch. Dist.,* 892 S.W.2d 156, 159 (Tex.App.-Houston [14th Dist.] 1994, writ denied). Thus, we review the issue *de novo. Doncer v. Dickerson,* 81 S.W.3d 349, 353 (Tex.App.-El Paso 2002, no pet.).

7 Charles and Beverly contend that they have standing to bring suit pursuant to section 102.003(a)(9) of the Texas Family Code. Section 102.003, entitled "General Standing to File Suit," is the general standing provision for filing an original suit affecting the parent-child relationship. Section 102.003(a)(9) provides that an original suit may be filed at any time by

> a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.

TEX. FAM.CODE ANN. § 102.003(a)(9) (Vernon Supp.2004). Charles and Beverly have met section 102.003(a)(9)'s standing ***135** requirement by pleading that they had actual care, control, and possession of **SSJ–J** for the requisite period of time.

Despite this fact, Cedric contends that, in addition to meeting sections 102.003(a)(9)'s standing requirement, Charles and Beverly must also meet the requirement of section 153.131 of the Family Code. That section, entitled "Presumption That Parent to be Appointed Managing Conservator," provides that

> unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

TEX. FAM.CODE ANN. § 153.131(a) (Vernon 2002). Thus, according to Cedric, Charles and Beverly do not have standing because they did not plead that appointment of Cedric would significantly impair **SSJ**–**J's** physical health or emotional development. We note, however, that Charles and Beverly did, in fact, include allegations in Charles's amended pleading, Beverly's plea in intervention, and their affidavits that appointment of Cedric as sole managing conservator or as joint managing conservator with the right to establish residency of the child would significantly impair the child's physical health or emotional development. Cedric urges, however, that these pleadings were not sufficient, because in order to have standing, Charles and Beverly must specify wrongful conduct by Cedric that could be considered harmful to the physical or emotional health of the child. Cedric cites to a number of cases, including *In re Aubin,* 29 S.W.3d 199 (Tex.App.-Beaumont 2000, orig. proceeding), *Von Behren v. Von Behren,* 800 S.W.2d 919 (Tex.App.-San Antonio 1990, writ denied), *Lewelling v. Lewelling,* 796 S.W.2d 164 (Tex.1990), *Brigham v. Brigham,* 863 S.W.2d 761 (Tex.App.-Dallas 1993, writ denied), and *In re W.G.W.,* 812 S.W.2d 409 (Tex.App.-Houston [1st Dist.] 1991, no writ). None of these, however, are on point.

In *In re Aubin,* 29 S.W.3d 199, 201 (Tex.App.-Beaumont 2000, orig. proceeding), the Burks filed suit under the former version of section 102.003(a)(9) against Aubin, the mother of three children, claiming that the children had been in their actual care, control, and possession for at least six months. Aubin filed a motion to dismiss challenging the Burks' standing to bring suit. *Id.* After the trial court denied her motion, Aubin filed a petition for writ of mandamus, alleging that the Burks had failed to establish standing at the temporary hearing and that the Burks had failed to prove that Aubin had placed the children in any clear and immediate danger. *Id.* The appellate court denied the petition without stating a reason for its ruling. *Id.* A year later, the Burks filed a motion for enforcement of the possession order and a motion to modify the temporary orders requesting that they be named temporary sole managing conservators. *Id.* In response, Aubin filed a motion to dismiss for want of prosecution, which included allegations that the trial court's temporary orders were an unconstitutional governmental interference with her right to rear her children. *Id.* When Aubin did not appear at the hearing on the motion to enforce, the trial court refused to rule on any of the motions and suggested the Burks file a writ of habeas corpus. *Id.* A month later, the trial court granted the Burks' application for an ex parte writ of attachment. *Id.* In response, Aubin filed another petition for writ of mandamus, requesting the appellate court command the trial court to vacate all of the orders granting writ of attachment, and to instruct his clerk to ***136** void the writs of attachment that have been issued. *Id.* at 201–02. In addition, Aubin requested that the appellate court command the trial court to vacate all temporary orders issued in this case, and to dismiss the suit. *Id.* at 202.

The appellate court, however, refused to order dismissal based on lack of standing, stating that there is some evidence in the record that the Burks had possession of the children for the requisite period. *Id.* at 203. The court further stated that the issue of whether Aubin is an unfit parent is the purpose of suits affecting the parent-child relationship and presents a factual dispute precluding granting mandamus relief on the trial court's denial of the motion to dismiss. *Id. In re Aubin,* therefore, does not support Cedric's argument.

Cedric also relies on *Von Behren v. Von Behren,* 800 S.W.2d 919, 920–21 (Tex.App.-San Antonio 1990, writ denied), in which a grandmother brought suit seeking to become managing conservator of her grandchildren. She brought the suit, however, pursuant to the standing provision for grandparents or others who have had substantial contact with the child. *Id.* at 921. This provision required proof that there is serious and immediate questions concerning the welfare of the child. *Id.* In upholding the trial court's dismissal for lack of standing, the appellate court made the distinction between those who are automatically given standing and those who are, because of an emergency situation, undertaking a rescue mission. *Id.* Thus, this case is

distinguishable because Charles and Beverly have automatic standing under section 102.003(a)(9).

The case of *Lewelling v. Lewelling,* 796 S.W.2d 164 (Tex.1990), another case upon which Cedric relies, does not involve a standing issue, but instead is an appeal from a ruling on the merits. Likewise, *Brigham v. Brigham,* 863 S.W.2d 761 (Tex.App.-Dallas 1993, writ denied), is an appeal from a trial on the merits and does not involve the issue of standing. Similarly, *In re W.G.W.,* 812 S.W.2d 409 (Tex.App.-Houston [1st Dist.] 1991, no writ), is an appeal from a trial on the merits. Thus, none of these cases support Cedric's position. As such, Cedric has cited no authority supporting his argument that in order to have standing, Charles and Beverly must plead facts sufficient to satisfy both section 102.003(a)(9) and section 153.131(a).

In contrast, Charles and Beverly have cited pertinent authority in support of their standing argument. In *Doncer v. Dickerson,* 81 S.W.3d 349, 351 (Tex.App.-El Paso 2002, no pet.), the El Paso Court of Appeals interpreted the Family Code's standing statute in a situation similar to this case. In *Doncer,* Shelly Dickerson and Ray Doncer were married and had a son. *Id.* Upon divorce, Shelly and Ray were named joint managing conservators of the child, with Shelly having the right to establish the primary residence of the child. *Id.* Ray then married Deborah Doncer who, upon Ray's death, sought possessory conservatorship of the child. *Id.* at 251–52. Shelly argued that Deborah lacked standing because the child never resided in Deborah and Ray's home for a period of six consecutive months as required by the Family Code's general standing provision. *Id.* at 352. In holding that Deborah had standing, the El Paso Court of Appeals traced the history of the Family Code's standing statute.

The current Family Code standing statute derives from former section 11.03. *Id.* at 354. Section 11.03 originally provided that a suit affecting the parent-child relationship could be brought by any person with an interest in the child. *Id.* Later, a section was added which defined a person with an interest in the child as a person ***137** who had possession and control of the child for at least six months immediately preceding the filing of the petition or was named in the code as being entitled to service by citation. *Id.* This new section "establishe[d] a reasonable minimum time after which a person supplying care and having actual custody of a child is deemed to have worked his or her way into standing to file, or to intervene in, a SAPCR." *Id.* at 355. Thus, "the legislature has determined that a person having had actual custody of a child for the 'magic period' of six months should be presumed to have 'an interest in the child.' " *Id.*

The standing statute was again amended to provide a laundry list of those entitled to bring suit. *Id.* The list included "a person who has had actual possession and control of the child for at least six months immediately preceding the filing of the petition." *Id.* Once again, the standing statute was amended to provide that an original suit may be brought by "a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months immediately preceding the filing of the petition and the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition." *Id.* at 356. The commentary in the legislative issue of the Section Reports states:

> The amendment to subsection (a)(10) is primarily designed to give standing to a stepparent who assisted in raising a child in the event that the child's parent dies. Note, however, that the statutory language is not limited merely to stepparents; literally it can also include an unmarried cohabitant or even an adult sibling of the child of a deceased parent. *It should always be borne in mind that standing to sue does not mean a right to win, but merely a right to be heard in court. Therefore, those who claim standing under this new subsection still will most often be faced with overcoming the parental presumption in a contest for managing conservatorship with the surviving parent.* On the other hand, if possessory conservatorship is sought, this grant of standing is clearly the first step toward

maintaining contact with the child.

Id. (emphasis added). When the Family Code was recodified, former section 11.03 became section 102.003. Subsection (8) became subsection (9) and subsection (10) became subsection (11). *Id.* at 357.

The standing statute was further amended to provide that foster parents who have had a child placed with them for not less than eighteen months have standing. *Id.* And, finally, the statute was amended to include section 102.003(a)(9), which provides that a person, other than a foster parent, who has had actual care, control, and possession of the child for six months ending not more than ninety days preceding the filing has standing. *Id.*

The El Paso Court of Appeals in *Doncer* was specifically called upon to interpret section 102.003(a)(11), which was "designed as a 'stepparent' statute, affording standing to, among others, a stepparent who helps raise a child when the stepparent's spouse—one of the child's parents—dies." *Id.* at 358. The court of appeals, however, looked no further than the general standing statute to determine standing. *Id.* at 362. Likewise, in interpreting section 102.003(a)(9), we see no reason and have found no authority that would require going beyond the general standing statute. There is simply nothing in the Family Code, or in cases interpreting the standing provision, that requires a petitioner under section 102.003(a)(9) to allege facts showing that the appointment of the parent would significantly impair the child's physical health or emotional development in ***138** order to have standing. This is an issue that goes to the merits. Nevertheless, we recognize, as the El Paso Court of Appeals did in quoting the commentary to the Section Reports when the standing provision was amended: standing does not mean the right to win; it is only a right to be heard. Thus, those claiming standing to bring a SAPCR must overcome the parental presumption. *Id.* at 356. And, Charles and Beverly must still overcome the parental presumption in a trial on the merits.

According to Cedric, however, *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), invalidates *Doncer.* For support, Cedric cites to *Doncer* in which the court of appeals noted that *Troxel* issued after the trial court's ruling. *See Doncer,* 81 S.W.3d at 362. Because the trial court did not address whether *Troxel* impacted Doncer's suit, the appellate court did not consider it either, as to do so would be to render an advisory opinion. *Id.* There is nothing, however, in *Troxel* that would affect the decision in *Doncer.* Similarly, there is nothing in *Troxel* that would affect whether Charles and Beverly have standing in this case. *Troxel* involved the constitutionality of a grandparent visitation statute that allowed any person to petition the court for visitation rights at any time and allowed the court to grant such rights based on the best interest of the child. *Troxel,* 530 U.S. at 60, 120 S.Ct. 2054. The Supreme Court in *Troxel* held that the statute was unconstitutional because it infringed on a parent's fundamental right to make decisions concerning the care, custody, and control of her children. *Id.* at 72. *Troxel* does not, however, affect the standing issue presented by the case before us. As stated above, Charles and Beverly will still be required to overcome the parental presumption in a trial on the merits.

CONCLUSION

In accordance with the above, we hold that Charles and Beverly have standing pursuant to the section 102.003(a)(9) of the Family Code. Accordingly, we reverse the trial court's judgment and remand the cause to the trial court for further proceedings in accordance with this opinion.

Footnotes

1 According to Appellants' Brief, Beverly changed her status from petitioner to intervenor in order to invoke section 102.004(b) of the Texas Family Code, which provides specifically for grandparent standing. There is no need for reliance on the grandparent standing provision, however, since

a grandparent can also qualify as "a person" under section 102.003(a)(9). *See In re C.M.V.,* 136 S.W.3d 280, 285 n. 2 (Tex.App.-San Antonio 2004, no pet.). Thus, whether Beverly is an intervenor or a petitioner makes no difference in this appeal; the issue is whether she and Charles have standing pursuant to section 102.003(a)(9).

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923 S.W.2d 573 (1996)

In the Interest of B.I.V., a Minor Child.

No. 95-0519.

Supreme Court of Texas.

April 12, **1996**.
Rehearing Overruled July 8, **1996**.

574 Dolores E. Valadez, Mission and John F. Campbell, Austin, for appellants.

Michael Steven Deck, John Robert King, McAllen, Charles G. Childress, and George Barnes, Austin, for appellees.

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

In this paternity action, the trial court held that the child's mother did not have standing to participate in the proceedings. The court of appeals affirmed. 897 **S.W.2d** 395. Because the suit affected her parental rights, we hold that the child's mother did have standing to participate in the proceedings and we accordingly reverse the judgment of the court of appeals.

Pursuant to section 76.004 of the Texas Human Resources Code, the Attorney General of Texas initiated this suit by filing a Petition to Establish the Parent-Child Relationship in the interest of **B.I.V.**, a minor child. The petition alleged that Raul L. Longoria was **B.I.V.**'s biological father and named Dolores E. Valadez as **B.I.V.**'s biological mother. Both Longoria and Valadez were served with citation and filed answers. In addition, Valadez asked for affirmative relief, including current and retroactive child support. The Attorney General requested that the court: establish Longoria's paternity; appoint a managing conservator and possessory conservator; determine whether good cause existed to change the child's surname; order Longoria to pay prospective and retroactive child support, medical expenses and health insurance, and attorney's fees and costs.

On August 9, 1993, Longoria's attorney announced to the trial court that he and the Attorney General had reached a settlement, which did not include Valadez. When Valadez's attorney objected to the proposed settlement, Longoria's attorney challenged her standing to participate in the proceedings. The trial court took the proposed settlement under advisement, ordering the parties to submit briefs on the legal issues involved.

On November 8, 1993, the trial court, without hearing evidence on any issue, signed a final judgment. In that judgment the trial court: denied Valadez's "motion to intervene," although she never filed such a motion; declared Longoria to be **B.I.V.**'s father; appointed Valadez **B.I.V.**'s sole managing conservator and appointed Longoria his possessory conservator; ordered Longoria to pay lump sums of $37,200 in future child support and $75,000 in retroactive child support to a trust for **B.I.V.**; and ordered Longoria to provide health insurance for the child.

The court of appeals dismissed Valadez's appeal, holding that she did not have standing to appeal because she was not a party to the suit. Both the trial court and the court of appeals concluded that Valadez's interests were not affected by the trial court's judgment. We do not agree.

To establish standing, a person must show a personal stake in the controversy. *Hunt v. Bass,* 664 **S.W.2d** 323, 324 (**Tex**. 1984); *Precision Sheet Metal Mfg. v. Yates,* 794 **S.W.2d** 545, 551 (**Tex**.App.—Dallas 1990, writ denied). As **B.I.V.**'s mother, Valadez could have filed this paternity suit in her own name. Instead, she asked the Attorney General to represent her pursuant to section 76.004 of the Human Resources Code. All relief sought in the suit was either for Valadez's benefit or **B.I.V.**'s. Although much of the relief sought was for the benefit of the child, the suit also purported to litigate Valadez's legal rights as **B.I.V.**'s mother.

575 In section 151.003 of the Texas Family Code, the Legislature has specified the legal rights and duties of a parent. By its

judgment, the trial court modified Valadez's parental rights, for example, by subjecting her right to physical possession of the child to Longoria's visitation rights, and by denying *575 her the right to receive child support payments by ordering that Longoria pay support into a trust. *See* **TEX**.FAM.CODE § 151.003(a)(1) & (8). As this judgment purported to affect Valadez's parental rights under the Family Code, we conclude that she had a personal stake in the action, and therefore had standing to participate in the proceeding.

Longoria argues that, even if Valadez had standing, she cannot complain because the trial court awarded all relief sought, including generous retroactive and prospective child support. Again, we disagree. As to current and prospective child support, the Family Code explicitly confers upon Valadez "the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child." **TEX**.FAM.CODE § 151.003(a)(8). The trial court had no authority to terminate Valadez's parental rights in this respect without her participation in the proceedings.

As to retroactive support, section 151.003(c) of the Family Code provides that "[a] parent who fails to discharge the duty of support is liable to a person who provides necessaries to those to whom support is owed." Thus a single parent who bears the entire financial burden of supporting a minor child is entitled to reimbursement from the other parent who has neglected his or her duty of support. *Creavin v. Moloney,* 773 **S.W.2d** 698, 703 (**Tex**.App.—Corpus Christi 1989, writ denied); *Maxwell v. Maxwell,* 204 **S.W.2d** 32, 37 (**Tex**.Civ.App.—Amarillo 1947, writ ref'd n.r.e.). Retroactive child support may represent funds the nonsupporting parent owed to the child, as well as funds owed the supporting parent to discharge his or her proportionate duty of financial support to the child. *Cf. Williams v. Patton,* 821 **S.W.2d** 141, 145 (**Tex**.1991) (stating that payment of child support arrearages "compensates for the wrong to the child at least as much as it reimburses the custodial parent for monies spent on the child"). Although a child no doubt suffers from the lack of a parent's financial support, the Legislature has recognized that the supporting parent suffers a financial loss as well, for which he or she is entitled to be compensated. In awarding retroactive support, a trial court considers not only the support the errant parent should have provided to the child, but also the right to reimbursement afforded someone who has supported the child in the meantime. We hold that Valadez has standing to assert any right she may have to retroactive child support.

Accordingly, the Court grants Valadez's application for writ of error, denies **B.I.V.**'s application for writ of error, and without hearing oral argument, reverses the judgment of the court of appeals, and remands this case to the trial court for further proceedings consistent with this opinion. *See* **TEX**.R.APP.P. 170.

567 S.W.2d 827 (1978)

INESCO, INC., Trans-Mex Leasing Company, and Elmer J. Gray, Appellants,

v.

Ross A. SEARS, Appellee.

No. 8092.

Court of Civil Appeals of Texas, Beaumont.

May 18, 1978.
Rehearing Denied June 15, 1978.

828 *828 Jerry D. Patchen, Robert Eikel, Houston, for appellants.

Charles F. Browning, Van E. McFarland, Houston, for appellee.

CLAYTON, Justice.

Following our original opinion in his cause, we have granted appellant Gray permission to file his amended brief; and our prior opinion in this cause is withdrawn, and this opinion is substituted in lieu thereof.

Plaintiff below, **Sears**, filed this action against **Inesco**, **Inc**., Trans-Mex Leasing Company, G. & L. Tool Company, and Elmer Gray, for the recovery of $40,000 he claimed was owed on the purchase price of a barge. Trial was to the court without a jury, and judgment was entered for plaintiff, holding the defendants, **Inesco**, Trans-Mex, and Gray, jointly and severally liable for $40,000. **Inesco**, Trans-Mex, and Gray have appealed.

The evidence shows that **Inesco** and **Sears** entered into an agreement by which **Inesco** would buy a certain barge for a total sales price of $220,000, which included: (1) $10,000 down payment, (2) $170,000 to be paid by August 10, 1973, when title was transferred, (3) $20,000 to be paid by September 7, 1973, and (4) $20,000 to be placed in escrow by September 7, 1973, pending ascertainment of the weight of the barge. This money in escrow would be paid in full to plaintiff-seller only if the barge weighed 6,500 tons. The agreement also provided "that there are no liens or encumbrances on said Vessel." The first $180,000 was provided by Gray, who was chairman of the board of **Inesco** and owned fifty percent of the stock. The remainder of the sales price was never paid, and no money was ever placed in escrow. The barge was later transferred to Trans-Mex Leasing Company, a subsidiary of **Inesco**. Following a dispute among the shareholders, the barge was transferred to Gray in exchange for all of his stock in **Inesco** and Trans-Mex.

829 At the close of the evidence the trial judge allowed both parties to amend their pleadings. In his trial amendment plaintiff *829 alleged, *inter alia,* that Gray was the alter ego of the corporations.

Extensive Findings of Fact and Conclusions of Law were filed. The court found, *inter alia,* that Gray was the undisclosed principal on the contract of sale from plaintiff; that Gray was the alter ego of **Inesco** and Trans-Mex; that the transfer to Gray was made to defeat the plaintiff's rights under the contract; and that the question of the weight of the barge had been waived by the defendants.

Defendant Gray's first point complains that the trial court erred in "finding the barge was subject to an equitable lien... and in allowing recovery upon such lien." The trial court entered judgment against "Defendants **Inesco**, **Inc**., Trans-Mex Leasing Company and Elmer J. Gray, jointly and severally, the sum of Forty Thousand ($40,000) Dollars, plus interest...." This judgment is for a money judgment against these defendants and in no way recognizes or gives any effect to any purported equitable lien. Such a lien is neither an estate or property in the barge itself, nor a right of action for the barge. It is merely an encumbrance or charge against the barge. *Houston National Exchange Bank v. De Blanc,* 247 S.W. 897 (Tex.Civ.App.—Beaumont 1923, no writ). The creation of a lien on the property in favor of the obligor-creditor is merely the right to have recourse to the property for the satisfaction of the obligor's debt. The judgment making no reference to a lien, and no foreclosure thereunder being ordered or adjudged, we fail to see how defendant Gray can be harmed in any manner insofar as the findings of the trial court as to the existence of an equitable lien are concerned. This point is overruled.

Defendant Gray's second point complains of error "in allowing parol testimony to alter the terms of the purchase and sale agreement ... to impose a lien .. and in allowing recovery upon the basis of such parol testimony."

Tex.R.Civ.P. 418(e) requires, as to contents of appellant's brief, the following:

> "... If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found...."

The statement of facts in this record consists of 439 pages, and this defendant's entire argument in his brief consists of three sentences, and not one single sentence of the "improper" evidence or any reference to any particular page in the record where same may be found is stated. We, therefore, decline to consider such point. If we did consider such point, the same would be overruled for the reasons stated under defendant's first point.

We consider defendant Gray's third, fourth, and sixth points together as they are germane to the sixth point complaining of the trial court's error in allowing recovery against Gray as the *alter ego* of **Inesco** or Trans-Mex urging that the evidence shows as a matter of law that Gray was not the *alter ego* of either **Inesco** or Trans-Mex. Since the point attacks the finding "as a matter of law" it must be considered as a "no evidence" point. "In deciding a `no evidence' point we must view the evidence in its most favorable light in support of the finding, and we must consider only the evidence and inferences which support the finding." *Lucas v. Hartford Accident and Indemnity Co.,* 552 S.W.2d 796, 797 (Tex. 1977); *accord, Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex.1965).

The basic rule of law cited in cases in which a plaintiff seeks to "pierce the corporate veil" is stated as follows:

> "Courts will not disregard the corporate fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetuate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations."

Bell Oil & Gas Co. v. Allied Chemical Corp., 431 S.W.2d 336, 340 (Tex.1968), quoting *Pace Corp. v. Jackson,* 155 Tex. 179,
830 284 S.W.2d 340, 351 (1955); *accord, Sutton v. Reagan & Gee,* 405 S.W.2d 828, 836-37 *830 (Tex.Civ.App.—San Antonio 1966, writ ref'd n. r. e.).

An excellent discussion of the *alter ego* doctrine is found in *Fagan v. La Gloria Oil and Gas Co.,* 494 S.W.2d 624 (Tex.Civ.App. —Houston [14th Dist.] 1973, no writ), in which Judge Tunks states that the doctrine should be applied in "situations wherein the corporation is not maintained as a bona fide entity, separate and distinct from its shareholders in the conduct of its own business, but rather is used as an agent or servant of the shareholders in the furtherance of their personal business. In such a situation where the corporation purportedly enters into a contract, but in doing so is in reality acting as agent for the shareholders in the furtherance of their personal business, the shareholders become liable on the contract, or for its breach, under the law of principal and agent." *Id.* at 632. In our case there is evidence that Gray had told the other shareholders-directors that he would pay the entire purchase price of the barge. Gray was the only shareholder who contributed money to **Inesco**, and there is evidence that he controlled all of the financial matters of the corporations. Gray provided the $180,000 required before transfer and approved the terms of the agreement. According to his own testimony, Gray originally intended to acquire title to the vessel in his own name. Instead, the title was initially in the name of **Inesco** and was later transferred to Trans-Mex, a subsidiary of **Inesco**, before being transferred to Gray in exchange for his stock in the corporations. Gray admitted that he was aware of the indebtedness on the vessel at the time of the transfer, but he claimed that it was a corporate obligation.

These facts support the findings that Gray was the principal in the contract with plaintiff and that Gray was using the corporate entity of **Inesco** to transact his personal business. Therefore, considering the evidence under the standard of review for a "no evidence" point, we hold that there is probative evidence to support the finding that Gray was the *alter ego* of the corporations.

In addition to the *alter ego* doctrine which we hold to be applicable in this case, there is another rule permitting plaintiff to recover which is supported by the evidence and fact findings, which are unchallenged by the defendants. This doctrine was described in *World Broadcasting System, **Inc**. v. Bass,* 160 Tex. 261, 328 S.W.2d 863 (1959), as follows:

> "... when a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed...." *Id.* at 864-65, quoting *Pierce v. United States,* 255 U.S. 398, 403, 41 S.Ct. 365, 65 L.Ed. 697 (1921).

The Court further stated:

> "Although purporting to be a simple sale of capital stock, the transaction was in legal contemplation the equivalent of a disposition of the corporate assets. Respondents thereby became personally liable for the outstanding debts of the Delaware corporation to the extent of its assets thus appropriated by them." *World Broadcasting System, **Inc**. v. Bass,* supra at 866.

In our case the only asset of the corporation was the barge, and Gray knew that when the barge was transferred to him, **Inesco** would not be able to pay the remainder of the purchase price. Gray also knew that plaintiff was demanding payment, and there was evidence that he knew that plaintiff had offered to rescind the contract if the barge was returned. Yet, in a transfer for worthless stock, he obtained title to the only asset of the corporation, leaving **Inesco** unable to pay the remainder of the purchase price. This evidence supports the conclusion that Gray has "denuded" the corporation of its assets so that it had nothing left with which to pay plaintiff, and therefore Gray should be held personally liable on plaintiff's claim. See *Fagan v. La Gloria Oil and Gas Co.,* supra at 632.

Gray's fifth point complains of error in permitting plaintiff's "trial amendment after the evidence had been closed ... was manifest
831 error." The trial court is *831 vested with discretion to allow or deny trial amendments, and the court's action in permitting a trial amendment will not be set aside in absence of a clear showing that the court has abused its discretion. *Ka-Hugh Enterprises, **Inc**. v. Fort Worth Pipe & Supply Co.,* 524 S.W.2d 418, 422 (Tex.Civ.App. — Fort Worth 1975, writ ref'd n. r. e.); *Tuck v. Tuck,* 509 S.W.2d 656, 658 (Tex.Civ.App. —Austin 1974, writ ref'd n. r. e.); *Tex.R. Civ.P. 66.* Since there is no showing that defendants were surprised or prejudiced by the granting of the trial amendment, no abuse of discretion is shown, and no reversible error is shown. See *Home Indemnity Co. v. Draper,* 504 S.W.2d 570, 577 (Tex.Civ. App.—Houston [1st Dist.] 1973, writ ref'd n. r. e.).

Defendants **Inesco** and Trans-Mex (in their points 2 and 3), and Gray (in his point 7) contend that the award should have been limited to a maximum recovery of $20,000 because the preponderance of the evidence establishes that the weight of the vessel was no more than 3,700 tons. The sales agreement provides:

> "If the weight of the Vessel is less than 6,500 tons Buyer will receive from the $20,000 escrow account an amount equal to $34.00 per ton for each ton less than 6,500 tons. If the net weight of the Vessel is determined to be in excess of 6,500 tons, the $20,000 will be released to Seller immediately and Buyer will pay Seller an additional amount equal to $34.00 per ton for each ton in excess of 6,500 tons."

It is undisputed that no money was ever placed in escrow.

There was contradictory evidence as to the weight of the barge, and no fact finding was made on this point. The only fact findings concerning the tonnage provisions are Findings 45 and 46, which provide:

> "45. The tonnage provision ... was to provide for the event that the barge had to be scrapped rather than being sold.
>
> "46. **Inesco** and Gray waived the tonnage provision of the contract when they elected to keep the barge."

These fact findings supporting the judgment have not been challenged. By finding that the defendants in action waived the tonnage provision, the trial court has made the weight of the barge a moot issue; the plaintiff was entitled to recover the entire $40,000 regardless of the weight. Therefore, no error is presented by these points which contend that the vessel weighed less than the required amount. These points are overruled.

Defendants, **Inesco**, **Inc**. and Trans-Mex Leasing Company, contend also that the trial court "erred and abused its discretion in proceeding with the trial of this cause against defendants **Inesco**, **Inc**. and Trans-Mex Leasing Company while permitting these Defendants' trial counsel to absent himself from the courtroom and not participate in the trial of the cause, all without notice to these Defendants, thus depriving these Defendants of a fair trial." James Adams, the attorney of record for **Inesco** and Trans-Mex, was served with a subpoena duces tecum before trial and was called as a witness by plaintiff. Mr. Adams was a

shareholder and director of the corporations, which were defunct at the time of trial. At the hearing on the motion for new trial, Adams testified that he and Mr. Lawrence, another director of the corporation, had agreed on his course of action during the trial. He further testified that he tried to contact Fontenot, the third shareholder and director, but was unable to do so.

Tex.Rev.Civ.Stat.Ann. art. 1302-2.07, B (1962) provides that "... the board of directors serving at the time of dissolution or the majority of them then living .. shall continue to manage the affairs of the corporation for the limited purpose or purposes specified in this Article, and shall have whatever powers may be necessary to accomplish such purposes, including the power to prosecute, pay, compromise, defend, and satisfy any action, claim, demand, or judgment by or against the corporation...." Therefore, Adams and Lawrence, constituting a majority of the directors, had authority to decide what action to take at the trial.

832 *832 The corporate defendants argue for the application of the rule stated in *Lowe v. City of Arlington,* 453 S.W.2d 379, 382 (Tex. Civ.App.—Fort Worth 1970, writ ref'd n. r. e.), as follows:

> "`Every litigant is entitled to be heard in court by counsel of his own selection. This is a valuable right, and the unwarranted denial of it is fundamental error where the litigant, without negligence or default on his part, is deprived of the right and an ex parte judgment is rendered against him.' 7 TEX.JUR.2d 73, § 33."

This case is distinguishable from the cases cited by **Inesco** and Trans-Mex in their brief. Those cases involved situations in which the attorney withdrew just before the trial (see, e. g., *Lowe v. City of Arlington,* supra) or the attorney was unavoidably absent at the trial. See e. g., *Arnold v. Fort Worth & D.S.P. Ry.,* 8 S.W.2d 298 (Tex.Civ.App.—Amarillo 1928, no writ).

This is not a case in which the litigant had inadequate notice of the withdrawal of his attorney, nor is it a case in which the attorney was unavoidably absent. On the contrary, the litigants in this case, **Inesco** and Trans-Mex, made a decision through a majority of their directors, i. e., Adams and Lawrence, not to present any defense at the trial. Therefore, **Inesco** and Trans-Mex have failed to establish that they were unjustly deprived of the right of counsel. This point is overruled.

No error being shown, the judgment of the trial court is affirmed.

AFFIRMED.

504 S.W.2d 397 (1973)

Joseph Ward JOHNSON et ux., Petitioners,
v.
Mary L. SNELL, Respondent.

No. B-3863.

Supreme Court of Texas.

November 14, 1973.
As Amended January 2, 1974.

Atlas, Hall, Schwarz, Mills, Gurwitz & Bland, Asa V. Bland, McAllen, for petitioners.

Adams, Graham, Lewis, Jenkins, Jones & Graham, J. Perry Jones, McAllen, for respondent.

DENTON, Justice.

398 Petitioners, Joseph Ward **Johnson** and wife, brought this suit to compel specific *398 performance of a written contract entered into between them and Mary L. **Snell**, respondent, to convey to them certain real estate situated in Hidalgo County; and for damages for the withholding of possession of the property. The trial court granted an instructed verdict denying petitioners the relief of specific performance. The court of civil appeals affirmed. 489 S.W. 2d 422. We reverse and remand.

The contract, upon which the suit is founded, provided in part as follows:

> ". . . Seller has agreed to sell and Purchasers have agreed to purchase for the consideration of $15,000.00 cash and the execution by the Grantees of a promissory vendor's lien note payable monthly in installments of $250.00 per month, beginning on the first day of the month after the date of closing and a payment on the first day of each month thereafter, continuing for 15 years, said note to bear interest at the rate of 6% per annum, included in said monthly payment, said note being payable on or before its maturity date.
>
> "Purchasers have deposited with Seller the sum of $1,000.00 to guarantee faithful performance of this contract and the transaction shall be closed on or before October 1, 1971, and the remaining sum of the cash payment, being a balance of $14,000.00, shall be paid on that date.
>
> ". . . and if Seller complies with her agreement and furnishes said title commitment and Purchasers fail or refuse to perform their contract by paying the balance of the down payment and executing the note and deed of trust as herein provided, then the escrow shall be forfeited to the Seller as liquidated damages.
>
> * * * * * *
>
> "On closing, Seller will furnish to Purchasers a good and sufficient Warranty Deed covering said property and reserving a vendor's lien to pay the payments of $250.00 per month over a term of 15 years, including interest, and shall deliver possession of said property to Purchasers. Taxes and insurance for the year 1971 shall be prorated as of the date of closing."

At the close of the plaintiffs' testimony, the trial court entered an instructed verdict for the defendant on two grounds, to wit: the terms of the written contract were not sufficiently certain and definite so as to warrant specific performance; and there was no meeting of the minds of the parties to the contract.

The controlling question here is whether the terms of the contract, all of which are contained in the written agreement, are sufficiently certain and definite. Specific performance will be decreed only if the essential terms of the contract are expressed with reasonable certainty. Bryant v. Clark, 163 Tex. 596, 358 S.W.2d 614 (1962); Langley v. Norris, 141 Tex. 405, 173 S.W.2d 454 (1943); Restatement, Contracts, § 370 (1932). Respondent's contention relative to the vagueness and indefiniteness of the contract are: that the contract does not recite a purchase price; nor does it provide for the amount of the vendor lien note, nor its

place of payment; nor does it provide for any of the terms which would be included in a deed of trust.

The real dispute here arises over the interpretation by the respondent of the provision relative to the interest. She testified:

> "Sir, nothing interests me in this contract except that they don't want to pay interest, which would amount to about $15,000."

She testified that she understood the parties agreed to a purchase price of $60,000; $15,000 in cash and 6% interest on the balance of $45,000. There is no contention that the contract is not complete.

399 We are of the opinion that the contract here in question is not too indefinite or uncertain to be specifically performed. *399 The only missing element of the contract is that it does not set out a total sale price for the property in question. This amount can be made certain by the use of amortization tables. The deferred payments were to be made for a specific term of 15 years in the amount of $250 payable monthly, beginning on the first day of the month following the closing. The monthly payment provision specifically provided that interest was to be included in the monthly payment of $250. The monthly payments payable over a period of 15 years would amount to $45,000.00. The down payment of $15,000 in cash would bring the total consideration for the sale to $60,000. Under the clear terms of the contract these monthly payments included 6% interest.

Respondent further contends the absent provisions of the deed of trust in the written contract and vendor's lien note are material, and make the contract unenforceable. The deed of trust is in legal effect a mortgage with power to sell on default, and it was provided for in the instant contract as additional security for respondent. The failure of the contract to provide the fundamental provisions of a deed of trust does not render the contract to sell property in itself incomplete and unenforceable. The contract further provided for the term of the vendor's lien note in such terms we believe to be sufficient for enforcement.

The contention is further made, and the court of civil appeals so held, that the contract was unenforceable because there was no meeting of the minds of the parties to the contract. Although respondent testified that she understood the contract to mean that she was to receive 6% interest on the balance due of $45,000.00, there is absolutely no evidence in the present record that the petitioner shared such view. A mistake by only one party to an agreement, not known to or induced by acts of the other party will not constitute grounds for relief. Morris v. Millers Mutual Fire Insurance Co. of Texas, 343 S. W.2d 269, (Tex.Civ.App.1961); Wheeler v. Holloway, 276 S.W. 653 (Tex.Comm'n App.1925). There are no pleadings or evidence of fraud which might vitiate the contract. The respondent's claim of mutual mistake cannot be sustained. The record does not support respondent's claim that the contract was the result of mutual mistake.

The trial court erred in instructing a verdict for the respondent, defendant below. The judgments of the trial court and court of civil appeals are reversed, and the cause is remanded to the trial court for a new trial.

WALKER, Justice (concurring).

In my opinion the trial court erred in instructing a verdict for respondent, and I concur in the opinion and judgment of the Court. As pointed out in the Court's opinion, the evidence does not establish mutual mistake as a matter of law. Respondent testified that she understood the contract to mean that she was to receive 180 monthly installments of $250.00 each on the principal of the note and, in addition thereto, interest at the rate of six per cent per annum. It does not appear that petitioners were laboring under the same misapprehension, but a reading of the statement of facts suggests to me that they may have been aware of respondent's mistake. As pointed out in Warren v. Osborne, Tex. Civ.App., 154 S.W.2d 944 (wr. ref. w.m.), knowledge of one party of the other's mistake regarding the expression of the contract is equivalent to mutual mistake. See also Automobile Ins. Co. v. United Elec. Serv. Co., Tex.Civ.App., 275 S.W.2d 833 (wr. ref. n.r.e.); 3 Pomeroy, Equity Jurisprudence, 5th ed. 1941, § 870a; 13 Williston on Contracts, 3rd ed. 1970, §§ 1548, 1557; Restatement, Contracts, §§ 71, 505. If respondent establishes on a retrial of the case, by findings supported by the evidence, that she was mistaken as she claims and that petitioners knew of
400 her mistake when the contract was signed, it seems to *400 me that equity should require a rescission of the contract unless petitioners wish to acquiesce in a reformation to carry out the agreement as intended and understood by respondent.

WestlawNext

Kimsey v. Burgin
Court of Appeals of Texas, San Antonio. | January 23, 1991 | 806 S.W.2d 571 *(Approx. 9 pages)*

806 S.W.2d 571
Court of Appeals of Texas,
San Antonio.

Roy E. **KIMSEY**, Jr., Appellant,

Larry **BURGIN**, Appellee.

No. 04–89–00239–CV. | Jan. 23, 1991. | Rehearing Denied March 15, 1991.

Assignee of vendee's interest in contracts for deed brought suit against assignor, seeking to recover unpaid balance of note given by assignor to assignee, and for foreclosure of collateral security. The 38th District Court, Real County, Mickey R. Pennington, J., granted summary judgment for assignor, and assignee appealed. The Court of Appeals, Stephens, J. (Retired), held that: (1) agreement by original purchaser to reconvey property to original vendor, in lieu of foreclosure, did not extinguish rights of assignee in contract for deed, nor did it extinguish rights of assignor, and (2) agreement between assignee of vendee's interest in contract for deed and original vendor, who agreed to accept warranty deed in lieu of foreclosure from original purchaser, ratified existing rights of assignee in contracts for deed which he acquired from assignor, after failure of assignor's interest because of purchaser's default.

Affirmed.

West Headnotes (7)

Change View

1 **Vendor and Purchaser** Summary Remedies for Recovery of Possession

Written agreement by original purchaser with original vendor of property to reconvey property back to vendor, in lieu of vendor's right to foreclosure, bound original vendor to abide by terms set forth in agreement to reconvey, and thus, reconveyance did not extinguish rights of holder of vendee's interest acquired by contracts for deed from title holder, nor did it extinguish rights of assignee in contracts for deed or of assignor in sale and assignment of his contracts for deed to assignee.

3 Cases that cite this headnote

2 **Vendor and Purchaser** Rights and Liabilities of Subsequent Purchasers

Agreement between assignee of vendee's interest in contracts for deed and original vendor, who agreed to accept warranty deed in lieu of foreclosure from original purchaser, ratified existing rights of assignee in contracts for deed which he acquired from assignor, after failure of assignor's interest because of purchaser's default.

3 **Vendor and Purchaser** Rights and Liabilities of Subsequent Purchasers

Original purchaser's granting of warranty deed in lieu of foreclosure to original vendor in property did not extinguish rights of intervening assignor of vendee's interest in contracts for deed, and thus did not preclude assignor from foreclosing liens.

4 **Secured Transactions** Property and Rights Subject to Security Interest

Interest of assignee of vendee's interest in contracts for deed, who secured promissory note he gave assignor as payment for land with lien on his rights in contracts, was "interest in land," and was not governed by the Texas Business and Commerce Code provisions for perfection of security interests in personal property, despite contention of assignor that contracts for deed, as mere executory contracts to purchase land upon fulfillment of contract obligations, were personal property until they ripened into real estate ownership. V.T.C.A., Bus. & C. §§ 1.201(37), 9.104(10).

2 Cases that cite this headnote

5 **Appeal and Error** Motions for New Trial

Validity of any alleged foreclosure sale by assignor of vendee's interest in contracts for deed was not before Court of Appeals on appeal, even though assignee did file motion for new trial making allegations of a nonjudicial foreclosure sale; no record of hearing on motion for new trial could be found.

6 **Vendor and Purchaser** For Sale

Adequate consideration existed for original note from assignee of vendee's interest in contracts for deed to assignor, despite default by original purchaser and reconveyance of property by warranty deed to original vendor, in lieu of foreclosure; original vendor executed document stating that he ratified contracts for deed held by assignee.

2 Cases that cite this headnote

7 **Appeal and Error** Points and Arguments

Appellant's argument that trial court erred by failing to grant motion for new trial did not comport with point of error, which argued that trial court erred in its entry of summary judgment, and since there was no record of hearing on motion for new trial, point of error would by overruled.

Attorneys and Law Firms

***572** Pat Long Weaver, Michael B. McKinney, Stubbeman, McRae, Sealy, Laughlin & Browder, Midland, for appellant.

L.B. Trulove, Jr., Sabinal, for appellee.

Before CADENA, C.J.[*], and CARR and STEPHENS, JJ.

Opinion

OPINION

STEPHENS, Justice.[1]

This suit was brought by Larry **Burgin**, Appellee, against Roy E. **Kimsey**, Jr.,

Appellant, seeking to recover the unpaid balance of a promissory note given **Burgin** by **Kimsey**, and for foreclosure of the collateral security. Summary judgment was granted **Burgin** for a money judgment, attorney's fees, and foreclosure of **Kimsey's** interest in two tracts of real estate in Real County, Texas.

On appeal **Kimsey** brings twelve points of error, contending that the trial court ***573** erred in granting summary judgment in favor of **Burgin**:

1) because **Burgin's** interest in the property made the subject of this suit has failed.

2) because there exists a genuine issue of material fact as to whether **Burgin's** interest in the property made the subject of this suit was ratified after its failure.

3) by granting a right to foreclose its alleged liens when no lien existed.

4) because it applied the incorrect theory of law in determining that **Burgin** held a security interest with respect to the property made the basis of this suit.

5) disallowing **Kimsey's** counter-claim for restitution of funds paid by **Kimsey** to **Burgin** under the contractual obligations made the basis of this suit.

6) because the trial court erred in failing to grant **Kimsey's** Motion for New Trial where **Kimsey** presented newly discovered evidence that **Burgin** had conducted a non-judicial foreclosure sale covering the property made the basis of this suit.

7) because there was no evidence of consideration from **Burgin** to **Kimsey** to support the promissory note and deed of trust made the basis of this suit.

8) because there was insufficient evidence of consideration from **Burgin** to **Kimsey** to support the promissory note and deed of trust made the basis of this suit.

9) in the alternative, because there was evidence that the consideration from **Burgin** to **Kimsey** supporting the obligation made the basis of this suit failed as a matter of law.

10) in the alternative, because there was a genuine issue of material fact as to whether the consideration from **Burgin** to **Kimsey** supporting the contractual obligations made the basis of this suit failed.

11) because there exists a genuine issue of material fact as to the alleged indebtedness of **Kimsey** to **Burgin**.

12) because **Kimsey** was entitled to prevail on his counter-claim and such claim was not barred by the statute of limitations.

FACTS

In 1979, L.R. French conveyed a tract of land in Real County, known as the Rancho Real to S.O.A.W. Enterprises, Inc., retaining a vendor's lien on the property. S.O.A.W. then subdivided the ranch and conveyed the two tracts of land in question, among others, to C & D Leasing Company, Inc., not by warranty deed, but instead by contracts for deed. C & D then conveyed the two tracts in question to **Burgin**, by contract for deed.

On May 29, 1981 **Kimsey** purchased **Burgin's** interest in the two tracts by accepting an Assignment of Agreement for Deed from **Burgin**. He executed a promissory note to **Burgin** in the amount of $74,725.58, and a Deed of Trust to Thad H. Marsh, describing the two tracts of land, as security for the promissory note.

On September 23, 1982, evidently because of financial difficulties, S.O.A.W. Enterprises, Inc., the owner of fee title to the property, conveyed it back to L.R. French, Jr. by general warranty deed, in lieu of foreclosure. Thereafter, on September 23, 1983, L.R. French, Jr. conveyed the property in question to Martin L. Allday, Trustee, by general warranty deed. On August 15, 1984, Allday, conveyed an

equitable interest in the property to **Kimsey**. Later, on January 6, 1983, French executed a document entitled "Ratification and Agreement" to **Kimsey** which stated that French ratified the Contract for Deed held by **Kimsey** from S.O.A.W., C & D, and **Burgin**.

The parties contend that the questions before this court are whether the contract between **Kimsey** and **Burgin** was a real estate transaction or a personal property transaction, and the effect of S.O.A.W. Enterprises, Inc.'s reconveyance of the real property title back to French.

The original conveyance from French to S.O.A.W. was a conveyance of real property, by general warranty deed, vesting title in S.O.A.W. S.O.A.W. then sub-divided and conveyed to C & D, by contract for deed, an interest that would ripen into full title only upon the payment of the contract price. Title to the real estate remained vested in S.O.A.W.

***574** **POINT OF ERROR NUMBER ONE**

1 **Kimsey** contends, in his first point, that the trial court erred in granting summary judgment in favor of **Burgin** because **Burgin's** interest in the property failed.

We cannot agree with this point of error. **Kimsey** owned his interest in the property by virtue of an assignment of **Burgin's** contract for deed, which **Burgin** had acquired from C & D Leasing, who in turn had acquired its interest in the property by contract for deed from S.O.A.W., the title holder of the property. On September 23, 1982 when S.O.A.W. was experiencing financial difficulties, it entered into a written agreement with French, the original vendor of the property, to reconvey the property to French, which agreement contained the following language:

> Recognizing the validity of French's 1979 liens and the existence of a continuous state of default, S.O.A.W. contacted French and offered to reconvey Rancho Real to French in lieu of the formal foreclosure proceedings available to French. French has accepted S.O.A.W.'s offer.

* * * * * *

> 3. French agrees to forebear his right to foreclose his liens. In consideration therefor, S.O.A.W. agrees to convey full legal title back to French of the 5,496.641 acres originally constituting Rancho Real less three tracts aggregating approximately 41.475 acres which have been deeded to third-parties previously. S.O.A.W. represents and warrants that no valid liens or encumbrances exist against the property to be reconveyed to French other than the following: (1) a first lien in favor of The Traveler's Insurance Company; (2) French's liens; (3) the equitable claims of the third-parties who have executed Agreements for Deed with S.O.A.W.; and (4) unpaid state and county ad valorem taxes.
>
> 4. S.O.A.W. agrees to assign its full right, title and interest in and to the approximately 225 Agreements for Deed covering various smaller tracts out of the Rancho Real to French. In consideration therefor, French agrees to honor the obligation of S.O.A.W. under such Agreement for Deed to deliver Warranty Deeds to the third-party purchasers when final payments for the various tracts have been received by French....

The acceptance of this agreement to reconvey the property by French, in lieu of his right to foreclosure, bound French to abide by the terms set forth in the agreement, and accordingly, the reconveyance did not extinguish the rights of **Kimsey** in the contract for deed which he held. Nor did it extinguish the rights of **Burgin** in the sale and assignment of his contract for deed from C & D Leasing to **Kimsey**.

Kimsey's First Point of Error is overruled.

POINT OF ERROR NUMBER TWO

2 In Point of Error Number Two **Kimsey** argues that the trial court erred in granting summary judgment because there exists a genuine issue of material fact as to whether **Burgin's** interest in the property made the subject of this suit was ratified after its failure.

Again, we cannot agree with this point of error. On January 6, 1983, **Kimsey** and French executed a document styled Ratification and Agreement, containing the following language:

> **WHEREAS,** by General Warranty Deed, dated September 23, 1982, ... S.O.A.W. Enterprises, Inc., d/b/a Rancho Real, Seller, contracted and agreed to sell to C & D Leasing, Purchaser, and Purchaser contracted and agreed to buy from Seller, the following described land located in Real County, Texas, to-wit:
>
> Tract No. 317, in Rancho Real, described by metes and bounds....
>
> at the price and upon the terms set forth therein; the interest of said C & D Leasing in said Agreement For Deed being now owned by Roy E. **Kimsey**, Jr.; and
>
> **WHEREAS,** by that certain Agreement For Deed, dated July 5, 1979, S.O.A.W. Enterprises, Inc., d/b/a Rancho Real, Seller, contracted and agreed to sell to C & D Leasing Co., Inc., Purchaser, and Purchaser contracted and agreed to buy from Seller, the following described land located in Real County, Texas, to-wit:
>
> ***575** Tract No. 293, in Rancho Real, described by metes and bounds....
>
> at the price and upon the terms set forth therein; the interest of said C & D Leasing Company, Inc., in said Agreement For Deed being now owned by Roy E. **Kimsey**, Jr.; and ...
>
> **NOW, THEREFORE,** in consideration of the premises and other good and valuable considerations, ... L.R. French, Jr. hereby ratifies, confirms and adopts each of the above described Agreements For Deed, and hereby contracts and agrees to sell to the said Roy E. **Kimsey**, Jr.,.... the land described in each of said Agreements For Deed, at the price and upon the terms set forth therein, to the same extent and for all intents and purposes, as if L.R. French, Jr. had executed each said Agreement For Deed, as Seller.
>
> The said L.R. French, Jr. directs said Roy E. **Kimsey**, Jr. to continue to make the monthly payments specified in each said Agreement, as therein directed, unless and until he is notified to the contrary by the said L.R. French, Jr....

This document expressly ratified the existing rights of **Kimsey** in the Contracts For Deed which he acquired from **Burgin**.

Kimsey's Point of Error Number Two is overruled.

POINT OF ERROR NUMBER THREE

3 In Point of Error Number Three, **Kimsey** argues that the trial court erred in granting summary judgment in favor of **Burgin** granting a right to foreclose its alleged liens when no lien existed.

Kimsey relies on *Flag–Redfern Oil Co. v. Humble Exploration, Inc.,* 744 S.W.2d 6 (Tex.1987), in his argument under Points Number One, Two, and Three to support his position that where a deed in lieu of foreclosure is issued, the rights of intervening purchasers of equitable interests are extinguished. This reliance is misplaced. In *Flag–Redfern* the Court held:

> Humble argues the deed from the Scotts to Kocurek was a "deed in lieu of foreclosure", as was found by the court of appeals, and this conveyance cut off the rights of the intervening purchaser, Flag–Redfern. Humble cites *North Texas Building & Loan Association v. Overton,* 126 Texas 104, 86 S.W.2d 738 (1935),

> and *Karcher v. Bousquet,* 672 S.W.2d 289 (Tex.Civ.App.—Tyler 1984, no writ) for the proposition that a deed in lieu of foreclosure cuts off the rights of intervening purchasers and junior lien holders. Humble also insists this principle is applicable in all situations, whether the potential foreclosure would be based on a vendor's lien or other lien.
>
> Flag–Redfern contends that a conveyance by a mortgagor to a mortgagee, after default of a note secured by a deed of trust, does not operate as a foreclosure and does not cut off the rights of an intervening purchaser.

. . . . .

> The court of appeals erred in labeling the Scott to Kocurek deed a "deed in lieu of foreclosure." .... There is no such deed as a deed in lieu of foreclosure. A deed given in satisfaction of a debt may serve as a convenient, efficient transfer of title upon default of a debt. *North Texas Building & Loan Assoc. v. Overton,* 126 Texas 104, 86 S.W.2d 738 (1935).

* * * * * *

> It would be unfair to allow parties to make private conveyances, although judicially efficient, to the detriment of unknowing parties by foreclosing their right to bid at a trustee sale; to redeem their interests; to insist on the marshalling of assets' or to set forth the affirmative defense of merger or extinguishment of the debt....

744 S.W.2d at 8, 9.

Kimsey's Point of Error Number Three is overruled.

POINT OF ERROR NUMBER FOUR

4 In Point of Error Number Four, **Kimsey** contends that the trial court erred in granting summary judgment in favor of **Burgin** because it applied the incorrect theory of law in determining that **Burgin** held a security interest with respect to the property made the basis of this suit.

Burgin argues that the contract for deed is merely an executory contract to purchase ***576** land upon the fulfillment of the contract's obligations, and thus, it is personal property until such time as it ripens into real estate ownership, and therefore is governed by TEX.BUS. & COM.CODE ANN. Chapt. 9 (Vernon 1968). On the other hand, **Kimsey** argues that under an executory contract to purchase land, the purchaser acquires an equitable title to the realty which is not "security interest," citing *City of Garland v. Wentzel,* 294 S.W.2d 145 (Tex.Civ.App.—Dallas 1956, writ ref'd n.r.e.). In *Wentzel,* the court held:

> It is well settled that the purchaser under an executory contract of sale acquires equitable title to the realty; having the exclusive right to sue for damages to the freehold. Thus in *Leeson v. City of Houston,* Tex.Com.App., 243 S.W. 485, 488, the Court stated: "By the great weight of authority it is now held that, although the legal title does not pass to the vendee under a contract of sale until actual delivery of a deed to the property still the vendee under such contract of purchase, especially where he goes into possession of the property, is invested with the equitable title from the date of the contract, or in any event, form the date he takes possession, and any increment, advantage, or enhancement to the property inures to his benefit, and any detriment, depreciation, or loss thereto without fault of either party must be borne by him." *See also Rives v. James,* Tex.Civ.App., 3 S.W.2d 932; *Ingram v. Central Bitulithic Co.,* Tex.Civ.App., 51 S.W.2d 1067; *Dimmitt Elevator Co. v. Carter,* Tex.Civ.App., 70 S.W.2d 615....

294 S.W.2d at 147.

In a later case, *Furman v. Sanchez,* 523 S.W.2d 253 (Tex.Civ.App.—San Antonio 1975, no writ), this Court held:

> Under the generally accepted rule in the United States, a purchaser, under an executory contract to purchase land acquires equitable title to the land at the time of the execution contract. Early Texas cases made a distinction between equitable rights and equitable title with regard to such contracts. It was held that a purchaser under such contract had only an equitable right so long as the purchase price remained unpaid, and he could not resist his seller's action for possession. On the other hand, when the purchaser had fully complied, he obtained equitable title and could demand a conveyance from a vendor. *Hemming v. Zimmerschitte,* 4 Tex. 159 (1849). Subsequent cases have not always followed this early distinction. The Commission of Appeals held in 1922 that the vendee of a contract of purchase, especially where he goes into possession of the property, is vested with the equitable title from the date of the contract, or in any event from the date he takes possession. *Leeson v. City of Houston,* 243 S.W. 485 (Tex.Comm'n App.1922, judgment adopted).... Whether speaking in terms of equitable right or equitable title, the Texas cases have generally given to the purchaser all the rights and incidents of title usually accorded to the holder of full equitable title in other states.

523 S.W.2d at 256–57.

Burgin additionally argues that TEX.BUS. & COM.CODE ANN. § 1.201(37) (Vernon Supp.1989) governs. The Texas Business and Commerce Code defines a security interest as one in personal property. TEX.BUS. & COM.CODE § 1.201(37) (Vernon Supp.1990). The Code further states in Chapter 9 that: “This chapter does not apply ... except to the extent that provision is made for fixtures in Section 9.313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder ...” TEX.BUS. & COM.CODE ANN. § 9.104(10) (Vernon Supp.1990). In *Huddleston v. Texas Commerce Bank–Dallas,* 756 S.W.2d 343, 347 (Tex.App.—Dallas 1988, writ denied) in addressing the Business and Commerce Code, the Court held: “Chapter 9, however, does not apply to the creation or transfer of an interest in or lien on real estate ...”

When **Kimsey** purchased his interest in the two tracts in question, he secured the promissory note which he gave **Burgin** as payment for the land, with a lien on his ***577** rights in the contract. Thus we conclude, that **Kimsey's** interest was an interest in land, and was not governed by the Texas Business and Commerce Code, and that the trial court was right in granting judgment of foreclosure of the lien in favor of **Burgin** by reason of non-payment of the note by **Kimsey**.

Kimsey's Point of Error Number Four is overruled.

POINT OF ERROR NUMBER FIVE

In Point of Error Number Five, **Kimsey** argues that the trial court erred in granting summary judgment in favor of **Burgin** disallowing **Kimsey's** counter-claim for restitution of funds paid by **Kimsey** to **Burgin** under the contractual obligations made the basis of this suit.

Under this point, **Kimsey** argues that because of complete failure of consideration, **Burgin** had no right to retain the funds he had previously paid because **Burgin's** interest failed. He contends that the trial court should have allowed the case to proceed and should have ordered a rescission of the contract and restitution of funds paid as a result of failure of consideration.

As we pointed out in Point of Error Numbers One and Two, **Kimsey's** interest in the property was not extinguished when the reconveyance was executed, thus there was no failure of consideration for the promissory note executed by **Kimsey** to **Burgin**.

Kimsey's Point of Error Number Five is overruled.

POINT OF ERROR NUMBER SIX

5 In Point of Error Number Six, **Kimsey** argues that the trial court erred in failing to grant **Kimsey's** Motion for New Trial where **Kimsey** presented newly discovered evidence that **Burgin** had conducted a non-judicial foreclosure sale covering the property made the basis of this suit.

Kimsey relies on *Houston Sash & Door Co., Inc. v. Davidson,* 509 S.W.2d 690 (Tex.Civ.App.—Beaumont 1974, writ ref'd n.r.e.), for the proposition that the non-judicial foreclosure of **Burgin** constituted an election of remedies, and waived his rights under this suit. We disagree with **Kimsey**. Although the record discloses that **Kimsey** did file a Motion for New Trial, making allegations of a non-judicial foreclosure sale, we find no record of a hearing on the Motion for New Trial, thus the validity of any alleged foreclosure sale is not before this court.

Point of Error Number Six is overruled.

POINTS OF ERROR NUMBER SEVEN, EIGHT AND NINE

6 In Points of Error Number Seven, Eight and Nine **Kimsey** argues that the trial court erred because there was no evidence, or insufficient evidence of consideration from **Burgin** to **Kimsey** to support the promissory note and deed of trust made the basis of this suit, and that the original consideration for the promissory note failed as a matter of law.

These points of error are without merit. Without detailed discussion, we hold that there was adequate consideration for the original promissory note from **Kimsey** to **Burgin**, and that as pointed out in Points of Error Two and Three, **Kimsey's** interest was not extinguished by the reconveyance of the land.

Points of Error Seven, Eight, and Nine are overruled.

POINT OF ERROR NUMBER TEN

Under Point of Error Number Ten, **Kimsey** argues that there were genuine issues of material fact as to whether consideration flowing from **Burgin** to **Kimsey** failed.

We have previously held that consideration did not fail.

Kimsey's Point of Error number Ten is overruled.

POINT OF ERROR NUMBER ELEVEN

7 Under Point of Error Number Eleven, **Kimsey** argues that the trial court erred in its entry of summary judgment because there were genuine issues of material ***578** fact as to the alleged indebtedness of **Kimsey** to **Burgin**.

Kimsey's argument appears to be that the trial court erred by its failure to grant **Kimsey's** Motion for New Trial predicated on the allegation therein that **Burgin** had sold the property at a non-judicial foreclosure for the sum of $50,0000.00 for which credit had not been given on the note. We find that **Kimsey** did file a Motion for New Trial, making allegations of a non-judicial foreclosure sale, but we find no record of a hearing on the Motion for New Trial. Since **Kimsey's** argument under this point does not comport with his point of error, and since there is no evidence in the record to support his argument, **Kimsey's** Point of Error Number Eleven is overruled.

POINT OF ERROR NUMBER TWELVE

Kimsey contends, in Point of Error Number Twelve, that the trial court erred in granting summary judgment in favor of **Burgin** because **Kimsey** was entitled to prevail on his counterclaim and such claim was not barred by the statute of limitations.

Kimsey contends that the trial court incorrectly applied the two year statute of limitations set forth in TEX.CIV.PRAC. & REM.CODE ANN. § 16.003 (Vernon 1986), because the section applies to personal injuries and torts. However, we need not address this argument because we have held in Point of Error Number Five that consideration did not fail, and thus restitution is not available. Point of Error Number

Twelve is overruled.

The judgment of the trial court is affirmed.

Footnotes

* Chief Justice Carlos C. Cadena (retired), not participating.

1 The Honorable Bill J. Stephens, Justice, retired, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

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GEORGETOWN UNIVERSITY LAW CENTER

Adam J. Levitin
Associate Professor of Law

December 28, 2010

To the Permanent Editorial Board:

I am an Associate Professor of Law at Georgetown University Law Center, in Washington, D.C., where I teach courses in secured credit (UCC Article 9 and real property security), payment systems (including UCC Article 3), structured finance, consumer finance, and contracts. I have testified repeatedly before Congress regarding chain of title issues in mortgage foreclosures and closely follow the commercial law issues involved in mortgage foreclosures.

I am writing to express serious concerns about the draft Report on Ownership and Enforcement of Notes Secured by a Mortgage authored by Permanent Editorial Board (PEB) for the Uniform Commercial Code. It is my understanding that the PEB will seek public comment on the draft report in January 2011. I strongly urge the PEB not to issue the draft report for public comment because its premises are so flawed.

I am concerned by the draft report for four reasons, each of which is addressed below in more detail. First, the report addresses issues that go beyond the scope of the UCC. Second, it weighs in on controversial issues that are the focus on numerous on-going litigations, which is an inappropriate action for the PEB. Third, the report relies heavily on UCC section 9-203(g), a provision that has deep conceptual problems and is in conflict with non-UCC law. And fourth, as the controversies involving mortgage notes do not involve divergent interpretations of the UCC, but rather questions about the requirements of non-UCC law, there is no need for the PEB report to clarify the UCC. At best, the draft report addresses unnecessary issues and at worst, it could have the effect of interfering in on-going litigation, and create an impression of certainty of results that will in fact vary widely under state law.

1. The PEB Report Addresses Topics Beyond the Scope of the UCC

The proposed report goes far beyond UCC issues and thus beyond the proper authority of the PEB. Instead, the report describes, relies upon, and could affect issues of real property law such as statute of frauds requirements, mortgage priority, effect of recording (such as the permissibly of recording in the name of a nominee), and mortgage enforceability. In particular, there are arguably conflicts between the provisions of UCC Article 9 regarding the transfer of mortgages related to promissory notes and other non-uniform provisions of state law. The UCC purports to provide a method for transferring mortgages when promissory notes are transferred, but many states have specific provisions governing the transfer of mortgages, and there is no reason to believe that the

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UCC supersedes long-standing non-UCC real property law. In particular, in "title theory" states, a mortgage is considered the ownership of real property (cf. the technical sale and repurchase operation of a deed of trust), which means that the transfer of the mortgage must comply with the requirements for transferring realty. These provisions are sometimes more extensive than those contemplated by section 9-203(g). The reconciliation of these provisions is an issue best left for courts and state legislatures, not for the PEB.

The PEB report claims not to opine on non-UCC issues,[1] yet it repeatedly does so. For example, it states that "the transferee need not take possession of the note or file an assignment of the mortgage in the real property records in order for the transferee to have an interest in the note and mortgage enforceable as against the transferor." Such a sentence might be an accurate statement of the law *if the law governing real property transfers consisted only of the UCC*, but there is of course law beyond the UCC. The failure to account for the nonuniform interaction of the UCC with non-UCC law makes statements like this misleading as to the actual state of mortgage enforceability.

Indeed, this particular issue—about what is necessary to render a mortgage enforceable—is particularly problematic, because it directly conflicts with the Official Commentary to the UCC, which is clear that the UCC takes no position on whether a mortgage is enforceable.[2] UCC section 9-308 Official Comment 6 states that:

> Under this Article, attachment and perfection of a security interest in a secured right to payment do not themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it….Similarly, this Article does not determine who has the power to release a mortgage of record. That issue is determined by real-property law.

As the Official Comment makes clear, Article 9 says nothing about enforceability of a note against the maker; that is left to Article 3. Article 9 is similarly silent on the question of mortgage enforceability. The Official Comment does not even refer to Article 3 because Article 3 does not address mortgage enforceability, only the enforceability of negotiable notes. One cannot conclude from silence that Article 9's provisions about the transfer of a mortgage also control the mortgage's enforceability. Moreover, the Official Comment's statement that Article 9 does not determine the power to release a mortgage is strong evidence that Article 9 does not govern mortgage enforceability because the two issues are inseparably connected. To read mortgage enforceability into the UCC as the PEB draft report does is to unleash the UCC from its textual moorings.

2. A PEB Report Is Not the Appropriate Vehicle for Addressing Controversial and Not-Yet-Settled Issues Such as Concerns About Mortgage Note Title Transfers

The PEB draft report attempts to resolve controversial policy issues that are best left to specific state or federal consultation with experts working on current mortgage issues, followed by a true state or federal drafting process, rather than to a report. The PEB's charter notes that "that Annotations or Comments which suggest a substantial departure from an accepted interpretation of the Code shall first also be approved by the Executive Committees of the Conference and the Institute and if those bodies direct shall be circulated for suggestions by interested groups prior to their becoming final." [3] This strongly suggests that the PEB is not to adopt controversial positions on its own.

The PEB draft report "suggest[s] a substantial departure for an accepted interpretation of the Code" both in terms of the interpretation of UCC section 9-203, discussed below under number 3. If

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[1] *E.g.*, PEB at 2 ("This Report does not address issues that are the particular province of real property law.").

[2] UCC section 9-607(b) does not alter this conclusion. First, the provision only addresses nonjudicial enforcement of mortgages, making it facially inapplicable to judicial foreclosure proceedings. Second, it merely permits a filing in the furtherance of enforcement; it does not in and of itself create any rights to enforcement. *See* UCC § 9-607 Official Comment 8 (noting "Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.").

[3] *See* PEB Charter *at* http://www.ali.org/doc/03-PEB%20for%20UCC%2003.pdf at B.5.b.

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the PEB's draft report were issued in final and followed by courts, it would effectively result in changes to the UCC and non-UCC law in terms of what is required in terms of mortgage enforceability.

Moreover, the PEB draft report goes to the heart of a hotly contested issues related to residential mortgage foreclosures, in particular the effect of a recording of a mortgage by the Mortgage Electronic Registration System (MERS) and chain of title and transfer problems in private-label residential mortgage securitizations. A PEB report is not an appropriate vehicle for resolving the serious legal issues posed by MERS or chain of title problems in private-label residential mortgage securitizations. Unfortunately, the PEB's draft report appears to be an attempt, if not to resolve these issues, than at least to put a finger on the scale in favor of large financial institutions and against financially-distressed homeowners, MBS investors, and insurers when these issues are decided in courts. Attempting a *sub rosa* resolution of such controversial issues of law through a PEB report would seriously undermine the perceived independence and credibility of the PEB and damage the reputation of the American Law Institute and the National Conference of Commissioners on Uniform State Law.

Accordingly, I would suggest that the PEB report is the wrong channel through which to advance these views. While I believe that these are issues are beyond the purview of the UCC, if the PEB believes that they should be addressed through the UCC, the PEB should put them forward as recommendations to the Executive Committees of the Conference.

3. The PEB Draft Report Is Based on a Reliance on Dubious Legal Principles

Much of the analysis in the PEB's draft report is based on the application of principles of agency law and real property law to the UCC. The PEB's draft report invokes these principles by reference to the Restatements of the Law on Agency and Property. The Restatements, however, are not law and are widely recognized as having strong normative components. Yet the PEB draft report reaches conclusions about the proper interpretation of the UCC based on agency and real property principles that are not actually the law in many states. If those states' actual law on agency or real property were to be applied, the interpretation of the UCC might well be different.

Nowhere is this clearer than in the PEB's draft report's insistence on repeating the mantra that "the mortgage follows the note." This principle underlies Parts 1 and 4 of the PEB draft report. While the "mortgage follows the note" principle is endorsed by the Restatement (Third) on Property and by UCC section 9-203 Official Comment 9,[4] it is highly problematic and evinces little consideration of the numerous situations in which a mortgage cannot (or should not) follow a note.

Section 9-203(g) codifies a legal position that is demonstrably at odds with other principles of law. It is also drafted in such a uniquely opaque and abstruse manner. In light of the conflicts section 9-203(g) raises with other long-standing provisions of state law, it is difficult to believe that state legislatures knowingly adopted the provision with the interpretation advanced by the PEB draft report.

Section 9-203(g) provides that the "attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien."[5] When read with the definitions of "security interest," "secured party" and "debtor,"[6] it becomes clear that the attachment of a security interest is meant to include the sale of a promissory note. Thus, the sale of a promissory note (a right to payment) secured by a security interest in real property (a mortgage) is also the sale of the mortgage.[7]

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[4] UCC § 9-203, Official Comment 9 (stating that UCC § 9-203(g) "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.").

[5] UCC § 9-203(g).

[6] U.C.C. § 1-201(b)(35) (defintiion of "security interest); UCC § 9-102(a)(28)(B) (definition of "debtor"); § 9-102(a)(72)(D) (definition of "secured party").

[7] The drafting of the provision leaves something to be desired, as "attachment" is defined as enforceability, not sale. For the security interest itself—that is the interest of the buyer in the promissory note—attachment is sufficient to effectuate a sale, but it is not

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Conceptually, there are several significant problems with this provision. First, it is questionable whether section 9-203(g) has any effect if the security instrument is a deed of trust. The technical operation of a deed of trust is not a security interest, but a transfer of the deed to the property in trust for the benefit of the obligee on the associated note. The deed of trust operates as a sale and repurchase, rather than a lien. Interpreted strictly, then, a deed of trust should not qualify as a "security interest or other lien on personal or real property," so it would not fall within the ambit of section 9-203(g). Accordingly, reading section 9-203(g) to mean that a mortgage always follows a note would result in non-uniform state law because of the prevalence or even exclusive use of deeds of trust in some states.

Even if section 9-203(g) does apply to deeds of trusts, it would mean that the mortgage follows the note principle is not absolute. If the trust deed is seen as a security interest, not a sale and repurchase, then the trust deed is necessarily separated from the note. The deed of trust trustee holds the security interest and the obligee has the note. The question of who may claim the status of trust beneficiary is determined by reference to trust and real property law, not to the Uniform Commercial Code, and under such law it might be possible for the beneficial interest in the trust deed to be sold without the note being sold, for example.

Moreover, in title theory states, a mortgage or deed of trust is considered the actual ownership of real property (cf. the sale/repurchase interpretation of a deed of trust). These states have specific requirements for the transfer of real property interests, which would presumably apply to mortgages. By claiming that the transfer of a note effectuates the transfer of a mortgage in a title theory state, the UCC reaches beyond its proper ambit of commercial law and attempts to supersede state real property law.

There are further problems with the mortgage follows the note principal and section 9-203(g). While a thief of a bearer note is a person entitled to enforce the note by virtue of being a holder, UCC section 3-301, it surely cannot follow that the thief of a note (but not of the mortgage) also becomes the mortgagee under the "mortgage follows the note" principle, much less is able to enforce the mortgage given that mortgage foreclosure is an equitable action and a thief lacks clean hands. Likewise, a mortgage can be given to a guarantor of a note, rather than to the obligee. In such a situation, the obligee could sell the note, but that should not deprive the guarantor of the mortgage.

Finally, the case law pedigree of the "mortgage follows the note" principle is less than spotless. Often the phrase is used in a cavalier fashion in dicta and is not the real issue in the case, and indeed, there are cases that provide for the opposite principle: "the note follows the mortgage."[8] In addition, general principles of free alienability of property suggest that a note and a mortgage may in fact be decoupled. Given the absence of a compelling policy reason why a mortgage should necessarily follow a note and the transactional ease by which parties can ensure this result if they so desire, there is no reason for the PEB to so strongly indorse a "mortgage follows the note" principle that extends the UCC beyond its proper scope in governing the transfer of personalty interest into the realm of realty.

The conceptual problems with section 9-203(g) are particularly concerning given the uniquely opaque (and arguably disingenuous) drafting of section 9-203. It is the most strangely drafted provision I have encountered in the UCC or in any legal code; it is so counterintuitive that it takes me a full half hour to teach the basic workings of the provision in my structured finance and inevitably leads to repeated questions from 2Ls, 3Ls, and LLMs of "why on earth would anyone ever draft a provision this way?" The only answer I can provide is that the drafting might be intentionally obscure. I am concerned that state legislatures simply did not understand what it was they were adopting when they enacted section 9-203(g).

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clear what attachment would mean about a lien on personal or real property, as the definition of such a lien does not include the interest of a buyer of the lien.

[8] *See, e.g.*, Dickey v. Pocomoke City Nat. Bank, 89 Md. 280 (1899) ("That statute made a complete change of the law on the subject in this state. Prior to its passage, the mortgage followed the debt secured by it, and became the property of the owner of the latter; but since then the debt, after maturity, follows the mortgage, and is conclusively presumed to belong to the person holding the record title to the mortgage.").

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To recognize that section 9-203(g) provides that the sale of a note effectuates the sale of an associated mortgage, one must first understand that a "secured party" means a buyer of a promissory note, and that a "debtor" means the seller of a promissory note.[9] All of these are completely non-intuitive definitions, but at least they are contained in UCC Article 9. To understand that section 9-203(g) effectuates the *sale* of a mortgage, not merely a security interest in a mortgage, one must also recognize that the UCC Article 1 definition of "security interest" includes a the interest of a buyer of a promissory note.[10] This is an even less intuitive definition, as a sale is often inherently different from a lien.

Even if one understands all of these unusual definitions, the language of section 9-203 still does little to make clear that it effectuates a sale, rather than a security interest. Instead, it refers to the "attachment," meaning the enforceability of a "security interest" between a "debtor" and a "secured party." To this drafting, one must then add subsection (g), which provides that a security interest in a promissory note (meaning a sale of promissory note) includes a security interest (again meaning the sale) of an affiliated security interest. Subsection (g) never uses the term "mortgage." Section 9-203(g) is just about the least straightforward way the law could state that the sale of a promissory note is effectuates a sale of an associated security interest.[11]

Section 9-203(g) is so opaquely drafted that it is not even cited by litigants when it would support their position; the drafting is so obscure that litigants are simply not aware of its existence. A search through state codes for provisions on mortgage transfers or sales would not yield any reference to section 9-203. I am not aware of *any* occasion in which a lender's attorney has cited section 9-203(g) in a foreclosure case, even when it would be extremely helpful to the lender's position. Indeed, even in the most high-profile foreclosure litigation yet, *U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass Through Certificates Series 2006-Z v. Ibanez*, No. 10694 (Mass. 2010) which was argued before the Supreme Judicial Court in Massachusetts this fall, first-rate financial services attorneys from K&L Gates LLP failed to cite to section 9-203(g), which would have significantly strengthened their case.

If highly motivated litigants are not aware of the effect of section 9-203(g), it is hard to believe that state legislatures possibly understood the provision when they adopted Article 9 of the UCC. While states have adopted section 9-203(g), I would urge the PEB not to base its report on an expansive reading of this deeply problematic provision.

4. A PEB Report Is Not Necessary as the Controversies Involving Mortgage Notes Are Not UCC Issues

Finally, it is not apparent to me why a PEB report is even necessary. The chain of title concerns involving mortgage securitization do not revolve around conflicting interpretations of either Article 3 or Article 9 the UCC. Issues involving MERS relate to the interaction between the UCC and non-UCC law. Arguments about the problems caused by MERS transfers are not arguments about how to interpret the UCC. Instead, they are arguments about whether there are additional legal requirements beyond the UCC's for the transfer of mortgages. Likewise, arguments about securitization chain of title are not about the interpretation of the UCC. Instead, they turn on whether the UCC even applies to transfers in mortgage securitizations or whether securitization trust documents represent variations by agreement from the UCC.[12] Neither of these issues is properly within the bailiwick of the PEB. At most, there might be confusion over the interpretation of UCC section 3-309 regarding lost notes, but the real issue there is that many states have chosen (with good reason) not to adopt the 2001 revision of that provision, not problems in how to interpreted revised section 3-309.

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[9] UCC § 9-102(a)(28)(B) (definition of "debtor"); § 9-102(a)(72)(D) (definition of "secured party").

[10] U.C.C. § 1-201(b)(35).

[11] I am aware that § 9-203 was designed so that the very same transaction could qualify as the granting of security interest if circumstances indicated that the transaction were not a true sale, and that this was done to facilitate asset securitization.

[12] *See* UCC § 1-302(a) (permitting variation by agreement); § 1-201(b)(3) (defining agreement); § 1-103 (noting that the principles of law and equity supplement the UCC).

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For these reasons, I strongly urge the PEB not to issue its draft report. I am happy to discuss these concerns with the PEB at its convenience.

Yours,

/s/Adam J. Levitin
Associate Professor
Georgetown University Law Center

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148 S.W.3d 374 (2004)

Evelyn LITTLE, Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE and Gary Johnson, Director, Respondents.

No. 03-0498.

Supreme Court of Texas.

Argued on September 8, 2004.
Decided October 15, 2004.

375 *375 Cynthia L. Biggers, Austin, Donald M. Bishop, Brentwood, Stephen Yelenosky, Austin, and John Griffin Jr., Houston Marek & Griffin, L.L.P., Victoria, for Petitioner.

Adrian L. Young, Greg Abbott, Attorney Gen., Robert Bruni Maddox, Jay T. Kimbrough, Phillip E. Marrus, Barry Ross McBee, John A. Neal, Chief Prosecutor, Edward D. Burbach and David A. Talbot Jr., Office of Attorney General, Austin, for Respondent.

Brian East, Advocacy, Inc., Austin, Amicus Curiae Coalition of Texas with Disabilities.

Justice SMITH delivered the unanimous opinion of the Court.

Section 21.051 of the Labor Code provides that "[a]n employer commits an unlawful employment practice if because of race, color, *disability,* religion, sex, national origin, or age the employer: (1) fails or refuses to hire an individual...." **Tex**. Lab.Code § 21.051 (emphasis added). For purposes of chapter 21 of the Labor Code, the term "disability" means "with respect to an individual, a mental or *physical impairment that substantially limits at least one major life activity* of that individual, a record of such an impairment, or being regarded as having such an impairment...." *Id.* § 21.002(6) (emphasis added).

The question in this case is whether the plaintiff-petitioner, whose left leg has been amputated at the knee, produced legally sufficient evidence that, at the time of the adverse employment actions of which she complains, she had a "disability." More specifically, the question is whether there is any probative summary judgment evidence that Evelyn **Little**, who wears a prosthesis on her left leg and walks with a noticeable limp, had at that time a "physical impairment that substantially limit[ed] at least one major life activity."

376 *376 The trial court granted the defendants' motion for summary judgment. The court of appeals affirmed, concluding that **Little** had "failed to make a threshold showing that she has a disability." 147 S.W.3d 421, 425. We will reverse and remand to the court of appeals.

I

In 1983, the Legislature enacted the Commission on Human Rights Act (CHRA). *See* CHRA, 68th Leg., 1st C.S., ch. 7, 1983 **Tex**. Gen. Laws 37 (compiled as **Tex**.Rev.Civ. Stat. Ann. art. 5221k). The CHRA created the Commission on Human Rights and designated it the state agency responsible for administering the statute. *Id.* §§ 3.01(a), 3.02.

Under the CHRA, as enacted, employers and other covered entities were generally prohibited from discriminating against an individual "because of race, color, handicap, religion, sex, national origin, or age" with respect to hiring and other employment actions. *Id.* §§ 5.01-5.03. The CHRA, as enacted, provided:

> "Handicap" means a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code, but does not include a condition of addiction to any drug or illegal or federally controlled substances or a condition of addiction to the use of alcohol.

Id. § 2.01(7)(B).

In 1987, in *Chevron Corp. v. Redmon,* 745 S.W.2d 314 (**Tex**.1987), this Court construed the term "handicap." Redmon, after being denied employment as a maintenance helper, sought relief under the CHRA. The vision in one of her eyes could not be corrected to better than 20/60, and it was undisputed that she was not hired because of her vision. *Id.* at 315. The Court determined as a matter of law that she was not "handicapped," concluding that "Redmon's minor visual problems do not constitute those severe barriers to employment or other life functions which necessitate protection by the State." *Id.* at 318. With regard to legislative intent, the Court stated: "[T]he legislature obviously chose not to employ the definition of `handicap' in the federal Rehabilitation Act, 29 U.S.C. § 701-796i." *Id.*

In 1988, the Sunset Advisory Commission issued a report that, inter alia, recommended that "[t]he definition of handicap in the Texas Commission on Human Rights Act should be changed to continue the broad interpretation under which the commission ha[d] operated" before *Chevron Corp. v. Redmon* and that "[t]he definition should be generally patterned after the language used by the federal government in the Federal Rehabilitation Act of 1973." **TEX**. SUNSET ADVISORY COMM'N, **TEX**. COMM'N ON HUMAN RIGHTS: STAFF REPORT 49 (1988) (available at Legislative Reference Library).

In 1989, the Legislature enacted sunset review legislation for the Commission on Human Rights. *See* Act of May 29, 1989, 71st Leg., R.S., ch. 1186, 1989 **Tex**. Gen. Laws 4824. The enactment replaced the term "handicap" with "disability" throughout the CHRA and provided: "`Disability' means a mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment...." *Id.* § 3, sec. 2.01(4), at 4824. *Cf. Holt v. Lone Star Gas Co.,* 921 S.W.2d 301, 305 (**Tex**.App.-Fort Worth 1996, no writ) ("[T]he 1989 changes in the TCHRA have lowered the threshold at which we will
377 find discrimination from a person who is handicapped to a person who merely suffers from a disability...."). *377 According to the available legislative history, the Legislature purposely adopted the federal statutory language. *See, e.g.,* SENATE GOV'T ORG. COMM., BILL ANALYSIS (May 10, 1989), **Tex**. S.B. 479, 71st Leg., R.S. (1989) (available at Legislative Reference Library) ("The purpose of this bill is to make the statutory modifications recommended by the Sunset Advisory Commission and other changes regarding TCHR. Generally, modifications proposed by this bill: ... define `disability' to reflect part of the definition of `individual with handicaps' in the Federal Rehabilitation Act of 1973....").

In 1990, Congress enacted the Americans with Disabilities Act (ADA). Pub.L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213). Under Title I of the ADA, employers and other covered entities are generally prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual" in regard to hiring and other employment actions. 42 U.S.C. § 12112(a). Section 12102(2) of the ADA provides: "The term `disability' means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2); *see also Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 478, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) ("[T]o fall within this definition one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C))").

In 1993, the Legislature amended "the Commission on Human Rights Act to bring it into compliance with the Civil Rights Act of 1991 and the Americans with Disabilities Act." SENATE RESEARCH CTR., BILL ANALYSIS (Aug. 4, 1993), **Tex**. H.B. 860, 73rd Leg., R.S. (1993) (available at Legislative Reference Library). The enactment modified the definition of "disability" contained in the CHRA to conform it with the ADA definition. *See* Act of May 14, 1993, 73rd Leg., R.S., ch. 276, § 2, sec. 2.01(4), 1993 **Tex**. Gen. Laws 1285, 1285.

Also in 1993, as part of the state's continuing statutory revision program, part of the CHRA was codified in the Labor Code. *See* Labor Code, 73rd Leg., R.S., ch. 269, § 1, 1993 **Tex**. Gen. Laws 987, 991-1004. The remainder of the CHRA was transferred to the Government Code. *Id.* § 2, at 1258-61. According to the relevant revisor's note:

> The revised law omits as unnecessary the short title provision of the source law formerly found in V.A.C.S. Article 5221k, Section 1.01. The source law formerly known as the Commission on Human Rights Act is now codified in part as Chapter 461, Government Code, and in part as Chapter 21, Labor Code. The omitted source law reads: "Art. 5221k. Sec. 1.01. This Act may be cited as the Commission on Human Rights Act."

378 2 **TEX**. LEGISLATIVE COUNCIL, LABOR CODE, REVISOR'S REPORT 1216 (1993) (available at Legislative Reference Library). In addition, the Commission on Human Rights was recently abolished and its powers and duties were transferred to the

newly-created Civil Rights Division of the Texas Workforce Commission. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 302, 2003 **Tex**. Gen. Laws 1279.[1] Accordingly, we will not *378 refer to chapter 21 of the Labor Code as the Commission on Human Rights Act.

II

In her first amended original petition, Evelyn **Little** sought relief under chapter 21 of the Labor Code against the Texas Department of **Criminal Justice** and Gary Johnson, in his official capacity as executive director of the Texas Department of **Criminal Justice**.[2] In part five of the pleading, entitled "Facts," **Little** alleged:

> Plaintiff, Evelyn **Little**, has a visible disability, which is the loss of the left leg at the knee. She wears a full leg prosthesis and has a limp.
>
> Ms. **Little** has been unlawfully denied employment by Defendants as a result of her disability.
>
> Ms. **Little** is an experienced Food Service Manager, having served as food manager at nationally recognized restaurants (Air Host, Sky Host, Ramada Inn and Howard Johnson's Inns). She has supervisory experience. She can handle physically demanding work and has worked 8 to 16 hour shifts without a break. She is mature (48 and 49 years old at the time she was applying for the jobs as Food Manager at Defendant TDCJ's various locations).
>
> Ms. **Little** completed the application and interview process for Food Service Manager positions at TDCJ over 20 times from 1995 through April 1999 at TDCJ's locations in east Texas. Each time she was notified that she was qualified for employment but was denied employment. Ms. **Little** was demonstrably better qualified than the selected applicant in several instances and was denied employment because of her disability.

In its answer, the TDCJ asserted a general denial. In addition, in part two of the pleading, entitled "Specific Denials and Defenses," the TDCJ alleged:

> 2. Plaintiff is not disabled within the meaning of the TCHRA or other law.
>
> 3. Plaintiff has requested no accommodation nor is an accommodation required to enable her to perform the essential functions of the job of Food Service Manager of TDCJ. Therefore, there is no issue whether any reasonable accommodation would or could have been provided. While Plaintiff does walk with a slight limp, her condition has been substantially corrected by prosthesis.
>
> ....
>
> 7. For each of the selections of which Plaintiff complains, TDCJ had a legitimate, non-discriminatory reason for its selection.

After discovery was completed, the TDCJ moved for summary judgment under Texas Rule of Civil Procedure 166a(c). In the argument section of the motion, the TDCJ asserted:

> Plaintiff must first prove that she is disabled. She is not disabled because she is not unable to perform either a broad range of jobs, or even the particular job. *See* 42 U.S.C. § 12112(a). She needs no accommodation. She is not substantially limited in any major activity. Her condition and abilities must be considered, as corrected by her prosthesis. *See* *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 482-3, 119 S.Ct. 2139, 2146-7, 144 L.Ed.2d 450 (1999).

In the motion's conclusion, the TDCJ argued:

> Plaintiff is able to walk with only a slight limp and is fully able to work. There is no evidence that she is disabled
> 379 or that TDCJ perceived her as disabled. *379 Neither party claims she needs an accommodation to perform the job as food service manager, or even a broad range of jobs. Her condition has been substantially corrected by prosthesis. She does not meet the definition of disability under the TCHRA.

> Moreover, Plaintiff cannot show that she was the best qualified candidate for any of the positions applied for. TDCJ records show that the best qualified candidates were selected. Plaintiff cannot prove pretext in any of the selection decisions. Moreover, she has no evidence of intentional discrimination. Her discrimination claim fails as a matter of law.

In support of the summary judgment motion, the TDCJ attached, inter alia, part of **Little's** deposition testimony. The deposition was conducted on September 7, 2001. In response to questions from counsel for the TDCJ concerning her physical impairment, **Little** agreed that she "walk[s] well with a limp" and "get [s] around pretty well."[3] The TDCJ presented no other summary judgment evidence regarding **Little's** physical impairment.

In her response to the summary judgment motion, **Little** asserted:

> [I]n the very case that established the relevance of corrective measures to the determination of disability, the United States Supreme Court noted that "individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run." *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 488, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). To defeat summary judgment, therefore, Ms. **Little** need offer only more than a scintilla of evidence that she is substantially impaired in walking or running. Her affidavit alone accomplishes that.
>
> Alternately, Ms. **Little** has a record of a substantial impairment of a major life activity....
>
> Alternately, Ms. **Little** contends and is entitled to attempt to prove to a jury that TDCJ personnel who made the hiring decisions at issue regarded her as a person with a substantial impairment of a major life activity....

In the response's conclusion, **Little** argued:

380 > Ms. **Little** has met her burden of producing sufficient evidence of the only *380 element of her prima facie case that has been questioned by defendants and her burden of bringing forth sufficient evidence of pretext that would enable reasonable and fair-minded people to differ in their conclusions. She is entitled to have her case decided by a jury.

In opposition to the summary judgment motion, **Little** executed and proffered a five-page affidavit. The affidavit was executed on May 17, 2002. In the affidavit, **Little** declared that "[w]hen I walk, my left leg remains stiff, and, with each step, I must swing it out away from my body to clear the floor."[4] In addition to the affidavit, **Little** attached to her response the deposition testimony of Ronald Kelly and other individuals who had conducted the relevant employment interviews. In response to questions concerning **Little's** limp, Kelly stated that "[i]t's something you can't miss unless you're just totally blind."

On June 6, 2002, the trial court granted the TDCJ's motion for summary judgment. The order granting the motion did not state the specific ground or grounds on which the motion was granted.

In the court of appeals, the parties presented the same arguments and authorities that they had presented to the trial court. On March 27, 2003, the court of appeals affirmed the trial court's judgment. With regard to whether **Little** had an actual disability, the court of appeals stated:

> [A]ppellant contends that her physical impairment is her amputated leg. As evidence of her disability, appellant directs us to her affidavit, wherein she states that she "cannot sit or walk like other people," and she cannot "walk quickly" and "cannot run at all." Appellant contends that even though she is able to walk with a prosthesis, she is still disabled because of substantial limitations on her ability to walk or run.
>
> ....
>
> Here, the summary judgment evidence shows that appellant can walk well with the use of her prosthesis, although with a slight limp and at a slower pace. We consider corrective and mitigating measures, such as the use of a prosthesis, when determining whether appellant is "disabled," as the term is defined under the ADA and TCHRA. *See* *Sutton v. United Air Lines,* 527 U.S. 471, 482-83, 119 S.Ct. 2139, 2146-47, 144 L.Ed.2d 450 (1999) (finding that evaluating person in hypothetical uncorrected state was impermissible interpretation of ADA). While there is some evidence of appellant's impairment, there was no summary judgment evidence that such

impairment constituted a substantial limitation of a major life activity.

147 S.W.3d at 424. The court of appeals also concluded that "there is no summary judgment evidence that appellant has a substantial record of impairment" and that "appellant did not present any competent summary judgment evidence that showed TDJC [sic] personnel regarded her as having an impairment." *Id.* at 425.

In this Court, it is undisputed that **Little** has a "physical impairment" and that walking is a "major life activity." **Tex**. Lab.Code § 381 21.002(6). As framed by **Little**, "[t]he first issue in this case is whether the prosthesis has restored function so that *381 the impairment is no longer a substantial limitation of the major life activity of walking."

After the parties filed briefs on the merits, the Court received a joint *amici curiae* brief from Advocacy, Incorporated; the Coalition of Texans with Disabilities; the American Association of Retired Persons; the American Diabetes Association; and the National Association of Protection and Advocacy Systems. With regard to **Little's** prosthesis, the *amici* assert: "Perhaps someday, medical regeneration or a super-prosthesis will exist (and will be accessible to Ms. **Little**) that completely restores functioning in all respects. That, of course, is not the situation in this case...." Accordingly, the *amici* contend that, at the time of the adverse employment actions of which she complains, **Little** clearly had a "physical impairment that substantially limit[ed] at least one major life activity." **Tex**. Lab.Code § 21.002(6).

III

Under Texas Rule of Civil Procedure 166a(c), the judgment sought by the moving party must be rendered if the summary judgment evidence shows that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law...." **Tex**.R. Civ. P. 166a(c). A defendant who conclusively negates at least one of the essential elements of the plaintiff's cause of action is entitled to summary judgment. *Randall's Food Mkts., Inc. v. Johnson,* 891 S.W.2d 640, 644 (**Tex**.1995); *see also Lear Siegler, Inc. v. Perez,* 819 S.W.2d 470, 471 (**Tex**.1991) ("For a defendant to be entitled to summary judgment [under Rule 166a(c)] it must *disprove,* as a matter of law, one of the essential elements of each of plaintiffs' causes of action.").

"When reviewing a motion for summary judgment, the court takes the nonmovant's evidence as true, indulges every reasonable inference in favor of the nonmovant," and resolves all doubts in favor of the nonmovant. *M.D. Anderson Hosp. v. Willrich,* 28 S.W.3d 22, 23 (**Tex**.2000) (citing *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548-49 (**Tex**.1985)).

We review de novo a court of appeals's affirmance of a summary judgment rendered under Texas Rule of Civil Procedure 166a(c). *See Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (**Tex**.2003).

IV

Section 21.002(6) of the Labor Code provides:

> "Disability" means, with respect to an individual, a mental or *physical impairment that substantially limits at least one major life activity* of that individual, a record of such an impairment, or being regarded as having such an impairment. The term does not include:
>
> (A) a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance; or
>
> (B) a currently communicable disease or infection as defined in Section 81.003, Health and Safety Code, or required to be reported under Section 81.041, Health and Safety Code, that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment.

TEX. LAB.CODE § 21.002(6) (emphasis added).

One express purpose of chapter 21 of the Labor Code is to "provide for the execution of the policies embodied in Title I of the 382 Americans with Disabilities Act of 1990 *and its subsequent amendments* (42 U.S.C. Section 12101 et seq.)." **TEX**. LAB. *382

CODE § 21.001(3) (emphasis added). Moreover, as discussed in part I, the Legislature in 1993 fully incorporated the ADA definition of the term "disability" into chapter 21. *See* NME Hosps., Inc. v. Rennels, 994 S.W.2d 142, 144 (**Tex**.1999) ("The [Commission on Human Rights] Act purports to correlate `state law with federal law in the area of discrimination in employment.'") (quoting Schroeder v. ***Tex***. Iron Works, Inc., 813 S.W.2d 483, 485 (**Tex**.1991)). Therefore, both the federal court decisions interpreting the ADA and the federal administrative regulations regarding the ADA guide our interpretation of the definition of "disability" contained in chapter 21. *See* Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 476 (**Tex**.2001) ("[A]nalogous federal statutes and the cases interpreting them guide our reading of the TCHRA.").

In Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), the United States Supreme Court interpreted the definition of the term "disability" contained in the ADA and held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses." *Id.* at 475.[5]

In *Sutton,* the plaintiffs applied to the defendant for employment as pilots and were both rejected because of their vision. The plaintiffs' uncorrected vision was unquestionably poor; however, with glasses or contact lenses, they were able to function the same as individuals who were not visually impaired.[6] The Supreme Court concluded, inter alia, that the plaintiffs were not actually disabled within the meaning of the ADA and affirmed the dismissal of their lawsuit. *Id.* at 488-89, 494, 119 S.Ct. 2139.

In a passage directly relevant to this case, **Justice** O'Connor, writing for the majority, stated:

> The dissents suggest that viewing individuals in their corrected state will exclude from the definition of "disab[led]" those who use prosthetic limbs, see *post,* at 497-498 (opinion of STEVENS, J.), *post,* at 513 (opinion of BREYER, J.), or take medicine for epilepsy or high blood pressure, see *post,* at 507, 509 (opinion of STEVENS, J.). This suggestion is incorrect. The use of a corrective device does not, by itself, relieve one's
> 383 disability. Rather, one has a disability under subsection *383 (A) if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.... The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.

Id. at 487-88, 119 S.Ct. 2139.

In addition, the federal Equal Employment Opportunity Commission has issued detailed regulations regarding Title I of the ADA and the definition of "disability" set forth in section 12102(2) of the ADA. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 (2004); *see also* Waldrip v. Gen. Elec. Co., 325 F.3d 652, 655 n. 1 (5th Cir.2003) ("We cite the EEOC regulations as persuasive authority, not for *Chevron* deference. We early on stated, and often have repeated, that the regulations `provide significant guidance.' Yet, we have never given the regulations *Chevron* deference, and recent decisions of the Supreme Court strongly suggest that the regulations are not entitled to such deference, because Congress delegated the authority to implement Title I of the ADA, which regulates employment, to the EEOC, 42 U.S.C. § 12116, but Title I does not include § 12102.") (citations omitted).

The relevant EEOC regulations provide:

> (i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (j) *Substantially limits* — (1) The term *substantially limits* means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> (2) The following factors should be considered in determining whether an individual is substantially limited in a

major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(i)-(j).

A person need not be totally unable to walk to be "disab[led]" under section 12102(2)(A) of the ADA; she need only be significantly restricted as to the condition, manner, or duration of her walking as compared to that of the average person in the general population. *See, e.g., Bragdon v. Abbott,* 524 U.S. 624, 641, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (The ADA "addresses substantial limitations on major life activities, not utter inabilities."); *Gillen v. Fallon Ambulance Serv., Inc.,* 283 F.3d 11, 22 (1st Cir.2002) ("The focus is not on whether the individual has the courage to participate in the major life activity despite her impairment, but, rather, on whether she faces significant obstacles when she does so. The EEOC's emphasis on `condition,
384 manner, or duration' in contrasting *384 how a disabled person performs an activity and how a member of the general public performs that same activity dovetails with this formulation.").

In the light most favorable to **Little**, the summary judgment record reflects that, at the time of the adverse employment actions of which she complains, she was significantly restricted as to the manner in which she could walk compared to the manner in which the average person in the general population could walk. *Cf. Lowe v. Ala. Power Co.,* 244 F.3d 1305, 1307 (11th Cir.2001) ("A disability is defined as a physical or mental impairment that substantially limits a major life activity of an individual. 42 U.S.C. § 12102(2). Lowe is a double amputee below the knee and is disabled within the meaning of the statute."); *Belk v. Southwestern Bell Tel. Co.,* 194 F.3d 946, 950 (8th Cir.1999) (decided post-*Sutton*) ("[I]t can hardly be disputed that Belk is disabled in the major life activity of walking. The full range of motion in his leg is limited by the brace, and his gait is hampered by a pronounced limp."). Therefore, we conclude that there is probative summary judgment evidence that, at the time of the adverse employment actions of which she complains, **Little** had a "physical impairment that substantially limit[ed] at least one major life activity." **TEX**. LAB.CODE § 21.002(6). Accordingly, the court of appeals erred in affirming the TDCJ's summary judgment on that ground.

V

In the trial court, the TDCJ moved for summary judgment on two grounds. The first ground was that **Little** did not meet the statutory definition of "disability." The second ground was that **Little** had no direct evidence of discriminatory intent, and that she could not raise an inference of discriminatory intent by proving that the TDCJ's articulated reasons for its adverse employment actions against her were a pretext for discrimination. Both grounds were raised and fully briefed in the court of appeals.

Under Texas Rule of Appellate Procedure 53.4, we have authority to consider the TDCJ's second ground for summary judgment. *See* **Tex**.R.App. P. 53.4. However, we decline to do so. *Cf. Cincinnati Life Ins. Co. v. Cates,* 927 S.W.2d 623, 626 (**Tex**.1996) ("We do not have the benefit of the court of appeals' decision on the merits of the insurance companies' alternate grounds or full briefing from the parties. For that reason, we remand the case to the court of appeals.").

VI

Based on the foregoing analysis, we reverse the court of appeals's judgment and remand the case to the court of appeals for further proceedings.

[1] The enactment became effective on March 1, 2004. *See* Notice Regarding the Transfer of **Tex**. Comm'n on Human Rights to the **Tex**. Workforce Comm'n Civil Rights Div., 29 **Tex**. Reg. 2977 (Mar. 19, 2004).

[2] For convenience, the defendants will be referred to as the "TDCJ" in the remainder of the opinion.

[3] The exchange, in its entirety, is set forth below:

Q. Is your leg amputated below the knee?

A. I have a half a kneecap so that would be above the knee — below the knee. It's an AK.

Q. For lack of a better term, the lower half of your leg has been taken off, is that correct?

A. Yes.

Q. Basically the lower half. You still have your thigh and your upper leg?

A. Yes.

Q. But you don't have your shin and all of that?

A. No. I don't have no toes down there.

Q. You have a prosthetic device?

A. Yes.

Q. I noticed when you came in today that it appeared to me you were able to walk pretty well, but with a limp?

A. Yes.

Q. But you are able to walk, are you not?

A. Yes, with the prosthesis.

Q. Given the fact that you have a limp, I mean you walk — it appeared to me that — you walk pretty well given the fact that you do walk with a limp. You walk well with a limp, would that be a fair statement?

A. Yes, that's correct.

Q. If there is such a thing as walking well with a limp, you walk well with a limp?

A. Yes, I look good.

Q. Yes, that's what I was trying to say. You don't — you're limited because you do walk with a limp, but it would be fair to say that you get around pretty well, don't you?

A. Yes, I do.

[4] In relevant part, the affidavit provided:

My prosthesis is an artificial leg that attaches above the knee. I wear it every day of my life. I am not able to bend my left leg with my leg muscles. To sit, I have to bend my artificial leg with my hand. When I walk, my left leg remains stiff, and, with each step, I must swing it out away from my body to clear the floor. I cannot sit or walk like other people do or walk quickly. I cannot run at all.

[5] Not surprisingly, the decision generated a substantial amount of law review commentary. *See, e.g.,* White, *Deference and Disability Discrimination,* 99 MICH. L.REV. 532 (2000); Harrington, Comment, *The Americans with Disabilities Act: The NewDefinition of Disability Post-Sutton v. United Air Lines, Inc.,* 84 MARQ. L.REV. 251 (2000); McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of* Sutton, 109 YALE L.J. 1161 (2000); McDonnell, Note, *Sutton v. United Air Lines: Unfairly Narrowing the Scope of the Americans with Disabilities Act,* 39 BRANDEIS L.J. 471 (2000-2001); Lovett, Note, *Supreme Court's Clarification of the Effect of "Mitigating Measures" in Disability Determinations Muddies Disabilities Waters: Sutton v. United Airlines, Inc.,* 21 MISS. C.L.REV. 153 (2001).

[6] "Petitioners are twin sisters, both of whom have severe myopia. Each petitioner's uncorrected visual acuity is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but with the use of corrective lenses, each has vision that is 20/20 or better. Consequently, without corrective lenses, each effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores, but with corrective measures, such as glasses or contact lenses, both function identically to individuals without a similar impairment." *Sutton,* 527 U.S. at 475, 119 S.Ct. 2139 (record citations omitted).

Long v. NCNB-Texas Nat. Bank
Court of Appeals of Texas, Corpus Christi. | July 28, 1994 | 882 S.W.2d 861 *(Approx. 14 pages)*

Corpus Christi.

Clarence **LONG**, Sr., et al., Appellants,

v.

NCNB–TEXAS NATIONAL BANK as Assignee of the Federal

Bank Victoria, N.A. F/K/A Interfirst Bank Victoria, N.A., Appellees.

No. 13–93–138–CV. | July 28, **1994**.

Bank foreclosed on realty secured by deed of trust that had been executed to secure note, and bank sought deficiency from note guarantors. The 24th District Court, Victoria County, Marion M. Lewis, J., entered summary judgment in favor of bank, and guarantors appealed. The Court of Appeals, Yañez, J., held that: (1) guarantors of note secured by realty were not entitled to notice of foreclosure sale, and (2) guarantors failed to obtain standing to challenge validity of nonjudicial foreclosure.

Affirmed.

West Headnotes (13)

Change View

1 **Judgment** Presumptions and Burden of Proof
In summary judgment proceedings, movants must establish their entitlement to judgment as matter of law by showing that no disputed fact issue prevents them from conclusively proving every element of their cause or defense.

1 Case that cites this headnote

2 **Appeal and Error** Judgment
Summary judgment movant's burden demands that appellate court resolve each doubt and indulge every reasonable inference in favor of nonmovant while accepting truth of all evidence against summary disposition.

1 Case that cites this headnote

3 **Liens** Statutory Liens
Vendor and Purchaser What Law Governs
Although Chapter 9 of Texas' Business and Commerce Code regulates security interests in personal property and fixtures, it omits governance over creation or transfer in or lien on real estate; thus, case law illuminating provisions of Business and Commerce Code do not influence court's interpretation of Property Code. V.T.C.A., Government Code § 311.023; V.T.C.A., Bus. & C. § 9.104(10).

2 Cases that cite this headnote

4 **Guaranty** Notice of Default to Guarantor
Guarantors of note secured by realty, as opposed to personal property, do

not enjoy right to notice of foreclosure sale where guarantors do not partake in nature and rights of note maker and case does not entail intermingled rights of guarantors and note makers. V.T.C.A., Property Code § 51.002(b)(3).

3 Cases that cite this headnote

5 **Mortgages** Persons Entitled to Relief and Parties

Nonjudicial foreclosure under deed of trust will suffer challenges to its validity from only note maker, note maker's privies, and parties with property interest affected by the sale.

2 Cases that cite this headnote

6 **Mortgages** Persons Entitled to Relief and Parties

To have standing to dispute validity of deed of trust foreclosure sale, one need only have established property interest in deed of trust realty to impute flaw in notice to note maker.

6 Cases that cite this headnote

7 **Mortgages** Persons Entitled to Relief and Parties

Principals of note maker which had executed deed of trust over realty to secure note lacked standing to contest validity of foreclosure notice to note maker where principals failed to describe any recognizable property interest in the realty.

5 Cases that cite this headnote

8 **Bills and Notes** Liability of Drawer
Guaranty Nature of Obligation

Fundamentally, promissory notes and guaranties are contracts implying that secured party owes both note maker and guarantor duty to discharge its respective contractual obligations.

2 Cases that cite this headnote

9 **Guaranty** Release or Loss of Other Securities

Secured party's negligent failure to exercise skill and care in performing its obligations under guaranty contract is breach of common-law duty to discharge its contractual obligations properly.

1 Case that cites this headnote

10 **Guaranty** Release or Loss of Other Securities

Unless guaranty contract provides otherwise, secured party must employ ordinary care in disposing of security.

11 **Guaranty** Release or Loss of Other Securities

Secured parties under note do not owe note guarantors duty of good faith.

3 Cases that cite this headnote

12 **Guaranty** Release or Loss of Other Securities

Note guarantor has right to avoid liability for deficiency following foreclosure by showing negligence in secured party's performance under guaranty contract.

2 Cases that cite this headnote

13 **Guaranty** Waiver or Estoppel of Guarantor
Note guarantor's right to insist on proper disposition of realty securing note can be waived.

Attorneys and Law Firms

***862** Bill W. Russell, Victoria, for appellants.

Douglas W. Sanders, Wright & Greenhill, San Antonio, for appellees.

Before SEERDEN, DORSEY and YAÑEZ, JJ.

Opinion

OPINION

YAÑEZ, Justice.

Clarence, Stephen and C.L. **Long**, guarantors of a promissory note, appeal from a summary judgment awarding **NCNB**–Texas National Bank the deficiency resulting from a realty foreclosure by **NCNB**. In six points of error, the **Longs** claim the trial court should have denied **NCNB's** motion for summary judgment and instead granted their own motion for summary judgment. We disagree and affirm the trial court's judgment.

In August of 1985, **Long** Engineering executed a deed of trust over realty in Victoria County to secure a $120,000 loan from InterFirst Bank Victoria, predecessor of **NCNB**. In their capacity as sole shareholders and directors of the company, the **Longs** guaranteed the note. **Long** Engineering defaulted and filed for bankruptcy in December of 1989. **NCNB** then moved for relief from the automatic stay of foreclosure resulting from the bankruptcy proceedings. The bankruptcy court granted **NCNB's** motion for relief from the automatic stay in an agreed order signed by **Long** Engineering's attorney.

In May of 1990, **NCNB** sent notice of the contemplated foreclosure sale to **Long** Engineering at the address required for such notices, as specified in the deed of trust. This address was abandoned. Although **NCNB** sent an additional copy of the notice to the attorney representing **Long** Engineering in bankruptcy, **NCNB** did not separately notify the president of **Long** Engineering. In June of 1990, **NCNB** bought the property at foreclosure sale for $60,500 and demanded that the **Longs** pay the deficiency. When the **Longs** refused, **NCNB** sued to enforce the guaranties and prevailed on summary judgment.

1 In summary judgment proceedings, movants must establish their entitlement to judgment as a matter of law by showing that no disputed fact issue prevents them from conclusively proving every element of their cause or defense. *Swilley v. Hughes,* 488 S.W.2d 64, 67 (Tex.1972); *MBank Corpus Christi N.A. v. Shiner,* 840 S.W.2d 724, 725 (Tex.App.—Corpus Christi 1992, no writ). When both parties move for summary judgment, each needs to meet this standard and neither may prevail merely because the other failed to discharge its burden of proof. *Buccaneer's Cove, Inc. v. Mainland Bank,* 831 S.W.2d 582, 583 (Tex.App.—Corpus Christi 1992, no writ); *Atrium v. Kenwin Shops of Crockett, Inc.,* 666 S.W.2d 315, 318 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The burden shifts once the movant establishes the right to summary judgment; ***863** the nonmovant must then present any issue that would avert the summary judgment. *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex.1979); *Diehl v. Rocky Mountain Communications, Inc.,* 818 S.W.2d 183, 184 (Tex.App.—Corpus Christi 1991, writ denied).

2 Movant's appellate burden demands that we resolve each doubt and indulge every reasonable inference in favor of the nonmovant while accepting the truth of all

evidence against the summary disposition. *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548–49 (Tex.1985); *Argonaut Ins. v. Allstate Ins.,* 869 S.W.2d 537, 537 (Tex.App.—Corpus Christi 1993, writ denied). Reviewing the summary judgment evidence in this light, we must determine whether such proof disposes of every genuine issue of material fact necessary to establish the movant's cause or defense. *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (Tex.1970); *Valero Energy Corp. v. M.W. Kellogg Constr. Co.,* 866 S.W.2d 252, 257 (Tex.App.—Corpus Christi 1993, writ denied).

Regarding the **Longs**' liability under the guaranties, four material elements comprise **NCNB's** cause of action:

(1) The existence and **NCNB's** ownership of the guaranties;

(2) Performance under the guaranties by InterFirst Bank Victoria and its successor, **NCNB**;

(3) **Long** Engineering's default on the underlying note so as to activate the **Longs**' liability under the guaranties; and

(4) The **Longs**' refusal to honor the guaranties.

See FDIC v. Attayi, 745 S.W.2d 939, 948 (Tex.App.—Houston [1st Dist.] 1988, no writ); *Barclay v. Waxahachie Bank & Trust Co.,* 568 S.W.2d 721, 723 (Tex.Civ.App.—Waco 1978, no writ). The parties have agreed to facts establishing all four elements of **NCNB's** cause, and such stipulations may appropriately evince a summary judgment. Tex.R.Civ.P. 166a(c). Moreover, this suit particularly invites summary judgment in that it requires little more than our interpretation of an unambiguous written agreement. *RGS, Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co.,* 700 S.W.2d 635, 638 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.).

The **Longs**' first two points of error urge that we recognize a statutory duty to provide notice of a foreclosure sale to guarantors of the underlying note secured by real property. The relevant statute requires notice to "each debtor who, according to the records of the holder of the debt, is obliged to pay the debt." Tex.Prop.Code Ann. § 51.002(b)(3) (Vernon 1989). Specifically, the **Longs** ask that we read "debtor" to encompass both the maker and the guarantor of the note so that notice serves as an additional element of **NCNB's** suit to enforce the guaranties.

Construing the notice requirement in a suit for deficiency under a note secured by personal property, we have interpreted the term "debtor" to include guarantors. *Hernandez v. Bexar County Nat'l Bank,* 710 S.W.2d 684, 687 (Tex.App.—Corpus Christi), *writ ref'd n.r.e. per curiam,* 716 S.W.2d 938 (Tex.1986) (construing Tex.Bus. & Com.Code Ann. §§ 9.504, 9.505 (Tex.UCC) (Vernon Supp.1986)); *see also FDIC v. Moore,* 846 S.W.2d 492, 495 (Tex.App.—Corpus Christi 1993, writ denied) (construing Tex.Bus. & Com.Code Ann. § 9.504(c) (Tex.UCC) (Vernon 1991)). A vigorous debate on the effect of disputed notice under the Business and Commerce Code divides the various courts of appeal. The two schools of thought differ over whether notice represents an element of the cause or if lack of notice merely provides an affirmative defense. *Compare Smith v. FDIC,* 800 S.W.2d 648, 650 (Tex.App. —Houston [1st Dist.] 1990, writ dism'd agr.) *with Daniell v. Citizens Bank,* 754 S.W.2d 407, 409 (Tex.App.—Corpus Christi 1988, no writ).

Conspicuously, no such debate animates the issue now before us. In *Hernandez,* we concluded that the Business and Commerce Code notice requirement bars liability for deficiency absent notice of the foreclosure sale to the guarantor. *Hernandez,* 710 S.W.2d at 687. We explicitly distinguished, however, between guarantors of a loan secured by realty under the Property Code and a loan secured with consumer goods under the Business and Commerce Code. *Id.* The ***864** identical distinction underlies the *Attayi* court's analysis of a guarantor's right to notice of the foreclosure sale under

the two codes. *Attayi,* 745 S.W.2d at 948. In a secured party's appeal from a summary judgment denying deficiency, the *Attayi* court addressed the material elements of the secured party's cause of action:

> As appellee correctly argues, when a guaranty is made on a promissory note that is secured by *personal property,* the Texas UCC article 9 applies. (citations omitted). Notice of the forced sale was an element of appellant's cause of action. (citations omitted).
>
> Appellant cites *Barclay v. Waxahachie Bank & Trust Co.,* 568 S.W.2d 721 (Tex.Civ.App.—Waco 1978, no writ), as authority for the elements of a suit on a guaranty [with no mention of notice as an element].
>
> At issue in *Barclay* were guaranties on promissory notes secured by *real property;* on the facts of the case the *Barclay* court's listing of the elements of a guaranty suit was correct. However, as stated above, the guaranty in the instant case was secured by *personal property.*

Attayi, 745 S.W.2d at 948.

Both *Hernandez* and *Attayi* contrast a guarantor's established right to notice if chattel secures the note with the absence of such a right under the guaranty of a note secured by realty. Neither the Business and Commerce Code nor the Property Code explicitly define "debtor" to include guarantors. Yet we discriminate between the two types of guaranty contracts because of the disparate legislative histories of their respective governing codes.

In May of 1965, Texas adopted the Official Text of the Uniform Commercial Code, with minor modifications irrelevant to this case, as chapters 1 through 9 of the Business and Commerce Code. *See generally Robinson v. Garcia,* 804 S.W.2d 238 (Tex.App.—Corpus Christi 1991), *writ denied per curiam,* 817 S.W.2d 59 (Tex.1991) (discussing legislative history of Texas UCC). Among the stated purposes of this enactment, chapter 1 particularly lists the goal of making "uniform the law among the various jurisdictions." Tex.Bus. & Com.Code Ann. § 1.102(b)(3) (Tex.UCC). This policy has encouraged Texas courts to look beyond our jurisdictional borders for guidance in construing the provisions of chapter 9. *See, e.g., MBank El Paso N.A. v. Sanchez,* 836 S.W.2d 151, 153–54 (Tex.1992) (citing § 1.102(b)(3) as grounds for surveying over a dozen jurisdictions before interpreting § 9.503); *Peck v. Mack Trucks, Inc.,* 704 S.W.2d 583, 585 (Tex.App.—Austin 1986, no writ) (noting that majority of jurisdictions include guarantors within term "debtor" under UCC article 9 as one justification for adopting same construction in Texas); *Sunjet, Inc. v. Ford Motor Credit Co.,* 703 S.W.2d 285, 287–88 (Tex.App.—Dallas 1985, no writ) (citing § 1.102(b)(3) as requiring multijurisdictional examination of evidentiary burden on secured party to interpret §§ 9.504, 9.507). The practice of consulting foreign authorities finds further support in the rules of construction contained within the Government Code: "A uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it." Tex.Gov't Code Ann. § 311.028 (Vernon 1988). This method of statutory construction distinctive to the Business and Commerce Code profoundly influences our understanding of chapter 9 and our contextual interpretation of the term "debtor." *See Peck,* 704 S.W.2d at 585.

3 Although chapter 9 of the Business and Commerce Code regulates security interests in personal property and fixtures, it expressly omits governance over "the creation or transfer of an interest in or lien on real estate." Tex.Bus. & Comm.Code Ann. § 9.104(10) (Tex.UCC). In both parameter and underlying purpose, therefore, the notice requirement in chapter 9 evolves under jurisprudential strictures wholly irrelevant to the Property Code. *See McFarlane v. Whitney,* 134 Tex. 394, 134 S.W.2d 1047, 1050 (Com.App.1940). No similar concern for interjurisdictional uniformity controls our reading of the Property Code. This underlying disparity between the various objects of the two codes outweighs the mere appearance of

similarity. Consequently, case law illuminating provisions of the Business and Commerce Code fails to influence our interpretation of ***865** the Property Code. *See* Tex.Gov't Code Ann. § 311.023.

To the contrary, we must construe the Property Code in the context of its own particular objects, circumstances, consequences and history. *Id.* The notice requirement in § 51.002 of the Property Code has been the subject of legislative attention in Texas since 1895. *Roedenbeck Farms v. Broussard,* 124 S.W.2d 929, 936 (Tex.Civ.App.—Beaumont), *writ ref'd,* 133 Tex. 126, 127 S.W.2d 168 (1939), *appeal dism'd,* 308 U.S. 514, 60 S.Ct. 145, 84 L.Ed. 438 (1939).

Parties to a deed of trust enjoyed absolute license to contract by agreed terms prior to March of 1889, when the statute requiring notice of foreclosure sales became effective. *International Bldg. & Loan v. Hardy,* 86 Tex. 610, 26 S.W. 497, 500 (1894); *see generally Armeta v. Nussbaum,* 519 S.W.2d 673 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n.r.e.) (discussing history of nonjudicial foreclosure under Texas law). The 1889 enactment allowed for contractual notices in addition to the statutory notice, but not as an alternative to the following requirement:

> [T]he time and place of making sale of real estate ... shall be publicly advertised ... for at least twenty days successively next before the day of sale, by posting up written or printed notice thereof, at three public places in the county, one of which shall be the door of the court house of the county.

Sayles' Civ.St. art. 2309 (also allowing countywide newspaper publication), *incorporated by reference in* Acts 1889, at 143, ch. 118; *see also International Bldg. & Loan,* 26 S.W. at 497; *Chamberlain v. Trammell,* 61 Tex.Civ.App. 650, 131 S.W. 227, 230 (1910, writ dism'd).

The 1915 amendments to the 1889 enactment altered the notice requirement by authorizing "the parties, as an *alternative* but not as a *cumulative* right, to contract as to a method of notice." *Roedenbeck Farms,* 124 S.W.2d at 936 (construing Acts 1915, 1st C.S., at 32, ch. 15 amendment to Rev.Civ.St.1911, art. 3759). Still, parties could not contract for one exclusive method of notification until further amendments were assembled in 1925 as article 3810, the immediate predecessor to the current statute. *Roedenbeck Farms,* 124 S.W.2d at 936 (comparing amended Rev.Civ.St.1911 with article 3810).

Notice to the debtor by certified mail plus posting on the courthouse door replaced the old posting requirement in 1976. Acts 1975, at 2354, ch. 723, § 1. The Texas legislature codified this version of the notice requirement into Section 51.002 of the Property Code without substantive amendment. Acts 1983, at 3475, ch. 576. To this day, the law governing nonjudicial foreclosure sales incorporates significant aspects of the 1889 enactment:

(1) notice of the time and place of the public foreclosure sale

(2) posted on the county courthouse door for three consecutive weeks prior to

(3) the foreclosure sale between 10:00 a.m. and 4:00 p.m. on the first Tuesday of the month in

(4) the county where the realty is located.

Compare Tex.Prop.Code Ann. § 51.002 (Vernon Supp.1993) *and McFarlane,* 134 S.W.2d at 1051 *with* Acts 1889, at 143, ch. 118 *and International Bldg. & Loan,* 26 S.W. at 497.

Since 1885, most of the amendments to this formal sales procedure have affected some facet of the notice requirement. *See, e.g.,* Tex.Prop.Code Ann. § 51.002 (Vernon Supp.1993). Obviously, the legislature has both deliberated over the

nonjudicial foreclosure process and shown itself willing to address any perceived weakness in the statutory scheme. In all its revisions to the notice requirement, from the 1915 amendments to the amendments of 1991, the legislature has never extended the right to notice of foreclosure to guarantors.

We need not rely solely on this legislative silence, however. In 1991 Texas enacted two statutes designed to protect both note makers and guarantors in deficiency suits rising from nonjudicial foreclosures on realty. Tex.Prop.Code Ann. §§ 51.003, 51.005 (Vernon Supp.1993). Trenchantly, neither statute adopts the language of Section 51.002 that identifies the "debtor" as each person "obliged to pay the debt." Rather, Section 51.003 extends specifically to all "persons against whom recovery of the deficiency is ***866** sought." Tex.Prop.Code Ann. § 51.003(c). Even more pointedly, Section 51.005 expressly inserts the phrase "including guarantors" after referring to "persons obligated on the indebtedness." Tex.Prop.Code Ann. § 51.005(c). In both statutes, the legislature chose unambiguous language that differs from the phrasing of Section 51.002 when it intended to embrace the guarantor within the scope of the statute's effect.

4 Finally, the plain wording of Section 51.005 militates against the **Longs**' interpretation of the notice requirement by limiting the right to contest the foreclosure price with the following language: "The suit must be brought not later than the 90th day after the date of the foreclosure sale or the date the guarantor receives actual notice of the foreclosure sale, whichever is later." Tex.Prop.Code Ann. § 51.005(b). The legislature clearly envisioned the prospect of guarantors defending suits for deficiency after they received no notice of the foreclosure sale. This notion cannot abide the **Longs**' contention that notice serves as an element of the secured party's cause of action. Rather than construe Section 51.002(b) as anathema to Section 51.005(b), we must prefer the interpretation that brings the two provisions into harmony. Tex. Gov't Code Ann. § 311.025. Accordingly, we hold that guarantors of a note secured by realty do not enjoy the right to notice of the foreclosure sale.

Although neither relied upon nor cited by the **Longs**, a distinguishable line of cases has been interpreted to suggest a guarantor's right to notice. *See, e.g., Micrea, Inc. v. Eureka Life Ins.,* 534 S.W.2d 348 (Tex.Civ.App.—Fort Worth 1976, writ ref'd n.r.e.) (citing, however, only cases that involve rights of note makers and their contractual privies). One commentator has inferred that the *Micrea* court tacitly acknowledged the guarantor's right to notice by holding that such rights were waived in the note and the guaranty. *Texas Foreclosure: Law & Practice* 67, § 2.39 (M. Baggett ed. 1984) (citing *Micrea* without discussion of guarantor's contractual privity with note maker as source for right to notice); *contra American Sav. & Loan v. Musick,* 531 S.W.2d 581, 588 (Tex.1975) ("There is no requirement that personal notice [of the foreclosure sale] be given to persons who were not parties to the deed of trust.") Significantly, *Micrea* involved a deficiency suit against the note maker and a guarantor who actually signed the promissory note itself as well as the separate guaranty contract. *See also, Carruth Mortgage Corp. v. Ford,* 630 S.W.2d 897 (Tex.App.—Houston [14th Dist.] 1982, no writ) (similarly concerning both note maker and guarantor and citing a case that discussed only note maker's right to notice, *Williams v. Henderson,* 580 S.W.2d 37 (Tex.App.—Houston [1st Dist.] 1979, no writ)). *But see Thompson v. Chrysler First Business Credit,* 840 S.W.2d 25 (Tex.App.—Dallas 1992, no writ) (requiring notice to guarantor in deficiency suit that did not involve note maker, citing *Caruth Mortgage, Williams* and a case regarding note maker's rights under Texas UCC, *Shumway v. Horizon Credit Corp.,* 801 S.W.2d 890 (Tex.1991)). The instant case entails neither the intermingled rights of guarantors and note makers nor a guarantor who signed the note and therefore partakes in the nature and rights of a note maker. We are purely considering the discrete rights of guarantors as distinct from the note maker's statutory right to notice of the foreclosure sale.

Hernandez and *Attayi* pointedly compared the expansive entitlement of Business and Commerce Code guarantors with the abridged rights of guarantors under the Property

Code. Analogously, the note maker's entitled status relative to the disfranchised position of the guarantor underlies the court's decision in *Miller v. University Sav.,* 858 S.W.2d 33 (Tex.App.—Houston [14th Dist.] 1993, no writ). Considering a guarantor's appeal from summary judgment, the *Miller* court addressed the secured party's duty to notify the guarantor of its intention to accelerate:

> [T]his case does not involve a holder's obligation to a maker. Instead, it involves the liability of a *guarantor* when the maker defaults on the loan. While we agree with appellant that Texas law requires a holder to notify a maker of his intent to accelerate a note, it does not require that notice of intent to accelerate be given to a guarantor. ***867** (citation omitted). While a guaranty clause may incorporate certain terms and provisions of the underlying promissory note, it is a separate contract with separate ramifications and obligations imposed on those parties.

Id. at 36; *cf. Musick,* 531 S.W.2d at 588 (secured parties need not notify trust beneficiaries of foreclosure sale under deed executed by trustees); *Ray v. Spencer,* 208 S.W.2d 103, 104 (Tex.Civ.App.—Texarkana 1947, writ ref'd) (secured parties need not notify unconditional guarantors of underlying default to fasten liability). In denying the right to notice of acceleration, *Miller* conforms with other cases holding certain rights and defenses of the note maker do not automatically inure to the guarantor. *See, e.g., Houston Sash & Door Co. v. Heaner,* 577 S.W.2d 217 (Tex.1979) (guarantor cannot assert maker's usury defense); *Universal Metals & Mach. v. Bohart,* 539 S.W.2d 874 (Tex.1976) (guarantor cannot assert maker's defense of forgery); *cf. Hopkins v. First Nat'l Bank,* 546 S.W.2d 84 (Tex.Civ.App. —Corpus Christi 1976), *writ ref'd n.r.e. per curiam,* 551 S.W.2d 343 (Tex.1977) (guarantor assumes note maker's obligations without necessarily assuming corresponding rights). Insofar as the availability of the maker's rights and defenses are concerned, this line of jurisprudence belies the canard that a guarantor is a favorite of the law. We find no legal basis for omitting notice of the realty foreclosure sale from the roster of note maker's rights that do not benefit the guarantor. Cases that adjudge the entwined rights of note makers and guarantors and cases concerning guarantors who participate in making the note fail to persuade us otherwise.

Having disavowed the **Longs**' right to notice of the foreclosure sale independent of **Long** Engineering's statutory right, we need not determine whether they waived those rights in the guaranty. We therefore overrule the **Longs**' first two points of error.

5 In related points of error three and four, the **Longs** contest the legal sufficiency of **NCNB's** notice to **Long** Engineering as the note maker. A nonjudicial foreclosure under deed of trust will suffer challenges to its validity from only the note maker, the note maker's privies, and parties with a property interest affected by the sale. *Goswami v. Metro. Sav. & Loan,* 751 S.W.2d 487, 489 (Tex.1988).

Historically, standing to insist upon the note maker's prerogative of personal notice of the foreclosure sale required privity of estate with the note maker. *See Hampshire v. Greeves,* 104 Tex. 620, 143 S.W 147, 150 (Tex.1912); *Weaver v. Acme Fin.,* 407 S.W.2d 227, 231 (Tex.Civ.App.—Corpus Christi 1966, no writ); *Collier v. Ford,* 81 S.W.2d 821, 824 (Tex.Civ.App.—Galveston 1935, writ dism'd w.o.j.). Parties to the note and deed instruments may also impeach the validity of the foreclosure sale as the note maker's privies of contract, an equally ancient basis for standing. *See Hinzie v. Kempner,* 82 Tex. 617, 18 S.W. 659, 661 (1891); *cf. Merrimack Mut. Fire Ins. v. Allied Fairbanks Bank,* 678 S.W.2d 574, 577 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (insurer who was not party to note and deed instruments lacked standing to contest validity of foreclosure and subsequent reformation of foreclosure documents); *Lockwood v. Lisby,* 476 S.W.2d 871, 875 (Tex.Civ.App.—Fort Worth 1972, writ ref'd n.r.e.) (absent notice of assignment to mortgagee, mortgagors' assignee is not entitled to separate notice but may question validity of notice to

mortgagors as their contractual privy).

6 7 Modern cases have expanded the class of parties with standing to dispute the validity of the foreclosure sale by adopting a more liberal attitude toward this privity requirement. *Compare Hampshire,* 143 S.W. at 150 *with Musick,* 531 S.W.2d at 586. Under the current approach, the **Longs** need only have established a property interest in the deed of trust realty to impute a flaw in **NCNB's** notice to **Long** Engineering. *See Musick,* 531 S.W.2d at 586. But the **Longs** merely claim that they "would have been present to bid at the foreclosure sale [or] would have had third parties to bid" if they had received notice. This fails to describe any recognizable property interest, let alone a mutual or successive right of property creating privity of estate with **Long** Engineering. Nor do the **Longs** claim the right to ***868** criticize the notice to **Long** Engineering as parties to the note or deed of trust. *See FDIC v. Coleman,* 795 S.W.2d 706, 710 (Tex.1990) (guarantors are not automatically parties to note). We find the **Longs** wanting for the standing necessary to attack the validity of **NCNB's** notice to **Long** Engineering and overrule their third and fourth points of error.

In two final points of error, the **Longs** claim they were damaged by alleged irregularities in the foreclosure sale. To support their contention that we must therefore reverse the trial court and set the foreclosure sale aside, the **Longs** cite *Musick.* In *Musick,* however, the supreme court founded the parties' standing to challenge the validity of the foreclosure sale on their property interest as established by the facts of record. *Musick,* 531 S.W.2d at 586. By signing separate and unconditional guaranty contracts and by failing to retain a property interest in the realty under deed of trust, the **Longs** removed themselves from the scope of *Musick.*

If the **Longs** have any recourse against **NCNB**, it must emanate from the guaranty contracts. *But see Lester v. First Am. Bank,* 866 S.W.2d 361 (Tex.App.—Austin 1993, n.w.h.) (guarantors may also claim statutory relief in foreclosure sales conducted after April 1, 1991, effective date of Tex.Prop.Code Ann. § 51.003). Two cases delineate the legal boundaries of **NCNB's** relationship to the **Longs** under their guaranties: *Coleman, supra,* and *RTC v. Westridge Court,* 815 S.W.2d 327 (Tex.App.—Houston [1st Dist.] 1991, writ denied) (specifically considering law prior to effect of § 51.003).

In *Coleman,* the supreme court looked sternly on the principals of a corporate note maker when they sought to avoid deficiency judgment after protecting the note maker from its creditors. *Coleman,* 795 S.W.2d at 709. Addressing a claim similar to the **Longs**' assertion that the value of the underlying realty exceeded the outstanding debt and should thus satisfy the whole obligation, the court said:

> If the value of the property really approximated the debt against it, as their counsel claimed, they should have caused [the corporate note maker] to sell it.... Furthermore, to impose a duty of good faith on a creditor in these circumstances is an impossible burden.... Even if the [secured party] had a duty of good faith in these circumstances, [the guarantors] waived it.... The guaranties gave the [secured party] the right to ignore the collateral and obtain a judgment from [the guarantors] for the full amount of the debt, even if the collateral might have been sold to satisfy part of the debt.

Id. at 709–10 (footnote omitted). The guarantors in *Coleman* did not, however, allege irregularities in the foreclosure sale. *Id.* at 708. If *Coleman* sets a ceiling for the duty owed to guarantors at something lower than good faith, *Westridge Court* defines the floor:

> Simply put, we must determine what duties [the secured party] owed [the guarantors].... [W]ith respect to the foreclosure sale, the mortgagee owes but one duty to the mortgagor, to conduct the sale

> *properly.* (citation omitted). We concur. We further hold that a mortgagor [sic] owes a guarantor the same duty.

Westridge Court, 815 S.W.2d at 332 (the court meant to hold that it is a *mortgagee* and not a *mortgagor* who owes the guarantor this duty; this is clear from the broader context of the quoted language). By allowing guarantors automatic standing to question whether the foreclosure sale was proper, *Westridge Court* seemingly contradicts case law from *Hampshire* and *Hinzie* through *Goswami* and *Musick.*

Yet this is not the best understanding of *Westridge Court.* The court clearly separated the conclusion that the foreclosure sale was valid from its determination that the sale was conducted properly, a distinctly lower standard of performance. *Westridge Court,* 815 S.W.2d at 332. Although the court equated the rights of the guarantor with the rights of the mortgagor, it never discussed the mortgagor's statutory rights or rights under the deed of trust. Instead, the court limited its examination of the record to the singular assessment of whether the secured party "committed some act of wrongdoing, misconduct, or unfairness." *Westridge Court,* 815 S.W.2d at 331 (citing ***869** *Tarrant Sav. v. Lucky Homes,* 390 S.W.2d 473, 475 (Tex.1965)). This analysis appropriately considers the secured party's contractual performance under its most general duty of care, which the secured party owes both guarantor and note maker alike. By stripping away any commentary on the note maker's statutory rights or the terms of the particular note, deed of trust and guaranty, *Westridge Court* reaches the underlying common law.

8 9 10 Fundamentally, promissory notes and guaranties are contracts. *Strickland v. Coleman,* 824 S.W.2d 188, 191 (Tex.App.—Houston [1st Dist.] 1991, no writ); *Fourticq v. Fireman's Fund Ins.,* 679 S.W.2d 562, 564 (Tex.App.—Dallas 1984, no writ). As such, notes and guaranties imply that a secured party owes both the note maker and guarantor the duty to discharge its respective contractual obligations properly. *Southwestern Bell Tel. v. DeLanney,* 809 S.W.2d 493, 494 (Tex.1991) (explaining this often misunderstood duty in reference to *Montgomery Ward & Co. v. Scharrenbeck,* 146 Tex. 153, 204 S.W.2d 508 (1947): by failing to perform "properly, the defendant breached its contract"); *Coulson v. Lake L.B.J. Mun. Util. Dist.,* 734 S.W.2d 649, 651 (Tex.1987); *Compton v. Polonski,* 567 S.W.2d 835, 839 (Tex.Civ.App.—Corpus Christi 1978, no writ). The secured party's negligent failure to exercise skill and care in performing its obligations under a guaranty contract would constitute a breach of this common-law duty. *Accord Coulson,* 734 S.W.2d at 651; *Montgomery Ward,* 204 S.W.2d at 510; *Compton,* 567 S.W.2d at 839. Unless the guaranty contract provides otherwise, the secured party must employ such ordinary care in disposing of the security. *T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218, 223 (Tex.1992); *Blocksom v. Guaranty State Bank & Trust,* 251 S.W. 1025, 1027 (Tex. Comm'n App.1923, holding approved); *Traywick v. Gunn,* 293 S.W. 273, 275 (Tex.Civ.App.—Texarkana 1927, no writ); *cf. SEI Business Sys. v. Bank One Texas,* 803 S.W.2d 838, 840 (Tex.App.—Dallas 1991, no writ) (guarantor can complain only if secured party fails to conduct foreclosure "in a proper manner").

11 12 Reading *Westridge Court* as addressing these duties effects the court's holding without negating the well-settled law limiting standing to contest the validity of a nonjudicial foreclosure. Moreover, this understanding of *Westridge Court* conforms with the determination by the supreme court in *Coleman* that secured parties do not owe guarantors a duty of good faith. As a result, *Westridge Court* confirms the guarantor's right to avoid liability for a deficiency by showing negligence in the secured party's performance under the guaranty contract. *Accord T.O. Stanley Boot Co.,* 847 S.W.2d at 223. This differs from the note maker's right to set aside an invalid foreclosure sale under the law of wrongful foreclosure. *See generally Durkay v. Madco Oil,* 862 S.W.2d 14 (Tex.App.—Corpus Christi 1993, writ denied), (discussing defects in foreclosure sale that note makers or their privies may allege to show invalidity and voidness); *Charter Nat'l Bank—Houston v. Stevens,* 781 S.W.2d 368 (Tex.App.—Houston [1st Dist.] 1989, writ denied) (discussing history of wrongful

foreclosure under Texas law).

13 Just like the note maker's right to notice of various actions on the note, however, the guarantor's right to insist upon the proper disposition of realty securing the note can be waived. *Coleman,* 795 S.W.2d at 710; *see also Athari v. Hutcheson,* 801 S.W.2d 896, 897 (Tex.1991) (discussing note maker's waiver of rights). Inferring surrender of a hypothetical duty of good faith from the creditor's contractual right to execute the guaranty without first seeking satisfaction from the collateral, the supreme court expounded:

> [I]f a creditor had a duty to the guarantors, and presumably the same duty to the debtor itself, to liquidate collateral only in such a way as to minimize a deficiency on the debt, the proper discharge would almost always raise material issues of fact.... Deficiency suits could rarely be resolved by summary judgment, and would necessitate a full trial on the merits. Commercial transactions require more predictability and certainty than this rule would afford.

Coleman, 795 S.W.2d at 710. The guaranties signed by the **Longs** contain a similar relinquishment of the necessity that **NCNB** proceed ***870** against the security before enforcing the guaranties. Under *Coleman,* such an explicit disavowal of any interest in the security apparently precludes the right to object to the manner of the collateral's disposition. *See also T.O. Stanley Boot Co.,* 847 S.W.2d at 223 (right to assert impairment of collateral defense may be waived in guaranty contract); *Smith v. U.S. Nat'l Bank,* 767 S.W.2d 820, 823 (Tex.App.—Texarkana 1989, writ denied) (impairment of subrogation and equity of redemption rights waived by language similar to waiver in **Longs**' guaranties); *Simpson v. MBank Dallas,* 724 S.W.2d 102, 106 (Tex.App.—Dallas 1987, writ ref'd n.r.e.) (duty to protect collateral waived by language similar to waiver in **Longs**' guaranties).

Some authorities suggest that the secured party revives the duty of care in foreclosure by electing to pursue the security after the guarantor has waived this as a prerequisite to liability. *See, e.g., Frederick v. United States,* 386 F.2d 481, 486 (5th Cir.1967); *Coleman,* 795 S.W.2d at 711 (Mauzy, J., dissenting); *Coleman v. FDIC,* 762 S.W.2d 243, 245 (Tex.App.—El Paso 1988), *rev'd,* 795 S.W.2d 706 (Tex.1990). Although it does not appear that the **Longs** would prevail under this more progressive view, we do not reach that determination because the supreme court has unequivocally adopted the contrary approach. We must therefore overrule the **Longs** last two points of error.

The trial court's judgment is affirmed.

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424 U.S. 319 (1976)

MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE
v.
ELDRIDGE.

No. 74-204.

Supreme Court of United States.

Argued October 6, 1975.
Decided February 24, 1976.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

322 *322 *Solicitor General Bork* argued the cause for petitioner. With him on the briefs were *Deputy Solicitor General Jones, Acting Assistant Attorney General Jaffe, Gerald P. Norton, William Kanter,* and *David M. Cohen.*

323 *323 *Donald E. Earls* argued the cause for respondent. With him on the briefs was *Carl E. McAfee.*[*]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U. S. C. § 423.[1] Respondent **Eldridge** was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state
324 agency charged with monitoring his medical condition. **Eldridge** completed *324 the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed **Eldridge** by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised **Eldridge** that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, **Eldridge** disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.[2] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified **Eldridge** in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

325 Instead of requesting reconsideration **Eldridge** commenced this action challenging the constitutional validity *325 of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.[3] 361 F. Supp. 520 (WD Va. 1973). The Secretary moved to dismiss on the grounds that **Eldridge's** benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, **Eldridge** relied exclusively upon this Court's decision in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.[4] The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

326 The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated **Eldridge's**

benefits abridged his right to procedural *326 due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in *Goldberg.* It further noted that decisions subsequent to *Goldberg* demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See *Fuentes* v. *Shevin,* 407 U. S. 67, 88-89 (1972); *Bell* v. *Burson,* 402 U. S. 535, 539 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits **Eldridge** had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F. Supp., at 528.[5] Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of **Eldridge's** benefits prior to an evidentiary hearing. 493 F. 2d 1230 (1974).[6] We reverse.

II

At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in *Weinberger* v. *Salfi,* 422 U. S. 749 (1975), bars the District Court from considering
327 **Eldridge's** action. *Salfi* was an action challenging the Social Security Act's *327 duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U. S. C. § 405 (h)[7] precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U. S. C. § 405 (g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

Section 405 (g) in part provides:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."[8]

328 *328 On its face § 405 (g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that **Eldridge** could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in *Salfi, supra,* at 767, he concludes that **Eldridge** cannot properly invoke § 405 (g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under § 405 (g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction . . . ." 422 U. S., at 764.[9] Implicit in *Salfi,* however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

329 *329 That this second requirement is an essential and distinct precondition for § 405 (g) jurisdiction is evident from the different conclusions that we reached in *Salfi* with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain[ed] no allegations that they have even filed an application with the Secretary . . . ." 422 U. S., at 764. With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits `to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.' " *Id.,* at 764-765. **Eldridge** has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

330 The fact that **Eldridge** failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling.[10] As construed in *Salfi,* § 405 (g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in *Salfi* did not present their constitutional claim to the Secretary.

Weinberger v. *Salfi,* O. T. 1974, No. 74-214, App. 11, 17-21. The situation here is not identical to *Salfi,* for, while the *330 Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 U. S. C. § 405 (a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of **Eldridge's** claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement. **Eldridge** concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR §§ 404.910, 404.916, 404.940 (1975). As *Salfi* recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. *Salfi* suggested that under § 405 (g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

331 **Eldridge's** constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there *331 is a crucial distinction between the nature of the constitutional claim asserted here and that raised in *Salfi.* A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. See *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 156 (1974). In light of the Court's prior decisions, see, *e. g., Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), **Eldridge** has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him
332 in a way not recompensable through retroactive payments.[11] Thus, unlike the situation in *Salfi,* denying **Eldridge's** substantive *332 claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U. S., at 762, would not answer his constitutional challenge.

We conclude that the denial of **Eldridge's** request for benefits constitutes a final decision for purposes of § 405 (g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim.[12]

III

A

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, *e. g., Richardson* v. *Belcher,* 404 U. S. 78, 80-81 (1971); *Richardson* v. *Perales,* 402 U. S. 389, 401-402 (1971); *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. *Arnett* v. *Kennedy,* 416 U. S. 134, 166 (POWELL, J., concurring in part) (1974); *Board of Regents* v. *Roth,* 408 U. S. 564, 576-578 (1972); *Bell* v. *Burson,* 402 U. S., at 539; *Goldberg* v. *Kelly,* 397 U. S., at 261-262. Rather, the Secretary contends that the existing administrative procedures,
333 detailed below, provide all the process *333 that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff* v. *McDonnell,* 418 U. S. 539, 557-558 (1974). See, *e. g., Phillips* v. *Commissioner,* 283 U. S. 589, 596-597 (1931). See also *Dent* v. *West Virginia,* 129 U. S. 114, 124-125 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965). See *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). **Eldridge** agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability

benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg* v. *Kelly,* 397 U. S., at 266-271, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly
334 about the requisite procedures. *Sniadach* *334 v. *Family Finance Corp.,* 395 U. S. 337 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes* v. *Shevin,* 407 U. S., at 96-97, the Court said only that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, *Bell* v. *Burson, supra,* at 540, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601, 607 (1975). More recently, in *Arnett* v. *Kennedy, supra,* we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U. S., at 142-146.

These decisions underscore the truism that " `[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett* v. *Kennedy, supra,* at 167-168 (POWELL, J., concurring in part); *Goldberg* v. *Kelly, supra,* at 263-266; *Cafeteria Workers* v. *McElroy, supra,* at 895. More precisely, our prior
335 decisions *335 indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g., Goldberg* v. *Kelly, supra,* at 263-271.

We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U. S. C. § 421 (a).[13] The standards applied and the procedures followed are prescribed by the Secretary, see § 421 (b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed. Reg. 4473 (1975).

336 *336 In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable

> "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U. S. C. § 423 (d) (1) (A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," § 423 (d) (3), that he has a physical or mental impairment of such severity that

> "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." § 423 (d) (2) (A).[14]

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As **Eldridge's**

benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.[15]

337 *337 The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail—in which case he is sent a detailed questionnaire—or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM § 6705.1; Disability Insurance State Manual (DISM) § 353.3 (TL No. 137, Mar. 5, 1975).[16]

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM § 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting
338 physician.[17] *Ibid.* Whenever the agency's tentative assessment of the beneficiary's condition differs from his *338 own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file.[18] He also may respond in writing and submit additional evidence. *Id.,* § 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U. S. C. § 421 (c); CM §§ 6701 (b), (c).[19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek *de novo* reconsideration by the state agency. 20 CFR §§ 404.907, 404.909 (1975).[20] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U. S. C. § 423 (a) (1970 ed., Supp. III).

339 *339 If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR §§ 404.917, 404.927 (1975). The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. § 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, § 404.945, and finally may obtain judicial review. 42 U. S. C. § 405 (g); 20 CFR § 404.951 (1975).[21]

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U. S. C. § 404. Cf. § 423 (b); 20 CFR §§ 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U. S. C. § 404.[22]

C

340 Despite the elaborate character of the administrative procedures provided by the Secretary, the courts *340 below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg,* see 397 U. S., at 263-264, the nonprobationary federal employee in *Arnett,* see 416 U. S., at 146, and the wage earner in *Sniadach.* See 395 U. S., at 341-342.[23]

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

> "The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over

eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U. S., at 264 (emphasis in original).

341 Eligibility for disability benefits, in contrast, is not based upon financial need.[24] Indeed, it is wholly unrelated to *341 the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards,[25] tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . ." *Richardson* v. *Belcher,* 404 U. S., at 85-87 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. *Morrissey* v. *Brewer,* 408 U. S. 471 (1972). The potential deprivation here is generally likely to be less than in *Goldberg,* although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U. S. C. § 423; 361 F. Supp., at 523. Thus, in contrast to the discharged federal employee in *Arnett,* there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in *Fusari* v. *Steinberg,* 419 U. S. 379, 389 (1975), "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes
342 that the delay between *342 a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. *id.,* at 383-384, 386, and the typically modest resources of the family unit of the physically disabled worker,[26] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability
343 benefits places a worker or his family below the subsistence level.[27] See *Arnett* v. *Kennedy,* 416 U. S., *343 at 169 (POWELL, J., concurring in part); *id.,* at 201-202 (WHITE, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 617 (1974); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," 42 U. S. C. § 423 (d) (3), that he is unable "to engage in any substantial gainful activity by reason of any *medically determinable* physical or mental impairment . . . ." § 423 (d) (1) (A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide
344 variety of information may be deemed relevant, and issues of witness credibility and *344 veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U. S., at 269.

345 By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson* v. *Perales,* 402 U. S., at 404, concerning a subject whom they have personally examined.[28] In *Richardson* the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." *Id.,* at 405, 407. To be sure, credibility and veracity may be a factor in the ultimate

disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, *345 is substantially less in this context than in *Goldberg.*

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U. S., at 269. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law—Cases and Comments 860-863 (6th ed. 1974).

346 A further safeguard against mistake is the policy of allowing the disability recipient's representative full access *346 to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg,* enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, *amici* point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%.[29] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process.
347 Their adequacy is especially suspect here since *347 the administrative review system is operated on an openfile basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

348 *348 Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving

scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, *supra,* 123 U. Pa. L. Rev., at 1276, 1303.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Comm.* v.
349 *McGrath,* 341 U. S., at 171-172 (Frankfurter, *349 J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg* v. *Kelly,* 397 U. S., at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett* v. *Kennedy,* 416 U. S., at 202 (WHITE, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. *Boddie* v. *Connecticut,* 401 U. S. 371, 378 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in *Richardson* v. *Wright,* 405 U. S. 208, 212 (1972), I agree with the District
350 Court and the Court of Appeals that, prior to termination of benefits, **Eldridge** must be afforded *350 an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U. S. C. § 601 *et seq.* See *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the **Eldridge** home and the family's furniture was repossessed, forcing **Eldridge**, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

[*] *J. Albert Woll, Laurence Gold,* and *Stephen P. Berzon* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

David A. Webster filed a brief for Caroline Williams as *amicus curiae.*

[1] The program is financed by revenues derived from employee and employer payroll taxes. 26 U. S. C. §§ 3101 (a), 3111 (a); 42 U. S. C. § 401 (b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U. S. C. §§ 423 (c) (1) (A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. §§ 402 (b)-(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. §§ 416 (i) (2) (D), 423 (a) (1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

[2] **Eldridge** originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

[3] The District Court ordered reinstatement of **Eldridge's** benefits pending its final disposition on the merits.

[4] In *Goldberg* the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U. S., at 266-271. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in *Goldberg.*

[5] The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the *Goldberg* requirements. See 45 CFR § 205.10 (a) (1975); n. 4, *supra.*

[6] The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in *Williams* v. *Weinberger,* 494 F. 2d 1191 (1974), cert. pending, No. 74-205.

[7] Title 42 U. S. C. § 405 (h) provides in full:

"(h) Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[8] Section 405 (g) further provides:

"Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . ."

[9] The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. *Salfi,* 422 U. S., at 763-764. As in *Salfi* no question as to whether **Eldridge** satisfied these requirements was timely raised below, see Fed. Rules Civ. Proc. 8 (c), 12 (h) (1), and they need not be considered here.

[10] If **Eldridge** had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. *Flemming* v. *Nestor,* 363 U. S. 603, 607 (1960).

[11] Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, *Cohen* v. *Beneficial Ind. Loan Corp.,* 337 U. S. 541, 546 (1949), when applying the finality requirements of 28 U. S. C. § 1291, which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and 28 U. S. C. § 1257, which empowers this Court to review only "final judgments" of state courts. See, *e. g., Harris* v. *Washington,* 404 U. S. 55 (1971); *Construction Laborers* v. *Curry,* 371 U. S. 542, 549-550 (1963); *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555, 557-558 (1963); *Cohen* v. *Beneficial Ind. Loan Corp., supra,* at 545-546. To be sure, certain of the policy considerations implicated in §§ 1257 and 1291 cases are different from those that are relevant here. Compare *Construction Laborers, supra,* at 550; *Mercantile Nat. Bank, supra,* at 558, with *McKart* v. *United States,* 395 U. S. 185, 193-195 (1969); L. Jaffe, Judicial Control of Administrative Action 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

[12] Given our conclusion that jurisdiction in the District Court was proper under § 405 (g), we find it unnecessary to consider **Eldridge's** contention that notwithstanding § 405 (h) there was jurisdiction over his claim under the mandamus statute, 28 U. S. C. § 1361, or the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

[13] In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U. S. C. § 701 *et seq.* (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This

assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H. R. Rep. No. 1698, 83d Cong., 2d Sess., 23-24 (1954).

[14] Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." § 423 (d) (2) (A).

[15] Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) § 6705.2 (c).

[16] Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

[17] All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM § 353.4C.

[18] The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM § 7314. See also 20 CFR § 401.3 (a) (2) (1975). The Secretary informs us that this curious limitation is currently under review.

[19] The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

[20] The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

[21] Unlike all prior levels of review, which are *de novo,* the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U. S. C. § 405 (g).

[22] The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U. S. C. § 404 (b). See generally 20 CFR §§ 404.501-404.515 (1975).

[23] This, of course, assumes that an employee whose wages are garnished erroneously is subsequently able to recover his back wages.

[24] The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U. S. C. § 415 (1970 ed., Supp. III). See § 423 (a) (2).

[25] Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U. S. C. § 424a (1970 ed., Supp. III); 20 CFR § 404.408 (1975); see *Richardson* v. *Belcher,* 404 U. S. 78 (1971).

[26] *Amici* cite statistics complied by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets—*i. e.,* cash, stocks, bonds—of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets—*i. e.,* automobile, real estate, and the like. Brief for AFL-CIO et al. as *Amici Curiae* App. 4a. See n. 29, *infra.*

[27] *Amici* emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U. S. C. § 423 (d) (1) with § 1382c (a) (3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U. S. C. §§ 2013 (c), 2014 (b); 7 CFR § 271 (1975). Finally, in 1974 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U. S. C. § 1383 (c) (1970 ed., Supp. III); 20 CFR § 416.1336 (c) (1975); 40 Fed. Reg. 1512 (1975); see Staff Report 346.

[28] The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U. S. C. § 423 (d) (2) (A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the

decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. 1 K. Davis, Administrative Law Treatise § 7.06, p. 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

[29] By focusing solely on the reversal rate for appealed reconsideration determinations *amici* overstate the relevant reversal rate. As we indicated last Term in *Fusari* v. *Steinberg,* 419 U. S. 379, 383 n. 6 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as *Amici Curiae* App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

964 S.W.2d 922 (1998)

Charles MAYHEW, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., Petitioners,

v.

The TOWN OF SUNNYVALE, Respondent.

No. 95-0771.

Supreme Court of Texas.

Argued October 24, 1996.
Decided March 13, 1998.
Rehearing Overruled May 8, 1998.

925 *925 Don Black, P. Michael Jung, Dallas, Charles L. Siemon, Marcella Larsen, Boca Raton, FL, for Petitioners.

LaDawn H. Conway, Cole B. Ramey, Terry D. Morgan, Robert H. Freilich, Kansas City, MO, W. Alan Wright, Dallas, for Respondent.

ABBOTT, Justice, delivered the opinion for a unanimous Court.

We are confronted with two primary questions in this regulatory takings case. First, we must determine the extent to which the Mayhews' claims are ripe for our consideration. Second, we must decide whether the denial of the Mayhews' planned development proposal violated their constitutional rights. While we conclude that the Mayhews' claims are ripe, we hold that the **Town** did not violate their constitutional rights. We reverse the court of appeals' judgment dismissing the Mayhews' claims, and we render judgment that the Mayhews take nothing.

I

The **Town** of **Sunnyvale**, a Texas general law municipal corporation with a population of approximately 2,000 people, is located approximately twelve miles east of the central business district of Dallas. The **Town** contains approximately 10,941 acres of land, but approximately 8,190 acres are currently vacant. The **Town's** first zoning ordinance, adopted in 1965, allowed residential development at a density of 3.6 units per acre. In 1973, in response to septic tank failures, the **Town** modified its zoning ordinance and enacted a one-acre minimum lot size requirement. However, when sanitary sewer facilities were later made available to the **Town**, the **Town** did not repeal its one-acre minimum lot requirement.

The **Mayhew** family owns approximately 1196 acres of land in **Sunnyvale**. From 1941 to 1965, the Mayhews acquired 850 acres of their property at a cost of $372,000.00. The Mayhews used this property for ranching for a number of years. In 1985 and 1986, the Mayhews purchased an additional 346 acres in the **Town** for development purposes. The Mayhews' property comprises 26% of the land available for residential development in the **Town**.

In 1985, the Mayhews began meeting with various **Town** officials seeking permission to proceed with a planned development
926 with a density in excess of the then allowable one-dwelling-unit-per-acre residential zoning. *926 The Mayhews told the **Town** a planned development would not be feasible under one-unit-per-acre zoning. In 1986, after meeting with the Mayhews, the **Town** adopted a comprehensive plan providing for a projected population of 25,000 by the year 2006, and 30,000 to 35,000 persons by the year 2016. The **Town** also amended article XV of its zoning ordinances to allow, upon council approval, planned developments with densities in excess of one dwelling-unit per acre.

In July 1986, after spending over $500,000 conducting studies and preparing evaluative reports, the Mayhews submitted their planned development proposal to the **Town**. If the proposal was approved, the Mayhews planned to sell their property to the Trammel Crow Company for development. Because Trammel Crow would only develop the property if it could build a minimum of 3,600 units, the Mayhews requested approval to build between 3,650 and 5,025 units on their land, a density of over three units per acre.

The **Town** employed a professional planning and engineering firm to initially review the proposal. This firm, after finding that the proposal satisfied each of the requirements of the **Town's** zoning ordinance, recommended approval of the proposal. The proposal was then forwarded to the **Town's** planning and zoning commission.

While the commission was reviewing the Mayhews' application, the **Town** council passed a moratorium on planned developments, which was in effect until the Spring of 1987. Despite the moratorium, the commission continued to consider the Mayhews' application. After four months of consideration, the commission recommended denial of the Mayhews' application on November 20, 1986. In support of its recommendation, the commission noted that the development would severely impact the ability of the **Town** to provide adequate municipal services. The commission also reasoned that the **Town** had a very unique character and lifestyle that differed from the proliferation of multi-family and single-family homes on small lots in adjoining municipalities. According to the commission, a less dense use of the property was preferable.

The **Town** council appointed a negotiating committee of two **Town** councilmen, the **Town** mayor, and the **Town** attorney. The Mayhews met with the committee and both sides tentatively agreed to a compromise development of 3,600 units. Subsequently, on January 13, 1987, the **Town** council met to vote on the proposal. During the council meeting, Charles **Mayhew**, Jr. told the council that anything less than approval for 3,600 units would be considered an outright denial. Despite the prior compromise, the **Town** council voted to deny the Mayhews' development proposal by a four-to-one vote. A subsequent meeting to reconsider the planned development request was canceled by the **Town**.

In March 1987, the Mayhews sued the **Town** and the four individual council members who voted against their proposal, alleging that the refusal to approve the planned development violated their state and federal constitutional rights to procedural due process, substantive due process, and equal protection. The Mayhews further alleged that the **Town's** decision was a taking of their property without payment of just or adequate compensation. The Mayhews also brought various statutory claims.

The **Town** and the individual council members moved for summary judgment, which the district court granted. On appeal, the court of appeals affirmed the summary judgment in favor of the individual council members, and also affirmed the summary judgment in favor of the **Town** on the Mayhews' statutory claims. However, the appellate court reversed the summary judgment on the Mayhews' constitutional claims against the **Town**, concluding that material fact questions existed regarding whether the **Town** violated the Mayhews' state and federal constitutional rights. ***Mayhew** v. **Town** of **Sunnyvale***, 774 S.W.2d 284, 286 (Tex.App.—Dallas 1989, writ denied), *cert. denied,* 498 U.S. 1087, 111 S.Ct. 963, 112 L.Ed.2d 1049 (1991).

Upon remand, the district court held a bench trial. The court heard testimony from thirty-five witnesses, most of whom were
927 experts. At the conclusion of the trial, the district court made numerous findings of fact *927 and conclusions of law, including findings that:

> 26. The **Mayhew** Ranch Planned Development was well-planned and satisfied all of the requirements contained in Article XV and the Zoning Ordinance of the **Town** of **Sunnyvale**.
>
> 36. Adequate steps were taken in the design of the **Mayhew** Ranch Planned Development to protect the public health, safety, welfare, and morals of the **Town** of **Sunnyvale** and its citizens.
>
> 40. Growth and development in the **Town** of **Sunnyvale** cannot possibly reach the population projection in the Comprehensive Plan of the **Town** of **Sunnyvale** under the **Town's** one-acre zoning.
>
> 78. The Planning and Zoning Commission's recommendations to the **Town** Council of November 20, 1986 had no basis in fact and were not rational.
>
> 82. The **Town** of **Sunnyvale's** one-acre zoning does not bear any factual relationship to valid planning principles or objectives.
>
> 87. The existing development in the **Town** of **Sunnyvale** is suburban and urban and any "rural" atmosphere that exists is the result of the existence of undeveloped private property.
>
> 99. In denying the application for planned development approval for the **Mayhew** Ranch Planned Development, the **Town** of **Sunnyvale** has refused to allow economically viable development on [the Mayhews'] property with the intention to prevent all development ... and thereby impose a servitude for the benefit of the public.

101. In denying the application for planned development approval ..., and in enacting numerous moratoria on applications for consideration of planned development approval, the **Town** of **Sunnyvale** has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.

106. Prior to the **Town** Council's action to deny the application for [the] planned development..., the [Mayhews'] property had a fair market value of at least $9,700,000.00.

107. The value of the [Mayhews'] property on January 13, 1987, with development approval ... and without the application of the one-acre zoning requirement, would have been greater than $15,000,000.00.

108. As a result of the **Town** Council's denial of the application for [the] planned development ..., and the continued application of the one-acre zoning, the fair market value of the [Mayhews'] property was reduced to $2,400,000.00.

115. The minimum residential density necessary for economic viability on [the Mayhews'] property is approximately 3,600 dwelling units or three dwelling units per acre.

117. Agriculture is not an economically viable use of [the Mayhews'] property.

118. No knowledgeable investor would purchase [the Mayhews'] property as it is currently zoned.

120. The **Town** Council's decision to deny the application for [the] planned development... has the practical effect of depriving [the Mayhews] of the only economically viable use of their property.

121. The result of the **Town** Council's decision to deny the application for [the] planned development ... is to destroy the value of [the Mayhews'] property.

131. The actions of the **Town** of **Sunnyvale** reveal a pattern and practice which

demonstrates the intent of the **Town** of **Sunnyvale** to deny any application for developmental approval with a density greater than one dwelling unit per acre.

133. The **Town** of **Sunnyvale** has closed the door on future reapplication by [the Mayhews] at a realistic or economically viable density.

Based on its findings, the district court concluded that the case was ripe for adjudication and that the Mayhews should prevail on their procedural due process, substantive due process, and equal protection claims under the federal and state constitutions. The district court further concluded that the **Town's** decision to deny the application for the planned development was an
928 unconstitutional taking under both the federal and state *928 constitutions. The court rendered judgment in favor of the Mayhews, awarding $5 million in damages, $2.3 million in prejudgment interest, approximately $1.2 million in attorney's fees, and costs.

The court of appeals reversed the district court's judgment and dismissed the Mayhews' claims against the **Town**, holding that none of the claims was ripe for review. ***Town** of **Sunnyvale** v. **Mayhew**,* 905 S.W.2d 234 (Tex.App.—Dallas 1994). In a supplemental opinion, the court of appeals addressed the merits of the Mayhews' claims in light of this Court's opinion in *Taub v. City of Deer Park,* 882 S.W.2d 824 (Tex.1994), *cert. denied,* 513 U.S. 1112, 115 S.Ct. 904, 130 L.Ed.2d 787 (1995). The court concluded that, even if the Mayhews' claims were ripe, the evidence was factually insufficient to support the trial court's findings. 905 S.W.2d at 259-68.

We granted the Mayhews' application for writ of error to consider whether their claims were ripe for review and whether judgment should be rendered on the Mayhews' state and federal constitutional claims.

II

Our initial inquiry is whether the Mayhews' claims are ripe for this Court's review. Ripeness is an element of subject matter jurisdiction. *State Bar of Texas v. Gomez,* 891 S.W.2d 243, 245 (Tex.1994); *City of Garland v. Louton,* 691 S.W.2d 603, 605 (Tex.1985). As such, ripeness is a legal question subject to de novo review that a court can raise sua sponte. *Texas Ass'n of*

Business v. Texas Air Control Bd., 852 S.W.2d 440, 444-45 (Tex.1993)(subject matter jurisdiction cannot be waived and may be raised for the first time on appeal by the parties or by the court); *North Alamo Water Supply Corp. v. Texas Dep't of Health,* 839 S.W.2d 455, 457 (Tex.App.—Austin 1992, writ denied)(issue of court's jurisdiction presented a question of law). *See also Reahard v. Lee County,* 30 F.3d 1412, 1415 (11th Cir.1994)(ripeness is a jurisdictional issue subject to a de novo review), *cert. denied,* 514 U.S. 1064, 115 S.Ct. 1693, 131 L.Ed.2d 557 (1995); *Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 163-64 (9th Cir.1993)(ripeness is a question of law subject to de novo review); *Herrington v. County of Sonoma,* 857 F.2d 567, 568 (9th Cir. 1988)(same), *cert. denied,* 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

The ripeness requirement emanates, in part, from the separation of powers provision set out in article II, section 1 of the Texas Constitution. Under the separation of powers doctrine, courts are without jurisdiction to issue advisory opinions because such is the function of the executive department, not the judiciary. *Texas Ass'n of Business,* 852 S.W.2d at 444; *see also Public Util. Comm'n v. Houston Lighting & Power Co.,* 748 S.W.2d 439 (Tex.1987)("A court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe."); *City of Garland,* 691 S.W.2d at 605 (same); *Coalson v. City Council of Victoria,* 610 S.W.2d 744, 747 (Tex.1980)(Texas Constitution precludes district courts from giving advisory opinions in prematurely filed actions).

The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes. *See Browning-Ferris, Inc. v. Brazoria County,* 742 S.W.2d 43, 49 (Tex.App.—Austin 1987, no writ). In this regard, the state ripeness doctrine is similar to the federal ripeness doctrine in that it has both constitutional and prudential dimensions.

This Court has never addressed the ripeness of constitutional challenges to land use regulation. We are aware of only one published Texas decision, *City of El Paso v. Madero Dev.,* 803 S.W.2d 396, 400 (Tex. App.—El Paso 1991, writ denied), *cert. denied,* 502 U.S. 1073, 112 S.Ct. 970, 117 L.Ed.2d 135 (1992), in which the ripeness of regulatory takings and related constitutional claims was analyzed. In that case, the court of appeals relied heavily on federal law to hold that the landowner's claims were not ripe. We agree that we should look to the experience of the federal courts in determining the ripeness of
929 constitutional challenges *929 to land-use regulations.[1] *Cf. Texas Ass'n of Business,* 852 S.W.2d at 444 ("Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.").

A

The federal courts have recognized, as a prudential matter, an essential prerequisite to the ripeness of federal regulatory takings and related constitutional claims. *Suitum v. Tahoe Regional Planning Agency,* ___ U.S. ___, ___-___ & n. 7, 117 S.Ct. 1659, 1664-65 & n. 7, 137 L.Ed.2d 980 (1997). This "essential prerequisite" requires "a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone `too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348, 106 S.Ct. 2561, 2565-66, 91 L.Ed.2d 285 (1986) (citations omitted). In other words, the federal courts have reasoned that a court cannot determine whether a taking or other constitutional violation has occurred until the court can compare the uses prohibited by the regulation to any permissible uses that may be made of the affected property.

Accordingly, in order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue.[2] *Suitum,* ___ U.S. at ___, 117 S.Ct. at 1665; *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985). A "final decision" usually requires both a rejected development plan and the denial of a variance from the controlling regulations. *Hamilton Bank,* 473 U.S. at 187-88, 105 S.Ct. at 3117; *see also MacDonald,* 477 U.S. at 351-52 & n. 8, 106 S.Ct. at 2567-68 & n. 8 (case was not ripe when a single "intense" subdivision proposal was rejected because a "meaningful application" had not been made); *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 293-97, 101 S.Ct. 2352, 2369-71, 69 L.Ed.2d 1 (1981)(Court refused to consider takings claim based on general regulatory provision that had not been applied to specific properties and from which no administrative relief had been sought); *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)("as-applied" constitutional challenge was not ripe because the property owners had not yet submitted a plan for the development of their property).

However, futile variance requests or re-applications are not required. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012 n. 3, 112 S.Ct. 2886, 2891 n. 3, 120 L.Ed.2d 798 (1992); *MacDonald,* 477 U.S. at 352 n. 8, 106 S.Ct. at 2567-68 n. 8; *Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1232 (9th Cir.), *cert. denied,* 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 504 (9th Cir.1990), *cert. denied,* 502 *930 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1575 (11th Cir.1989); *Hoehne v. County of San Benito,* 870 F.2d 529, 534-35 (9th Cir.1989); *Herrington v. County of Sonoma,* 857 F.2d at 569-70; *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1454-55 (9th Cir.), *modified on other grounds,* 830 F.2d 968 (9th Cir.1987), *cert. denied,* 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988).

Moreover, the term "variance" is "not definitive or talismanic;" it encompasses "other types of permits or actions [that] are available and could provide similar relief." *Southern Pacific,* 922 F.2d at 503; *see also Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1541 (11th Cir.)(aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans"), *cert. denied,* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan,* 874 F.2d 717, 721 (10th Cir.1989)(claim not ripe until initial permit application denied and some effort made to "compromise" with the city to allow some level of development). The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to "grant different forms of relief or make policy decisions which might abate the alleged taking." *Southern Pacific,* 922 F.2d at 503.

The same "final decision" requirement applies to determine the ripeness of as-applied due process and equal protection challenges to a land-use decision. *See, e.g., Hamilton Bank,* 473 U.S. at 199-200, 105 S.Ct. at 3123-24 (concluding that due process claim under Fourteenth Amendment was not ripe because the requisite variance had not been sought to establish a "final decision," and utilizing the same rationale in analyzing the ripeness of the takings claim and the due process claim); *Taylor Inv., Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1292-95 (3d Cir.1993)(final decision rule of *MacDonald* and *Hamilton Bank* applies to substantive due process, equal protection, and procedural due process claims), *cert. denied,* 510 U.S. 914, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993); *Bigelow v. Michigan Dep't of Natural Resources,* 970 F.2d 154, 159-60 (6th Cir.1992)(procedural due process claim, which was related to plaintiff's takings claim, subject to the finality rule); *Eide v. Sarasota County,* 908 F.2d 716, 725 (11th Cir.1990)(finality requirement applies to substantive due process claim), *cert. denied,* 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991); *Herrington,* 857 F.2d at 569 (final decision requirement applies to substantive due process and equal protection claims); *Norco Constr., Inc. v. King County,* 801 F.2d 1143, 1145 (9th Cir.1986)(final decision requirement applies to procedural due process and equal protection claims).

However, a final decision on the application of the zoning ordinance to the plaintiff's property is not required if the plaintiff brings a facial challenge to the ordinance. *See Pennell v. City of San Jose,* 485 U.S. 1, 9-14, 108 S.Ct. 849, 856-59, 99 L.Ed.2d 1 (1988); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 386, 47 S.Ct. 114, 117-18, 71 L.Ed. 303 (1926); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 894-95 (6th Cir.1991); *Smithfield Concerned Citizens for Fair Zoning v. **Town** of Smithfield,* 907 F.2d 239, 242-43 (1st Cir.1990); *Beacon Hill Farm Assocs. II v. Loudoun County Bd. of Supervisors,* 875 F.2d 1081, 1084-85 (4th Cir.1989).

B

The Mayhews alleged (1) just compensation takings claims, (2) "fails to substantially advance" takings claims, (3) substantive due process and due course claims, (4) equal protection claims, and (5) procedural due process and due course claims under the United States Constitution and Texas Constitution regarding the **Town's** denial of their planned development application for 3,600 units. The Mayhews also argue in their application for writ of error that their constitutional claims challenge the **Town's** continued application and enforcement of a blanket one-acre zoning designation on their property. We conclude, however, that this challenge is not independent from their claims stemming from the **Town's** denial of their planned development proposal. The record in this case clearly indicates that the Mayhews were only interested in the **Town** approving their development *931 request for 3,600 units. As Charles **Mayhew**, Jr. testified, anything less than 3,600 units, the Mayhews believed, was an outright denial of their application. The Mayhews' very theory at trial was that the only economically viable use of their property was to develop it in accordance with the development proposal that the **Town** rejected. While the **Town's** general one-acre zoning requirement almost certainly contributed to the **Town's** rejection of the Mayhews' application, the one-acre zoning requirement itself did not cause a discrete injury separate from the harm the Mayhews suffered as a result of the denial of their planned development proposal because the Mayhews had no intention of pursuing a development with less than 3,600 units.

The **Town** maintains that the Mayhews' claims regarding the denial of their planned development application are not ripe because the Mayhews submitted only one planned development application and did not thereafter reapply for development or submit a "variance." The Mayhews counter that, under the circumstances of this case, their planned development application and amended request for 3,600 units were sufficient, and that any further applications would have been futile. We agree with the Mayhews.

After the **Town** denied the Mayhews' planned development application for 3,600 units, the Mayhews did not thereafter request a variance. Moreover, the Mayhews did not file another planned development application. Instead, the Mayhews filed this suit. Normally, their failure to reapply or seek a variance would be fatal to the ripeness of their claims. *See MacDonald,* 477 U.S. at 351, 106 S.Ct. at 2567; *Hamilton Bank,* 473 U.S. at 188-91, 105 S.Ct. at 3117-19. However, under the unique circumstances of this case, we conclude that the Mayhews' constitutional challenges to the **Town's** denial of their planned development application for 3,600 units are ripe for this Court's review.

A planned development is not a typical request for a zoning change; the density, type, and location of particular uses in the development are left to the planning process and are determined through negotiations between the developer and the **town**. The evidence in this case establishes the extent to which the Mayhews worked with the **Town** in attempting to have their development approved. The Mayhews originally requested approval to build between 3,650 and 5,025 units on their land. They spent over a year in negotiations with the **Town**, and expended over $500,000 preparing and developing the application. The Mayhews presented the project to the **Town** planning staff, the **Town** planning and zoning committee, and the **Town** council. After receiving a negative response from the planning and zoning committee, the Mayhews met with **Town** council members, and, in an effort to compromise, agreed to alter their application. The Mayhews then submitted a modified application to the **Town** council, which the council rejected.

The modified application that the Mayhews presented to the **Town** council requested 3,600 units, a reduction from their original request for approval. Such a compromise proposal can sometimes be sufficient to satisfy the variance requirement. *Executive 100, Inc.,* 922 F.2d at 1540 (aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans"); *Landmark Land Co.,* 874 F.2d at 721 (claim not ripe until initial permit application denied and some effort made to "compromise" with the city to allow some level of development).

Moreover, this modified application was not the most profitable use envisioned by the Mayhews, but rather the minimum number of units the Mayhews believed necessary to make an economically viable use of their land. In fact, the very theory espoused by the Mayhews at trial was that only improvements along the lines of their 3,600 unit proposed planned development would avert a regulatory taking. In other words, the Mayhews alleged that anything less than the **Town** allowing their planned development would deny the only economically viable use of their property.

The United States Supreme Court has indicated that such a claim may be ripe without the necessity of seeking a variance or
932 filing a subsequent application. In *MacDonald,* after the county rejected the applicant's single *932 proposal to subdivide the property into 159 single-family and multi-family residential lots, the applicant immediately sued, alleging that the county had restricted the property to an open-space agricultural use, thereby appropriating the property. *MacDonald,* 477 U.S. at 342-44, 106 S.Ct. at 2562-64. Because the county's only action was its rejection of a single subdivision proposal, the Supreme Court held that the applicant's claim that the county had deprived it of all use of its property was not ripe. In such a situation, the Court reasoned that the applicant had not received the county's "`final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" *Id.* at 351, 106 S.Ct. at 2567 (quoting *Hamilton Bank,* 473 U.S. at 191, 105 S.Ct. at 3118-19). But the Court noted that the applicant did not "contend that *only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." Id.* at 352 n. 8, 106 S.Ct. at 2567-68 n. 8 (emphasis added). The Supreme Court accordingly implied that the result may have been different if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal.

Of course, that is exactly the Mayhews' complaint. The Mayhews allege that anything less than approval for 3,600 units on their property constitutes a regulatory taking. The ripeness doctrine does not require a property owner, such as the Mayhews, to seek permits for development that the property owner does not deem economically viable. *See Beure-Co. v. United States,* 16 Cl. Ct. 42, 51 n. 11 (1988). We accordingly conclude that, under the circumstances of this case, the Mayhews were not required to submit additional alternative proposals, after a year of negotiations and $500,000 in expenditures, to ripen this complaint.

Any other holding would require the Mayhews to expend their own time and resources pursuing, and the **Town's** time and

resources considering, a development proposal that the Mayhews would never actually develop. Requiring such a wasteful expenditure of resources would violate the Supreme Court's admonition that a property owner is "not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination." *MacDonald,* 477 U.S. at 352 n. 7, 106 S.Ct. at 2567-68 n. 7. The **Town** clearly was not going to approve the Mayhews' development proposal for 3,600 units, making a subsequent application or variance request for 3,600 units a futile act. We therefore hold that the Mayhews' claims that the **Town** violated their constitutional rights by denying their planned development proposal for 3,600 units are ripe for this Court's review.

III

The Mayhews brought five separate claims against the **Town** under the federal and state constitutions, alleging "fails to substantially advance" takings claims, "just compensation" takings claims, substantive due process and due course claims, equal protection claims, and procedural due process and due course claims. The Mayhews urged in their application for writ of error that Texas takings jurisprudence follows the federal standards. Accordingly, for purposes of this case, we assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards. *Cf. Tilton v. Marshall,* 925 S.W.2d 672, 677 n. 6 (Tex.1996) (assuming without deciding that the state and federal free exercise guarantees were coextensive with respect to relator's claims because relator did not demonstrate that the provisions should be applied differently).

Before proceeding to analyze the Mayhews' five constitutional claims, we must consider the proper effect of the findings of fact made by the district court in this case. Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. *City of College Station v. Turtle*
933 *Rock Corp.,* 680 S.W.2d 802, 804 (Tex.1984); *see also Hunt v. City of San Antonio,* 462 S.W.2d *933 536, 539 (Tex.1971); *DuPuy v. City of Waco,* 396 S.W.2d 103, 110 (Tex.1965). In resolving this legal issue, we consider all of the surrounding circumstances. *City of College Station,* 680 S.W.2d at 804; *see also Hunt,* 462 S.W.2d at 539; *City of Bellaire v. Lamkin,* 159 Tex. 141, 317 S.W.2d 43, 45 (1958); *City of Waxahachie v. Watkins,* 154 Tex. 206, 275 S.W.2d 477, 481 (1955). While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, *cf. Republican Party of Texas v. Dietz,* 940 S.W.2d 86, 91 (Tex.1997), the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law.[3]

A. REGULATORY TAKING CLAIM

The Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. *Williamson Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 175 n. 1, 105 S.Ct. 3108, 3110-11 n. 1, 87 L.Ed.2d 126 (1985); *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897). Similarly, article I, section 17 of the Texas Constitution provides, in pertinent part, that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made...."

Takings can be classified as either physical or regulatory takings. Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *See Yee v. City of Escondido,* 503 U.S. 519, 522, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153 (1992). The Mayhews do not claim that the **Town** has physically taken their property. Rather, the Mayhews allege that the denial of their planned development constitutes a regulatory taking.

Zoning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board. *Goss v. City of Little Rock,* 90 F.3d 306, 308 (8th Cir.1996); *Burns v. City of Des Peres,* 534 F.2d 103, 108 (8th Cir.), *cert. denied,* 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d 139 (1976). However, despite the discretion afforded to municipal authorities, zoning decisions must comply with constitutional limitations. As a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests" or it denies an owner all "economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). *See also Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 2316-17, 129 L.Ed.2d 304 (1994);

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016, 112 S.Ct. 2886, 2893-94, 120 L.Ed.2d 798 (1992); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485, 107 S.Ct. 1232, 1241-42, 94 L.Ed.2d 472 (1987).

The Mayhews allege, and the district court found, that the denial of the Mayhews' planned development did not substantially advance legitimate state interests and amounted to a taking because all economically viable use of their property was denied. We first analyze whether the **Town's** actions substantially advance legitimate governmental interests before determining whether the **Town's** actions denied the Mayhews all economically viable use of their property.

1. *Substantially Advance Legitimate Interests*

A property regulation must "substantially advance" a legitimate governmental interest to pass constitutional muster. *See, e.g.,*
934 *Dolan,* 512 U.S. at 385, 114 S.Ct. at *934 2316-17; *Nollan,* 483 U.S. at 834, 107 S.Ct. at 3147. *See also City of College Station,* 680 S.W.2d at 805 (property regulation must be "substantially related" to a legitimate goal); *Hunt,* 462 S.W.2d at 539 (same); *Watkins,* 275 S.W.2d at 481 (same); *Lombardo,* 73 S.W.2d at 485 (same). While it is clear that a zoning ordinance that does not substantially advance a legitimate state interest constitutes a taking, the standards for determining what constitutes a legitimate state interest or what relation between a regulation and the state interest satisfies the "substantially advance" requirement in a regulatory takings case has not been clarified by the United States Supreme Court. *See, e.g., Nollan,* 483 U.S. at 834, 107 S.Ct. at 3147.

The Supreme Court has, however, indicated that "a broad range of governmental purposes and regulations" will satisfy these requirements. *Id.* at 834-35, 107 S.Ct. at 3147-48. Specifically, the Supreme Court has noted that the following state interests are legitimate state interests: protecting residents from the "ill effects of urbanization"; *Agins,* 447 U.S. at 261, 100 S.Ct. at 2141-42; enhancing the quality of life; *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 129, 98 S.Ct. 2646, 2661-62, 57 L.Ed.2d 631 (1978); and protecting a beach system for recreation, tourism, and public health; *Keystone,* 480 U.S. at 488, 107 S.Ct. at 1243-44; *Esposito v. South Carolina Coastal Council,* 939 F.2d 165, 169 (4th Cir.1991), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992).

In *Agins,* the City of Tiburon adopted a zoning ordinance governing development of open space land that limited the plaintiffs to building between one and five single-family residences on the five acres of land which they had previously purchased for residential development. 447 U.S. at 257, 100 S.Ct. at 2139-40. The Court held that protecting the residents of Tiburon from the ill effects of urbanization by precluding the conversion of open-space land to urban uses was a legitimate government purpose. *Id.* at 261, 100 S.Ct. at 2141-42. *Cf. Penn Central Transp. Co.,* 438 U.S. at 129, 98 S.Ct. at 2661-62 (preservation of desirable aesthetic features); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974); *Berman v. Parker,* 348 U.S. 26, 32-33, 75 S.Ct. 98, 102-03, 99 L.Ed. 27 (1954); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 394-95, 47 S.Ct. 114, 120-21, 71 L.Ed. 303 (1926); *see also Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 165 (9th Cir.1993)(preservation of agricultural uses of land a legitimate state interest); *Smithfield Concerned Citizens for Fair Zoning v. **Town** of Smithfield,* 907 F.2d 239, 244-45 (1st Cir.1990)(controlling both the rate and character of community growth a legitimate government purpose); *Pompa Construction Corp. v. City of Saratoga Springs,* 706 F.2d 418, 422 (2d Cir.1983) (discouraging conversion of open-space land to urban uses a legitimate state interest). Such zoning ordinances benefit "the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." *Agins,* 447 U.S. at 262, 100 S.Ct. at 2142.

The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. *See Yee v. City of Escondido,* 503 U.S. 519, 530, 112 S.Ct. 1522, 1529-30, 118 L.Ed.2d 153 (1992); *see also generally Nollan,* 483 U.S. at 837, 107 S.Ct. at 3148-49; *Esposito,* 939 F.2d at 169. This requirement is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. *Nollan,* 483 U.S. at 834 n. 3, 107 S.Ct. at 3147 n. 3. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective. *Id.*

The **Town's** denial of the Mayhews' planned development application passes constitutional muster under this standard. In making this determination, we do not review the wisdom of the **Town's** decision. *See Smithfield Concerned Citizens,* 907 F.2d

at 245. Rather, we are concerned only with whether the decision satisfies constitutional standards.

935 *935 The Mayhews allege that the real reason behind the denial of their development application was to have their property serve as "borrowed" open space for the residents of the **Town** who primarily live on less than one-acre lots. In support of this contention, the Mayhews presented evidence negating some of the reasons given by the planning and zoning commission for the denial of their development application. For instance, the Mayhews presented evidence establishing, and the district court found, that sanitary sewer facilities would not be a problem for the Mayhews' planned development because the local sewage plant was operating in full compliance with EPA guidelines and had enough capacity to serve the additional residences contemplated in the Mayhews' planned development.

But the **Town's** planning and zoning commission came forth with a number of separate reasons for the denial of the Mayhews' application, several of which substantially advance legitimate state interests. The **Town** denied the development application in part because of the impact the development would have on the overall character of the community and the unique character and lifestyle of the **Town** which is different from that of adjoining municipalities where there is a proliferation of multi-family and single-family homes on small lots. Under the Supreme Court's decision in *Agins,* concern for such urbanization effects is clearly a legitimate state interest.

We also conclude that the denial of the Mayhews' development application substantially advances the **Town's** legitimate concern for protecting the community from the ill effects of urbanization. The Mayhews requested a planned development with 3,600 units in a **Town** with a population of only approximately 2,000 residents. Photographs in the record show that the **Town** is uniquely rural and suburban, with undivided two lane roads, clusters of trees, lakes and ponds, and houses on large lots. This community would change drastically if a large planned development with at least three residences per acre was built. The Mayhews' planned development would result in an estimated population increase of between 10,000 and 15,000 persons, more than quadrupling the population of the **Town**. Simply put, the **Town** has a substantial interest in preserving the rate and character of community growth, and its action in denying the Mayhews' planned development furthers those interests.

2. *Just Compensation Takings Claim*

Our conclusion that the **Town's** action substantially advances a legitimate state interest does not end the takings inquiry, however. A compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015-19 & n. 8, 112 S.Ct. 2886, 2893-95 & n. 8, 120 L.Ed.2d 798 (1992); *see also Taub v. City of Deer Park,* 882 S.W.2d 824, 826 (Tex.1994), *cert. denied,* 513 U.S. 1112, 115 S.Ct. 904, 130 L.Ed.2d 787 (1995); *City of Austin v. Teague,* 570 S.W.2d 389, 393 (Tex.1978).

A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. *See, e.g., Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 2316-17, 129 L.Ed.2d 304 (1994); *Lucas,* 505 U.S. at 1015-16, 1020, 112 S.Ct. at 2893-94; *Taub,* 882 S.W.2d at 826; *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 806 (Tex. 1984); *Teague,* 570 S.W.2d at 393. Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.

In contrast, determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires a consideration of two factors: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations. *See Lucas,* 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8; *Penn Central,* 438 U.S.
936 at 124, 98 S.Ct. at 2659. The first factor, the economic impact of the regulation, *936 merely compares the value that has been taken from the property with the value that remains in the property. *Keystone,* 480 U.S. at 497, 107 S.Ct. at 1248. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979); *see also Moore v. City of Costa Mesa,* 886 F.2d 260, 263 (9th Cir.1989), *cert. denied,* 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990). The second factor is the investment-backed expectation of the landowner. The existing and permitted uses of the property constitute the "primary expectation" of the landowner that is affected by regulation. *Penn Central,* 438 U.S. at 136, 98 S.Ct. at 2665; *see also Lucas,* 505 U.S. at 1017 n. 7, 112 S.Ct. at 2894 n. 7 (owner's reasonable expectations shaped by uses permitted by state law); *Esposito v. South Carolina Coastal Council,* 939 F.2d 165, 170 (4th Cir.1991), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992)("the courts have traditionally

looked to the existing use of property as a basis for determining the extent of interference with the owner's `primary expectation concerning the use of the parcel.'") (quoting *Penn Central,* 438 U.S. at 136, 98 S.Ct. at 2665). Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations. *See Pompa Construction Corp. v. City of Saratoga Springs,* 706 F.2d 418, 424-25 (2d Cir.1983).

The **Town** urges that its rejection of the Mayhews' application did not unconstitutionally deprive them of their property. The **Town** first contends that the district court found that the Mayhews' property retained a value of at least $2.4 million following the denial of the planned development application; thus, according to the **Town**, the property's value was not totally destroyed. The **Town** next urges that the denial of the development request did not unreasonably interfere with the Mayhews' property rights because the Mayhews had no right to have their property "up-zoned" for a greater density of development. In other words, the **Town** asserts that the Mayhews had no reasonable investment-backed expectation to lose. The **Town** also maintains that the Mayhews were not singled out unfairly through the denial of the planned development proposal. Instead, the **Town** claims that the zoning applied evenly to all property owners in the **Town** and the **Town** denied applications other than just the Mayhews' proposal.[4]

The Mayhews counter, however, that this is not the typical denial of an up-zoning application. The Mayhews point out that the district court found that the only economically viable use of this property was to construct 3,600 residential units. The district court also found that agriculture was not an economically viable use of the property. Finally, the district court found that, with one-acre zoning, it would take a minimum of 150 years before the Mayhews could completely develop their property. Accordingly, the district court found that no reasonable investor would purchase the Mayhews' property.

We first must consider the effect of these fact-findings relied on by the Mayhews. As discussed previously, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law, but we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property. Under substantive law, a regulatory taking occurs when governmental regulations deprive the owner of all economically viable use of the property or totally destroy the property's value. *Dolan,* 512 U.S. at 385, 114 S.Ct. at 2316-17; *Lucas,* 505 U.S. at 1015-16, 112 S.Ct. at 2893; *Taub,* 882 S.W.2d at 826. Some courts have made an alternative pronouncement that a taking occurs when the government does not allow
937 any use of the property that is sufficiently desirable to permit *937 the property owner to sell the property. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422, 1433 (9th Cir.1996), *petition for cert. filed,* 66 U.S.L.W. 3509 (U.S. Jan. 26, 1998) (No. 97-1235); *Park Ave. Tower Assoc. v. City of New York,* 746 F.2d 135, 139 (2d Cir.1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985). The district court's findings that there was no economically viable use of the property and that no reasonable investor would purchase the property purport to decide the ultimate legal issue of whether a taking has occurred. This, however, involves a question of law, and we therefore owe no deference to the trial court's "findings" in this regard. We will instead focus on the district court's underlying factual determinations regarding the extent of the governmental intrusion and the diminution in the property's value in determining whether the **Town** has taken the Mayhews' property without just compensation.

The relevant factual findings demonstrate that the **Town** has not totally destroyed all value of the property by denying the Mayhews' planned development proposal. In *Lucas,* the Supreme Court clarified that a taking occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas,* 505 U.S. at 1019, 112 S.Ct. at 2895 (emphasis in original). Because the trial court found that Lucas's property was rendered completely and wholly valueless by the regulations at issue, the Supreme Court concluded that a taking had occurred. *Id.* at 1019-20, 112 S.Ct. at 2895-96. In contrast, the district court in this case determined that, even after the denial of the Mayhews' planned development proposal, the property retained a value of $2.4 million. In such a situation, the governmental regulation has not entirely destroyed the property's value.

Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. *See Lucas,* 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8 (takings are to be measured by the "economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations"); *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659 (same); *see also Taub,* 882 S.W.2d at 826 (sufficiently severe economic impact can constitute a taking). The reasonable investment-backed expectation of the claimant is critical to this analysis because it distinguishes this concept from those situations in which the landowner's property has been totally destroyed. Because we conclude that the Mayhews had no reasonable investment-backed expectation to build 3,600 units on their property, we hold that the **Town** has not

unreasonably interfered with their right to use and enjoy their property by denying their planned development proposal.

When the Mayhews first began purchasing their property, the **Town** did not have a zoning ordinance in place. It is undisputed that the Mayhews originally purchased their property for ranching, not for development. They then used their property for ranching for nearly four decades. Historical uses of the property are critically important when determining the reasonable investment-backed expectation of the landowner. *See* Esposito, 939 F.2d at 170 ("the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's `primary expectation concerning the use of the parcel.'")(quoting *Penn Central,* 438 U.S. at 136, 98 S.Ct. at 2665). After four decades of ranching their property in a **Town** with a population of no more than 2,000 people, the Mayhews did not have a reasonable investment-backed expectation that they could pursue an intensive development of 3,600 units that would more than quadruple the **Town's** population.

The Mayhews' subsequent purchases of property in 1985 and 1986 were for purposes of development. However, at this time, the **Town's** zoning ordinances had restricted development to one unit per acre for the preceding twelve years. The existing
938 zoning of the property at the time it was *938 acquired is to be considered in determining whether the regulation interferes with investment-backed expectations. *See* Pompa Construction Corp., 706 F.2d at 424-25. We do not believe that the Mayhews had a reasonable investment-backed expectation to build 3,600 units on their 1,200 acres when the **Town's** zoning ordinances had for twelve years limited development to one unit per acre.

Accordingly, we render judgment against the Mayhews on their regulatory takings claims. The **Town's** denial of the planned development substantially advanced legitimate state interests and did not totally destroy the value of the Mayhews' property or unreasonably interfere with their rights to use and enjoy their property.

B. SUBSTANTIVE DUE PROCESS

A court should not set aside a zoning determination for a substantive due process violation unless the action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Nectow v. City of Cambridge,* 277 U.S. 183, 187-88, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928); *see also* Pennell v. City of San Jose, 485 U.S. 1, 11, 108 S.Ct. 849, 857, 99 L.Ed.2d 1 (1988); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *Smithfield Concerned Citizens for Fair Zoning v.* ***Town*** *of Smithfield,* 907 F.2d 239, 243-44 (1st Cir.1990); *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 (11th Cir. 1989).

A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose. *FM Properties Operating Co. v. City of Austin,* 93 F.3d 167, 174 (5th Cir.1996); *Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 165 (9th Cir.1993); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 507 (9th Cir.1990), *cert. denied,* 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *Smithfield Concerned Citizens,* 907 F.2d at 243-44; *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir.), *cert. denied,* 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980). This deferential inquiry does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 487-88, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). If it is at least fairly debatable that the decision was rationally related to legitimate government interests, the decision must be upheld. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 101 S.Ct. 715, 723-24, 66 L.Ed.2d 659 (1981); *FM Properties,* 93 F.3d at 175. The ordinance will violate substantive due process only if it is *clearly* arbitrary and unreasonable. *See* Esposito v. South Carolina Coastal Council, 939 F.2d 165, 170 (4th Cir.1991), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992).

In *Greenbriar,* 881 F.2d at 1577-80, the Eleventh Circuit was faced with a substantive due process challenge similar to the challenge made by the Mayhews in this case. The fact finder determined in that case, based on conflicting evidence on whether the proposal was in the best interest of the community, that the city council had acted arbitrarily and capriciously in refusing to rezone the subject property based on "political pressure" from constituents. The Eleventh Circuit held, however, that this evidence was not sufficient to establish that the city acted irrationally or arbitrarily in rejecting the application. *Id.* at 1580; *see also* Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827-29 (4th Cir.1995)(a landowner who speculatively purchases property based on the possibility of an upzoning does not demonstrate a substantive due process violation when the county refuses to

grant upzoning).

We likewise conclude that the **Town** did not act irrationally or arbitrarily in denying the Mayhews' planned development application. The **Town's** concerns regarding the urbanization effects of the development are legitimate governmental interests,
939 and *939 the denial of the development application is clearly rationally related to those interests.

C. EQUAL PROTECTION

An as-applied equal protection claim requires that the government treat the claimant different from other similarly-situated landowners without any reasonable basis. *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1541 (11th Cir.), *cert. denied,* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991). The ordinance generally must only be rationally related to a legitimate state interest to survive an equal protection challenge, unless the ordinance discriminates against a suspect class. *Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 165 (9th Cir.1993); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 507 (9th Cir.1990), *cert. denied,* 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991). Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause. *See City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985); *Clajon Production Corp. v. Petera,* 70 F.3d 1566, 1580 (10th Cir.1995); *see also City of New Orleans v. Dukes,* 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976); *Barshop v. Medina Cty. Underground Water Conservation Dist.,* 925 S.W.2d 618, 631-32 (Tex.1996).

The Mayhews claim that they are not being treated the same as other property owners in the **Town** that have higher density properties. However, they are not similarly situated. A landowner seeking a zoning change for a 1200 acre development is not similarly situated to a landowner seeking to build on a small parcel of land. There is no showing that the Mayhews have been treated differently from other property owners seeking a planned development on their property.

The Mayhews also allege that the zoning ordinance has a disproportionate impact on racial minorities, thus invoking a suspect class. At trial, however, the Mayhews stipulated that they abandoned any "allegation of racial animus as a motivation for the actions either in regard to the planned development or in regard to the existing zoning which applies to the subject property." That stipulation applies in this Court as well.

Finally, the Mayhews claim that the **Town's** zoning ordinance was not rationally related to a legitimate government purpose. In analyzing this claim, we apply the same standards as to their substantive due process analysis. For the same reasons that we concluded that the **Town's** actions did not violate substantive due process, we conclude that the **Town** has not violated the Mayhews' equal protection rights.

D. PROCEDURAL DUE PROCESS

If an individual is deprived of a property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process. *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982). Accordingly, a plaintiff alleging a procedural due process takings claim must establish that he was deprived of notice and an opportunity to be heard with respect to a decision affecting his property rights. *Cf. Anderson v. Douglas County,* 4 F.3d 574, 578 (8th Cir.1993), *cert. denied,* 510 U.S. 1113, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); *Herrington v. County of Sonoma,* 834 F.2d 1488, 1501 (9th Cir.), *modified on other grounds,* 857 F.2d 567 (9th Cir.1988), *cert. denied,* 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

The Mayhews were given notice and an opportunity to be heard with respect to their development application. While the Mayhews complain that the procedure was unfair because the **Town** applied ad hoc unreviewable standards in making its determination and that the **Town** lacked the discretion to deny the application because it satisfied the applicable standards, this is not the proper inquiry. Zoning is a legislative act. *See, e.g., Thompson v. City of Palestine,* 510 S.W.2d 579, 581 (Tex.1974).
940 In making a legislative zoning determination, a city or **town** is entitled to consider all the facts and *940 circumstances which may affect the property, the community, and the welfare of its citizens. *Cf. City of El Paso v. Donohue,* 163 Tex. 160, 352 S.W.2d 713, 716 (1962). To satisfy the requirements of procedural due process, then, the **Town** must only provide notice and an

opportunity to be heard, which it did. We conclude that the Mayhews are not entitled to prevail on their procedural due process claims.

*** * * ***

We reverse the court of appeals' judgment dismissing the Mayhews' claims on ripeness grounds. Rather than dismissing their claims, we render a take-nothing judgment against the Mayhews because we hold that, as a matter of law, the Mayhews did not prevail on their just compensation takings claims, "substantially advances" takings claims, substantive due process and due course claims, equal protection claims, and procedural due process and due course claims under the federal and state constitutions.

[1] It is possible that we are compelled to reach this result, at least with respect to the Mayhews' federal claims. While state procedural law generally determines the manner in which a federal question is to be presented in state court, that is not the case if federal substantive law defines its own procedural matrix. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24, at 166 (2d ed.1988). Because the United States Supreme Court has stated that the "final decision" prudential ripeness requirement "follows from the principle that only a regulation that `goes too far' results in a taking under the Fifth Amendment," *Suitum v. Tahoe Regional Planning Agency,* ___ U.S. ___, ___, 117 S.Ct. 1659, 1665, 137 L.Ed.2d 980 (1997) (citations omitted), a persuasive argument could be made that the "final decision" aspect of ripeness is not independent of federal substantive law. *See also MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348, 106 S.Ct. 2561, 2565-66, 91 L.Ed.2d 285 (1986)(final decision is an "essential prerequisite" of a regulatory takings claim). In any event, we need not determine whether we are compelled by federal supremacy to rely on federal law because, in determining the ripeness of the Mayhews' regulatory takings claims in this case, we apply federal jurisprudence.

[2] Moreover, before a regulatory takings claim can be maintained in federal court, a plaintiff must seek compensation through the procedures the state has provided for doing so. *Suitum,* ___ U.S. at ___, 117 S.Ct. at 1665; *Hamilton Bank,* 473 U.S. at 194-95, 105 S.Ct. at 3120-21. This requirement does not apply in this case.

[3] The United States Supreme Court apparently also views the ultimate determinations in takings cases as a legal issue. *See United States v. Causby,* 328 U.S. 256, 259, 66 S.Ct. 1062, 1064-65, 90 L.Ed. 1206 (1946)(accepting Court of Claims' factual conclusion that the existence of government airplanes in the airspace immediately above the property destroyed its value while reserving for itself the legal conclusion of whether a compensable taking occurred under the Fifth Amendment).

[4] As Justice Scalia has observed, "Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the Takings Clause] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation would be) the source of the social problem, it cannot be said that he has been singled out unfairly." *Pennell v. City of San Jose,* 485 U.S. 1, 20, 108 S.Ct. 849, 861-62, 99 L.Ed.2d 1 (1988) (Scalia, J., dissenting).

WestlawNext

McKamey v. Thorp
Supreme Court of Texas. | May 27, 1884 | 61 Tex. 648 *(Approx. 7 pages)*

Supreme Court of **Texas**.

LETITIA G. **MCKAMEY** ET AL.

v.

P. **THORP** ET AL.

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RELATED TOPICS

Execution
- Sale
  - Judgment Creditors Purchase of Property

Fraudulent Conveyances
- Transfers and Transactions Invalid
  - Corpus of Spouse Statutory Estate

Trespass to Try Title
- Proceedings
  - Plea of Not Guilty

West Headnotes (7)

Change View

1 **Execution** Notice

Under the operation of the registration laws, when an execution lien attaches by levy, without notice of an unrecorded conveyance previously made, the purchaser acquires title as against such former purchaser or creditor, though he may have had notice afterwards at the time of his purchase at execution sale. Citing Parker v. Coop, 60 **Tex**. 111.

17 Cases that cite this headnote

2 **Execution** Judgment Creditor as Purchaser

One who buys land from his debtor at a voluntary sale, and pays no money, but credits the price on the debt owing him, is not a bona fide purchaser for value, within the meaning of Rev.St. art. 2318 (Vernon's Ann.Civ.St. art 3818), providing that a purchaser under execution shall be deemed an innocent purchaser without notice in all cases where he would be deemed such had the sale been made voluntarily by defendant in person.

28 Cases that cite this headnote

3 **Execution** Judgment Creditor as Purchaser

A., to repay money of his wife that had been used by him, conveyed land to B., who conveyed to her by deed, not reciting that the purchase money was her separate property, or that the deed was for her sole benefit. Held, that the wife was the equitable owner, a resulting trust being created by the use of her money in the purchase of the land; and that A.'s judgment creditor, buying at the execution sale without notice of such trust, and crediting the amount of his bid on the execution, was not a purchaser for value.

35 Cases that cite this headnote

4 **Fraudulent Conveyances** Nature, Source, and Sufficiency of Consideration in General

Where property is conveyed by a third person to the wife, the consideration being paid by the husband, but out of separate funds of the wife, it is not a fraud on the rights of creditors.

1 Case that cites this headnote

5 **Fraudulent Conveyances** Payment of Claims Arising from Husband's Appropriation of Wife's Separate Estate

A husband, to repay his wife for her money used by him, conveyed land to a third person, who conveyed it to her by a deed which did not recite that the purchase money was her separate property, or that the deed was for her sole benefit. *Held,* that such conveyance was not in fraud of the husband's creditors, and that a creditor of the husband, having notice of the trust in favor of the wife, was not protected by a mere execution lien.

21 Cases that cite this headnote

6 **Trespass to Try Title** Matters Provable Under Plea of Not Guilty, or General Issue

In trespass to try title, under a plea of not guilty, evidence for defendant may be admitted to show that plaintiff's title was acquired by fraud, or that it had failed on account of a sale to an innocent purchaser, since under such plea any defense that will prevent plaintiff's recovery may be interposed, except the statute of limitations.

11 Cases that cite this headnote

7 **Trespass to Try Title** Matters Provable Under Plea of Not Guilty, or General Issue

In A.'s action against B. of trespass to try title B., under the plea of not guilty, may show fraud in A.'s acquisition of title, or that A.'s title had failed by reason of a sale to an innocent purchaser without notice.

2 Cases that cite this headnote

649 APPEAL from Hood. Tried below before the Hon. T. L. Nugent.

Letitia G. **McKamey**, joined by her husband, Wm. N. **McKamey**, sued appellees P. **Thorp** *et al.* in trespass to try title to a house and lot at **Thorp's** Spring. Plaintiffs alleged that the lot was the separate property of the wife. Defendants answered by general demurrer and not guilty. Judgment that plaintiff take nothing, etc.

The property in question was paid for out of Mrs. **McKamey's** separate means, held by her husband for her and which was inherited,??in the land, and the deeds from Walker and wife taken to her with the intent of vesting the title in her in her separate right.

The defendants, over the objections of plaintiff, proved many facts tending to show the insolvency of Wm. N. **McKamey**, husband of the plaintiff L. G. **McKamey**, his indebtedness, evasion and delay of creditors, etc. Defendant claimed title through a judgment and execution sale, wherein H. J. Thompson was plaintiff and Wm. N. **McKamey** was defendant, and Thompson, through his attorneys, McCall & McCall, became the purchaser, crediting the sum bid on the execution.

Attorneys and Law Firms

Thomas T. Ewell, for appellants.

McCall & McCall, for appellees, cited: Parker v. Coop, **61 Tex.**, 111; Wallace v. Campbell, 54 **Tex.**, 87; Kirk v. Navigation Co., 49 **Tex.**, 215; Cooke v. Bremond, 27 **Tex.**, 459; Leading Cases in Equity, vol. 2, pp. 109, 110.

Opinion

WILLIE, CHIEF JUSTICE.

The court did not err in admitting the testimony referred to in the first and second

assignments of error. Our Revised Statutes provide that any defense to an action of trespass to try title may be given in evidence under the plea of not guilty, except the statute of limitations, which must be specially pleaded. The testimony was offered to show fraud in the acquisition of title to the land by Mrs. **McKamey**, and that Thompson was an innocent purchaser without notice; either of which facts, if available as defenses, were as admissible under the pleas of not guilty as under an answer in which they were specially relied on.

The judge below, to whom the cause was submitted without a ***650** jury, has not placed his conclusions of fact and law upon record, and we are not, therefore, informed as to the grounds upon which his judgment in favor of the appellees was based.

There seems to be no evidence in the record to show that the deed to the land was taken in Mrs. **McKamey's** name for the purpose of defrauding the creditors of her husband. On the contrary, the whole evidence tends to show that she had inherited property from her father's estate, which had been converted into money and turned over to her husband, and of which he had had the use for many years; that it was the understanding between **McKamey** and his wife that this money was to be invested in property for her benefit, and that accordingly a portion of it was used in the purchase of the premises in controversy. If the money remained the property of Mrs. **McKamey** whilst in the hands of her husband, his creditors had no claim upon it, and to invest it in property for her benefit was no fraud upon their rights. If the transaction resulted in his becoming her debtor, it was entirely legal and proper for him to pay the debt, either wholly or in part, by purchasing the premises and having the title made directly to her.

The deed to Mrs. **McKamey** did not recite that the purchase money was her separate property, or that the conveyance was for her sole or separate use or benefit, or any other fact which gave notice of her ownership of the land described in it. By its terms the legal title to the land was placed in the community of herself and husband, but her money having paid for it, a resulting trust was created in her favor, and she became the equitable owner of the property.

The land was afterwards levied on and sold under an execution against **McKamey**, in favor of Thompson, the latter becoming the purchaser and paying for the land by crediting the amount of his bid upon the judgment on which the execution had issued.

There is no proof that Thompson had any notice of Mrs. **McKamey's** title or claim to the land, either at the date of the levy of the execution or of the sale at which he purchased.

The evidence introduced by the plaintiffs below to show such notice was not only meager and insufficient, but was contradicted by the testimony of the opposite party. Even had it been stronger, if thus contradicted, we should be compelled to treat the case as lacking in proof of notice, the judge below having found against the party upon whom rested the burden of making such proof. In the decision of this case, therefore, Thompson must be treated as having bought without knowledge of Mrs. **McKamey's** title, paying the ***651** purchase money by crediting it upon his judgment against her husband.

The defendants, who claim under Thompson, had full notice of her rights before they bought, and their title must stand or fall with that which was acquired by Thompson through his purchase at the sheriff's sale.

It is the well settled law of this court that an execution lien will hold good as against an unrecorded conveyance previously made to a third party by the judgment creditor. Ayers v. Duprey, 27 **Tex**., 594; Grace v. Wade, 45 **Tex**., 522; Borden v. McRae, 46 **Tex**., 396; Parker v. Coop, 2 **Tex**. L. R., 22 (60 **Tex**., 111); Grimes v. Hobson, 46 **Tex**., 416. Hence, where such a lien has been secured without notice, the purchaser at the sale made under the execution is protected in his title, whether he have knowledge of the unrecorded instrument at the time of his purchase or not. Id.

This is by force of the registration laws, which render all unrecorded conveyances void as against subsequent purchasers for value without notice, and as against all creditors, the latter being construed to be those who have liens upon the property. Id.

In such cases the purchaser at sheriff's sale, whether plaintiff in execution or not, has the benefit of the lien secured by the levy, and no notice received thereafter will affect his title. Id.

But as a resulting trust is not within the registration laws, and the holder of this equity cannot spread his title upon record, these rules are inapplicable to his case. Parker v. Coop, 60 **Tex**., 111. Hence a creditor claiming a mere statutory lien by judgment or execution has been held by this court not to be protected by reason simply of want of notice of such an equity; although it is otherwise in reference to a creditor by mortgage or deed of trust, o?? similar instruments, which are regarded as standing upon the same footing with conveyances by deed. Id.; Bailey & Pond v. Tindell, 2 **Tex**. L. R., 141; 2 Story's Eq. Jur., sec. 1502, note 2. Hence, also, an execution or judgment lien, obtained without notice of the resulting trust, cannot inure to the benefit of one buying at the sheriff's sale made under the execution. Parker v. Coop, *supra.*

The title of the latter as against the resulting trust must be determined without reference to any notice of it at the time of the record of the judgment or the levy of the execution. It must depend upon whether or not he had notice at the time of sale, and if not, then whether or not he was a purchaser for valuable consideration.

As Thompson bought the property in controversy without notice ***652** of Mrs. **McKamey's** title, the only question for our decision is: Was he a purchaser for valuable consideration, having paid the amount of his bid by crediting it upon his judgment against the defendant in execution?

A review of our decisions will show that in a few cases intimations have been made to the effect that one buying under such circumstances is to be treated as a *bona fide* purchaser, and that in other cases the rule has been distinctly laid down to the contrary.

In Blankenship v. Douglas, 26 **Tex**., 225, an intimation was thrown out to the effect that a creditor thus buying was a *bona fide* purchaser, but it was added that it was not intended to express any authoritative opinion upon the point.

In Wallace v. Campbell, 54 **Tex**., 90, 91, it was said that such a purchase might be *bona fide* when a previous judgment or execution lien had been secured upon the property sold. The creditor would then hold through his previous lien and not merely through his purchase at the judicial sale.

It may be also remarked that in such case a purchaser surrenders an existing security, viz., the previous lien of his judgment or execution, and this is held equivalent to the payment of a valuable consideration. Love v. Taylor, 26 Miss., 574; Padgett v. Lawrence, 10 Paige Ch., 179. It is obvious from this that where there is no such prior lien acquired, as in case of a resulting trust, the foundation of the creditor's title through the purchase at sheriff's sale is removed and the title itself must fall. These decisions are, therefore, not authority for holding that a judgment creditor, purchasing at his own sale, without any previous lien acquired upon the property, is a purchaser for valuable consideration.

On the contrary, in Ayers v. Duprey, 27 **Tex**., 594, it was held that "it will not constitute a *bona fide* purchase that the creditor bids off the premises and applies the bid on his own judgment. That is a precedent debt, and the consideration is not advanced upon the faith of the judgment." Whilst this point was not necessary to a decision of the cause, it was raised by the record and passed upon by the court. In the subsequent case of Delespine v. Campbell, 52 **Tex**., 12, the doctrine on this subject as stated in Ayers v. Duprey, is approved and followed.

The decided tendency of our decisions seems, therefore, to be in favor of the doctrine that a creditor buying at his own sale and crediting his bid upon the judgment is not a purchaser for value. And this view seems to be supported by very high authority. 1 Story's Eq., sec. 420, note 3, and authorities cited.

***653** Our Revised Statutes, under which this case must be decided, provide that "a purchaser under execution shall be deemed to be an innocent purchaser without notice in all cases where he would be deemed to be such had the sale been made voluntarily by the defendant in person." Art. 2318.

We have, therefore, only to inquire in what cases a purchaser from a defendant in execution at private sale is deemed a *bona fide* purchaser, in order to determine when he will be so considered when buying at sheriff's sale.

It seems to be held by the great weight of American authority that a creditor who buys from his debtor, and pays the consideration money by merely crediting the amount upon a pre-existing debt, is not a *bona fide* purchaser for value. Dickerson v. Tillinghast, 4 Paige Ch., 221, 222; Padgett v. Lawrence, *supra;* Upshaw v. Hargrove, 6 Sm. & Marsh., 292; Clark v. Flint, 22 Pick., 243; Buffington v. Garrish, 15 Mass., 156.

This doctrine proceeds upon the principle that the creditor receiving the conveyance divests himself of no right, and places himself in no worse situation than he would have been if he had received notice of the prior title existing in the property in favor of a third party. He is treated as advancing nothing on the faith of his purchase, and as losing nothing if the apparent title of his vendor should prove worthless. Dickerson v. Tillinghast, *supra;* Wright v. Douglass, 10 Barb., 107.

As a natural result of this principle, if a valid security, such as a mortgage or judgment lien, is surrendered, or in addition to the precedent debt a new consideration is advanced, or new liabilities are incurred, the purchase will become *bona fide.* Love v. Taylor, *supra;* Padgett v. Lawrence, *supra.* And in most of the American courts the purchaser of negotiable paper is held not to be within the rule; but this arises from considerations pertaining to mercantile law alone and the necessities of commerce, which require that such paper should pass from hand to hand more freely than any other species of property. Swift v. Tyson, 16 Pet., 1; Brush v. Scribner, 11 Conn., 388.

None of these exceptions are of course applicable to a purchase, like the present, of land by a creditor who has advanced no new consideration, surrendered no security, but merely credited the consideration money upon a larger indebtedness held by him against his debtor.

From the decisions made by this court previously to the Revised Statutes, the principles upon which they rest, and the authorities ***654** cited to sustain them, it would seem that the article of our statutes cited above is but declaratory of the law as it already existed.

In any event it cannot be said that in placing execution sales upon the same plane with private conveyances made by the debtor, the statute has given the creditor purchasing any better position than he before possessed. For it is sometimes held that an execution creditor purchasing at his own sale, and crediting his bid on the judgment, may be a *bona fide* purchaser, when, if he had received a conveyance voluntarily from the debtor for the same consideration, he would not have occupied that position. Compare Dickerson v. Tillinghast, *supra,* with Wood v. Chapin, 3 Kern., 509.

Indeed there may be some reason for the difference, as the purchaser at sheriff's sale must needs pay a portion of his bid in settlement of the expenses of the cause, which the private purchaser does not; and in addition it is the policy of the law to encourage the judgment creditor to bid at his own sale and thus create competition, and cause the property to bring a larger price for the benefit of the debtor. But be this as it may, the statute places both classes of purchasers upon the same footing, and a

purchaser at sheriff's sale cannot be protected unless the law would also shield him had he bought privately from his debtor, the defendant in execution.

Thompson was not, therefore, a *bona fide* purchaser of the property in controversy, and his vendees, the defendants, having bought with notice of Mrs. **McKamey's** claim, judgment should have been rendered for the plaintiffs below. The judgment is therefore reversed, and will be rendered here in favor of the appellants that they recover the land sued for, and their costs, and have their writ of possession against the appellees.

REVERSED AND RENDERED.

Parallel Citations

1884 WL 8841 (Tex.)

End of Document

170 S.W.3d 242 (2005)

Dennis NAUSLAR and Nauslar Investments, L.L.C., Appellant

v.

COORS BREWING CO. and Golden Distributing Enterprises, L.P., Appellees.

No. 05-04-00704-CV.

Court of Appeals of Texas, Dallas.

August 19, 2005.

246 *246 Martin J. Siegel, Houston, TX, for Appellant.

Jon P. Christiansen, Michael J. Aprahamian, Foley & Lardner LLP, Milwaukee, WI, Monica Wiseman Latin, J. Michael Hughes, Rodney H. Lawson and John Franklin Guild, Carrington, Coleman, Sloman & Blumenthal, L.L.P., David Bryant, Diamond, McCarthy, Taylor, Finley, Bryant & Lee, Sean Joseph McCaffity, Dallas, TX, for Appellee.

Before Justices BRIDGES, O'NEILL, and MAZZANT.

OPINION

Opinion by Justice O'NEILL.

247 The trial court granted the Defendants' pleas to the jurisdiction for lack of standing *247 on all of the Plaintiffs' claims and dismissed the case. We conclude that (1) Plaintiff-Appellants lack standing on the statutory and common-law causes of action brought on their own behalf. Concerning the causes of action asserted "on behalf of" the business entity that they sold, they affirmatively negate having capacity to bring those claims. Accordingly, we affirm the trial court's dismissal of all of Plaintiffs' claims. We reverse the trial court's order denying **Coors** attorneys' fees and remand that issue.

Facts

The crux of this dispute is the disapproval by **Coors Brewing Co**. ("**Coors**") of a proposed consolidation in 2001 between Willow Distributors, L.P. ("Willow"), an entity distributing **Coors** beer in the Dallas area, and the distributor of Miller beer, Miller of Dallas ("Miller"). Plaintiffs alleged that Willow and Miller had agreed to a joint venture that would be operated by a new entity, United LP. Willow and Miller would each own 50% of the new entity, and the cash flow from the new business would be shared equally. In addition, **Nauslar** asserts the new enterprise would employ him as a company manager.

At the time of the proposed consolidation (the "Consolidation"), neither of the Plaintiffs was party to the distributorship agreement with **Coors**. Rather, Willow was the contracting party and the named distributor under the distributor agreement with **Coors**. Plaintiff Dennis **Nauslar**, individually, did not have a direct ownership interest in Willow, and Plaintiff **Nauslar** Investments was the limited partner in Willow. The structure underpinning Willow is as follows: Willow's general partner was DEN L.P. and its limited partner was **Nauslar** Investments LLC. **Nauslar**, individually, was 100% owner of **Nauslar** Investments, which in turn was the limited partner in DEN L.P (general partner in Willow).

When, in September 2001, **Nauslar** presented the proposed Consolidation to **Coors** for its approval, **Coors** rejected the deal. Instead, **Coors** invoked its right under the distributorship agreement to negotiate exclusively to buy Willow. It assigned that exclusive right to Golden Distributing Enterprises, L.P. (Golden). Over the next year, according to Plaintiffs, it became clear that Golden could not feasibly consolidate with or purchase Willow. Subsequently, **Nauslar** approached Miller again, but this time Miller was interested in only an outright purchase of Willow. **Coors** approved an outright sale to Miller. **Coors**, relying on a clause in the distributorship agreement, required **Nauslar** to sign a "mutual release" on behalf of Willow. Under that agreement, both Willow and **Coors** released any and all claims each had against the other and also warranted that neither party had assigned any such claims to a third party. **Nauslar** signed the release, and Miller bought Willow and DEN L.P. from **Nauslar** and

Nausar Investments for $57.8 million.

Nauslar and **Nauslar** Investments sued **Coors**, alleging it unreasonably disapproved the proposed Consolidation with Miller, in violation of the Texas Beer Industry Fair Dealing Law. They also brought a number of common-law claims against **Coors** and Golden, including one for tortious interference with the Consolidation. After two hearings, the trial court granted **Coors's** and Golden's pleas to the jurisdiction and dismissed all of the Plaintiffs' causes of action for lack of standing. Plaintiffs brought this appeal, challenging the trial courts' dismissal of their statutory and common-law causes of action.

248 *248 **Summary**

Plaintiffs seek to bring their claims in their own right, as individual claims brought on their own behalf. They also assert — as former partners and owners of Willow — claims "on behalf of" Willow, for alleged injuries to Willow itself, but with recovery going to Plaintiffs, not Willow. First, we address the individual claims and conclude that Plaintiffs lack standing to bring either the common-law or statutory causes of action in their own right. We address next the claims brought "on behalf of" Willow, i.e., the Willow partnership's claims. We conclude that Plaintiffs, in their live pleading, affirmatively negate that they have capacity to bring claims on behalf of Willow. Having rejected their other theory by which to allege capacity, we affirm dismissal of the claims asserted on behalf of Willow. We conclude that an award of attorney's fees under the statute is mandatory if one party prevails in an action under that statute, and thus we reverse the trial court's order denying **Coors** its attorney's fees and remand that issue.

I. Common-Law Causes of Action Asserted as Individual Right of Action

We address whether the Plaintiffs have standing, in their own right, to bring and personally recover on the common-law causes of action[1] they assert against Defendants. We note first the injury asserted. Plaintiffs allege that Willow was weakened by **Coors's** efforts to force a deal with Golden, and that Willow's value declined between the time of the disapproval in 2001 and the subsequent sale to Miller in 2003. Specifically, Plaintiffs assert damages as follows: **Nauslar**, individually, seeks redress for (1) the distributions, profits and other benefits of ownership he would have reaped as the *sole owner* of Willow and other corporate entities, had **Coors** approved the Consolidation; and (2) loss of salary, bonuses and other employment compensation he would have been paid by United (the operating entity to be formed upon Consolidation) as well as employment-related losses as an *employee* of Willow. **Nauslar** Investments, Inc. asserts that, as the *former general partner* of DEN LP (the general partner of Willow) and as the *former limited partner* of Willow, it was "injured to the same degree as — and could assert all claims of DEN LP and Willow."

In sum, **Nauslar** seeks damages for loss of the benefits of ownership and employment-related losses. **Nauslar** Investments, as former general partner of the general partner of Willow, seeks damages that mirror those suffered by Willow.

A. Standard of Review and Principles Governing Standing

Because the question of standing is a legal question, we review de novo a trial court's ruling on a plea to the jurisdiction. *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 928 (Tex.1998). Standing is a component of a court's subject-matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 446 (Tex.1993). The plaintiff has the burden of alleging facts that affirmatively demonstrate a court's jurisdiction to hear a cause. *Id.* A plea to the jurisdiction challenges a trial court's
249 authority to hear a case by alleging that the factual allegations *249 in the plaintiff's pleadings, when taken as true, fail to invoke the trial court's jurisdiction. *El Paso Cmty. Partners v. B & G/Sunrise Joint Venture,* 24 S.W.3d 620, 623 (Tex.App.-Austin 2000, no pet.) (citing *Bybee v. Fireman's Fund Ins. **Co**.,* 160 Tex. 429, 331 S.W.2d 910, 917 (1960)). We construe the allegations in the pleadings in favor of the pleader. *Tex. Air Control Bd.,* 852 S.W.2d at 446.

When a plaintiff fails to plead facts that establish jurisdiction, but the petition does not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *County of Cameron v. Brown,* 80 S.W.3d 549, 555 (Tex.2002). On the other hand, if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.*

A person has standing to sue when he is personally aggrieved by the alleged wrong. *Nootsie Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 661 (Tex.1996). A person has standing if (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or other-wise; or (5) he is an appropriate party to assert the public's interest in the matter, as well as his own. *Precision Sheet Metal Mfg. **Co**., Inc. v. Yates,* 794 S.W.2d 545, 552 (Tex.App.-Dallas 1990, writ denied).

Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate. *Exxon Corp. v. Pluff,* 94 S.W.3d 22, 27 (Tex.App.-Tyler 2002, pet. denied); *Cadle **Co**. v. Lobingier,* 50 S.W.3d 662, 669-70 (Tex.App.-Fort Worth 2001, pet. denied); *Brunson v. Woolsey,* 63 S.W.3d 583, 587 (Tex.App.-Fort Worth 2001, no pet.). Only the person whose primary legal right has been breached may seek redress for an injury. *Nobles v. Marcus,* 533 S.W.2d 923, 927 (Tex.1976) (defrauded party only can bring suit to set aside deed obtained by fraud). "Without breach of a legal right belonging to the plaintiff no cause of action can accrue to his benefit." *Id.*

B. Legal Principles: Whose Primary Legal Right Was Allegedly Infringed?

Plaintiffs' principle argument is that the issue raised concerns who owns the claims, and thus presents a question of capacity, not standing. They rely on *Pledger v. Schoellkopf,* 762 S.W.2d 145, 146 (Tex.1988) (a challenge to a shareholder's right to bring a cause of action for wrongs done to the corporation raises a question of capacity). They also rely on *Prostok v. Browning,* 112 S.W.3d 876, 921 (Tex.App.-Dallas 2003) ("A challenge to who owns a claim raises the issue of capacity, not standing."), *aff'd,* 165 S.W.3d 336 (Tex.2005). We disagree that the pleadings raise only an issue of capacity, not standing. The case law reveals that, with respect to Plaintiffs' individual common-law causes of action, a fundamental question is raised: Do these claims embody a primary legal right belonging to the Plaintiffs or does the Willow partnership have the primary right of action? That raises an issue of standing.

We note initially that *Pledger* cannot stand for the simplistic proposition that a challenge to a stakeholder's bringing a suit to
250 recover personally for corporate wrongs *250 raises an issue of capacity only. The *Pledger* court did not, indeed could not, discuss standing because that issue was not before it. 762 S.W.2d at 145-46. The case was decided before the determination that standing is an component of subject-matter jurisdiction and thus can be raised first on appeal. *See Tex. Air Control Bd.,* 852 S.W.2d at 446.

An individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity. *Wingate v. Hajdik,* 795 S.W.2d 717, 719 (Tex.1990). In *Wingate,* one corporate shareholder sued another alleging he had appropriated corporate assets. The court ruled that individual stockholders have no separate, independent right of action for injuries suffered by the corporation, when the injures merely result in depreciation of the value of plaintiffs' stock. *Id.* at 719.

In *Fredericksburg Indus., Inc. v. Franklin Int'l, Inc.,* 911 S.W.2d 518, 520 (Tex.App.-San Antonio 1995, writ denied), the president/employee of a furniture manufacturing corporation sued a corporate supplier, asserting he lost wages as a result of the supplier's delivering defective glue. The court held he lacked standing: the cause of action belonged to the corporation alone, as the damages were to the corporation's profits, and any claim the plaintiff had for lost wages was against the corporation. *Id.* at 521.

Other cases in the corporate context reaffirm that where damage is to the business entity's worth, the individual stakeholder cannot personally recover, whether the damages sought are in terms of diminished value of an ownership interest or loss of employee benefits. In *Mendenhall v. Fleming **Co**., Inc.,* 504 F.2d 879 (5th Cir.1974), the plaintiffs sought to recover personally for damages from anti-trust violations arising from the operation of retail stores by a corporation, which they had created. *Id.* at 880. The court noted that the business allegedly interfered with was that operated by the corporation and the damages sought were direct damage to corporate worth. Thus, the plaintiffs lacked standing. *Id.* at 880-81. The right of recovery was the entity's right alone, even though in an economic sense the impact "may bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership." *Id.* at 881 (quoting *Martens v. Barrett,* 245 F.2d 844, 846 (5th Cir.1957)).

A partner has no individual, separate cause of action for losses suffered by reason of tortious interference with a contract

between the partnership and a third party: damages for loss in value of the partnership interest or employment losses are subsumed in the partnership's causes of action. *Cates v. Int'l Tel. & Tel. Corp.,* 756 F.2d 1161 (5th Cir.1985) (construing Texas law).

C. Application and Conclusion

Nauslar generally argues that he has standing, because he was "personally aggrieved" by, and suffered "direct injury" from, Defendants' actions in disapproving the Consolidation. He seeks to recover for loss of benefits of ownership and employment. **Nauslar** Investments asserts it has standing to sue, individually, for harms done to the partnership and seeks damages mirroring those Willow could recover.

As the case law demonstrates, Plaintiffs do not have a separate, individual right of action for injuries to the partnership that diminished the value of their ownership interest in that entity. *Wingate,* 795 S.W.2d at 719. Willow is the one who suffered the
251 direct injury from the alleged *251 harm to the partnership's worth, and any loss to Plaintiffs in the sale price is "both indirect to and duplicative of" the entity's right of action. *Mendenhall,* 504 F.2d at 881. The right of recovery is Willow's right alone, even though the economic impact of the alleged wrongdoing may bring about reduced earnings, salary or bonus. *Fredericksburg,* 911 S.W.2d at 520; *Cates,* 756 F.2d at 1181; *Mendenhall,* 504 F.2d at 881.

We note the applicability of the facts in *Cates* to the instant case. 756 F.2d 1161. The *Cates* plaintiff, a minority partner, attempted to bring individual claims for tortious interference with the partnership's business, as do the Plaintiffs here. The damages sought were similar as well. The court's holding warrants quotation:

> Accordingly, any claims for damages which [plaintiff] suffered by reason of diminution in value of his partnership interest, or his share of partnership income, or his salary or bonus from the partnerships or their businesses, by reason of breach of such agreements, or tortious interference with such businesses, or anticompetitive conduct interfering with or limiting or "taking over" such businesses or their activities, *are in effect subsumed within the causes of action of the partnerships and do not afford [plaintiff] ... a separate, individual cause of action.*

Id. at 1181.

Accordingly, Willow possesses the primary legal right that was allegedly violated, and thus Willow is the exclusive party with a justifiable interest in redressing those alleged injuries. Accordingly, Plaintiffs do not have a standing to pursue and recover personally on the asserted common-law causes of action.

Plaintiffs' arguments to the contrary do not alter our conclusion. Concerning the tortious-interference cause of action, **Nauslar** argues that he has individual standing to pursue the claim under *Sturges v. Wal-Mart Stores, Inc.,* 39 S.W.3d 608 (Tex.App.-Beaumont 1998), *rev'd on other grounds,* 52 S.W.3d 711 (Tex.2001). In that case, individuals were deemed to have standing where a proposed business entity was never formed due to the defendant's interference. The appellate court held that the individual plaintiffs, who had signed the letter of intent, were all "interested parties who would have profited from the prospective lease," who were directly involved in the building of the proposed structure, and who sustained "direct economic injury" as a result of Wal-Mart's interference. *Id.* at 614-15.

Sturges is inapposite. The proposed entity in *Sturges* was never formed, leaving the principals in that enterprise as the directly injured parties. In today's case, the direct injury from Defendants' alleged wrongdoing was to Willow, the operating business entity that would have consolidated with Miller.

Plaintiffs also rely on *Abraham Inv. **Co**. v. Payne Ranch, Inc.,* 968 S.W.2d 518 (Tex.App.-Amarillo 1998, pet. denied) to overcome the obstacle that they were not party to the proposed consolidation agreement between Willow and Miller. In that case, plaintiff Abraham had a contract to purchase a ranch from defendant Payne. That contract was subject to a pre-existing preferential right of purchase contained in a contract between Payne and Campbell, which Campbell exercised to purchase the ranch. Defendants asserted Abraham lacked standing to sue for tortious interference, as he was not party to the Payne-Campbell contract. The court disagreed: whether Abraham was entitled to fulfillment of the direct contract to purchase with Payne turned on whether the third-party contract was properly exercised. *Id.* at 523-34.

252 *252 *Abraham* is inapposite, as the analogy fails at the outset. The plaintiff had a direct contract with the defendant. Disposition

under that contract turned on whether the third-party contract was properly exercised. In today's case, there is no direct contract between Plaintiffs and Defendants **Coors** and Golden. Accordingly, Plaintiffs lack standing to pursue their tortious-interference cause of action against Defendants.

Nauslar Investments asserts standing in its roles as *former* general partner of Willow's general partner and *former* limited partner of Willow. To overcome the obstacle that it is not a general partner of Willow, it relies on the double derivative rule governing corporate derivative suits. To overcome the general rule that a partner cannot sue individually on a partnership claim, it relies on cases applying an exception to that rule. Those cases do not apply because, as discussed below, **Nauslar** Investments sold to Miller the entirety of its interest in Willow.[2] None of the cases it cites stands for the proposition that a partner that has sold its entire interest in the partnership can personally recover on a claim belonging to that partnership. The *Mendenhall* court, discussing the sale of corporate stock, captured the effect of the Plaintiffs' sale of the partnership:

> When [plaintiffs] sold their corporate stock to a third party, *they sold their right to control the very cause of action they now attempt to assert.* This suit cannot reclaim that corporate cause of action by asserting the same damage sustained by the corporation also served to diminish the value of their individually held estates.

Mendenhall, 504 F.2d at 881.

II. Plaintiffs' Statutory Causes of Action Asserted in Their Right

Plaintiffs assert that **Coors** unreasonably disapproved the Consolidation in violation of the Texas Beer Industry Fair Dealing Law (BIFDL), which prohibits manufacturers from withholding approval of the transfer of distributorship rights if the substituting party meets "reasonable standards." TEX. ALCO. BEV.CODE ANN. § 102.71, -.76, -.77, -.79 (Vernon 1995). We examine whether Plaintiffs have standing, in their own right, to bring a claim for the alleged violation of BIFDL.[3]

A. Legal Principles Governing Standing Based on Statute

Standing to sue can be predicated upon either statutory or common-law authority. *See Williams v. Lara,* 52 S.W.3d 171, 178-79 (Tex.2001). The general rules of standing apply unless statutory authority for standing exists. *Id.* at 178. If standing is statutorily conferred, the statute granting authority and the case law interpreting it serve as the proper framework of analysis. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex.1984).

253 We review matters of statutory construction de novo. *City of San Antonio* *253 *v. City of Boerne,* 111 S.W.3d 22, 25 (Tex.2003). In construing a statute, our objective is to determine and give effect to the legislature's intent. *Id.* If a statute's meaning is unambiguous, we generally interpret the statute according to its plain meaning. *Id.* We begin by examining the exact wording and apply the tenet that the legislature chooses its words carefully and means what it says. *Williams v. Vought,* 68 S.W.3d 102, 115 (Tex.App.-Dallas 2001, no pet.) (Morris, J., concurring). We determine legislative intent from the entire act and not just its isolated portions. *City of San Antonio,* 111 S.W.3d at 25.

BIFDL provides a judicial remedy for a "manufacturer" or "distributor," as defined in the statute,[4] who are parties to a distributorship agreement:

> If a manufacturer or distributor who is a party to an agreement pursuant to Section 102.51 of this code fails to comply with this Act or otherwise engages in conduct prohibited under this Act ... the aggrieved manufacturer or distributor may maintain a civil action in a court of competent jurisdiction....

TEX. ALCO. BEV.CODE ANN. § 102.79(a).

BIFDL prohibits a manufacturer from withholding approval of a distributor's transfer of its distributorship interest when the person or persons to be substituted "meet reasonable standards." The full provision reads as follows:

> *No manufacturer shall unreasonably withhold or delay its approval of any assignment, sale, or transfer of the stock of a distributor* or all or any portion of a distributor's assets, distributor's voting stock, the voting stock of any parent corporation, or the beneficial ownership or control of any other entity owning or controlling the

> distributor, including the distributor's rights and obligations under the terms of an agreement *whenever the person or persons to be substituted meet reasonable standards. ...*

Id. § 102.76(a) (emphasis added).

In a case construing these two sections of BIFDL, the Corpus Christi Court of Appeals held that the plaintiff did not have a statutory right to maintain its cause of action against the distributor, because it failed to comply strictly with the statute's requirements. *Ace Sales **Co**., Inc. v. Cerveceria Modelo, S.A. de C.V.,* 739 S.W.2d 442, 447 (Tex.App.-Corpus Christi 1987, writ denied). The distributor Ace sought damages for the manufacturer's failure to approve a transfer of the distributorship rights to Ace's buyer. The court noted that section 102.79 of BIFDL provides a remedy for parties to an agreement under section 102.51, which in turn requires a written agreement. TEX. ALCO. BEV.CODE ANN. §§ 102.51, 102.79. Because Ace did not produce a written agreement, it had no remedy under BIFDL. *Id.* In so holding, the court relied on the principle that "if a cause of action and remedy for its enforcement are derived from a statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." *Id.* (quoting *Tex. Catastrophe Prop. Ins. Ass'n v. Council of **Co**-Owners of Saida II Towers Condo. Ass'n,* 706 S.W.2d 644, 646 (Tex.1986)).

B. Analysis and Conclusion

Nauslar argues that although he is not a "distributor" under the BIFDL definition, he should be entitled to sue under the statute,
254 based on its text, legislative history, and purpose. **Nauslar** *254 points to the text of Section 102.76(a) that protects not just transfers of the distributorship itself, but also transfers of "the voting stock of any partner corporation," as well as the "beneficial ownership" of entities owning the distributor. He argues that persons representing those interests must have standing under the statute, to effectuate the broad protective purpose of the statute. He also points to pieces of legislative history to indicate that, in discussing the pending bill, the legislators did not distinguish between the business entity that comprises the distributorship and the individuals who own that entity.

We are not persuaded to adopt Plaintiffs' expansive reading of the text of BIFDL. Rather, we are persuaded by Appellee's argument that when the legislature intends to grant a remedy to all persons who might be injured by a statutory violation, it plainly grants a remedy to "injured persons." *See, e.g.,* TEX. BUS. & COM.CODE ANN. § 19.02 (Vernon 2002) (granting judicial remedy to "a person injured" by a violation of the statute regulating relationship between manufacturers and dealers of particular equipment); TEX. OCC.CODE ANN. § 2352.201 (Vernon 2004) (violators of statute are liable to "an injured party ...").

We apply the tenet that the legislature chooses its words carefully and means what it says. *Williams,* 68 S.W.3d at 115. The remedies section, Section 102.79(a), plainly states who may sue for violations of the statute: "manufacturers" and "distributors," as defined under the statute, who are party to a distributorship agreement. These plaintiffs do not fall within the statutorily defined class of persons who may sue. Neither are we persuaded to read the statute expansively to go beyond its plainly stated purpose. The statute states that its purpose is "to promote the public's interest in the fair, efficient, and competitive distribution of beer within the state...." TEX. ALCO. BEV.CODE ANN. § 102.72. As noted, Willow itself has standing to redress violations of the statute. This satisfies the statutory purpose of protecting the *general public interest* in fair competition. We conclude the statutory purpose does not extend to protect Plaintiffs' individual interests in obtaining higher compensation from the transfer of its interest in Willow. *Tex. Catastrophe Prop. Ins.,* 706 S.W.2d at 646 (when cause of action derives from statute, statutory provisions must be complied with in all respects or action not maintainable).

C. Was the No-Assignment Clause Void?

Nauslar asserts **Coors** demanded that Willow sign a mutual release of any claims it had against **Coors**, which included Willow's warranty that it had not assigned any of its claims to a third party. **Nauslar** asserts that, but for **Coors's** insistence that he execute the release by Willow, he would have assigned Willow's claims to himself. The release, **Nauslar** asserts, violated the "anti-waiver" provision of BIFDL. He argues **Coors** should not be allowed to circumvent the section prohibiting unreasonable disapproval of a transfer by violating the section prohibiting the release of such claims. As a remedy, **Nauslar** invokes equity principles, urging the court to declare an "equitable assignment" of Willow's claims to **Nauslar**, thus enabling him to sue — as constructive assignee of Willow's claims — under BIFDL.

Section 102.72(c) of BIFDL states, "The effect of this Act may not be varied by agreement. Any agreement purporting to do so is void and unenforceable to the extent of such variance only." **Nauslar** asserts that this "anti-waiver" provision prohibited **Coors**
255 from conditioning its approval of the sale of Willow on Willow's *255 release of its claims against **Coors**. **Nauslar** insists the only permitted reason for disapproving a transfer under section 102.76 is when the proposed transferee fails to meet "reasonable standards." **Coors** is thus not permitted to disapprove a transfer based on a failure to sign a release. Thus **Nauslar** argues, the release-with-non-assignment clause, which waives the distributor's BIFDL claim, should be declared void under the anti-waiver provision, section 102.72(c).

We note that the issue **Nauslar** raises, whether he individually had statutory standing to pursue Willow's claim, turns on the permissibility of the clause in which Willow warrants it did not assign its claims to a third party. Thus, we need not address whether the release by Willow of its own BIFDL claims against **Coors** was prohibited by the anti-waiver provision in section 102.76(c). The issue is this: Is a distributor's representation that it has not assigned its statutory claims, if any, to a third party an agreement that "varies the effect of the BIFDL" so as to be void? As discussed, the plain language of section 102.79 grants a right of action only to "distributors or manufacturers" that are party to a distributorship agreement. **Nauslar** points to no authority to indicate that BIFDL claims must remain freely assignable to those not otherwise entitled to bring such claims in their own right. And we see no language in the text of the statute requiring the reading urged by Plaintiffs.

Accordingly, we hold that neither Plaintiff has standing to bring the claims, on their own behalf, seeking redress for violations of BIFDL.

III. Plaintiffs' Causes of Action Asserted "On Behalf Of" Willow

We turn to Plaintiffs' assertion of causes of action purportedly brought "on behalf of" Willow. Plaintiffs assert — as the *former partners in and owners of* Willow — they are entitled to recover personally on Willow's claims for injuries suffered by Willow. Plaintiffs argue Defendants' challenges go to the issue of "claim ownership" only. They assert, "An argument about whether a current or former owner, as distinct from his company, owns a particular claim is an argument about capacity."

A. Legal Principles

A plaintiff must have both standing and capacity to bring a lawsuit. *Coastal Liquids Transp. L.P. v. Harris County Appraisal Dist.,* 46 S.W.3d 880, 884 (Tex.2001). A party has capacity to sue when it has legal authority to act, regardless of whether it has a justiciable interest in the controversy. *Nootsie, Ltd.,* 925 S.W.2d at 661. Standing pertains to a person's justiciable interest in a suit and is a component of subject-matter jurisdiction. *See Tex. Air Control Bd.,* 852 S.W.2d at 443, 445-46. Capacity is a party's legal authority to go into court to prosecute or defend a suit. *El T. Mexican Rests., Inc. v. Bacon,* 921 S.W.2d 247, 249 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

B. Analysis and Conclusion

Plaintiffs allege, and it is undisputed, that Plaintiffs sold their interest in the Willow partnership to Miller. Willow's causes of action belong to the partnership, not to its partners. Absent an agreement otherwise, Willow's assets, including any chose in action it held, would have transferred to Miller in the sale.[5]

256 *256 Plaintiffs do not allege that they consensually acquired legal title to Willow's causes of action — and thus possess exclusive authority (capacity) to prosecute and recover on Willow's claims. That is, they do not allege that, despite the sale to Miller, they retained title to Willow's causes of action, or otherwise acquired those assets by assignment. Indeed, Plaintiffs allege and argue the opposite: they allege that **Coors** conditioned its approval of the sale on Willow's warranting it had not assigned its claims against **Coors** to a third party. **Nauslar** argues, but for that condition, he would have caused Willow to assign its claims to himself.[6]

Plaintiffs thus judicially admit they have do not own legal title to Willow's causes of action. *Houston First American Sav. v. Musick,* 650 S.W.2d 764, 767 (Tex.1983) (judicial admissions are assertions of fact, not pled in the alternative, in the live pleadings of a party). Plaintiffs do posit the "constructive assignee" theory by which to establish their alleged right to bring

Willow's causes of action. As a legal basis, they argue the warranty of no assignment violates BIFDL and thus should be declared void. We concluded above, as a matter of law, that the non-assignment clause does not violate BIFDL. Plaintiffs allege no other legal basis to avoid the effect of their having failed to acquire the legal right to prosecute and personally recover on Willow's causes of action.

To bring suit and recover on a cause of action, a plaintiff must have both standing and capacity. *El T. Mexican Rests.,* 921 S.W.2d at 250. It is recognized that a party may plead himself out of court, e.g., the plaintiff may plead facts which affirmatively negate his cause of action. *Tex. Dept. of Corrections v. Herring,* 513 S.W.2d 6, 10 (Tex.1974) (citing *Schroeder v. Tex. & Pacific Ry. **Co**.,* 243 S.W.2d 261 (Tex.Civ.App.-Dallas 1951, no writ)). Plaintiffs affirmatively negate that they own legal title to Willow's claims, asserting instead a legal theory to overcome that fact, which we have rejected.[7] We conclude that, on the state of the pleadings, Plaintiffs lack capacity to bring Willow's partnership claims. Thus, the suit cannot proceed on those causes of action.
257 We decline to remand for the trial court to engage in a futile inquiry. *Wilson* *257 *v. Texas Parks and Wildlife Dept.,* 8 S.W.3d 634, 635 (Tex.1999) (declining to remand for retrial of issue on which no evidence was offered; such "would be improper and, it appears, futile"); *Sabine Offshore Serv., Inc. v. City of Port Arthur,* 595 S.W.2d 840, 841 (Tex.1979) (declining to remand when futile and not in furtherance of judicial economy). We conclude the claims asserted "on behalf of" Willow were properly dismissed. Accordingly, we need not reach the issue whether Plaintiffs also lacked standing to pursue Willow's claims. In addition, we need not reach other unrelated issues raised by Plaintiff.

IV. Attorney Fees under BIFDL

Coors asserts, on cross-appeal, that the trial court erred in denying **Coors** attorney fees under BIFDL. **Coors** argues it prevailed on the BIFDL claims and an award of attorney's fees is mandatory to the prevailing party in an action brought under BIFDL.

Section 102.79(c) of BIFDL states,

> The *prevailing party to any action* under Subsection (a) of this section shall be entitled to actual damages, including the value of the distributor's business, as specified in Section 102.77 of this code, *reasonable attorney's fees,* and court costs.

TEX. ALCO. BEV.CODE ANN. § 102.79(c) (emphasis added). Subsection (a) provides for a right of action for a "manufacturer or distributor" who is party to a distributorship agreement. If the defending manufacturer or distributor fails to comply with the statute, "the aggrieved manufacturer or distributor *may maintain* a civil action in a court of competent jurisdiction...." *Id.* § 102.79(a) (emphasis added).

Plaintiff's respond that, if they do not have standing under the statute, then the trial court lacks jurisdiction to award attorney's fees, relying on *Smith v. Tex. Improvement **Co**.,* 570 S.W.2d 90, 92 n. 3 (Tex.App.-Dallas 1978, no writ) (when court lacks jurisdiction, court cannot render judgment j.n.o.v.; only valid order is one of dismissal).

We have concluded that Plaintiffs lack standing to bring the BIFDL claims, either in their own right or "on behalf of" Willow. **Coors** thus qualifies as a "prevailing party" within the meaning of section 102.79(c). *Robbins v. Capozzi,* 100 S.W.3d 18, 27 (Tex.App.-Tyler 2002, no pet.) ("prevailing party" successfully prosecutes or defends against an action; prevailing party is one who is vindicated). The BIFDL claims were brought under subsection (a) as section 102.79(c) requires. Further the fee award is mandatory, in that subsection (c) explicitly states the prevailing party "shall" recover reasonable attorney's fees. *See Town East Ford Sales, Inc. v. Gray,* 730 S.W.2d 796, 812 (Tex.App.-Dallas 1987, no writ) (fees mandatory under statutory provision stating "consumer who prevails *shall* be awarded court costs and reasonable and necessary attorney's fees").

The Plaintiffs' reliance on the broad statements in *Smith* is misplaced. That case did not address an issue involving a statutory provision mandating an award of fees. A trial court's dismissal for lack of subject-matter jurisdiction does not prevent the concurrent award of attorney's fees under the mandatory award provision. *See Galveston County Comm'rs Court v. Lohec,* 814 S.W.2d 751, 755 (Tex.App.-Houston [(14th Dist.)] 1991), *rev'd on other grounds,* 841 S.W.2d 361 (Tex.1992) (under declaratory-judgment statute, trial court could award attorneys' fees against party found to have no standing). Further, the statute is worded
258 such that a manufacturer or distributor may *maintain an action* and the prevailing party in that *258 action *shall* recover reasonable attorney fees. Thus, the statutory text mandates the award of fees even if the action cannot be *maintained,* whether

or not it is dismissed for lack of jurisdiction. Accordingly, we reverse the trial court's order denying **Coors** attorney's fees and remand that issue for further proceedings.

Accordingly, we AFFIRM the trial court's dismissal of all of Plaintiffs claims. We REVERSE the trial court's order denying **Coors** attorney's fees under BIFDL and REMAND that issue for further proceedings.

[1] Plaintiffs sued **Coors** for breach of contract and sued both **Coors** and Golden for conspiracy to terminate the Consolidation, negligence per se, and tortious interference. **Nauslar** also asserted that he, individually, was a third-party beneficiary to the Consolidation agreement. We refer to these causes of action collectively as Plaintiffs' common-law actions.

[2] The facts in the cited cases are not analogous: *Allied Chemical **Co**. v. DeHaven,* 824 S.W.2d 257 (Tex. App-Houston [14th Dist.] 1992,) (exceptional circumstances made it inequitable to prevent resigning partner from bringing suit on behalf of partnership during winding-up phase); *Tex. Westheimer Corp. v. 5647 Westheimer,* 68 S.W.3d 15, 21-22 (Tex.App.-Houston [1st Dist.] 2001, pet. denied) (dispute over rights to profit participation owed to partnership by third party; suit instituted during winding-up phase of partnership) In today's case, the partnership was not wound up, but as discussed below, Plaintiffs sold the partnership in its entirety.

[3] It is undisputed that Willow itself has standing to pursue a BIFDL claim. Willow is not a party to this suit and Plaintiffs disavow that they are suing derivatively on any claims that belong to Willow.

[4] Under section 102.71, "distributor" is defined as a person licensed under Section 64.01 or 65.01 of the Act, which sections in turn define the activities a licensed distributor is authorized to perform. TEX. ALCO. BEV.CODE ANN. §§ 64.01, 65.01, 102.71.

[5] Under the Texas Revised Limited Partnership Act (TRLPA), the partnership, not the partners, own the partnership's property. TEX.REV.CIV. STAT. ANN. art. 6132a-7.01 (Vernon Supp.2004-05). When a business entity is acquired in its entirety by another, in the absence of specific terms to the contrary, both the liabilities and assets of the acquired company are transferred to the purchaser. *Duke Energy Field Servs. Assets, L.L.C. v. Nat'l Union Fire Ins. **Co**. of Pittsburgh, PA,* 68 S.W.3d 848, 850 (Tex.App.-Texarkana 2002, pet. denied).

[6] Plaintiffs plead, in their live pleading:

[A]s a condition for gaining its approval, and in tacit acknowledgement of its past wrongdoing, **Coors** extracted a purported release from Willow for claims against **Coors** arising out of its former, illegal conduct.

...

Coors' release also contained the following provision requiring **Nauslar** to represent that he had not assigned Willow's claim to any third party ...

If **Coors** had not conditioned approval of **Nauslar's** sale of Willow and DEN to Miller of Dallas on execution of its release in its original form, and had instead agreed to allow assignments, **Nauslar** would have assigned to himself all rights possessed by Willow to sue **Coors** for the claims alleged in this petition.

[7] In addition, at the end of the first hearing, the trial court ordered Plaintiffs to replead with much more specificity so that you make it clear "who is suing for what, what wrong to whom, when, and causing whatever for what period of damages.... I'm probably going to grant [the pleas to jurisdiction] the next go round if you don't make it clear...." *See Harris County v. Sykes,* 136 S.W.3d 635, 639 (Tex.2004) (if plaintiff given opportunity to amend and still fails to allege facts sufficient to withstand plea to jurisdiction, court should dismiss action).

789 S.W.2d 358 (1990)

NCNB TEXAS NATIONAL BANK, Appellant,

v.

STERLING PROJECTS, INC., Sterling Capital Center, Ltd., MWJ Corp., and Melvin W. Jackson, Jr., Appellees.

No. 05-89-01395-CV.

Court of Appeals of Texas, Dallas.

April 24, 1990.
Rehearing Denied May 23, 1990.

359 *359 Toby L. Gerber, Robert D. Barbee, Dallas, for appellant.

Joseph R. Reznicek, Marc S. Culp, Dallas, for appellees.

Before WHITHAM, ROWE and BAKER, JJ.

OPINION

BAKER, Justice.

NCNB Texas National **Bank** appeals from the trial court's denial of its request for an injunction to prevent **Sterling Projects**, **Inc**., *et al.,* from dissipating rents **Sterling** collected prior to the institution of this action. **NCNB** claims that the trial court erred as a matter of law or, alternatively, abused its discretion by refusing to enjoin **Sterling** from dissipating rents it collected because: (1) **NCNB** held a valid, activated assignment of rents, and the rents **Sterling** collected were subject to the assignment; (2) the case law does not bar assertion of **NCNB's** lien against identifiable rents collected prior to the activation of the assignment; and (3) dissipation of the rents by **Sterling** would constitute a fraudulent transfer. We disagree and affirm the trial court's judgment.

NCNB is the holder of a series of promissory notes executed by **Sterling**. These notes are secured, in part, by a deed of trust and an assignment of rents. **Sterling** defaulted on the note payments. **NCNB** demanded that **Sterling** apply previously collected rents toward the unpaid debt. **Sterling** refused. **NCNB** filed this action seeking an order enjoining **Sterling** from dissipating the collected rents. The trial court denied **NCNB's** requested injunctive relief.

In points one and two, **NCNB** contends that the trial court erred in refusing its requested injunctive relief because it held a valid, activated assignment of the rents and that Texas case law does not bar assertion of its lien against the identifiable rents **Sterling** collected prior to activation of the assignment.

The Texas cases considering assignment of rents clauses have discussed two types: (1) the assignment intended as additional security—that is, a lien; and (2) the absolute assignment—that is, a transfer of title. Under the lien theory, the mortgagee is not the owner of the property and is not entitled to its possession, rents, or profits. *Taylor v. Brennan,* 621 S.W.2d 592, 593
360 (**Tex**.1981). As noted in *Taylor,* it is a *360 common practice to include in the deed of trust, or in a separate instrument, terms assigning to the mortgagee the mortgagor's interest in all rents falling due after the date of the mortgage as additional security for payment of the mortgage debt. *Taylor,* 621 S.W.2d at 593. The Texas cases, when considering the question of rents assigned as security, have followed the common law rule that an assignment of rents does not become operative until the mortgagee takes some affirmative action to enforce the lien, such as taking possession of the property, impounding the rents, securing the appointment of a receiver, or taking some other similar action. *See Simon v. State Mut. Life Assur. Co.,* 126 S.W.2d 682, 686 (**Tex**.Civ.App.—Dallas 1939, writ ref'd); *McGeorge v. Henrie,* 94 S.W.2d 761, 762-63 (**Tex**.Civ.App.—Texarkana 1936, no writ).

On the other hand, an absolute assignment of rents operates to transfer the right to rents automatically upon the happening of a

specified condition, such as default. The absolute assignment does not create a security interest but instead passes title to the rents. An absolute assignment of rents is not security but is a *pro tanto* payment of the obligation. The law favors the assignment of rents as additional security as opposed to the absolute assignment. *See* *Taylor,* 621 S.W.2d at 594.

NCNB argues that *Taylor* has been misinterpreted and that the nature of its rights depends upon the interpretation of the terms of the agreements between the parties. **NCNB** frames the issue as "not whether the assignment is `collateral' or `absolute,' since **NCNB** has never asserted that title to the rents (and a *pro tanto* discharge of the debt) occurred during a pre-default collection, but rather whether the express language of the contracts created a right in **NCNB**, which upon enforcement, extended to the readily identifiable funds of the collateral assigned." During oral argument, **NCNB** conceded, as stated in its brief, that the agreements did not establish an absolute assignment and that **NCNB** does not assert title to the rents. However, **NCNB** does assert that the agreements are something more than a mere pledge and in essence establish an arrangement between the parties requiring **Sterling** to use the collected rents for the limited purposes specified by the agreements—that is, to pay its debt. **NCNB** argues that the two theories established in *Taylor* are not mutually exclusive and that other possibilities exist in which its present assignments fall. **Sterling**, to the contrary, contends that the rent assignment agreements were intended as additional security and that **NCNB's** right to such rents must be triggered by affirmative action on its part. *See* *Taylor,* 621 S.W.2d at 594; *Summers v. Consolidated Capital Special Trust,* 783 S.W.2d 580, 583 (**Tex**.1989).

In our view, the correct interpretation of *Taylor* is that an assignee of rents either takes title to such rents under an absolute assignment or holds only a lien against the rents as additional security. Since **NCNB** concedes that it does not hold an absolute assignment and that it did not have title to the rents, the trial court did not err in denying the relief requested. A trial court abuses its discretion when it acts without reference to guiding rules and principles. *See* *Morrow v. H.E.B., **Inc**.,* 714 S.W.2d 297, 298 (**Tex**.1986). We hold that because it acted with reference to the guiding rules and principles set out in *Taylor* and *Summers,* the trial court did not abuse its discretion. *See* *Taylor,* 621 S.W.2d at 594; *Summers,* 783 S.W.2d at 583. We overrule **NCNB's** points of error one and two.

In its third point of error, **NCNB** contends that it was entitled to injunctive relief under the Uniform Fraudulent Transfer Act. *See* **TEX**.BUS. & COM.CODE ANN., §§ 24.001-.013 (Vernon 1987). However, **NCNB** has failed to point to the record, nor can we find in the record, where it requested the trial court to grant relief on this theory. By failing to allege and submit this theory to the trial court, **NCNB** has failed to preserve it for review. *State v. J.M. Huber Corp.,* 145 **Tex**. 517, 199 S.W.2d 501, 501 (1947);
361 *Security Savings Ass'n v. Clifton,* 755 S.W.2d 925, 932 (**Tex**. App.—Dallas 1988, no writ); **Tex**.R.App.P. *361 52(a). We overrule **NCNB's** point of error number three.

We affirm the trial court's judgment.

WestlawNext

Paris Grocer Co. v. Burks
Supreme Court of Texas. | November 13, 1907 | 101 Tex. 106 | 105 S.W. 174 *(Approx. 5 pages)*

PARIS GROCER CO. et al.

v.

BURKS et al.

Return to list **2** of **49 results** Search term

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by the **Paris Grocer** Company against W. H. **Burks** and others, in which J. R. Shelton, as trustee in bankruptcy of defendant **Burks**, intervened, and such action was consolidated with one brought by the trustee against J. C. **Burks** and another. From a judgment of the Court of Civil Appeals (99 S. W. 1135), affirming a judgment for defendants, plaintiff and intervener bring error. Partly reversed and remanded, and partly affirmed.

West Headnotes (5)

Change View

1 **Attachment** Priorities Between Attachments, and Other Liens or Claims

An attachment lien prevails over a prior unrecorded deed, unless the creditor, prior to the levy, had notice of the deed; and it is immaterial whether the creditor has examined the records as to the debtor's title.

11 Cases that cite this headnote

2 **Attachment** Priorities Between Attachments, and Other Liens or Claims

Though exclusive and visible possession of land by the holder of an unrecorded deed is notice to attaching creditors of the grantor, a creditor need not make inquiry as to a claim other than that of the debtor, in the absence of possession of a third person; and where one conveyed a tract to her son, severing it from land retained by her, and he reconveyed to her, but she did not record the deed, his attaching creditors were not charged with notice of her rights, where she did not reside and had no tenant on the tract, though she grew alfalfa thereon and used the land as a pasture.

32 Cases that cite this headnote

3 **Attachment** Priorities Between Attachments, and Other Liens or Claims

The statute giving an attaching creditor's lien priority over prior unrecorded instruments operates only against claims dependent upon instruments required or permitted to be recorded; and rights to which the law gives rise in certain states of fact, and of which it requires no evidence upon the records or in writing, such as vendors' liens, certain kinds of trusts, etc., are not postponed to the liens of creditors acquired through legal process.

6 Cases that cite this headnote

4 **Evidence** Reservations or Limitations

One having conveyed land by absolute deed may not show an oral promise of the grantee to reconvey unless he should build and live on the land, so as to claim priority over the grantee's attaching creditor, under the rule that a consideration different from or in addition to that expressed may be shown; that rule being applicable only to enforce a vendor's lien or a trust, or to show that a conveyance apparently without consideration was really upon a valuable one, but not to defeat a conveyance.

12 Cases that cite this headnote

5 **Vendor and Purchaser** As to Liens Acquired by Legal Proceedings

Since a vendor's lien arises only out of a sale, one did not have a vendor's lien taking priority over her son's creditor's attachment lien, where she had conveyed land to him for $1 and love and affection, on his oral agreement to reconvey if he failed to build and live on the land; his promise, if treated by the parties as an essential part of the transaction, at most making the gift a conditional one.

1 Case that cites this headnote

Attorneys and Law Firms

***107 **174** Lennox & Lennox, for plaintiffs in error.

***108** A. L. Beaty, for defendants in error.

Opinion

***109** WILLIAMS, J.

***110** A full statement of the character of this litigation will be found in the opinion of the Court of Civil Appeals, 99 S. W. 1135, 17 **Tex**. Ct. Rep. 892. As the questions raised by the application for a writ of error relate only to the controversy concerning the tract of 18 acres of land referred to below, the statement here will be confined to the facts on which those questions depend. Mrs. I. H. **Burks** was the owner of a tract of 72 acres of land, which she occupied as a home. For the 18-acre tract now in controversy, originally a part of the firstnamed tract, she executed to her son, W. H. **Burks**, a deed dated May 20, 1902, and recorded June 9, 1902. The consideration recited in this deed was $1 and love and affection, but it was alleged and proved that at the time of its execution the grantee orally agreed to build and live on the land so conveyed, and that, if he should fail to do so, he would reconvey it to Mrs. **Burks**. Not having performed this agreement, and being unable to do so, W. H. **Burks**, in accordance with it, reconveyed to his mother by deed dated March 30, 1903, and reciting as its consideration the sum of one dollar and love and affection. This deed was not recorded until February 3, 1904. The **Paris Grocer** Company seeks in this case to subject this tract to the lien of an attachment against W. H. **Burks** which at the suit of the **grocer** company was fixed upon it January 20, 1904. The **grocer** company, before it levied the writ, had no notice of the unrecorded deed from W. H. **Burks** to his mother, unless there was such possession by her as, in law, constituted notice. Prior to the conveyance by Mrs. **Burks** to her son the 72 acres were and yet are inclosed by a fence. In the southeast corner there was an inside inclosure planted with alfalfa, which from time to time was cut and used by Mrs. **Burks**. Before making the deed to her son, and preparatory to it, she caused the 18-acre tract in controversy upon the eastern side of the large tract to be surveyed and its lines to be marked with stakes; the line dividing it from the remainder of the tract from which it

was taken running through the inner inclosure, so as to leave a part of it and of the fences inclosing it one the land conveyed to her son and a part on that retained by her. She continuously used the whole of this inclosure up to the time of the levy without change in such use, except that during the year immediately preceding the levy she discontinued the cutting of the alfalfa and used the land as a pasture. During the same period she also used the remainder of the 18 acres in connection with her home as a pasture. None of her houses or other improvements, except the fences referred to, were ever on the tract in controversy. From the autumn of 1903 down to the time of trial W. ***175** H. **Burks** lived with his mother in her home, except for a time in the summer of 1904 after the attachment was levied. This is a contention between the parties as to the fact last stated, but the uncontradicted evidence in the record shows it to be as stated.

That the lien of the attachment must prevail over the unrecorded deed, unless the creditor, prior to the levy, had notice of such deed, is a proposition put beyond all question by the decisions of this court. The right of the creditor is purely statutory, and requires nothing ***111** but the concurrence of the conditions required by the statute to make it complete. The statute by its terms makes void the unrecorded deed as against 'all creditors,' but the courts hold this to mean all creditors who have acquired liens without notice of the deed. When these elements exist the right of the creditor is perfect in law, and no considerations of equity or questions of estoppel enter into the case. It is wholly immaterial whether the creditor has ever examined the records as to the title of his debtor or not, since a deed of the property executed by the latter is by the statute made void as against the lien of the former, unless he is affected with notice. It is equally well settled, however, that an open, exclusive, and visible possession, maintained by the holder of the unrecorded deed when the right of the creditor attaches, is notice of the right under which it is held. This is so, for the reason that one who seeks to acquire an interest in or with respect to land is expected, in the exercise of common prudence, to learn of a possession held by others than him whose rights he purposes to acquire, and to make inquiry of the possessor as to the nature of the claim under which he holds. Watkins v. Edwards, 23 **Tex**. 443; Mullins v. Wimberly, 50 **Tex**. 464. Having such opportunities, of which prudence dictates that he shall avail himself, one who has omitted to do so will not be heard to deny that he had notice of a fact of the existence of which he was thus put upon inquiry. But the fundamental fact essential to the application of this doctrine is that of a possession visibly that of some one who is not the person with whom the purchaser or creditor purposes to deal. He is not required to institute inquiries as to the existence of rights of which there is no evidence upon the records, unless there be some fact which he knows or should know sufficient to excite inquiry in the minds of prudent persons. A possession openly that of one other than his debtor or vendor is such a fact; but is a possession sufficient which does not appear to be that of a third person? The reason upon which the doctrine is founded does not warrant an affirmative answer. The authorities lay it down that the possession must be open and visible and unequivocal, meaning that it must be openly, visibly, and unequivocally that of the claimant under the unrecorded instrument. Now, it is true that the evidence adduced at the trial develops that Mrs. **Burks** had possession of the 18 acres at the time of the levy; but it is not true that such possession was so held and exercised that it appeared to be hers, rather than that of W. H. **Burks**. She did not reside on it and had no tenant on it. She used it in connection with the tract on which she did reside; but it must not be forgotten that by the deed she had severed it and the parts of the fence which were on it from her own tract, and made it a separate tract belonging to her son. His situation with reference to it was such as to have enabled him to put it to the use shown to have been made of it. That use, apparently, was only such as might as well have been attributed by an observer to him as to her. Nothing in it would have been suggested to one having no other knowledge that it was hers, rather than his. As we have said, the creditor was not bound to make inquiry to find out a claim other than that of the debtor, in the absence of such a possession as pointed to a third person ***112** as the possessor, and for this purpose the use of the land under the circumstances shown

was, in our opinion, clearly insufficient. Wade on Notice, § 291.

We are not holding that Mrs. **Burks** and her son were jointly in possession, either of her home or, after the reconveyance, of the tract in controversy. When the facts are all developed, the possession appears to have been legally hers; but those facts were unknown to the creditor, and the possession was not held in such a way as in itself to show that it was hers. Nor do we lay down any doctrine inconsistent with the decision in Mainwarring v. Templeton, 51 **Tex**. 205, which holds that, where the owner of land on which he has a tenant conveys to another to whom the tenant attorns, no other change of possession is necessary to give notice of the title of the purchaser. There was no uncertainty as to the possession in that case, the tenant openly and unequivocally living on the land and holding for his landlord. In the case of Eylar v. Eylar, 30 **Tex**. 315, it is held that continued possession by a grantor after he had conveyed the land possessed is no notice of an unrecorded claim of his inconsistent with that of his grantee. That decision does not, as contended by the defendant in error, state merely a doctrine of estoppel in favor of a purchaser, as some other cases somewhat like it do (Heidenheimer v. Stewart, 65 **Tex**. 321; Graves v. Kinney, 95 **Tex**. 210, 66 S. W. 293), but lays down a rule as to the effect of possession as notice under circumstances such as there existed; and we think no sound reason could be given for holding that a possession which was not notice to a purchaser would be notice to a creditor, when both take their rights under the same statute. We do not, however, rest our present decision upon the Eylar Case and others which follow it. Difficulties arise in the application of its doctrine in cases like this, where the claild of ****176*** the possessor does not arise out of a secret understanding or reservation characterizing the transaction in which he apparently conveyed his entire title, but out of a reconveyance taking place with a considerable interval of time between it had that relied on as a divestiture of his title and possession. Whether the rule laid down in the case referred to applies in cases like this at all, and, if so, whether the fact that a person in possession has executed a vonveyance of the land possessed is to be held to destroy for all time the effect of such possession as notice, we deem it unnecessary at this time to determine. Smith v. Montes, 11 **Tex**. 25; Harn v. Smith, 79 **Tex**. 313, 15 S. W. 240, 23 Am. St. Rep. 340. We content ourselves with holding that the possession exercised by Mrs. **Burks** in this case was of too uncertain and equivocal a kind to constitute notice of her unrecorded deed.

Counsel for the defendants in error argue that, if the deed be disregarded, still Mrs. **Burks** has rights growing out of her original agreement with her son which are not subject to the operation of the statute, and which are superior to the plaintiffs' lien. It is true that the statute operates only against claims dependent on instruments which are required or permitted to be recorded, and rights to which the law gives rise in certain states of fact and of which it requires no evidence upon the records or in writing, such as vendors' ****113*** liens, certain kinds of trusts, and, perhaps, others that might be instanced, are not postponed to rights of creditors resulting from the mere acquisition of liens by legal process; but we are of the opinion that no right of that character was in Mrs. **Burks**. Her especial contention is that the promise of her son to build upon and occupy the land constituted the consideration for the conveyance to secure which she had a vendor's lien upon the property conveyed. But a vendor's lien arises only out of a sale, and is given to secure the purchase money. Without pausing to consider whether or not so indefinite a consideration as that set up could in any case give rise to a lien (see 29 Am. & Eng. Ency. Law, pp. 744-746, and authorities cited), we dispose of this contention by stating the obvious fact that there was not a sale, but a gift, of this land. If the promise of the grantee was treated by the parties as an essential part of the transaction, which the evidence by no means makes clear, it could only be regarded as being essential as a condition subsequent, making the gift a conditional one. The authorities relied on to sustain the claim of a vendor's lien are Rainey v. Chambers, 56 **Tex**. 17, White v. Street, 67 **Tex**. 177, 2 S. W. 529, and Mayer v. Swift, 75 **Tex**. 370, 11 S. W. 378. In the first case it was held that a lien existed upon land conveyed by a mother to her son by deed reciting a paid

consideration, to secure his agreement to pay a stated sum of money yearly towards her support during her lifetime, which agreement was shown by parol to have been the true consideration for the land. In the second case there was an exchange of lands. In both it was held that a vendor's lien existed to secure the rendering of the stipulated consideration. In other words, there were, in effect, sales of the land, for considerations to be rendered in future, and the value of those considerations in money was ascertainable. The third case involved a proceeding to set aside for fraud and imposition a conveyance of her home by an infirm old woman to the defendant in order to obtain a support by him during her life, for which the deed contained a stipulation, and it was expressly said: 'The character of the consideration mentioned in the deed makes the remedy by suit to enforce vendor's lien inapplicable, but by no means enables appellant to hold the land without discharging the consideration. The consideration stated in the deed is a charge upon the land which courts of equity may enforce without rescinding the deed.' The court also held the facts would have justified a finding of imposition practiced by the defendant on the plaintiff to authorize a cancellation of the instrument, but that the mere failure of the defendant to support the plaintiff would not justify such a remedy. The proposition last stated was also laid down in Rainey v. Chambers.

It is apparent that these decisions do not sustain the contention that Mrs. **Burks** had a vendor's lien on the land to secure the performance of her son's promise. Had she at the time of the levy any other right growing out of the oral promise, not expressed in the deed, which she could have enforced against her son and which was not subject to the registration laws? Her deed upon its face was an ***114** unconditional conveyance and passed the title to the land. Whatever may be the nature sought to be ascribed to the claim asserted under the parol evidence, it is in truth an attempt to ingraft upon the deed a parol condition. That this cannot be done we understand the authorities to hold uniformly. In connection with allegations of fraud, accident, or mistake, such a stipulation and its nonperformance may be employed in equity as the basis for a cancellation; but the bare effort to use it as in itself furnishing a ground for defeating or qualifying the deed is opposed to the well-settled rule that such instruments cannot be added to by parol. This cannot be evaded by calling the promise the consideration of the deed and invoking the rule, often laid down, that a consideration different from or in addition to that expressed may be shown. This may be done when such evidence has some legitimate purpose to accomplish in the case, such as to enforce a vendor's lien or a trust, or to show that a conveyance apparently without consideration was really upon a valuable one; but such evidence may not be used to defeat the deed as a conveyance. The evidence introduced here does not tend to show either a ***177** lien or a trust, and, as the title which passed by the deed could not be affected by the evidence introduced, it tended to establish no controlling fact. G., H. & S. A. Ry. Co. v. Pfeuffer, 56 **Tex**. 66; H. & T. C. Ry. Co. v. McKinney, 55 **Tex**. 187; East Line & Red River R. R. Co. v. Garrett, 52 **Tex**. 133; Kahn v. Kahn, 94 **Tex**. 119, 58 S. W. 825; Marshall Co. High School Co. v. Iowa Evangelical Synod, 28 Iowa, 360; Moser v. Miller, 7 Watts (Pa.) 156; Chapman v. Gordon, 29 Ga. 250.

The reconveyance by the son was a recognition of the moral obligation assumed in receiving the deed from his mother, and it may therefore be true that the reconveyance was upon a consideration that would protect it from the attack of the creditor made upon the ground that it was voluntary (Bicocchi v. Casey-Swasey Co., 91 **Tex**. 271, 42 S. W. 963, 66 Am. St. Rep. 875); but Mrs. **Burks** could not, under the rule of evidence, have shown the parol condition in order to defeat the deed which she had made, or to compel a reconveyance. Her legal right to the land, therefore, depended on the deed from her son, which, as we have seen, does not affect the creditor attacting without notice. That creditor became entitled to insist upon the legal effect of the deed under which the debtor held the land and upon the rule excluding the parol evidence. The evidence as it stands in the record does not sustain the judgment, and in so far as it denies to the plaintiffs in error the right to subject the 18 acres to their attachment it will be reversed, and the cause remanded for further trial. As to the

other matters, the judgment is affirmed.

Reversed in part; affirmed in part.

Parallel Citations

105 S.W. 174

End of Document

971 S.W.2d 439 (1998)

Patti PATTERSON, M.D., Interim Commissioner of Health, in her official capacity, William Reyn Archer, recently appointed Commissioner of Health, in his official capacity, and the Texas Department of Health, Appellants,

v.

PLANNED PARENTHOOD OF HOUSTON AND SOUTHEAST TEXAS, INC., Appellee.

No. 97-0889.

Supreme Court of Texas.

Argued February 4, 1998.
Decided June 23, 1998.

Edward P. Watt, Daniel R. Castro, Austin, Kelly J. Shackelford, Dallas, Dedra L. Wilburn, Dan Morales, Toni Hunter, Laquita A. Hamilton, Austin, for Appellants.

Martha S. Dickie, David C. Duggins, Charles R. Burton, Austin, for Appellee.

HANKINSON, Justice, delivered the opinion of the Court, in which PHILLIPS, Chief Justice, and HECHT, ENOCH, SPECTOR, OWEN, and BAKER, Justices, joined.

440 On direct appeal, the Texas Commissioner of Health asks us to reverse the judgment of *440 the trial court declaring rider 14 to the 1997-1999 Department of Health family planning appropriation to be unconstitutional. The rider forbids the use of state funds to dispense prescription drugs to minors without parental consent. **Planned Parenthood** challenged rider 14 on the grounds that it conflicts with federal law and violates the unity-in-subject clause of the Texas Constitution. Because we determine that the challenge to rider 14 is not ripe, we vacate the trial court's judgment and dismiss this case for want of jurisdiction.

The State of Texas voluntarily participates in four federal programs that provide funds for family planning services: (1) Title X of the Public Health Service Act, 42 U.S.C. § 300, which provides project grants to public and private agencies for family planning services; (2) Temporary Assistance to Needy Families, 42 U.S.C. § 701 (TANF, also known as the Welfare Reform Act), which provides grants to the states to assist needy families; (3) Title XIX of the Social Security Act, 42 U.S.C. § 1396 (Medicaid), which provides medical care to the needy through a cooperative federal-state program; and (4) Title XX of the Social Security Act, 42 U.S.C. § 1397, which provides block grants to the states for social services, including family planning. The funds from these four programs compose the state's family planning appropriation, identified in the General Appropriations Act as Department of Health Strategy D.1.2. See General Appropriations Act, 75th Leg., R.S., ch. 1452, 1997 Tex. Gen. Laws 5535, 5663. The federal government is the sole source of funds for all the programs except Medicaid. As a voluntary participant in the Medicaid program, the state agrees to match every nine dollars of federal funds with one dollar of state funds. See 42 U.S.C. § 1396b(a)(5). In 1997 the legislature appropriated approximately $93 million for family planning services for each year of the coming biennium, with approximately $5.4 million per year representing the state's required matching funds for Medicaid. In 1997 the legislature also attached rider 14 to the family planning appropriation, declaring that "no state funds may be used to dispense prescription drugs to minors without parental consent." General Appropriations Act, 75th Leg., R.S., ch. 1452, 1997 Tex. Gen. Laws 5535, 5675.

As part of its family planning services, plaintiff **Planned Parenthood** of Houston and Southeast Texas, Inc., provides prescription medication, including contraceptives and drugs for treating sexually transmitted diseases, to minors without requiring parental consent. **Planned Parenthood** contracts with the state to receive funds for these services under Title X, Title XX, and TANF. **Planned Parenthood** is also an enrolled Medicaid provider, and is reimbursed on a fee-for-service basis by the Department of Health (through an insurance program) for the family planning services it provides to Medicaid-eligible individuals. The federal regulations governing these programs have been interpreted to proscribe the imposition of a parental notification or consent requirement. See New York v. Heckler, 719 F.2d 1191, 1196 (2d Cir.1983) (invalidating federal regulation requiring parental notification of prescription contraceptives as unauthorized by Title X); **Planned Parenthood** Ass'n v.

Schweiker, 700 F.2d 710, 722 (D.C.Cir.1983) (explaining that federal regulations forbid state from denying Title X services to minors who lack parental consent); T___ H___ v. Jones, 425 F.Supp. 873, 878 (D.Utah 1975), aff'd in part, 425 U.S. 986 (1976) (invalidating state parental consent requirement for family planning services as conflicting with federal welfare and Medicaid requirements).

Concerned about what it perceived to be a conflict between the federal program rules' forbidding a parental consent requirement and rider 14's explicit parental consent requirement, **Planned Parenthood** asked defendant Texas Department of Health about the Commissioner of Health's opinion on the effect of rider 14 on family planning funds. The Department of Health and its commissioner are charged with administering and distributing funds the legislature appropriates for family planning services. The Commissioner in turn requested an opinion from the United States Department of Health and Human Services (DHHS). A regional health administrator for DHHS replied by letter that, in his view, rider 14 "is, on its face, inconsistent with the applicable
441 Title X family *441 planning legislative authority and implementing regulations. Because the Title X Family Planning Program operates under total budgeting principles, if this Rider is fully implemented, the Texas Department of Health would be ineligible to receive Title X funding." The concept of "total budgeting principles" means that if a family planning program receives any money through Title X, Title X regulations apply to all of the funds in that program, "including but not limited to grant funds, grant-related income or matching funds." 42 C.F.R. 59.2 (1997).

In light of this express suggestion that Texas might lose its federal family planning funds, **Planned Parenthood** filed this action against the Department and its commissioner seeking a declaration that rider 14 is unconstitutional. It alleged that the rider violates the Supremacy Clause, Article 6, Clause 2, of the United States Constitution by imposing a parental consent requirement in conflict with federal law, and violates the unity-in-subject clause, article III, section 35, of the Texas Constitution by amending or repealing certain provisions of the general law in an appropriations act.

At trial before the court, the parties stipulated to a number of facts, including that "[e]ffective September 1, 1997, **Planned Parenthood** will no longer be eligible to receive Medicaid funds for providing prescription medication to minors without consent." **Planned Parenthood** called as its sole witness Carol Pavlica, the director of the family planning program for the Department of Health. She explained that although the Department had not yet made any final or official decisions, it was considering two plans in its efforts to implement rider 14. Under the first plan (identified by the parties as "Plan A"), the state would simply require all minors receiving prescription drugs from family planning programs to have parental consent. She acknowledged that in her opinion this plan would jeopardize all federal family planning funds.

To avoid potentially jeopardizing federal family planning funds, the Department was considering a second plan ("Plan B"). Under Plan B, the state would continue to pay for prescriptions to minors without parental consent, but would pay for those prescriptions with federal funds other than Medicaid funds (Medicaid being the only program with a matching state component), including prescriptions for Medicaid-eligible minors. Thus under this plan, in Pavlica's opinion, the state could comply with the legislature's dictate that no state funds be used to dispense prescription drugs to minors lacking parental consent, without violating the federal rules that receipt of family planning services cannot be conditioned on parental consent, or jeopardizing other federal family planning funds. She made clear that under Plan B, neither **Planned Parenthood** nor its minor clients (including those eligible for Medicaid) would suffer any change in requirements, services, or funding; in other words, the state does and will continue to pay for prescriptions for minors even if they lack parental consent, but from federal funds without a state matching fund component. She also testified she believed the state would not be jeopardizing its federal funds by implementing Plan B because the state would not in fact be imposing a parental consent requirement.

The trial court declared rider 14 unconstitutional on the bases that (1) it conflicts with the federal laws governing the four federal programs in the family planning appropriation, and (2) it violates article III, section 35, of the Texas Constitution by attempting to repeal or amend certain provisions of Chapter 32 of the Texas Human Resources Code. The court rendered judgment enjoining the Commissioner from implementing rider 14. It also issued detailed findings of fact and conclusions of law.

Under federal law, the trial court concluded that the rules governing the federal family planning programs in which the state participates forbid imposition of parental consent requirements, and preempt any state law to the contrary that would affect programs drawing on those federal funds. Although the trial court termed it "an admirable effort" to comply with both federal law and rider 14, the court concluded that the Department's proposed plan to track prescriptions and payments (Plan B) and use
442 federal funds without a state matching component to *442 pay for prescriptions without parental consent would not avoid the conflict with federal law: "While a state can restrict the use of state money appropriated solely for state purposes, a state cannot restrict the use of state money appropriated to match federal money. Under federal law, matching money must come without

restrictions or it is not matching money."

Under Texas law, the trial court rejected **Planned Parenthood's** assertion that the rider amended or repealed Chapter 32 of the Family Code (permitting consent by a nonparent to treatment of a minor under certain circumstances), but ruled that it did amend or repeal certain provisions of Chapter 32 of the Human Resources Code (governing the state's medical assistance program for needy individuals). It determined that section 32.024(a) of the Human Resources Code requires the Department of Health to provide medical services to the needy in accordance with federal law, and section 32.031(b) authorizes the Department to spend state funds to do so. Thus the trial court concluded that the rider unconstitutionally amended general law by bringing the state out of compliance with the federal rules governing family planning funds: "Texas has chosen in its own general law to spend its funds consistent with federal law, and a rider cannot amend or repeal that general law." The trial court also concluded that **Planned Parenthood** had standing to bring its claims because it receives part of the funds that the state is placing at risk by enforcing a rider in conflict with federal law, and that even the Department's proposed plan to use federal funds without a state matching component did not resolve that conflict. Based on the letter from DHHS, the court concluded that "[t]his threatened cut-off of federal funds—which directly threatens **Planned Parenthood**—is sufficient to give **Planned Parenthood** standing to force compliance with the law." The court also premised standing on its finding that the administrative costs of implementing Plan B would be paid for with funds that would otherwise be available to **Planned Parenthood** to assist needy individuals.

While the trial court framed this issue as one of standing, we view it more precisely as one of ripeness. Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction, *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 928 (Tex.1998), and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented. *See* DAVIS & PIERCE, II ADMINISTRATIVE LAW TREATISE, § 15.12, at 361 (3d ed. 1994) ("In many cases the two problems of standing and ripeness are merged; a party may lack standing because what has happened to him is not far enough developed, but the lack of development may be the essence of unripeness."). But if standing focuses on the question of who may bring an action, *see Barshop v. Medina County Underground Water Conservation Dist.,* 925 S.W.2d 618, 626-627 (Tex.1996), ripeness examines when that action may be brought. At the time a lawsuit is filed, ripeness asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote. *See* Nichol, *Ripeness and the Constitution,* 54 U. CHI. L.REV. 153, 169 (1987); 13A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3532.1, at 130 (2d ed.1984). Ripeness thus focuses on whether the case involves "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." Wright, *supra,* § 3532, at 112. By maintaining this focus, the ripeness doctrine serves to avoid premature adjudication. While the standing doctrine has been much criticized, ripeness, especially in its pragmatic focus, has found the approval of commentators. *See, e.g.,* Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers,* 68 N.D. L.REV. 1, 19-20 (1992); WRIGHT, *supra,* § 3532, at 112 ("As compared to standing, ripeness decisions have developed a generally satisfactory method for resolving the problems of prematurity.").

The constitutional roots of justiciability doctrines such as ripeness, as well as standing and mootness, lie in the prohibition on advisory opinions, which in turn stems from the separation of powers doctrine. *See* TEX. CONST. art. II, § 1 (separation of powers), art. IV, §§ 1, 22 (attorney general is part of the executive department, and is empowered to issue advisory opinions to
443 the governor *443 and other officials), art. V, § 8 (district court jurisdiction); *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 444 (Tex.1993) (explaining that "we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department"); *Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641, 646 (1933) (explaining that under the constitution, appellate court jurisdiction does not extend to issuing advisory opinions); *see also Farmers Tex. County Mut. Ins. Co. v. Griffin,* 955 S.W.2d 81, 84 (Tex.1997) (reviewing justiciability principles in light of 1985 constitutional amendment to district court jurisdiction).

The courts of this state are not empowered to give advisory opinions. *Wessely Energy Corp. v. Jennings,* 736 S.W.2d 624, 628 (Tex.1987); *United Servs. Life Ins. Co. v. Delaney,* 396 S.W.2d 855, 859 (Tex.1965); *Alamo Express v. Union City Transfer,* 158 Tex. 234, 309 S.W.2d 815, 827 (1958). This prohibition extends to cases that are not yet ripe. *See Camarena v. Texas Employment Comm'n,* 754 S.W.2d 149, 151 (Tex.1988); *Public Util. Comm'n v. Houston Lighting & Power Co.,* 748 S.W.2d 439, 442 (Tex.1987); *City of Garland v. Louton,* 691 S.W.2d 603, 605 (Tex.1985); *California Prod., Inc. v. Puretex Lemon Juice,* 160 Tex. 586, 334 S.W.2d 780, 783 (1960). A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass. *See Camarena,* 754 S.W.2d at 151 (holding trial court could not grant relief based on "a hypothetical situation which might or might not arise at a later date. District courts, under our Constitution, do not give advice or decide cases upon speculative, hypothetical or contingent situations").

The concerns addressed by the ripeness doctrine encompass more than a question of constitutional prohibition. The doctrine has a pragmatic, prudential aspect that is directed toward "[conserving] judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes." *Mayhew,* 964 S.W.2d at 928; *see also* Nichol, *supra,* at 174 ("ripeness analysis carries the banner of prudence rather than power"). Refraining from issuing advisory opinions and waiting for cases' timely factual development is also essential to the proper development of the state's jurisprudence. *See* Entman, *Flawed Activism: The Tennessee Supreme Court's Advisory Opinions on Joint Tort Liability and Summary Judgment,* 24 MEM. ST. U.L.REV. 193, 199 (1994); Frankfurter, *A Note on Advisory Opinions,* 37 Harv. L.Rev. 1002, 1002-03 (1924). "Litigation based upon hypothetical possibility rather than concrete fact is apt to be poor litigation. The demand for specificity, therefore, stems from a judicial desire for better lawmaking." Nichol, *supra,* at 177; Wright, *supra,* § 3532.3, at 147 ("adjudication may be postponed until a better factual record is available, `[e]ven though the challenged statute is sure to work the injury alleged.'") (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 300, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). Moreover, avoiding premature litigation prevents courts from "entangling themselves in abstract disagreements over administrative policies" while at the same time serving to "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *City of El Paso v. Madero Dev. & Constr. Co.,* 803 S.W.2d 396, 398-99 (Tex.App.—El Paso 1991, writ denied) (citing *Abbott Lab. v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)); *see also* DAVIS & PIERCE, *supra,* § 15.12, at 360 (explaining that ripeness law "limits the ability of courts to intrude excessively on the policymaking domains of the politically accountable [branches of government]"); Nichol, *supra,* at 178 (similarly noting that ripeness doctrine "allows the courts to postpone interfering when necessary so that other branches of government ... may perform their functions unimpeded").

We examine the ripeness of **Planned Parenthood's** claims in light of these principles. **Planned Parenthood** argues that any implementation of rider 14 will result in it losing federal funds, at the very least those provided through Title X. Thus **Planned**
444 **Parenthood** urges that it is in immediate danger *444 of sustaining some direct injury because of the Department's **planned** implementation of rider 14. **Planned Parenthood** further argues that it is unclear whether the Department can legitimately separate federal and state funds, and that even if the Department can lawfully implement such a plan, **Planned Parenthood** is harmed by the administrative costs of implementation.

The record does not support **Planned Parenthood's** assertions. Pavlica, the sole witness, explained that the Department had not finalized its plans, but was leaning to Plan B, and had only just begun investigating what automation demands Plan B might require. She emphasized that **Planned Parenthood** and its clients would experience no change in actual services provided or paid for under Plan B, but that only the funding source for some of the prescriptions would change. She testified that the Department would not in fact require parental consent before paying for prescriptions to minors under Plan B: "We would not change the parental consent requirements so minors would continue to be served." The letter from DHHS does not specifically address Plan B, but refers to rider 14 *"on its face,"* states that Texas may be ineligible to receive Title X funds *"if* [rider 14] is fully implemented," and clearly assumes that parental consent will be required before any drugs are prescribed. (Emphasis added.) Nothing in the record demonstrates that the federal government has actually considered Plan B, much less suggested revoking or withdrawing funding based on it. Likewise, no evidence supports the trial court's conclusion that the administrative costs of implementing Plan B would come from family planning program funds that would otherwise have gone to **Planned Parenthood**, or even the actual amount of what those administrative costs would be. Pavlica testified that although she was "not exactly sure" what the administrative costs might be, based on her experience, she "would guess ... [that] it would be several hundreds of thousands of dollars" to segregate the funds. She did not suggest or even speculate about where the administrative funds would come from. This testimony is not specific enough to support the conclusion that harm to **Planned Parenthood** is imminent.

This is precisely the kind of case in which resolution of the claim presented depends on the occurrence of contingent future events that may not occur as anticipated or may not occur at all. We simply do not know what the federal government will do if the state carries out its plan to segregate the funds, and the record does not even demonstrate what exactly the state will do. Without knowing what the federal government will do, **Planned Parenthood** cannot show a conflict between federal and state demands or that the state's proposed action will cause it any injury. While **Planned Parenthood** does not have to wait until its funds are actually revoked or cut off, its potential injury must be more certain; the threat must be established by something more definite than the DHHS letter presented in this case, which does not address whatever final action the Department of Health may take to meet its statutory obligations to the legislature and Congress. Because its alleged injury remains contingent, **Planned Parenthood's** claim is not yet ripe for review.

The essence of the ripeness doctrine is to avoid premature adjudication of just such a situation; to hold otherwise would be the

essence of an advisory opinion, advising what the law would be on a hypothetical set of facts. Neither this Court nor the trial court has the power to do so. Accordingly, we vacate the trial court's judgment and dismiss this case for want of jurisdiction.

GONZALEZ, J., filed a concurring opinion, in which ABBOTT, J., joined.

GONZALEZ, Justice joined by ABBOTT, Justice, concurring in the judgment.

I concur with the Court that the challenge to rider 14 is not ripe. I write separately to address the threshold issue the Court leaves open—whether **Planned Parenthood** has standing to challenge rider 14, even assuming the case is ripe. I would dismiss the case because **Planned Parenthood** lacks standing either in its own right or on behalf of the minors of the State of Texas.

445 *445 In Texas, "[a] two-part test governs whether a plaintiff has standing to challenge a statute." *Barshop v. Medina Underground Water Conservation Dist.,* 925 S.W.2d 618, 626 (Tex.1996). First, the "plaintiff must ... suffer some actual or threatened restriction under that statute." *Texas Workers' Compensation Comm'n v. Garcia,* 893 S.W.2d 504, 518 (Tex.1995). "Second, the plaintiff must contend that the statute unconstitutionally restricts the plaintiff's rights, not somebody else's." Id.

Planned Parenthood maintains that rider 14 "unconstitutionally restricts its own rights" in two ways. First, if the United States Department of Health and Human Services (DHHS) determines that Texas Department of Health's implementation of rider 14 will result in a loss of federal family planning funds, then **Planned Parenthood** "will not be able to subsidize all the costs of providing expensive prescription drugs to minor patients who cannot obtain parental consent." Second, even if the DHHS is satisfied that "Plan B" does not violate federal regulations, **Planned Parenthood** claims it is harmed by the administrative costs expended to implement Plan B. However, **Planned Parenthood** fails to identify the source of its "right" or "entitlement" to Texas tax revenues or to the most efficient and cost-effective administration of those tax revenues.

In *Texas Association of Business v. Texas Air Control Board,* 852 S.W.2d 440 (Tex. 1993), we held that "[t]he standing requirement stems from two *limitations* on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision." *Id.* at 443 (emphasis added). The open courts provision provides:

> All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13. We held that this provision "contemplates access to the courts *only for those litigants suffering an injury."* 852 S.W.2d at 444 (emphasis added). This provision, which authorizes the courts to remedy injuries done in one's "lands, goods, person or reputation," implicitly defines the bounds of potentially justiciable issues. *Cf. Baptist Mem'l Hosp. Sys. v. Arredondo,* 922 S.W.2d 120, 121 (Tex.1996) (recognizing that under the open courts provision, the legislature may limit a cause of action unless it unreasonably restricts "a well-recognized common law cause of action"). For a plaintiff to have standing, it must demonstrate that it at least arguably has some legal or liberty interest grounded in the constitution, a statute, or the common law. *See Spring Branch I.S.D. v. Stamos,* 695 S.W.2d 556, 561 (Tex.1985) ("A property or liberty interest must find its origin in some aspect of state law.").

Planned Parenthood, therefore, must have some arguable basis for asserting that rider 14 abrogates some legal or liberty interest of its own. **Planned Parenthood** has not alleged that rider 14 abridges any common law right arising under property, tort, or contract law. It has not identified any fundamental right to state subsidization, *see Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it."), or to the most efficient and least wasteful administration of the state's health care resources. *Cf. Flast v. Cohen,* 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) ("[To establish Article III standing] [i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."). Generally, a state's choice of whether to fund a particular program or the efficiency of its administration is not actionable. Furthermore, **Planned Parenthood** does not identify any implicit right or entitlement owing it under the Texas Constitution or the Texas Human Resources Code abridged by rider 14, even if federal funds are cut off.

The unity-in-subject clause of the Texas Constitution does not, by itself, provide **Planned Parenthood** any legal or liberty interest. *See* TEX. CONST. art. III, § 35. This Court has previously invalidated riders as void under Section 35 of Article III of the
446 Texas Constitution, but only where the plaintiff asserted an otherwise protected interest. *446 In *LeCroy v. Hanlon,* 713 S.W.2d

335, 338 (Tex.1986), for example, this Court held that sections of an omnibus fee bill increasing filing fees violated the "caption requirement" of Article III, Section 35. However, the plaintiff's standing to raise this claim was not in doubt because he claimed that the filing fees burdened his personal, constitutional right to open courts. *See id.* at 337. In *Moore v. Sheppard,* 144 Tex. 537, 192 S.W.2d 559, 562 (1946), this Court held that an amendment to an appropriation bill directing that fees paid to clerks for either official or unofficial documents be deposited with the State Treasury violated the unity-in-subject clause. There, the plaintiffs' standing was also not in question, because they had an arguable property interest in the compensation they received "for [services] that they [had] no obligation, under the law, to perform." *Id.* at 560.

Planned Parenthood asserts that rider 14 conflicts with the purposes of Section 32 of the Human Resources Code. That section provides, in pertinent part, that:

> (a) This chapter shall be liberally construed and applied in relation to applicable federal laws and regulations so that adequate and high quality health care may be made available to all children and adults who need the care and are not financially able to pay for it.
>
> (b) If a provision of this chapter conflicts with a provision of the Social Security Act or any other federal act and renders the state program out of conformity with federal law to the extent that federal matching money is not available to the state, the conflicting provision of state law shall be inoperative to the extent of the conflict but shall not affect the remainder of this chapter.

TEX. HUM. RES.CODE § 32.002. This section provides indigent children and adults with a statutory interest in maintaining the flow of federal health care funds, but it does not give **Planned Parenthood**, a conduit for these taxpayer-supported services, a similar statutory interest. The statute's purposes are directed to the beneficiaries of the state and federal funds, not to fund **Planned Parenthood's** budget.

What the Legislature gives the Legislature can take away. The adults and children deprived of further entitlements may have a remedy if the process by which the Legislature terminates them does not accord with due process. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 263-64, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (holding that procedural due process requires that evidentiary hearing be held before public assistance payments to welfare recipients are terminated); *Goldsmith v. United States Bd. of Tax Appeals,* 270 U.S. 117, 123, 46 S.Ct. 215, 70 L.Ed. 494 (1926) (holding that Board's refusal to admit petitioner to the practice of law without a prior hearing or statement of reasons for denial violated due process). **Planned Parenthood** has no standing in its own right to challenge rider 14's alleged conflict with the provisions of the Texas Human Resources Code.

In its Original and First Amended Original Petition, **Planned Parenthood** argued that it has standing to represent the interests of the minors of the State of Texas. Under Texas law, however, only the parents or guardians of a minor may represent their legal interests. *See* Tex. Fam.Code § 151.003(a)(7). **Planned Parenthood** is not the surrogate parent of Texas's minor children. Its status as an advocacy organization for certain rights of minors (e.g., access to contraceptives without parental consent) does not confer it standing. *See, e.g., Texas Dep't of Mental Health and Mental Retardation v. Petty,* 778 S.W.2d 156, 163-66 (Tex.App.—Austin 1989, writ dism'd w.o.j.) (holding that Advocacy, Inc., a non-profit advocacy organization for the rights of the mentally disabled, lacked standing to sue on behalf of the rights of the mentally disabled).

The question of **Planned Parenthood's** standing to represent the minors of the state of Texas obscures the larger issue underlying this case—parental rights. The purpose of rider 14 was to withhold state funds from a program that, as currently implemented, interferes with parental supervision over the health care and sexual behavior of minor children. Indeed, **Planned Parenthood's** policy of providing minors prescription drugs without parental consent, for which it seeks this state's subsidies, is inconsistent with Texas law. Section 151.003(a)(6) of the Texas Family Code provides, in pertinent part:

447 *447 (a) A parent of a child has the following rights and duties:

> ...
>
> (6) *the right to consent* to the child's marriage, enlistment in the armed forces of the United States, *medical* and dental care, and psychiatric, psychological and surgical treatment....

TEX. FAM.CODE § 151.003(a)(6) (emphasis added).

The importance of parental involvement in minors' decisions to avail themselves of contraceptive or abortion services is aptly

illustrated in the amicus brief of several families supporting rider 14 who unsuccessfully attempted to intervene at the trial level. The daughter of one of the individuals filing the amicus brief was impregnated on two separate occasions by her mother's boyfriend while she was living with her mother. Both times, the live-in boyfriend took the daughter—once when she was twelve and once when she was thirteen—to an abortion clinic in order to conceal his criminal deeds. A parental consent requirement would have prevented the live-in boyfriend from being able to continue his abuse. The irony of **Planned Parenthood's** argument that it represents the state's minors is that when some of those minors sought to intervene to speak for themselves —through their lawful representatives —**Planned Parenthood** opposed their intervention.

Unlike the federal authorities the Court cites early in its opinion, other courts, including our own, have strongly affirmed the ancient and well-established right of parents to guide and direct the decisions of their minor children. "The natural right which exists between parents and their children is one of constitutional dimensions." *Wiley v. Spratlan,* 543 S.W.2d 349, 352 (Tex.1976). "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Only a generation ago, this Court recognized the fundamental importance of parental rights in reaffirming the doctrine of parental immunity:

> We trust that it is not out of date for the state and its courts to be concerned with the welfare of the family as the most vital unit in our society. We recognize that peace, tranquility and discipline in the home are endowed and inspired by higher authority than statutory enactments and court decisions. Harmonious family relationships depend on filial and parental love and respect which can neither be created nor preserved by legislatures or courts. The most we can do is to prevent the judicial system from being used to disrupt the wide sphere of reasonable discretion which is necessary in order for parents to properly exercise their responsibility to provide nurture, care, and discipline for their children.

Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex.1971). These principles cannot be reiterated often enough, especially in the context of a minor's health and sex-related decisions. To grant **Planned Parenthood** standing to represent the state's minors would usurp this vital parental role.

Accordingly, I would hold not only that the case is not ripe, but also that **Planned Parenthood** has failed to otherwise establish standing to challenge rider 14.

Perkins v. Chase Manhattan Mortg. Corp.
Court of Appeals of Texas, Austin. | June 16, 2006 | Not Reported in S.W.3d *(Approx. 8 pages)*

MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

CHASE MANHATTAN MORTGAGE CORPORATION, Appellee.

No. 03-04-00741-CV. | June 16, 2006.

From the District Court of Travis County, 261st Judicial District, No. GN401164; Charles F. Campbell, Jr., Judge Presiding.

Attorneys and Law Firms

Wesley Eugene **Perkins**, pro se.

Peggy Heller, for **Chase** Manhattan Mortgage Corporation.

Before Chief Justice LAW, Justices B.A. SMITH and PURYEAR.

Opinion

MEMORANDUM OPINION

DAVID PURYEAR, Justice.

***1** Appellant Wesley Eugene **Perkins** appeals from the trial court's orders granting summary judgment in favor of appellee **Chase** Manhattan Mortgage Corporation and denying **Perkins's** motions to strike and for sanctions. We affirm the trial court's orders.

Initially, we note that **Perkins** is representing himself pro se. He asserts that as a pro se litigant, he should be held to less stringent standards than an attorney. **Perkins** is correct that we will attempt to read pleadings drafted by a pro se litigant liberally and with patience. *See Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (holding that under Fed.R.Civ.P. 12, allegations in pro se inmate's pleadings are held "to less stringent standards than formal pleadings drafted by lawyers"). However, a pro se litigant is held to the same procedural standards as attorneys; to allow otherwise could give pro se litigants an unfair advantage over litigants represented by counsel. *Mansfield State Bank v. Cohn,* 573 S.W.2d 181, 184-85 (Tex.1978); *see Faretta v. California,* 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (in federal criminal trial, defendant's "right of self-representation is not a license to abuse the dignity of the courtroom" or to fail "to comply with relevant rules of procedural and substantive law"). Therefore, we will attempt to read **Perkins's** pleadings and other documents liberally to discern the substance of his complaints. *See Johnson v. McAdams,* 781 S.W.2d 451, 452 (Tex.App.-Houston [1st Dist.] 1989, no writ) (citing *Haines,* 404 U.S. at 520). However, we will not overlook a lack of supporting facts or a failure to meet procedural requirements in considering **Perkins's** claims. *See Cohn,* 573 S.W.2d at 184-85; *Johnson,* 781 S.W.2d at 452-53.

Factual and Procedural Background

In 1997, **Perkins** bought a house in Austin, borrowing $82,413 from **Chase**. In exchange for the loan, **Perkins** signed a deed of trust and adjustable rate note in favor of **Chase**. After **Perkins** defaulted on the loan, **Chase**, acting through its attorneys at Barrett Burke Wilson Castle Daffin & Frappier, L.L.P. ("Barrett Burke"), sent **Perkins** notice that he was in default. **Perkins** responded by filing a "Private International Administrative Remedy Demand." **Perkins's** "Demand" acknowledged his receipt of Barrett Burke's notice of default and said that he was not refusing to pay the "alleged debt," but instead was giving notice that the debt was invalid, that the claim was disputed, that **Perkins** did not dispute the amount of debt claimed, and that Barrett Burke must cease all collection activity until it sent **Perkins** a "verification as required by the Fair Debt Collection Practices Act." *See* 15 U.S.C.A. § 1692g(b) (West 1998). **Perkins** stated that any future communications by Barrett Burke, "absent the above-cited requisite 'verification of the debt,' " would constitute Barrett Burke's "tacit admission, confession, and agreement" that it had "no lawful, bona fide, verifiable claim." **Perkins** attached a "Certified Promissory Note" stating that the note was tendered "as full satisfaction" of the alleged debt and that the note constituted **Perkins's** "promise to pay this instrument upon presentment and indorsement," citing the Uniform Commercial Code (the "UCC," codified at Tex. Bus. & Com.Code Ann. tit. 1 (West 1994 & 2002 & Supp.2005)). The note stated that "[a]s an operation of law, [**Chase**] tacitly consents and agrees that there is accord and satisfaction by use of this instrument to satisfy [**Chase's**] claim and [**Perkins**] is hereby discharged from liability on this alleged account and the obligation is suspended in accordance with law as codified at UCC §§ 3-310(b), 3-311, and 3-603." **Perkins** also attached a "disclosure statement," which he said **Chase** and Barrett Burke were required to complete, asking forty-four questions such as the name and address of the debtor and debt collector, the "Alleged Account Number" and amount owed, whether the debt had been purchased from an original creditor, whether there was "verifiable evidence of an exchange of a benefit or detriment between Debt Collector and alleged Debtor," and whether "[a]t the time the alleged original contract was executed, ... all parties [were] advised of the importance of consulting a licensed legal professional before executing the alleged contract." The form stated that failure to complete and return the form with a verification of the debt would constitute "tacit agreement that Debt Collector ha[d] no verifiable, lawful, bona fide claim re the hereinabove-referenced alleged account" and would mean that Barrett Burke waived all claims against **Perkins** and indemnified him against any and all fees and costs incurred.

***2** In 2004, **Chase**, still represented by Barrett Burke, filed suit seeking judicial review of **Perkins's** documents, which **Chase** alleged were fraudulent "Republic of Texas documents, instruments, liens, and claims" made against the real property and filed by **Perkins** in public records, including Travis County property records. **Chase** sought to clear the title of the land and extinguish **Perkins's** attempts to encumber **Chase's** interests in the property. **Chase** also sought to foreclose on the property, either judicially or under the terms of the contract and the property code. **Chase** asked the trial court to declare that **Perkins** had defaulted on the note, that **Perkins** was divested of any interest in the property, and that **Perkins's** documents purporting to establish a lien against the property were void. **Chase** further sought attorney's fees and asked the court to order a writ of possession should **Perkins** refuse to vacate the property.

Perkins responded by filing a "Sworn Rule 12 Motion for Attorneys to Show Authority," asking that Barrett Burke show its authority to act for and represent **Chase**. **Perkins** "demand[ed]" that the trial court require **Chase's** attorneys to appear and produce "their bona fide 'License to Practice Law' issued by The State of Texas," stating "[a]bsence thereof is tacit admittance that none exist." He stated that "a license to practice law is not a membership card provided by the bar association" and that he had "made a careful search of the records and can find no Texas State Office that issues licenses to practice law."

Chase filed a motion for summary judgment, contending that it held title through the vendor's lien, it was entitled to rescind the lien due to **Perkins's** nonpayment of the loan, and the trial court should annul the liens and other documents **Perkins** filed against **Chase's** interest in the property. As evidence, **Chase** produced an affidavit of Kay Walters, the foreclosure manager for Barrett Burke. Walters explained that **Perkins** took out a loan from **Chase** in 1997 then ceased making payments in August 2003. Walters attached the warranty deed, note, deed of trust, and a payoff statement to show that **Chase** loaned **Perkins** the money and that **Perkins** still owed $76,590 in principal on the loan. The warranty deed, which was filed in the Travis County property records in 1997, recites that **Chase** was granted a vendor's lien and superior title in exchange for a $82,413 loan; the note provides that if **Perkins** failed to make the required payments, **Chase** could accelerate the loan; and the deed of trust provides that in the event of default and acceleration of the note, **Chase** could foreclose on the property.

In response, **Perkins** filed a "Judicial Notice Pursuant to 201(d) Texas and Federal Rules of Evidence," demanding that the trial court "provide a written list of all presumptions that the court will take notice of at any proceedings." **Perkins** quoted case law to the effect that statements of counsel made in briefs or arguments will not support summary judgment and that evidence must be provided through affidavit, testimony, or admissible documentation. **Perkins** also filed a "Sworn Motion to Strike Sham," arguing that **Chase's** petition should be struck entirely because **Chase** refused to abide by his International Administrative Remedy Demand and opted "to by-pass administrative remedy," thus disposing of any genuine issues of fact remaining. **Perkins** asserted that there was no proof that **Perkins** had filed his administrative lien documents in the public record or "used the money evidenced by the Loan Agreement," and argued that **Chase** was attempting to "foist 'Unofficial Documents" ' and fraud upon the trial court. **Perkins** further filed a motion for sanctions and an "Affidavit in Opposition to Summary Judgment." **Perkins's** affidavit consists of 136 statements such as, "I am Wesley Eugene **Perkins**," "I do not consent to this matter," and, "This court *does not* have jurisdiction in this matter." **Perkins** asserted that **Chase** was offering unofficial documents and that the matter was settled. **Perkins** complained that **Chase** should not have entered into evidence the original documents he sent as his Administrative Remedy Demand, stating that the "one time functioning" documents were now commercially inaccessible. **Perkins** stated that "[s]hould it be discovered that this court may have jurisdiction," the court "is rendered crippled," "incapable of rendering justice," and incompetent. **Perkins** asserted that because **Chase** and its attorneys did not act on his demands, **Chase** accepted his documents as true. **Perkins** attacked the veracity and competence of Kay Walters and Peggy Heller, **Chase's** lead attorney, and stated that **Chase's** summary judgment evidence was altered and incomplete; **Perkins** did not explain how the documents were unreliable. **Perkins** also stated without explanation that **Chase's** petition, motion for summary judgment, and affidavit in support of summary judgment were erroneous and unreliable. Finally, **Perkins** stated that he wanted "to examine the bond of this matter," the "underwriting of this matter," and the bonds and liability limits of all actors involved, and asserted that "*summary judgment in this matter is not appropriate*."

***3** **Chase** responded to **Perkins's** various motions, stating that **Perkins's** pleadings and affidavit were not competent summary judgment evidence and did not raise a fact issue because they made unsupported legal conclusions and constituted inadmissible hearsay. **Chase** provided an affidavit by Charlie Wightman, Default Resolution Supervisor for **Chase**. Wightman averred that he retained Barrett Burke to handle **Perkins's** default and authorized Peggy Heller to retain an additional attorney to assist in representing **Chase**.

Following a hearing, the trial court denied **Perkins's** motion to strike, motion for sanctions, and motion to show authority. The court granted **Chase's** motion for

summary judgment.[1] **Perkins** appeals in fourteen issues and several additional arguments, attacking the trial court's orders. Having read **Perkins's** brief carefully, it appears that he (1) disputes whether **Chase's** attorneys showed they had authority to act in the case, (2) argues that the trial court was incompetent and lacked jurisdiction over the cause, (3) attacks whether the trial court was bonded, under oath, and "in the office," (4) asserts that **Chase** tacitly admitted to the truth of **Perkins's** motions and pleadings, (5) complains that the trial court should have granted his motions to strike and for sanctions, (6) argues that the trial court should have filed findings of fact and conclusions of law, (7) contends that the trial court forfeited its jurisdiction by taking certain facts as true, (8) maintains that **Chase** destroyed valuable property by introducing the original promissory note into the record, (9) asserts that his debt was discharged when he tendered his promissory note, and (10) contends that the trial court erred in refusing to consider his affidavit and rendering judgment for **Chase**.

Issues Related to Jurisdiction and Attorneys' Authority to Represent Chase

We will first address **Perkins's** issues related to whether **Chase's** attorneys showed themselves authorized to represent **Chase**. **Perkins** filed a motion demanding that **Chase's** attorneys show their authority to represent **Chase** by way of licenses to practice law issued by a state office. In response, **Chase** filed Wightman's affidavit stating that he had hired Barrett Burke to represent **Chase's** interests in this matter and that he authorized Heller to hire an additional attorney to assist in the case. At the hearing, **Perkins** asserted that the affidavit should be disregarded because the pleading to which it was attached had some apparent typographical errors; although the motion stated that Wightman's affidavit was attached as "Exhibit 'A,' " the affidavit was not actually labeled as such; Wightman did not produce tangible proof that he was authorized to speak for **Chase**; and **Chase** never produced proof that it existed as a corporation. **Perkins** also argued that the affidavit was insufficient because it did not establish that the attorneys were properly licensed and authorized to practice law. On appeal, he contends that the attorneys did not establish their authority to represent **Chase** or practice law and, therefore, the trial court lacked jurisdiction over the matter. **Perkins** further demanded that the trial court, "being of and under proper oath and bond of and in the office," issue an order requiring the attorneys to show their authority, and he asserts on appeal that because the trial court did not satisfy that demand, the court was without jurisdiction. Finally, although it is not entirely clear, he seems to argue that the trial judge was not authorized to proceed because he was not elected to the particular trial court in question and did not show that he was both a United States citizen and licensed to practice law in Texas. *See* Tex. Const. art. V, § 7.

***4** The rules of civil procedure allow a party to challenge whether a lawsuit is being prosecuted without authority. Tex.R. Civ. P. 12. If a motion is filed under rule 12, the challenged attorney must appear and show her authority to act. *Id.* At the hearing on **Perkins's** motions and **Chase's** motion for summary judgment, attorney Mark Hopkins produced Wightman's affidavit, in which he averred that he retained Peggy Heller to handle **Perkins's** default and that he authorized Heller to retain Hopkins to serve as local counsel and assist with the litigation. Wightman averred that Heller and Hopkins were authorized to act on **Chase's** behalf in the proceeding against **Perkins**.

Chase's response stated that "Exhibit A," an "Affidavit of Representative of **Chase** Manhattan Mortgage Corporation," was attached as proof. However, Wightman's affidavit was not labeled "Exhibit A," although it was the only exhibit attached. **Perkins** argued that the affidavit was a sham and should not be considered because it was not labeled "Exhibit 'A' " and because the motion contained several errors. **Perkins** also quotes the trial court's statement agreeing with **Perkins** that the affidavit was "unacceptable" because of typographical errors in the response to which the affidavit was attached, arguing that the court recognized the defective nature of the affidavit but wrongfully accepted it as evidence nonetheless. In agreeing with **Perkins**, the trial court did not agree that the document was unacceptable as evidence and should be ignored. Instead, the court noted the errors and admonished counsel to be more careful in the future when preparing such documents. The court explicitly stated that

the response and affidavit, although not perfect, were adequate to show that the attorneys had authority to represent **Chase**. The fact that the affidavit did not bear the label referenced in the response is of no matter because Wightman's affidavit was attached to the response, was the only document attached, and clearly stated that the attorneys were authorized to represent **Chase** in this case. By considering the documents and ruling that the attorneys had proven their authority, the trial court did not err or in any way "forfeit" its jurisdiction over the case. We overrule **Perkins's** eleventh issue.

Perkins also attacks the attorneys' authority, arguing that they did not prove that they were licensed to practice law in Texas. Rule 12 does not require an attorney to produce a physical license to practice law issued by a state agency; it requires an attorney to show "sufficient authority to prosecute or defend the suit on behalf of the other party." Tex.R. Civ. P. 12. The legislature established the State Bar of Texas as an administrative agency authorized to assist the judiciary in governing the practice of law in Texas. *See* Tex. Gov't Code Ann. §§ 81.011, .012 (West 2005). Attorneys licensed to practice in Texas must enroll in the State Bar. *Id.* § 81.051 (West 2005). The supreme court has the exclusive jurisdiction to determine rules governing the admission to the practice of law in Texas. *Id.* § 81.061 (West 2005). A membership card issued by the State Bar is "evidence of membership" and thus, of a person's license to practice law. Tex. State Bar. R. art. III, §§ 2, 4, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. (West 2005). In their pleadings, **Chase's** attorneys listed their names, law firm names, and bar card numbers. **Perkins** did not argue that the attorneys had been disbarred or had never been licensed by the supreme court to practice law. *See Keller Indus., Inc. v. Blanton,* 804 S.W.2d 182, 185 (Tex.App.-Houston [14th Dist.] 1991, no writ) ("The practice of law is not a right bestowed upon an individual; rather, it is a license granted by the state subject to rules and regulations. However, once those rules and regulations are complied with by an individual, one who chooses his or her counsel should not be denied that choice by the courts except for compelling reasons." (citation omitted)). Wightman's affidavit showed that Heller and Hopkins had authority to represent **Chase**. *See Boudreau v. Federal Trust Bank,* 115 S.W.3d 740, 741-42 (Tex.App.-Dallas 2003, pet. denied); *Spigener v. Wallis,* 80 S.W.3d 174, 184 (Tex.App.-Waco 2002, no pet.). The trial court did not err in ruling that **Chase's** attorneys proved their authority to represent their client. We overrule issues one, two, seven, and twelve.

***5** Although in issue three **Perkins** seems to attack the trial judge's authority to preside over the hearing and make rulings on the various motions, he did not raise any such issues before the trial court and did not file any objections to the judge. Therefore, he has waived any issues related to the trial judge's qualifications. We overrule issue three.

In several issues, **Perkins** contends that the trial court lacked or lost jurisdiction over the proceeding. We disagree.

Contrary to **Perkins's** assertions, the trial court did not lose jurisdiction over the matter as a result of **Perkins's** challenge to the attorneys' authority. The Texas Constitution grants district courts exclusive original jurisdiction over suits involving the title to land. *See* Tex. Const. art. V, § 8. **Perkins** admits that the property in question is located in Travis County, and thus, the Travis County district court gained subject matter jurisdiction over the cause when **Chase** filed its suit. *See Catalina Dev., Inc. v. County of El Paso,* 121 S.W.3d 704, 708 (Tex.2003) (Enoch, J., dissenting) ("When the trial court obtained jurisdiction, which it did when Collins filed suit, it had the authority to decide the merits of the entire controversy."); *see also Haley v. Tax Appraisal Dist.,* No. 03-00-00179-CV, 2001 Tex.App. LEXIS 170, at *3-4, 2001 WL 23149 (Tex.App.-Austin Jan.11, 2001, no pet.) (not designated for publication) (holding that trial court had subject matter over delinquent tax proceeding because district courts have exclusive jurisdiction over such suits, property was located in Bell County, and suit was filed in Bell County). **Perkins** admitted in his affidavit that he was

domiciled in Travis County, and the court's docket sheet states that service of process was made on **Perkins**. Therefore, the court had personal jurisdiction over **Perkins**. *See Haley,* 2001 Tex.App. LEXIS 170, at *3, 2001 WL 23149. Although **Perkins** asserted in his various filings that the pleadings did not constitute an answer to **Chase's** petition and that he did not concede the issue of personal jurisdiction, **Perkins** did not file a special appearance under rule 120a and he sought affirmative determinations and actions by the trial court. *See* Tex.R. Civ. P. 120a. Thus, **Perkins** waived any issue related to the trial court's exercise of personal jurisdiction. *See id.; Dawson-Austin v. Austin,* 968 S.W.2d 319, 322 (Tex.1998) (party makes general appearance if he invokes trial court's judgment on question other than jurisdiction, recognizes that action is properly pending before court, or seeks affirmative action from court). **Perkins** did not show grounds to support his assertion that the trial court lacked jurisdiction over the subject matter or the parties. We overrule issues number four and five.

Perkins's Remaining Procedural Issues

Perkins next asserts that **Chase** did not respond to his motions to strike or for sanctions and did not object to his affidavit in opposition to summary judgment and, therefore, admitted to the truth and validity of all matters asserted in those documents. Contrary to **Perkins's** assertions, **Chase** responded to **Perkins's** motions to strike and for sanctions by way of a reply to **Perkins's** response to the motion for summary judgment and a response to his motion to show authority and for sanctions. **Chase** further objected to **Perkins's** pleadings and affidavit filed in response to the motion for summary judgment, arguing that the documents were improper summary judgment evidence. **Chase** did not act or fail to act so as to ratify any of **Perkins's** pleadings or purported evidence. We overrule **Perkins's** sixth, eighth, and ninth issues.

***6** In issue thirteen, **Perkins** seems to argue that the trial court made a statement that showed that the court was so incompetent that the court no longer had authority to proceed.[2] We cannot discern exactly what **Perkins** is contending by this issue. We do, however, note that the trial court was correct in its statement that courts are appropriate venues for determining the propriety of private agreements and settlements when those alleged settlements are disputed. **Perkins** has presented nothing for our review by this issue, and we overrule issue thirteen.

In his fourteenth issue, **Perkins** asserts that the trial court failed to file findings of fact and conclusions of law when requested to do so by **Perkins**. "The only cogent conclusion that can be reached from this lack of Findings of Fact and Conclusions of Law," **Perkins** argues, is that the trial court "has come to know that he was indeed without jurisdiction in this matter, incompetent in this matter, incompetent to hear this case, [and] incompetent to render judgment." Initially, we note that findings of fact and conclusions of law "have no place in a summary judgment proceeding" and therefore are not required to be filed. *Linwood v. NCNB Tex.,* 885 S.W.2d 102, 103 (Tex.1994); *Golden v. McNeal,* 78 S.W.3d 488, 495 (Tex.App.-Houston [14th Dist.] 2004, pet. ref'd). Further, although the trial court signed its order granting summary judgment on November 3, **Perkins** did not file his request for findings and conclusions until November 29, twenty-six days later. **Perkins's** request, therefore, was not timely filed. *See* Tex.R. Civ. P. 296 (request must be filed within twenty days of signing of judgment). Finally, **Perkins** did not file a notice of past due findings and conclusions as required by rule 297. *See* Tex.R. Civ. P. 297. Therefore, any error in the trial court's failure to make findings of fact and conclusions of law is waived. *See In re A.I.G.,* 135 S.W.3d 687, 694 (Tex.App.-San Antonio 2003, no pet.); *American Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P.,* 74 S.W.3d 527, 530 (Tex.App.-Dallas 2002, pet. denied). We overrule issue number fourteen.

In issue ten, **Perkins** asserts that the trial court showed it was biased against him when it allowed **Chase's** attorney to make statements explaining the posture of the case and **Chase's** arguments. At the hearing, **Perkins** frequently objected to the attorney's statements, asking whether the attorney was testifying. The trial court

explained that the attorney was allowed to explain his position, much the same way **Perkins** had explained his positions before being sworn under oath to testify. **Perkins** is correct that an attorney's statements do not constitute evidence or support the granting of summary judgment. However, an attorney may speak in a hearing to summarize the evidence and arguments presented, which is what **Chase's** attorney did here. The trial court did not exhibit bias against **Perkins**. To the contrary, the court was quite patient during the proceeding, attempting to explain procedure and its decisions. Nor did the court grant summary judgment based on counsel's statements, rather than proper evidence. We overrule **Perkins's** tenth issue.

Propriety of Summary Judgment

***7** In addition to the fourteen issues set out above, **Perkins** also makes a broad attack on the propriety of the trial court's granting of summary judgment, arguing that by his International Remedy Demand, he made a good faith effort to verify and settle **Chase's** claim. He again attacks the trial court's jurisdiction and argues that **Chase** did not establish that it had standing to bring or that the court had subject matter jurisdiction over the cause. **Perkins** further complains that **Chase** destroyed the commercial value of the promissory note he provided in response to the notification that he was in default.

A motion for summary judgment is properly granted if, when the evidence is viewed in the light most favorable to the non-movant, a movant establishes itself entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548-49 (Tex.1985). We review *de novo* a trial court's decision to grant summary judgment. *Natividad v. Alexsis, Inc.,* 875 S.W.2d 695, 699 (Tex.1994).

Perkins invokes the UCC to argue that he attempted to tender performance under the deed and note by sending **Chase** his "Certified Promissory Note." However, real estate contracts are not governed by the UCC; the UCC applies only to sales of goods. *See* Tex. Bus. & Com.Code Ann. § 2.102 (West 1994); *Gupta v. Ritter Homes, Inc.,* 633 S.W.2d 626, 627 (Tex.App.-Houston [14th Dist.] 1982) (cause of action under UCC was "unfounded because sales of realty ... are not within the scope of the Code"), *rev'd on other grounds,* 646 S.W.2d 168 (Tex.1983); *see also* Tex. Bus. & Com.Code Ann. § 9.109(d)(11) (West 2005) (chapter 9 of UCC does not apply to creation or transfer or interest in or lien on real property); *Vogel v. Travelers Indem. Co.,* 966 S.W.2d 748, 753 (Tex.App.-San Antonio 1998, no pet.) (discussing former UCC § 9.104, now § 9.109, and stating that because "Deed of Trust places a lien on *real* property, it is not governed by the UCC"); *Long v. NCNB-Texas Nat'l Bank,* 882 S.W.2d 861, 864 (Tex.App.-Corpus Christi 1994, no writ) (same). Thus, **Perkins's** attempt to discharge his loan obligations through a promissory note under the UCC was not a defense to **Chase's** claim. [3]

Chase produced evidence in the form of affidavits and documentation showing that **Perkins** borrowed $82,413 from **Chase** to purchase a house. In exchange for the loan, **Perkins** signed a deed of trust granting **Chase** a security interest in the property and the right to accelerate the loan upon default. **Perkins** also signed a note promising that he would repay the loan amount over time and with interest. **Chase** produced a payoff statement setting out the balance due and an affidavit by Barrett Burke's foreclosure manager swearing that the payoff statement was a true and correct statement of the amount owed and averring that **Perkins** had not made any payments in the last year. **Chase**, therefore, established that it had a security interest in the property and that **Perkins** had defaulted on the loan.

***8** **Perkins** did not answer **Chase's** motion with any evidence raising a genuine question of material fact. **Perkins** produced an "affidavit," which he argues established his defenses as a matter of law. We have already held that his averments were not deemed admitted or otherwise ceded by **Chase**. In his affidavit, **Perkins** did not raise any issues as to whether he took out the mortgage loan or had ceased making payments or whether **Chase** had a right to accelerate the loan and foreclose

upon the property. Instead, his affidavit consists of conclusory statements that he had been harmed by **Chase's** pleadings, that **Chase** had tacitly admitted that it had no claim, and that he had paid the loan through his promissory note. Such conclusory statements of fact or law are not competent summary judgment evidence. *See McIntyre v. Ramirez,* 109 S.W.3d 741, 749-50 (Tex.2003); *Brownlee v. Brownlee,* 665 S.W.2d 111, 112 (Tex.1984); *see also Walls Reg'l Hosp. v. Bomar,* 9 S.W.3d 805, 807 (Tex.1999) ("characterizations of Boyett's conduct and motives were conclusory and do not create a fact issue"). The trial court did not err in granting summary judgment in favor of **Chase**.

Conclusion

Chase established its right to summary judgment through competent evidence. **Perkins** did not produce contrary evidence raising a fact issue as to whether **Chase** had a right to foreclose on the property. We have overruled **Perkins's** fourteen issues and have held that the trial court properly granted summary judgment for **Chase**. We therefore affirm the trial court's order.

Footnotes

1 The trial court also granted **Chase's** motion for sanctions, but did not award attorney's fees or monetary sanctions. Similarly, in its order granting summary judgment, the court granted **Chase's** motion in all respects, but did not address **Chase's** request for attorney's fees.

2 **Perkins** argues in full:

> As found in recorder's Record page 36, lines 3, 4 where recorded as said, by MR. **PERKINS**, "they're trying to bring a *private settled matter into court.*" Whereupon the court responded, line 5, "*That's what this court is for.*" To which MR. **PERKINS** says, "Right." (the reporter's Record fails to show the tone of the response as it seems to have been a question), and the court responds in lines 7, 8, "*That's what all these courts are for.*" (Emphasis added.)
>
> Goes to show a level of incompetent that removes judge actor from any position of competent authority in this matter.

3 We further note that **Perkins** already signed a promissory note when he took out the mortgage loan from **Chase**. His Adjusted Rate Note states that **Perkins** promised to repay the loan as specified in the terms of the note, and **Perkins** defaulted on those promises.

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RELATED TOPICS

Judgment
Conclusiveness of Adjudication
Prior Case Bars Retrial of Cause of Action
Basis of Title Authorized Plaintiff

Trespass to Try Title
Proceedings
Land of Plaintiffs and Defendants

Permian Oil Co. v. Smith
Supreme Court of Texas. | April 7, 1937 | 129 Tex. 413 | 107 S.W.2d 564 *(Approx. 22 pages)*

129 Tex. 413
Supreme Court of **Texas**.

PERMIAN OIL CO.

v.

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Motions Nos. 11501, 11502; No. 6351. | April 7, 1937. | Dissenting Opinion July 6, 1937.

CURETON, C. J., dissenting in part.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

On motions for rehearing.

Motions overruled.

For former opinion, see 73 S.W.(2d) 490.

West Headnotes (18)

Change View

1 **Judgment** Admissibility in General
Findings of fact and conclusions of law held part of "judgment record," as respects whether such findings and conclusions supporting prior judgment in trespass to try title action were admissible in subsequent trespass to try title action on issue of res judicata. Vernon's Ann.Civ.St. art. 7391.

2 **Judgment** Admissibility in General
Where, in two cases, parties, cause of action, capacity in which parties act, and res are the same, judgment in prior case bars retrial of same cause of action without inquiry into balance of record unless judgment is ambiguous; but, where prior case involves other issues, entire record of such case, without reference to question of ambiguity of judgment, is admissible to determine whether issue involved in subsequent case was disposed of in prior case.

4 Cases that cite this headnote

3 **Judgment** Nature and Requisites of Former Recovery as Bar in General
Purpose of principle of res judicata is to prevent retrial between same parties or their privies of cause of action or issue which has been finally disposed of.

2 Cases that cite this headnote

4 **Judgment** Application of General Rules of Construction

Judgments are construed like other written instruments.

13 Cases that cite this headnote

5 **Judgment** Admissibility in General

That judgment in trespass to try title action referred to pleadings for description of land and nature of cause of action held not to make judgment ambiguous so that entire record could be offered in evidence in subsequent trespass to try title action on issue of res judicata. Vernon's Ann.Civ.St. art. 7391.

4 Cases that cite this headnote

6 **Judgment** Admissibility in General

Trespass to try title action constituted collateral attack on judgment in trespass to try title action between parties' predecessors, and, unless prior judgment was ambiguous, issue of res judicata could be determined only from pleadings, to which judgment referred, and judgment, and not from judgment roll. Vernon's Ann.Civ.St. art. 7391.

5 Cases that cite this headnote

7 **Judgment** Trespass to Try Title

That boundary controversy was sole issue controlling title in action of trespass to try title would not prevent "take nothing" judgment from being res judicata of subsequent trespass to try title action by successor of defendant in prior action against successors of plaintiff in prior action, where pleadings in prior action were in statutory form. Vernon's Ann.Civ.St. art. 7391.

4 Cases that cite this headnote

8 **Trespass to Try Title** Judgment

In trespass to try title in statutory form, where plaintiff fails to show paramount title, judgment leaves defendant in possession, and such possession imports title. Vernon's Ann.Civ.St. art. 7391.

1 Case that cites this headnote

9 **Trespass to Try Title** Possession or Right Thereto

Possession imports title, and party in possession of land is considered the owner until the contrary is proved.

2 Cases that cite this headnote

10 **Trespass to Try Title** Judgment

No judgment can establish title or right of possession in litigant in absolute sense of finality against the world, but title or right of possession established is limited to parties bound by judgment. Vernon's Ann.Civ.St. art. 7391.

5 Cases that cite this headnote

11 **Trespass to Try Title** Issues, and Evidence Admissible Under Pleadings in General

Petition limited to statutory form of trespass to try title puts in issue both title and possession, and, if plaintiff seeks to limit issues, he must do so by special pleading in appropriate form. Vernon's Ann.Civ.St. art. 7391.

5 Cases that cite this headnote

12 **Judgment** Admissibility in General

Where judgment was unambiguous, judgment roll was admissible to test validity of judgment, but not to contradict judgment, or for purposes of interpretation or explanation of judgment.

1 Case that cites this headnote

13 **Judgment** Trespass to Try Title

"Take nothing" judgment in trespass to try title action, under petition in statutory form and answer of "not guilty," held unambiguous and res judicata of subsequent trespass to try title action by successor of defendant in prior action against successors of plaintiff in prior action notwithstanding that prior action hinged entirely on question of boundary, and that judgment referred to pleadings for description of land and nature of cause of action. Vernon's Ann.Civ.St. art. 7391.

9 Cases that cite this headnote

14 **Trespass to Try Title** Judgment

"Take nothing" judgment in trespass to try title operates as muniment of title, and adjudges, in effect, that facts were found to exist which, between parties, established in defendant all title to land, including, just as effectively as though it had passed by voluntary conveyance, such title as plaintiff had. Vernon's Ann.Civ.St. art. 7391.

8 Cases that cite this headnote

15 **Judgment** Admissibility in General

Under statute requiring recording of judgment, judgment holder may introduce judgment to make prima facie case, but, on introduction of evidence of title of subsequent purchaser arising while judgment was unrecorded, judgment holder has burden of showing notice or lack of consideration on part of subsequent purchaser. Vernon's Ann.Civ.St. art. 6638.

3 Cases that cite this headnote

16 **Judgment** Admissibility in General

In trespass to try title, unrecorded judgment in prior trespass to try title action, offered by plaintiff, held improperly stricken from evidence before defendants offered evidence of title, since judgment was admissible to make prima facie case, and defendants were not entitled to rely on statute requiring recording of judgment in absence of showing of acquisition of title after judgment was rendered. Vernon's Ann.Civ.St. art. 6638.

2 Cases that cite this headnote

17 **Judgment** Finality of Determination

That party to prior action could have prevailed had he been diligent did not prevent application of doctrine of res judicata to bar such party's successor.

1 Case that cites this headnote

18 **Judgment** Collateral Nature of Proceeding in General

Trespass to try title action constituted collateral attack on judgment in trespass to try title action between parties' predecessors. Rev.St.1925, art. 7391.

2 Cases that cite this headnote

Attorneys and Law Firms

***417 **565** J. B. Dibrell, Sr., of Seguin, J. B. Dibrell, Jr., Dibrell & Starnes, and Critz & Woodward, all of Coleman, John Sayles, of Abilene, and Hart Johnson, of Fort Stockton, for plaintiff in error.

***418** Chas. Gibbs, Gibbs & Lewis, Robt. T. Neill, Harris, Harris & Sedberry, J. W. Stovall, **Smith** & Neill, H. O. Williams, and James Cornell, all of San Angelo, Phillips, Trammell, Chizum, Estes & Edwards, Burney Braly, and Hiner & Pannill, all of Fort Worth, Black & Graves and W. A. Keeling, all of Austin, Thompson, Knight, Baker & Harris, of Dallas, Baker, Botts, Andrews & Wharton, Rex G. Baker, and R. H. Whilden, all of Houston, John Rogers, Chas. A. Holden, and Maxey, Holden & Holleman, all of Tulsa, Okl., Brian Montague, of Del Rio, W. C. Jackson, of Fort Stockton, F. H. DeGroat, of Duluth, Minn., and Thompson, Mitchell, Thompson & Young and Lloyd L. Adams, all of St. Louis, Mo., for defendants in error.

***419** Walter L. Kimmel, of Tulsa, Okl., amicus curiae.

Opinion

ELWOOD FOUTS, Special Justice.

This case was decided by the opinion appearing in (Tex.Sup.) 73 S.W.(2d) 490. Motions for rehearing were duly filed. Before action was taken on these motions the personnel of the court was changed, Associate Justice SHARP succeeding Judge GREENWOOD, and Associate Justice CRITZ replacing Judge PIERSON, deceased. ***566** Judge CRITZ certified his disqualification, resulting in the appointment of ELWOOD FOUTS, of Houston, **Tex**., as Special Associate Justice, who duly qualified. The court as thus composed requested oral argument on the motions due to the fact that Chief Justice CURETON alone heard argument as a member of the court when the case was originally disposed of. The questions decided by this opinion on the motions for rehearing embrace only a portion of those discussed and disposed of by the former opinion which is overruled where it does not conform to the law as here announced and as thus modified stands approved.

The parties will be designated here as they were in the trial court. Briefly summarized the facts are:

This suit was filed June 21, 1928, by **Permian Oil** Company against the defendants, seeking to recover the land described and the value of the **oil** produced therefrom. Plaintiff established title in John Monroe and then offered in evidence the pleadings and judgment rendered in cause No. 854, John Monroe v. T. F. Hickox, in the district court of Pecos county, **Tex**. That suit was filed August 22, 1910, and disposed of March 4, 1911, by a take nothing judgment entered against the plaintiff. The petition there was in statutory form of trespass to try title describing sections 103 and 104, **Texas** Central Railway, as the land sued for. The answer was a plea of not guilty. The present suit involves said section 103. Apparently some of the defendants claim title under John Monroe. There was filed in the former case the court's findings of fact and conclusions of law. Plaintiff, which holds under Hickox, asserts that it has Monroe's title by virtue of the former judgment. ***447** It is evident from the record that some of the defendants herein claim to have acquired their several titles at a time when that judgment was not properly recorded, as required by statute. Plaintiff made no proof that such defendants were not bona fide purchasers for value or that they bought with notice. The judgment in Monroe v. Hickox and its supporting pleadings was admitted in evidence over the objection of defendants on the ground that such proof was not made and on the further ground that the judgment was either void on the face of the reocrd or else if properly construed did not dispose of the issue of title. Defendants renewed their objections in a motion to strike the evidence, in which they prevailed after they themselves offered in evidence, over the objection of the plaintiff, the entire record out of which emanated the judgment of Monroe v. Hickox. Their motion

resulted in a peremptory instruction against the plaintiff.

1 Objection was made by the plaintiff that the court's findings of fact and conclusions of law in Monroe v. Hickox were not a part of the judgment record. We do not agree with this contention.

The phrases 'judgment roll,' 'judgment record,' and 'face of the record' are terms used interchangeably in our decisions. They grow out of the common law where in the earliest cases on officer of courts of record preserved on a scroll of parchment a record of the issues which the contestants agreed to litigate. At that time their pleadings were oral. This roll later embraced the written pleadings, the court's charge to the jury, the jury's verdict, the court's final judgment, and other similar matters constituting a part of the proceedings of the trial. One of the purposes of the roll was to enable the proper application of the rule of res adjudicata, the record being preserved among other reasons in order to show what issues had been disposed of and the parties to be bound thereby. When inquiry as to what constitutes record arises, it must be remembered that ordinarily one of the purposes of the inquiry is to properly apply the rule of res adjudicata. Every part of the trial proceedings preserved in courts of record under direction of the court for the pupose of its record constitutes the judgment roll.

The defendants offered the record of the former case for the purpose of establishing either that the judgment entered was void on the face of the record, or if not void, then construed in the light of the judgment roll actually disposed of only one issue, that of boundary, and therefore, they contend, did not operate as a muniment of title; or that it constituted conclusive ***448** evidence that the sole issue determined was that sections 103 and 104, as between the parties and their privies, either could not be located on the ground or else were in total conflict with senior surveys 34 and 35, G. C. & S. F. Ry. Co. block 194, and because of which they contend that plaintiff, the successor in title of Hickox, is estopped to now maintain that section 103 can be located on the ground free of conflict. These contentions are again strongly ****567** urged by the defendants in their motion for rehearing. Because of the doubts which were raised in the mind of the court by the argument that these contentions were supported by fundamental law which had been lost sight of in too narrowly adhering to precedent, we have re-examined the whole field of law involved.

2 The principle of res adjudicata is founded in public policy and is as old as English jurisprudence. Fundamentally its purpose is to expedite justice by putting an end to litigation; and to preserve the sanctity of the judgments of the courts by making them immune from collateral attack. Once a court has exercised its functions of decision on an issue over which it has jurisdiction, and that decision becomes final, the parties thereto and their privies cannot escape its binding effect. Lacking this anchorage of finality a judicial system would be little more than a rule of fiat.

It has been said that the rule finds its application in two classes of judgments issuing out of courts having jurisdiction. One class is encountered where in the first case out of which the judgment issues, and in the second suit where the judgment is offered in bar, the parties are the same, the cause of action is the same, the capacity in which the parties act is the same, and the res or things disposed of are the same. Such a judgment, if unambiguous, as a general rule is treated as an absolute bar to retrial of the same cause of action on the theory that it has been merged in the judgment. A judgment of this type usually permits of no inquiry into the balance of the record from which it emanates, except in the case of certain well recognized exceptions. Where such a judgment is ambiguous, the judgment roll, and if necessary extrinsic evidence, is admissible, not to contradict the judgment, but only to aid in its construction. The other type is encountered where the parties to a subsequent suit seek to relitigate an issue which was disposed of by final judgment in a former suit to which they were parties, although the cause of action may have involved other issues. In the latter instance it has been said the parties and their privies are estopped to try again such issue disposed of by the former judgment and the entire record in the first case ***449**

is admissible in evidence in order to determine whether or not the issue involved in the second case was actually disposed of in the first, without reference to the question of ambiguity.

3 The cases as a matter of fact do not so completely separate themselves into two such sharply defined classifications, but graduate from the one into the other, and hence the explanation for the use by courts of much very general and conflicting language. It must be borne in mind that the purpose of the law remains constant to prevent the failure of justice as the result of permitting the retrial between the same parties or their privies of a cause of action or of an issue which has been finally disposed of.

4 5 The judgment in cause No. 854, unless affected by ambiguity leading to the construction sought by defendants, clearly comes within the first classification. It is necessary, therefore, to ascertain whether that judgment is ambiguous. This involves a number of problems. We find no reason to hold it ambiguous simply because it is necessary to refer to the pleadings. It is true the description of the land and the nature of the cause of action do not appear in the face of the judgment. However, this is supplied by the direct reference to the plaintiff's pleadings appearing in the face of the judgment. Judgments are construed like other written instruments. 'That is certain which may be made certain,' and being certain, is unambiguous, whether it be a judgment or a writing of other description. By this reference in the judgment there is as effectively supplied the description of the land and the cause of action disposed of as though the judgment had recited both in its face. Freeman on Judgments, s 97; Martin v. Teal (Tex.Civ.App.) 29 S.W. 691; Ruby v. Von Valkenberg, 72 **Tex**. 459, 10 S.W. 514. The petition and the decree are set forth at the end of this opinion in a addenda note.

But the defendants nevertheless contend that even after referring to the pleadings it is impossible to know what the judgment decided, and thus being ambiguous it is proper to consult the judgment record from which it appears that the sole issue determined by the court was an issue of boundary and that, being only a boundary suit, the judgment is void and falls because the description is insufficient, citing the requirements of article 7366, and the decisions of this court to the effect that judgments, in boundary suits involving descriptions similar to the one used here, are ineffectual ****568*** because nothing has been decided. Inherent in these contentions is the conception that different causes of actions are involved in boundary suits and other trespass to try title suits.

****450*** We are mindful that in a number of early decisions by a divided court, judgments in boundary suits brought in form of trespass to try title were held to be final notwithstanding the statutory right then existing by which plaintiffs in trespass to try title were permitted to bring a second suit. But while these holdings appeared to be on the theory of res adjudicata, they may be in part accounted for by recognizing that they also involved the construction of a statute, the court ascertaining from the record that 'title' as that term was employed in the then existing statute was not an issue in those cases. There are also cases, construing the former statute making judgments in boundary cases final in Courts of Civil Appeals, from which it might be inferred that the cause of action in a boundary case in the usual form of trespass to try title differs from that in other trespass to try title cases. Without reviewing these cases it may be said that they were undoubtedly influenced by the fact that they were construing the effect of the statute. We are unwilling to accept cases of either class as authority for the proposition that different causes of action are involved in trespass to try title suits brought in statutory form one of which turns on the fact of boundary and the other of which turns on some other evidentiary fact affecting title.

6 7 Measured by the familiar rule, cause No. 854 as tried was a boundary suit. On appeal it would have been judged as such because the record shows there would have been no suit but for the question of boundaries. Expressions from boundary cases on appeal indicating judgments to be void because the testimony

shows a description, apparently sufficient, actually to be insufficient to locate the land on the ground, cannot be invoked on collateral attack to nullify a judgment in trespass to try title where the description on its face is sufficient. Such decisions are dealing with voidable, not void, judgments. But this is not an appeal of the case of Monroe v. Hickox, No. 854. The question here in one of res adjudicata: Does the judgment in cause No. 854 dispose of the title to the land in question so that the parties and their privies are bound thereby? Under decisions of this court founded on our present trespass to try title statutes, the contention now made constitutes a collateral attack on the judgment and under the general rule must be judged by the pleadings and judgment alone, unless the judgment because of ambiguity is limited by the judgment roll. Aside from the claim of ambiguity, the judgment in cause No. 854 as it stands is not void because of insufficient description: The description used in the petition in that case was sufficient under the requirements of article 7366, as was pointed out ***451*** in the original opinion. The fact that on the trial boundary was the sole controversy controlling title does not keep the former judgment, which disposed of title, from binding the parties and their privies. In trespass to try title determination of the outcome of the suit through the fact of boundary does not alter the cause of action plead and disposed of by the judgment. In Monroe v. Hickox the cause of action was the title to the land described. These conclusions follow from recognized principles as is pointed out in the well-reasoned opinion in Freeman v. McAninch, 87 **Tex**. 132, 27 S.W. 97, 47 Am.St.Rep. 79, where it was decided that a judgment in a boundary suit brought in form of trespass to try title, although disposed of on the fact of boundary, nevertheless was res adjudicata of the issue of title. There the pleadings were in statutory form of trespass to try title. 'An issue is the question in dispute between parties to an action, and, in the courts of this state, that is required to be presented by proper pleadings. * * * Thus were the issues presented, and the leading issue was one of title; and the fact that the determination of that may have depended on a question of boundary could not change the character of the vital issue in the case, for that was but a question of fact, to be considered like any other fact in determining whether the issue of title to the land should be decided in favor of the one party or the other. * * * The issue presented by the pleadings and determined by the judgment, was one of title; and that * * * this depended on the fact of true locality of the boundary between the surveys, could not change the character of that issue.' Freeman v. McAninch, 87 **Tex**. 132, 27 S.W. 97, 98, 47 Am.St.Rep. 79. The judgment in Monroe v. Hickox is not void unless construction made necessary because of ambiguity discloses some fatal deficiency.

569 Returning to the question of ambiguity and the contention that the effect of the judgment in cause No. 854, because it is claimed to be ambiguous, should be limited to the issue or issues actually tried, as disclosed by the findings of fact and conclusions of law, and the further contention that plaintiff is estopped while claiming the benefits of that judgment to now show a total absence of conflict and a present ability to locate the land on the ground, it may be said that were these original questions their answer would be more difficult. It is true, as pointed out by some of the defendants, that in every decision from French v. Olive, 67 **Tex**. 400, 3 S.W. 568, down to that announced in this case in the original opinion by the Commission of Appeals, title itself was actually the issue tried. It is ***452*** true that nowhere has this court directly announced that in trespass to try title where the cause of action was properly limited to some issue less than title itself plaintiff nevertheless lost his title under a take nothing judgment and the defendant gained it. It is true that in many of the other states where statutes similar to our trespass to try title statutes prevail, and where the statutory provision similar to that embraced in article 7391 exists, the general rule seems to be that the defendant in a take nothing judgment does not gain or become vested by presumption with the plaintiff's title. On the trial he must establish facts entitling him to acquire the plaintiff's title by virtue of the judgment. Indeed, the United States Supreme Court in Barrows v. Kindred, 4 Wall. (71 U.S.) 399, 403, 18 L.Ed. 383, construing the Illinois Statute, which resembles our article 7391, after commenting on the absence of construction by the state courts, said: 'Where a

plaintiff shows no title, and is therefore defeated, it is not easy to perceive how any title can be said to have been established in the action, or how, under the statute, the result can affect his right to bring a new action for the same premises.'

By the rule thus announced a losing plaintiff in a take nothing judgment would not be foreclosed from bringing a second suit if title itself were not affirmatively established in defendant in the first suit. Under such reasoning every take nothing judgment in trespass to try title would be ambiguous because it would be impossible to know whether it operated as a dismissal or as an adjudication of title, or an adjudication of some right incident to title. Therefore the record could rightly be employed to construe and limit it to the actual issue tried, and if the effect of the take nothing judgment was equivalent to a dismissal, that effect would permit the bringing of another suit by the losing plaintiff.

But here we are confronted with article 7391 and its construction by this court. That article reads: 'Any final judgment rendered in any action for the recovery of real estate shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming from, through or under such party, by title arising after the commencement of such action.'

8 When Judge Gaines in French v. Olive announced the rule that the effect of a take nothing judgment in trespass to try title was to hold that the defendant had the better title, his ***453** opinion, and the long line of decisions by this court following it, necessarily operated to construe article 7391 and the judgment together and in effect announced the rule to be: That when the plaintiff failed for any reason, whether it be due to conflict with a senior survey, outstanding title in a third party, or other lack of title in himself, the judgment left the defendant in possession of the premises; and that such possession imported title; and that title was thereby established in the defendant.

9 10 The party in possession of land is considered to be the owner until the contrary is proved. His possession imports that he holds a title thereto. As was said in Linthicum v. March, 37 **Tex**. 349: 'This has been the repeated language of this court since Hughes v. Lane, 6 **Tex**. (289) 292, in which it is said: 'The possession of the defendant gave him a right against the plaintiff, until he showed sufficient title,'' Thus the contention that no title was established by the judgment in cause No. 854 seems unsound. In this state it is elementary that no judgment can 'establish' 'title or right of possession' in a litigant in the absolute sense of finality against the world. The 'title or right of possession established' is limited to the parties bound by the judgment.

In trespass to try title brought in statutory form the plaintiff asserts that he has the title and is entitled to the right of possession. The defendant by his plea of not guilty admits that he has possession ***570** and asserts that he possesses the better title. When the ordinary judgment is entered there cannot remain outstanding in the losing party an opposing title. The decree announces that facts appeared on the trial which converged and combined in the winning party all of the rights of both plaintiff and defendant.

11 Had the pleadings in this case confined the parties to the issue of locating a boundary, we possibly might face a different case. The cause of action which was asserted against the defendant by the plaintiff in the trespass to try title suit of Monroe v. Hickox, pleaded in general form, was the claim to the title and possession of the land described. The defendant's plea of not guilty admitted his possession and put in issue the plaintiff's cause of action. The plaintiff failed and the defendant prevailed. In such an instance both the title and the possession of defendant was established as between the parties by the judgment. In this state a petition limited to the statutory form of trespass to try title always puts in issue both title and possession. Any one of a number of facts may determine the issue, ***454** but the cause of action remains the same. If the plaintiff seeks to limit the issue to one of such facts, he must do so by special pleading in appropriate form. By so doing he may limit the case to the portion of his land involved in the boundary dispute, or possession, or to some other incident

of title.

12 13 14 It plainly appears therefore that under construction long established by this court the judgment in cause No. 854 was unambiguous. Furthermore there was present in the judgment and the judgment roll no other feature which took the judgment out of the general rule. The judgment could not be contradicted by the record, and being unambiguous neither was there anything in it to be interpreted or explained by the record. The judgment roll was properly admitted to test the validity of the judgment, but this only operated to show that the judgment was not void on the face of the record. Neither the rule of res adjudicata nor the rule of estoppel can be invoked to escape this conclusive effect. Instead these principles unite to establish this result. To hold otherwise would be to nullify the meaning of article 7391 as long construed by this court, and would overturn the long line of decisions to the effect that the plaintiff must recover on the strength of his own title and to the effect that possession imports title. Thus it has come about that the rule in this state is recognized to be that a judgment in trespass to try title that plaintiff take nothing by virtue of his suit operates as a muniment of title and adjudges in effect that facts were found to exist which between the parties established in the defendant all the title to the land, including, just as effectively as though it had passed by voluntary conveyance, such title as plaintiff had.

Defendants also contend the trial court properly instructed the jury to find for the defendants at the close of plaintiff's testimony because the judgment in cause No. 854 was not recorded as required by article 6638, Revised Civil Statutes. Defendants contend the burden was on plaintiff to prove notice or lack of consideration by defendants before the judgment was admissible. Plaintiff contends the burden was on defendants to prove themselves innocent purchasers without notice before they could receive the protection of that statute. We think that neither contention is correct.

Present article 6638, enacted February 5, 1940, reads as follows: 'Every partition of land made under an order or decree of a court, and every judgment or decree by which the title to land is recovered shall be duly recorded in the office of the ***455*** county clerk in which such land may lie; and until so recorded, such partition, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof.'

The law of 1836 relative to registration of deeds which is quite similar provided: 'No Deed shall take effect as regards the interest and rights of third parties until the same shall have been duly proved and presented to the court as required by this Act for the recording of land titles.' This act was amended February 5, 1840 (at the same time present article 6638 was enacted), so as to make unrecorded conveyances void as against all subsequent purchasers who established that they had bought for value and without notice. Under the law of 1836 the burden was on the senior unrecorded deed holder to establish that the junior deed holder was not an innocent purchaser for value. Under the act of 1840 this burden was shifted ***571*** and the junior deed holder was required to show that he was an innocent purchaser.

The case of Kimball v. Houston **Oil** Company, 100 **Tex**. 336, 99 S.W. 852, 854, opinion by Judge Williams, construed the Act of 1836 affecting the registration of deeds. The question involved was that of burden of proof, the holder of the junior deed contending that the burden was on the senior unrecorded deed holder to prove that the subsequent purchaser had knowledge of the prior deed. The court held this contention to be correct. Construing the language of the Act of 1836, in connection with the Act of 1840 which amended it, Judge Williams uses this language: 'We think it is true that under either statute the burden is upon one claiming against an unrecorded deed to produce evidence sufficient to bring himself within its protection; to show, in other words, that he is one to whom its language applies.'

Continuing elsewhere, while recognizing that the Act of 1836 was a registration act and that the holder under the unrecorded senior deed could offer the deed in evidence in making out his prima facie case, he then says: 'When, against such a deed'

(referring to the unrecorded senior deed), 'is produced a subsequent one from the same grantor, apparently valid, is it not shown, prima facie at least, that the claimant under it is a third party having a right or an interest to be affected by the prior conveyance, and is he not literally within the terms of the statute and entitled to its protection?' ***456** He answered by holding that the junior deed holder was then within the protection of that statute and that the burden shifted to the holder under the senior unrecorded deed to prove the junior deed holder was not an innocent purchaser.

The two statutes, the one applying to deeds, the other to judgments, are so similar in their wording as to make it appear that this reasoning applies with equal force in construing article 6638, unless it is inhibited by previous decisions of this court. The statute of 1836 concerning deeds provided that no unrecorded deed could affect the rights of third parties. The statute of 1840, present article 6638, concerning judgments, provides that no rights can be established under an unrecorded judgment. To undertake to establish a right under an unrecorded deed would be the only way a person could affect the rights of third parties and to undertake to establish a right under an unrecorde judgment of necessity would adversely affect the rights of third parties, so that the language of each statute operates to announce the same rule which applies in the one instance to unrecorded deeds and in the other to unrecorded judgments.

Here, as in Kimball v. Houston **Oil** Company, it is plausibly argued by plaintiff that article 6638 is only a registration statute designed to protect creditors and innocent purchasers and that properly interpreted the statute should be construed as our other registration statutes, to place the burden on the subsequent purchaser to establish that he bought for value without notice. It is true this court a number of times has held this to be a registration act and we later quote from some of those decisions. So had the Act of 1836 affecting deeds been held to be a registration act as was pointed out in Kimball v. Houston **Oil** Company, where Judge Williams quoted at length from Crosby v. Huston, 1 **Tex**. 203, 238, and then said (referring to Chief Justice Hemphill's opinion in that case): 'The court therefore fore concluded that proof of the unrecorded instrument, other than the record, might be made; but also held that the 'letter of the statutes will be departed from only 'where the notice is so clearly proved as to make it fraudulent in the purchaser to take a conveyance in prejudice to the known title of the other party.'' * * * We regard this as a decision of the question in this case, declaring the law to be that the holder of a junior deed taken while the act of 1836 was in force is entitled to the protection of that act until his claim is shown to be fraudulent.' It the Legislature on February 5, 1840, by the statute covering judgments, had intended to place the burden on the subsequent ***457** purchaser to prove that he bought for a valuable consideration without notice, before he could receive the protection of article 6638, it could have done so by using the same language employed by it on the same day when it amended the Act of 1836 affecting the registration of deeds, under which amended act this burden was placed on the junior deed holder. Evidently it intended to avoid this by using language similar to that of the original Act of 1836, affecting deeds.

Article 6638 has been construed several times by this court to be a registration ***572** statute and therefore not a rule of evidence precluding proof of an unrecorded judgment, just as the rule concerning the Act of 1836 covering unrecorded deeds was announced in Crosby v. Huston. The unrecorded deed under the Act of 1836 was admissible to enable the claimant thereunder to make out his prima facie case. But upon the introduction in evidence by the subsequent purchaser of a conveyance taken while the senior deed was off the record the burden then fell on the unrecorded deed holder to show notice or lack of consideration on the part of the junior deed holder.

15 Such we believe is also the rule under article 6638.

Thornton v. Murray, 50 **Tex**. 161, seemed to go even further and hold as defendants

contend. It is there stated: 'The eivdent object of this provision, 'The evident object of this provision, in evidence of a decree or judgment of the class designated, under all circumstances, until recorded, but only to apply the system of registration to such a judgment or decree, and to deny to a party the right to so introduce it in evidence unless he shows its registration, or facts which make it, as between the parties and under the general provisions of the registration laws, admissible without registration.'

Also in Russell v. Farquhar, 55 **Tex**. 355, it is said: '* * * the statute properly construed did not require the registration of the former judgment to render it admissible in a subsequent suit for title and partition of the same land betwen the same parties.'

But in Henderson v. Lindley, 75 **Tex**. 185, 189, 12 S.W. 979, Judge Gaines demonstrated that the unrecorded judgment was admissible not alone against those who had notice but against all persons. However, he did not construe the statute so as to take away its protection. He only permitted the introduction in evidence of the judgment, which operated to make out a prima facie case. It was unnecessary for him to comment on the burden ***458** of proof which fell on the plaintiff when the defendant introduced evidence to show that he purchased when the judgment was off the record; the trial court in that case appears to have placed the entire burden of proof on the claimant under the unrecorded judgment. The protection of the statute comes to life when the opposing party offers a title acquired while the judgment was off the record. By doing so that party brings himself within the protection of the statute, and the burden is then on the claimant under the unrecorded judgment to prove notice so clearly as to make it fraudulent in the subsequent purchaser to take a conveyance in opposition to the known title of the other party.

16 The judgment in cause No. 854, Monroe v. Hickox, was improperly stricken from evidence by the trial court. While the burden of proof rested on the plaintiff to show that the defendants had notice of the judgment or were not bona fide purchasers for value, upon the introduction of eivdence by them showing that they purchased from or under John Monroe at a time when the judgment was off the record, this burden had not arisen when the motion to strike the evidence was sustained, and the peremptory instruction against the plaintiff was entered. The defendants had not offered their title.

17 Running through this lawsuit we find the appeal for relief from the mistakes of a party to another suit or the errors of another trial court. But such relief could come here, as is always the case, only at the expense of the rights of many of those who have been 'vigilant and careful.' The fact that the record in this case now shows that Monroe could have prevailed in his suit No. 854 if he had been sufficiently diligent does not weaken but only serves to emphasize the principles reaffirmed in this opinion. 'When a party passes by his opportunity, the law will not aid him. In Ewing v. McNairy, 20 Ohio St. (315) 322, the judge says: 'By refusing to relieve parties against the consequence of their own neglect, it seeks to make them viligant and careful. On any other principle, there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial,'' Freeman v. McAninch, supra.

The motions for rehearing are overruled.

CURETON, C. J., dissents in part.

Addenda.

(1) The first-amended original petition filed by John Monroe on February 28, 1911, in a statutory form of trespass to try title in said cause No. 854; said amended petition being as follows:

****573* 'In the District Court of Pecos County, Texas, February Term A. D. 1911.**

'John Monroe vs. T. F. Hickox, No. 854.

'To the Honorable District Court of Said County:

'Now comes John Monroe who resides in Pecos County, **Texas**, hereinafter called plaintiff, and leave of the Court having first been had and obtained, files this his first amended original petition and complains of T. F. Hickox, hereinafter styled defendant, and for cause of action, plaintiff represents to the Court that on or about the 21st day of April A. D. 1909, he was lawfully seized and possessed of the following described land and premises, situated in the County of Pecos, State of **Texas**, holding and claiming the same in fee simple, to-wit:

'1st. All of Section No. 104, Block 194, T. C. Ry. Co. original grantees, situated in Pecos County, **Texas**.

'2nd. All of Section No. 103, Block 194, T. C. Ry. Co. original grantee situated in Pecos County, **Texas**, described as follows:

'Beginning at a stake and mound at the N. E. Cor. of Sur. No. 102, Blk. 194, T. C. R. R. Co., Cert. 2302, for the N. W. Cor. of this survey.

'Thence east 1900 vrs. to a stake and mound for the N. E. Cor. of this survey.

'Thence South 1209 vrs. to a stk. and md. for the S. W. cor. of this survey.

'Thence West 1900 vrs. to a stk. and md. for the S. W. Cor. of this survey.

'Thence North 1209 vrs. to the place of beginning, and said Section No. 104, Block No. 194, T. C. Ry. Co. is described by metes and bounds as follows, to-wit:

'Beginning at a stake and mound at the N. E. Cor. of Survey No. 103, Block No. 194, for the N. W. Cor. of this survey.

'Thence East 1900 vrs. to stake and mound for N. E. Cor. of this survey.

'Thence South 1209 vrs. to stake and mound for S. E. Cor. of this survey; thence West 1900 vrs. to stake and mound for S. W. Cor. of this survey; thence North 1209 vrs. to the place of beginning.

'That on the day and year last aforesaid, defendant unlawfully entered upon the premises and ejected plaintiff therefrom and unlawfully withholds from him the possession thereof to his damage in the sum of $2,000.00. That the reasonable rental value of said land and premises is $100.00 per annum; that on the date that defendant entered upon plaintiff's said land, plaintiff had on same a wire fence composed of wire nailed on the posts set in the ground, that defendant has, since said date, broke, tore down and destroyed plaintiff's said fence and the posts and wire composing the same, to the plaintiff's damage in the sum of $100.00.

'Therefore, plaintiff prays judgment of the court that inasmuch as the defendant has been duly cited to appear and answer this petition, that plaintiff have judgment for the title and possession of said lands and premises above described, and that writ of restitution issue, and for his rents, damages and costs of this suit, and for such other relief, special and general, in law and in equity that he may be justly entitled to, etc.'

(2) The judgment rendered and entered in the minutes of the district court of Pecos county in said cause No. 854, as follows:

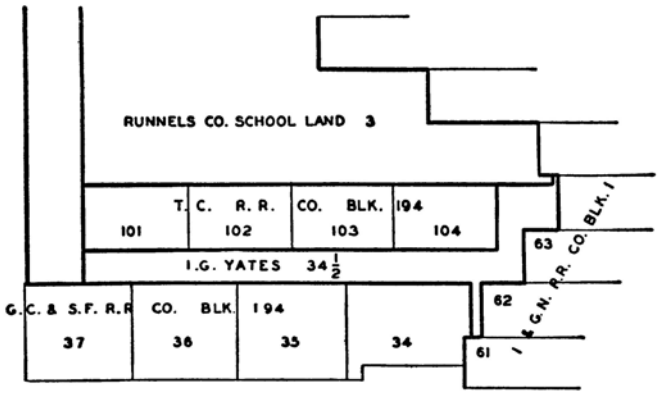
'In the District Court of Pecos County, Texas, Feb. Term 1911.

'John Monroe vs. T. F. Hickox, No. 854.
'On the 28th day of February A. D. 1911, came on to be heard the above numbered and entitled cause in its regular order on the docket, and thereupon came the plaintiff in person and by attorney, and also came the defendant in person and by attorney, and all parties announced ready for trial, and no jury having been demanded and all issues of law and fact being submitted to the court, the pleadings were thereupon read, the evidence introduced and argument of counsel made, and the court after hearing same, thereafter on the 4th day of March A. D. 1911, in open court

pronounced judgment in favor of the defendant. It is therefore ordered, adjudged and decreed by the court that the plaintiff John Monroe take nothing by his suit against the defendant T. F. Hickox, and that the defendant T. F. Hickox, go hence without day and recover against the plaintiff John Monroe all costs of suit, for which execution will issue. To which judgment of the court the plaintiff John Monroe in open court excepted and gave notice of appeal to the Court of Civil Appeals of the 4th Supreme Judicial District of **Texas**, sitting at San Antonio, **Texas**, and upon plaintiff's request and good cause being shown he is hereby given sixty days after the adjournment of this court within which to file his statement of facts herein.'

CURETON, Chief Justice (dissenting).
For a statement of this case I refer generally to the opinion of the Court of Civil Appeals, 47 S.W.(2d) 500, and to the opinion of Special Associate Justice FOUTS on the motion for rehearing. **107** S.W.(2d) **564**. In this court the case was originally heard by the Commission of Appeals, and the judgment recommended in the opinion of the Commission (73 S.W.(2d) 490) was entered by the Supreme Court. I was unable to agree to the correctness of that opinion and judgment, and so notified my then associates, reserving the right to file a dissenting opinion on motion for rehearing, after a more exhaustive examination of the questions involved. Argument was invited on this motion, as stated in the opinion of Special Associate Justice FOUTS. Upon the argument ****574*** counsel were informed from the Bench that I had not approved the opinion previously rendered nor the decree entered thereon, but had withheld my final conclusion until the motion for rehearing came on for consideration. I could not approve the main conclusion of Special Associate Justice FOUTS, nor agree to the reversal of the case, but, being unable at the time to prepare an opinion expressing my views, I requested that a notation of my intention to do so later be appended to that opinion, and this was done. This duty I shall now attempt to perform. My views are well expressed in the opinion of the Court of Civil Appeals (47 **S.W**. (**2d**) 500), and I shall not elaborate on certain questions there discussed.

For the purpose of presenting the locus of this controversy, I here reproduce a map taken from one of the arguments filed on behalf of defendants in error, which in turn was based on certain maps in evidence. The map is here presented only for the purpose of showing the approximate relative locations of surveys 34 and 35, block 194, and section 103, the land here involved:



****462*** Mrs. M. A. **Smith**, the widow of John Monroe, and the other defendants in error claim title to this land under a grant from the State. The **Permian Oil** Company claims title from the heirs of Hickox, but the Hickox title in turn depends upon a certain judgment in cause No. 854, John Monroe v. Hickox, entered by the district court of Pecos county on March 4, 1911. John Monroe brought that suit, as owner of section 103, against Hickox, who owned sections 34 and 35, shown on the map, and a 'take nothing' judgment was entered. That judgment is the primary subject of this opinion. The judgment reads as follows:

'In the District Court of Pecos County, Texas. February Term, 1911, John Monroe v. T. F. Hickox.

'On the 28th day of February, A. D. 1911, came on to be heard the above numbered and entitled cause in its regular order on the docket, and thereupon came the plaintiff in person and by attorney, and also came the defendant in person and by attorney and all parties announced ready for trial, and no jury having been demanded and all issues of law and fact being submitted to the court, the pleadings were thereupon read, the evidence introduced and argument of counsel made, and the court after hearing same, thereafter on the 4th day of March, A. D. 1911, in open court pronounced judgment in favor of the defendant. It is therefore ordered, adjudged, and decreed by the court that the plaintiff, John Monroe, take nothing by his suit, against the defendant, T. F. Hickox, and that the defendant, T. F. Hickox, go hence without day and recover against the plaintiff, John Monroe, all costs of suit, for which execution will issue. To which judgment of the court the plaintiff, John Monroe, in open court excepted and gave notice of appeal to the Court of Civil Appeals of the 4th Supreme Judicial District of **Texas**, sitting at San Antonio, **Texas**, and upon plaintiff's request *****575*** and good cause being shown he is hereby given sixty days after the adjournment of this court within which to file his state(ment) of facts herein.

'O. K. W. C. Douglas, Judge.'

This judgment was rendered on March 4, 1911, and on the same day the court filed his findings of fact and conclusions of law, which read:

'John Monroe vs. T. F. Hickox, No. 854, in District Court, Pecos County, **Texas**. February Term, 1911.

'I, W. C. Douglas, Judge of the District Court of Pecos County, **Texas**, have this day prepared and do hereby order filed in this cause, the following findings of fact and conclusions of law, to-wit:

****463*** **'Findings of Fact.**

'1. Block C-4, G. C. & S. F. Ry. Co., is composed of sixty-four surveys. The field notes show that they were all made by H. C. Barton, deputy surveyor of Pecos County, between the 5th and 20th days of October, 1881. According to the field notes of Survey No. 4 of this block, the northwest corner was marked as follows: 'Pile of pebbles for the N. E. corner of Survey No. 3, this block from which Capstone Mountain bears south 1500 varas,' the northeast corner is described as 'Stone mound from which Capstone Mountain bears S. 19 E. and another Capstone Mountain bears N. 70 E.,' corners answering to this description were found on the ground located relatively as shown in the sketch of surveyor, W. T. Hope.

'2. Block Z, **Texas** Central Railway Company, is composed of fifty-four surveys. They were made by F. Schadowsky, between the 4th and 8th days of November, 1882. The beginning calls of this block tie on to Block C-4. There is no testimony locating this block on the ground.

'3. Block 194, G. C. & S. F. Ry. Company, is composed of one hundred surveys, the record showing they were made by I. W. Durrell, deputy surveyor of Pecos County, between the 17th and 31st days of May, 1883. It appears that he made fifteen surveys on each of the first six days and ten surveys on the seventh day. The beginning calls of this block tie on to Block Z, G. C. & S. F. Railway, but there is no testimony locating on the ground any of the original land marks called for in the field notes.

'3. Block No. 178, **Texas** Central Railway Company, is composed of thirty-six surveys, the record showing they were made by I. W. Durrell, deputy surveyor of Pecos County. The first eighteen of these surveys appear to have been made on November 21, 1882, and the 1ast eighteen made on November 22, 1882. The beginning call starts at river survey at No. 543, in the name of H. & G. N. Railway Company. None of the land marks called for by the field notes of this block were located on the ground by any of the testimony.

'4. The river surveys shown on the map of surveyor W. T. Hope were made in the year 1876 by Jacob Kuechler, deputy surveyor of Pecos County, Survey 4, of Block C-4, G. C. & S. F. Railway Company, located on the ground from objects found corresponding to the calls for its northeast and northwest corners relatively as shown on Hope's map. Survey 71, I. & G. N. Railway on the map of the surveyor, W. T. Hope, with its northwest corner marked by stone mound; there is no call in the field notes for a stone mound at this point. Survey No. 61, ***464*** I. & G. N. Railway was located on the ground relatively as shown on Hope's map by course and distance from the northwest corner of Survey 71, established as aforesaid, and its location verified by a call of its field notes for road on a mesa. Survey No. 3, Runnels County school land, was located on the ground by course and distance based on Surveys 71 and 61, which were located on the ground as aforesaid. All of these locations were made on the ground by surveyor W. T. Hope and were based on actual runnings as shown by the red lines delineated on this map. The balance of the surveys shown on the map of surveyor Hope were platted in by him according to their calls for course and distance based on his actual work on the ground shown by the red lines, and with relation to the aforesaid land marks.

'5. By beginning at the northeast corner of Survey 4, Block C-4, G. C. & S. F. Railway Company, as found on the ground, and running by course and distance and thereby locating Surveys 103 and 104, **Texas** Central Railway; these two surveys would lie adjoining and immediately south of Survey 3, Runnels County school land, and would not conflict with Surveys 34 and 35, **Texas** Central Railway.

'6. By constructing Block 194, G. C. & S. F. Railway, based on the calls for the river surveys, as located on the ground, ***576*** surveys 34 and 35, G. C. & S. F. Railway Company, Block 194 would lie adjoining and immediately south of Survey No. 3, Runnels County school land and be in total conflict with Surveys 103 and 104.

'7. Surveys 103 and 104, being the land sued for by plaintiff, are junior surveys to Surveys 34 and 35.

'8. I am unable to follow the footsteps of the original surveyor in establishing Block 194, G. C. & S. F. Ry., either in the original location of (or) the corrected surveys, and I am unable to ascertain the true intention of the original surveyor as to locating this block on the ground.

'9. I am unable from the testimony in evidence to ascertain the true location on the ground of Surveys Nos. 103, 104, 34 and 35, above referred to.

'10. I find that Block 194, G. C. & S. F. Railway, was originally located by an office survey.

'11. I find that the calls of Block 194 to tie on to Block Z and its calls to tie on to the river surveys are repugnant to each other and inconsistent, and I am unable to determine which of these calls should be regarded as a mistake of the surveyor.

'12. I find that the plaintiff is the legal owner and holder of the fee simple title Survey No. 103, **Texas** Central Railway, ***465*** and that he holds Survey No. 104, under a contract of purchase from the State of **Texas**, in accordance with the school land laws, and that he has made his proof of occupancy thereon as required by law, and that his said sale is in good standing.

'13. Defendant is the holder and entitled to the possession of Survey No 34, under a contract of purchase from the State of **Texas**, in accordance with the school land laws, and his sale is in good standing.

'14. The said Hope map is hereby referred to and made a part hereof.

'Conclusions of Law.

'1. The burden of proof is upon the plaintiff to establish the location of the two tracts of

land sued for upon the ground, and to show that there is no conflict between said surveys and Surveys Numbers 34 and 35, and said Surveys Numbers 34 and 35 being senior surveys.

'2. It is presumed that the work of an official surveyor was actually done on the ground, but the amount of work he certified to having done within a given time, the character of the work as called for by the field notes, and the lack of evidence found on the ground, discrepancies in distances between objects called for, and the like, may be sufficient to rebut said presumption.

'3. Where there are two theories upon which a survey which is not fixed to the ground by any of its calls can be constructed, and one theory shows a conflict between a senior and a junior survey, and the other theory shows no conflict between them and the evidence, aided by the presumptions of law, furnishes no method for following the footsteps of the original surveyor or for arriving at the intent and purpose of the original surveyor, the presumption of the law will be resolved in favor of the senior survey that there is a conflict, the owner of the junior survey being the plaintiff.

'4. Having found as a fact that the location of Surveys Numbers 34 and 35 and 103 and 104 cannot be located upon the ground from the testimony in evidence, and that there is a total conflict between them based on certain calls and no conflict based on other calls, which theories are irreconcilable, and the true theory unascertainable from the testimony, I conclude that the plaintiff should take naught by this suit and that the defendant should recover his costs herein.

'W. C. Douglas,

'Judge District Court,

'63rd Judicial District.'

Indorsed: 'No. 854. John Monroe v. T. F. Hickox. Findings of facts and conclusions of law. Filed March 4, 1911. Frank ***466*** Rooney, Dist. Clk., Pecos Co., **Tex**., by H. L. Winfield, Dy.' (All italics mine.)

Monroe's suit was in the statutory form of trespass to try title, and Hickox's answer was a plea of 'not guilty.' It was in reality a boundary duit, the parties thinking at the time that there was a conflict between the south boundary lines of sections 103 and 104 and the north boundary lines of sections 34 and 35. Of course, the Yates survey, 34 1/2 shown on the map, had not then been established by the state. In fact, the south boundary line of surveys 103 and 104 is shown as conterminous with the north boundary line of surveys 34 and 35 by the General Land Office maps of 1896 and 1907. Both these maps are in the record as plaintiff's (**Permian Oil** Compay's) exhibits. It was not then understood or known that in truth and fact ***577*** there was a vacancy between the surveys about one-half mile wide, now known as the Yates No. 34 1/2 survey. Monroe's suit, while filed in the statutory form of trespass to try title, was in reality a boundary suit, and was tried as such. I quite agree with Special Associate Justice FOUTS when he says in the majority opinion, 'measured by the familiar rule, cause No. 854 as tried was a boundary sut.' Being a boundary suit, the place of controversy was the conterminous line between surveys 103 and 104 on the one hand, and 34 and 35 on the other. In this boundary controversy Monroe lost-did not prove his case, and the court adjudged that he 'take nothing.' We are now asked to decree that by these words 'take nothing' Monroe lost and Hickox acquired title to survey 103, shown on the map, located approximately a half mile north of the line of controversy, and between which and sections 34 and 35 there then intervened a vacancy, upon which is now located the Yates survey No. 34 1/2. In other words, we are asked to say that the district court by its 'take nothing' decree in a boundary suit awarded title to Hickox to a tract of land a half mile away, which Hickox did not own, and which Monroe did own. (See fact findings 12 and 13, quoted above.) That is stretching a 'take nothing' judgment a little too far for my legalistic credulity to accept. I decline to believe that the trial judge intended to render, or that interpreted under

established rules he did render, an India-rubber decree that would stretch from the point of actual controversy across an intervening section of land, and enfold in its elastic embrace the premises here involved.

My immediate purpose is to determine the meaning and effect of the 'take nothing' judgment. Under our system of jurisprudence a judgment is to be tested by its substance rather than by its form. Form is of slight importance, and no particular ***467** phraseology is required to make a judgment valid. A judgment should, of course, be appropriate to the proceedings in which it is rendered, show affirmatively that the merits of the case have been passed upon, and award the judicial consequences which the law attaches to the ascertained facts. 25 Tex.Jur. p. 446, s 77. Among the requisites of a valid judgment is the universally approved one that where property is the subject of the decree it should be described with certainty, or furnish means of its identification. 25 Tex.Jur. p. 542, s 81. A judgment must also be sufficiently definite and certain to define and protect the rights of all litigants, and must not be in the alternative or be conditional or contingent. 25 Tex.Jur. pp. 456, 457, ss 84, 85. The rules of construction as applied to judgments generally is well stated in **Texas** Jurisprudence as follows: 'In accordance with familiar principles a judgment is construed as it is written. If plain and unambiguous, it is not to be interpreted in the light of subsequent or prior statements or acts of the court evincing judicial intention when the judgment was rendered. Nor can a judgment be sustained or explained by reference to the understanding of the parties, even though entered pursuant to stipulation. It must be read as an entirety, and if, taken as a whole and construed according to well-known rules, it is unambiguous, no room is left for interpretation.'

However, if a judgment is ambiguous, familiar rules of construction may be applied: 'If the judgment is ambiguous, application is made of familiar rules of construction, such as that effect will be given to reasonable intendments, that a writing will be made to harmonize with the facts, that the circumstances will be considered, and that a common-sense construction will be put on language as a whole.' (Italics mine.)

In construing an ambiguous judgment, 'it is always proper to look to the entire record, the pleadings, the issues made in the case, the testimony offered in support of the pleadings, the charge, the fact or facts found by the Court, and other proceedings leading up to the judgment.' 25 Tex.Jur. pp. 461, 462, s 89, and the many cases cited in the notes. Not only is it true that a judgment must conform to and be supported by the pleadings and the evidence, but in a case tried to the court 'it must conform to and be supported by the findings of fact and conclusions of law.' 25 Tex.Jur. p. 484, s 103. Not only is it true that a judgment must conform to the verdict (25 Tex.Jur. p. 484, s 104), but it must conform to the conclusions of fact found by the trial judge when separately stated. R.S. ***468** art. 2209, and article 2211 (as amended by Acts 1931, c. 77, s 1 (Vernon's Ann.Civ.St. arts. 2209, 2211)) 25 Tex.Jur. p. 488, s 106, and cases cited in the notes. As to this rule the statute cited expressly declares: 'Where a special verdict ****578** is rendered, or the conclusions of fact found by the judge are separately stated, the court shall render judgment thereon unless set aside or a new trial is granted.' (Italics mine.)

The rules stated above have a direct bearing on the proper interpretation of the judgment here involved, and are as applicable here as if the case were one of direct appeal from the decree before us for interpretation.

We are compelled to determine the meaning and effect of the judgment in cause 854, previously described, in order to ascertain whether or not it is res adjudicata on the question of title to the land involved in the instant case. In interpreting that judgment we should assume that the trial judge who entered it did his duty, and followed the rules of law applicable to the case; the he intended to render a valid judgment, one which would not be set aside on appeal, one appropriate to the proceeding, and which awarded the judicial consequences which the law attached to the ascertained facts; that he intended to make his decree certain, and not conditional or contingent; and that he intended to follow the statute (article 2209, which was but the embodiment of the rule

as generally applied by courts) and conform his decree to the 'conclusions of fact' found by him and 'separately stated,' found, and filed on the very day the judgment was rendered. 25 Tex.Jur. p. 460, s 87; Austin v. Conaway (Tex.Civ.App.) 283 S.W. 189; Freeman on Judgments (5th Ed.) vol. 1, p. 132, s 76; 34 C.J. p. 501, s 764; p. 504, s 797. As a leading authority states: 'When the language is susceptible of two interpretations, from one of which it follows that the law has been correctly applied to the facts and from the other that there has been an incorrect application, that construction will be adopted which upholds the judgment.' 25 Tex.Jur. pp. 459, 460, s 87; Cough v. Jones (Tex.Com.App.) 212 S.W. 943; 34 C.J. p. 501, s 794.

I shall now for the moment assume that the judgment before us (in cause No. 854, previously quoted) is ambiguous, and determine whether or not the judgment roll, embracing in this instance the findings of fact and conclusions of law of the trial judge, previously quoted, were admissible in evidence in this suit. The **Permian Oil** Company depends for its title upon that decree, and says that by force of that judgment their predecessor in title, Hickox, became the owner of the land here involved, and that it is res adjudicata of the issue of title of the defendants ***469** in error, who claim under John Monroe, who brought and lost the suit in which the judgment was entered. Of course, if the judgment is not ambiguous, nothing is admissible to explain it. It explains itself. 25 Tex.Jur. p. 459, s 86, supra. Nor can the judgment roll or anything else be used to contradict an unambiguous decree. 25 Tex.Jur. p. 853, s 328. There are exceptions to the rules just stated, but they are not here involved. 25 Tex.Jur. p. 862, s 331. But once it is determined that a judgment is ambiguous the whole record may be examined to ascertain its meaning, and it will not be given a more extensive effect than is warranted by the record. 25 Tex.Jur. p. 461, s 89; Freeman on Judgments (5th Ed.) vol. 1, p. 134, s 76; 34 C.J. p. 501, s 794; p. 504, s 797; p. 505, s 801; Black on Judgments (2d Ed.) vol. 1, p. 179, s 123; Durden v. Roland (Tex.Civ.App.) 269 S.W. 274; Dunlap v. Southerlin, 63 **Tex**. 38; Campbell v. Schrock (Tex.Com.App.) 50 S.W.(2d) 788; Houston **Oil** Co. v. Village Mills Co. (Tex.Com.App.) 241 S.W. 122, **129**; Poitevent v. Scarborough, 103 **Tex**. 111, 124 S.W. 87; Lipsitz v. First Nat. Bank (Tex.Com.App.) 293 S.W. 563; Barnes v. Hobson (Tex.Civ.App.) 250 S.W. 238; Oklahoma v. **Texas**, 256 U.S. 70, 88, 41 S.Ct. 420, 65 L.Ed. 831; Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683, 690, 15 S.Ct. 733, 39 L.Ed. 859; Barton v. Chrestman (Tex.Civ.App.) 275 S.W. 401; Campbell v. McLaughlin (Tex.Com.App.) 280 S.W. 189.

In **Texas** Jurisprudence (s 89, supra) the rule is stated as follows: 'In construing an ambiguous judgment it is always proper for the court to look to the entire record (including the citation), the pleadings, the issues made in the case, the testimony offered in support of pleadings, the charge, the fact or facts found by the court, and other proceedings leading up to the judgment.' (Italics mine.)

In Freeman on Judgments (s 77), cited above, the text reads: 'If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record, If, with the light thrown upon it by them, its obscurity is dispelled, and its intended signification made apparent, it will be upheld and carried into effect. In case of doubt regarding ***579** the signification of a judgment, or of any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the record. This is well illustrated in those cases in which the ***470** description of property in the judgment is supplemented and made certain in this manner. And the judgment will not be given a more extensive effect in this respect than is warranted by the record.'

Black on Judgments (s 123, cited above) states: 'The rule for the construction of ambiguous judgments is clearly stated by the supreme court of Kansas in the following language: 'Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the

other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms.“

The texts cited from 34 Corpus Juris declare:

‘The legal operation and effect of a judgment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments must be construed as a whole, and so as to give effect to every word and part. The entire judgment roll may be looked to for the purpose of interpretation. Necessary legal implications are included although not expressed in terms, but the adjudication does not extend beyond what the language used fairly warrants. The legal effect, rather than the mere language used, governs. In cases of ambiguity or doubt, the entire record may be examined and considered. Judgments are to have a reasonable intendment. Where a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective and conclusive, and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered.’ Section 794. (Italics mine.)

‘Where the language of a judgment is ambiguous or its meaning doubtful, reference may be had to the pleadings in the case, and the judgment interpreted in the light which they throw upon it. But if the meaning of the judgment is clear and plain on its face, it cannot be changed, extended, or restricted by anything contained in the pleadings.’ Section 796.

‘A judgment should be interpreted with reference to the verdict of the jury, and if possible so as to harmonize them. Like rules apply where the facts are found by the court or referee.’ Section 797. (Italics mine.)

Writing on ‘The Judgment as an Estoppel,’ Freeman in his work on Judgments, in part, says: ***471*** ‘To determine what was adjudicated in a prior action the record in that case may, of course, be considered. The judgment itself must be properly proved. But inasmuch as the mere judgment may not alone establish the jurisdiction of the court, or show what matters were determined, it is ordinarily necessary to prove the whole judgment-roll or record when a judgment is urged as an estoppel or bar. And even though it may not always be necessary, it is always proper to do so. But as to just what may be regarded as a part of the record for this purpose and what extrinsic matters may be proved or considered, there is no absolute or universal rule. However, it is quite generally agreed that the pleadings, instructions to the jury and the verdict, or the findings and conclusions, may be looked to to determine what was adjudicated.’ (Italics mine.) Freeman on Judgments (5th Ed.) vol. 2, s 771.

The **Texas** authorities are consistent with the texts cited and quoted.

It is also quite elementary that when reference must be had to the record in interpreting an ambiguous judgment, the whole record may be examined. As said in Black on Judgments (2d Ed.) vol. 1, p. 181, s 124: ‘* * * and when a copy of the record of the judgment is required, for the purpose of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as evidence under an issue of nul tiel record, or to establish a former adjudication of the same subject-matter between the same parties, and indeed in all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable ***580*** part of it. And the general rule is, that where the copy of a record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part.’ (Italics mine.)

Indeed, not only is it true that the whole record may be examined in interpreting an ambiguous judgment, but evidence outside the record, even parol, is admissible to show for what the judgment was recovered, ‘what was the real cause of action.’ 34 C.J. p. 506, s 803; LaBrie v. McKim, 56 Tex.Civ.App. 322, 120 S.W. 1083; Cook v.

Burnley, 45 **Tex**. 97; Russell v. Place, 94 U.S. 606, 24 L.Ed. 214; Freeman v. McAninch, 87 **Tex**. 132, 135, 27 S.W. 97, 47 Am.St.Rep. 79; Reast v. Donald, 84 **Tex**. 648, 19 S.W. 795; Oldham v. McIver, 49 **Tex**. 556, 572.

Is the judgment before us (in cause No. 854) ambiguous? That it is so is not open to discussion. You cannot from the face of the judgment determine the nature of the cause of ***472** action, what was sued for, nor what was recovered, if anything; nor does it contain the description of any property or land. As it stands it is not only ambiguous, but absolutely meaningless. When you read it you know that Monroe sued Hickox and lost, but whether the suit was for land, personal injuries, foreclosure of a lien, etc., you cannot determine from the face of the decree. You might infer from the names that it was not a suit for divorce, and that is as definite a conclusion as the face of the judgment warrants. So it was, and is, necessary to examine the record to determine the nature of the cause of action, the description of the property involved, if any, and to ascertain the facts found by the trial court, in order that we may so interpret the decree in such a manner that it will award the judicial consequences of the ascertained facts. Authorities, supra.

The majority opinion in this case says the judgment is not ambiguous, although it states: 'It is true the description of the land and the nature of the cause of action do not appear in the face of the judgment.' (Italics mine.) The opinion then proceeds to hold, if I understand it correctly, that this is supplied 'by the direct reference to the plaintiff's pleadings appearing in the face of the judgment.' Then, declares the opinion: 'By this reference in the judgment there is as effectively supplied the description of the land and the cause of action disposed of as though the judgment had recited both in its face,' citing Freeman on Judgments (5th Ed.) vol. 1, s 97; Martin v. Teal (Tex.Civ.App.) 29 S.W. 691, 692; and Ruby v. Von Valkenberg, 72 **Tex**. 459, 10 S.W. 514, 515. The language of the judgment to which the opinion makes reference, following recitation of appearance, is found in the following extract: 'The pleadings were thereupon read, the evidence introduced, and argument of counsel made, and the court after hearing same,' pronounced judgment, etc. This is a mere recital that the pleadings were read, and no more incorporated the description of the cause of action and of the land contained in the petition in the judgment than it did 'the evidence introduced and argument of counsel made.' Of course, the pleadings, like the balance of the record, could be considered in interpreting an ambiguous judgment, but to say that this bare recital that the pleadings were read so incorporates the pleadings in the decree as to relieve it, as it stood, of its ambiguous character, is a doctrine so novel and strange as to be, I believe, without precedent. Certainly the authorities cited in no manner support it. The text cited from Freeman on Judgments reads: 'In view of the principle that that is certain which is capable of being made certain, it is generally held that a reference to ***473** the pleadings or other parts of the record is sufficient if they contain an adequate description. If the property is sufficiently described in the declaration it is sufficient for the judgment to refer to it as the premises 'mentioned in the declaration.' But if the description referred to is itself uncertain, it cannot aid the judgment, as where a writ is directed to issue to restore to plaintiff possession of the lands, or so much thereof as are not farther south than the boundary line described in the verdict, and the verdict merely designates such lien as being seven and nine feet south of a certain hedge. A judgment for 'the tract of land described in the petition,' which in fact describes two tracts, is insufficient. But describing property as 'the property in controversy' may be sufficient.' Section 97.

Freeman, as shown, has reference to decrees which refer to the pleadings specifically for descriptive purposes, as 'the tract of land described in the petition,' etc.

****581** In Martin v. Teal the judgment in part was that 'the wire fence inclosing survey 70, and in controversy,' etc., and that the defendant recover possession of said 'one mile or more of wire fence inclosing said survey and the subject-matter of this controversy.' All the Court of Civil Appeals held was that the judgment was sufficient 'if

it refers for such description to pleadings by which it can be made certain.'

In Ruby v. Von Valkenberg a judgment rendered in 1847 was introduced in evidence, which decreed 'that the property conveyed by plaintiff and his wife by deed, of which plaintiff has incorporated a copy into his petition, and which is made part of this decree.' This court simply held that under the law as it existed when the judgment was entered this was permissible.

The question here involved, viz., whether a bare recital that the pleadings were read in a district court case relieved a vague and meaningless judgment of its ambiguity to such an extent as forbids reference to the complete judgment roll in its interpretation, was not involved nor determined by either of the authorities cited. The plain fact is that the plaintiffs in error are depending upon an ambiguous judgment, and the whole judgment roll record is admissible to determine its meaning, not just a part of the record, the pleadings for example, but the whole of it, 'so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part.' Black on Judgments, s 124, supra. However, if it be said that the bare recital in the judgment that the pleadings were read had the legal effect of incorporating within the judgment itself the entire petition in cause No. 854 (which, as a matter of law, common sense, and common practice it does ***474** not), still the judgment would not be relieved of its ambiguous character, and resort must still be had to ascertain the character of suit in which the judgment was entered, and the effect to be given to the decree, as awarding the judicial consequences to the determined facts. The petition in form was one of statutory trespass to try title, and the answer consisted of a plea of 'not guilty.' Looking at the petition and answer alone, what sort of suit was it? The answer is that nobody can tell. It might, of course, be one to actually determine who possessed the title to the land described, but it might be for any one of a number of other purposes, viz.:

(1) It might be a boundary suit, to determine a boundary line between two adjacent surveys, for it has long been the law that such suits could be brought in form of trespass to try title; or

(2) It might be an action brought by a grantor to recover the land because of a breach of condition of a deed, as, for example, for failure to pay purchase money notes; or

(3) An action by a landlord who seeks to compel his tenant to vacate the premises upon expiration of a lease; or

(4) An action by an owner whose land has been appropriated for public use without compensation; or

(5) An action to attack the validity of process or sale under execution.

41 Tex.Jur. p. 458, s 5; Weaver v. Vandervanter, 84 **Tex**. 691, 19 S.W. 889; Kauffman v. Brown, 83 **Tex**. 41, 18 S.W. 425; Andrews v. Parker, 48 **Tex**. 94; Garner v. Chicago, R. I. & G. R. Co. (Tex.Civ.App.) 10 S.W.(2d) 132; Spencer v. Rosenthall, 58 **Tex**. 4; Purinton v. Davis, 66 **Tex**. **455**, 1 S.W. 343; **Smith** v. Cottingham, 20 Tex.Civ.App. 303, 49 S.W. 145; Curran v. **Texas** L. & Mtg. Co., 24 Tex.Civ.App. 499, 60 S.W. 466; Bull v. Bearden (Tex.Civ.App.) 159 S.W. 1177.

It is obvious that since the judgment interpreted alone by the petition in this case does not disclose which one of the many actions which could be brought in the form of trespass to try title was in fact brought and tried, it is ambiguous as not disclosing the nature of the action, an important factor in determining the effectiveness of a plea of res adjudicata. Shall we say that when a vendor brings a trespass to try title suit against his vendee because the latter has defaulted in the payment of purchase money, and the court decrees that he 'take nothing' in the judgment, without disclosing in the decree that he does this because in his fact findings he has found that the vendee has not defaulted in payment, that thereby the vendee has recovered the land and has his vendor's title, and that the balance of the record, including the findings of

fact, may not be looked *475 to to ascertain what was actually litigated? I think not, although that would be the certain result under the majority opinion in this case. Shall we say that when a landlord brings a trespass to try title suit against his tenant, and is defeated in fact because the tenancy is not up, that the tenant under a 'take **582 nothing' judgment would get his landlord's title, and that the record, including the fact findings, could not be examined to determine just what was litigated? I think not, and yet under the majority opinion in this case that would be the result. Many other illustrations of the result of an application of the doctrine of the majority opinion in this case could be given, but the above suffice to show the grave injustice of looking only to the 'take nothing' decree and the pleadings as alone determining what has actually been litigated by a trespass to try title action. Greenleaf says: 'When a former judgment is shown by way of bar, whether by pleading, or in evidence it is competent for the plaintiff to reply, that it did not relate to the same property or transaction in controversy in the action, to which it is set up in bar; and the question of identity, thus raised, is to be determined by the jury, upon the evidence adduced. And though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record, it remains doubtful whether the same subject-matter were actually passed upon, it seems that parol evidence may be received to show the truth. So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all with the same propriety, the judgment is not conclusive, but only prima facie evidence upon any one of the propositions, and evidence aliunde is adminssible to rebut it.' Greenleaf on Evidence (15th Ed.) vol. 1, s 532.

Greenleaf adds in his notes: 'It is obvious that, to prove what was the point in issue in a previous action at common law, it is necessary to produce the entire record. Foot v. Glover, 4 Blackf. (Ind.) 313. And see Morris v. Keyes, 1 Hill (N.Y.) 540; Glascock v. Hays, 4 Dana ((Ky.) 58) 59.'

As I understand the majority opinion in this case, it disregards the difference between a trespass to try title suit which involves and determines title, and a trespass to try title suit which involves and determines boundary. After referring to the fact that formerly we permitted two suits for title and only one over boundary, though each might be brought in form of trespass to try title, and that from 1892, for forty years or more, this court under the statute had jurisdiction over trespass to try title suits when they were in reality title suits, but had *476 none over boundary suits, although brought in the form of trespass to try title, the opinion declares: 'We are unwilling to accept cases of either class as authority for the proposition that different causes of action are involved in trespass to try title suits brought in statutory form one of which turns on the fact of boundary and the other of which turns on some other evidentiary fact affecting title.'

That quotation plainly shows that the majority opinion disregards the essential difference between a trespass to try title suit involving and determining title, and a trespass to try title suit involving and determining boundary. The rule thus announced, I believe, is without precedent and without authority, and the opinion, in so far as I am able to understand it, cites none.

For many years after the adoption of the common law and the trespass to try title statute in 1840, our statutes permitted two suits for the recovery of title to lands by the plaintiff, the second within a limited time after the first, although he lost the first one. Then, as now, these suits were to be in the form of trespass to try title. This court, of course, following the statute, recognized that an adverse judgment in the first suit was not res adjudicata or a bar to the plaintiff's right to timely file and try the second suit. but this court held that if the first suit, though in form of trespass to try title, was in reality a boundary suit, an adverse judgment was res adjudicata and barred in second suit. Jones v. Andrews, 72 **Tex**. 5, 12, 9 S.W. 170; Spence v. McGowan, 53 **Tex**. 30; Bird v. Montgomery, 34 **Tex**. 713: Corporation of San Patricio v. Mattis, 58 **Tex**. 242.

In the case of Jones v Andrews, just cited, the court makes clear its recognition of the

distinction between a suit involving and to determine title, and one involving and to determine boundary, approving the rule that where a suit, though nominally to try title, was in fact to settle a disputed boundary, it was not a title suit.

It is well within the recollection of the bar generally that from 1892 until a few years back the Courts of Civil Appeals had final jurisdiction over boundary suits, and this court, though clothed with power to hear title suits, had no such authority over boundary suits, even though brought in form of trespass to try title. Wright v. Bell, 94 **Tex**. 577, 63 S.W. 623; Schiele v. Kimball, 113 **Tex**. 1, 194 S.W. 944; Cox v. Finks, 91 **Tex**. 318, 43 S.W. 1; *****583*** Steward v. Coleman County, 95 **Tex**. 445, 67 S.W. 1016. So, for approximately a hundred years the jurisprudence of **Texas** has recognized a difference between title and boundary suits, even though each were brought in the statutory form of trespass to try title. I think it too late, ****477*** without legislative action, to now say that we will no longer recognize the distinction and apply rules of law respectively applicable. Of course, it is true that in a boundary suit the defendant, like Bre'r Rabbit in the fable, can sit and say nothing, and compel the plaintiff to prove his title; but this does not make it a title suit-it still remains a boundary suit. Cox v. Finks, 91 **Tex**. 318, 320, 43 S.W. 1. The majority opinion in this case quite rightly says: 'Measured by the familiar rule, cause No. 854 as tried was a boundary suit.' I am of the opinion that the 'take nothing' judgment should be interpreted as a 'take nothing' judgment would be interpreted in a boundary suit, and in harmony with the court's findings of fact and conclusions of law, instead of as if in a title suit, as the majority opinion holds. When we go to the record, and examine the court's findings of fact and conclusions of law, we find that in fact the court did not determine the question of boundary, because he was unable to locate the surveys whose conterminous lines were involved. He so stated in fact finding No. 9, quoted above. In No. 4 of his conclusions of law, quoted supra, the court stated his reasons for entering the 'take nothing' judgment, as follows: '4. Having found as a fact that the location of surveys numbers 34 and 35, and 103 and 104, cannot be located upon the ground from the testimony in evidence and that there is a total conflict between them based on certain calls and no conflict based on other calls which theories are irreconcilable and the true theory unascertainable from the testimony, I conclude that the plaintiff should take naught by this suit and that the defendant should recover his costs herein.' (Italics mine.)

It is perfectly plain from this conclusion that the words 'take nothing' as used in the judgment were not intended to award title to any land-not even a disputed strip to Hickox. The judge said, 'I conclude that the plaintiff should take naught' by this suit because the allegedly conflicting surveys could not be located on the ground; in other words, the plaintiff should 'take naught' simply because he had failed to make a case.

The words 'take nothing' used in the judgment are not words defined by statute; nor are they defined in Words and Phrases and other similar works. They are to be interpreted in the same manner that other words are interpreted-and here, as found in an ambiguous decree, must have their meaning determined in connection with the basis of that decree, viz., the findings of fact and conclusions of law of the trial court. That by their use, and by the judgment rendered, the court did not intend to award title to section 103 to Hickox is shown by his ****478*** finding No. 12, quoted above, in which he said: 'I find that the plaintiff (Monroe) is the legal owner and holder of the fee simple title to Survey 103,' etc. It is also plain, I think, that by the judgment the court did not intend to fix or establish any boundary line. The judgment is ambiguous, and that interpretation is the only one consistent with his findings of fact and conclusions of law to the effect that he could not locate on the ground the surveys involved or their conterminous boundaries.

The object and purpose of a suit to determine title and those of a boundary suit are plainly different, and require different types of judgment. The object of a trespass to try title suit to establish and determine title is, of course, to ascertain who has the superior title to the land; and a judgment which describes the land involved as it is

described in the petition, either directly or by reference, is sufficient as to description, even though simply a copy of the field notes of the patent-provided, of course, by it the land may be located. Freeman on Judgments (5th Ed.) vol. 1, s 96. The object and purpose of a boundary suit is to ascertain the boundary, and the judgment determines the location of the line on the ground and describes and identifies it. 41 Tex.Jur. p. 680, 681, s 173. And it is elementary that a decree which does not do so is void; and since a description which merely follows that of the partent settles nothing, but leaves the parties where they were when the suit began, the judgment is void. Converse v. Langshaw, 81 **Tex**. 275, 16 S.W. 1031, and other authorities cited by Justice Higgins in **Permian Oil** Co. v. **Smith** (Tex.Civ.App.) 47 S.W.(2d) 500, 507, et seq.

Bearing in mind these differences in the objects and purposes of suits to determine title and those to ascertain and fix boundaries, and the resultant differences in the ***584** descriptions which must characterize the judgments, it is plain that a 'take nothing' decree in a boundary suit does not transfer title, because it does not establish and determine the boundary. Such was the effect given to a general judgment for the defendant in a previous boundary suit in the case of Wallis v. Wofford (Tex.Civ.App.) 26 S.W. 739, by Justice Williams, who afterwards for many years graced the Supreme Bench of **Texas**. In the reported case a judgment for the defendant in the former suit was set up as a bar to the maintenance of the action. Justice Williams overruled the contention, saying: 'But, from the petition, it does not appear that any line was fixed. The judgment was simply for defendant, which means that plaintiff had not shown himself entitled to judgment for the land for which he sued. Whatever may be the effect of ***479** that judgment, it does not fix any boundary, and does not preclude appellant from asserting title to any land which, under or consistent with it, he may show himself to have.'

In this connection, and without elaboration, I desire to state that I approve what Mr. Justice Higgins has said as to the invalidity of the judgment here involved, because of its failure, in the light of the record, to determine the boundary dispute. See **Permian Oil** Co. v. **Smith** (Tex.Civ.App.) 47 S.W.(2d) 500, 507, et seq.

Thus far I have regarded the judgment here involved as one rendered in a boundary suit. If it be said, however, that it was in truth and in fact a suit for title (which it was not), still the result produced by proper observance of the rules of interpretation is the same, viz., that the 'take nothing' judgment did not have the effect of awarding Monroe's title to Hickox. We are dealing with an ambiguous judgment-a meaningless one, until it is read in connection with the judgment roll. When we go to the judgment roll and examine the findings of fact and conclusions of law, it is at once apparent that the court did not intend to award the title to survey 103 to Hickox, because he says, as I have shown, that Monroe owned that survey. An ambiguous judgment is to be interpreted in harmony with the findings and conclusions of the trial court, if this can be done. Authorities supra; R.S. art. 2209, and article 2211 (as amended Vernon's Ann.Civ.St. arts. 2209, 2211); 25 Tex.Jur. p. 488, s 106. Even if it be said that the 'take nothing' judgment here was rendered in a title suit, there is still another reason why it was not effective to transfer title from Monroe to Hickox. Assuming that the ordinary effect of a 'take nothing' judgment is to transfer title to the defendant, it is plain, I think, that the rule has no application where the court deciding the case is unable to locate the land, and at the very time of the rendition of the judgment finds that it can not be located.

An action to try title is a proceeding in rem or of the nature of such a proceeding. 41 Tex.Jur. p. 678, s 170. The title is transferred because of the court's jurisdiction of the land, and the decree operates, not in personam, by compelling the adverse party to execute a transfer, but in rem, upon the land and title to the land. If the title is transferred, the transfer is effected by the judgment itself operating upon the property within the jurisdiction of the court. 'The foundation of jurisdiction is physical power' (McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458), that is, the power to seize a thing that actually exists-and the court knows

exists-and deliver into the possession of the party to whom has been adjudged rightful possession. A ***480** court is without jurisdiction to transfer by mere force of its judgment title to land which the court cannot locate, and expressly finds that he cannot locate; indeed, in this case the court could not be certain of the existence of the land which the suit purported to involve. In truth, the court in his conclusion of law No. 4, heretofore quoted, said that he concluded that 'the plaintiff (Monroe) should take naught,' (because the surveys involved could not be located. In the light of that conclusion, his 'take nothing' judgment must be interpreted, and to say that by it he transferred title to Hickox, the defendant, is not only against sound reason, but would assume that the court deliberately entered a void judgment-one he knew at the time was void-for the reason that it is elementary that a decree must so describe the property awarded that it may be found and located on the ground. 41 Tex.Jur. p. 683, s 175. If the court was unable to locate the land involved, as he concluded, and yet entered a judgment awarding it to Hickox, then we would be compelled to say he deliberately entered a void decree. The judgment is not to be interpreted in this manner if there is an interpretation which makes the judgment valid. Authorities supra; 25 Tex.Jur. p. 460, s 87; ****585** Gough v. Jones (Tex.Com.App.) 212 S.W. 943. A proper interpretation of the judgment before us is that it had no purpose to transfer title, and that the 'take nothing' order was entered merely because the plaintiff had failed to prove his case by the location of the surveys and the conflicting conterminous lines, if any. The case of Freeman v. McAninch, 87 **Tex**. 132, 27 S.W. 97, 47 Am.St.Rep. 79, bears no relationship to the instant case. The statement of that case by Judge Stayton, in part, is as follows:

'On December 7, 1878, John D. Freeman brought an action against J. F. McAninch and Daniel McCray to recover a tract of land, containing 622 1/2 acres,-part of one-third of a league of land originally granted to Joseph Washington. The petition was in the usual form of petitions in actions of trespass to try title, and described the land sued for by metes and bounds.

'Defendants demurred to the petition; pleaded not guilty, limitation of three and ten years; set up title in themselves to part of the land, giving description of that which each claimed, under a survey made by virtue of certificate issued to George Allen.

'They also pleaded in estoppel acts of D. C. Freeman, and claimed value of improvements made in good faith.

'The cause was tried before a jury, and, upon a verdict for plaintiff, judgment was rendered in his favor for all the land sued for, which in the judgment was described as in the petition.

***481** 'From that judgment, defendants prosecuted a writ of error to the supreme court, where the judgment was affirmed.

'Defendants in that action seek in this to avoid the effect of that judgment, as an adjudication of the title to all the land described in the petition and judgment; and Daniel McCray now asserts title to 134 1/3 acres of the land embraced in that judgment, to which he asserts title through a conveyance made by D. C. Freeman pending that action.'

Daniel McCray sought to avoid the judgment against him to 134 1/3 acres of the land because of some oral agreement had with the lawyers, which was not part of the judgment roll, and by reason of which he did not introduce in evidence his title. all that Judge Stayton held was that he could not contradict the judgment by evidence of such an agreement, and that he was concluded by the decree in the previous suit. Briefly, that is all that was decided, and in no way sustains the contention of the **Permian Oil** Company in the case before us.

I approve what is said in the opinion of the majority with reference to recordation of judgments, notice, innocent purchasers, etc. From what I have said above my disagreement with the majority on the vital question here involved is apparent. I am of

the view that the judgment of the Court of Civil Appeals should have been affirmed; and since this was not done, and for the reasons herein shown, I respectfully dissent from the majority opinion.

Parallel Citations

107 S.W.2d 564

End of Document

Pioneer Building & Loan Ass'n v. Cowan
Court of Civil Appeals of Texas, Waco. | December 15, 1938 | 123 S.W.2d 726 *(Approx. 9 pages)*

123 S.W.2d 726
Court of Civil Appeals of Texas, Waco.

PIONEER BUILDING & LOAN ASS'N

v.

Return to list **1** of **35 results** Search term

No. 2054. | Dec. 15, 1938. | Rehearing Denied Jan. 19, 1939.

Appeal from District Court, Nineteenth District, McLennan County; R. B. Stanford, Judge.

Suit by Effie **Cowan** against the **Pioneer Building** & **Loan Association** and another to restrain sale of property under trust deed and to have the trust deed canceled and cloud on plaintiff's title removed, wherein named defendant filed a cross-action. Defendant E. C. Street filed disclaimer. From an adverse judgment, the named defendant appeals.

Reversed and remanded for new trial.

West Headnotes (18)

Change View

1 **Mortgages** Restraining Exercise of Power
A sale under power contained in trust deed, if made after notice or service of temporary injunction restraining the sale, and in violation of the injunction, was void.

2 Cases that cite this headnote

2 **Mortgages** Restraining Exercise of Power
A sale under power contained in trust deed, if made prior to notice or service of injunction restraining the sale, and not in violation thereof, would be valid; the injunction not being effectual.

3 **Mortgages** Restraining Exercise of Power
Sale under power contained in trust deed could be completed by execution and delivery of deed after dissolution of injunction restraining the sale, if mortgagor was in default on date of posting of notice of sale, which was prior to granting of injunction, and sale was made pursuant to timely notice given in proper manner.

6 **Mortgages** Conveyance to Purchaser
Where foreclosure sale is held in accordance with law and provisions of mortgage, purchaser obtains an equitable title, although no deed is made.

5 Cases that cite this headnote

RELATED TOPICS

Rights and Liabilities of Parties
- Mortgagee of Property
- Possession of Mortgaged Premises Assignment of Rent Clause

Injunction
- Restraining Order Pending Hearing of Application
  - Trust Foreclosure Sale of Apartment Project

8 **Mortgages** Possession or Control of Property

Parties to mortgage may make parol or written agreement contemporaneous with or subsequent to execution thereof, relating to possession or right of possession of the premises other than that which the law would determine in absence of contract.

9 **Mortgages** Between Parties to Mortgage or Their Privies

Where mortgagee has wrongfully obtained and withheld possession of mortgaged premises, it is unnecessary to recovery of title and possession by mortgagor that he tender amount due, though mortgagee may under proper averments have judgment for his debt and foreclosure and sale to satisfy it.

10 **Mortgages** Between Parties to Mortgage or Their Privies

If mortgagee is placed in possession under mortgage or subsequent agreement and by terms thereof is entitled to retain it, mortgagor cannot recover possession without discharging the debt or making valid and sufficient tender of amount thereof.

11 **Mortgages** Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received
Mortgages Reimbursement or Recovery of Taxes Paid by Mortgagee
Mortgages Insurance
Mortgages Repairs

Mortgagee in possession was authorized under trust deed and obligated as mortgagee in possession to incur and pay expenses, including costs of repairs necessary to upkeep and preservation of mortgaged premises, insurance, taxes, furnishing of water, and advertising of property for rent, and could deduct such payments from rents collected by it.

2 Cases that cite this headnote

12 **Mortgages** Application to Debt or Interest

Mortgagee in possession was required to apply net proceeds of rents and profits of premises which were subject of trust deed, to payment of current installments of interest and dues as they matured.

1 Case that cites this headnote

14 **Mortgages** Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received

Where possession is rightfully obtained by mortgagee, the mortgagee, in possession either in person or by tenant, is bound to account for rents and profits received by it or which it might have received by use of reasonable diligence and care.

1 Case that cites this headnote

15 **Mortgages** Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received

That rents received by mortgagee rightfully in possession are less than full rental value of property does not of itself show negligence on part of mortgagee as respects amount for which mortgagee is accountable.

16 **Mortgages** Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received

If mortgaged premises are rented at time mortgagee rightfully takes possession, or are rented with consent of mortgagor, mortgagor cannot insist that mortgagee account for higher rental for such premises than that provided in the rental contracts.

1 Case that cites this headnote

18 **Mortgages** Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received

In action involving accountability of mortgagee under trust deed, rightfully in possession with consent of mortgagor, finding that amount due to the mortgagee was $1,162.72 was not sustained by evidence, which established that much larger sum was due.

14 **Landlord and Tenant** Necessity of Surrendering Possession to Discharge Ground of Estoppel

Where a mortgagee enters into possession of property under agreement that it should refrain from foreclosure during its possession, mortgagee may not foreclose without first surrendering its possession.

15 **Mortgages** Under Mortgages in General

As between mortgagor and mortgagee, the mortgagee has merely a lien upon the mortgaged property to secure payment of the sum owed by the mortgagor.

16 **Mortgages** Liability of Mortgagee in Possession for Rent or Use and Occupation and to Account for Rents and Profits Received

A mortgagee rightfully in possession is not required to account for amount of reduction of rent obtained from the mortgaged premises after mortgagee takes possession, where rent is reduced in order to retain the tenant.

17 **Mortgages** Between Parties to Mortgage or Their Privies

When mortgagee wrongfully ousts mortgagor and assumes absolute control of premises, mortgagee is responsible for reasonable rental value, if any, of the premises during time it holds possession.

18 **Mortgages** Grounds of Action in General

The mere fact that mortgagee is in possession of property does not prevent it from foreclosing its mortgage, as an accounting for rents and profits may be properly disposed of on the trial.

Attorneys and Law Firms

***728** Street & Street, of Waco, for appellant.

W. V. Dunnam, of Waco, for appellee.

Opinion

GEORGE, Justice.

This suit was instituted by Effie **Cowan**, mortgagor, against **Pioneer Building** & **Loan Association**, mortgagee in possession of the mortgaged property, and E. C.

Street, trustee in deed of trust, seeking an injunction forever restraining sale or offering for sale of property under power in deed of trust, on the grounds (1) that the deed of trust was void because it was the homestead of Miss **Cowan** at all times in question and the notary was disqualified; (2) that the note was without consideration in part; (3) that **Pioneer Building** & **Loan Association** failed to use reasonable care after it came into possession of the property in renting and collecting the rents therefrom, and that if it had exercised such care, the rents collected would have been sufficient to have paid off and discharged the installments and interest on maturity; (4) that if the reasonable rental value of the premises in the sum of $60 had been applied to the **loan**, there would not have been due any sum whatever, and praying that the injunction be made perpetual; that she recover the title and possession of the property; that an accounting be had; that the rental value of $60 per month from July, 1933, be applied to the payment and discharge of the indebtedness; that the deed of trust be cancelled and that the cloud cast on the title by reason thereof be removed.

Temporary injunction was granted on ex parte hearing on November 2, 1935, restraining advertised sale for November 5, 1935, and restraining offering of property for sale under power contained in deed of trust. E. C. Street filed disclaimer. **Pioneer Building** & **Loan Association** answered and plead general demurrer and general denial and asked that the temporary injunction be dissolved, and by way of cross action alleged sale of property on November 5, 1935, under power of sale in deed of trust after default and after due notice of sale given in the time and manner provided by law and in the deed of trust without notice of the granting of the injunction, and asked that the sale be confirmed, and, in the alternative, prayed for judgment for its debt and foreclosure of lien.

The jury found (1) that the reasonable monthly rental of the property from June 20, 1933, to June 18, 1937, was $50 per month; (2) that **Pioneer Building** & **Loan Association** failed to cause the property to produce its reasonable rental value; (3) that **Pioneer Building** & **Loan Association** failed to exercise ordinary care in the management and renting of the property; (4) that the failure to exercise ordinary care in the management and renting was the proximate cause of Miss **Cowan's** damages; (5) that the failure to exercise ordinary care in the management and renting was negligence; (6) that Miss **Cowan** had sustained actual damages by reason of the failure of **Pioneer Building** & **Loan Association** to collect the reasonable rental value of the property; (7) that her damages were the proximate result of the negligence of **Pioneer Building** & **Loan Association** in failing to collect the reasonable rental value of the property; (8) that the sum of $1159.20 would reasonably compensate Miss **Cowan** for the damages suffered by her for the loss of rents occasioned as the proximate result of the negligence of **Pioneer Building** & **Loan Association** and its failure to exercise ordinary care in the management and renting of her property, and the collection of rents therefrom; (9) that **Pioneer Building** & **Loan Association**, by taking and retaining possession of the property under the rent assignment, intended to waive its privilege to declare the note due and foreclose its lien during the time the possession of such property was retained by it; (10) that the schedule of rents collected from tenants did not meet with the approval of Miss **Cowan**.

The court, on July 1, 1937, rendered judgment declaring and decreeing (a) that $50 per month be applied to the payment and discharge of the indebtedness; (b) that Miss **Cowan's** indebtedness as of that date to **Pioneer Building** & **Loan Association** was the sum of $1162.72; (c) that **Pioneer Building** & **Loan Association** waived its right under the deed of trust to foreclose its lien and recover judgment against Miss **Cowan** during the time of the retention by it of the property; (d) that it was entitled to retain possession thereof until payment of the balance of $1162.72; (e) that all costs incurred be taxed against **Pioneer Building** & **Loan Association**, ***729** and (f) that all other relief sued and prayed for by either party and not expressly granted therein was refused and denied. Hence this appeal by **Pioneer Building** & **Loan Association**.

The property consists of a two-story frame eight room residence on Colcord Avenue in Waco that could be used and rented as two apartments. Appellee, feme sole, on January 25, 1930, executed and delivered her promissory note to appellant in the sum of $3500 payable in approximately 128 months, bearing interest at the rate of 8.4% per annum, interest payable monthly as it accrued, providing for 10% attorney's fees on principal and interest due and stipulating that failure to make the monthly payments of interest as they accrued or to make payments on shares of stock should, at the election of the holder, mature the note and subject lien to foreclosure; and she, on the same day, in order to secure the prompt payment of the interest on the note and the installments on the shares of stock, taxes, insurance, interest, etc., executed and delivered deed of trust to E. C. Street, trustee, **Pioneer Building** & **Loan Association**, cestui que trust. She thereafter, in January, 1933, moved to Mart, Texas, and on June 20, 1933, being in default in payments, assigned the rents accruing from said property to appellant and delivered partial constructive possession of the property to appellant, with the request that it look after the collection of the rents, and upon the understanding that it would apply all rents collected by it to the upkeep of the property, furnishing of water, payment of taxes, insurance, interest, dues, etc., and that she would assist in finding suitable tenants for the **building**. She, at the time of the assignment, had the downstairs apartment rented at either $17.50 or $18 per month, and the upstairs apartment for $15 per month. She thereafter, on divers occasions, consulted with appellant as to the tenants in the **building** and as to the rent to be paid by them, and she on different occasions acquiesced in the renting of the property and in the amount of rent to be received therefrom. She retained possession of a part of the residence for her individual use for a part of the time. She did not pay any taxes after securing the **loan** in January, 1930, with the exception of the year 1931, and admits being in default on June 20, 1933. Appellant rendered an accounting of all receipts and disbursements in connection with the property from June 20, 1933, to the date of trial showing in detail the rents collected and how credited, the bills for water, repairs, taxes and insurance paid and charged. The items charged were first paid out of the rent as received and the balance of the rent was applied to the payment of the interest and installments, and no payments were made by appellee after June 20, 1933, otherwise. Appellant, on or before October 10, 1935, matured the note and caused the trustee on that date to post notices of the sale of the property for Tuesday, November 5, 1935.

Appellant introduced testimony tending to establish the fact that the property was duly sold by the trustee at public auction to it without notice of the granting of the temporary injunction, and that the deed was not delivered for the reason that notice was given to the trustee and it within a few minutes after the sale and before the preparation and delivery of deed.

Appellant contends (1) that the trial court erred in refusing to confirm the sale of November 5, 1935, on the ground that the uncontradicted evidence shows sale of property to appellant in conformity with the law and the deed of trust before notice of granting of injunction was received by either the trustee or appellant; (2) that the trial court erred in submitting to the jury special issue No. 9, inquiring whether appellant by accepting rent assignment intended to waive its right of foreclosure and in founding its judgment on the jury's answer thereto on the ground that there was no evidence to raise such issue or support such finding; (3) that the trial court erred in refusing to vest title in appellant; (4) that the trial court erred in denying appellant a foreclosure of its lien; (5) that the trial court erred in submitting special issue No. 1, inquiring as to the reasonable monthly rental value of property for the reason that such issue did not provide a means of properly determining the liability of appellant, if any, to appellee under the facts in this record; (6) that the trial court erred in refusing to allow appellant credit in its accounting for the taxes paid on property; and (7) that the evidence does not support the judgment rendered by the court.

1 2 3 If the sale was made after either notice or service of temporary injunction and in violation thereof, then the same ***730*** was void. Lindley v. Easley,

Tex.Civ.App., 59 **S.W.2d** 927; Ward v. Billups, 76 Tex. 466, 13 S.W. 308; Morgan v. Massillon Engine & Thresher Co., Tex.Civ.App., 274 S.W. 255. But, if it was made prior to either notice or service of injunction and not in violation thereof, then the injunction did not become effectual (32 C.J., subsec. e, sec. 627, p. 372), and the sale may be completed by the execution and delivery of the deed after the dissolution of the injunction, provided appellee was in default on and prior to October 10, 1935, and appellant was entitled to mature indebtedness and ask foreclosure and had caused notice of the sale for November 5, 1935 to be given in the time and manner required by law and the deed of trust, and sale was made pursuant thereto.

6 45 Where a mortgagee enters into possession of the property under an agreement that it should refrain from foreclosure during its possession of the premises, it may not foreclose its mortgage without first surrendering its possession, Wiltsie on Mortgage Foreclosure, 4th Ed., sec. 176, p. 243; McLeod v. McEachern, 187 Ala. 230, 65 So. 790; yet the fact that the mortgagee is in possession of the property does not prevent it from foreclosing its mortgage as an accounting for the rents and profits may be properly disposed of on the trial. Shaw v. Polk, 152 Ark. 18, 237 S.W. 703; Marion County State Bank v. Myers, 99 Kan. 60, 160 P. 979. Where the sale is made in accordance with law and the provisions of the mortgage, the purchaser obtains an equitable title, although no deed is made. Morgan v. Kendrick, 91 Ark. 394, 121 S.W. 278, 134 Am.St.Rep. 78; Bellenger v. Whitt, 208 Ala. 655, 95 So. 10.

8 7 As between the mortgagor and mortgagee, the latter has merely a lien upon the mortgaged property to secure payment of the sum owed by the former, Carroll v. Edmondson, Tex.Com.App., 41 **S.W.2d** 64; Id., Tex.Civ.App., 28 **S.W.2d** 250; Hill v. Gomez, Tex.Civ.App., 260 S.W. 618, but it is competent for the parties to a mortgage to make a parol or written agreement contemporaneous with or subsequent to the execution thereof as to the possession or the right of possession of the premises other than that which the law would determine in the absence of a contract. Morrow v. Morgan, 48 Tex. 304; Rowan v. Texas Orchard Dev. Co., Tex.Civ.App., 181 S.W. 871, error refused; 41 C.J. pp. 610, 611, sec. 578; 29 Tex.Jur. 878, 879, sec. 68.

9 10 Where a mortgagee has wrongfully obtained and withheld possession of the mortgaged premises, it is not necessary to a recovery of title and possession by the mortgagor that he should tender the amount due, though the mortgagee may, under proper averments, have a judgment for his debt and foreclosure and sale to satisfy it. Loving v. Milliken, 59 Tex. 423; Burks v. Burks, Tex.Civ.App., 141 S.W. 337, error refused. However, if the mortgagee was placed in possession under the mortgage or subsequent agreement and was by the terms thereof entitled to retain it, then the mortgagor cannot recover possession without discharging the debt or making a valid and sufficient tender thereof. Hannay v. Thompson, 14 Tex. 142, 144; Rodriguez v. Haynes, 76 Tex. 225, 13 S.W. 296; Duke v. Reed, 64 Tex. 705; Price v. Reeves, Tex.Civ.App., 91 **S.W.2d** 862; Connor Bros. v. Williams, 130 Tex. 572, 112 **S.W.2d** 709; Williams v. Connor Bros., Tex.Civ.App., 83 **S.W.2d** 692; Browne v. King, 111 Tex. 330, 235 S.W. 522; Jasper State Bank v. Braswell, 130 Tex. 549, 111 **S.W.2d** 1079, 115 A.L.R. 329; Id., Tex.Civ.App., 107 **S.W.2d** 681.

11 12 Appellant was authorized under the deed of trust, and obligated as mortgagee in possession, to incur and pay expenses, including costs of repairs necessary to the upkeep and preservation of the premises, insurance, taxes, furnishing of water and advertising of property for rent, and deduct the same from the rents collected by it. Stone v. Tilley, 100 Tex. 487, 101 S.W. 201, 10 L.R.A.,N.S., 678, **123** Am.St.Rep. 819, 15 Ann.Cas. 524; Majors v. Strickland, Tex.Civ.App., 6 **S.W.2d** 133; Brown v. Crawford, D.C., 252 F. 248; Hays v. Christiansen, 105 Neb. 586, 181 N.W. 379; Id., 114 Neb. 764, 209 N.W. 609; Lesser v. Reeves, 142 Ark. 320, 219 S.W. 15; and equity and justice required it to apply the net proceeds of the rents and profits to the payment of the respective current installments of interest and dues as the same matured. Miller v. White, Tex.Civ.App., 264 S.W. 176.

14 15 13 When a mortgagee wrongfully ousts the mortgagor and assumes absolute control of the premises, it is responsible for the reasonable rental value, if any, of the property during the time it holds ***731** possession. Lucia v. Adams, 36 Tex.Civ.App. 454, 82 S.W. 335. But where possession is rightfully obtained, then the true rule is that a mortgagee in possession, either in person or by a tenant, is bound to account for the rents and profits received by it or which it might have received by the use of reasonable diligence and care, Frey v. Campbell, 3 S.W. 368, 8 Ky.Law Rep. 772; Matthews v. Memphis & C. R. Co., 108 U.S. 368, 2 S.Ct. 780, 27 L.Ed. 756; Caldwell v. Hall, 49 Ark. 508, 1 S.W. 62, 4 Am.St.Rep. 64; Dozier v. Mitchell, 65 Ala. 511; Murdock v. Clarke, 90 Cal. 427, 27 P. 275; Bowen v. Boughner, 189 Ky. 107, 224 S.W. 653; Sibley v. Garland, 239 Mass. 20, 131 N.E. 466; Stevenson v. Edwards, 98 Mo. 622, 12 S.W. 255; Brown v. Berry, 89 N.J.Eq. 230, 108 A. 51; and the fact that the rents received are less than the full rental value of the property does not of itself show negligence. Brown v. South Boston Savings Bank, 148 Mass. 300, 19 N.E. 382; Moshier v. Norton, 100 Ill. 63, 68.

16 17 If the premises, or a part thereof, are rented at the time the mortgagee takes possession, or are rented with the consent of the mortgagor, the mortgagor can not insist that the mortgagee account for a higher rental for such premises, or portions thereof, than that provided in the rental contracts. Emil Kiewert Co. v. Juneau, 6 Cir., 24 C.C.A. 294, 78 F. 708, 47 U.S.App. 394; Eldriedge v. Hoefer, 50 Or. 241, 93 P. 246, 94 P. 563, 96 P. 1105; National Mutual Bldg. & **Loan** Ass'n v. Houston, 81 Miss. 386, 32 So. 911. Nor is a mortgagee required to account for the amount of reduction where it reduces the rent in order to retain the tenant. Chapman v. Cooney, 25 R.I. 657, 57 A. 928.

18 Appellant made no profit out of the possession of the residence and appellee was not in a position to spare the time necessary to a proper managing and renting of the premises on account of pressing duties in Mart, Texas; and while appellant is bound to account for the rents and profits received by it or which it might have received by the use of reasonable care, yet it is not, under the facts in this record, liable for a rental of fifty dollars per month from June 20, 1933, to June 18, 1937. It appears that fifty dollars per month was rather above, than below, what the evidence tends to show a fair rent to have been from month to month for the whole period, without taking into account any contingencies in loss of time in renting, rent contracts made or acquiesced in by mortgagor for a less aggregate amount, or failure in collections, all of which were revealed to be important. Its accountability did not extend to imaginary rents and profits or rental value. The application of the rule or standard applied in the trial court does not accomplish justice between the parties, for it is disclosed by an examination of the judgment that appellant was charged with the application of fifty dollars per month on the interest and dues owing it by appellee and that it was denied any credit for the amounts incurred in furnishing water, for insurance, making needed repairs, advertising property for rent and paying taxes. The aggregate amount of fifty dollars per month from June 20, 1933, to June 20, 1937, is only $2400, and the amount of rents and profits actually received by appellant is a far lesser sum. The amount of principal of **loan**, interest, taxes, insurance, water charges, advertising and repair costs, etc., as of date of trial was in excess of $5000, if the credits to which appellee was entitled are not considered, yet the trial court established the amount due appellant as of June 18, 1937, as the sum of $1162.72. Therefore, the judgment of the trial court is reversed and the cause is remanded for another trial.

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Randall's Food Markets, Inc. v. Johnson
Supreme Court of Texas. | January 12, 1995 | 891 S.W.2d 640 | 129 Lab.Cas. P 57, 855 *(Approx. 13 pages)*

891 S.W.2d 640
Supreme Court of Texas.

RANDALL'S FOOD MARKETS, INC., Vernon Frank Davis, Lewis Simmons, and Gary Mike Seals, Petitioners,

Mary Lynn JOHNSON, Respondent.

No. 94–0055. | Argued Oct. 19, 1994. | Decided Jan. 12, 1995.

Manager brought action for damages against store owner, its district manager, its director, and clerk, alleging conspiracy, slander, intentional infliction of emotional distress, breach of contract, tortious interference with contract, and false imprisonment. The 122th District Court, Galveston County, H.G. Dalehite, J., granted summary judgment for defendants, and manager appealed. The Houston Court of Appeals, Smith, J., (Retired), 869 S.W.2d 390, affirmed in part and reversed in part, and appeal was taken. The Supreme Court, Spector, J., held that: (1) store's questioning of manager about possible theft did not constitute extreme and outrageous conduct necessary to state claim for intentional infliction of emotional distress; (2) store's request that manager stay away from particular area of the business premises during work hours did not constitute false imprisonment; and (3) store did not slander manager because all of the statements made by store's employees were both true and qualifiedly privileged.

Reversed.

West Headnotes (23)

Change View

1 **Courts** Ancillary and incidental jurisdiction
Because Supreme Court had subject matter jurisdiction over plaintiff's claims for intentional infliction of emotional distress, false imprisonment, and libel, it had jurisdiction over the entire case, including the slander issues.

9 Cases that cite this headnote

2 **Judgment** Grounds for Summary Judgment
Defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment as to that cause of action and likewise, defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

505 Cases that cite this headnote

3 **Judgment** Presumptions and burden of proof
In reviewing summary judgment, court must accept as true evidence in favor of nonmovant, indulging every reasonable inference and resolving all doubts

in his favor. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

362 Cases that cite this headnote

4 **Damages** Elements in general

To recover for intentional infliction of emotional distress, plaintiff must prove that defendant acted intentionally or recklessly, that defendant's conduct was extreme and outrageous, that defendant's actions caused plaintiff emotional distress, and that emotional distress suffered by plaintiff was severe.

63 Cases that cite this headnote

5 **Damages** Other particular cases

Employer's questioning of employee about possible theft did not constitute "extreme and outrageous conduct" necessary to state claim for intentional infliction of emotional distress; employer's conduct was not beyond all possible bounds of decency, but rather was managerial function that was necessary to the ordinary operation of business organization.

81 Cases that cite this headnote

6 **Labor and Employment** Investigations

Employers act within their legal rights in investigating reasonably credible allegations of dishonesty of their employees.

5 Cases that cite this headnote

7 **False Imprisonment** Nature and Elements of False Imprisonment

Essential elements of false imprisonment are willful detention without consent and without authority of law.

15 Cases that cite this headnote

8 **False Imprisonment** Act or means of arrest or detention

For purposes of false imprisonment, detention may be accomplished by violence, by threats, or by any other means that restrains person from moving from one place to another.

17 Cases that cite this headnote

9 **False Imprisonment** Act or means of arrest or detention

Where it is alleged that detention, for purposes of false imprisonment claim, is effected by a threat, plaintiff must demonstrate that threat was such as would inspire in the threatened person a just fear of injury to her person, reputation, or property.

16 Cases that cite this headnote

10 **False Imprisonment** Act or means of arrest or detention

When employer supervises its employees, it necessarily temporarily restricts employees' freedom to move from one place to another or in the direction that they wish to go, but, without more, such restriction is not a "willful detention" which is one of the elements for false imprisonment; however, this type of restriction could constitute "willful detention" where employer also uses physical force or threatens employee's person, reputation, or property.

31 Cases that cite this headnote

11 **Labor and Employment** Manner of conducting business
Employer has the right, subject to certain limited exceptions, to instruct its employees regarding task that they are to perform during work hours; to effectively manage its business, employer must be able to suggest, and even insist, that employees perform certain tasks in certain locations at certain times.

2 Cases that cite this headnote

12 **False Imprisonment** Act or means of arrest or detention
Employer's request that employee stay away from particular area of the business premises during work hours did not constitute "false imprisonment."

13 **Libel and Slander** Nature and elements of defamation in general
"Slander" is defamatory statement that is orally communicated or published to third person without legal excuse.

92 Cases that cite this headnote

14 **Libel and Slander** Truth as justification in general
In suits brought by private individuals, truth is affirmative defense to slander.

14 Cases that cite this headnote

15 **Libel and Slander** As to character of employee
For purposes of slander action, employer has conditional or qualified privilege that attaches to communications made in course of investigation following report of employee wrongdoing and this privilege remains intact as long as communications pass only to persons having interest or duty in the matter to which the communications relate.

43 Cases that cite this headnote

16 **Libel and Slander** Existence and Effect of Malice
Proof that statement was motivated by actual malice existing at time of publication defeats employer's conditional or qualified privilege that attaches to communications made in course of investigation following report of employee wrongdoing.

50 Cases that cite this headnote

17 **Libel and Slander** Malice
In the defamation context, statement is made with actual malice when statement is made with knowledge of its falsity or with reckless disregard as to its truth.

20 Cases that cite this headnote

18 **Judgment** Weight and sufficiency
To invoke on summary judgment conditional or qualified privilege that attaches to communications made in course of investigation following report of employee wrongdoing, employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice.

83 Cases that cite this headnote

19 **Libel and Slander** As to character of employee

Libel and Slander Truth as justification in general

Store did not slander worker who did not pay for item because all of the statements made by store's employees were both true and qualifiedly privileged; store never accused worker of theft or of having the intent to steal, throughout investigation, store's employees merely communicated to each other that worker had left store without paying for item and worker did not dispute this fact but argued only that she did not have the intent to steal, store had right to investigate incident and could not have conducted investigation without communicating facts regarding worker's actions to each other, all of the store's employees who gave or received statements about incident had interest or duty in the matter, and store established absence of malice with regard to these statements by conclusively proving that its employees had reasonable grounds to believe that their statements were true.

10 Cases that cite this headnote

20 **Libel and Slander** Truth as justification in general

Truth is a complete defense to defamation.

12 Cases that cite this headnote

21 **Libel and Slander** As to character of employee

As employee of store, cosmetician was privileged to report alleged wrongdoing by his supervisor to store's management, but cosmetician stepped outside boundaries of this privilege by circulating petition about supervisor to ordinary employees and customers and, in so doing, cosmetician, as a matter of law, acted independently and outside scope of her authority and therefore, store which did not authorize, condone, or ratify cosmetician's circulation of petition was not liable for any defamation claims that may have resulted from petition's circulation.

4 Cases that cite this headnote

22 **Libel and Slander** As to character of employee

Store did not defame supervisor because all of the statements made by store employees about cosmetician's allegations, that supervisor used store merchandise without paying for it, were qualifiedly privileged; once store received cosmetician's complaints, it was privileged to investigate them, all of the employees who gave or received statements about cosmetician's allegations had interest or duty in the matter, and none of the employees repeated cosmetician's complaints with knowledge of their falsity or with reckless disregard as to their truth.

24 Cases that cite this headnote

23 **Libel and Slander** As to character of employee

Store did not defame worker because all of its statements made by store employees regarding cosmetician's allegations that worker used store merchandise without paying for it were qualifiedly privileged; employees who gave or received statements about cosmetician's allegations had interest or duty in the matter and none of them repeated cosmetician's complaints with knowledge of their falsity or with reckless disregard as to their truth.

39 Cases that cite this headnote

Attorneys and Law Firms

***642** Jay H. Henderson, Holly H. Williamson, Houston, for petitioners.

Mark W. Stevens, Galveston, for respondent.

Opinion

SPECTOR, Justice, delivered the opinion of the Court, in which PHILLIPS, Chief Justice, and GONZALEZ, HIGHTOWER, HECHT, CORNYN, GAMMAGE, and ENOCH, Justices, join.

This appeal presents three issues regarding an employer's treatment of an employee suspected of misconduct. The first is whether the employer's questioning of the employee about possible theft constitutes "extreme and outrageous conduct" necessary to state a claim for intentional infliction of emotional ***643** distress. The second is whether the employer's request that the employee stay away from a particular area of the business premises during work hours constitutes false imprisonment. The third is whether the employer's statements made in the course of its investigations of employee wrongdoing fall outside of its qualified privilege. For the reasons explained herein, we answer all three questions in the negative. We therefore render judgment that the employee take nothing.

Mary Lynn Johnson, a manager of a Randall's store, purchased several items from the store, but did not pay for a large Christmas wreath that she was holding. Vernon Davis, the check-out clerk, did not charge Johnson for the twenty-five dollar wreath because, after ringing up her other items, he asked her if there was anything else, and she replied that there was nothing else. Davis reported Johnson's failure to pay him for the wreath to management. The store's security guard was then requested to investigate the incident. The guard contacted Lewis Simmons (director of the store), and Simmons reported the incident to Mike Seals (the district manager for that store).

When Johnson returned to work two days later, Simmons escorted her to an office in the back of the store and questioned her about the wreath. Johnson admitted that she left the store without paying for the wreath, explaining that she had a lot on her mind at the time. With Johnson in the room, Simmons then called Seals and reported the results of this interview to him. Because Seals wanted to meet with Johnson later that day, Simmons asked her to stay at the store. Simmons told Johnson that he did not think it would be a good idea for her to be on the store's floor; he suggested that she either remain in the office or work on a volunteer project painting a booth for a parade. Johnson chose to wait for Seals in the office. While she waited, Johnson left the office twice, once to use the restroom and the second time to visit a friend in the floral department and to pay for the wreath.

When Seals arrived at the store, he and Simmons questioned Johnson further. They asked how she could forget to pay for an item when she was checking out with several other items at the same time. This questioning caused Johnson to cry. At the end of this interview, Seals suspended Johnson for thirty days without pay and informed her that at the conclusion of the thirty days she would be transferred to another, nearby store. Johnson never reported to work at the other store. She subsequently sued Randall's, Seals, Simmons, and Davis (collectively, "Randall's"), alleging various claims, including intentional infliction of emotional distress, false imprisonment, and defamation.

Some of Johnson's defamation allegations stem from statements made by Scottie Ketner, a former Randall's employee who worked in the cosmetics section of the store and was a subordinate of Johnson's. While employed at Randall's, Ketner complained about Johnson's management style and alleged that Johnson used store merchandise without paying for it. Ketner documented her complaints in memoranda addressed to Randall's management. Randall's investigated this incident and concluded that the problem was essentially a personality conflict for which Ketner was largely responsible.

The trial court granted Randall's motion for summary judgment on all of Johnson's

claims. The court of appeals affirmed in part and reversed in part, reversing the judgment of the trial court on the claims of intentional infliction of emotional distress, false imprisonment, and defamation.[1] 869 S.W.2d 390.

1 This Court has jurisdiction of this case pursuant to sections 22.001(a)(1) and 22.001(a)(6) of the Texas Government Code. Because this Court has subject matter jurisdiction over the intentional infliction of emotional distress, false imprisonment, and libel actions, it has jurisdiction over the entire ***644*** case, including the slander issues.[2] *Stafford v. Stafford,* 726 S.W.2d 14, 15 (Tex.1987).

2 3 To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c). A defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment as to that cause of action. *Wornick Co. v. Casas,* 856 S.W.2d 732, 733 (Tex.1993); *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (Tex.1970). Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. In reviewing a summary judgment, we must accept as true evidence in favor of the non-movant, indulging every reasonable inference and resolving all doubts in his or her favor. *El Chico Corp. v. Poole,* 732 S.W.2d 306, 315 (Tex.1987).

I.

4 5 To recover for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman,* 855 S.W.2d 619, 621–22 (Tex.1993). In *Twyman,* we adopted the Restatement's formulation of the tort of intentional infliction of emotional distress, including the definition of extreme and outrageous conduct as conduct that is " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* at 621 (quoting RESTATEMENT (SECOND) OF TORTSSSS § 46 cmt. d (1965)). We hold that the summary judgment evidence establishes as a matter of law that Randall's conduct was not "extreme and outrageous," an essential element of the tort of intentional infliction of emotional distress.

The conduct that Johnson alleges was extreme and outrageous is Simmons and Seals' questioning of her regarding the wreath. Johnson maintains that during Simmons' telephone conversation with Seals, which occurred after Simmons' initial questioning of her, his tone and manner became severe and curt. She alleges that Simmons merely answered Seals' questions and did not explain the facts to him. During Simmons and Seals' subsequent meeting with Johnson, the summary judgment evidence establishes that Johnson explained her version of the wreath incident, and then she was asked how she could forget to pay for an item when she was checking out with several other items at the same time.

6 Accepting all evidence favorable to Johnson as true, we conclude that, as a matter of law, neither Randall's nor its agents engaged in extreme and outrageous conduct. Randall's merely asked a management-level employee to explain a report of wrongdoing. Employers act within their legal rights in investigating reasonably credible allegations of dishonesty of their employees. *See Johnson v. Merrell Dow Pharmaceuticals, Inc.,* 965 F.2d 31, 34 (5th Cir.1992). This conduct is not "beyond all possible bounds of decency," "atrocious," and "utterly intolerable in a civilized community"; rather, it is a managerial function that is necessary to the ordinary operation of a business organization. *See Wornick Co. v. Casas,* 856 S.W.2d 732, 735 (Tex.1993).

II.

7 8 9 The essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. *Sears, Roebuck & Co. v. Castillo,* 693 S.W.2d 374, 375 (Tex.1985). A detention ***645** may be accomplished by violence, by threats, or by any other means that restrains a person from moving from one place to another. *Martinez v. Goodyear Tire & Rubber Co.,* 651 S.W.2d 18, 20 (Tex.App.—San Antonio 1983, no writ). Where it is alleged that a detention is effected by a threat, the plaintiff must demonstrate that the threat was such as would inspire in the threatened person a just fear of injury to her person, reputation, or property. *Id.* at 20–21; *Black v. Kroger Co.,* 527 S.W.2d 794, 796 (Tex.Civ.App.—Houston [1st Dist.] 1975, writ dism'd). We hold that, as a matter of law, Randall's did not willfully detain Johnson.

Johnson bases her false imprisonment claim on her alleged confinement in a back office for several hours while awaiting the arrival of Seals.[3] According to Johnson's testimony, Simmons told Johnson that, while waiting for Seals, she could either paint a booth for a volunteer project or remain in the office, but he did not think it would be a good idea for her to be on the floor of the store. Johnson testified that she believed that Simmons would physically prevent her from leaving the back room had she wanted to leave. She based this belief on Simmons' "sternness, his tone of voice, [and] his insistence that I stay put."

Johnson does not contend that her detention was effected by actual physical force; rather, she alleges that Simmons detained her by sternly insisting that she stay put, which caused her to fear that he would physically prevent her from leaving had she attempted to leave. In effect, Johnson alleges that Simmons impliedly threatened her person. This allegation is conclusively negated by the fact that Johnson left the area that she was allegedly confined to twice, and no one tried to stop her from doing so. Neither Simmons nor anyone else guarded Johnson. Simmons never stated that he would physically restrain Johnson if she attempted to enter the floor of the store. Simmons did not even attempt to confine Johnson to a particular place; he merely suggested that she avoid one area of the store. In short, no threat was made to detain Johnson.

10 11 12 Simmons' request that Johnson not work in one area of the workplace does not constitute false imprisonment. When an employer supervises its employees, it necessarily temporarily restricts the employees' freedom to move from place to place or in the direction that they wish to go. Without more, however, such a restriction is not a "willful detention."[4] An employer has the right, subject to certain limited exceptions,[5] to instruct its employees regarding the tasks that they are to perform during work hours. Johnson was compensated for the time that she spent waiting for Seals, and Simmons gave her the choice of passing this time working on a volunteer project or sitting and waiting in the office. In order to effectively ***646** manage its business, an employer must be able to suggest, and even insist, that its employees perform certain tasks in certain locations at certain times. As a matter of law, Randall's did not falsely imprison Johnson.

III.

13 14 Johnson alleges that Randall's defamed her in the course of its investigations of the Christmas wreath incident and Ketner's allegations. Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. *Diaz v. Rankin,* 777 S.W.2d 496, 498 (Tex.App.—Corpus Christi 1989, no writ); *Ramos v. Henry C. Beck Co.,* 711 S.W.2d 331, 333 (Tex.App.—Dallas 1986, no writ). In suits brought by private individuals,[6] truth is an affirmative defense to slander. *Town of South Padre Island v. Jacobs,* 736 S.W.2d 134, 140 (Tex.App.—Corpus Christi 1986, writ denied).

15 16 17 18 In addition, an employer has a conditional or qualified privilege that attaches to communications made in the course of an investigation following a report of employee wrongdoing. *Southwestern Bell Telephone Co. v. Dixon,* 575 S.W.2d 596, 599 (Tex.Civ.App.—San Antonio 1978), *writ dism'd w.o.j.,* 607 S.W.2d

240 (Tex.1980). The privilege remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate. *Butler v. Central Bank & Trust Co.,* 458 S.W.2d 510, 514–15 (Tex.Civ.App.—Dallas 1970, writ dism'd); *see also Bergman v. Oshman's Sporting Goods, Inc.,* 594 S.W.2d 814, 816 (Tex.Civ.App.—Tyler 1980, no writ). Proof that a statement was motivated by actual malice existing at the time of publication defeats the privilege. *See Marathon Oil Co. v. Salazar,* 682 S.W.2d 624, 631 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Bergman,* 594 S.W.2d at 816 n. 1. In the defamation context, a statement is made with actual malice when the statement is made with knowledge of its falsity or with reckless disregard as to its truth. *Hagler v. Procter & Gamble Mfg. Co.,* 884 S.W.2d 771 (Tex.1994). To invoke the privilege on summary judgment, an employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice. *See Jackson v. Cheatwood,* 445 S.W.2d 513, 514 (Tex.1969); *Goodman v. Gallerano,* 695 S.W.2d 286, 287–88 (Tex.App.—Dallas 1985, no writ).

19 Johnson claims that she was slandered in the course of the wreath investigation when Davis, Simmons, and Seals orally published, falsely, that she had stolen a wreath from the store. However, Randall's proved that all of the statements that its agents made concerning Johnson's actions with respect to the wreath were true. Randall's never accused Johnson of theft or of having the intent to steal. Throughout the investigation, Randall's employees merely communicated to each other that Johnson had left the store without paying for a wreath. Johnson does not dispute this fact; she argues only that she did not have the intent to steal. The summary judgment evidence contains deposition testimony from the employees who allegedly made statements regarding the wreath incident, and this testimony establishes that these employees did not speculate or make accusations regarding Johnson's intent.

20 Johnson incorrectly contends that, while the statements made by Randall's employees may be literally true, they are slanderous because those who hear the statements might infer that she is dishonest. Truth is a complete defense to defamation. Randall's had a right to investigate the wreath incident, and it could not have conducted the investigation without communicating the facts regarding Johnson's actions with respect to the wreath to each other.

Furthermore, all of the statements made by Randall's employees were qualifiedly privileged. Davis' report that Johnson left the store without paying him for a wreath triggered Randall's privilege to investigate. The employees who received communications regarding ***647** the wreath incident were: several managers on duty on the night of the wreath incident, the security guard who subsequently investigated the incident, the assistant store manager, the director of the store, the district manager for the store, and the vice president of Randall's human resources. In addition, the security guard interviewed employees with knowledge of facts relevant to his investigation.[7] Thus, all of the employees who gave or received statements about the wreath incident had an interest or duty in the matter. Randall's established an absence of malice with regard to these statements by conclusively proving that its employees had reasonable grounds to believe that their statements were true. *See Casso v. Brand,* 776 S.W.2d 551, 558 (Tex.1989). In fact, as discussed previously, the truth of the statements is undisputed.

21 The statements made by Randall's employees regarding Ketner's complaints are also qualifiedly privileged. Through both oral and written communications, Ketner complained to Randall's management that Johnson was a poor manager and that she used store merchandise without paying for it. As an employee of Randall's, Ketner was privileged to report this alleged wrongdoing to management. *Bergman,* 594 S.W.2d at 816. However, Ketner stepped outside the boundaries of this privilege by circulating a petition about Johnson to ordinary employees and customers. In so doing, Ketner, as a matter of law, acted independently and outside the scope of her authority as a cosmetician. *See Wagner v. Caprock Beef Packers Co.,* 540 S.W.2d 303, 304–05 (Tex.1976). The summary judgment evidence establishes that Randall's

did not authorize, condone, or ratify Ketner's circulation of this petition; therefore, Randall's is not liable for any defamation claims that may have resulted from the petition's circulation. *Id.*

22 Once Randall's received Ketner's complaints, it was privileged to investigate them. The summary judgment evidence establishes that various members of Randall's management received complaints from Ketner and forwarded them to the vice president of human resources, who documented the complaints and placed them in Johnson's personnel file. The record also establishes that the managers who received complaints discussed the complaints with Johnson's supervisors in an attempt to resolve the matter. The vice president investigated the complaints and reported the results in two of his own memoranda. Ketner's allegations were not repeated in these memoranda. Instead, the memoranda described the problem as largely a personality conflict, and placed the blame of the conflict largely on Ketner. These memoranda were circulated to members of Randall's management who had received Ketner's complaints or who were supervisors of Johnson. Thus, all of the employees who gave or received statements about the Ketner allegations had an interest or duty in the matter.

23 Randall's conclusively established an absence of malice with regard to statements made about Ketner's allegations. None of Randall's agents repeated Ketner's complaints with knowledge of their falsity or with reckless disregard as to their truth. The complaints were merely forwarded to the appropriate managers for investigation and resolution.

* * * * * *

We conclude that, as a matter of law, the conduct of Randall's in this case was not extreme and outrageous and did not constitute a willful detention of Johnson. On the subject of the wreath incident, we conclude that Randall's did not slander Johnson because all of the statements made by Randall's employees were both true and qualifiedly privileged. With regard to the Ketner allegations, we conclude that Randall's did not defame Johnson because all of the statements ***648** made by Randall's employees were qualifiedly privileged. We accordingly reverse the judgment of the court of appeals and render judgment that Johnson take nothing.

OWEN, J., not sitting.

Parallel Citations

129 Lab.Cas. P 57,855, 10 IER Cases 427, 38 Tex. Sup. Ct. J. 167

Footnotes

1 The court of appeals reversed the trial court's judgment on the slander claim regarding the alleged theft of the wreath and the defamation claim concerning Ketner's statements, but upheld the trial court's judgment rejecting a third slander claim. Johnson does not challenge the court of appeals' ruling on the third claim.

2 Although this Court now has jurisdiction over slander cases, it did not at the time that this litigation commenced. Act of May 17, 1985, 69th Leg., R.S., ch. 480, § 1, 1985 Tex.Gen.Laws 1720, 1731, *amended by* Act of May 25, 1993, 73rd Leg., R.S., ch. 855, §§ 2 & 3, 1993 Tex.Gen.Laws 3365, 3366 (amending § 22.225 of the Texas Government Code to provide this Court with subject matter jurisdiction over slander cases, excluding matters in litigation prior to Sept. 1, 1993, the effective date of the Act).

3 The court of appeals stated that Johnson's false imprisonment claim is

based not only on the alleged detainment while waiting for Seals, but also on the length of time involved in the interviews. 869 S.W.2d at 398. However, Johnson did not present any legal or factual arguments supporting a false imprisonment claim stemming from her meetings with Simmons and Seals to the court of appeals or to this Court. Her pleadings also do not allege such a claim. On the issue of false imprisonment, Johnson pleaded, in full, that:

> Plaintiff Mary Lynn Johnson would further show that her liberty was falsely and wrongly restrained by Defendant Lewis Simmons at the direction of Mike Seals and, upon information and belief, with the approval of Ron Barclay, by ordering and instructing her to remain within confined spaces prior to the arrival of Mike Seals on Thursday, November 29, 1991, for a period of approximately two to three hours.

4 This type of restriction could constitute a willful detention where the employer also uses physical force or threatens the employee's person, reputation, or property. *See, e.g., Black,* 527 S.W.2d at 801 (holding that the jury could reasonably conclude that threats of being taken to jail and of not seeing her daughter for a long time could have intimidated the plaintiff to the extent that she was unable to exercise her free will to leave the interview room); *Kroger Co. v. Warren,* 420 S.W.2d 218, 220–22 (Tex.Civ.App.—Houston [1st Dist.] 1967, no writ) (upholding trial court's finding of false imprisonment where the plaintiff was told that she could not leave the room until she signed a statement and was physically restrained when she attempted to leave).

5 *See, e.g., Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex.1985) (holding that an employer may not discharge an employee for the sole reason that the employee refused to perform an illegal act).

6 At this time, we need not and do not decide whether truth is an affirmative defense in slander cases brought by public officials or public figures. *See Casso v. Brand,* 776 S.W.2d 551, 555 n. 3 (Tex.1989).

7 In his concurring opinion, Justice Cohen concluded that Johnson's allegation that the security guard talked loud enough for others to hear him during these interviews was enough to defeat Randall's motion for summary judgment. 869 S.W.2d at 403. However, Randall's conclusively negated this allegation with the uncontroverted deposition testimony of the security guard, which established that the interviews were conducted in the back of the store restaurant, that no one was nearby while the interviews were conducted, and that if anyone walked by, the security guard and the interviewees stopped talking.

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118 S.W.3d 439 (2003)

Gloria Jean REISS, Petitioner,

v.

Edwin F. REISS, Respondent.

No. 01-0251.

Supreme Court of Texas.

Argued April 24, 2002.
Decided June 26, 2003.
Rehearing Denied November 21, 2003.

440 *440 Shawn Casey and Rita Miller Fason, Houston, for Petitioner.

Richard N. Countiss, Countiss Law Firm, Robert C. Kuehm, Houston, for Respondent.

Justice O'NEILL delivered the opinion of the Court, in which Chief Justice PHILLIPS, Justice HECHT, Justice OWEN, and Justice SMITH joined.

In this case, we must interpret a 1980 divorce decree that divided retirement benefits stemming from one spouse's employment both during and after the marriage. The trial court held that the decree entitled the non-employee spouse to a specific percentage of the total amount of the benefits as of the employee spouse's retirement. The court of appeals reversed, concluding that the decree awarded the non-employee spouse an interest in only the community portion of the benefits at the date of divorce, to be valued at the date of receipt. 40 S.W.3d 605, 613. In accordance with our decision announced today in *Shanks v. Treadway,* 110 S.W.3d 444 (Tex.2003), we reverse the judgment of the court of appeals and render judgment that the non-employee spouse is entitled to a percentage of the total amount of the retirement benefits.

I

Edwin and Gloria **Reiss** married in 1956. In 1957, Edwin started working for Goodyear Tire & Rubber Company, and he participated in the company's retirement plan until his retirement from Goodyear in 1998.[1]

The couple divorced in 1980. The trial court entered a final divorce decree that awarded Gloria fifty percent of Edwin's retirement benefits, and neither party appealed the judgment. The decree provides in pertinent part:

The Court finds that the parties own community property which should be divided in an equitable manner. It is therefore ORDERED that the community property owned by the parties shall be divided as follows:

....

The Court further finds that the parties own as community ... a Pension Plan at Goodyear Tire & Rubber Company, where [Edwin] is employed at its Houston, Texas, plant, which Pension Plan the parties have a vested interest in.

....

It is further ORDERED, ADJUDGED AND DECREED that if and when Respondent, Edwin F. **Reiss**, retires and/or receives a pension from Goodyear Tire & Rubber Company, or for any other reason becomes entitled to receive retirement or pension benefits from Goodyear Tire & Rubber Company, then, and in such event, [Gloria] shall receive fifty percent (50%) of such retirement or pension benefit to which Edwin F. **Reiss** is entitled to receive from Goodyear Tire & Rubber Company.

441 After Edwin retired in 1998, Gloria sought to enforce the decree's division of pension benefits by moving for a Qualified *441 Domestic Relations Order ("QDRO"), *see* Tex. Fam.Code § 9.102, that would entitle her to fifty percent of the total benefits earned under the pension plan, including any sums accrued after the divorce. The trial court granted the motion and entered a

QDRO awarding Gloria half of all pension benefits. Edwin appealed, arguing that the court's QDRO divested him of separate property.

The court of appeals reversed the trial court's judgment, stating that "[t]he only property the divorce decree purported to divide was community property." 40 S.W.3d at 608. Accordingly, the appellate court remanded the case to the trial court to enter a QDRO calculating Gloria's fifty percent interest in only the community property portion of Edwin's retirement benefits, "i.e., that portion corresponding to the time the marriage and his retirement plan participation overlapped," but valuing those benefits as of the date of receipt. *Id.* at 607, 613. Gloria now appeals that judgment, asserting that the divorce decree unambiguously awarded her a fixed percentage of her ex-husband's total retirement and that, because Edwin did not appeal the original decree, *res judicata* bars his collateral attack of the judgment. We agree with the trial court's interpretation of the decree and therefore reverse the court of appeals' judgment.

II

For the sake of brevity, we refer to our discussion in *Shanks* of the complexities involved in dividing retirement benefits, the state of the law at the time the decree was entered, and the changes made soon after. *See* *Shanks,* 110 S.W.3d at 446. We reiterate that we interpret a divorce decree like any other judgment, reading the decree as a whole and "effectuat[ing] the order in light of the literal language used" if that language is unambiguous. *Wilde v. Murchie,* 949 S.W.2d 331, 332 (Tex.1997).

The portion of the Reisses' decree that divided the retirement benefits contains language very similar to the decree in *Shanks,* and unlike the dissent, we see no valid reason to interpret the decrees differently.[2] As in *Shanks,* the court that entered the Reisses' decree failed to apportion the community interest by using the formula set out in *Taggart v. Taggart,* 552 S.W.2d 422, 424 (Tex.1977), the prevailing law regarding division of retirement benefits upon divorce at the time the decree was entered.[3] Instead, the court awarded Gloria half of the total benefits, in effect mistakenly classifying all of the benefits Edwin was entitled to receive under the plan as community property and dividing them as such.

The court of appeals focused heavily on the fact that *Taggart* and *Cearley v. Cearley,* 544 S.W.2d 661 (Tex.1976), were controlling when the trial court entered the decree. 40 S.W.3d at 608-09. The court "presume[d] the trial court knew of *Cearley*
442 and *Taggart* and constructed his decree accordingly." *Id.* at 609. But when the language of the decree is unambiguous, *442 as it is here, we interpret the judgment literally. *Wilde,* 949 S.W.2d at 332. Only when a judgment is subject to more than one reasonable interpretation do we adopt the construction that correctly applies the law. *MacGregor v. Rich,* 941 S.W.2d 74, 75 (Tex.1997) (per curiam). And though the effect of the decree is to divest Edwin of his separate property,[4] that does not alter the decree's plain language.

The dissent interprets the decree in this case differently than we did in *Shanks* because this decree divides the retirement benefits in a section dedicated to apportioning community property and states that the Reisses own the pension plan as community property. Both the dissent and the court of appeals therefore interpret the decree to divide only the community portion of Edwin's retirement benefits. 118 S.W.3d at 444 (Jefferson, J., dissenting); 40 S.W.3d at 608. That analysis, however, ignores the decree's plain language. The decree specifically recites that Gloria "shall receive fifty percent (50%) of such retirement or pension benefit to which Edwin ... is entitled to receive" if and when he retires or is otherwise entitled to the benefits. This language unequivocally awards Gloria half of Edwin's total retirement benefits under the plan, regardless of when they accrued.

Our interpretation does not, as the dissent contends, ignore relevant language in the decree or give "effect to one isolated sentence...." 118 S.W.3d at 444-45 (Jefferson, J., dissenting). We recognize that the decree prefaced the substantive division by classifying the benefits as community property, but that certainly does not mean that all of the property characterized as community was done so correctly. It is clear that the trial court did not intend in a broad sense to divest Edwin of separate property. But as we discussed in *Shanks,* the complicated state of the law in this area and the "difficulty inherent in dividing pension plans that involve both separate and community property" indicate that interpreting such a division is not as simple as determining whether the trial court intended to divide only community property. *Shanks,* 110 S.W.3d at 448. And though a trial court's incorrect characterization of property upon divorce that affects the "just and right" division of the community estate is grounds for reversal on appeal, *Jacobs v. Jacobs,* 687 S.W.2d 731, 733 (Tex.1985), Edwin did not appeal the judgment in this case.

Again, we see no valid reason to interpret the Reisses' decree differently than the very similar decree in *Shanks.* 110 S.W.3d at 448. The district court correctly construed the divorce decree to award Gloria fifty percent of Edwin's total retirement benefits. The QDRO therefore serves its intended purpose of implementing the division of benefits set out in the original decree and does not impermissibly "amend, modify, alter, or change the division of property made or approved in the decree of divorce." Tex. Fam.Code § 9.007(a). Because the QDRO entered in this case is consistent with the unappealed divorce decree's unambiguous property division, the court of appeals erred in reversing the district court's judgment.

III

443 Finally, Edwin contends that the divorce decree is a void judgment because the trial court that entered it did not have jurisdiction *443 to divest him of his separate property. Therefore, Edwin argues, the decree is subject to attack at any time. We disagree.

"Jurisdiction" refers to a court's authority to adjudicate a case. *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 75 (Tex.2000). In general, as long as the court entering a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void. *Mapco, Inc. v. Forrest,* 795 S.W.2d 700, 703 (Tex.1990) (per curiam) (citing *Cook v. Cameron,* 733 S.W.2d 137, 140 (Tex.1987)). Errors other than lack of jurisdiction, such as "a court's action contrary to a statute or statutory equivalent," merely render the judgment voidable so that it may be "corrected through the ordinary appellate process or other proper proceedings." *Id.* (citing *El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc.,* 617 S.W.2d 189 (Tex. 1981) and *Middleton v. Murff,* 689 S.W.2d 212, 213 (Tex.1985)).

The trial court in this case incorrectly characterized all of the benefits accrued under the pension plan as community property in the Reisses' divorce decree, and the judgment was voidable if properly appealed. *Mapco, Inc.,* 795 S.W.2d at 703. But the judgment is not void because a court has jurisdiction to characterize community property-even if it does so incorrectly. *See Hesser v. Hesser,* 842 S.W.2d 759, 764 (Tex.App.-Houston [1st Dist.] 1992, writ denied).[5] Absent an appeal, the judgment became final, and Edwin may not now collaterally attack the court's division of property in the decree. *Cook,* 733 S.W.2d at 140; *Baxter v. Ruddle,* 794 S.W.2d 761, 762 (Tex.1990).

IV

The divorce decree is unambiguous, and the trial court correctly interpreted the decree. Because the court of appeals erroneously reversed the trial court's judgment, we reverse the judgment of the court of appeals and render judgment that Gloria **Reiss** is entitled to fifty percent of Edwin **Reiss's** total retirement benefits.

Justice JEFFERSON filed a dissenting opinion, in which Justice ENOCH and Justice WAINWRIGHT joined.

Justice SCHNEIDER did not participate in the decision.

Justice JEFFERSON, joined by Justice ENOCH and Justice WAINWRIGHT, dissenting.

The Court erroneously concludes that the decree in this case is analogous to the decree in *Shanks v. Treadway,* 110 S.W.3d 444 (Tex.2003), and therefore, the result here should be the same as in *Shanks.* But the Court's holding fails to give due weight to material distinctions between the two decrees. I would hold that the Reisses' decree awards Gloria fifty percent of the community portion of Edwin's retirement benefits. Because the Court concludes otherwise, I respectfully dissent.

It is well-established that, when construing a divorce decree, we read the decree as a whole. *Constance v. Constance,* 544 S.W.2d 659, 660 (Tex.1977); *Lone Star Cement Corp. v. Fair,* 467 S.W.2d 402, 404-05 (Tex.1971). If a decree is unambiguous,
444 we do not consider extrinsic matters to give the decree a meaning different from that of its literal language. *Wilde v.* *444 *Murchie,* 949 S.W.2d 331, 332 (Tex.1997); *see also Harrison v. Manvel Oil Co.,* 142 Tex. 669, 180 S.W.2d 909, 914-15 (1944). That does not mean, however, that we are free to interpret decrees based only on the literal meaning of a few isolated words, phrases, or sentences. *See Wilde,* 949 S.W.2d at 332; *see also Point Lookout W., Inc. v. Whorton,* 742 S.W.2d 277, 278 (Tex. 1987) (citing *Lone Star Cement Corp.,* 467 S.W.2d at 405).

Here, the Court focuses on only one sentence of the decree, which states that Gloria is to receive "fifty percent (50%) of such retirement or pension benefit to which Edwin F. **Reiss** is entitled to receive from Goodyear Tire & Rubber Company." Because

similar language appears in the decree in *Shanks,* the Court concludes that there is "no valid reason to interpret the Reisses' decree differently than the very similar decree in *Shanks."* 118 S.W.3d 442. But the Court's conclusion dismisses as irrelevant material differences between the decrees.

For example, prior to awarding Gloria fifty percent of Edwin's retirement benefits, the decree provides:

The Court further finds that the parties own *as community* [*property*] ... a Pension Plan at Goodyear Tire & Rubber Company, where [Edwin] is employed at its Houston, Texas, plant, which Pension Plan the parties have a vested interest in.

(Emphasis added.) Thus, the trial court specifically determined on June 12, 1980 that Edwin's "Pension Plan" was community property. The decree also provides that the parties' "community property" should be divided in an "equitable manner."[1] None of this language, however, appears anywhere in the decree in *Shanks.* In fact, the *Shanks* decree does not characterize the retirement benefits as either separate or community property. Moreover, in *Shanks,* the trial court advised the parties that it intended to award Treadway twenty-five percent of Shanks's total retirement benefits. Such a clarification is absent from the record here. Given these significant differences, I disagree with the Court's conclusion that the decrees are sufficiently similar to construe them alike.

I recognize that the decree provides that Gloria is entitled to receive "fifty percent (50%) of such retirement or pension benefit to which Edwin F. **Reiss** is entitled to receive from Goodyear Tire & Rubber Company." Nevertheless, when construed in context of the entire decree, it is unreasonable to conclude that the decree awards Gloria an interest in the entirety of Edwin's retirement benefits, including that portion representing his separate property. The decree's structure and plain language, from beginning to end, evidence an intent to divide only the couple's community property. This construction is also consistent with Texas law at the time of the Reisses' divorce. *See Eggemeyer v. Eggemeyer,* 554 S.W.2d 137, 142 (Tex.1977) (holding that both Texas's Constitution and Family Code prohibit a court from divesting spouses of separate property) (citing Tex. Const. art. I, § 9; art. XVI, § 15; Tex. Fam.Code §§ 3.63, 5.01). To interpret the decree as the Court does here is inconsistent with prevailing law at the
445 time and gives effect to one isolated sentence over the construction of the decree *445 as a whole and the trial court's clear characterization of the pension as community property.

The Court's holding also permits the trial court to effectuate a substantive change in the original decree's property division. Under the Texas Family Code, the court rendering a divorce decree retains the power to enforce property divisions. Tex. Fam.Code § 9.002. Upon a finding that the original decree is insufficiently specific to be enforceable by contempt, "the court may render a clarifying order setting forth specific terms to enforce compliance with the original division of property." *Id.* § 9.008(b). A court may not, however, "amend, modify, alter, or change the division of property made or approved in the [original] decree." *Id.* § 9.007(a). Thus, if the original decree is unambiguous, as it is here, the district court is without authority to enter an order altering or modifying the original disposition of property. *Pierce v. Pierce,* 850 S.W.2d 675, 679 (Tex.App.-El Paso 1993, writ denied).

The Reisses' decree unambiguously awarded Gloria a fifty percent interest in the *community* portion of Edwin's retirement benefits. Thus, the district court was without authority to enter a QDRO altering that division. *See* Tex. Fam.Code § 9.007. Accordingly, the appellate court correctly found that the district court erred by awarding Gloria a fifty percent interest in the entirety of Edwin's retirement benefits.

The Court holds that the Reisses' decree unambiguously awards Gloria an interest in the entirety of Edwin's retirement benefits. To reach this conclusion, it dismisses as irrelevant important differences between the decree in this case and the one in *Shanks.* Moreover, the Court improperly sanctions a substantive change in the decree's property division. I would hold that the decree, when read in its entirety, unambiguously awards Gloria fifty percent in only the community portion of Edwin's retirement benefits. Accordingly, I would affirm the courts of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

[1] The *Shanks* opinion provides some background information on the two most common types of retirement plans, defined benefits and defined contribution plans. *Shanks,* 110 S.W.3d at 445. Edwin participated in a defined benefits plan.

[2] The *Shanks* decree awarded the non-employee spouse "a `pro-rata interest' ... of any and all sums received or paid to" the employee spouse from the pension plan. *Shanks,* 110 S.W.3d at 444. The decree defined "pro-rata interest" as "25% of the total sum or sums paid or to be paid to [the employee spouse] from such pension or retirement plan." *Id.*

[3] In the *Shanks* opinion, we discuss in detail the *Taggart* formula and the changes the Court made to the formula in 1983 when we decided *Berry v. Berry,* 647 S.W.2d 945 (Tex. 1983). *Shanks,* 110 S.W.3d at 446.

[4] As we noted in *Shanks,* even if the court had correctly applied *Taggart,* it would still have divested Edwin of some separate property. *Shanks,* 110 S.W.3d at 447. In *Berry,* the Court attempted to remedy the concerns about the *Taggart* formula. *Id.* at 446 n. 3; *Berry,* 647 S.W.2d at 947.

[5] If we were to accept Edwin's argument, even pre-*Berry* divorce decrees that correctly applied the controlling *Taggart* formula in dividing retirement benefits would be void and could be set aside at any time. *See supra* note 4; *Berry,* 647 S.W.2d at 947 (altering the *Taggart* formula to avoid invading a spouse's separate property).

[1] "All marital property is ... either separate or community. If acquired before marriage by any method, or after marriage by gift, devise or descent, it is separate; otherwise, it is community." *Eggemeyer v. Eggemeyer,* 554 S.W.2d 137, 140 (Tex.1979) (quoting *Hilley v. Hilley,* 161 Tex. 569, 342 S.W.2d 565, 567-68 (1961)). Because the trial court found the pension to be "community property," its division of that property was necessarily referable to those assets that accrued during the time that Gloria and Edwin were married.

997 S.W.2d 217 (1999)

RHÔNE-POULENC, INC., Petitioner,

v.

Kenda STEEL, individually and on behalf of her minor children, Garrison STEEL, Samantha Gail Steel, and a/n/f of Gregory Steel, a minor child, now deceased and on behalf of the Estate of Gregory Steel, Respondents.

No. 98-0130.

Supreme Court of Texas.

Argued October 20, 1998.
Decided July 1, 1999.

219 *219 Marie R. Yeates, Houston, Robert L. LeBoeuf, Angelton, Gwen J. Samora, Houston, Bebe H. Kivitz, Michael T. Starczewski, Philadelphia, PA, for Petitioner.

Richard S. London, Pete T. Patterson, John L. Barnes, Houston, for Respondents.

Justice BAKER delivered the opinion of the Court in which Chief Justice PHILLIPS, Justice ENOCH, Justice OWEN, Justice ABBOTT, Justice HANKINSON, Justice O'NEILL and Justice GONZALES joined.

This summary judgment case involves an alleged latent occupational disease. The sole issue is whether the trial court's case management orders shifted the burden of proof from the movant, Rhône-**Poulenc**, to the nonmovants, the Steels, in a summary judgment proceeding under Rule 166a(c) of the Texas Rules of Civil Procedure. Because Rule 166a(c) requires a summary judgment movant to prove it is entitled to judgment as a matter of law, we conclude that the orders did not shift the burden from Rhône to the Steels. We also conclude that Rhône's summary judgment evidence did not meet Rule 166a(c)'s burden. Accordingly, we affirm the court of appeals' judgment, albeit for reasons different from those the court of appeals expressed.

I. BACKGROUND

From November 1986 to early 1990, Jeffrey **Steel** worked at Rhône's Freeport, Texas, rare earths processing facility. At this facility, workers extract rare earth elements from special ores for use in automotive catalytic converters, television picture tubes,
220 and related products. The ores used in the rare earth's separation process contain naturally occurring, *220 low-level radioactive material. During processing, the radioactive material is removed from the ore, drummed, and disposed of under state and federal regulatory requirements. **Steel** was responsible for filtering out the radioactive material and then drumming the waste. He was also responsible for cleaning the filtration system and storing the residue in sumps after electrical or mechanical failures at Rhône. Every three to four months **Steel** was responsible for cleaning the sumps, which required him to physically remove the waste in buckets and put it in the drums. **Steel** asserted that during these activities he was exposed to, splattered with, and sometimes ingested the radioactive waste residue.

On October 6, 1989, a physician diagnosed **Steel**, at age twenty-eight, with anaplastic oligodendroglioma, a rare form of brain cancer. On September 21, 1992, **Steel** and his wife, Kenda, sued ninety defendants including Rhône. The Steels claim that **Steel's** exposure to various substances while working at Rhône caused him to develop brain cancer. Rhône raised the two-year statute of limitations as a defense. The Steels then pleaded the discovery rule and asserted that they did not discover the cause of **Steel's** injury until September 19, 1990.[1] On this date, Kenda **Steel** read a newspaper article about companies in Freeport voluntarily agreeing to reduce plant emissions because of pressure from the Environmental Protection Agency. This article referred to "cancer risks" at plants where emission reductions were to take place. Mrs. **Steel** testified that she first realized that her husband's brain tumor was connected with his work at Rhône when she read the newspaper article.

In March 1993, the Steels filed an amended petition and asserted claims on behalf of their minor son, Gregory **Steel**, who died from leukemia on June 22, 1991. The Steels claim that while Jeffrey **Steel** worked at Rhône, he unknowingly and inadvertently

brought radioactive residue home on his clothing and shoes. The Steels asserted that Gregory was thus exposed to these hazardous substances and that as a result, Gregory contracted leukemia and died.

During the litigation, the trial court issued two agreed case management orders. The trial court issued the first order on January 26, 1993. That order required the Steels to provide to all defendants: (1) an affidavit signed by Jeffrey **Steel** detailing his exposure to specific chemicals; and (2) an affidavit signed by a qualified medical doctor stating the doctor's medical opinion, based on a reasonable degree of medical probability, that exposure to specific chemicals in the manner described in Jeffrey **Steel's** affidavit, was, for each chemical, a substantial contributing cause of **Steel's** brain cancer. The doctor's affidavit was also to provide the basis for that doctor's opinion including reliance, if any, upon specific epidemiological, toxicological, or other medical studies.

On April 28, 1993, the trial court signed a second order, which required: (1) a second affidavit by Jeffrey **Steel** detailing each exposure to specific chemicals that he believed caused his son, Gregory, to receive exposure to such chemicals; and (2) an affidavit by a qualified medical doctor stating the doctor's medical opinion, based on a reasonable degree of medical probability, that exposure to specific chemicals in the manner described in Jeffrey **Steel's** second affidavit was, for each chemical, a substantial contributing cause of Gregory **Steel's** leukemia. The doctor's affidavit was also to provide the basis for that doctor's opinion including reliance, if any, upon specific epidemiological, toxicological, or other medical studies.

221 In response to the orders, the Steels provided Jeffrey **Steel's** affidavit, including *221 a list of chemicals to which he was exposed and their origin. Initially, rather than an affidavit, the Steels provided a letter from Dr. Daniel Teitelbaum, a clinical toxicologist, which stated that there was a greater probability than not that the radioactive and organic materials to which Jeffrey **Steel** was exposed in the course of his work at Rhône were the sole cause or contributed substantially to the cause of Jeffrey **Steel's** brain tumor and Gregory **Steel's** leukemia.

In October 1994, all defendants, including Rhône, moved for summary judgment. The defendants asserted as grounds for their motion that the Steels could not prove causation for Jeffrey **Steel's** brain tumor or Gregory **Steel's** leukemia and that limitations barred Jeffrey **Steel's** claims against all defendants. The defendants supported their motion with an affidavit from Stanley M. Pier, Ph.D., an environmental toxicologist, who stated in his affidavit:

> Plaintiffs basically speculate that for some unspecified period of time, Jeffrey and Gregory **Steel** may have come into contact with a small amount of unknown chemicals, which plaintiffs allege may have caused their diseases, while at the same time selectively ignoring all other factors in cancer causation such as alcohol, tobacco, drugs and diet, for example. Essentially, plaintiffs attempt to take an unknown exposure to unknown quantities of unknown chemicals and opine causation with a reasonable medical certainty. This flaunts all processes of scientific reasoning.
>
> ....
>
> Before a physician/scientist/plaintiff can state that a known carcinogen can cause or has caused a given cancer, the plaintiff/physician/scientist must have a definition of the substance involved and the characteristics of the exposure.... Absent chemical or exposure information, no physician/scientist/plaintiff can possibly establish a medical link within a reasonable certainty, between a carcinogenic agent and a particular cancer.

In response to the defendants' motions for summary judgment, the Steels provided Dr. Teitelbaum's affidavit, Kenda **Steel's** affidavit, and the September 19, 1990 article linking chemicals from work sites to cancer. In February 1995, the trial court granted summary judgment for all defendants except Rhône. The trial court's order stated that limitations barred all the Steels' claims by and through Jeffrey **Steel**, and that all the Steels' claims by and through Gregory **Steel** failed for want of medical causation.

Rhône again moved for summary judgment asserting that limitations barred the damages claims derivative of Jeffrey **Steel's** own claims, limitations barred claims for Gregory **Steel's** death, and there was no competent summary judgment evidence of exposure or causation that raised a fact issue on the cause of Gregory **Steel's** death. The Steels responded, attaching their original response to the original motion, a second affidavit from Dr. Teitelbaum, and other documents.

Those defendants who had previously received summary judgment moved for severance. The trial court initially granted a severance, but subsequently rescinded the severance order, granted Rhône's motion for summary judgment, and rendered a

final judgment disposing of the Steels' claims against all defendants. The judgment stated that the court ruled that limitations barred the Steels' claims against all defendants. The judgment further stated that the Steels waived their right to appeal the earlier judgment against all defendants, except Rhône, and that the appellate time limits had run on those defendants. Consequently, the Steels appealed only their claims against Rhône.

In the court of appeals, the Steels asserted that the trial court erred in granting Rhône summary judgment on limitations. The
222 Steels argued that the discovery rule tolled limitations on Jeffrey **Steel's** claims and a genuine material *222 fact issue existed about the date the Steels discovered their injuries. Rhône argued that Jeffrey **Steel's** injury was not inherently undiscoverable because he knew of the nature of his injury on October 6, 1989, when he was diagnosed with a brain tumor and knew he had previously worked with chemicals. Therefore, the discovery rule did not apply in that limitations was tolled only until October 6, 1989, at the latest. The court of appeals held that the discovery rule did apply to Jeffrey **Steel's** injury and that Rhône did not negate the discovery rule by proving as a matter of law when Jeffrey **Steel** should have discovered the nature of his actionable injury. The court of appeals concluded that a material fact issue remained about when Jeffrey **Steel** should have reasonably discovered the nature of his injury. 962 S.W.2d 613, 620

The Steels also asserted that they raised a material fact issue on the cause of Jeffrey **Steel's** brain tumor and Gregory **Steel's** leukemia. Rhône challenged the competency and admissibility of the Steels' affidavits. Rhône asserted that Jeffrey **Steel's** affidavit was conclusory and inadmissible hearsay and that Dr. Teitelbaum's affidavit was incompetent because it was based on inadmissible hearsay and not personal knowledge. The court of appeals held that Jeffrey **Steel's** statement that the chemicals and waste contributed to his son's death was not based on his personal knowledge, but was conclusory and, therefore, not competent summary judgment evidence. The court of appeals concluded that Jeffrey **Steel's** statement about his job responsibilities, the processes and chemicals involved in his job activities, and how radioactive substances came into contact with his skin and clothing were competent summary judgment evidence. The court of appeals also concluded that Dr. Teitelbaum's affidavit was competent summary judgment evidence to controvert Dr. Pier's affidavit. The court of appeals concluded that the Teitelbaum affidavit raised material fact issues about Jeffrey and Gregory Steels' specific exposures to chemicals and the causal connection between those exposures and their deaths. Accordingly, the court of appeals reversed the trial court's summary judgment and remanded the cause for further proceedings.

Rhône petitioned this Court for review, asserting that the case management orders shifted the burden of proof from Rhône as the movant to the Steels as the nonmovants and that the Steels failed to present competent summary judgment evidence to raise a fact issue on limitations and causation. Specifically, Rhône argues that: (1) limitations bars Jeffrey **Steel's** claims because he admittedly learned of his injury more than two years before the Steels filed suit; (2) the discovery rule does not apply to Jeffrey **Steel's** claims; (3) even if the discovery rule applies to Jeffrey **Steel's** claims, those claims are still barred by limitations; and (4) the Steels did not raise a material fact issue about causation on Gregory **Steel's** leukemia.

II. SUMMARY JUDGMENT

A. BURDEN OF PROOF

Rule 166a provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine fact issue. *See* Swilley v. Hughes, 488 S.W.2d 64, 68 (Tex.1972). The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* TEX.R. CIV. P. 166a(c);[2] *Wornick Co. v. Casas,* 856 S.W.2d 732, 733 (Tex.1993); *Nixon v. Mr. Property Mgt. Co.,* 690 S.W.2d 546, 548 (Tex.1985); *Calvillo v. Gonzalez,* 922 S.W.2d 928, 929 (Tex.1996). The nonmovant has no burden to respond
223 to a summary judgment motion unless the movant *223 conclusively establishes its cause of action or defense. *See Oram v. General Am. Oil Co.,* 513 S.W.2d 533, 534 (Tex.1974); *Swilley,* 488 S.W.2d at 67-68. The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient. *See City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex.1979). The movant must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *See Walker v. Harris,* 924 S.W.2d 375, 377 (Tex.1996); *Centeq Realty, **Inc**. v. Siegler,* 899 S.W.2d 195, 197 (Tex.1995); *City of Houston,* 589 S.W.2d at 678.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that

defense. *See* *Velsicol Chem. Corp. v. Winograd,* 956 S.W.2d 529, 530 (Tex.1997). When the plaintiff pleads the discovery rule as an exception to limitations, the defendant must negate that exception as well. *See* *Velsicol,* 956 S.W.2d at 530; *Burns v. Thomas,* 786 S.W.2d 266, 267 (Tex.1990); *Woods v. William M. Mercer, **Inc**.,* 769 S.W.2d 515, 518 n. 2. (Tex.1988).[3]

B. STANDARD OF REVIEW

Summary judgments must stand on their own merits. Accordingly, on appeal, the nonmovant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment. *See* *City of Houston,* 589 S.W.2d at 678. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant. *See* *Science Spectrum, **Inc**. v. Martinez,* 941 S.W.2d 910, 911 (Tex.1997); *Friendswood Dev. Co. v. McDade & Co.,* 926 S.W.2d 280, 282 (Tex.1996); *Wornick,* 856 S.W.2d at 733. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See* *Science Spectrum, **Inc**.,* 941 S.W.2d at 911; *Friendswood Dev. Co.,* 926 S.W.2d at 282; *Wornick,* 856 S.W.2d at 733; *Nixon,* 690 S.W.2d at 548-49. On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* *Nixon,* 690 S.W.2d at 548.

III. ANALYSIS

Rhône presents four issues to this Court: (1) whether limitations bars Jeffrey **Steel's** claims because he admittedly learned of his injury more than two years before the Steels filed suit; (2) whether the discovery rule applies to Jeffrey **Steel's** claims; (3) if the discovery rule applies to Jeffrey **Steel's** claims, whether those claims are barred under the discovery rule; and (4) whether the Steels raised a material fact issue about causation on Gregory **Steel's** leukemia.

Rhône concedes that, ordinarily, as the movant for summary judgment on limitations grounds, it would have the burden to prove that the discovery rule does not apply to Jeffrey **Steel's** claims, or if it does apply, to negate the discovery rule. But Rhône argues that the first agreed case management order shifted the burden of raising a fact issue on limitations and on the discovery rule to the Steels. Rhône contends that this case is not in the posture of a pre-September 1997 summary judgment motion on the causation element, when a defendant must have conclusively negated that element of a plaintiff's cause of action. Additionally, Rhône contends that the second agreed case management order shifted the burden of raising a material fact issue
224 on the causation element to *224 the Steels. Rhône asserts that the burden the Steels assumed is much like the burden every plaintiff now faces when opposing a "no evidence" summary judgment motion under recently amended Texas Rule of Civil Procedure 166a(i). We disagree.

First, Rule 166a(c) governs Rhône's summary judgment motion. *See* TEX.R. CIV. P. 166a(c). Rule 166a(c) clearly requires that Rhône, as the moving party, has the burden to establish that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* TEX.R. CIV. P. 166a(c); *Calvillo,* 922 S.W.2d at 929. Second, neither of the agreed case management orders facially purports to shift the burden of raising fact issues on limitations, the discovery rule, or causation to the Steels. The Steels only agreed to and the orders only obligated them to provide, on a day certain, the affidavits described above. We conclude that neither case management order served to shift the burden of proof under Rule 166a(c). Accordingly, Rhône has the burden to conclusively establish limitations, conclusively establish that the discovery rule does not apply to Jeffrey **Steel's** claims, conclusively negate the discovery rule if it does apply, and conclusively establish that there is no causation between Jeffrey **Steel's** exposure and Gregory **Steel's** leukemia. *See* *Lear Siegler, **Inc**. v. Perez,* 819 S.W.2d 470, 471 (Tex.1991); *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (Tex.1970). Consequently, we consider whether Rhône's motion for summary judgment and its supporting summary judgment evidence meets its burden as it pertains to the issues Rhône raises.

In its amended motion for summary judgment, Rhône relied solely on Dr. Pier's affidavit, which Rhône filed in support of its first summary judgment motion. Dr. Pier's affidavit is limited to challenging the competency and admissibility of the Steels' affidavits and Dr. Teitelbaum's opinion letter.[4]

We conclude, as Rhône conceded in oral argument, that Dr. Pier's affidavit does not prove as a matter of law that it was not objectively verifiable that there was a causal link between Jeffrey **Steel's** brain tumor and his exposure to radioactive materials at Rhône's facility. Consequently, Rhône did not carry its summary judgment burden because its summary judgment evidence did not prove as a matter of law that the discovery rule does not apply in this case.

Because we conclude that Rhône did not conclusively prove that the discovery rule does not apply, we assume, but do not decide, that the discovery rule applies for purposes of determining whether Rhône negated the discovery rule as a matter of law. *See Science Spectrum, **Inc.**,* 941 S.W.2d at 911; *Wornick,* 856 S.W.2d at 733; *Nixon,* 690 S.W.2d at 548-49. The parties assume, for purposes of this appeal, that Jeffrey **Steel's** brain tumor is a latent occupational disease. We likewise assume, but do not decide, the same fact for purposes of this appeal. Therefore, to sustain its burden of proof, Rhône was required to offer summary judgment evidence to show, as a matter of law, that, before September 19, 1990, the Steels knew or in the exercise of reasonable diligence should have known that Jeffrey **Steel's** brain tumor was likely work-related. *See Childs v. Haussecker,* 974 S.W.2d 31, 33 (Tex.1998). Rhône offered no such evidence. Consequently, a fact question exists about whether the Steels knew or should have known before September 19, 1990, through the exercise of reasonable diligence, that the brain tumor was
225 likely work-related. Accordingly, the court of appeals correctly determined that Rhône was not entitled to summary judgment *225 on Jeffrey **Steel's** claims on limitations grounds.

Finally, Rhône had to negate the causation element on Gregory **Steel's** leukemia by establishing that no genuine issue of material fact existed about whether Gregory **Steel's** alleged exposure to the radioactive materials his father brought home caused Gregory to contract leukemia and die from that disease. *See Wornick,* 856 S.W.2d at 733. As Rhône recognizes, Dr. Pier's affidavit does not contain any summary judgment evidence that would establish, as a matter of law, that there is no causal connection between Gregory **Steel's** leukemia and the radioactive materials Jeffrey **Steel** carried home from Rhône's Freeport facility. Furthermore, the Steels, as the nonmovants, needed no answer or response to Rhône's motion to contend that Rhône did not carry its summary judgment burden. *See City of Houston,* 589 S.W.2d at 678. Consequently, we conclude that Rhône did not carry its summary judgment burden to disprove causation as a matter of law.

IV. CONCLUSION

We hold that the trial court's case management orders did not shift the Rule 166a(c) summary judgment burden from Rhône, the movant, to the Steels, the nonmovants. We hold that Rhône did not carry its summary judgment burden to prove as a matter of law that limitations barred Jeffrey **Steel's** claims or that Jeffrey **Steel's** exposure to radioactive materials at Rhône's Freeport facility did not cause Gregory **Steel's** leukemia. Accordingly, we affirm the court of appeals' judgment.

Justice HECHT filed a dissenting opinion.

Justice HECHT, dissenting.

I respectfully dissent. Plaintiffs agreed to pretrial orders requiring them to produce, by a specified date, a qualified medical doctor's affidavit stating that Jeffrey **Steel's** claimed exposure to chemicals at work was, in reasonable medical probability, a substantial contributing cause of his brain cancer and his son's leukemia, and stating the basis for that opinion. Without such evidence plaintiffs cannot prevail on their claims against Rhône-**Poulenc**. Plaintiffs did not produce an affidavit within the time agreed. The orders stated that the parties could move for modifications or for further pretrial orders. Plaintiffs did not do so. Plaintiffs later presented a physician's affidavit in response to Rhône-**Poulenc's** motion for summary judgment that contained the required opinion regarding causation but offered no basis for it.

In *Koslow's v. Mackie,* we held that a trial court can strike a party's pleadings for disobeying a pretrial order under Rule 166 of the Texas Rules of Civil Procedure.[1] The district court in the present case did not impose this sanction on the plaintiffs. It allowed plaintiffs to present a physician's affidavit in response to Rhône-**Poulenc's** motion for summary judgment. But because this affidavit did not state a reliable basis for the physician's opinion— evidence that the plaintiffs had agreed to produce, that the pretrial orders required, and that is essential to their claims—the district court granted summary judgment for Rhône-**Poulenc**. The Court holds that the district court impermissibly shifted the summary judgment burden by relieving Rhône-**Poulenc** of its burden to disprove an element of the plaintiffs' claims, and by placing on the plaintiffs the burden of raising a fact issue. Assuming the Court is correct, I fail to see how the plaintiffs were harmed when the district court was fully authorized by Rule 166 to strike the plaintiffs' pleadings and dismiss their claims outright without allowing their belated efforts to produce the
226 necessary evidence. Plaintiffs' failure to comply with the agreed pretrial orders was not technical, *226 inadvertent, or otherwise excusable; rather, they were unable to produce essential evidence in support of their claims even long after they had agreed to do so. In these circumstances, I would hold that the district court's dismissal of plaintiffs' claims was not reversible error.

[1] Because September 19, 1992 fell on a Saturday, the Steels' lawsuit, filed on September 21, 1992, the first Monday after September 19, 1992,

was, under Texas Rule of Civil Procedure 4, within two years from September 19, 1990. *See* TEX.R. CIV. P. 4.

[2] Rhône filed its motion for summary judgment before September 1, 1997, the effective date of Rule 166a(i). *See* TEX.R. CIV. P. 166a(i).

[3] However, the rule is to the contrary in a trial on the merits. The party seeking the benefit of the discovery rule to avoid limitations has the burden of pleading and proving the discovery rule in a trial on the merits. *See Woods,* 769 S.W.2d at 518.

[4] We note that Dr. Pier's affidavit does not challenge Dr. Teitelbaum's later-filed affidavits.

[1] 796 S.W.2d 700, 703-705 (Tex.1990).

214 S.W.3d 148 (2007)

SCI TEXAS FUNERAL SERVICES, INC., Professional Funeral Associates, Inc., SCIT Holdings, Inc., SCI Funeral Services, Inc., and Service Corporation International, Appellants,

v.

David HIJAR, Lupe Wiebel, and Patricia Villegas, Appellees.

No. 08-05-00182-CV.

Court of Appeals of Texas, El Paso.

January 11, 2007.
Rehearing Overruled February 7, 2007.

150 *150 Joseph L. Hood Jr., Scott Hulse, Marshall, Feuille, Finger & Thurmond, El Paso, for Appellants.

Alan B. Rich, Baron & Budd, P.C., Dallas, for Appellees.

Before CHEW, C.J., McCLURE, and BARAJAS, C.J. (Ret.) BARAJAS, C.J. (Ret.), sitting by assignment, not participating.

OPINION ON REHEARING

ANN CRAWFORD McCLURE, Justice.

Pending before the Court is Appellees' motion for rehearing. The motion is granted and we withdraw our opinion and judgment dated July 27, 2006. The following is the opinion of this court.

In this interlocutory appeal, **SCI** Texas **Funeral** Services, **Inc**., Professional **Funeral** Associates, **Inc**., SCIT Holdings, **Inc**., **SCI Funeral** Services, **Inc**., and Service Corporation International (collectively **SCI**) appeal from a class certification order. At issue is whether Appellees have standing to pursue individual and class claims against **SCI** based upon purported violations of the federal and state **Funeral** Rule. Because they do not, we reverse the certification order and render judgment dismissing all causes of action except the suit for injunctive relief.

151 *151 ## THE FUNERAL RULE

On September 24, 1982, the Federal Trade Commission promulgated the **Funeral** Rule, which prohibited certain unfair and deceptive practices in the **funeral** service industry. *Pennsylvania **Funeral** Directors Association, **Inc**. v. F.T.C.,* 41 F.3d 81, 82 (3rd Cir.1994), *citing* Trade Regulation Rule; **Funeral** Industry Practices, 16 C.F.R. Part 453 (1982). The Fourth Circuit affirmed the FTC's decision to issue the **Funeral** Rule in *Harry & Bryant Co. v. FTC,* 726 F.2d 993 (4th Cir.1984), *cert. denied,* 469 U.S. 820, 105 S.Ct. 91, 83 L.Ed.2d 37 (1984).

The **Funeral** Rule requires that a **funeral** home provide consumers with a general price list of the **funeral** goods or services regularly offered by the **funeral** provider. *See* 16 C.F.R. §§ 453.1(b), 453.3(f)(1)(ii). Customers who contract for **funeral** goods and services must be given a separate purchase agreement that lists retail prices for all goods and services selected, lists the actual or estimated prices for "cash advance items" and lists a total cost. 16 C.F.R. § 453.2(b). A "cash advance item" is any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. 16 C.F.R. § 453.1(b). It includes any item obtained from a third party and paid for by the **funeral** provider on the purchaser's behalf. *Id.*

Similarly, the Texas Occupations Code and Texas Administrative Code require that a **funeral** establishment provide a retail price list of items or services provided by the establishment. **TEX**.OCC.CODE ANN. § 651.405 (Vernon 2004); 22 **TEX**.ADMIN.CODE § 203.7. Like its federal counterpart, the Texas Occupations Code mandates that the purchase agreement list certain information, including the amount paid or owed to another person by the **funeral** establishment on behalf of the customer, and

each fee charged the customer for the cost of advancing funds or becoming indebted to another person on behalf of the customer. **TEX**.OCC.CODE ANN. § 651.406(a). The purchase agreement must include specifically itemized cash advance items. 22 **TEX**.ADMIN.CODE §§ 203.7(b)(5)(A)(ii), 203.20. It is a deceptive act or practice for a **funeral** provider to represent that the price charged for a cash advance item is the same as the cost to the **funeral** provider for the item when that is not the case. 22 **TEX**.ADMIN.CODE § 203.20.

UNDERLYING FACTS

Appellees, David **Hijar**, Lupe Wiebel, and Patricia Villegas, each purchased **funeral** goods and services from **SCI**-affiliated **funeral** homes in El Paso. **Hijar** filed suit alleging state law claims on behalf of himself and a class for fraud, negligent misrepresentation, deceptive trade practices, and civil conspiracy. The allegations were based on **SCI's** violation of the state and federal **Funeral** Rule. Wiebel and Villegas later joined the suit and the plaintiffs added a cause of action based upon violations of the Texas Occupations Code. **SCI** sought summary judgment contending that the **Funeral** Rule only applies to cash advance items and does not apply to all goods and services obtained from third parties. In his fifth amended petition, **Hijar** abandoned the fraud, negligent misrepresentation and deceptive trade causes of action. He added a cause of action for breach of contract arising from **SCI's** violation of the **Funeral** Rule. In that petition, he sought injunctive relief and damages. **Hijar** also filed a motion for summary judgment. The trial court denied **SCI's** motion and granted partial summary judgment in favor of **Hijar**, finding:

152 • **SCI** obtained **funeral** goods and services from third-parties on behalf of **Hijar** and *152 other persons arranging funerals with **funeral** homes owned or operated by **SCI**;

• **SCI** failed to disclose to persons arranging funerals that the price being charged for cash advance items was not the same as the cost to **SCI** for the items when such was the case; and

• **SCI's** contract with **Hijar** and others failed to state the amount paid or owed to another person by **SCI** on behalf of **Hijar** and other customers, and failed to disclose each fee charged **Hijar** and other customers for the cost of advancing funds or becoming indebted to another person on behalf of the customer.

The court concluded "that the following goods and services, as a matter of law, are `cash advance' items under 16 C.F.R. § 453.3(1)(b) and 22 **TEX**.ADMIN.CODE § 203.1(3) when purchased from a third-party and resold to persons arranging funerals: direct cremation; immediate burial; forwarding remains; receiving remains; embalming; refrigeration; other preparation; transportation; casket/cremation casket; alternative container; outside enclosure; clothing/shroud; memorial booklet; service folders/prayer cards; acknowledgment cards; flowers; shipping container; crematory services; crucifix; escorts; certified copies; public transportation; outside **funeral** director's expense; vault installation; clergy/religious facility; musicians or singers; hairdressing; and permits."

The court also found that the terms of both the federal and state statute are implied in every "Statement of **Funeral** Goods and Services Selected/Purchase Agreement," and because **SCI** had violated these provisions, it had breached the contract with **Hijar**. Finding that the statutory violations rendered the agreement illegal and unenforceable to the extent the listed prices exceeded the amount paid to third parties, the court ruled that **Hijar** is entitled to recover the difference as restitution.

Following the entry of the partial summary judgment, **Hijar** filed a sixth amended petition which added a cause of action for restitution based on an illegal contract. On January 21, 2005, the trial court entered the following findings against **SCI** for discovery violations:

• Since and including March 18, 1998, it has been the systematic and uniform practice of Defendants to obtain and pay for **funeral** goods and **funeral** services from third parties on behalf of purchasers.

• Since and including March 18, 1998, it has been the uniform and systematic practice of Defendants to fail to disclose to persons arranging funerals with Defendants that the price being charged for a cash advance item is not the same as the cost to the **funeral** provider for the item when such was the case.

• Since and including March 18, 1998, it has been the uniform and systematic practice of Defendants to fail to state on **funeral** purchase agreements the amount paid or owed to other persons by the **funeral** establishment on behalf of the customers and

each fee charged the customers for the cost of advancing funds or becoming indebted to other persons on behalf of the customers.

• There are records in the possession of Defendants that show the difference between the cost of **funeral** goods and **funeral** services to Defendants and the amount charged to persons arranging funerals with Defendants since March 18, 1998.

• There are records in the possession of Defendants that show the amount paid or owed to other persons by Defendants on behalf of the customers and each fee charged the customers for the cost of advancing funds or become indebted to other
153 persons on behalf of the customers, *153 and the amount charged to persons arranging funerals with Defendants since March 18, 1998.

• Since and including March 18, 1998, Defendants have obtained and paid for **funeral** goods and **funeral** services from third parties on behalf of more than one thousand (1,000) purchasers, failed to disclose to more than one thousand (1,000) persons arranging funerals with Defendants that the price being charged for cash advance items is not the same as the cost to the Defendants for the items when such was the case, and failed to state on **funeral** purchase agreements the amount paid or owed to other persons by their **funeral** establishments on behalf of more than one thousand (1,000) customers and each fee charged the customers for the cost of advancing funds or become indebted to other persons on behalf of the customers.

Wiebel and Villegas were subsequently added as plaintiffs in a seventh amended petition, but the causes of action remained the same as in the sixth amended petition. Following a hearing, the trial court entered an order certifying the class. **SCI** raises several challenges to the certification order in this interlocutory appeal.

STANDING

In its first issue, **SCI** contends that Appellees cannot represent a class because they lack standing. We must first determine whether there is a private cause of action for violation of the **Funeral** Rule under either the federal or state regulations. If not, the causes of action based on violations of the **Funeral** Rule fail as a matter of law.

Subject matter jurisdiction is essential to the authority of a court to decide a case. *Texas Association of Business v. Texas Air Control Board,* 852 S.W.2d 440, 443 (**Tex**.1993). Standing is implicit in the concept of subject matter jurisdiction. *M.D. Anderson Cancer Center v. Novak,* 52 S.W.3d 704, 708 (**Tex**.2001). Whether a party has standing to maintain a suit is a question of law. *Texas Natural Resource Conservation Commission v. IT-Davy,* 74 S.W.3d 849, 855 (**Tex**.2002); *Everett v. TK-Taito, L.L.C.,* 178 S.W.3d 844, 850 (**Tex**.App.-Fort Worth 2005, no pet.). Standing to sue is a prerequisite to class certification and is properly raised on an interlocutory appeal of a class certification order. *See M.D. Anderson Cancer Ctr. v. Novak,* 52 S.W.3d 704, 705-06 (**Tex**.2001).

In reviewing a standing ruling, we construe the petition in favor of the pleader. *Everett,* 178 S.W.3d at 850. In the context of class action litigation, a named plaintiff's lack of individual standing at the time suit is filed deprives the court of subject matter jurisdiction over the plaintiff's individual claims and claims on behalf of a class. *Novak,* 52 S.W.3d at 711.

Standing focuses on the question of who may bring an action. *Waco Independent School District v. Gibson,* 22 S.W.3d 849, 851 (**Tex**.2000). When standing is placed at issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. *Flast v. Cohen,* 392 U.S. 83, 99-100, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Standing to sue may be predicated upon either statutory or common law authority. *Everett,* 178 S.W.3d at 850. The common law standing rules apply except where standing is statutorily conferred. *Id., citing Hunt v. Bass,* 664 S.W.2d 323, 324 (**Tex**. 1984). To establish common law standing, a plaintiff must show a distinct injury
154 to the plaintiff and a real controversy between the parties, which will be actually *154 determined by the judicial declaration sought. *Everett,* 178 S.W.3d at 850, *citing Brown v. Todd,* 53 S.W.3d 297, 305 (**Tex**. 2001). In conferring statutory standing, the Legislature may by statute exempt litigants from proof of the "special injury" required to establish common law standing. *Everett,* 178 S.W.3d at 850. When standing has been statutorily conferred, the statute itself serves as the proper framework for a standing analysis. *Id.* The plaintiff must demonstrate how he has been wronged within the parameters of the language used in the statute. *Id., citing Scott v. Board of Adjustment,* 405 S.W.2d 55, 56 (**Tex**.1966).

The Causes of Action:

Illegal Contract, Civil Conspiracy and Violations of the Funeral Rules

The trial court certified four causes of action: breach of contract, illegal contract, civil conspiracy, and violation of the Texas Occupations Code. Each is based upon **SCI's** purported violation of the **Funeral** Rule. **SCI** contends that because there is no private cause of action for violation of the **Funeral** Rule, Appellees lack standing to assert these claims on behalf of themselves or the class. We agree.

The federal **Funeral** Rule was adopted pursuant to Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a)(1), which outlaws unfair and deceptive acts and practices in or affecting commerce, and Section 18, 15 U.S.C. § 57a(a)(1), which authorizes the Commission to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and "requirements . . . for the purpose of preventing such acts or practices." *Harry & Bryant Co.,* 726 F.2d at 999. Federal courts have uniformly held that a private right of action does not exist under Section 5 of the FTCA. *See e.g., Morales v. Walker Motors Sales, **Inc**.,* 162 F.Supp.2d 786, 790 (S.D.Ohio 2000); *American Airlines v. Christensen,* 967 F.2d 410, 414 (10th Cir. 1992); *R.T. Vanderbilt Co. v. Occ. Saf. & H. Rev. Commission,* 708 F.2d 570, 574-5 n. 5 (11th Cir.1983); *Fulton v. Hecht,* 580 F.2d 1243, 1248 (5th Cir.1978), *cert. denied,* 440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979); *Alfred Dunhill, Ltd. v. Interstate Cigar Co.,* 499 F.2d 232, 237 (2nd Cir.1974); *Holloway v. Bristol-Myers Corp.,* 485 F.2d 986, 997-1002 (D.C.Cir. 1973); *Carlson v. Coca-Cola Co.,* 483 F.2d 279, 280 (9th Cir.1973); *St. Martin v. KFC Corp.,* 935 F.Supp. 898, 907 (W.D.Ky.1996). Nor may a plaintiff create a private cause of action by alleging a violation of an FTC regulation to satisfy an element of a state common law claim. *See Morrison v. Back Yard Burgers, **Inc**.,* 91 F.3d 1184, 1187 (8th Cir.1996); *Carlson* 483 F.2d at 280. We conclude that there is no private cause of action for violation of the federal **Funeral** Rule. Because their illegal contract and civil conspiracy causes of action are based on **SCI's** a violation of the federal **Funeral** Rule, Appellees lack standing to assert these claims on behalf of themselves and the class.

Appellees have also pled a separate cause of action for **SCI's** violation of Chapter 651 of the Texas Occupations Code. Their illegal contract and civil conspiracy claims are based on the state version of the **Funeral** Rule. While the Texas Occupations Code provides for the assessment of monetary administrative penalties by the Texas **Funeral** Service Commission, it does not provide for a private cause of action to recover damages. *See* **TEX**. OCC.CODE ANN. §§ 651.551-651.552. The only relief
155 which may be sought by a private party is injunctive relief against a **funeral** establishment, an embalmer, or a *155 **funeral** director who violates Chapter 651 or a rule adopted under the chapter. **TEX**. OCC.CODE ANN. §§ 651.601.

Appellees suggest that they have standing to maintain their claim since their petition seeks injunctive relief as permitted by Section 651.601. But the trial court did not certify an injunction class and this does not serve as a basis for affirming the certification order. Other than injunctive relief, there is no private right of action for violation of the provisions found in Chapter 651 or a rule adopted under that chapter. Therefore, Appellees lack standing to assert a separate cause of action for violation of the state **Funeral** Rule. They also lack standing to maintain their illegal contract and civil conspiracy causes of action insofar as these claims are based on a claimed violation of the state **Funeral** Rule.

Breach of Contract

This leaves only the breach of contract cause of action. On original submission, we held that Appellees lack standing to assert breach of contract because the claim is expressly based on violations of the federal and state **Funeral** Rules. Complaining that we misunderstood the basis of their breach of contract action, Appellees have challenged this holding in their motion for rehearing.

We begin with a review of their pleadings. In their seventh amended petition, Appellees allege:

• Paragraph 18. Federal and state regulations require that a **funeral** provider must notify a consumer if the **funeral** provider charges the consumer more than the **funeral** provider pays to a third party for the same service or merchandise. *See* 16 C.F.R. § 453.1(b), 16 C.F.R. § 453.3(f), 22 TAC § 203.8(f), and 22 TAC § 203.1(3). The Defendants failed to provide such notice to Plaintiffs and the Plaintiff Classes.

• Paragraph 19. In failing to disclose this information, Defendants . . . violated Texas and federal regulations. . . .

The breach of contract claim is found in paragraphs 35 through 37:

• 35. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 34 above.

• 36. The state and federal laws referenced above are incorporated into the contracts entered into by Plaintiffs, the members of the Plaintiff Classes and Defendants. Plaintiffs and the members of the Plaintiff Classes performed their obligations under the contracts. Defendants breached the contracts by failing to comply with these laws.

• 37. As a result of these breaches of contract by Defendants, the Defendants unlawfully benefitted and were unjustly enriched. Therefore, Plaintiffs and the members of the Plaintiff Classes seek restitutionary damages from Defendants.

In their initial brief, Appellees responded to **SCI's** argument that there is no private cause of action for violation of the **Funeral** Rule by stating:

> **SCI** fails to distinguish between a private right of action based on a statute, and a common law contract claim based upon the contract as modified by a statute. The **Funeral** Rule is incorporated into the contract as a matter of well settled Texas law that, `The laws existing at the time a contract is made become a part of the contract and governs the transaction.' Accordingly, `a party's obligation under a contract is measured by the standard of the laws existing at the time the contract is made.'

Based on the pleadings and the arguments offered in their briefing, we understood Appellees to assert that the **Funeral** Rule
156 was impliedly incorporated in the contract and that **SCI's** alleged violation of *156 the **Funeral** Rule constituted a breach of the contract. We concluded, based on the federal authority set forth above, that Appellees do not have standing to assert the breach of contract claim based on violation of the FTC **Funeral** Rule. In their motion for rehearing, Appellees vigorously argue that **Hijar's** contract *expressly* incorporates many **Funeral** Rule terms and that **SCI** breached the specific written terms of those provisions in the contract. They contend that even if the **Funeral** Rule ceased to exist, **SCI** still breached the express, written terms of its contract with **Hijar**. Quite pointedly, they maintain that we either misunderstood their claim or we intended to "usher in an unwise and unprecedented sea-change in Texas contract law." We certainly did not intend anything so dramatic. If we misunderstood Appellees' breach of contract claim, it is because Appellees did not previously make the argument now contained in their motion for rehearing. With this understanding of the breach of contract cause of action, we conclude that Appellees do not lack standing to assert the claim insofar as it is based on **SCI's** alleged breach of the specific written provisions of the contract.

Standing to Seek Restitution

Our conclusion that Appellees have standing to assert their breach of contract claim is not the end of the standing inquiry. **SCI** also contends that the equitable remedy restitution is not a proper remedy under the legal theories and facts pled.

Appellees do not seek damages for **SCI's** alleged breach of contract. Rather, they seek restitution based on their assertion that **SCI** was unjustly enriched. The unjust enrichment doctrine generally applies the principles of restitution to disputes which are not governed by a contract between the parties. *R. Conrad Moore & Assocs., **Inc**. v. Lerma,* 946 S.W.2d 90, 96 (**Tex**.App.-El Paso 1997, pet. denied). Restitution is available if the contract is unenforceable, impossible, not fully performed, or void for other legal reasons. *Id.* at 96-97. But Appellees do not allege that the contracts were unenforceable, impossible, or not fully performed. Instead, they argue that restitution is a proper remedy because the contracts are void due to illegality. An illegal contract is one in which the parties undertake to do an act forbidden by the law of place where it is to be done, and as such it is an invalid agreement which imposes no legal obligation. *Franklin v. Jackson,* 847 S.W.2d 306, 309-10 (**Tex**.App.-El Paso 1992, pet. denied). A contract to do a thing which cannot be performed without a violation of the law is void. *Id.* However, a contract that could have been performed in a legal manner will not be declared void simply because it may have been performed in an illegal manner. *Id., citing Lewis v. Davis,* 145 **Tex**. 468, 199 S.W.2d 146, 148-49 (1947); *Wade v. Jones,* 526 S.W.2d 160, 162-63 (**Tex**.Civ.App.-Dallas 1975, no writ). It is undisputed that a contract to provide **funeral** services is not in and of itself illegal, and Appellees concede as much. They contend, however, that **SCI** "illegally overcharged the class for the price of certain **funeral** goods and services" and "[t]he class's contractual agreement to pay the padded bills is void because the markups violate the **Funeral** Rule." Appellees do not allege in their pleadings or argue in their brief that the contract could not have been performed in a legal manner. To the contrary, they claim that **SCI** could have and should have given them the notice required by the **Funeral** Rule but failed to do so. Such an allegation would not support a finding that the contracts are illegal, unenforceable,
157 and void. *See Wade,* 526 S.W.2d at 162-63 (failure of plaintiff to obtain a permit from city to move house to *157 defendants'

land did not operate to invalidate purchase agreement on ground of illegality, even if property was located within city so as to require application of licensing ordinances, where there was no evidence to show that plaintiff could not have obtained such a permit or that he could not have performed agreement in a legal manner). We conclude that restitution is not an available remedy for **SCI's** alleged breach of contract. In the absence of a cognizable damage theory, Appellees lack standing to maintain their cause of action for breach of contract. For the foregoing reasons, Issue One is sustained.

We reverse the certification order and render judgment dismissing the breach of contract, illegal contract and civil conspiracy claims. The only cause of action remaining in the trial court is Appellees' petition for injunctive relief.

99 S.W.3d 263 (2003)

George B. SHEPARD; James C. Mills, Individually and d/b/a MultiMortgage BanCorp; and MultiMortgage BanCorp, Inc., Appellants,

v.

Elbert G. BOONE, Jr. and Mary Ella Boone, Appellees.

No. 11-02-00043-CV.

Court of Appeals of Texas, Eastland.

January 23, 2003.

264 *264 Lester Buzbee, III, Humble, for appellant.

Percy L. Wayne Isgitt, C. Zan Turcotte, Law Office of Percy L. "Wayne" Isgitt, P.C., Houston, for appellee.

Panel consists of: ARNOT, C.J., and McCALL, J., and McCLOUD, S.J.[*]

Opinion

AUSTIN McCLOUD, Senior Justice (Retired).

This is a wrongful foreclosure case. Elbert G. **Boone**, Jr. and Mary Ella **Boone**, appellees, sued George B. **Shepard** and James C. Mills, individually and d/b/a MultiMortgage BanCorp, and MultiMortgage BanCorp, Inc., appellants, seeking to set aside a foreclosure sale. On March 15, 2001, the trial court entered a partial summary judgment ordering that a trustee's sale by Mills, substitute trustee, was void. The court further ordered that the trustee's deed from Mills, substitute trustee, to **Shepard** was void. On October 3, 2001, the trial court held a hearing on attorney's fees. On October 16, 2001, the court entered a final judgment awarding appellees $29,356.00 in attorney's fees. The judgment stated that "[a]ll relief requested in this case and not expressly granted is denied. This judgment finally disposes of all parties and claims and is appealable."

Appellants appeal. We affirm the summary judgment, reverse the award of attorney's fees, and remand that issue to the trial court for a new trial.

In 1986, appellees signed a contract for improvements to their home, a deed of trust covering their residence, and a promissory note in the amount of $45,011.00. The note was made payable to Briercroft Savings Association in monthly installments of $697.17. Briercroft assigned the note to Old Republic Insured Financial Acceptance Corporation on October 23, 1995. On January 6, 1998, Old Republic assigned all of its interest in the "Contract for Improvements" and "Deed of Trust" executed by appellees to "MultiMortgage BanCorp." The written assignment did not assign the $45,011.00 note that was executed by appellees. On January 8, 1998, Mills, as president of MultiMortgage BanCorp, notified appellees by letter that MultiMortgage BanCorp had purchased appellees' note and deed of trust. Mills stated in the letter that appellees were required to provide the "Noteholder" with insurance coverage and with proof that all taxes were current and paid when due. Mills stated that, should appellees fail to comply within 20 days, the owner and holder could at its option declare the entire balance of the indebtedness due and payable and sell the property at foreclosure to satisfy such indebtedness. On January 29, 1998, notice was given to appellees that a foreclosure sale would be conducted on March 3, 1998, because of default in the payment of the indebtedness.
265 On March *265 3, 1998, Mills, as substitute trustee, executed a deed conveying appellees' real property to **Shepard**.

Appellees alleged, among other things, in their motion for summary judgment that MultiMortgage BanCorp was not the owner and holder of the note at the time of the foreclosure sale. Appellants responded by relying upon the written assignment from Old Republic to MultiMortgage BanCorp dated January 6, 1998.

The trial court's order granting the partial summary judgment did not specify the ground or grounds relied on by the court for its ruling. We must affirm the summary judgment if any of the theories urged by appellees in their motion for summary judgment are meritorious. *Carr v. Brasher,* 776 S.W.2d 567 (Tex.1989).

Appellees argue that they established that they were entitled to a summary judgment on the issues "expressly presented to the trial court" by conclusively proving all the essential elements of their cause of action as a matter of law. *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671, 678 (Tex.1979). We agree. The court in *City of Houston v. Clear Creek Basin Authority, supra* at 678-79, stated:

With the exception of an attack on the legal sufficiency of the grounds expressly raised by the movant in his motion for summary judgment, the non-movant must expressly present to the trial court any reasons seeking to *avoid* movant's entitlement, such as those set out in rules 93 and 94, and he must present summary judgment proof when necessary to establish a fact issue. No longer must the movant negate all possible issues of law and fact that *could* be raised by the non-movant in the trial court but were not. (Emphasis in original)

The "holder" of a negotiable instrument is defined in TEX. BUS. & COM. CODE ANN. § 1.201(20) (Vernon Supp.2003) as:

> [T]he person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession.

TEX. BUS. & COM. CODE ANN. § 3.201 (Vernon 2002) provides in part:

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.

In *Jernigan v. Bank One,* Texas, N.A., 803 S.W.2d 774, 777 (Tex.App.-Houston [14th Dist.] 1991, no writ), the court recognized that, under certain circumstances, a promissory note can be transferred without a written assignment or proper indorsement. The court held:

Promissory notes can be transferred lawfully without a written assignment or an indorsement by the legal owner or holder. *Waters v. Waters,* 498 S.W.2d 236, 241 (Tex.Civ.App.-Tyler 1973, writ ref'd n.r.e.); see also *Christian v. University Federal Savings Association,* 792 S.W.2d at 534. Absent an indorsement, however, possession must be accounted for by proving the transaction through which the note was acquired. Tex. Bus. & Com.Code Ann. § 3.201(c), Comment 8 (Vernon 1968); *Lawson v. Finance America Private Brands, Inc.,* 537 S.W.2d at 485. Appellee has presented no proof of any transfer that would vest in it ownership rights sufficient to enforce payment of the note.

266 *266 See *Northwestern National Insurance Company v. Crockett,* 857 S.W.2d 757, 758 (Tex.App.-Beaumont 1993, no writ).

Here, appellants failed in their written response to appellees' motion for summary judgment to allege or present sufficient summary judgment proof that MultiMortgage BanCorp was the owner and holder of the note signed by appellees. *City of Houston v. Clear Creek Basin Authority, supra* at 678-79. Appellants' written response and summary judgment proof relied upon the written assignment from Old Republic to MultiMortgage BanCorp. That assignment did not assign the note signed by appellees. The summary judgment proof conclusively established that the party (MultiMortgage BanCorp) that foreclosed on appellees' residence was not the owner and holder of the note. The trial court correctly granted the partial summary judgment.

Appellants contend that the trial court erred in granting appellees' motion to file their "Supplemental Third Amended Petition" and in awarding appellees attorney's fees pursuant to the Texas Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997). We agree.

In their third amended original petition, appellees alleged that the note, deed of trust, and contract were void. The court expressly refused to find that these instruments were void in the partial summary judgment that was entered. Appellees also alleged that the foreclosure was wrongful and placed a cloud on appellees' title to the property because MultiMortgage BanCorp was not the owner and holder of the note at the time of the foreclosure and sale. Appellees specifically alleged, in a separate paragraph titled "Attorney's Fees," that they were entitled to attorney's fees pursuant to "16 C.F.R. 433 and/or Tex. Civ. Prac. & Rem.Code § 38.001."

On October 3, 2001, the day of the hearing on attorney's fees, appellees filed a motion to file a "supplemental" third amended petition. The supplemental petition states:

Plaintiffs are entitled to recover their reasonable and necessary attorney's fees pursuant to the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem.Code § 37.001, because their causes of action include a declaration of rights, status and legal relations under a written contract and other writings. Tex. Civ. Prac. & Rem.Code § 37.004. This Court has granted partial summary judgment in favor of Plaintiffs declaring the foreclosure sale against the Plaintffs' real property and trustee's deed resulting from the sale void, because none of the Defendants own and hold the Note and Deed of Trust upon which the foreclosure was predicated. This declaration of the parties' rights constitutes relief pursuant to Tex. Civ. Prac. & Rem.Code § 37.004, and entitles Plaintiffs to attorney's fees pursuant thereto.

After the parties presented their arguments and authorities, the court granted appellees' motion to file their supplemental third amended petition. Appellants urged in their objections at trial, and in this appeal, that the request for attorney's fees pursuant to
267 Section 37.009 was a "surprise" under TEX.R.CIV.P. 63 and 66 and a "substantive" change.[1] We agree. See *267 *Chapin & Chapin, Inc. v. Texas Sand & Gravel, Inc.,* 844 S.W.2d 664 (Tex.1992).

Appellees argued before the trial court and on this appeal that they had sought attorney's fees pursuant to Section 37.009 in their third amended original petition filed July 6, 2000. We disagree. In their third amended original petition, appellees sought "Attorney's Fees" pursuant to two specifically alleged statutes. In their prayer, appellees requested "[r]easonable attorney's fees" and a "*declaration* that the Substitute Trustee's Deed, the Note, the Deed of Trust, the Contract ... are void" along with several other requests. (Emphasis added) The inclusion in the prayer of the word "declaration" was not a proper allegation for attorney's fees pursuant to Section 37.009. The supplemental third amended petition, which was filed on the day of the hearing, asserted a "new cause of action" for attorney's fees pursuant to the Texas Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.001 et seq. (Vernon 1997 & Supp.2003), and was prejudicial on its face. See *Greenhalgh v. Service Lloyds Insurance Company,* 787 S.W.2d 938 (Tex.1990). *Purvis Oil Corp. v. Hillin,* 890 S.W.2d 931, 939 (Tex.App.-El Paso 1994, no writ), and the other cases cited by appellees are distinguishable. We note that the court in *Purvis Oil Corp.* pointed out that, in Hillin's "amended answer, it specifically requests an award of attorney's fees pursuant to Section 37.009 of the Texas Civil Practice and Remedies Code (Uniform Declaratory Judgments Act)." No similar allegation was made by appellees in their third amended original petition. Such allegation was first made in their supplemental third amended petition which was filed on the day of the trial of the issue of attorney's fees. We hold that appellees did not allege that they were entitled to attorney's fees pursuant to the Texas Declaratory Judgments Act in their third amended original petition. Also, the trial court abused its discretion in granting appellees' motion to file their supplemental third amended petition and in awarding appellees attorney's fees of $29,356.00. The issue of attorney's fees is remanded to the trial court.

The trial court's judgment granting the partial summary judgment is affirmed. The award of attorney's fees is reversed, and the attorney's fees issue is remanded to the trial court.

[*] Austin McCloud, Retired Chief Justice, Court of Appeals, 11th District of Texas at Eastland sitting by assignment.

[1] Appellants did not object that appellees' cloud-on-title allegation involved a dispute over title to land, and attorney's fees are not to be awarded in this type of suit under the Texas Declaratory Judgments Act. Therefore, we will not discuss that issue. See *The John G. and Marie Stella Kenedy Memorial Foundation v. David Dewhurst, Commissioner of the General Land Office,* 90 S.W.3d 268 (Tex.2002); *Brainard v. State,* 12 S.W.3d 6, 27-30 (Tex. 1999); *Amerman v. Martin,* 83 S.W.3d 858 (Tex.App.-Texarkana 2002, pet'n filed); 17 WILLIAM V. DORSANEO III ET AL., TEXAS LITIGATION GUIDE § 257.06(3) (Nov.2000).

603 S.W.2d 829 (1980)

The STATE BAR OF TEXAS, Relator,
v.
Honorable Wyatt H. HEARD, Judge, Respondent.

No. B-9033.

Supreme Court of Texas.

July 30, 1980.
Rehearing Denied September 12, 1980.

831 *831 Jerry Zunker, Gen. Counsel, Steven D. Peterson, First Asst. Gen. Counsel, **State Bar** of Texas, Austin, for relator.

Andrew L. Jefferson, Jr., Houston, for respondent.

SPEARS, Justice.

In this original proceeding, relator, the **State Bar** of Texas, prays this court to issue a writ of mandamus compelling respondent, Judge Wyatt **Heard**, to render an order suspending the license to practice law of Ronald B. Pruitt during the pending appeal from Pruitt's conviction for conspiracy to commit mail fraud and substantive mail fraud. We conditionally grant the writ.

On April 30, 1979, Pruitt was convicted by a jury in a United States District Court in Florida of one count of conspiring to commit mail fraud (Title 18 U.S.C. § 371) and six counts of substantive mail fraud (Title 18 U.S.C. § 1341). Pruitt was sentenced to three years imprisonment on each count, to be served concurrently. He then perfected his appeal to the United States Court of Appeals, Fifth Circuit, and that appeal is now pending.

In July of 1979, the **State Bar** of Texas filed a complaint in Judge **Heard's** court pursuant to § 16 of the **State Bar** Act, **Tex**.Rev.Civ.Stat.Ann. art. 320a-1 (Vernon), seeking the suspension of Pruitt's law license during appeal of the conviction and further seeking disbarment upon proof that the conviction was final. Thereafter, the **State Bar** filed a "Motion for Summary Judgment" which asked the court for an interlocutory order suspending Pruitt's license during the pendency of his appeal. The respondent, Judge **Heard**, denied the motion, stating that the denial was without prejudice to reassert the motion if and when the criminal conviction became final on appeal.

The **State Bar** Act[1] was passed in aid of this court's exercise of its inherent power to regulate the practice of law.[2] Section 16 of that act provides in pertinent part:

> Sec. 16. (a) No attorney shall be suspended from practice, except by the attorney's concurrence under an order of suspension entered by the grievance committee, until such attorney has been convicted of the charge or charges for disbarment pending against him or her in a court of competent jurisdiction. *Provided, however, that on proof of conviction of an attorney* in any trial court of competent jurisdiction *of any felony involving moral turpitude* or of any misdemeanor involving the theft, embezzlement, or fraudulent misappropriation of money or other property, *the district court of the county of the residence of the convicted attorney shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction.* An
832 attorney who has been given probation after the conviction, whether adjudicated or unadjudicated, *832 shall be suspended from the practice of law during the probation. On proof of final conviction of any felony involving moral turpitude or any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter a judgment disbarring him or her.
>
> . . . . .
>
> (b) *In any action seeking to disbar an attorney* for acts made the basis of a conviction for a felony involving moral turpitude or a misdemeanor involving theft, embezzlement, a fraudulent misappropriation of money or other

> property, *the record of conviction shall be conclusive evidence of the guilt of the attorney for the crime of which he or she was convicted.* (emphasis added).

This statute gives the district court no discretion and upon proof of the conviction of a felony involving moral turpitude, the court had a mandatory duty to render an order suspending Pruitt's license to practice law during the pendency of his appeal.

Respondent **Heard** argues that a writ of mandamus is not an appropriate remedy here for several reasons. First, he contends that Pruitt, who has not been made a party to this proceeding, is a necessary party, without whom relief cannot be granted, since Pruitt's rights would be directly affected by the issuance of the writ. We overrule this contention. In *Dick v. Kazen,* 156 **Tex**. 122, 292 S.W.2d 913, 916-17 (1956), an election case, we responded to a similar argument, saying:

> [T]he application presents only the question of ascertaining whether or not the judge of the district court has refused to do an official act involving only official power and duty arbitrarily laid upon him by law, and the performance of which, if it be so required, could in no way comprehend the impairment of any legal right, which might be asserted to circumvent such legal requirement. Where application for a writ of mandamus is sought to compel a trial judge to do what is alleged to be a duty mandatorily enjoined upon him by law, and as to which, if it thus exists, he could have no discretion, a case of this nature, which has been held to require parties litigant adverse to the relator to be brought into the proceeding, is not presented.

The cases of *Williams v. Wray,* 123 **Tex**. 466, 72 S.W.2d 577 (1934) and *Lanford v. Smith,* 128 **Tex**. 373, 99 S.W.2d 593 (1936), cited by respondent **Heard**, are distinguishable. In those cases there was a *judicial* function involved that affected the rights of an absent party. In *Williams,* a mandamus was sought to compel the district judge to proceed to trial in a cause. In *Lanford,* the court of civil appeals reversed the trial court's order overruling a plea of privilege, but instead of rendering judgment that the case be transferred, the court of civil appeals remanded the case for a new venue trial on the theory that it did not appear from the record that the facts had been fully developed. In both cases, this court denied a writ of mandamus on the grounds that there were absent parties whose rights would be injuriously affected by the issuance of a mandamus.

In the case before us, however, no judicial act is involved; rather the act required is merely ministerial. In *Commissioner of the General Land Office v. Smith,* 5 **Tex**. 471, 479 (1849) this court observed:

> The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.

In the present case no discretion or judgment was necessary for the trial court to follow the clear provisions of section 16(a) of the **State Bar** Act. We reaffirm the rule in *Dick v. Kazen, supra,* 292 S.W.2d at 917, that adverse parties in the litigation need not
833 be parties in the mandamus action *833 which involves only an absolute and rigid duty of the trial court to follow a fixed and prescribed course not involving the exercise of judgment or discretion. In such an instance the writ, if granted, could only run against the judge.[3]

Respondent next contends that mandamus will not lie until the **State Bar** has first made application to the court of civil appeals. He argues that the **State Bar** is merely asking this court to order the trial judge to enter a judgment, a matter over which the court of civil appeals has concurrent jurisdiction under **Tex**.Rev.Civ.Stat. Ann. art. 1824 (Vernon). We do not agree. The **State Bar** asks us to order Judge **Heard** to vacate his order denying the interlocutory order and to render an order suspending Pruitt's license pending appeal of his conviction. Although the **State Bar** captioned the relief it sought in the trial court a motion for summary judgment, it is clear from reading the instrument that the **State Bar** was not asking, at that point, for summary judgment. Rather, it was a motion to invoke the special remedy of suspension provided for by statute.[4] We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it. **Tex**.R.Civ.P. 71 (Vernon 1979). *See Rose v. **State**,* 497 S.W.2d 444 (**Tex**.1973).[5] The **State Bar's** motion for an order immediately suspending Pruitt's license sought an interlocutory order while the case for disbarment was pending. This relief is not within the purview of article 1824. The mandamus power of the court of civil appeals is limited to directing the trial court to proceed to trial and judgment and does not include the power to tell that court what judgment it should enter. *Weber v. Snell,* 539 S.W.2d 363, 367 (**Tex**.Civ.App. — Houston [1st Dist.] 1976). Nor does the court of civil appeals have jurisdiction to order the trial court to set aside a void interlocutory order. *Crane v. Tunks,* 160 **Tex**. 182, 328 S.W.2d 434, 438 (1959); *Chapa v. Betts,* 534 S.W.2d 446,

447 (**Tex**.Civ.App. — Austin 1976).

Respondent **Heard** next argues that mandamus will not lie because this court does not have jurisdiction to correct an incidental ruling made by the trial court in the course of orderly trial proceeding when there is an adequate remedy available. He further urges that the **State Bar** may not prosecute an appeal from the order denying a motion for summary judgment; instead, he says that the **State Bar** should proceed to trial in the disbarment suit and appeal from any adverse ruling.

As we have noted, the **State Bar's** motion was not in the nature of a summary judgment, but was a motion praying for an interlocutory order specifically provided for and required by statute. Except in rare instances, this court will not issue writs of mandamus to control or correct rulings on motions, which are merely incidental to the normal trial process, when an adequate
834 remedy by appeal exists for correction of any erroneous ruling. ***State** ex rel. Pettit* *834 *v. Thurmond,* 516 S.W.2d 119, 121 (**Tex**. 1974); *Pope v. Ferguson,* 445 S.W.2d 950, 954 (**Tex**.1969). We will, however, issue a writ of mandamus directing a trial judge to enter or set aside a particular judgment or order when the directed course of action is the only proper course and the petitioner has no other adequate remedy. ***State** ex rel. Pettit v. Thurmond, supra; Pope v. Ferguson, supra*. Under those circumstances, mandamus will lie when there is a clear abuse of discretion as in *Stewart v. McCain,* 575 S.W.2d 509 (**Tex**.1978); *Texarkana Memorial Hosp., Inc. v. Jones,* 551 S.W.2d 33 (**Tex**.1977); *Houdaille Indus., Inc. v. Cunningham,* 502 S.W.2d 544 (**Tex**.1973); *Maresca v. Marks,* 362 S.W.2d 299 (**Tex**. 1962). Likewise, in the absence of another adequate remedy, mandamus will lie when a district court fails to observe a mandatory statutory provision conferring a right or forbidding a particular action. In these instances the trial court's discretion is not invoked, and its failure to comply with the mandatory provision renders its order or judgment void. ***State** Bd. of Ins. v. Betts,* 158 **Tex**. 612, 315 S.W.2d 279, 280 (1958); ***State** v. Ferguson,* 133 **Tex**. 60, 125 S.W.2d 272, 274 (1939); *see* ***State** ex rel. Pettit v. Thurmond, supra,* at 121, 123. In *Stakes v. Rogers,* 139 **Tex**. 650, 165 S.W.2d 81, 82 (1942) we stated:

> A writ of mandamus will lie to correct the action of a trial judge where he acts in abuse of his discretion, or in violation of his clear duty under the law, and there is no adequate remedy by appeal.

In the case before us, the statute provides that upon "proof of [final] conviction of an attorney ... of any felony involving moral turpitude ... the district court ... *shall* enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction." (emphasis added). This provision calls for no discretion. It calls for no judicial decision. It is clear and unambiguous, and it mandates what the district court must do upon application of the **State Bar**.

Moreover, because the order complained of is an interlocutory order, denying the motion to suspend Pruitt's license, appeal is not available to the **State Bar**. Therefore, the **State Bar** would be required to wait until the federal appeal is decided and the disbarment suit is **heard** before it could appeal the failure of respondent to suspend Pruitt's license. This requirement would effectively repeal § 16(a) of the **State Bar** Act, however, because the question of suspension would be rendered moot once Pruitt's appeal is decided. If his appeal was unsuccessful, his federal conviction would be final, and the trial court must disbar him.[6] On the other hand if Pruitt's appeal is successful and no other grounds exist that would require disbarment, the trial court must restore his license. In either event, the dispute over the suspension would be meaningless.

Considerations raised by relator's affidavits to the effect that the conviction is likely to be reversed by the Fifth Circuit and that the trial court in Florida believed Pruitt's guilt to be a "very close case" are immaterial. The clear mandate is grounded in sound public policy. The practice of law is a license, not a right, and only persons of good moral character and fitness are permitted to practice law in the courts of this **state**. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands.

The final question we address is whether the conviction of Pruitt was for a crime involving moral turpitude. Pruitt was convicted on counts of both conspiracy to commit mail fraud and substantive mail fraud. A specific intent to defraud has been held a necessary element for the conviction of mail fraud. *Williams v. United States,* 278 F.2d 535, 537 (9th Cir. 1960). Moreover, any
835 crime of which fraud is a *835 necessary element is a crime involving moral turpitude. *Jordan v. DeGeorge,* 341 U.S. 223, 227, 71 S.Ct. 703, 705, 95 L.Ed. 886 (1951). In *Jordan* the Supreme Court stated:

> The term "moral turpitude" has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses.

. . . . .

> In deciding the case before the Court, we look to the manner in which the term "moral turpitude" has been applied by judicial decision. Without exception, federal and **state** courts have held that a crime in which fraud is an ingredient involves moral turpitude. (footnotes omitted).

Id. The determination whether a particular crime involves moral turpitude is a question of law. *United States v. Tuttle,* 46 F.2d 342, 345 (E.D.La.1930); In re McAllister, 14 Cal.2d 602, 95 P.2d 932, 933 (1939) (in bank).

In other jurisdictions the specific crime of mail fraud has been held to be a crime involving moral turpitude for which an attorney can be disbarred. *In re Fumo,* 52 Ill.2d 307, 288 N.E.2d 9, 11 (1972); *Louisiana **State Bar** Ass'n v. Hennigan,* 340 So.2d 264, 269 (La.1976); *Neibling v. Terry,* 177 S.W.2d 502, 503 (Mo.1944) (en banc); *Ohio **State Bar** Ass'n v. Mackay,* 46 Ohio St.2d 81, 346 N.E.2d 302, 303 (1976); *In re Comyns,* 132 Wash. 391, 232 P. 269, 270 (1925); *In re West,* 155 W.Va. 648, 186 S.E.2d 776, 778 (1972).

In *Attorney Grievance Comm'n v. Reamer,* 281 Md. 323, 379 A.2d 171, 173-74 (1977) the Maryland Court of Appeals held:

> It is clear from our cases that the term "moral turpitude" connotes a fraudulent or dishonest intent, and that a crime in which an intent to defraud is an element is a crime involving moral turpitude.
>
> . . . . .
>
> The essential elements of mail fraud under 18 U.S.C. § 1341 are the intentional devising of a scheme to defraud or to obtain money or property by false pretenses, representations, or promises, and the use of the United States Mails for the purpose of executing the fraudulent scheme.... Generally, the cases indicate that a scheme to defraud within the meaning of the mail fraud statute consists of a pattern of behavior calculated to deceive persons of ordinary prudence and comprehension.

Further, it has been held that conspiracy to commit an offense involving moral turpitude is itself an offense involving moral turpitude. *In re McAllister,* 14 Cal.2d 602, 95 P.2d 932, 933 (1939) (in bank); *see In re Leonard,* 64 Ill.2d 398, 1 Ill.Dec. 62, 356 N.E.2d 62 (1976).

In *Muniz v. **State**,* 575 S.W.2d 408, 411 (**Tex**.Civ.App. — Corpus Christi 1968, writ ref'd n.r.e.) the court correctly observed:

> The question of whether a particular crime involves moral turpitude is to be determined by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law.

We hold that the offenses of which Pruitt was convicted were crimes involving moral turpitude as a matter of law.

A writ of mandamus ordering Judge **Heard** to render an order suspending the license to practice law of Ronald B. Pruitt during the pendency of the appeal from his conviction will issue only if Judge **Heard** refuses to do so voluntarily.

Dissenting opinion by POPE, J., joined by CAMPBELL, J.

Dissenting opinion by GREENHILL, C. J.

POPE, Justice, dissenting.

The Supreme Court has by today's decision for the first time intervened to set aside a trial court's order denying a partial summary judgment. This court has ordered the trial court to grant the partial summary judgment. This court's action violates
836 settled principles and practices that a mandamus is not a proper vehicle to forestall *836 trial courts from making errors nor to correct even their obvious and gross errors. Appellate Procedure in Texas § 1.1(1), at 10 (2d ed. 1979). Mandamus is not a writ which affords an accelerated appeal nor priority of review by leaping over the trial and appellate process. A practice which tolerates a direct hearing before the Supreme Court on trial court rulings defeats the orderly trial and appellate process as we fully stated in *Pope v. Ferguson,* 445 S.W.2d 950, 954 (**Tex**.1969), *cert. denied,* 397 U.S. 997, 90 S.Ct. 1138, 25 L.Ed.2d 405 (1970):

> Moreover, with this type of intervention, the fundamental concept of all American judicial systems of trial and

> appeal would become outmoded. Having entered the thicket to control or correct one such trial court ruling, the appellate courts would soon be asked in direct proceedings to require by writs of mandamus that trial judges enter orders, or set aside orders, sustaining or overruling (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante veredicto, (7) motions for new trial, and a myriad of interlocutory orders and judgments; and, as to each, it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.

More disturbing than the court's embracing a practice which permits a case to "bounce back and forth like a rubber ball between the district and the Supreme Court" (*Maresca v. Marks,* 362 S.W.2d 299 (**Tex**.1962) (Walker, J., dissenting), is the court's liberty with the record before us. Recognizing that this court will not intervene by mandamus in partial summary judgment proceedings and other interim rulings at the trial court level, the court surprisingly supports its decision by declaring that the trial court's action did not arise out of a summary judgment matter. This is not a correct or fair analysis of this whole record.

This Was and Is a Summary Judgment Proceeding

The **State Bar** filed this action to suspend Ronald Pruitt's law license and to disbar him if his conviction is affirmed on appeal. The **State Bar** then filed what it called its Motion for Summary Judgment. It prayed that "the court grant this Motion for Summary Judgment, and that this Interlocutory Judgment be entered in favor of the Plaintiff against Defendant, suspending the law license of the Defendant during the pendency of any appeal from the convictions ...." The trial court ordered a hearing on "the foregoing Motion for Summary Judgment." Mr. Pruitt filed his Opposition to Plaintiff's Motion for Summary Judgment, and the **State Bar** replied by pleading:

> The summary judgment evidence currently on file herein, pursuant to Rules 166-A, Texas Rules of Civil Procedure, include the Plaintiff's Original Formal Complaint .... Such documents on file in this cause are among those documents specifically set forth in Rule 166-A, Texas Rules of Civil Procedure and show that there is no genuine issue as to any material fact, and that the Plaintiff is entitled to judgment as a matter of law as set out in its Motion.

The **State Bar** in its prayer stated that it "reurges ... its Motion for Summary Judgment heretofore filed ...."

The hearing before the trial court on the **State Bar's** suit to suspend the license pending the appeal of Mr. Pruitt's conviction, was conducted exactly as a summary judgment proceeding by use of admissions and affidavits. I know of no proceeding other than a summary judgment hearing that permits the settlement of fact issues by affidavit. Rule 166-A, **Tex**.R.Civ.P.

The trial judge signed an order that recited:

> [I]t is the Court's opinion that the Plaintiff's Motion for Summary Judgment should be denied ... it is ORDERED,
837 ADJUDGED AND DECREED that the Motion for Summary Judgment filed by the **State Bar** of Texas, *837 be, and the same hereby is, denied....

We now come to the **State Bar's** documents filed before this court. The **State Bar's** application for writ of mandamus filed in this court stated that the trial judge denied its "Motion for Summary Judgment," and that it has no appeal from "the denial of the Motion for Summary Judgment." The **State Bar's** brief before this court states that the document it filed and that was **heard** by the trial court was "its Motion for Summary Judgment." Its first point in the brief is: "The Respondent has, by entry of an order denying Relator's Motion for Summary Judgment, applied judicial discretion to a statute that clearly authorizes no discretion."

The **State Bar** in its opening statement on oral argument to this court should settle the nature of its application for this court's writ of mandamus. Counsel told this court:

> The order of which we complain denies relator's motion for summary judgment. . ..

But the opinion of this court says that the proceeding was not a summary judgment hearing.

The court has thus entered the thicket. We have done so to set aside a denial of a summary judgment and this court has itself granted the summary judgment, while the cause still languishes in the trial court.

The **State Bar** argues that it has no right to appeal, but it pleaded itself into that posture. It had to do no more than file a suit to suspend the law license and go to trial. Then either party could appeal from a final judgment. By pleading in a single action for too much, a suspension of the license and a disbarment in the future, the **State Bar** cannot get a final judgment until Pruitt's conviction becomes final on appeal. Even now, the **State Bar** could sever its claim for disbarment or dismiss it, go to trial and obtain a final judgment. The court's opinion invites pleadings that seek too much. By doing so one may urge in an extraordinary proceeding that it has no right to appeal. That is true of interim and interlocutory orders. Until now it was no basis for this court's intervention.

The precedents cited by the majority do not hold that a mandamus will lie for the denial of a summary judgment. They fall into two groups. The first group of cases includes *Stewart v. McCain,* 575 S.W.2d 509 (**Tex**.1979); *Texarkana Memorial Hosp., Inc., v. Jones,* 551 S.W.2d 33 (**Tex**.1977); *Houdaille Industries, Inc. v. Cunningham,* 502 S.W.2d 544 (**Tex**.1973), and *Maresca v. Marks,* 362 S.W.2d 299 (**Tex**.1962). This court intervened in each of those cases to protect a constitutional or substantive privilege, because, once the privileged information was disgorged, it could not be retrieved. There is another group of cases cited to support the court's grant of the motion for summary judgment. They are ***State** ex rel. Pettit v. Thurmond,* 516 S.W.2d 119 (**Tex**.1974); ***State** Board of Insurance v. Betts,* 158 **Tex**. 612, 315 S.W.2d 279 (1958); *Stakes v. Rogers,* 139 **Tex**. 650, 165 S.W.2d 81 (1942); and ***State** v. Ferguson,* 133 **Tex**. 60, 125 S.W.2d 272 (1939). Those cases do not stand for the rule for which they are stated in the court's opinion. Those are cases in which this court intervened because the trial court had taken action for which it lacked power or jurisdiction.

The court by today's decision has taken the step to intervene when the trial court's ruling is clearly wrong. One need not now proceed by way of an appeal; he need not satisfy the jurisdictional requirements of article 1728. He need show only that a trial judge has violated a clear and unambiguous statutory provision conferring or forbidding a particular action.

I respectfully dissent.

CAMPBELL, J., joins in this dissent.

GREENHILL, Chief Justice, dissenting.

I agree with the dissenting opinion.

This court cannot, and should not, supervise by mandamus, the actions of all the trial courts in this **State**. This court, partially
838 for that reason, has not heretofore issued a mandamus for denial of a summary *838 judgment and should decline to do so here. There are, in my opinion, other ways in which the **State Bar** could have obtained the relief it sought.

Lest I be misunderstood, however, I think it should be stated that, in my opinion, Judge **Heard** erred in failing to suspend the license of Ronald Pruitt. The statute says that upon a conviction in any court of competent jurisdiction of any felony involving moral turpitude, "the district court ... *shall* enter our order suspending the attorney ...." In my opinion the Legislature intended that "shall" means "shall" and not "may."

This means that the license *shall* be suspended upon a conviction in a trial court. It does not mean that the license shall not be suspended until the conviction is affirmed. The statute provides for *disbarment,* not suspension, upon an affirmance of the conviction. And, as the majority opinion states, the conviction of mail fraud is clearly the conviction of a felony involving moral turpitude.

[1] Section 16(a) is substantially identical to § 6 of the prior **State Bar** Act as it existed before its reenactment on June 11, 1979. *Compare* **Tex**.Rev.Civ.Stat.Ann. art. 320a-1, § 16(a) (Vernon) *with* 1969 **Tex**.Gen.Laws, ch. 134, § 6, at 364.

[2] *See Order of the Supreme Court of Texas,* 1A **Tex**.Rev.Civ.Stat.Ann. 43 (Vernon Supp.1979).

[3] The record in this case discloses that the attorney representing respondent **Heard** is the same attorney representing Pruitt in the trial court. All matters filed in this mandamus proceeding were furnished to Pruitt's counsel whose brief and argument sought to advance Pruitt's interests in the proceeding as much as **Heard's**.

[4] The **State Bar's** motion for summary judgment prayed that "the court grant this Motion for Summary Judgment, and that *this Interlocutory Judgment be entered* in favor of the Plaintiff [**State Bar**] and against Defendant [Pruitt], *suspending the lawlicense* of the Defendant during the pendency of any appeal from the convictions cited herein, *and that upon proof of final conviction, the Defendant be, by this Court, disbarred.* Plaintiff further prays for such other and further relief to which it may show itself entitled, including all costs of court." (emphasis added).

In *Freedson v. **State Bar** of Texas,* 600 S.W.2d 349 (**Tex**.Civ.App. — Houston [1st Dist.] 1980, writ pending), the **State Bar** sought the same relief by summary judgment. Since use of the vehicle of summary judgment was apparently not challenged by the appellant, the court did not write on the question and the point is not raised in the pending application.

[5] In *Rose* an instrument captioned a Motion Requesting Court to Amend Its Judgment, filed long after the county court's judgment became final, was treated by this court as an action in the nature of an equitable bill of review.

[6] As will be discussed later, mail fraud and conspiracy to commit mail fraud are crimes involving moral turpitude.

880 S.W.2d 427 (1994)

STATE of Texas, Appellant,

v.

FIRST INTERSTATE BANK OF TEXAS, N.A., Lienholder, Appellee.

No. 3-93-248-CV.

Court of Appeals of Texas, Austin.

March 2, 1994.
Rehearing Overruled August 17, 1994.

428 *428 Dan Morales, Atty. Gen., Mark Heidenheimer, Asst. Atty. Gen., Austin, for appellant.

Susan P. Burton, Clark, Thomas, Winters & Newton, Austin, for appellee.

Before POWERS, JONES and KIDD, JJ.

POWERS, Justice.

The **State** of Texas appeals from a summary judgment obtained by **First Interstate Bank** of Texas, N.A., in the **State's** condemnation suit against land upon which the **bank** held a mortgage lien. We will affirm the judgment.

THE CONTROVERSY

Crossroads, Inc., owned in fee simple certain land in Williamson County and had given the **Bank** a mortgage lien on the land to secure Crossroads' debt to the **bank** in the amount of $3,214,788.[1] The **State** commenced condemnation proceedings against the land, seeking most but not all the land for highway purposes. The **State's** petition designated both Crossroads and the **Bank** as "owners" of the property.[2]

The special commissioners awarded $6,363,000 in the proceeding, making no allocation as between Crossroads and the **Bank**. The **State** filed objection to the award and contemporaneously deposited with the court the lump sum of $6,363,000, subject to the order of Crossroads and the **Bank**.[3] Crossroads also filed objection to the commissioners' award and moved
429 contemporaneously, *429 joined by the **Bank**, to withdraw the $6,363,000. No party objected to withdrawal of the deposit and Crossroads received the money. Crossroads paid its $3,214,788 debt to the **Bank** and kept the balance. The **Bank** released its lien on the property. The trial court granted the **Bank** summary judgment to the effect that it had no further interest in the litigation after the extinguishing of its lien, and no liability to the **State** arising out of the condemnation proceeding.

Crossroads and the **State** subsequently settled and compromised their controversy and reduced their bargain to an agreed judgment signed by the court. The agreed judgment stipulates that Crossroads' damages for the condemnation are $3,534,337, or about half the deposit made by the **State** and withdrawn by the **Bank** and Crossroads. The judgment awards the **State** recovery of the difference from Crossroads, which has not and evidently cannot pay the judgment debt. The **Bank** was not a party to the agreed judgment, having obtained previously the summary judgment that it was not liable for the difference.

In its appeal, the **State** contends the summary judgment in favor of the **Bank** was erroneous because the **Bank** was liable for the difference under the terms of section 21.044 of the Property Code, properly construed. That statute provides the property owner may recover damages for any injury occasioned by the condemnor's taking possession of the property *pendente lite,* in cases where it is finally adjudged that the condemnor did not have the right to condemn the property; and the court may order the damages paid from any money deposited with the court by the condemnor. The statute concludes with the following sentence: "However, if the award paid to or appropriated by the property owner exceeds the court's final determination of the value of the property, the court shall order the *property owner* to return the excess to the condemnor." Tex. Prop.Code Ann. § 21.044(b) (West 1984) (emphasis added). This statutory provision is the basis of the **State's** claim against the **Bank**.

The **State** argues the words "property owner," as used in section 21.044(b) of the Property Code, must include mortgagees and others having less than a fee interest in the land because the words "property owner" as used *elsewhere* in the condemnation statutes have been held to include persons holding less than a fee interest. *See, e.g., Elliott v. Joseph,* 163 Tex. 71, 351 S.W.2d 879, 883-84 (1961) (holding the term "owner," under former article 3265, section 3, includes lessee for a term of years). We reject the theory for the reasons given below.

DISCUSSION AND HOLDINGS

The term "property owner," or some similar term, is used throughout the condemnation statutes. *See* Tex.Prop.Code Ann. §§ 21.012-.014, § 21.016 (West 1984); §§ 21.019-.021 (West 1984 & Supp.1993); §§ 21.041-.045 (West 1984 & Supp.1993); § 21.062 (West 1984). It is true we must *presume* the legislature intended the term should have the same meaning wherever used in the condemnation statute. *See Fox v. Burgess,* 157 Tex. 292, 302 S.W.2d 405, 407 (1957); *Hufstedler v. Harral,* 54 S.W.2d 353, 355 (Tex.Civ.App.—Amarillo 1932, writ ref'd). What single meaning shall we then impute to the term "property owner" as its presumed meaning?

It is well settled in legal usage, and we believe ordinary usage as well, that a mortgagee is not an "owner" of the property that secures his debt (A mortgagee is, of course, owner of the debt and its incident, the security interest.). A mortgagee has no proprietary interest, such as the right to dispose of the property, and no right of possession unless and until he acquires them by foreclosure of his lien. *Pearce v. Stokes,* 155 Tex. 564, 291 S.W.2d 309, 312 (1956); *Humble Oil & Ref. Co. v. Atwood,* 150 Tex. 617, 244 S.W.2d 637, 640 (1951); *Carroll v. Edmondson,* 41 S.W.2d 64, 65 (Tex.Comm'n App.1931, judgm't adopted); Madison Rayburn, *Texas Law of Condemnation* § 79, at 289 (1960); John Huffaker, Note, *Condemnation—The Mortgagee's Interest in the Condemnation Award For a Partial Taking of the Mortgaged Property,* 4 Tex.Tech L.Rev. 405, 406 (1973). A mortgagee
430 could not, for example, be a "property owner" entitled to *430 recover moving expenses as damages under section 21.043(a) of the Property Code.

Moreover, we believe our courts have implicitly recognized that the legislature presumably intended the legal sense of the term "property owner" throughout the condemnation statutes. The courts have implied as much by the weighty justifications they have given for *departing* from that presumed meaning in particular instances.

For example, the condemnation statutes require that the "property owner" be designated in the condemnor's petition and require that he be given compensation for the taking or damaging of his property. *See* Tex.Prop.Code Ann. §§ 21.012(b)(3) (West 1984); §§ 21.041, 21.042 (West 1984 & Supp. 1993). Under predecessor statutes, the courts held that a lien holder *was* a "property owner" entitled to appear and recover damages in the condemnation suit for injury to his interests. The courts that held to this effect did *not* do so because they believed the legislature intended that the words "property owner," as used in the condemnation statutes, *included* owners of interests in the land less than a fee interest. Rather, the courts reasoned that holders of non-fee interests were *presumably* excluded from the term "property owner" as used in the condemnation statutes, *but* they could come within that term *by judicial construction* of a particular statute when that was necessary to avoid an absurd result.

The courts reasoned as follows, for example, in deciding whether a lienholder was an "owner" of property under the statutes requiring payment of compensation when "property" is taken. A lienholder's interest is entirely unaffected by the final judgment in a condemnation suit if he is not a party. His lien survives as an encumbrance against the property and an impediment to the progress of the intended improvement. The condemnor might, of course, maintain a separate condemnation action against the lienholder, but this would be unnecessarily expensive and contrary to the public interest in resolving in a single suit the claims of all persons entitled to damages by reason of the taking. Consequently, the lienholder may be treated as a "property owner" so as to permit a single suit, "because only when every interest of every character in the land is acquired can the property be devoted fully and without restraint or interference to the public purpose." *Houston N. Shore Ry. v. Tyrrell,* 128 Tex. 248, 98 S.W.2d 786, 793 (1936); *see also Glade v. Dietert,* 156 Tex. 382, 295 S.W.2d 642, 646 (1956); *Aggs v. Shackleford Co.,* 85 Tex. 145, 19 S.W. 1085, 1087 (1892); *Acree v.* ***State***, 47 S.W.2d 907, 909 (Tex.Civ.App.—Waco 1932, writ dism'd). This justifying rationale is entirely unnecessary and irrelevant *except* as against a presumption that the words "property owner," as used in the condemnation statutes, do *not* include lienholders. Consequently, this presumption prevails absent a reason, such as that given in *Tyrrell* and *Dietert,* for departing from the presumption by judicial construction. *See, e.g., Langston v.* ***State***, 315 S.W.2d 90, 92-93 (Tex.Civ.App.—Waco 1958, no writ) (holding mortgagee not a "property owner" whose absence from suit will

render condemnation void).

With regard to section 21.044(b) of the Property Code, we find no similar justification for departing from the presumption that the term "property owner," as used therein, excludes mortgagees. Section 21.044(b) operates in conjunction with section 21.021, the latter being a provision that allows a condemnor to acquire possession of the property pending further litigation after the commissioners' award. Section 21.021 originated in an enactment for a specific purpose—to meet an emergency in "[t]he fact that great enterprises are necessarily delayed and hindered in their right to enter upon and take possession of property by the present condition of our law...." Act of April 15, 1899, 26th Leg., R.S., ch. LXX, § 3, 1899 Tex.Gen.Laws 105, 106 (since amended). Under this enactment, the condemnor might obtain possession of the condemned property *pendente lite,* provided he deposited *twice* the amount of damages fixed by the commissioners. *Id.* § 1. Otherwise, the statutory arrangements are basically the same in section 21.021, which requires deposit of the money "subject to the order of the property owner."
431 Tex.Prop.Code Ann. § 21.021(a)(1) (West 1984). That the deposit must be made *431 "subject to the order of the property owner" implies that the deposit must be unqualified and unconditional, the condemnor bearing any risk of loss occasioned by an irregular disposition of the money. *City of San Antonio v. Astoria,* 67 S.W.2d 321, 323 (Tex.Civ. App.—San Antonio 1933), *aff'd,* 128 Tex. 284, 96 S.W.2d 783 (1936); Julius L. Sackman, 6 *Nichols' The Law of Eminent Domain* § 26.61 at 26-563 (3d ed. 1990). Unless those be the terms of the deposit, the condemnor has not paid compensation *before* the taking of the land, as the constitution requires. Tex. Const. art. I, § 17.

But the condemnor is not without protection against the risk involved. He may simply orchestrate his project so that he does not require possession in advance of a final judgment. He may object to the property owner's withdrawal of the deposit if he fears any irregular disposition of the money or if he believes the final damages fixed by the court will exceed the amount deposited, coupled with a chance that the property owner might not be able to repay the excess withdrawn. Indeed, it is said that the condemnor has a *duty* to object and protect himself in such circumstances. *Wynnewood **Bank** & Trust v. **State**,* 767 S.W.2d 491, 496 (Tex.Civ. App.—Dallas 1989, no writ). Given that a mortgagee ordinarily has no right of possession and, that the deposit is for the benefit of the condemnor who has sufficient means of protecting himself against any loss, we see no justifying rationale for our construing section 21.044(b) contrary to its presumed meaning, which excludes mortgagees from its scope. We hold accordingly.

It may be the **State** contends alternatively that the **Bank** has an equitable obligation to repay the excess of the withdrawn deposit over the amount fixed as damages in the agreed judgment. The **State** does not make this argument explicitly, but does place great emphasis upon a statement in *Wynnewood* that a lienholder's security interest is transferred to the deposit when it is placed in court by the condemnor.[4] *Wynnewood* deals with such a theory. Consistent with *Wynnewood,* however, we hold the **State** is not entitled to recover in equity because there is no showing that the **State** exercised reasonable diligence to protect itself by the means available to it. *Wynnewood **Bank** & Trust,* 767 S.W.2d at 496-97.

Accordingly, we affirm the judgment below.

Affirmed.

[1] We have simplified the facts of the case considerably in the interest of clarity. The facts stated permit a discussion of the theories advanced by the parties in their briefs.

[2] Section 21.012(b) of the Property Code requires that the condemnor's petition "describe the property to be condemned" and "**state** the name of the owner of the property if the owner is known." Tex.Prop.Code Ann. § 21.012(b)(1), (3) (West 1984). The property described in the **State's** petition was the real property owned in fee simple by Crossroads. It is undisputed that the **Bank** owned no interest in the land apart from the security interest of its mortgage lien.

[3] Section 21.021 of the Property Code establishes a means by which the condemnor may enter upon and obtain possession of the condemned property between the time of the commissioners' award and the conclusion of any further litigation. The condemnor may obtain the right of possession for the period indicated if the condemnor either (1) "pays to the *property owner* the amount of damages and costs awarded by the special commissioners" or (2) "deposits that amount of money with the court subject to the order of the *property owner*...." Tex.Prop.Code Ann. § 21.021(a)(1) (West 1984) (emphasis added). In the present case, the **State** chose the second alternative of depositing the money with the court subject to the order of Crossroads and the **Bank**.

[4] We adhere, of course, to our construction of the relevant statutes as set out in the foregoing part of the text. Our alternative holding refers to a matter urged vigorously in the **State's** brief. When the mortgagee is made a party to the condemnation suit, and has only a security interest in the property, it is said that his rights against the property are supplanted by the condemnor's deposit but *follow in equity* the award of the special

commissioners. The mortgagee is then entitled to the **first** of any proceeds realized, to the extent of the unpaid debt when the whole of the property is taken, or to the extent of any impairment of his security interest when only a part of the property is taken. *See generally* Julius L. Sackman, 2 *Nichols' The Law of Eminent Domain* § 5.18 (3d ed. 1990); Huffaker, *supra;* Harold Don Teague, *Condemnation of Mortgaged Property,* 44 Tex.L.Rev. 1535 (1966); Recent cases, *Eminent Domain—Rights of a Mortgagee,* 11 Tex.L.Rev. 387 (1933). These authorities also discuss the interesting question of how any impairment of the mortgagee's security interest should be measured in a partial taking. That issue is not material here.

We are uncertain why the **State** emphasizes the transfer of the mortgagee's security interest from the property to the commissioners' award. This proposition does not seem to bear on the question of whether the legislature intended the words "property owner" to include mortgagees by its use of the words in section 21.044(b) of the Property Code. And the **Bank** makes no claim against the condemned *property;* it urges indeed that its interest has been satisfied entirely by the **first** proceeds from the *award* to which its rights had been transferred in equity. As mentioned in the text, it may be that the **State** claims a right of restitution in equity—a claim we reject for the reason given.

306 S.W.3d 919 (2010)

STOP THE ORDINANCES PLEASE; WWGAF, Inc. d/b/a/ Rockin "R" River Rides; Texas Tubes; Corner Tubes; Gruene Home Run Batting Cages & Tubing; and Stone Randall Williams, Appellants,

v.

CITY OF NEW BRAUNFELS, Texas, Appellee.

No. 03-07-00386-CV.

Court of Appeals of Texas, Austin.

February 19, 2010.

921 *921 David L. Earl, Scott M. Tschirhart, Paul A. Fletcher, Earl & Associates, P.C., Beth Watkins Squires, Law Office of Beth Squires, San Antonio, TX, for Appellants.

William M. McKamie, Bradford E. Bullock, Law Office of William M. McKamie, P.C., San Antonio, TX, Alan Wayland, **City** Attorney, **New Braunfels**, TX, for Appellee.

922 *922 Before Chief Justice LAW, Justices PEMBERTON and WALDROP.

OPINION

BOB PEMBERTON, Justice.

Appellants **Stop** The **Ordinances Please** (**STOP**); WWGAF, Inc., d/b/a Rockin "R" River Rides; Texas Tubes; Corner Tubes; Gruene Home Run Batting Cages & Tubing; and Stone Randall Williams appeal a district court judgment dismissing, for lack of standing, declaratory and injunctive relief claims they asserted against the **City** of **New Braunfels** (the **City**) challenging certain municipal **ordinances**. Concluding that the district court properly dismissed some of appellants' claims but erred in dismissing others, we will affirm the judgment in part and reverse and remand in part.

BACKGROUND

Within the **City's** municipal boundaries flow two public waterways—the Guadalupe River, on its path from the Texas Hill Country to the Gulf of Mexico, and a tributary to the Guadalupe, the spring-fed Comal River, the entire expanse of which is located within **city** limits. Especially during the hotter months, these rivers' refreshing cool waters and scenic beauty have long attracted thousands of "tubers" from throughout Texas to visit the **New Braunfels** area and delight in floating lazily downstream on inner tubes or other flotation devices.

It has not been unknown for many tubers to enjoy alcoholic beverages while floating along. For several years, some **New Braunfels** residents (including river-side residential property owners) and some local officials have complained that tubers, often fueled by excessive amounts of alcohol, have engaged in behaviors detrimental to the rivers and surrounding land, not to mention the ability of others to quietly enjoy these areas. Complaints have included public lewdness, nudity, urination and defecation; littering; staggering or debilitating drunkenness; and life-threatening stunt-jumping into the water from bridges and the like. These residents and officials have advocated—in addition to reliance on already-strained local law enforcement resources—various state or local regulatory actions to combat factors they perceive as contributing to these developments.[1] Generally opposed to these sorts of initiatives (and disputing the degree to which the alleged problems to which the initiatives are directed exist) have been a number of local businesses that earn revenue from tubers (and/or their alcoholic-beverage consumption). Among these are outfitters who earn revenue from renting inner tubes and providing shuttle services between entry and exit points along the rivers.

In 2006 and 2007, the **New Braunfels City** Council enacted the following four **ordinances**:

• *The "Beer Bong" Ordinance.* Finding that "volume drinking devices propose certain health, safety, and welfare hazards," the Council enacted a citywide prohibition against the use or possession of "volume drinking devices" in public places within the **City**. The ordinance defines "volume drinking devices" as "an object used, intended for use or designed for use in artificially increasing the speed with which, and/or amount of, alcohol is ingested into the human body by carrying the liquid from a higher
923 location into the mouth *923 by force of gravity or mechanical means, including but not limited to funnels, tubes and hoses." This prohibition explicitly includes "a beer bong."

• *The Five-Ounce Container Ordinance.* Finding that "[t]he use of containers with a volume of 5 fluid ounces or less on waterways within the **City** has created a public nuisance by increasing litter and interfering with the public's enjoyment of parks, waterways, and public spaces," the Council enacted a prohibition against the use, carrying, possession, or disposal of an "open container" with a volume capacity of five fluid ounces or less in the public waters of the portions of the Guadalupe River, Lake Dunlap (a reservoir on the Guadalupe), or Comal River that lie within the **city** limits. "Open container" is defined as "a bottle, can, or other receptacle that is open, that has been opened, that has a broken seal, or the contents of which are fully or partially removed."

• *The Parks Ordinance.* Based on recommendations of a Council-appointed "River Activities Committee" and the **City's** Parks and Recreation Advisory Board, and "to protect the health, safety and welfare of the citizens and visitors to **New Braunfels**," Council enacted a prohibition against the consumption of alcoholic beverages or possession of an open container of same within the boundaries of seventeen public parks and **city**-owned properties within the **city** limits. Some, but not all, of these properties are located along the Comal or Guadalupe and provide access for tubing. In one park, Prince Solms Park, the **City** rents tubes.

• *The Cooler & Container Ordinance.* Following another recommendation of the River Activities Committee, which advocated the limitation "in order to decrease litter, minimize public nuisances and interference with the public's enjoyment of parks, waterways and public spaces; and preserve the pristine nature of the waterways," Council enacted a prohibition against the use, carrying, possession, or disposal of a "cooler" ("a receptacle or apparatus capable of cooling or keeping cold food and drinks and which carry more than one container") with a capacity exceeding sixteen quarts on or in the public waters of the portions of the Guadalupe and Comal Rivers that lie within the **city** limits. The ordinance further limits each person to one cooler and requires that any cooler be secured by a zipper, Velcro snap, mechanical latch, or bungee cord to prevent the contents of the cooler from falling out of the cooler. It also prohibits the use, carrying, or possession of containers constructed of glass or Styrofoam.

In response to these **ordinances**, **STOP**, which alleged it was "an unincorporated association of business owners and other parties interested in the use and enjoyment of the Comal and Guadalupe Rivers which flow within the corporate **city** limits of the **City** of **New Braunfels**," sued the **City** under the Uniform Declaratory Judgments Act[2] seeking declaratory and injunctive relief to restrain enforcement of the **ordinances**. Characterizing the **ordinances** as merely an attempt to regulate alcohol consumption on the rivers, **STOP** sought declarations that the **ordinances** and the **City's** actions exceeded the **City's** authority
924 by attempting to regulate matters *924 preempted by State authority under the alcoholic beverage code. *See* Tex. Alco. Bev.Code Ann. § 1.06 (West 2007) ("Unless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by this code."). In the alternative, **STOP** also sought a declaration that the Five-Ounce Container Ordinance (which it terms the "Jell-O-Shot Ordinance" to emphasize the ordinance's perceived connection to alcohol regulation) and Cooler & Container Ordinance, each of which contain language about litter control, violate section 361.0961 of the health and safety code. *See* Tex. Health & Safety Code Ann. § 361.0961 (West 2001) ("A local government or other political subdivision may not adopt an ordinance, rule, or regulation to: . . . prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law. . . .").

The **City** responded with a plea to the jurisdiction challenging whether **STOP** had sufficiently pled its standing to prosecute its claims. Following a hearing at which only argument was presented, the district court granted the plea, then later vacated its order to afford **STOP** the opportunity to replead. *See* Texas Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226-27 (Tex.2004) (plaintiff should be afforded opportunity to amend if pleadings do not contain sufficient facts to affirmatively demonstrate trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction). The court set a deadline for **STOP** to replead and scheduled a hearing thereafter. In advance of the hearing, **STOP** amended its petition twice. In its live pleading (its third amended petition), **STOP** joined five individual plaintiffs whom it alleges are among its members (collectively, Appellants). Four individual plaintiffs are outfitters engaged in the business of renting tubes and ice chests for use

on the Comal and Guadalupe Rivers—Rockin "R" River Rides, Texas Tubes, Corner Tubes, and Gruene Home Run Batting Cages & Tubing (collectively, the "Outfitter Plaintiffs"). The fifth individual plaintiff, Stone Randall Williams, alleges that he received a citation for a violation of the Cooler & Container Ordinance while tubing on the Comal within **New Braunfels city** limits.[3]

Appellants also added **new** allegations and claims. They alleged that the four challenged **ordinances**, by exceeding the **City's** statutory powers, violated article XI, section 5 of the Texas Constitution. *See* Tex. Const. art. XI, § 5 ("[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."). Further, in addition to the claims previously asserted by **STOP**, Appellants sought declarations that the Comal and Guadalupe as they flow through the **City** are "navigable streams" whose waters and riverbeds are owned by the State and held in trust for the people of the State, and that the **City** "may not exert its police powers against the State of Texas or on the state-owned property consisting of the water and riverbeds of the Comal and Guadalupe Rivers as they flow through the **City**." Finally, Appellants sought a declaration that a 2001 ordinance under which the **City** had imposed a "river management fee" on the Outfitter Plaintiffs was "illegal and unconstitutional."

925 *925 The **City** did not dispute the Outfitter Plaintiffs' standing to challenge the river-management fee, but asserted that Appellants had not demonstrated standing to assert any of their other claims. Following the hearing, at which only argument was presented, the district court granted the **City's** plea except with regard to the unchallenged river-management-fee claims. The court severed the river-management-fee claims, making its dismissal of the other claims final. This appeal ensued.

ANALYSIS

In a single issue, Appellants assert that the district court erred in granting the **City's** plea to the jurisdiction because they had sufficiently pled their standing to prosecute the claims at issue, both individually and through **STOP**. In a subsidiary argument, Appellants urge that two of the Outfitter Plaintiffs that are riparian landowners—Rockin "R," which owns property on both the Comal and Guadalupe, and Texas Tubes, which owns property on the Comal—have standing to obtain a declaration as to whether these waterways are "navigable streams" under Texas law.

Standard and scope of review

A plea to the jurisdiction challenges a trial court's authority to decide a case. *See* *Miranda,* 133 S.W.3d at 225-26. Analysis of whether this authority exists begins with the plaintiff's live pleadings. *Id.* at 226. The plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Id.* (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 446 (Tex.1993)). Whether the plaintiff met this burden is a question of law that we review de novo. *Id.* We construe the pleadings liberally and look to the pleader's intent. *Id.*

Ordinarily, if the pleadings do not contain sufficient facts to affirmatively demonstrate the district court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency, and we afford the plaintiffs the opportunity to amend. *Id.* at 226-27; *cf. id.* at 227 (if pleadings affirmatively negate existence of jurisdiction, then plea to the jurisdiction may be granted without allowing plaintiffs an opportunity to amend). However, where, as here, the plaintiffs have already been afforded an opportunity to amend in response to the trial court's granting of a plea to the jurisdiction, the plaintiffs are not entitled to replead yet again if we determine their pleadings still fail to invoke the trial court's jurisdiction. *Harris County v. Sykes,* 136 S.W.3d 635, 639-40 (Tex.2004).

When resolving issues presented by the plea to the jurisdiction, we may consider evidence that the parties have submitted. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex.2000). Here, neither party submitted evidence in connection with the **City's** plea, although Appellants did attach to their petition copies of the **ordinances** they challenged.

General standing principles

926 Standing, at least in a constitutional sense, is a component of the trial court's subject-matter jurisdiction. *See* *Texas Ass'n of Bus.,* 852 S.W.2d at 443-45.[4] The general test for constitutional standing in Texas courts is whether there is a "real" (i.e.,

justiciable) controversy *926 between the parties that will actually be determined by the judicial declaration sought. *See id.* at 446. Constitutional standing is thus concerned not only with whether a justiciable controversy exists, but whether the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy that the judicial declaration sought would resolve. *See Patterson v. Planned Parenthood,* 971 S.W.2d 439, 442 (Tex. 1998); *Nootsie, Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 662 (Tex. 1996). The requirement thereby serves to safeguard the separation of powers by ensuring that the judiciary does not encroach upon the executive branch by rendering advisory opinions, decisions on abstract questions of law that do not bind the parties. *See Texas Ass'n of Bus.,* 852 S.W.2d at 444.

For a party to have standing to challenge a governmental action, as a general rule, it "must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large." *South Tex. Water Auth. v. Lomas,* 223 S.W.3d 304, 307 (Tex.2007); *see Brown v. Todd,* 53 S.W.3d 297, 302 (Tex.2001) ("Our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large."); *Tri County Citizens Rights Org. v. Johnson,* 498 S.W.2d 227, 228-29 (Tex.Civ.App.-Austin 1973, writ ref'd n.r.e.) ("It is an established rule . . . that `. . . sufficiency of a plaintiff's interest (to maintain a lawsuit) comes into question when he intervenes in public affairs. When the plaintiff, as a private citizen, asserts a public, as distinguished from a private, right, and his complaint fails to show that the matters in dispute affect him differently from other citizens, he does not establish a justiciable interest.'") (quoting 1 Roy W. McDonald, *Texas Civil Practice* § 3.03, at 229 (rev. vol. 1965)). The United States Supreme Court, applying standing principles that are analogous to Texas standing jurisprudence at least with respect to challenges to governmental action, has explained that the "irreducible constitutional minimum" of standing consists of three elements:

> (1) "the plaintiff must have suffered an `injury in fact'—an invasion of a `legally protected' [or cognizable] interest which is (a) concrete and particularized and (b) `actual or imminent, not conjectural or hypothetical'";
>
> (2) "there must be a causal connection between the injury and the conduct complained of"—the injury must be "fairly traceable" to the challenged action of the defendant and not the independent action of a third party not before the court; and
>
> (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see Brown,* 53 S.W.3d at 305 ("[W]e may look to the similar federal standing requirements for guidance."); *Save Our Springs Alliance, Inc. v. **City** of Dripping Springs,* 304 S.W.3d 871, 878 (Tex.App.-Austin 2010, no pet. h.).[5] "Injury-in-fact," the cornerstone of these requirements, is conceptually distinct from the question of whether the plaintiff has incurred a *legal* injury—i.e., whether the plaintiff has a viable
927 cause of action on the *927 merits. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex.1984).[6] Similarly, the required infringement of a "legally protected interest" does not necessarily have to rise to the level of depriving the plaintiff of a "vested right" so as to violate due process. *See Coastal Habitat Alliance v. Public Util. Comm'n,* 294 S.W.3d 276, 287 (Tex. App.-Austin 2009, no pet.) ("Whether a plaintiff has standing in federal courts to assert a cause of action is not indicative of the deprivation of a vested property right."). Nonetheless, it remains that a plaintiff must show that it has or imminently will suffer an invasion of some legally cognizable interest that is sufficiently unique to the plaintiff, as distinguished from the general public, to ensure that the plaintiff has a sufficient personal stake in the controversy so that the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of the other branches. *Save Our Springs Alliance, Inc.,* 304 S.W.3d 871, 894 (applying this requirement to hold that association members, who claimed environmental, scientific, and recreational interests in Barton Springs, but no property interests affected by alleged pollution, had not established injury distinct from that of general public); *see also Lujan,* 504 U.S. at 560, 576-78, 112 S.Ct. 2130 (discussing role of standing in preventing judicial incursions into legislative and executive spheres).

Outfitter Plaintiffs

The four Outfitter Plaintiffs assert that their live petition sufficiently alleges they are incurring particularized injury from the **ordinances** so as to confer standing to prosecute their claims. They emphasize their pleading allegations that each business is located in the **City** (such that it and its patrons are subject to the challenged **ordinances**) and that the **ordinances**:

> have a chilling effect on [the Outfitter] Plaintiffs' businesses in that they discourage tourists from visiting the Comal and Guadalupe Rivers and Plaintiffs are significantly harmed thereby. For example, Plaintiff Rockin' "R"

> River Rides has experienced a decrease in revenues attributable to the **Ordinances** in excess of $200,000.00 as measured between 2006 and 2007 sales to date. Other Outfitter Plaintiffs have experienced similar decreases in revenues. . . . [T]he unlawful and unreasonable **ordinances** that place . . . restrictions on the rental and use of tubes and ice chests within the Comal and Guadalupe Rivers within the **City** of **New Braunfels** has been extremely specific and unique, as well as particular impact on the Outfitters in that they are a limited number of business enterprises and employers that rent tubes and ice chests to the general public for use on public waterways. The substantial investment of the Outfitters, which is in excess of thousands of dollars per Outfitter, in the tubes, ice chests and associated products, which have become illegal to use within the public waterways, have taken the value of said personal property of the Outfitter Plaintiffs without due process, and in a manner which is totally unreasonable, arbitrary, and capricious. The regulation of the size of coolers which may be used (and specifically and particularly which the Outfitters can no longer rent) are uniquely causing harm to the Outfitter Plaintiffs.

The Outfitter Plaintiffs additionally plead, in a section of their petition titled "Special Injury and Particular Injury of Plaintiffs":

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> Outfitter Plaintiffs also are suffering particular and unique injury from that of *928 the general public in that they are being denied their ability to use their personal property, vis-a-vis ice chests and tubes, in the conducting of their business for rental purposes. The ownership of the personal property is a vested property right which has been arbitrarily, unreasonably, and capriciously restricted by Defendant, **City** of **New Braunfels**' enforcement of the Cooler and Container Ordinance in a manner that is unlawful and violates the relevant portions of the Alcoholic Beverage Code and Health and Safety Code cited above.

We observe that although the Outfitter Plaintiffs complain that the **City** has in some manner "restricted" their ability to rent tubes, ice chests, and unspecified "associated products" through the challenged **ordinances**, the sole *direct* restriction on them or their property they identify is the Cooler & Container Ordinance's prohibition against ice chests that exceed sixteen quarts in capacity. Liberally construing their pleadings, the Outfitter Plaintiffs allege they had invested in ice chests with larger capacities for purposes of renting them to tubers and that the Cooler & Container Ordinance subsequently banned those coolers from the portions of the Comal and Guadalupe within **City** limits. The pleadings, liberally construed, further allege that this restriction denuded those coolers of their value as property that can be rented to tubers wishing to tube within **City** limits. Further, the **City** acknowledges that the Outfitter Plaintiffs' allegations support the inference that they incurred additional expenses in purchasing smaller coolers complying with the ordinance to replace the non-compliant larger ones.

By alleging that the Cooler & Container Ordinance restricted their use of their property, caused them to incur additional expenses, and damaged or destroyed their market for larger cooler rentals within the **City** limits, the Outfitter Plaintiffs have demonstrated the required actual, concrete, and particularized infringement of their legally protected interests necessary for standing. *See* *Texas Dep't of Ins. v. Reconveyance Servs.,* 240 S.W.3d 418, 437, 439 (Tex.App.-Austin 2007, pet. filed) (business had standing to challenge agency actions that it alleged destroyed market for its services in Texas); *Lake Medina Conserv. Soc'y v. Texas Natural Res. Conserv. Comm'n,* 980 S.W.2d 511, 516 (Tex. App.-Austin 1998, pet. denied) (association comprised of lakeside property owners and waterfront businesses had standing to challenge administrative action that would cause lake levels to drop); *Texas Rivers Prot. Ass'n v. Texas Natural Res. Conserv. Comm'n,* 910 S.W.2d 147, 151-52 (Tex.App.-Austin 1995, writ denied) (citing harm to canoe trip guides' "business opportunities" as supporting individual guides' standing to challenge agency action that would lower river levels); *see also* *National Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 281-84 (6th Cir.1997) (firearms manufacturers had standing to challenge weapons restrictions; observing that "courts have routinely found . . . a justiciable controversy when suit is brought by the plaintiff subject to a regulatory burden imposed by a statute"); *Wedges/Ledges of Cal., Inc. v. **City** of Phoenix,* 24 F.3d 56, 61 (9th Cir.1994) ("It is well settled that a provider of goods or services has standing to challenge government regulations that directly affect its customers and restrict its market.") (citing cases). We likewise conclude that the Outfitter Plaintiffs have sufficiently alleged their injuries are "fairly traceable" to the Cooler & Container Ordinance and would likely be redressed by invalidating the cooler restriction (which would allow them to
929 rent the larger coolers again). *See* *Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130. Consequently, the *929 Outfitter Plaintiffs have demonstrated standing to prosecute their claims seeking to invalidate the Cooler & Container Ordinance's ban on coolers exceeding sixteen quarts in capacity.

In contending otherwise, the **City** urges that the Outfitter Plaintiffs have not sufficiently pled a regulatory-taking claim and could not do so because the Cooler & Container Ordinance does not deprive them of all conceivable uses of the larger, non-compliant

coolers. However, as we have noted, a plaintiff is not required to allege the deprivation of a "vested right" constituting a due-process violation to demonstrate the requisite infringement of a "legally protected interest." *Coastal Habitat Alliance,* 294 S.W.3d at 287; *see Texas Rivers Prot. Ass'n,* 910 S.W.2d at 151-52 (plaintiffs challenging agency actions that would cause river levels to drop were not required to demonstrate deprivation of "vested right" in river level to have standing; their riparian ownership and business interests in guiding canoe trips sufficiently distinguished their injury from public at large). The **City** similarly challenges whether the Outfitter Plaintiffs could prevail on the merits of their claims, but that issue in this case, again, is distinct from the threshold question of whether they have standing to advance those claims. *See Bland Indep. Sch. Dist.,* 34 S.W.3d at 554-55 (distinguishing threshold issue of standing from merits).

As for the other three challenged **ordinances** and the portions of the Cooler & Container Ordinance other than the cooler-size restriction (i.e., the ban on glass and Styrofoam containers, requirements for securing coolers, and the one-cooler-per-person limit), the Outfitter Plaintiffs have not pled any facts demonstrating injury from any direct restrictions on themselves or their property. Unlike the case with the cooler-size restrictions, there is no allegation that the Outfitter Plaintiffs sell or rent beer bongs, sell or rent containers with a volume capacity of less than five ounces, or that the outfitters own property that is subject to the Parks Ordinance's alcohol ban. Nor have the Outfitter Plaintiffs pled any facts demonstrating that the Cooler & Container Ordinance's requirements for securing coolers have caused them to incur additional costs or replace existing coolers. Instead, based on their pleadings, the Outfitter Plaintiffs' injury, if any, must derive solely from a detrimental impact of these restrictions on the market for their rental tubes and ice chests.

As previously explained, government regulations that directly impact a plaintiff's customers and restrict its market can support standing. Nonetheless, as the U.S. Supreme Court has observed, where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation. . . of *someone else,* . . . . standing is not precluded, but is ordinarily `substantially more difficult' to establish." *Lujan,* 504 U.S. at 562, 112 S.Ct. 2130 (citations omitted). In such instances, "[t]he existence of one or more of the essential elements of standing `depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict,' and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.* (citations omitted). The Outfitter Plaintiffs satisfied this standard with regard to the **City's** cooler-size restriction—they pled they owned larger, non-compliant coolers that they can no longer rent to
930 their tubing customers because the customers are prohibited from using them within the **City**. They did not, however, sufficiently *930 plead facts demonstrating injury from the other challenged restrictions.

The Outfitter Plaintiffs do not allege facts demonstrating that the citywide restriction against beer bongs, the prohibitions against containers less than five ounces in capacity or glass or Styrofoam containers in the rivers, the requirement that coolers be secured, or the ban on drinking in public parks has caused them to incur a concrete and particularized injury. There is simply no causal linkage alleged that would demonstrate why or how a potential customer's inability to use a beer bong in the **City**, drink alcohol in a public park, and carry less-than-five-ounce open containers or glass bottles in the rivers, or the requirement that they secure their ice chests results in potential customers deciding not to rent inner tubes and ice chests from the Outfitter Plaintiffs when they would otherwise do so. Nor do the Outfitter Plaintiffs identify any injury they incurred from the one-cooler-per-person limit. Although they broadly complain of lost revenues they "attribute" to the **ordinances** collectively, these bare conclusions are insufficient to affirmatively demonstrate their standing. *See Miranda,* 133 S.W.3d at 226 (plaintiff has burden of alleging *facts* that affirmatively demonstrate trial court's subject-matter jurisdiction).

Ultimately, the Outfitter Plaintiffs rely on a broad allegation that the **ordinances** collectively "discourage tourists from visiting the Comal and Guadalupe Rivers." The general economic impact from a decrease in tourism would be one that the Outfitter Plaintiffs would share with other **New Braunfels** citizens. Such an injury is not sufficiently particularized and distinct from the public at large to confer standing. *See Lomas,* 223 S.W.3d at 307-08.

In the alternative, the Outfitter Plaintiffs argue that their pleadings demonstrate their standing as taxpayers to challenge the **ordinances**. Under a narrow exception to the standing requirement that a plaintiff show a particularized injury distinct from that suffered by the general public to challenge a governmental action, a taxpayer has standing to sue to enjoin the illegal expenditure of public funds without showing a distinct injury. *Bland,* 34 S.W.3d at 555-56. However, as the **City** points out, the Outfitter Plaintiffs have not sought to enjoin the illegal expenditure of funds by the **City**. *See id.* at 556. Consequently, they cannot rely on the taxpayer-standing exception here.

In sum, the district court properly dismissed for lack of standing the Outfitter Plaintiffs' claims challenging the Beer Bong

Ordinance, the Five-Ounce Container Ordinance, the Parks Ordinance, and the portions of the Cooler & Container Ordinance other than the cooler-size limitation. However, we conclude that the Outfitter Plaintiffs did demonstrate their standing to prosecute their claims challenging the cooler-size limitation. Furthermore, it follows from this holding that the Outfitter Plaintiffs likewise have standing to prosecute their claims for a declaration that the Comal and Guadalupe are navigable streams whose waters and riverbeds are owned by the State and held in trust for the people of the State. The **City** dismisses this claim as a "red herring," in the view that the question of the rivers' navigability is a mere abstract question of law unrelated to the parties' dispute concerning the **ordinances**. We disagree.

Appellants seek a declaration as to the rivers' navigability as a predicate to a declaration that the **City** "may not exert its police powers against the State of Texas or on the state-owned property consisting of the water and riverbeds of the Comal and
931 Guadalupe Rivers as they flow through the **City**." Although the navigability issue might have been rendered moot if we had *931 held that the Outfitter Plaintiffs lacked standing to challenge any of the **ordinances**, as the **City** suggests, we have instead concluded that the Outfitter Plaintiffs have standing to challenge the Cooler & Container Ordinance's cooler-size restriction. Consequently, the issue of navigability remains ripe and justiciable, and the Outfitter Plaintiffs have standing to assert their declaratory claim concerning that issue for the same reasons they have standing to challenge the cooler-size limitation.

Williams

In addition to the four Outfitter Plaintiffs, a fifth individual plaintiff, Stone Randall Williams, alleged that he was cited for violating the Cooler & Container Ordinance. Williams asserts that the prospect of a fine or sanctions for his alleged violation confers upon him standing to challenge the ordinance in this proceeding. The **City** responds that the district court lacked subject-matter jurisdiction over Williams's claims under *State v. Morales,* 869 S.W.2d 941 (Tex.1994). In *Morales,* the Texas Supreme Court held that courts lack jurisdiction to grant injunctive or declaratory relief to restrain enforcement of a criminal statute unless the statute is unconstitutional and its enforcement will result in irreparable injury to vested property rights. *Id.* at 945, 947. As the **City** urges, Williams had no vested property right in carrying a cooler of a particular size into the Comal River or committing any of the other acts prohibited by the ordinance.[7] Consequently, the district court properly dismissed Williams's claims for want of subject-matter jurisdiction.

STOP

Finally, we consider whether **STOP** has associational standing to assert the claims. An association has standing to sue on behalf of its members if: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Texas Ass'n of Bus.,* 852 S.W.2d at 446-47 (adopting the test from *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)); *Hendee v. Dewhurst,* 228 S.W.3d 354, 382 (Tex.App.-Austin 2007, pet. denied). Each element of this test is satisfied with respect to the claims that the Outfitter Plaintiffs have standing to assert.

As for the first element, we have held that individual members of **STOP**—the Outfitter Plaintiffs—have standing to seek a declaration regarding the navigability of the Comal and Guadalupe Rivers and to assert the other claims to the extent they challenge the cooler-size restriction in the Cooler & Container Ordinance. Appellants do not allege additional facts that would demonstrate the individual standing of any other **STOP** members. Regarding the second element, the pleadings reflect that **STOP's** purpose—as suggested by its name, **Stop** The **Ordinances Please**—is to defeat or end the enforcement of the challenged **ordinances**. Finally, concerning the third element, **STOP's** claims do not require the participation of its individual
932 members because it seeks only prospective declaratory and injunctive relief, raises *932 only questions of law, and need not prove the individual circumstances of its members to obtain relief. *See Texas Ass'n of Bus.,* 852 S.W.2d at 448. We conclude that **STOP** has associational standing to prosecute the navigability claim and the claims challenging the cooler-size restriction.

CONCLUSION

We reverse the district court's judgment dismissing **STOP's** and the Outfitter Plaintiffs' claims seeking a declaration that the Comal and Guadalupe Rivers are navigable and their claims challenging the Cooler & Container Ordinance's cooler-size

restriction. We remand these claims to the district court for further proceedings. We otherwise affirm the judgment.

Chief Justice LAW not participating.

[1] These efforts have included an unsuccessful effort to persuade the alcoholic beverage commission to designate the two rivers a "central business district" in which open alcohol containers could be prohibited. *See* Tex. Alco. Bev.Code Ann. § 109.35 (West 2007).

[2] *See* Uniform Declaratory Judgments Act (UDJA), Tex. Civ. Prac. & Rem.Code Ann. §§ 37.001-.011 (West 2008).

[3] Another individual plaintiff joining the suit, Lindsay Michelle Crim, alleged she had been cited for violating the Parks Ordinance while tubing on the Comal. Crim, however, did not file a notice of appeal. Still more individual plaintiffs joined in Appellants' second amended petition but were nonsuited by omission in Appellants' third amended petition.

[4] *Cf. Coastal Oil & Gas Corp. v. Garza Energy Trust,* 268 S.W.3d 1, 9 n. 16 (Tex.2008) (observing that federal standing doctrine has both jurisdictional and prudential components and that "[t]his Court has not indicated whether standing is always a matter of subject-matter jurisdiction").

[5] *See also* William V. Dorsaneo, *The Enigma of Standing Doctrine in Texas Courts,* 28 Tex. Rev. Litig. 35, 42-58 (2008) (observing that Texas courts have sometimes equated "standing" to bring common-law or statutory claim with existence of *legal* injury while applying standing principles in public-rights cases that resemble injury-in-fact test applied by federal courts).

[6] *See also* Dorsaneo, *supra* note 5, at 44-45.

[7] Even though Lindsay Michelle Crim did not file a notice of appeal, Appellants argue— apparently as part of their efforts to demonstrate **STOP's** associational standing—that Crim had individual standing to challenge the Parks Ordinance because she received a citation for violating it. As with Williams, Crim's claims were properly dismissed under *Morales* because she had no vested right to possess alcoholic beverages in the **City's** parks.

379 S.W.2d 386 (1964)

LUCKY HOMES, INC., et al., Appellants,

v.

TARRANT SAVINGS ASSOCIATION, Appellee.

No. 16523.

Court of Civil Appeals of Texas, Fort Worth.

May 8, 1964.
Rehearing Denied June 5, 1964.

387 *387 McDonald, Sanders, Nichols, Wynn & Ginsburg, and Atwood McDonald, Fort Worth, for appellants.

Brown, Herman, Scott & Young, and A. J. Bryan, Fort Worth, for appellee.

MASSEY, Chief Justice.

In connection with the trial of this case we have reached the conclusion that there was error on the part of the trial court in failing and refusing to submit issues of fact to the jury to be resolved as prerequisites to the plaintiff's right to the judgment it obtained, because the right of the plaintiff to recover on its suit for debt deficiency (following foreclosure and sale of property on which a mortgage had been given as security) could not be said to have been established as a matter of law.

In Casa Monte Company v. Ward, 1961 (Tex.Civ.App., Austin), 342 S.W.2d 812, it is stated, "A prerequisite to the recovery of a deficiency judgment is the establishment of the deficiency by a valid foreclosure sale. Bailey v. Block, 104 Tex. 101, 134 S.W. 323, Sullivan v. Hardin, Tex. Civ.App., Amarillo, 102 S.W.2d 1110."

This statement of law is correct, and, to us, means that he who seeks to obtain a judgment for any deficiency claimed to remain
388 upon a debt owing him (after he has *388 obtained funds to be credited upon the debt as the result of a sale under foreclosure of property pledged as security upon the debt) is obliged to make out a prima facie case that the foreclosure sale was valid; which prima facie case, unrebutted, establishes the propriety of his suit for deficiency and the proper amount thereof. To us it has the further meaning, however, that if plaintiff's prima facie case is rebutted by evidence upon the trial, and an issue raised upon the matter of the validity of the foreclosure sale (under defensive pleading of the defendant wherein fact or facts are asserted inconsistent with that essential element of the plaintiff's cause of action for the deficiency), it becomes the plaintiff's burden to have submitted to the jury and a favorable finding returned on the issue submitting the rebutting fact, because the rebutting fact constitutes a denial of an element of the plaintiff's cause of action. See Hodges on Special Issue Submission in Texas, p. 90, "Burden of Proof", § 32, "Burden in Inferential-Rebuttal Issues".

In Black v. Burd, 1953 (Tex.Civ.App., Fort Worth), 255 S.W.2d 553, writ ref., n. r. e., Justice Renfro of this Court cited the case of John Hancock Mut. life Ins. Co. v. Howard, 1935 (Tex.Civ.App., Waco), 85 S.W.2d 986, 989, error refused, and remarked, "The above case discusses the rule that where a mortgagee makes an unauthorized sale, he is liable in damages for the value of the land at the time of the sale, less the value of the mortgage debt, and acknowledges the correctness of the rule where title has, by means of illegal sale, passed into the hands of a third party, and particularly if the third party purchased in good faith for value received and without notice (citing cases)." On page 557 of the opinion is further stated, "Where the record shows, as it does here, that the appellant under the pretense of a sale under the power given in the deeds of trust, in satisfaction of the debt has acquired possession of the mortgaged property and appropriated it to his own use and benefit, it would be inequitable to allow him the full amount of his debt without allowing a proper credit for the value of the property so appropriated."

In this state we use a deed of trust in the nature of a mortgage in transfers of real property. Thereby a lien is retained or given as security, with simultaneous execution of a deed of trust to one who is to hold the office of trustee for the purpose of foreclosure without necessity of resort to litigation. The deed of trust transaction is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at anytime before the sale of the property. In other words it is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. In connection with any actual execution of the power of sale the person who has given the deed of trust is a *cestui que trust* of him who acts as trustee thereunder, and the

trustee in effecting the sale pursuant to the authority granted in the deed of trust owes to him at least the duty to carry out the authority devolved, in scrupulous honesty, according to law and the provisions of the trust instrument. See Bogert, Trusts & Trustees, p. 226, 227, "Trusts and Other Relationships—Distinctions", § 29, "Mortgages and trust deeds"; p. 604, "Sales by Trustees", § 747, "Effect of Wrongful Sale".

In the instant case the defendants/appellants, **Lucky Homes**, **Inc**., et al., owed a debt to plaintiff/appellee, **Tarrant Savings Association**. Said plaintiff was secured as to the indebtedness by a lien on certain realty and the defendants had given further security in that they were obligated under a deed of trust naming O. W. White as trustee. This instrument provided, in the event of any breach of the covenants and agreements therein, that "on the request of the holder of said note (which request is hereby assumed) said Trustee, or his substitute appointed hereunder, is hereby authorized and empowered to sell as an entirety or in
389 parcels * * * the property hereby conveyed to the highest bidder for cash at the Courthouse door in Fort Worth, **Tarrant** County, *389 Texas on the day and between the hours prescribed by law, after posting notices of sale for the length of time, in the manner and at the places now provided by law for sale of property under powers contained in deeds of trust, * * *." Further language of the instrument provided: "It is agreed that the holder of the note hereby secured may at any time or times appoint a successor or substitute trustee in the place of said Trustee * * * by an instrument in writing, and any person so appointed shall have all powers conferred herein upon the Trustee above named, it being understood that said power of substitution may be exercised as frequently and at such times as said holder of said note may desire."

Further language of the instrument provided: "And Grantors do hereby ratify and confirm any and all acts which the said Trustee or his successor or substitute, may do in the premises by virtue hereof, and expressly stipulate and agree that any and all recitals contained in any deed or deeds executed by the Trustee or substitute trustee under this instrument, shall be conclusively presumed to be true in all courts of law and equity and shall be prima facie proof that all prerequisites to such sale or sales have been regularly performed, and prima facie proof of the regularity of the appointment of said Trustee and of the authority of said Trustee to make said sale, * * *."

In the trial court the plaintiff made out its prima facie case under its suit for deficiency. In connection with its proof of the propriety and regularity of the foreclosure sale it introduced proof that O. W. White, Trustee named in the instrument, became physically unable to act as such and so certified to the plaintiff, as the owner and holder of the note, and that plaintiff did properly appoint Edwin B. Conley as Substitute Trustee by instrument in writing under date of November 30, 1962. Then plaintiff introduced the Deed of Trust and also the deed of the Substitute Trustee to the purchaser at the trustee's sale. In the latter instrument was recited by Edwin B. Conley, Substitute Trustee: "AND, WHEREAS, Pursuant to said request and to the provisions of said Deed of Trust, I proceeded to sell said property at public auction, at the Court House door, of **Tarrant** County, Texas, between the hours of ten o'clock A.M. and four o'clock P.M., on Tuesday the 4th day of December A.D. 1962, after having given public notice of the time, place and terms of such sale, as prescribed by the terms of said Deed of Trust, and after first posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said County, one of which was posted at the Court House door of said County; * * *." The Substitute Trustee's deed was executed according to the formalities requisite for transfers of real estate on December 4, 1962.

It is to be noted that there was only a four (4) day's time interval between the day of the appointment of the Substitute Trustee and the day of the Substitute Trustee's sale. The deed executed pursuant to said sale contains the recitation that said Substitute Trustee had given "public notice of the time, place and terms of the sale", and that he, the Substitute Trustee, had posted notices thereof "for three consecutive weeks prior to the day of the sale", etc. From the language we have quoted from the Deed of Trust instrument it is to be observed that the defendants were bound to the agreement that said recitals in themselves should constitute prima facie proof (as against them) that the prerequisites of the sale had been regularly performed, etc.

The evidence, under and within the defensive pleading of defendants, controverted the recitals of the Substitute Trustee's deed, and thus raised the issue of the propriety and regularity of his sale. This evidence came from the lips of the Substitute Trustee himself. He testified that he had not posted any written notice of the sale at all, nor did he give any public notice of the time, place and terms of the sale. We have little doubt but that plaintiff could have marshalled evidence to show that the original
390 Trustee, O. W. White, had attended the posting of the necessary notices, given *390 public notice of the time, place and terms of the sale, etc., thus satisfying the requisites of law and of the trust instrument itself. But such fact was not established by the evidence in the case. Even had such proof been introduced we believe that the issue arisen upon the regularity of the sale would have persisted and been a question of fact to be resolved by the jury. As heretofore noted, the trial court did not submit the issues so raised to the jury, but believing them resolved as a matter of law, rendered judgment for the plaintiff.

The defendants have also presented the contention that an issue was raised upon the matter of whether the Substitute Trustee conducted the sale with scrupulous attention to the fiduciary obligation owed them in connection therewith. They did not submit a request for the submission of such an issue, and we do not believe that such would be an inferential-rebuttal issue upon which the plaintiff would carry the burden as an essential element of its case. Reversible error could not have resulted.

Some comment appears in order in connection with the plaintiff's/appellee's counterpoints. In this case it was not incumbent upon the defendants to offer to "do equity" as a prerequisite to obtaining equitable relief, or to tender the balance plaintiff claims to be owing on the debt. Under their pleadings, and under the evidence in the record, the issue existed whether they had already "done equity" in that plaintiff had received more than the balance in question whereby defendants were relieved of any obligation to make further tender. Under defendants'/appellants' theory of the case the question of the validity of the sale by the Substitute Trustee was not a matter of collateral attack in the sense of a choice of attempting to set the sale aside and regain title to realty or to adjudicate title to realty, rather than to conduct litigation which might cast a cloud on the title thereto in another or others who now purport to be owners. Title to the realty was not the issue in the suit, but rather was the issue related to the matter of unjust enrichment of the plaintiff or to the kindred matter of unjust impoverishment of the defendants. In other words the defendants desire proper credit upon the conceded amount of their debt, which, under law they cite as applicable because of the alleged invalidity of the sale, would be the fair cash market value of the property as of the date the Substitute Trustee conducted the sale.

To emphasize the basis of our holding in this case we think it should be understood that the judgment for plaintiff was erroneous because it did not secure the submission of special issues, upon which findings favorable to it were returned, and therefore did not establish those elements of its case prerequisite to the propriety of judgment being rendered in its favor. Issues of fact were raised, the burden of persuasion upon which was the plaintiff's. The case was erroneously withdrawn from the jury. Plaintiff was not entitled to judgment as a matter of law.

Reversed and remanded.

390 S.W.2d 473 (1965)

TARRANT SAVINGS ASSOCIATION, a Corporation, Petitioner,
v.
LUCKY HOMES, INC., et al., Respondents.

No. A-10262.

Supreme Court of Texas.

April 14, 1965.
Rehearing Denied May 14, 1964.

474 *474 Brown, Herman, Scott & Young and A. J. Bryan, Fort Worth, for petitioner.

McDonald, Sanders, Nichols, Wynn & Ginsburg, Fort Worth, for respondents.

HAMILTON, Justice.

This is a suit by **Tarrant Savings Association**, petitioner, plaintiff in the trial court, seeking a deficiency judgment after a foreclosure under a deed of trust previously executed by **Lucky Homes**, **Inc**., et al., respondents, in favor of petitioner. Following the conclusion of the evidence the trial court withdrew the case from the jury except as to one issue on the market value of the property foreclosed on at the time of the foreclosure sale. The court entered judgment for petitioner for the deficiency in the sum of $1258.81. The Court of Civil Appeals reversed the judgment of the trial court and remanded the case for a new trial. 379 S.W.2d 386.

In the trial of this cause petitioner maintained its burden to establish its case by introducing its note from respondents in the amount of $2,500. Day v. Cooper, 175 S.W. 485, Tex.Civ.App., no writ hist.; Citizens' Garage Co. v. Wilson, 252 S.W. 186, Tex.Civ.App., no writ hist. See Lewin v. Houston, 8 Tex. 94, and Page v. Carson, 16 S.W. 1036 (Tex.Comm.App.). A credit of $1,200 was allowed as a result of the sale of certain property which had been mortgaged to secure petitioner in its note. Once petitioner's case had been made out the burden shifted to the respondents, defendants in the trial court, to show some reason for denying recovery to petitioner. Citizens' Garage Co. v. Wilson, supra; Brenard Mfg. Co. v. Barnett, 210 S.W. 990, Tex. Civ.App., no writ hist. See Newton v. Newton, 77 Tex. 508, 14 S.W. 157, and Reed v. Buck (Tex.Sup.Ct.), 370 S.W.2d 867. The question to be decided here concerns whether respondents have sustained this burden so as to raise a fact issue relating to some defense to petitioner's right of recovery on its suit for deficiency. We hold that respondents have failed in this respect.

Respondents attempt to defeat petitioner's case by showing that an improper credit has been allowed against their note. It is respondents' theory that the foreclosure sale whereby the mortgaged property was sold for $1,200 was invalid because proper legal notices were not posted as required by statute. The only proof put forward by respondents to maintain their burden on this defensive matter related to the fact that the substitute trustee had not posted the notices himself nor did he know whether in fact they had been posted. Petitioner had introduced in evidence the substitute trustee's deed of conveyance with its recitations that E. B. Conley, the substitute trustee, had posted proper notices as provided for in the deed of trust. Respondents urge that by proving that this recitation was erroneous the presumption that Conley properly posted the notices had been destroyed. They are correct in this contention, but they have simply not gone far enough. The destruction of the presumption does not raise a
475 fact issue as to whether O. W. White, the *475 original trustee, properly posted the notices. It was their burden to prove that notices were not posted, and all that they have done is prove that the substitute trustee did not post them, not that they were not posted. From the record it is apparent that the substitute trustee could not have posted proper notices since he was appointed only four days prior to the foreclosure sale.

At the time the notices should have been posted White was the only one authorized by the deed of trust to post them. Respondents make no attempt to show that White did not in fact post the notices. When an original trustee properly posts the notices required by law, there would be no necessity for re-posting, and the substitute trustee could have made a valid sale. Gamble v. Martin et al., 60 Tex.Civ.App. 517, 129 S.W. 386, no writ hist.

Under respondents' theory that a fact issue had been raised with respect to whether or not proper notices had been posted, the

only question under this record which could have been submitted to the jury was whether or not White had failed to properly post notices. There is no evidence presented which would support an affirmative finding to such an issue. It is therefore our opinion that respondents have merely shown that the substitute trustee, Conley, has not posted the proper notices, not that said notices were not in fact posted. Respondents have thus failed to maintain their burden of proof in this case.

The basic error committed by the Court of Civil Appeals lies in the premise upon which it constructed its opinion. That court accepted as sound the rule that "[a] prerequisite to the recovery of a deficiency judgment is the establishment of the deficiency by a valid foreclosure sale", citing Casa Monte Co. v. Ward, Tex.Civ.App., 342 S.W.2d 812, no writ hist., and Sullivan v. Hardin, Tex.Civ.App., 102 S.W.2d 1110, no writ hist. This premise from which the Court of Civil Appeals reasoned is clearly erroneous. Under Maupin v. Cheney, 139 Tex. 426, 163 S.W.2d 380, if the sale is valid the mortgagee is entitled to judgment for the amount of the note, interest and attorney's fees, less the amount received at the trustee sale and other legitimate credits. If the sale is invalid and title to the property has passed to a third person or the property has been appropriated to the use and benefit of the mortgagee, the mortgagor is entitled to have the reasonable market value of the property credited on the note (of course if, as in Maupin, the mortgaged property had an outstanding prior vendor's lien or other prior deed of trust held by some third party, then the credit allowed would be the reasonable market value of the mortgagor's equity in said property). The case of John Hancock Mutual Life Ins. Co. v. Howard, Tex.Civ.App., 85 S.W. 2d 986, writ refused, provides the additional rule that if the sale was invalid and the property has not passed into the hands of a third person or been appropriated to the use and benefit of the mortgagee, the mortgagee may by alternative pleading have a judgment of foreclosure of his lien and for any deficiency which crediting of the proceeds of the sale may leave.

Respondents had an additional point before the Court of Civil Appeals by which they urge that this sale should be set aside on proof of inadequacy of price coupled with some wrongdoing, misconduct or unfairness on the part of the person exercising the power of sale under the deed of trust. Respondents contend that there was an inadequate price paid at the foreclosure sale in this case and point to the fact that while the sale was for only $1,200, the jury found the value of the property to be $4,000. Respondents further urge that there is sufficient evidence to go to the jury on the question of unfairness and improper conduct on the part of Conley.

Mere inadequacy of consideration alone does not render a foreclosure sale void if the sale was legally and fairly made. Burnette
476 v. Realty Trust Co., 74 S.W.2d 536, Tex.Civ.App., writ ref. It therefore becomes our responsibility to determine *476 whether from the record a fact issue was raised with respect to the propriety of this sale.

The record shows that Conley recommended to another employee of **Tarrant** what said employee should bid for **Tarrant** at the foreclosure sale. Respondents contend that such action on the part of Conley constitutes improper conduct. We do not agree. The rule is well settled in this state that a mortgagee with power to sell may purchase at his own sale made at public auction. Southern Trust & Mortgage Co. v. Daniel, 143 Tex. 321, 184 S.W.2d 465; Thornton v. Goodman, 216 S.W. 147 (Tex.Comm.App.). Since this is the law in Texas, it must follow that the mere fact that Conley, an officer of **Tarrant**, the mortgagee, requested another employee of **Tarrant** to come to the sale and to bid $1,200 on **Tarrant's** behalf does not constitute an impropriety on Conley's part. Finding no evidence of unfair or wrongful conduct on Conley's part that could combine with the alleged inadequate price so as to void the foreclosure sale, we overrule this point.

We reverse the Court of Civil Appeals and affirm the judgment of the trial court.

621 S.W.2d 592 (1981)

James S. TAYLOR, Jr., Petitioner,

v.

T. C. BRENNAN, Jr., Respondent.

No. C-38.

Supreme Court of Texas.

September 23, 1981.

593 *593 Donna M. Bobbitt, Houston, for petitioner.

Butler, Binion, Rice, Cook & Knapp, Roger A. Rider and Sharon E. Peebles, Houston, for respondent.

McGEE, Justice.

This is a suit for damages for waste of security involving the interpretation of an assignment of rentals instrument executed in connection with the purchase of realty. The trial court rendered judgment against the purchaser for waste of security and failure to refund security deposits, plus attorneys' fees. The court of civil appeals affirmed. 605 S.W.2d 657. We reverse that part of the judgment of the court of civil appeals which awarded damages against **Taylor** for waste of security. We affirm the remainder of the judgment of the court of civil appeals.

In January, 1974, T. C. **Brennan**, Jr., sold the Sagewood Apartments, located in Houston, to James S. **Taylor**, Jr. The conveyance was made subject to a first lien deed of trust and an assignment of rentals in favor of First Continental Mortgage Company. **Taylor** also executed a promissory note, a second lien deed of trust, an assignment of rentals, a U.C.C. security agreement and an assignment of lessor's interest in leases, all in favor of **Brennan**. The deed of trust and general warranty deed contained a promise by **Taylor** to make all payments and perform all obligations pursuant to the first lien note and the first lien in favor of First Continental. However, the parties expressly agreed that **Taylor** would not assume any personal liability on the obligation to First Continental.

In the latter part of September, 1974, First Continental notified **Brennan** that **Taylor** had defaulted on the August and September first lien payments. **Taylor** was current on all second lien payments to **Brennan**. **Taylor** collected rents from tenants for August and September but did not apply them to discharge the delinquency on the first lien. **Brennan** responded by foreclosing on his second lien and regaining possession of the property. The first lien was not foreclosed. Once in possession, **Brennan** collected $4,082.64 in rents, but was forced to pay First Continental, the first lienholder, $19,976.32 for the payments due on the first lien.

Brennan sued **Taylor** for damages for waste of security. He alleged that the various security agreements assigned the rents from the Sagewood Apartments, and the rents were to be used specifically for payment of the first lien and second lien mortgage notes. Consequently, while he was in default, **Taylor's** failure to apply the rents he collected to discharge the first lien payments constituted waste of security. The trial court filed findings of fact and conclusions of law. One of those conclusions of law reads as follows:

> "(3) That the Assignment of Rents (Plaintiff's Exhibit No. 8) *pledged* the rents from the tenants' leases in the Sagewood Apartments *as security* against the debts between defendant **Taylor** and plaintiff." (Emphasis added).

The trial court awarded **Brennan** damages of $19,976.32 for waste. In affirming the trial court, the court of civil appeals held that the first assignment of rentals instrument, which **Taylor** took the property subject to, was an absolute assignment to the first lienholder, which upon default, gave rise to a cause of action for waste of security.

Texas follows the lien theory of mortgages. Under this theory the mortgagee is not the owner of the property and is not entitled to its possession, rentals or profits. Thus, it has become a common practice to include in the deed of trust, or in a separate instrument, terms assigning to the mortgagee the mortgagor's interest in all rents falling due after the date of the mortgage as additional security for payment of the mortgage debt.

594 *594 The Texas cases addressing rentals assigned as security have followed the common law rule that an assignment of rentals does not become operative until the mortgagee obtains possession of the property, or impounds the rents, or secures the appointment of a receiver, or takes some other similar action. *Simon v. State Mutual Life Assur. Co.,* 126 S.W.2d 682 (Tex.Civ.App.— Dallas 1939, writ ref'd); *McGeorge v. Henrie,* 94 S.W.2d 761 (Tex.Civ.App.—Texarkana 1936, no writ). Most jurisdictions are in accord. 59 C.J.S. Mortgages § 316 n. 71 at 411.

On the other hand, an absolute assignment of rentals operates to transfer the right to rentals automatically upon the happening of a specified condition, such as default. *Kinnison v. Guaranty Liquidating Corporation,* 18 Cal.2d 256, 115 P.2d 450, 453 (Cal.1941). The absolute assignment does not create a security interest but instead passes title to the rents. *In Re Ventura—Louise Properties,* 490 F.2d 1141 (9th Cir. 1974).

Courts have been reluctant to construe assignment of rentals clauses to operate as absolute assignments. The public policy embracing the rule was articulated by Justice Augustus Hand in *Prudential Insurance Company of America v. Liberdar Holding Corp.,* 74 F.2d 50 (2d Cir. 1934):

> "It seems unlikely that mere words of assignment of future rents can entitle a mortgagee to claim rentals which have been collected by a mortgagor and mingled with its other property. Sound policy as well as every probable intention should prevent a mortgagee from interfering with the mortgagor's possession until the mortgagee takes steps to get the rentals within his control. To hold otherwise would be to impose unworkable restrictions upon industry in cases where mortgagors have been led to suppose that they might rightfully apply the rentals to their own business."

It has also been felt that to construe the clause as an absolute assignment of rents would impose no duty upon the mortgagee to collect rents, and gives the mortgagor no assurance that the mortgagee would collect them and apply them to the debt. Osborne, G., Mortgages (2d ed. 1970) § 150 at 252.

The question before us is whether the assignment of rentals operated as an absolute assignment to **Brennan** so as to transfer rents automatically upon default, or a pledge to secure a debt which must be activated by some affirmative act by **Brennan**.

The deed, deed of trust, and assignment of rentals were executed contemporaneously on January 11, 1974, and therefore the intent of the parties is to be ascertained by construing those instruments together. *Mazzola v. Lucia,* 109 S.W.2d 273 (Tex.Civ.App.—Beaumont 1937, writ ref'd); *Stubblefield v. Cooper,* 37 S.W.2d 818 (Tex.Civ.App. —Amarillo 1930, writ dism'd w.o.j.). Accordingly, we must determine from a reading of the documents whether the parties intended the assignment of rentals to be absolute or merely a pledge. When an assignment of rentals is given as "further" or "additional" security, there is a strong indication the parties intended a pledge, *Simon v. State Mutual Life Assur. Co., supra,* while an absolute assignment of rentals is not security, but is a *pro tanto* payment of the obligation. *Malsman v. Brandler,* 230 Cal.App.2d 922, 41 Cal.Rptr. 438 (1964).

The granting clause of the assignment of rentals contains the following language:

> "NOW, THEREFORE, in order *further to secure* the payment of the indebtedness of the Borrower to the Lender, ... the said Borrower does hereby sell, assign, transfer and set over unto the Lender all of the rents, issues and profits of the aforesaid mortgaged premises." (Emphasis added).

Additionally, the assignment permits the lender at its option upon default, to enter upon the premises and collect the rents accrued but unpaid, and those rents thereafter accruing and becoming payable. The deed of trust gives the lender (mortgagee) a similar right of entry and power of collection.

595 *595 The foregoing language and provisions manifest an intention by the parties to create a pledge of rentals. The assignment of rentals not only states that it is "further" security for the debt, but also contemplates that the mortgagee, upon default, will be required to take some type of affirmative action pursuant to its right of entry. These facts are entirely consistent with a pledge. Our construction of the documents is further reinforced by the conclusion of law filed by the trial court. As a result, **Brennan** could not recover the rents collected by **Taylor** before **Brennan** took any action to foreclose the second lien.

Taylor breached an obligation to **Brennan** by failing to make the August and September first lien payments. **Taylor's** obligations to **Brennan** were defined by the documents attendant to the second lien mortgage. The court of civil appeals, however, construed the assignment of rentals attendant to the first lien mortgage. Since **Taylor** took the property "subject to"

that mortgage, it was improper for the court to determine his rights with respect to **Brennan** by construing documents to which he was not a party and upon which he had no personal liability. In any event, as the assignment of rentals was given as further and additional security to the first lien mortgagee, it was a mere pledge and not an absolute assignment.

We reverse that part of the judgment of the court of civil appeals which awarded damages against **Taylor** for waste of security. We affirm the remainder of the judgment of the court of civil appeals.

WALLACE, J., not sitting.

574 S.W.2d 833 (1978)

R. M. TAYLOR et al.

v.

Roy RIGBY d/b/a Rigby Plumbing Co.

No. 1160.

Court of Civil Appeals of Texas, Tyler.

November 22, 1978.
Rehearing Denied December 21, 1978.

834 *834 James R. Cornelius, Jr., Zeleskey, Cornelius, Rogers, Berry & Hallmark, Lufkin, Charles E. Fitch, DeLange, Hudspeth, Pitman & Katz, Houston, for appellants.

Bill McWhorter, McWhorter & Earley, Nacogdoches, for appellee.

McKAY, Justice.

Appellee, Roy **Rigby** d/b/a **Rigby** Plumbing Company, brought suit against R. M. **Taylor** and wife, and the First Bank and Trust Company of Lufkin, as Trustee for the First State General Employee Benefit Trust, seeking to foreclose a contractual, a statutory and a constitutional lien on a tract of land in the hands of subsequent purchasers; alternatively, **Rigby** prayed for $35,480 for labor, materials and renting of equipment in quantum meruit. **Taylor** and wife answered by general denial, and specifically denied that **Rigby** had any lien in that he failed to comply with either the constitutional provisions, the statutory provisions or the recording statutes which would create any lien. The bank answered by general denial, and pled waiver and estoppel; that the statutory lien statutes constitute an unconstitutional taking of property rights without due process of law; and that if it should be determined that **Rigby** had or has a valid constitutional or statutory lien then the bank is entitled to the first proceeds by virtue of its lien on the property. The bank also filed a cross-action for the first proceeds.

Trial was to a jury; the trial court rendered judgment for **Rigby**, foreclosing a contractual lien, a constitutional lien and a statutory lien. Both the Taylors and First Bank and Trust appeal.

On April 15, 1971, W. C. Murphrey and wife entered into a written contract with **Rigby** for plumbing work on 30.5 acres of their land which they planned to use as a mobile home park. The contract provided for a lien in favor of **Rigby**. **Rigby** completed a portion of the work but stopped work when weekly progress payments were not made as called for by the contract. **Rigby** demanded payment, then filed his lien contract for record in Nacogdoches County on May 24, 1971.

On May 5, 1971, the Murphreys executed a note and deed of trust to Stone Fort National Bank covering the same 30.5 acre
835 tract. The Murphreys defaulted on this *835 note and Stone Fort Bank, acting through its trustee, foreclosed its deed of trust lien and sold the property to **Taylor** and wife. The deed to the Taylors was filed for record April 4, 1972.

On March 29, 1972, **Rigby** sued the Murphreys for the money due on his contract, and default judgment was taken on August 10, 1972, in the amount of $30,000.

On December 5, 1972, the Taylors executed a deed of trust to First Bank and Trust covering the same tract, and such deed was filed for record December 13, 1972.

The time element in the sequence of events follows:

Aug. 15, 1970 The Murphreys bought land, including both tracts involved here, and gave deed of trust to Stone Fort National Bank. Apr. 15, 1971 **Rigby** contracted with Murphreys to make improvements (laying sewer and water lines) on the 30.5 acre tract for $56,497.50, said contract giving plaintiff a lien on said tract as security for payment. Apr. 17, 1971 **Rigby** began work. May 5, 1971 Murphreys borrowed $10,000 from Stone Fort National Bank to finance construction of a KOA building on an adjoining 24.5 acre tract, and gave the bank a second lien deed of trust (on both tracts). May 24, 1971 **Rigby** recorded contract with County Clerk in Mechanics' and Materialmen's Lien Records (following failure to receive weekly progress payments from

Murphreys). Mar. 29, 1972 **Rigby** filed petition in suit against Murphreys, claiming $30,000 due for labor and materials furnished under the contract. Apr. 4, 1972 Trustee under second lien deed of trust held trustee's sale of both tracts and sold them to Defendant **Taylor** for $15,600. Apr. 10, 1972 Stone Fort National Bank sold the first note and deed of trust to **Taylor** for $42,067.85 by an assignment of lien. Aug. 10, 1972 **Rigby** took default judgment against Murphreys in that suit for $30,000. Aug. 16, 1972 **Rigby** filed abstract of judgment obtained against Murphreys. Dec. 5, 1972 Taylors executed deed of trust to Lemke, Trustee for benefit of First Bank & Trust of Lufkin (a defendant here), as Trustee for First State General Employee Benefit Trust, said deed of trust covering both tracts.

836 The jury found[1] that **Rigby** performed his obligations to the Murphreys under the *836 April 15, 1971, contract; that the Stone Fort Bank had notice of the work and the lien of **Rigby** at the time of the execution of the deed of trust by the Murphreys on May 5, 1971; that **Rigby's** failure to warn **Taylor** of his lien did not mislead **Taylor** to his injury so as to estop **Rigby** from asserting his lien; that **Rigby** did not waive his claim to a lien; that **Taylor** did have actual knowledge of **Rigby's** lien and any fact or facts that would cause a prudent person to make inquiry as to such claim on or before April 4, 1972; and that $33,000 is the value of the improvements made by **Rigby** on the tract in question.

The judgment of the trial court provided that **Rigby** "recover his debt, damages and costs and have foreclosure of his contractual lien, constitutional lien and statutory lien" on the property, and that an Order of Sale issue and the property be sold at sheriff's sale, with the costs and expenses of sale to be first paid; then the $30,000 judgment in favor of **Rigby** against the Murphreys be satisfied; then the deed of trust from the Taylors to First Bank & Trust be paid, and then any balance to the Taylors.

The Taylors and the First Bank and Trust (hereinafter called appellants) have filed a joint brief and by their point 1 contend that **Rigby's** only monetary recovery being in quantum meruit, there is no lien to secure it. Argument is made that the written contract only gave a lien to secure payment of the amount due under the completed contract and it does not provide for a lien if the contract was only partially completed. Appellants further maintain that there was no substantial performance by **Rigby**; that the jury's answer to special issue 1 was based on the trial court's instruction that **Rigby** was relieved of his obligation to perform by the owner's breach in not making progress payments; and that the only issue submitted to the jury regarding damages was based on quantum meruit in issue 6, and that no lien exists to secure quantum meruit recovery.

Appellee argues that no money judgment was rendered, but rather his prayer for foreclosure of his contractual, constitutional and statutory liens was granted, and that the judgment was for satisfaction of the prior judgment against the Murphreys; that the contract was divisible and he had completely performed items 1, 2, 3, and 7 thereof (relating to laying sewer lines); that all the cases relied on by appellant are contractual lien cases only; and that according to the contract, quantum meruit relief would be secured by foreclosure of the contractual lien.

Appellants reply that appellee had no constitutional or statutory lien—no constitutional lien because he was not making or repairing any "buildings or articles" as required by the constitutional provision, and no statutory lien because he did not follow the proper procedures to fix such a lien.

It becomes necessary to determine whether **Rigby** had a lien, and if so, what kind of lien. Did **Rigby** have a constitutional lien? Section 37, Article 16 of the Constitution of Texas provides:

> "Mechanics, artisans and materialmen, of every class, shall have a lien upon the *buildings* and *articles* made or repaired by them for the value of their labor done thereon, or material furnished therefor;..." [Emphasis added.]

In *Campbell v. City of Dallas,* 120 S.W.2d 1095, 1097 (Tex.Civ.App.—Waco 1938, writ ref'd), the court, speaking through Judge
837 Alexander, held that one who installed sewer and water mains "was not engaged in *837 erecting a building or making or repairing an article within the contemplation of art. 16, sec. 37 of our State Constitution, ... and therefore did not have a constitutional lien thereon." The *Campbell* case has not been overruled or modified, and we believe it controls the question here. Therefore, we hold that **Rigby** did not have a constitutional lien on the tract of land involved here.

As to the statutory lien claimed by **Rigby** and foreclosed by the trial court judgment, Article 5453[2] provides that:

> "The lien provided for in Article 5452 may be fixed and secured in the following manner:
>
> "1. Every original contractor, not later than one hundred twenty (120) days,... after the indebtedness accrues as

> defined hereinafter in Article 5467, *shall file his affidavit claiming a lien,* to be recorded in a book kept by the county clerk for that purpose ...." [Emphasis added.]

Rigby filed his lien contract for record on May 24, 1971. An examination of that instrument, however, reveals that it did not comply with the statute in that it is not sworn to. It contains the acknowledgment of the parties to the contract, but there is no jurat, and such instrument was not an affidavit within the statute requiring a sworn statement of a claimed lien. *Conn, Sherrod & Co., Inc. v. Tri-Electric Supply Co.,* 535 S.W.2d 31, 34 (Tex.Civ.App.—Tyler 1976, writ ref'd n.r.e.). Art. 5455 provides, "An affidavit claiming a lien filed for record... shall be signed by the claimant or by some person on his behalf and shall contain in substance the following: a. A *sworn statement* of his claim, including the amount thereof...." [Emphasis added.] An acknowledgment is not a jurat, and therefore not a sworn statement. *Perkins v. Crittenden,* 462 S.W.2d 565 (Tex. 1970); *Crockett v. Sampson,* 439 S.W.2d 355 (Tex.Civ.App.—Austin 1969, no writ); *Dee's Cabinet Shop, Inc. v. Weber,* 562 S.W.2d 945, 948 (Tex.Civ.App.—Fort Worth 1978, no writ). In our view there was no statutory lien on the tract in question.

There is another reason why **Rigby** would not have a statutory mechanic's lien. There was no allegation nor proof that he substantially performed the contract with the Murphreys, and the authority in Texas is that a contractor may not have the benefit of a mechanic's lien unless he has substantially performed the lien contract. *Continental National Bank of Fort Worth v. Conner,* 147 Tex. 218, 214 S.W.2d 928, 934 (1948).

The final argument of appellants on this point is that the written contract only gave a lien to secure payment of the amount due under the completed contract, and did not provide for a lien in case the contract was only partially completed. The basic argument is that **Rigby's** recovery is based on quantum meruit, not on the contract, and, therefore, there is no lien to secure such a recovery. The claimed lien here, it is contended, is a creature of the contract, and where the recovery is outside the contract there is no lien. The contract here does not provide for a lien to secure payment of a partial recovery for partial performance, but the lien is "to secure the total payment in the amount of $54,497.50... for all labor, materials and services performed thereon as itemized hereinbefore."

The finding by the jury in issue 6 for $33,000 was evidently disregarded by the trial court, and the judgment rendered provided for recovery based upon the $30,000 judgment previously rendered for **Rigby** in his suit against the Murphreys. The suit against the Murphreys alleged the contract between **Rigby** and the Murphreys but the judgment was obviously rendered upon quantum meruit. There was no pleading there, as there is none in the instant case, that the contract was substantially performed. There was no jury finding on substantial performance, nor was there any finding on what the cost would be to
838 complete the contract. In our view the recovery by **Rigby** in his suit against the Murphreys *838 was based upon quantum meruit; the jury's answer to issue 6 in the instant suit was also based upon quantum meruit. Therefore, the right of **Rigby** to recovery on a quantum meruit basis where there has been only partial performance was not based on the contract, but is laid on an implied agreement by the owner to pay for the benefit received.

The Supreme Court in *Davidson v. Clearman,* 391 S.W.2d 48, 50-51 (Tex.1965), wrote:

> "The right to recover on quantum meruit does not grow out of the contract, but is independent of it. It is based upon the promises implied by law to pay for beneficial services rendered and knowingly accepted....
>
> . . . . .
>
> "... Quantum meruit being a recovery outside of, and independent of the contract, there was no lien agreed upon between the parties to secure the payment of a quantum meruit recovery. For this reason, there is no lien to be foreclosed, and the courts below erred in ordering a foreclosure of the mechanic's and materialman's lien contract."

Davidson v. Clearman, supra, has been cited and followed by *Black Lake Pipeline Co. v. Union Construction Co.,* 538 S.W.2d 80, 86 (Tex.1976); *Warren v. Denison,* 563 S.W.2d 299, 309 (Tex.Civ.App.—Amarillo 1978, no writ); *City of Ingleside v. Stewart,* 554 S.W.2d 939, 943 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.); *McDaniel v. Tucker,* 520 S.W.2d 543, 548-9 (Tex.Civ. App.—Corpus Christi 1975, no writ); *Anderson v. Casebolt,* 484 S.W.2d 462, 463 (Tex.Civ.App.—Fort Worth 1972, reversed on other grounds, Tex., 493 S.W.2d 509); *Ryan v. Thurmond,* 481 S.W.2d 199, 204 (Tex.Civ.App.—Corpus Christi 1972, writ ref'd n.r.e.); *Kyburz, Ferrell & Heesch v. Magnolia Independent School District,* 476 S.W.2d 763, 767 (Tex.Civ.App.—Beaumont 1972, writ ref'd n.r.e.); *Dill v. Helms,* 468 S.W.2d 608, 611 (Tex.Civ.App.—Waco 1971, writ ref'd n.r.e.); 10 Tex.Jur.2d Building Contracts, sec. 44, p. 46.

Since any recovery **Rigby** had in his suit against the Murphreys was in quantum meruit he had abandoned recovery on the contract, and having done so he did not have a contractual lien. Additionally, appellee's pleadings do not specifically ask for the foreclosure of a contractual lien against appellants. We hold that there was no contractual lien to be foreclosed.

Rigby argues that the contract was divisible, that the evidence revealed that certain items called for in the contract were completed, and that the jury in answering issue 1 found that **Rigby** had completely performed items 1, 2, 3 and 7 of the contract. The jury did find in issue 1 that **Rigby** performed his obligations to the Murphreys under the contract, but under the instructions given by the trial court **Rigby** was relieved of further performance after the Murphreys failed to perform in not making weekly progress payments. Under the trial court's instruction the answer of the jury could not be interpreted as a finding that **Rigby** substantially performed under the contract. **Rigby**, in his suit against the Murphreys, as well as in the instant case, elected to recover for the value of the materials and labor furnished, or the money value of the improvements to the property.

Rigby contends that there was complete performance of a divisible contract, and, therefore, his liens were properly foreclosed by the trial court. We disagree. The language of the contract refutes the contention. The contract provided in paragraph VII, "Owners hereby give contractor a lien upon the described premises ... together with the improvements to be placed thereon, ... *to secure the total payment in the amount of $54,497.50,* and any additional payments due contractor for services ... and for all labor, materials and services performed thereon as itemized hereinabove." [Emphasis added.] There was no provision (such as set out in *Davidson v. Clearman, supra*) that failure to complete the contract shall not defeat the indebtedness and the lien, but
839 such indebtedness and lien on the premises and improvements shall exist in favor of the *839 contractor for such contract price less the amount reasonably necessary to complete the contract.

It was said in *Davidson v. Clearman, supra,* at p. 51: "There are no jury findings as to the amount of money which would be required to complete the contract; therefore, this provision cannot be applied in this case. In addition and *more important is the fact that the recovery was had under quantum meruit and not under the contract.*" [Emphasis added.]

Having determined that appellee **Rigby** had neither a constitutional lien, a statutory lien nor a contractual lien we sustain appellants' first point of error. The trial court's judgment was based upon the foreclosure of the liens—there being a provision that "no party to this suit shall be personally liable for the sum set out in (b) above [$30,000 recovered in the suit by **Rigby** against Murphreys]." This provision is not attacked by either party here.

Appellee contends that his suit against the Murphreys for debt and money judgment without asserting or attempting to foreclose a lien against the property does not waive nor evidence an intention to waive any lien rights he may have had. The authorities cited by appellee are distinguishable from the case at bar. The cases **Rigby** cites stand for the proposition that where there is a debt secured by a note, in turn secured by a lien, the note and lien constitute separate obligations so that suit may be had on the note to obtain a personal judgment, and later suit may be had on the lien if the personal judgment were not satisfied. Where there is no note, but merely a debt secured by a lien, the lien is an incident of and inseparable from the debt. *University Savings and Loan Ass'n v. Security Lumber Co.,* 423 S.W.2d 287, 292 (Tex.1967). When one sues on the debt, the lien is thereby necessarily implicated, and both must be put in issue. If the lien is not put in issue, it is abandoned. In the instant case, there is no note to constitute an obligation separate from the lien, and **Rigby's** suit against the Murphreys was only for a debt based upon quantum meruit and not to foreclose a lien.

In view of our disposition of this cause we do not reach appellants' other points.

The judgment of the trial court is reversed, and judgment is here rendered that appellee **Rigby** take nothing.

[1] "SPECIAL ISSUE NO. 1

"Do you find from a preponderance of the evidence that Roy **Rigby** performed his obligations to the Murphreys under the contract of April 15, 1971.

"In connection with the above issue, you are instructed that one party is relieved of his obligation to continue his performance under a contract after the other party has failed to perform his obligations under the contract.

"Answer `We do' or `We do not'.

"Answer: `We do.'

"SPECIAL ISSUE NO. 2

"Do you find from a preponderance of the evidence that the Stone Fort National Bank through its loan officer and employee, Elbert Sowell, had

notice of the work and lien of plaintiff Roy **Rigby** at the time of the execution of the Deed of Trust by W. C. (Patrick) Murphree [sic] and wife, Zuma Murphree [sic] on May 5, 1971?

"ANSWER: `We do' or `We do not'

"ANSWER: `We do'

["By the word `Notice' as used in this charge is meant knowledge of the existence of the fact inquired about, or knowledge of facts which would naturally lead a prudent person to make an inquiry which would lead to discovery of the fact inquired about."]

"SPECIAL ISSUE NO. 3

"Do you find from a preponderance of the evidence that the failure of Roy **Rigby** to warn R. M. **Taylor** of his lien, misled R. M. **Taylor** to his injury so as to estop Roy **Rigby** from now asserting his lien?

"ANSWER: `We do' or `We do not'

"ANSWER: `We do not'

"SPECIAL ISSUE NO. 4

"Do you find from a preponderance of the evidence that Roy **Rigby** waived his claim to a lien on the land involved in this suit?

"Answer `We do' or `We do not'.

"Answer: `We do not'

["You are instructed, that in connection with this charge, the term `Waiver' is meant, an intentional relinquishment of a known legal right available to a party."]

"SPECIAL ISSUE NO. 5

"Do you find from a preponderance of the evidence that R. M. **Taylor** did not have actual knowledge of Roy **Rigby's** lien on the land involved in this suit, and did not have actual knowledge of any fact or facts that would cause a party of ordinary prudence to make inquiry as to such claim on or before April 4, 1972?

"ANSWER: `He did have' or `He did not have'

"ANSWER: `He did have'

"In connection with the above issue, you are instructed that by the term `actual knowledge' is meant knowledge which will be imputed and may be implied from circumstances where the circumstances known to one concerning a matter in which he is interested are sufficient to require him, as an honest and prudent person, to investigate concerning the rights of others in the same matter and diligent investigation will lead to discovery of any right conflicting with his own.

"SPECIAL ISSUE NO. 6

"What sum of money do you find from a preponderance of the evidence to be the value of the improvements made by Roy **Rigby** to the 30.5 acre tract in question?

"ANSWER IN DOLLARS AND CENTS:

"ANSWER: `$33,000.00.'"

[2] Statutes cited are Texas Revised Civil Statutes unless otherwise indicated.

IN THE SUPREME COURT OF TEXAS

NO. 01-0619

TEXAS DEPARTMENT OF PARKS AND WILDLIFE, PETITIONER,

v.

MARIA MIRANDA AND RAY MIRANDA, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued October 30, 2002

JUSTICE WAINWRIGHT delivered the opinion of the Court with respect to parts I., II., III.A., III.B., III.C.2., III.C.3., III.D., and IV., in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE OWEN, and JUSTICE SMITH joined, and a plurality opinion with respect to Part III.C.1., in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, and JUSTICE SMITH joined.

JUSTICE JEFFERSON filed a dissenting opinion.

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE O=NEILL and JUSTICE SCHNEIDER joined.

Maria Miranda sustained injuries after a tree limb fell on her at Garner State Park in Uvalde County. Maria and her husband Ray sued the Texas Parks and Wildlife Department,[1] alleging negligence and gross negligence. The Department filed a plea to the jurisdiction, to which it attached supporting evidence, and argued that sovereign immunity barred the Mirandas=

[1] The Mirandas originally named the ATexas Department of Parks and Wildlife@ as defendant but corrected the name to the ATexas Parks and Wildlife Department@ in their third amended petition. Because the parties and lower courts retained the original style of the case, we retain that style but in our opinion refer to the Department by its correct name.

claims. The trial court denied the plea to the jurisdiction and a unanimous court of appeals affirmed, holding that the trial court could not consider evidence in support of the plea because the Department did not allege that the Mirandas= pleadings were a sham for the purpose of wrongfully obtaining jurisdiction. 55 S.W.3d 648, 652.

In accord with our decision in *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000), we hold that the trial court in this case was required to examine the evidence on which the parties relied to determine if a fact issue existed regarding the alleged gross negligence of the Department. Due to the unusual confluence of standards erected by the Legislature for waiver of sovereign immunity in the Texas Tort Claims Act and the recreational use statute, plaintiffs must plead gross negligence to establish subject matter jurisdiction. Further, if the plaintiffs= factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal plaintiffs must raise at least a genuine issue of material fact to overcome the challenge to the trial court=s subject matter jurisdiction. Because the Mirandas failed to raise a genuine issue of material fact regarding the alleged gross negligence of the Department, we conclude that the trial court lacked subject matter jurisdiction over this lawsuit. Therefore, we reverse the judgment of the court of appeals and render judgment dismissing the case.

I. Factual and Procedural Background

The Mirandas= third amended petition contains the following allegations: In April 1998, the Mirandas and their family were camping and picnicking as paying guests at Garner State Park, owned and operated by the Texas Parks and Wildlife Department. The Mirandas asked a park ranger to recommend a campsite that would be safe for children. While standing next to a picnic table at the recommended campsite, a falling tree branch approximately twelve inches in

diameter and fifteen feet long struck Maria on the head. As a result of the incident, Maria suffered extensive injuries to her head, neck, and spine. Ray suffered mental anguish and other damages related to his wife=s injuries.

On May 7, 1999, the Mirandas filed suit against the Department, alleging negligence and later amended their suit to add gross negligence claims. With respect to the gross negligence claims, the Mirandas alleged that the Department Aknew of the dangers of its falling tree branches, failed to inspect, failed to prune, failed to alleviate or remove the danger, and consciously and deliberately failed to warn Plaintiffs of the extremely dangerous condition,@ Aknew that its property contained hidden, dangerous defect [sic] in that its tree branches which have not been inspected or pruned regularly fall,@ failed Ato make safe the dangerous condition of its campsite trees,@ and Afailed to warn or make reasonably safe the dangerous condition of which it was aware.@ In addition, the Mirandas alleged that the Department=s conduct was Awillful, wanton, or grossly negligent.@

Over a year after the Mirandas filed suit and after the parties conducted discovery, the Department filed a plea to the jurisdiction and motion to dismiss, arguing that the Mirandas= allegations were insufficient to invoke a waiver of the Department=s sovereign immunity under the standard established in the Tort Claims Act and the recreational use statute.[2] TEX. CIV. PRAC. & REM. CODE " 101.001-.109; *id.* " 75.001-.004. The Department attached evidence in support of its plea. The Mirandas filed a response to the Department=s plea and their third amended original petition. In their response, the Mirandas stated that they relied on evidence attached to the Department=s plea, including written discovery responses from the Department

[2] The Department also moved for summary judgment under Texas Rule of Civil Procedure 166a(b)-(c)and 166a(I). The trial court denied both motions, but the Department does not appeal the trial court=s denial of either motion.

and the deposition the Mirandas took of assistant park manager Craig VanBaarle. At the trial court=s hearing on the Department=s plea, the parties addressed the allegations in the Mirandas= third amended original petition. The next day, the trial court denied the plea. The Department filed this interlocutory appeal claiming that the trial court erroneously denied its plea to the jurisdiction and motion to dismiss. *Id.* ' 51.014(a)(8). The court of appeals affirmed the trial court=s denial of the plea, stating that the Mirandas pled a premises defect cause of action based on gross negligence under the recreational use statute. 55 S.W.3d at 652. The court of appeals rejected the Department=s argument that there was no evidence to support gross negligence, holding that Athe trial court was not authorized to inquire into the substance of the claims because the Department did not specifically allege that the Mirandas= allegations were pled merely as a sham for the purpose of wrongfully obtaining jurisdiction.@ *Id*. (citing *Bland*, 34 S.W.3d at 554 and *Rylander v. Caldwell*, 23 S.W.3d 132, 135 (Tex. App.BAustin 2000, no pet.)).

The Department contends that the court of appeals erred in relying solely upon the conclusory allegations found in the Mirandas= petition to affirm the trial court=s denial of the Department=s plea to the jurisdiction and in disregarding the Department=s evidence submitted with its plea. Specifically, the Department contends that gross negligence is a jurisdictional prerequisite to the Mirandas= claims and that its evidence affirmatively negates gross negligence. The Department further argues that because the Mirandas failed to plead specific facts alleging gross negligence in their petition or introduce evidence to controvert the evidence in the Department=s plea, they failed to establish subject matter jurisdiction to proceed with the litigation.

After originally dismissing the petition for want of jurisdiction, we granted the Department=s petition on motion for rehearing. Before we consider the substantive issues presented, we first determine whether we have jurisdiction over this interlocutory appeal.

II. Conflicts Jurisdiction

When there is no dissent in the court of appeals, this Court has jurisdiction over interlocutory appeals only if the court of appeals= decision Aholds differently@ or conflicts with Aa prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case.@ TEX. GOV=T CODE ' 22.001(a)(2);[3] *Schein v. Stromboe*, 102 S.W.3d 675, 687 (Tex. 2002); *Tex. Natural Res. Conservation Comm=n v. White*, 46 S.W.3d 864, 867 (Tex. 2001). Two decisions conflict for purposes of establishing our jurisdiction under section 22.001(a)(2) when the two cases are so similar that the decision in one case is necessarily conclusive of the decision in the other. *Schein*, 102 S.W.3d at 687-88; *White*, 46 S.W.3d at 867. AThe conflict must be on the very question of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court.@ *Christy v. Williams*, 298 S.W.2d 565, 568-69 (Tex. 1957) (citation omitted).

The Department contends that this Court has jurisdiction over its interlocutory appeal because the court of appeals= decision here conflicts with our opinion in *Bland*. In *Bland*, we held that a trial court Amay consider evidence *and must do so when necessary to resolve the jurisdictional issues raised*.@ 34 S.W.3d at 555 (emphasis added). While recognizing that Aa

[3] The Legislature amended section 22.001 of the Government Code, effective September 1, 2003. Act of June 11, 2003, 78th Leg., R.S., Ch. 204 (codified as section 22.001(e) of the Texas Government Code). The amendment, which applies to actions filed on or after September 1, 2003 and does not govern our jurisdiction in this case, provides that Aone court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.@

dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction,@ we explained that Abecause a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case.@ *Id.* at 554. AThe court should, of course, confine itself to the evidence relevant to the jurisdictional issue.@ *Id*. at 555.

In *Bland*, we included examples of when relevant evidence may be considered in determining whether jurisdiction has been established. *See id.* at 554. We also observed that when the defendant contends that the amount in controversy falls below the trial court=s jurisdictional limit, the trial court should limit its inquiry to the pleadings. *Id.* In that situation, we concluded, Athe plaintiff=s pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction.@ *Id*.

In this case, the court of appeals inaccurately stated and then misapplied *Bland*=s holding. 55 S.W.3d at 650-52. The court of appeals held that an inquiry behind the factual allegations pled in support of subject matter jurisdiction was improper unless the Department specifically alleged that the Mirandas= allegations were pled merely as a sham to wrongfully obtain jurisdiction. *Id.* at 652. This conflicts with our holding in *Bland* that a court *must* consider evidence when necessary to resolve the jurisdictional issues raised. 34 S.W.3d at 555; *see also County of Cameron v. Brown*, 80 S.W.3d 549, 556-57 (Tex. 2002) (considering pleadings and limited jurisdictional evidence in evaluating forseeability element of premises defect claim under the Tort Claims Act); *Tex. Dep=t of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001) (examining pleadings and limited jurisdictional evidence to determine

whether plaintiff affirmatively demonstrated waiver of sovereign immunity); *White*, 46 S.W.3d at 868 (analyzing the facts alleged by the plaintiff and to the extent relevant, evidence submitted by the parties, in considering whether plaintiff stated a claim for injuries caused by Amotor-driven equipment@ under the Tort Claims Act). In *Bland*, our preclusion of a trial court=s inquiry behind the facts pled in determining subject matter jurisdiction was limited to the jurisdictional amount. 34 S.W.3d at 554. Even this bar could be lifted, and evidence of the jurisdictional amount considered, in circumstances in which an adverse party asserts that the amount in controversy was pled as a sham to obtain jurisdiction.[4] *Id.* That circumstance is not at issue here. Thus, the court of appeals= holding conflicts with the same question of law that we decided in *Bland*, and the opinions cannot stand together. *Schein*, 102 S.W.3d at 689. This conflict provides the basis for our jurisdiction to consider the merits of the plea. *See* TEX. GOV=T CODE ' 22.001(a)(2).

III. The Department=s Plea to the Jurisdiction

A. Sovereign Immunity

[4] The plaintiff=s allegations in the petition of the amount in controversy control for jurisdictional purposes unless the party challenging jurisdiction pleads and proves that the plaintiff=s allegations of the amount in controversy were made fraudulently for the purpose of obtaining jurisdiction. *See Bland*, 34 S.W.3d at 554; *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996); *Tidball v. Eichoff*, 17 S.W. 263, 263 (Tex. 1886). We disapprove of courts of appeals= holdings that require a party to allege that pleadings, other than the jurisdictional amount, are fraudulent in order for the trial court to consider evidence, when otherwise necessary, of whether it has jurisdiction over a case. *See*, *e.g.*, *Sullivan v. Wilmer Hutchins Indep. Sch. Dist.*, 47 S.W.3d 529, 531 (Tex. App.BDallas 2000), *rev=d on other grounds*, 51 S.W.3d 293 (Tex. 2001); *Denton County v. Howard*, 22 S.W.3d 113, 117-18 (Tex. App.BFort Worth 2000, no pet.); *Tex. Dep=t of Mental Health & Mental Retardation v. Pearce*, 16 S.W.3d 456, 460 (Tex. App.BWaco 2000, pet. dism=d w.o.j.); *Tex. State Employees Union/CWA Local 6184 v. Tex. Workforce Comm=n*, 16 S.W.3d 61, 65, 66 (Tex. App.BAustin 2000, no pet.); *Dalmac Constr. Co. v. Tex. A & M Univ.*, 35 S.W.3d 654, 655 n.1 (Tex. App.BAustin 1999), *rev=d on other grounds*, *sub nom. Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591 (Tex. 2001); *Univ. of Houston v. Elthon*, 9 S.W.3d 351, 356 (Tex. App.BHouston [14th Dist.] 1999, pet. dism=d w.o.j.); *Curbo v. State*, *Office of the Governor*, 998 S.W.2d 337, 341-42 (Tex. App.BAustin 1999, no pet.); *City of Saginaw v. Carter,* 996 S.W.2d 1, 3 (Tex. App.BFort Worth 1999, pet. dism=d w.o.j.); *Bland Indep. Sch. Dist. v. Blue*, 989 S.W.2d 441, 447 (Tex. App.BDallas 1999), *rev=d*, 34 S.W.3d 547 (Tex. 2000).

In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit. *Tex. Dep=t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute on other grounds as stated in Little-Tex Insulation Co.*, 39 S.W.3d at 593; *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980); *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). The Texas Tort Claims Act provides a limited waiver of sovereign immunity. TEX. CIV. PRAC. & REM. CODE " 101.001-.109. Sovereign immunity includes two distinct principles, immunity from suit and immunity from liablity. *Jones*, 8 S.W.3d at 638; *Fed. Sign*, 951 S.W.2d at 405. Immunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction. *Jones*, 8 S.W.3d at 638; *Fed. Sign*, 951 S.W.2d at 405. The Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive: ASovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.@ TEX. CIV. PRAC. & REM. CODE ' 101.025(a); *State ex rel. State Dep=t of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 326 (Tex. 2002); *Miller*, 51 S.W.3d at 587. Thus, the Department is immune from suit unless the Tort Claims Act expressly waives immunity. *See* TEX. CIV. PRAC. & REM. CODE " 101.001(3)(A) (defining a governmental unit to include Aall departments@ of the state), 101.021, 101.025; *White*, 46 S.W.3d at 868.

The Tort Claims Act expressly waives sovereign immunity in three areas: A>use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property.=@ *Brown*, 80 S.W.3d at 554 (quoting *Tex. Dep=t of Transp. v. Able*, 35 S.W.3d 608, 611 (Tex. 2000)); *see* TEX. CIV. PRAC. & REM CODE ' 101.021. Section 101.058 of the Tort Claims Act further modifies a governmental unit=s waiver of immunity from suit by imposing

the limitations of liability articulated in the recreational use statute. TEX. CIV. PRAC. & REM. CODE ' 101.058 (ATo the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Tort Claims Act], Chapter 75 controls.@).

The recreational use statute provides:

> If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:
>
> (1) assure that the premises are safe for that purpose;
>
> (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
>
> (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

Id. ' 75.002(c)(1)-(3). Recreational use includes camping and picknicking, the activities in which the Mirandas were engaged at the state park when Maria was injured. *Id.* ' 75.001(3). As applied to a governmental unit, the recreational use statute limits liability even if the person pays to enter the premises. *Id*. ' 75.003(c) (excepting governmental units from the chapter=s exclusion of landowners who charge a fee for recreational use of land).

The recreational use statute limits the Department=s duty for premises defects to that which is owed a trespasser.[5] *Id.* The limited duty owed a trespasser is not to injure that person willfully, wantonly, or through gross negligence. *Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997). Therefore, a governmental unit waives sovereign immunity under the recreational use statute and the Tort Claims Act only if it is grossly negligent. TEX. CIV.

[5] The recreational use statute does not limit the liability of an owner, lessee, or occupant Awho has been grossly negligent or has acted with malicious intent or in bad faith.@ TEX. CIV. PRAC. & REM. CODE ' 75.002(d).

PRAC. & REM. CODE ' 75.002 (c)-(d); *City of Bellmead v. Torres*, 89 S.W.3d 611, 613 (Tex. 2002); *Timmons*, 947 S.W.2d at 193. A[G]ross negligence involves two components: (1) viewed objectively from the actor=s standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.@ *Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 245, 246 (Tex. 1999) (citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)).

B. Standard of Review

Sovereign immunity from suit defeats a trial court=s subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction. *Jones*, 8 S.W.3d at 637; *see also Hosner*, 1 Tex. at 769 (recognizing as appropriate procedure the challenge of a court=s subject matter jurisdiction through a plea to the jurisdiction). The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed. *Austin & N.W.R. Co. v. Cluck*, 77 S.W. 403, 405 (Tex. 1903) (A[T]here can be no doubt that the courts of Texas must look to the Constitution of this state, the enactments of the Legislature, and the common law for their authority to proceed . . . .@); *see also State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (AAs a general proposition, before a court may address the merits of any case, the court must have jurisdiction over the party or the property subject to the suit, jurisdiction over the subject matter, jurisdiction to enter the particular judgment, and capacity to act as a court.@); *Gentry v. Bowser & Lemmon*, 21 S.W. 569, 570 (Tex. Civ. App.BFort Worth 1893, no writ) (ACertainly the court has the right to hear the necessary evidence to enable it to decide as to whether or not it has power to try the case it is

sought to have it adjudicate, whether the allegations disclosing such want of jurisdiction appear in the petition of the plaintiff, or in the plea to the jurisdiction by the defendant.@).

Whether a court has subject matter jurisdiction is a question of law. *Tex. Natural Res. Conservation Comm=n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Whether a pleader has alleged facts that affirmatively demonstrate a trial court=s subject matter jurisdiction is a question of law reviewed *de novo*. Likewise, whether undisputed evidence of jurisdictional facts establishes a trial court=s jurisdiction is also a question of law. However, in some cases, disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact. *See Gates v. Pitts,* 291 S.W. 948, 949 (Tex. Civ. App.BAmarillo 1927, no writ); *Gentry*, 21 S.W. at 570; *see also Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 n.3 (1st Cir. 2001) (observing that in certain situations, the predicate facts can be so inextricably linked to the merits of the controversy that the district court may Adefer resolution of the jurisdictional issue until the time of trial@); *Cameron v. Children=s Hosp. Med. Ctr.*, 131 F.3d 1167, 1170 (6th Cir. 1997) (A[W]hether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case.@); *Williamson v. Tucker*, 645 F.2d 404, 413 n.6, 416 n.10 (5th Cir. 1981) (suggesting that a federal district court=s role in determining jurisdictional facts may be more limited in cases in which the jurisdictional attack implicates the merits of plaintiff=s cause of action). In this case, we address a plea to the jurisdiction in which undisputed evidence implicates both the subject matter jurisdiction of the court and the merits of the case.

When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court=s jurisdiction to hear the cause. *Tex.*

Ass=n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993). We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders= intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court=s jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. *Brown*, 80 S.W.3d at 555. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.*

However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *See Bland*, 34 S.W.3d at 555 (confining the evidentiary review to evidence that is relevant to the jurisdictional issue). When the consideration of a trial court=s subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable. *Id.* at 554. Then, in a case in which the jurisdictional challenge implicates the merits of the plaintiffs= cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists. The United States Supreme Court and all of the federal circuits have authorized federal district courts to consider evidence in deciding motions to dismiss for lack of subject matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1); *Land v. Dollar*, 330 U.S. 731, 735 & n.4, (1947), *overruled by implication on other grounds by Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (observing that as a general rule, district courts have authority to inquire Ainto the facts as they exist@ Aby affidavits or otherwise@ as well as the pleadings

when determining whether the court has subject matter jurisdiction).[6] If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

We acknowledge that this standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c). We adhere to the fundamental precept that a court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided. This standard accomplishes this goal and more. It also protects the interests of the state and the injured claimants in cases like this one, in which the determination of the subject matter

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[6] *See, e.g., Harris v. P.A.M. Transp., Inc.,* 339 F.3d 635, 637 n.4 (8th Cir. 2003) (acknowledging district court=s authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1)); *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001 (7th Cir. 2003) (observing that when considering a motion for dismissal for lack of subject matter jurisdiction, A>[t]he district court may properly . . . view whatever evidence has been submitted on the issue=@ (quoting *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1997))); *Sizova v. Nat=l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002) (noting district court=s A>wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)=@ (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995))); *Valentin*, 254 F.3d at 363 (district court has Abroad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction@); *Ass=n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (A>district court obviously does not abuse its discretion by looking to . . . extra-pleading material=@ in deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989))); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (allowing district court to Arefer to evidence outside the pleadings@ to resolve a Rule 12(b)(1) motion); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (AIn ruling on a Rule 12(b)(1) motion, the court may consider exhibits outside the pleadings.@); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (acknowledging a trial court=s Aauthority to consider evidence presented beyond the pleadings . . . which may include considering affidavits, allowing further discovery, hearing oral testimony, conducting an evidentiary hearing@); *Herbert v. Nat=l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992) (A[W]here necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court=s resolution of disputed facts.@); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (noting that Asubstantial authority@ acknowledges the trial court=s freedom to consider disputed evidence when deciding a Rule 12(b)(1) motion) (citations omitted); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) (A[T]he district court may consider affidavits, allow discovery, hear oral testimony, order an evidentiary hearing, or even postpone its determination if the question of jurisdiction is intertwined with the merits.@); *Mortensen v. First Fed. Sav. & Loan Ass=n*, 549 F.2d 884, 891 (3d Cir. 1977) (acknowledging that Asubstantial authority@ allows trial courts to weigh the evidence of disputed facts when considering a Rule 12(b)(1) motion); *see also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE ' 1364, at 468-469 (2d ed. 1990).

jurisdiction of the court implicates the merits of the parties= cause of action. The standard allows the state in a timely manner to extricate itself from litigation if it is truly immune. However, by reserving for the fact finder the resolution of disputed jurisdictional facts that implicate the merits of the claim or defense, we preserve the parties= right to present the merits of their case at trial. Similar to the purpose of a plea to the jurisdiction, which is to defeat a cause of action for which the state has not waived sovereign immunity (usually before the state has incurred the full costs of litigation), the purpose of summary judgments in Texas is ">to eliminate patently unmeritorious claims and untenable defenses.=" *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) (quoting *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979)). By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to Aput on their case simply to establish jurisdiction.@ *Bland*, 34 S.W.3d at 554. Instead, after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue. *See Huckabee v. Time Warner Entm=t Co. L.P.*, 19 S.W.3d 413, 420 (Tex. 2000); *Phan Son Van v. Pena*, 990 S.W.2d 751, 753 (Tex. 1999).

Appellate courts reviewing a challenge to a trial court=s subject matter jurisdiction review the trial court=s ruling *de novo*. *IT-Davy*, 74 S.W.3d at 855. When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant. *See Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

In his dissent JUSTICE JEFFERSON criticizes this standard of review as depriving plaintiffs responding to a plea of the procedural protections of a motion for summary judgment, including a twenty-one day notice period or an adequate time to conduct discovery. TEX. R. CIV. P. 166a(c), 166a(i). However, the scheduling of a hearing of a plea to the jurisdiction is left to the discretion of the trial court, which is in the best position to evaluate the appropriate time frame for hearing a plea in any particular case. This procedure does not dramatically differ from that outlined in Texas Rule of Civil Procedure 120a governing special appearances. Although Rule 120a requires any affidavits to be used at a hearing on a special appearance to be served at least seven days before the hearing, it does not specify the length of a notice period and is therefore presumably subject to the three-day notice period of Rule 21. TEX. R. CIV. P. 21. Rule 120a allows the trial court to order a continuance and allow time for discovery if the development of the case requires it. Nothing prevents a trial court from doing the same with a plea to the jurisdiction where evidence is necessary.

Many other procedures in Texas practice B ranging from a trial court=s rulings on motions to strike intervention to the timing of a class certification decision to even the alteration of the summary judgment notice periods - also Adepend[] . . . upon the wise exercise of discretion by the trial court.@ *Union Carbide Corp. v. B.D. Moye*, 798 S.W.2d 792, 794 (Tex. 1990) (Hecht, J., concurring); *see, e.g.,* TEX. R. CIV. P. 42(c)(1)(A) (directing a trial court to determine whether a suit may be maintained as a class action Aat an early practicable time@); TEX. R. CIV. P. 166a(c) (A*Except on leave of court*, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing.@) (emphasis added); *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990) (observing that the trial court has broad discretion in

ruling on a motion to strike intervention, even though Rule 60 does not provide explicit guidelines for the scheduling of a hearing or the evaluation of evidence). Thus, the Texas civil procedural scheme entrusts many scheduling and procedural issues to the sound discretion of the trial court, subject to appellate review. Of course, Texas practice and rules also allow the parties to request additional time to prepare for certain hearings or to conduct discovery upon a showing of sufficient cause, and the court=s ruling on such a motion is reviewed for an abuse of discretion. *See, e.g.,* TEX. R. CIV. P. 166a(g), 247, 251, 252. We note, also, that federal practice does not prescribe a procedure for the consideration of jurisdictional evidence but instead allows the district courts to tailor a method to suit the requirements of the cases before them. *Land*, 330 U.S. at 735 n.4; *Moran*, 27 F.3d at 172. In any event, the Mirandas do not complain that they had an inadequate opportunity to conduct sufficient discovery, nor did they request a continuance to do so.

C. Waiver of Immunity Based on Premises Defects

1. The Mirandas= Pleadings

The Mirandas contend that their pleadings fall within the Tort Claims Act=s waiver of immunity for both premises defects and injuries arising out of conditions or use of property. The Act provides that a state agency is liable for injury and death caused by Aa condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.@ TEX. CIV. PRAC. & REM. CODE ' 101.021(2). The Mirandas= pleadings allege injuries caused by a falling tree limb, which falls under the definition of real property B *i.e.*, A>land, and generally whatever is erected or growing upon or affixed to land.=@ *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000) (quoting *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985) (Gonzalez, J., concurring)). The

Mirandas= allegation of an injury caused by a tree limb falling on Maria Miranda constitutes an allegation of a condition or use of real property and is an allegation of a premises defect.

To state a claim under the recreational use statute, the Mirandas must allege sufficient facts to establish that the Department was grossly negligent. *See* TEX. CIV. PRAC. & REM. CODE " 75.002 (c)-(d), 101.021, 101.025, 101.058. The Mirandas contend that both their allegations and the evidence presented on the plea establish claims of gross negligence. Looking first to the relevant factual allegations in the third amended petition, the Mirandas claim that (1) they specifically asked the Department=s employee for a recommendation of a safe camping location; (2) at the campsite, Maria was struck by a falling tree branch that severely injured her; (3) the unpruned, uninspected tree branches created a dangerous, defective condition on the premises of which the Department was aware; (4) the Department knew of the dangers of its falling tree branches but failed to inspect, prune, alleviate the dangers, or otherwise make safe the dangerous conditions of its trees; (5) the Department consciously and deliberately failed to warn the Mirandas of the extremely dangerous condition; and (6) the Department=s conduct was willful, wanton, or grossly negligent. A liberal construction of these allegations, as required, demonstrates that the Mirandas stated a claim against the Department for gross negligence. This conclusion should not be read as a suggestion that the Department has a duty to inspect every tree in each of the many parks that the Department manages. Instead, in this case, the Mirandas alleged sufficient facts to survive a plea to the jurisdiction based solely on the pleadings.

JUSTICE JEFFERSON=s dissent contends that the Mirandas= third amended petition does not state a claim for gross negligence because the allegations are conclusory and do not assert enough specific facts alleging that the Department had actual subjective awareness of the risk involved and proceeded, nevertheless, with conscious indifference. He suggests that to state

a claim the Mirandas should have pled that the Department had Aactual knowledge that the branch would fall yet nevertheless instructed Maria to camp beneath it.@ __ S.W.3d at __. The pleading hurdle he seeks to erect would be groundbreaking, indeed, extending beyond current requirements under our rules of civil procedure and case law. Rules 45 and 47 require that the original pleadings give a short statement of the cause of action sufficient to give the opposing party fair notice of the claim involved. TEX. R. CIV. P. 45, 47; *Paramount Pipe & Supply Co., Inc. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988); *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981). Rule 45 does not require that the plaintiff set out in his pleadings the evidence upon which he relies to establish his asserted cause of action. *Muhr*, 749 S.W.2d 494-95. While it is clear that A[t]he party suing the governmental entity must establish the state=s consent, which may be alleged either by reference to a statute or to express legislative permission,@ *Jones*, 8 S.W.3d at 638, and that A[m]ere reference to the Tort Claims Act does not establish the state=s consent to be sued and thus is not enough to confer jurisdiction on the trial court,@ *Miller*, 51 S.W.3d at 587, the Mirandas= pleadings allege sufficient facts to bring their claims under the recreational use statute and the Tort Claims Act.

Although facts alleged in a petition should not be improperly stretched to state a claim for gross negligence, JUSTICE JEFFERSON=s pleading standard for gross negligence would be virtually impossible to meet, even when grossly negligent conduct occurred, absent an admission of liability. His standard requires specific factual allegations in an original petition of what the defendant knew and thought B *i.e.*, its state of mind. His pleading hurdle would require discovery into the very extrinsic facts which he bemoans consideration of in the plea to the jurisdiction. The Mirandas= third amended petition provided sufficient notice to ascertain the nature and basic issues of the controversy and the evidence that probably would be relevant.

JUSTICE JEFFERSON also contends that the Mirandas are entitled to replead. As a practical matter, the Mirandas have already repled to try to cure the Adefects@ that JUSTICE JEFFERSON raises. The Mirandas no doubt filed their third amended petition, in which allegations of gross negligence were raised for the first time in this lawsuit, in response to the Department=s plea to the jurisdiction. However, because the Mirandas= third amended petition satisfies the notice pleading requirements of our procedural rules, the Mirandas do not need, nor are they entitled to, an opportunity to replead. *See* TEX. R. CIV. P. 47.

2. The Department=s Evidence

The Department challenged the Mirandas= pleadings and also submitted evidence to controvert the factual allegations supporting jurisdiction. We consider the relevant evidence submitted to decide this jurisdictional challenge. *See Bland*, 34 S.W.3d at 555. The Department attached the deposition testimony of Craig VanBaarle, the assistant park manager for Garner State Park, to its plea to the jurisdiction. VanBaarle testified that while the park normally inspects and maintains its trees, tree limbs are only pruned or trimmed if they appear to be dead. According to VanBaarle, the tree limb that fell on Maria was living. He testified that both dead and living tree limbs have fallen at various locations in the park. He testified that the park knows that tree limbs can fall and have fallen on approximately twenty occasions. However, no one had ever been injured by falling tree limbs. He also testified that the tree limb that injured Maria Miranda fell from fifty feet above the campsite and that the park employees would not have been able to see the limb clearly without climbing the tree even if the limb had been dead.

In addition, the Department attached the affidavit of Roy B. Inks, operations and maintenance specialist at Garner State Park. Inks= responsibilities included supervision of park maintenance including preservation and maintenance of trees at campsites. According to his

affidavit, Inks inspected the campsite after the accident. His examination of the tree and the fallen branch failed to reveal any indication that the branch was dead, decaying, or in need of pruning. Inks opined that there was no reason to conclude that the tree presented a dangerous or hazardous condition. Inks further opined that the branch that struck Maria Abroke away from the tree as a result of an unpredictable and unforseeable phenomenon known as >sudden branch drop syndrome.=@ Inks explained that A[i]t would be rare for anyone to be able to predict which branches will fall and which ones will not@ as a result of this phenomenon. The Mirandas cite the Department=s evidence as proof that the Department knew about sudden branch drop syndrome and did nothing about it, thus establishing gross negligence. The Mirandas did not cite any controverting evidence in their response to the Department=s plea.

We first examine this evidence to determine whether it establishes that the Department was grossly negligent. We have observed that with regard to the subjective component of gross negligence, it is the defendant=s state of mind B whether the defendant knew about a peril but nevertheless acted in a way that demonstrated that he did not care about the consequences B that separates ordinary negligence from gross negligence. *Louisiana-Pacific*, 19 S.W.3d at 246-47. We search the record for evidence that the Department=s acts or omissions demonstrate that it did not care about the consequences to the Mirandas of a known extreme risk of danger. The Mirandas fail to point to any evidence, and the record contains no evidence, that shows that sudden branch drop syndrome constitutes an extreme risk of danger or that the Department had actual, subjective knowledge of that risk but nevertheless proceeded in conscious disregard for the safety of others. Nor is there any evidence that the Department could have taken any reasonable steps to minimize the dangers of an Aunforseeable@ and Aunpredictable@ phenomenon. We conclude that the evidence in the record establishes that the Department was

not grossly negligent and that the Mirandas have failed to raise a fact question regarding the Department=s alleged gross negligence. The Mirandas fall short of satisfying the requirements for the Legislature=s limited grant of a waiver of sovereign immunity from suit under the applicable statutes. Therefore, the trial court lacked subject matter jurisdiction.

3. Dissent

In his dissent, JUSTICE BRISTER takes the view that all pleas to jurisdiction based on immunity must take the form of two Astandard@ or Aestablished@ motions B either special exceptions or motions for summary judgment. __ S.W.3d at __. This approach might be appropriate, if we were starting from scratch. Given that we are not writing on a blank slate, that pleas have been a useful procedural vehicle in Texas for over 150 years, and that use of its counterpart (Federal Rule of Civil Procedure 12(b)(1)) to challenge subject matter jurisdiction in the federal judicial system when evidence is involved has been authorized by every federal circuit court, the Court declines to abolish by written opinion such pleas to the jurisdiction.

The plea to the jurisdiction was included in procedural rules promulgated by this Court in 1877 and has been used as a procedural vehicle to challenge subject matter jurisdiction in trial courts for over a century and a half. *See* TEX. R. CIV. P. 85; TEX. DIST. CT. R. 7, 47 Tex. 597, 617 (1877); *Hosner,* 1 Tex. at 769. In fact, as early as 1893, Texas courts indicated that evidentiary challenges to subject matter jurisdiction raised in pleas to the jurisdiction should be considered by trial courts. *See, e.g., Gates,* 291 S.W. at 949; *Gentry*, 21 S.W. at 570. With such a long lineage, one wonders why a plea to jurisdiction does not qualify as a Astandard@ or Aestablished@ motion. Perhaps a second mention in the Texas Rules of Civil Procedure would suffice.

We decide that refining the rules for considering a plea supported by evidence is a better approach than eliminating the motion. This approach is consistent with precedent, is not disruptive to civil practice going back more than a century, and furthers the legislative purpose of timely adjudicating subject matter jurisdiction when the immunity and liability facts are the same.

There is a suggestion in the dissents that confirming in this opinion the authority of trial courts to consider evidence in a plea to the jurisdiction is unfair to the parties in this case. The facts undercut this assertion. At the trial court, both parties relied on extrinsic evidence in briefing the plea, and both parties had extrinsic evidence on file with the court. Furthermore, plaintiffs expressly stated in their response to the plea that they were relying on ADefendants= responses to discovery requests, and upon the deposition of Craig VanBaarle [the Department=s assistant park manager].@ In fact, the Mirandas deposed VanBaarle months before the Department filed its plea. There is good reason why Plaintiffs have not argued unfair surprise. Given Texas precedents and the actions of the parties, there was none.

D. Waiver of Immunity Based on Condition or Use of Tangible Property

The Mirandas assert that their pleadings also state a cause of action for injuries resulting from a condition or use of tangible property. The allegations in the Mirandas= third amended petition concern only the Department=s failure to act to reduce risks of falling tree limbs and failure to warn the Mirandas of the risk of falling tree limbs. These allegations comprise the elements of their premises defect claim. The Tort Claims Act=s scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in section 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property. *See State v. Tennison*, 509 S.W.2d

560, 562 (Tex. 1974) (rejecting the argument that the Tort Claims Act Acreates two entirely separate grounds of liability@ for negligent use or condition of real property and premise defect, but instead interpreting the premises defect provision to further limit the waiver of immunity for negligent use or condition of real property). Other Texas courts have recognized that to allow plaintiffs to characterize premises defect claims as claims caused by the negligent condition or use of personal or real property would render the Legislature=s heightened requirements for premises defect claims meaningless. *See, e.g., State v. Estate of Horton*, 4 S.W.3d 53, 54 (Tex. App.BTyler 1999, no pet.) (stating that once a claim is determined to be a premises defect, the claimant is limited to the provisions delineated by the section on premises defects and may not assert a general negligence theory); *accord Laman v. Big Spring State Hosp.*, 970 S.W.2d 670, 671-72 (Tex. App.BEastland 1998, pet. denied); *Univ. of Texas-Pan Am. v. Valdez*, 869 S.W.2d 446, 450 (Tex. App.BCorpus Christi 1993, writ denied); *Hawley v. State Dep=t of Highways and Pub. Transp.*, 830 S.W.2d 278, 281 (Tex. App.BAmarillo 1992, no writ). Accordingly, we conclude that the Mirandas have not established a cause of action under the Tort Claims Act for condition or use of tangible property separate from their premises defect claim.

IV. Conclusion

Trial courts should decide dilatory pleas early B at the pleading stage of litigation if possible. Here, the Legislature=s mandate is not so simple. By statute, waiver of sovereign immunity for recreational use of the Department=s premises can only be effected by a showing that it acted with gross negligence. Due to the standard erected (gross negligence), the determination of whether immunity was waived may require consideration of extrinsic facts after reasonable opportunity for targeted discovery. To preclude consideration of extrinsic facts when necessary to decide a plea to the jurisdiction would require a trial on the merits for many cases

that do not need it, waste the resources of the courts and the parties in the case, and involve state courts in rulings on the merits in cases over which they have no jurisdiction.

For the reasons explained, we conclude that the Department established that it was not grossly negligent and that the Mirandas failed to raise a fact issue on that point. Thus, the trial court lacked subject matter jurisdiction over the action. The judgment of the court of appeals is reversed and the Mirandas= action dismissed for lack of subject matter jurisdiction.

_____

J. Dale Wainwright
Justice

OPINION DELIVERED: April 2, 2004

74 S.W.3d 849 (2002)

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, Petitioner,

v.

IT-DAVY, Respondent.

No. 99-1114.

Supreme Court of Texas.

Argued September 5, 2001.
Decided April 11, 2002.

851 *851 John Cornyn, Attorney General of the State of Texas, Howard G. Baldwin, First Assistant Attorney General, Julie Caruthers Parsley, Patrick J. Feeney, Linda Eads, William Rich Thompson, and Jeffrey S. Boyd, Austin, for Petitioner.

Bob E. Shannon, Kevin M. Sadler, Baker & Botts, Scott K. Field, York, Keller & Field, L.L.P., Austin, for Respondent.

JAMES A. BAKER, Justice.

The issue in this case is whether the sovereign-immunity doctrine bars IT-**Davy**, a general contractor, from suing the Texas **Natural** Resource **Conservation** Commission, a state agency, for claims arising from the TNRCC's alleged breach of contract. IT-**Davy** alleges that it fully performed under its contract with the TNRCC. Further, IT-**Davy** alleges that the TNRCC accepted the full performance but did not fully pay for the accepted services. The TNRCC filed a plea to the jurisdiction, arguing that sovereign immunity bars IT-**Davy's** claims. The trial court denied the jurisdictional plea. The court of appeals affirmed the trial court's order because it determined that IT-**Davy's** allegations were "sufficient to show that the [TNRCC] has engaged in conduct, beyond the mere execution of a contract, that waives its immunity from suit." 998 S.W.2d 898, 902. We disagree.

We conclude that the sovereign-immunity doctrine bars IT-**Davy's** suit. We also conclude that neither the TNRCC's conduct nor the express terms of the contract waived such immunity. Moreover, neither the Water Code nor the Declaratory Judgment Act waive the TNRCC's sovereign immunity from suit under the facts here. Accordingly, we reverse the court of appeals' judgment and dismiss IT-**Davy's** claims for want of jurisdiction.

I. BACKGROUND

In 1990, the TNRCC's predecessor, the Texas Water Commission, accepted IT-**Davy's** bid to clean up the Sikes Disposal Pits, a hazardous waste site in Houston. The contract provides for "equitable adjustments" if "conditions materially differ and ... cause an increase or decrease in [IT-**Davy's**] cost or the time required to perform any part of the work...." Additionally, the contract's "remedies provision" states that all claims or disputes related to the agreement "will be decided by arbitration if the parties mutually agree to arbitration or otherwise in a court of competent jurisdiction in the City of Austin, Travis County, Texas."

The parties do not dispute that IT-**Davy** performed the clean-up or that the TNRCC paid IT-**Davy** the full contract price. However, IT-**Davy** claims it incurred additional expenses and lost profits because materially different site conditions increased its clean-up costs. Accordingly, IT-**Davy** requested equitable adjustments. After meetings and informal mediation, the TNRCC agreed to pay IT-**Davy** an additional $700,000 over the contract price. But IT-**Davy**, believing the TNRCC owes an additional $6,723,655 in extra costs and lost profits, sent a detailed letter to the TNRCC demanding more money. The TNRCC's executive director rejected IT-**Davy's** demand for additional equitable adjustments. The rejection letter states, in part:

852 *852 We believe we have paid all amounts due not only under the original contract but also under the numerous contract amendments that we agreed to during the course of the cleanup.

If you feel the need to pursue additional remedies, we intend to participate in those with the same good faith we have demonstrated over the past several years. But we must decline your most recent demand for payment.

IT-**Davy** next sought to arbitrate the dispute under the contract's "remedies provision." But the TNRCC denied IT-**Davy's**

request. Then, without obtaining legislative consent, IT-**Davy** sued the TNRCC in a Travis County district court. IT-**Davy** sought a declaration about its rights and the TNRCC's legal obligations under the contract. Also, IT-**Davy** sought damages for breach of contract, negligent misrepresentation, quantum meruit, and promissory estoppel.

The TNRCC filed a plea to the jurisdiction based on sovereign immunity. After a hearing, the trial court denied the plea. The TNRCC filed an interlocutory appeal. *See* **Tex**. Civ. Prac. & Rem.Code § 51.014(a)(8). The court of appeals determined that TNRCC waived immunity from suit by engaging in conduct "beyond the mere execution of a contract." 998 S.W.2d at 902. Specifically, the court of appeals concluded that IT-**Davy's** allegations—that IT-**Davy** fully performed under the contract, did additional work at the TNRCC's express request, and did not receive full payment from the TNRCC for this additional work—were sufficient to waive the TNRCC's immunity from suit. 998 S.W.2d at 902.

The TNRCC petitioned this Court to review the court of appeals' decision. While the TNRCC's petition was pending, we decided three related sovereign-immunity cases: *General Services Commission v. Little-**Tex** Insulation Co.,* consolidated with *Texas A & M University v. Dalmac Construction Co.,* 39 S.W.3d 591 (**Tex**. 2001); and *Texas Department of Transportation v. Aer-Aerotron, Inc.,* 39 S.W.3d 220 (**Tex**.2001). We then granted the TNRCC's petition to determine whether sovereign immunity bars IT-**Davy's** suit.

II. JURISDICTION

The Texas Government Code generally makes jurisdiction over interlocutory appeals final in the courts of appeals. *See* **Tex**. Gov't Code § 22.225(b); *Coastal Corp. v. Garza,* 979 S.W.2d 318, 319 (**Tex**. 1998). However, this Court has jurisdiction over an interlocutory appeal when there is a dissent in the court of appeals, or the court of appeals "holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case." **Tex**. Gov't Code § 22.001(a)(2); see also **Tex**. Gov't Code § 22.225(c); *Texas **Natural Res**. **Conservation Comm'n** v. White,* 46 S.W.3d 864, 867 (**Tex**.2001). Our conflicts jurisdiction exists only if "the rulings in the two cases are `so far upon the same facts that the decision of one case is necessarily conclusive of the decision in the other.'" *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 551 (**Tex**.2000) (citations omitted). The test is whether one case would operate to overrule the other if the same court rendered both. *Coastal Corp.,* 979 S.W.2d at 319-20.

Here, there is no dissent in the court of appeals. Accordingly, we have jurisdiction only if we determine that the court of appeals held differently from a prior decision of another court of appeals or this Court. *See* **Tex**. Gov't Code §§ 22.001(a)(2), 22.225(c); *White,* 46 S.W.3d at 867.

853 *853 We conclude that the court of appeals' decision conflicts with *Ho v. University of Texas at Arlington,* 984 S.W.2d 672 (**Tex**. App.-Amarillo 1998, pet. denied). In *Ho,* the University dismissed Ho from its doctoral program without granting her a degree. Ho brought various contract, tort, and constitutional claims against the University. In a summary-judgment motion, the University asserted that the sovereign-immunity doctrine barred Ho's claims. Relying on *Federal Sign* and a court-of-appeals decision, Ho asserted that she did not have to plead and prove legislative consent to suit because the University's conduct waived its immunity from suit. *Ho,* 984 S.W.2d at 682. The trial court granted the University's motion. On appeal, Ho relied on *Federal Sign* to argue that the University's conduct waived its immunity from suit and, consequently, she could sue the University without obtaining legislative consent. *Ho,* 984 S.W.2d at 682 (citing *Federal Sign v. Texas S. Univ.,* 951 S.W.2d 401, 408 n. 1 (**Tex**.1997)). The court of appeals rejected her argument:

> We disagree with Ho's premise. By stating that it is "the Legislature's sole province to waive or abrogate sovereign immunity," the majority opinion in *Federal Sign* clearly reaffirmed a long line of cases standing for that general principle....
>
> [T]he *only exception* we have found in which the State, by its own actions waives immunity, is that which applies when the State initiates a suit.... Therefore, inasmuch as Ho was unable to plead and prove she had the State's consent to bring this suit, she has not complied with that procedural requirement and the trial court correctly granted summary judgment dismissing Ho's contract claims.

Ho, 984 S.W.2d at 682-83 (citations omitted) (emphasis added). Because *Ho* rejects any waiver-by-conduct exception to sovereign immunity when a private party sues the State, the court of appeals' decision here would operate to overrule *Ho* if the

same court of appeals had rendered the decision. *See* Coastal Corp., 979 S.W.2d at 319-20. Therefore, we have jurisdiction to consider this interlocutory appeal. *See* **Tex**. Gov't Code §§ 22.001(a)(2), 22.225(c); *White,* 46 S.W.3d at 867.

III. APPLICABLE LAW

A. The Sovereign-Immunity Doctrine and the Standard of Review

Sovereign immunity protects the State from lawsuits for money damages. *Little-**Tex**,* 39 S.W.3d at 594. Sovereign immunity encompasses two principles: immunity from suit and immunity from liability. *Little-**Tex**,* 39 S.W.3d at 594. Immunity from suit bars a suit against the State unless the Legislature expressly consents to the suit. *Little-**Tex**,* 39 S.W.3d at 594. If the Legislature has not expressly waived immunity from suit, the State retains such immunity even if its liability is not disputed. *Federal Sign,* 951 S.W.2d at 405. Immunity from liability protects the State from money judgments even if the Legislature has expressly given consent to sue. *Little-**Tex**,* 39 S.W.3d at 594.

This Court has long recognized that "it is the Legislature's sole province to waive or abrogate sovereign immunity." *Federal Sign,* 951 S.W.2d at 409; *see also Duhart v. State,* 610 S.W.2d 740, 741 (**Tex**. 1980); *Missouri Pac. R.R. Co. v. Brownsville Navigation Dist.,* 453 S.W.2d 812, 813-14 (**Tex**.1970); *Griffin v. Hawn,* 161 **Tex**. 422, 341 S.W.2d 151, 152 (1960); *W.D. Haden Co. v. Dodgen,* 158 **Tex**. 74, 308 S.W.2d 838, 840 (1958); *Texas Highway Dept. v. Weber,* 147 **Tex**. 628, 219 S.W.2d 70, 71
854 (1949); *Hosner v. DeYoung,* 1 **Tex**. 764, 769 (1847). The Legislature may consent *854 to suits against the State by statute or by resolution. *Little-**Tex**,* 39 S.W.3d at 594. Legislative consent to sue the State must be expressed in "clear and unambiguous language." **Tex**. Gov't Code § 311.034; *University of **Tex**. Med. Branch at Galveston v. York,* 871 S.W.2d 175, 177 (**Tex**.1994).

We have consistently deferred to the Legislature to waive sovereign immunity from suit, because this allows the Legislature to protect its policymaking function. *Hosner,* 1 **Tex**. at 769; *see also* Cunningham & Pearce, *Contracting with the State: The Daring Five—The Achilles' Heel of Sovereign Immunity?,* 31 St. Mary's L.J. 255, 258 n. 15, 259 n. 16 (1999); Harold J. Krent, *Reconceptualizing Sovereign Immunity,* 45 Vand. L.Rev. 1529, 1535 (1992). Indeed, in the Code Construction Act, the Legislature expressed its desire to maintain control over sovereign immunity "[i]n order to preserve [its] interest in managing state fiscal matters through the appropriations process...." *See* **Tex**. Gov't Code § 311.034. Subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments. *See* Krent, 45 Vand. L.Rev. at 1537 n. 23. Accordingly, the Legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear. *Federal Sign,* 951 S.W.2d at 414 (Hecht, J., concurring); *Guillory v. Port of Houston Auth.,* 845 S.W.2d 812, 813 (**Tex**.1993).

In the contract-claims context, legislative control over sovereign immunity allows the Legislature to respond to changing conditions and revise existing agreements if doing so would benefit the public. *Federal Sign,* 951 S.W.2d at 414 (Hecht, J., concurring). Moreover, legislative control ensures that current policymakers are neither bound by, nor held accountable for, policies underlying their predecessors' long-term contracts. *See* Krent, 45 Vand. L.Rev. at 1538. But legislative control over waiving immunity from suit does not mean that the State can freely breach contracts with private parties, or that the State can use sovereign immunity as a shield to avoid paying for benefits the State accepts under a contract. Rather, if a party who contracts with the State feels aggrieved, it can seek redress by asking the Legislature to waive immunity from suit. *See* **Tex**. Civ. Prac. & Rem.Code §§ 107.001-.005.

When the State contracts with a private party, it waives immunity from *liability. Little-**Tex**,* 39 S.W.3d at 594. But the State does not waive immunity from *suit* simply by contracting with a private party. *Little-**Tex**,* 39 S.W.3d at 594. Until recently, if the Legislature had not expressly waived sovereign immunity from suit by statute, a private party could sue the State for breach of contract only if it obtained a legislative resolution. *See* **Tex**. Civ. Prac. & Rem.Code § 107.001. In 1999, the Legislature enacted an administrative process to resolve breach-of-contract claims against the State. Act of May 30, 1999, 76th Leg., R.S., ch. 1352, 1999 **Tex**. Gen. Laws 4578 (codified at **Tex**. Gov't Code §§ 2260.001-.108). However, chapter 2260 does not apply to contracts "executed or awarded on or before August 30, 1999." **Tex**. Gov't Code § 2260.002(2). And, although chapter 2260 provides an administrative remedy, it does not waive the State's sovereign immunity from suit in breach-of-contract cases. **Tex**. Gov't Code § 2260.006; *Little-**Tex**,* 39 S.W.3d at 595.

855 *855 A plaintiff who sues the State must establish the State's consent to suit. *Texas Dep't of Transp. v. Jones,* 8 S.W.3d 636, 638 (**Tex**.1999). Otherwise, sovereign immunity from suit defeats a trial court's subject-matter jurisdiction. *Jones,* 8 S.W.3d at 638. The State may assert sovereign immunity from suit in a plea to the jurisdiction. *Jones,* 8 S.W.3d at 638. Whether a trial court has subject-matter jurisdiction is a question of law subject to *de novo* review. *See Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 928 (**Tex**. 1998). Accordingly, we review a trial court's order denying a jurisdictional plea based on sovereign immunity *de novo. See Mayhew,* 964 S.W.2d at 928.

B. The Texas Water Code

The Texas Water Code authorizes the TNRCC's executive director to negotiate and, with the TNRCC's consent, enter into contracts "for the purpose of carrying out the powers, duties, and responsibilities of the commission." **Tex**. Water Code § 5.229(b). The Water Code also allows "[a] person affected by a ruling, order, decision, or other act of the commission" to petition a Travis County trial court "to review, set aside, modify, or suspend the act of the commission." **Tex**. Water Code §§ 5.351(a), 5.354. Moreover, a person affected by agency inaction can "file a petition to compel the commission or the executive director to show cause why it should not be directed by the court to take immediate action." **Tex**. Water Code § 5.352.

C. The Declaratory Judgment Act

The Uniform Declaratory Judgment Act (DJA) is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." **Tex**. Civ. Prac. & Rem.Code § 37.002(b). The Act provides:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem.Code § 37.004(a). The DJA does not extend a trial court's jurisdiction, and a litigant's request for declaratory relief does not confer jurisdiction on a court or change a suit's underlying nature. *State v. Morales,* 869 S.W.2d 941, 947 (**Tex**.1994).

Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority. *See, e.g., Texas Educ. Agency v. Leeper,* 893 S.W.2d 432 (**Tex**.1994) (suit challenging state officials' construction of compulsory school-attendance law); *Dodgen,* 308 S.W.2d at 838 (suit against state official for wrongfully imposing a statutory tax burden). But such suits are not "suits against the State." *Dodgen,* 308 S.W.2d at 840 (citing the rule announced in *Cobb v. Harrington,* 144 **Tex**. 360, 190 S.W.2d 709, 712 (1945)). This is because suits to compel state officers to act within their official capacity do not attempt to subject the State to liability. *Griffin,* 341 S.W.2d at 152. Therefore, certain declaratory-judgment actions against state officials do not implicate the sovereign-immunity doctrine. *See Cobb,* 190 S.W.2d at 712.

In contrast, declaratory-judgment suits against state officials seeking to establish a contract's validity, to enforce performance
856 under a contract, or to impose contractual liabilities are suits against the State. *Dodgen,* 308 S.W.2d at 840 *856 (citing *Herring v. Houston Nat'l Exch. Bank,* 113 **Tex**. 264, 253 S.W. 813, 814 (1923)). That is because such suits attempt to control state action by imposing liability on the State. *See Griffin,* 341 S.W.2d at 152. Consequently, such suits cannot be maintained without legislative permission. *See Federal Sign,* 951 S.W.2d at 404. And, private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim. *See Dodgen,* 308 S.W.2d at 842.

IV. ANALYSIS

The TNRCC argues that, as a State agency, it enjoys immunity from IT-**Davy's** suit absent legislative consent. *See Federal Sign,* 951 S.W.2d at 408. In response, IT-**Davy** offers four theories to support its contention that the TNRCC waived its sovereign immunity from suit. Specifically, IT-**Davy** asserts that the TNRCC's sovereign immunity from suit was waived by: (1) the TNRCC's accepting full contractual benefits ("waiver by conduct"); (2) the TNRCC's entering into a contract with express

terms allowing the parties to resolve disputes in court ("waiver by contract"); (3) legislative consent in sections 5.351 and 5.352 of the Water Code; and (4) legislative consent in the Declaratory Judgment Act. We conclude that none of these theories support the conclusion that the TNRCC's immunity from suit was waived.

A. Waiver by Conduct

This cause was pending in this Court when we decided in *Little-**Tex*** that chapter 2260's administrative remedy foreclosed a waiver-by-conduct exception to sovereign immunity in breach-of-contract cases. *Little-**Tex**,* 39 S.W.3d at 597. However, soon after *Little-**Tex*** issued, the Legislature amended chapter 2260 so it does not apply to contracts executed on or before August 30, 1999. Act of June 17, 2001, 77th Leg., R.S., ch. 1422, 2001 **Tex**. Gen. Laws 5021, 5066 (codified at **Tex**. Gov't Code § 2260.002(2)). Here, the parties executed the contract in 1990, so chapter 2260 does not apply. Thus, we consider the parties' waiver-by-conduct arguments.

Relying on *Federal Sign* and courts of appeals' decisions since that case, IT-**Davy** argues that the TNRCC waived its immunity from suit by fully accepting benefits under the contract. The TNRCC, also relying on *Federal Sign,* claims that private parties must have legislative consent to sue the State. The TNRCC reasons that a judicially created waiver-by-conduct exception to sovereign immunity would destroy the jurisdictional nature of sovereign immunity. This is because such an exception would force the State to litigate acceptance-of-full-performance allegations before it could receive the traditional protections of sovereign immunity.

In *Federal Sign,* we held that, by entering into a contract, the State does not waive its immunity from suit. *Federal Sign,* 951 S.W.2d at 408. We also reaffirmed the long-standing principle that it is the Legislature's sole province to waive or abrogate the State's immunity from suit. *Federal Sign,* 951 S.W.2d at 409 (citations omitted). But in a footnote, we opined that there may be circumstances "where the State may waive its immunity by conduct other than simply executing a contract...." *Federal Sign,* 951 S.W.2d at 408 n. 1.

Several courts of appeals have relied on this footnote to create a judicially-imposed, equitable waiver of immunity from suit. *See, e.g., DalMac Constr. Co. v. Texas A & M Univ.,* 35 S.W.3d 654 (**Tex**.App.-Austin 1999), *rev'd,* 39 S.W.3d 591 (**Tex**.2001);
857 *Aer-Aerotron, Inc. v. Texas Dep't of* *857 *Transp.,* 997 S.W.2d 687 (**Tex**.App.-Austin 1999), *rev'd,* 39 S.W.3d 220 (**Tex**.2001); *Little-**Tex** Insulation Co. v. General Servs. **Comm'n**,* 997 S.W.2d 358 (**Tex**.App.-Austin 1999), *rev'd,* 39 S.W.3d 591 (**Tex**. 2001); *Texas S. Univ. v. Araserve Campus Dining Servs. of Texas, Inc.,* 981 S.W.2d 929 (**Tex**.App.-Houston [1st Dist.] 1998, pet. denied); *Alamo Cmty. Coll. Dist. v. Obayashi Corp.,* 980 S.W.2d 745 (**Tex**.App.-San Antonio 1998, pet. denied). Specifically, these courts have concluded that, by conduct that includes accepting benefits under a contract for goods or services, the State waives its immunity from a breach-of-contract suit. *See DalMac,* 35 S.W.3d at 657; *Aer-Aerotron,* 997 S.W.2d at 692; *Little-**Tex**,* 997 S.W.2d at 364-65; *Araserve,* 981 S.W.2d at 935; *Obayashi,* 980 S.W.2d at 750. IT-**Davy** likewise relies on the *Federal Sign* footnote to ask this Court to fashion a waiver-by-conduct exception to the sovereign-immunity rule. We decline to do so.

We again reaffirm that it is the Legislature's sole province to waive or abrogate sovereign immunity. *See Little-**Tex**,* 39 S.W.3d at 597; *Federal Sign,* 951 S.W.2d at 409; *Duhart,* 610 S.W.2d at 741; *Missouri Pac.,* 453 S.W.2d at 813-14; *Griffin,* 341 S.W.2d at 152; *Dodgen,* 308 S.W.2d at 840; *Weber,* 219 S.W.2d at 71; *Hosner,* 1 **Tex**. at 769. As explained above, we created this general rule over one hundred and fifty years ago, and we have steadfastly upheld it for various policy reasons. *See Federal Sign,* 951 S.W.2d at 413-15 (Hecht, J., concurring); *Guillory,* 845 S.W.2d at 813; *Hosner,* 1 **Tex**. at 769. Creating a waiver-by-conduct exception would force the State to expend its resources to litigate the waiver-by-conduct issue before enjoying sovereign immunity's protections—and this would defeat many of the doctrine's underlying policies.

Moreover, the Legislature has recognized this general rule by enacting comprehensive schemes that allow contracting parties to resolve breach-of-contract claims against the State. *See* **Tex**. Civ. Prac. & Rem.Code § 107.001; **Tex**. Gov't Code §§ 2260.001-.108. In providing private parties with these avenues for redress, the Legislature has attempted to balance competing private and public interests. As explained above, chapter 2260 does not apply here. Consequently, IT-**Davy's** only option was to obtain legislative consent to sue the TNRCC by following chapter 107's procedures. IT-**Davy** chose to ignore the legislative scheme and now urges us to do the same. Once again, we decline to interfere. *See Little-**Tex**,* 39 S.W.3d at 595. Because we have consistently held that only the Legislature can waive sovereign immunity from suit, allowing other governmental entities to waive immunity by conduct that includes accepting benefits under a contract would be fundamentally inconsistent with our

established jurisprudence and with the existing legislative scheme. Accordingly, we reject IT-**Davy's** argument that we should fashion such a waiver-by-conduct exception in a breach-of-contract suit against the State.

B. Waiver by Contract

IT-**Davy** also argues that the contract clearly and unambiguously waives sovereign immunity from suit because it includes a provision stating that all claims or disputes related to the agreement will be decided by arbitration or in court. To support this contention, IT-**Davy** relies on federal cases that recognize Indian tribes' and foreign governments' rights to contractually waive those entities' immunity from suit. *See, e.g., C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S.
858 411, 418-19, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001); *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro,* *858 875 F.2d 1174, 1177 (5th Cir.1989). IT-**Davy** also points to other states' case law determining that state officials' entering into a contract may waive the State's immunity from suit. *See, e.g., Ace Flying Serv., Inc. v. Colorado Dep't of Agric.,* 136 Colo. 19, 314 P.2d 278, 280 (1957); *Pan-Am Tobacco Corp. v. Dep't of Corrections,* 471 So.2d 4, 5 (Fla.1984); *Smith v. North Carolina,* 289 N.C. 303, 222 S.E.2d 412, 424 (1976).

On the other hand, the TNRCC argues that only the Legislature may waive the State's sovereign immunity from suit. Therefore, the TNRCC contends, neither the TNRCC nor its agents, who have authority to execute contracts on its behalf, have the power to waive sovereign immunity in express contractual terms. We agree.

Indian tribes, foreign governments, and even administrative officials in other states may have the power to waive their sovereign immunity by contract. However, this does not control whether an administrative agent, in agreeing to certain contractual terms, can waive the agency's sovereign immunity in Texas. As the TNRCC observes, Texas law is clear. Only the Legislature can waive sovereign immunity from suit in a breach-of-contract claim. *Federal Sign,* 951 S.W.2d at 409. Administrative agencies, such as the TNRCC, are part of our government's *executive* branch. *See, e.g., Williamson Pointe Venture v. City of Austin,* 912 S.W.2d 340, 344 (**Tex**. App.-Austin 1995, no writ). Consequently, administrative agencies cannot waive immunity from suit. It also follows that administrative agents—even those who have authority to contract on the agency's behalf—cannot waive their agencies' immunity from suit.

Here, the Water Code designates the TNRCC's executive director as the person who has the authority to negotiate and execute contracts on the TNRCC's behalf so the TNRCC can carry out its "powers, duties, and responsibilities." **Tex**. Water Code § 5.229. However, this provision does not clearly and unambiguously waive the TNRCC's immunity from breach-of-contract suits. *See* **Tex**. Gov't Code § 311.034; *York,* 871 S.W.2d at 177. Moreover, it does not clearly and unambiguously give the executive director the authority to do so. Therefore, even though the TNRCC's executive director had the authority to enter into the contract with IT-**Davy** on the TNRCC's behalf, he did not have authority to, and thus did not, waive the TNRCC's immunity from suit.

C. Waiver by The Texas Water Code

IT-**Davy** contends that Water Code sections 5.351 and 5.352 expressly waive the TNRCC's sovereign immunity from suit. As previously discussed, these sections allow a person "affected by a [TNRCC] ruling, order, decision, or other act"—or by the TNRCC's or its executive director's "inaction"—to seek judicial review of such action or inaction in district court. **Tex**. Water Code §§ 5.351, 5.352.

The TNRCC responds that Water Code sections 5.351 and 5.352 give trial courts only limited power, which is to review administrative actions of a regulatory nature. Thus, the TNRCC argues that these sections do not give trial courts original jurisdiction to decide breach-of-contract claims and, therefore, they do not waive the State's immunity from suit. *See State v. Operating Contractors,* 985 S.W.2d 646, 656 n. 14 (**Tex**.App.-Austin 1999, pet. denied). We agree.

No court has defined the precise scope of a trial court's jurisdiction under sections 5.351 and 5.352. However, one court of
859 appeals has construed analogous language in the Health and Safety Code as granting *859 only a limited right to review certain administrative actions. *See Operating Contractors,* 985 S.W.2d at 656 n. 14. Specifically, the court of appeals concluded that section 382.032 of the Health and Safety Code authorizes judicial review of "rulings of a regulatory nature, not of a contractual nature." *Operating Contractors,* 985 S.W.2d at 656 n. 14.

The Code Construction Act provides that "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." **Tex**. Gov't Code § 311.034. And, the Legislature knows how to clearly and unambiguously waive sovereign immunity from suit. For instance, the Texas Tort Claims Act provides that "[s]overeign immunity to suit is waived and abolished to the extent of liability created by this chapter." **Tex**. Civ. Prac. & Rem.Code § 101.025(a). But this language is readily distinguishable from language that allows an affected party to seek judicial review of an administrative action. *See, e.g., Operating Contractors,* 985 S.W.2d at 656 n. 14.

Here, neither section 5.351 nor 5.352 clearly and unambiguously waives the TNRCC's sovereign immunity from suit for breach-of-contract claims. Rather, their plain texts expressly provide only for judicial review of administrative action or inaction. *See* **Tex**. Water Code §§ 5.351, 5.352; *see also Continental Cas. Ins. Co. v. Functional Restoration Assocs.,* 19 S.W.3d 393, 398 (**Tex**.2000). Moreover, these provisions appear in the Water Code subchapter entitled "Judicial Review," which defines the procedures and remedies available to obtain judicial review of certain TNRCC actions. *See* **Tex**. Water Code §§ 5.351-.357.

Thus, we conclude that Water Code sections 5.351 and 5.352 do not waive the TNRCC's sovereign immunity from suit for breach-of-contract claims. Moreover, because IT-**Davy** does not seek judicial review of any TNRCC regulatory action, we reject IT-**Davy's** argument that the Water Code waives sovereign immunity from suit here.

D. Waiver by The Declaratory Judgment Act

IT-**Davy** further claims that the Declaratory Judgment Act (DJA) waives the TNRCC's sovereign immunity from suit. IT-**Davy** sought declaratory relief, asking the trial court to determine its rights and status, and the TNRCC's legal obligations, under the contract. *See* **Tex**. Civ. Prac. & Rem.Code § 37.004(a). More specifically, IT-**Davy** asked the trial court to declare that IT-**Davy** performed additional work and incurred additional expenses beyond the contract's scope, and thus, the TNRCC owed IT-**Davy** more money. IT-**Davy** relies on *Leeper* to assert that the DJA waives the State's immunity from both suit and liability. *See Leeper,* 893 S.W.2d at 446.

In response, the TNRCC argues that the DJA does not authorize private parties to sue the State for money damages. Further, the TNRCC contends that IT-**Davy's** DJA claim is merely an attempt to confer jurisdiction on the trial court to decide the breach-of-contract claim. We agree.

IT-**Davy** misplaces its reliance on *Leeper.* In *Leeper,* home-school parents and curriculum providers brought a class-action suit against state officials, challenging the Texas Education Agency's construction of the compulsory school-attendance law. *Leeper,* 893 S.W.2d at 432. They sought a declaration that the compulsory attendance law's private-school exemption includes home-schooled children, and therefore, the home-school parents could not be prosecuted for keeping their children home. We
860 determined that the DJA expressly allows persons to challenge ordinances *860 or statutes. *Leeper,* 893 S.W.2d at 446. Moreover, the DJA requires challengers to join governmental entities in suits to construe legislative pronouncements, and the DJA authorizes awarding attorneys' fees. *Leeper,* 893 S.W.2d at 446. Accordingly, we held that the DJA necessarily waives governmental immunity for attorneys' fees in suits to construe legislative pronouncements. *Leeper,* 893 S.W.2d at 446.

However, *Leeper's* limited waiver does not allow private parties to sue the State for money damages under the DJA. And IT-**Davy** is not asking the trial court to construe a legislative enactment. Rather, it is seeking a declaratory judgment only in an attempt to have the trial court decide its breach-of-contract claim. Thus, we conclude IT-**Davy's** request for declaratory relief does not waive the TNRCC's sovereign immunity from suit and cannot be maintained without legislative consent. *See Federal Sign,* 951 S.W.2d at 404; *Dodgen,* 308 S.W.2d at 840.

V. CONCLUSION

As we concluded in *Little-**Tex,*** "there is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature." *Little-**Tex,*** 39 S.W.3d at 597. This means that a private party, such as IT-**Davy**, must have legislative consent—by statute or resolution—to sue the State for claims arising from an alleged breach of contract. *See Federal Sign,* 951 S.W.2d at 411. Although the Water Code and the DJA provide limited waivers of immunity, neither statute allows IT-**Davy** to sue the TNRCC for breach of contract. And IT-**Davy** did not obtain a legislative resolution allowing it to sue the TNRCC. *See* **Tex**. Gov't Code § 107.001. Finally, because only the Legislature—not the TNRCC or its agents—can waive

sovereign immunity, neither the TNRCC's conduct in accepting benefits under the contract, nor its executive director's executing the contract with a remedies provision, waived its immunity from suit.

Accordingly, we reject IT-**Davy's** arguments that the TNRCC's sovereign immunity from suit was waived in this case. We reverse the court of appeals' judgment and dismiss IT-**Davy's** claims for want of jurisdiction. *See* **Tex**.R.App. P. 60.2(c).

Justice HECHT issued an opinion concurring in the judgment in which Chief Justice PHILLIPS, Justice OWEN, and Justice JEFFERSON joined.

Justice ENOCH issued a dissenting opinion.

Justice HECHT, joined by Chief Justice PHILLIPS, Justice OWEN, and Justice JEFFERSON, concurring in the judgment.

I agree that the Texas **Natural** Resource **Conservation** Commission's immunity from suit has not been waived in this case for any of the reasons argued by IT-**Davy**. I cannot join, however, in the broad language of Justice Baker's opinion that indicates that the State is always immune from suit for breach of contract absent legislative consent. I doubt whether governmental immunity from suit for breach of contract can be applied so rigidly, but we certainly need not decide that issue to resolve this case. Accordingly, I concur only in the Court's judgment.

In his opinion for the Court in *Federal Sign v. Texas Southern University,* Justice Baker noted that there may be "circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from
861 suit when it *861 contracts."[1] In his opinion today he appears to have abandoned this view, stating that "allowing ... governmental entities to waive immunity by conduct that includes accepting benefits under a contract would be fundamentally inconsistent with out established jurisprudence."[2] He does not explain this about-face. The Court was correct in *Federal Sign.* As one example, it has long been held that the State can waive immunity by filing suit.[3] There may be others, such as debt obligations.[4] We need not here decide the issue for all time, any more than we needed to in *Federal Sign.*

Federal Sign won a bid to install basketball arena scoreboards at Texas Southern University, but before it performed any work on TSU's property or delivered any materials, TSU canceled the contract. The Court held that Federal Sign's suit against TSU for breach of contract was barred by immunity. In a concurring opinion, I raised the question whether the result would be different "if TSU had accepted the scoreboards, acknowledged that Federal Sign had fully complied with the contract, but refused to pay the agreed price".[5] That question, I said, the Court need not and did not answer. In the present case, IT-**Davy** argues that its situation is like the hypothetical I raised in *Federal Sign,* but that simply is not true. My hypothetical supposed a government agency that chiseled a contractor just because it could get away with doing so. Here, TNRCC and IT-**Davy** have a legitimate disagreement over what price should be paid for the extra work IT-**Davy** performed beyond that required by its contract. This is nothing more than an ordinary contract dispute.

I adhere to the views I expressed in my concurring opinion in *Federal Sign v. Texas Southern University* that the Legislature is better suited than the Judiciary to weigh the policy and political concerns that inhere in determining whether the State should be immune from suit for breaching its contracts.[6] As I explained there,

not all the factors that weigh in determining the State's liability on its contracts can be assessed in a judicial proceeding. Must the State honor all long-term contracts when they no longer serve the public interest, continuing to spend tax revenues on matters that no longer benefit the people? If so, then the government's ability to respond to changing conditions for the welfare of the people as a whole is impaired. Moreover, each succeeding administration may become increasingly bound by the contracts of prior administrations with no way of escape except payment of public resources. Harold J. Krent, *Reconceptualizing Sovereign Immunity,* 45 Vanderbilt L.Rev. 1529, 1530 (1992). Would state officials be unduly anxious to conform to judicial policy wishes if they knew that judges could determine the State's liability for millions of dollars? *See id.* Would the prospect of liability smother policy initiatives based upon truly changed circumstances? *See id.* at 1530-1531. Governmental immunity rests
862 on such concerns and not simply *862 on the archaic idea that "the king can do no wrong". Such political concerns pertain to the nature of democratic government and cannot be assessed by a jury in a contract suit. They are best determined by the people's representatives in the Legislature.[7]

I do not include among these justifications for a legislative determination of waivers of immunity Justice Baker's idea that "subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended

purposes toward defending lawsuits and paying judgments."[8] The decision is best left to the Legislature, not because the State is above defending its actions or paying its debts, but because judicial proceedings are not the only, and not necessarily the best, avenue for resolving contract disputes with the State.

In 1999, the Legislature provided a claims procedure for certain kinds of contract disputes with the State by adopting chapter 2260 of the Government Code.[9] Chapter 2260 limits the damages that can be recovered.[10] A dispute not covered by this procedure may be presented to the Legislature with a petition for permission to sue the State under chapter 107 of the Civil Practice and Remedies Code.[11] I noted in *Federal Sign* that from 1989 through 1995, the Legislature granted only nine of 173 petitions for permission to sue under chapter 107;[12] in the three legislative sessions since then it has granted ten of forty-nine such petitions, and it granted two others to permit claims under chapter 2260 that could not otherwise have been made.[13] Both by enacting chapter 2260 and by considering petitions under chapter 107, it remains true that "the Legislature has taken an active role in determining what claims have sufficient merit that they should be prosecuted."[14]

Justice Enoch's continued insistence that justifications of governmental immunity for contract suits are unconvincing is not without force, given that the vast majority of states have relinquished such immunity.[15] But his argument that such immunity works an injustice goes too far. He simply disregards the fact that even if the State were not immune from contract suits, it would not be required to pay the judgments rendered without approval of the Legislature. Thus, recourse to the Legislature is unavoidable. At worst, it seems to me, petitioning the Legislature for a waiver of immunity merely delays resolution of claims, and the process provided by new chapter 2260 may prove speedier.

In sum, I have little difficulty concluding that IT-**Davy's** suit is barred by immunity, but I cannot absolutely foreclose the possibility that the State may waive immunity in some circumstances other than by statute.

CRAIG T. ENOCH, Justice, dissenting.

863 From its perspective, IT-**Davy**, in good faith, bargained for and fully performed its *863 obligations to the State under a binding contract. And in exchange, it expects to be paid the agreed upon compensation—an amount it claims to be $6,723,655. The State, on the other hand, asserts that it owes no more than $700,000. Once again for citizens who have contractual disputes with the State, the Court, itself, closes the courthouse doors and then throws up its hands, claiming helplessness.

I remind the Court that the doctrine of sovereign immunity is not a creation of the Legislature, but a creation of this Court. And it improperly reads the doctrine of sovereign immunity to close the courthouse to contract suits against the State, especially when the Legislature, as in this case, has given the executive director the specific power to enter into contracts "for the purpose of carrying out the powers, duties, and responsibilities of the [TNRCC]."[1]

Ironically, Justice Baker admonishes the State to not use sovereign immunity as a "shield to avoid paying for benefits the State accepts under a contract,"[2] a proposition with which I assume all the Justices on this Court would agree. But the State is doing something worse—interposing sovereign immunity to close the courthouse doors so that the merits of the claim can't even be determined. Of course, as the Court suggests, IT-**Davy** *could* ask the Legislature to waive immunity from suit. But surely a contracting party should not be dependent on a stable of lobbyists, assuring the support of seventy-six representatives, sixteen senators and one governor, just to open the courthouse. IT-**Davy** contracted with the TNRCC, which was specifically authorized by the legislature to enter into contracts. The Court should not hand to the Legislature IT-**Davy's** keys to the courthouse.

Oddly, Justice Hecht, rather than join Justice Baker, offers hope that there remains another key—a magic key that will loosen sovereign immunity's lock and open the courthouse doors. But it is false hope. He is unable to identify and can give only vague clues about what that key may look like. This just encourages endless, fruitless litigation as each new contracting party, thinking it has discovered the key, seeks to open the courthouse door. As happened with the many parties in the cases cited below and to IT-**Davy** in this case, it will learn from this Court that, alas, it didn't have the magic key.

As the list of those shut out of the courthouse continues to grow, the Court will, perhaps, begin to appreciate the plight it forces
864 on parties contracting with the State. Today, we add IT-**Davy** to that list.[3] For the reasons expressed in my *864 dissent in *General Services Commission v. Little-**Tex** Insulation Company*[4] and *Federal Sign v. Texas Southern University,*[5] I again respectfully dissent.

[1] 951 S.W.2d 401, 408 n. 1 (**Tex**.1997).

[2] *Ante* at 857.

[3] *Anderson, Clayton & Co. v. State,* 122 **Tex**. 530, 62 S.W.2d 107, 110 (**Comm'n** App.1933, op. adopted); *Kinnear v. Texas **Comm'n** on Human Rights,* 14 S.W.3d 299, 300 (**Tex**. 2000) (per curiam).

[4] *Federal Sign,* 951 S.W.2d at 412 (Hecht, J., concurring).

[5] *Id.*

[6] *Id.* at 412-416.

[7] *Id.* at 414.

[8] *Ante* at 865.

[9] **Tex**. Gov't Code §§ 2260.001-.108.

[10] *Id.* § 2260.003.

[11] **Tex**. Civ. Prac. & Rem.Code §§ 107.001-.005.

[12] *Federal Sign,* 951 S.W.2d at 413 (Hecht, J., concurring) (citing Texas House of Representatives, Interim Report to the 75th Legislature 9 (1996)).

[13] *See Texas Legislature Online* at http://www.capitol.state.tx.us/ (derived from searches of concurrent resolutions).

[14] *Id.*

[15] Texas House of Representatives, Interim Report to the 75th Legislature 18-29 (1996).

[1] **Tex**. Water Code § 5.229.

[2] 74 S.W.3d at 854.

[3] *See Gen. Servs. **Comm'n** v. Little-**Tex** Insulation Co.,* 39 S.W.3d 591, 600 (**Tex**.2001); *Texas Dep't of Transp. v. Aer-Aerotron, Inc.,* 39 S.W.3d 220 (**Tex**.2001); *Federal Sign v. Texas S. Univ.,* 951 S.W.2d 401, 408 (**Tex**.1997); ***Tex**. Dep't of Pub. Safety v. Int'l Capital Corp.,* 40 S.W.3d 687 (**Tex**.App.-Austin 2001, no pet.); *Denver City Ind. Sch. Dist. v. Moses,* 51 S.W.3d 386 (**Tex**.App.-Amarillo 2001, no pet.); *Gendreau v. Medical Arts Hosp.,* 54 S.W.3d 877 (**Tex**.App.-Eastland 2001, pet. filed); *City of Houston v. Northwood Mun. Util. Dist. No. 1,* 73 S.W.3d 304 (**Tex**.App.-Houston [1st Dist.] 2001, no pet.); ***Tex**. Dept. of Pub. Safety v. Rivera,* No. 13-01-00446-CV, 2001 **Tex**. App. LEXIS 7681 (Corpus Christi Nov. 15, 2001, no pet.) (not designated for publication); *Landry's Crab Shack v. Bd. of Regents,* No. 03-00-00690-CV, 2001 WL 1240832, 2001 **Tex**.App. LEXIS 6948 (Austin Oct. 18, 2001, no pet.) (not designated for publication); *Ondemir v. Bexar County Clerk,* No. 04-00-00497-CV, 2001 WL 1136074, 2001 **Tex**.App. LEXIS 6488 (San Antonio Sept. 26, 2001, pet. denied) (not designated for publication); *O'Dell v. Perry,* No. 03-00-00603-CV, 2001 WL 726387, 2001 **Tex**.App. LEXIS 4367 (Austin June 29, 2001, no pet.) (not designated for publication); *State DOT v. Ramirez,* 72 S.W.3d 376 (Austin 2001, pet. filed) (not designated for publication); *Texas A & M Univ. Sys. v. AFEX Corp.,* No. 03-00-00222-CV, 2001 WL 193881, 2001 **Tex**.App. LEXIS 1266 (Austin Mar. 1, 2001, no pet.) (not designated for publication).

[4] 39 S.W.3d at 602.

[5] 951 S.W.2d at 416.

Texas Ass'n of Business v. Texas Air Control Bd.
Supreme Court of Texas. | March 3, 1993 | 852 S.W.2d 440 *(Approx. 54 pages)*

852 S.W.2d 440
Supreme Court of **Texas**.

TEXAS ASSOCIATION OF BUSINESS, Appellant,

TEXAS AIR CONTROL BOARD and **Texas** Water Commission, Appellees.

No. C–9556. | March 3, 1993. | Rehearing Overruled May 5, 1993.

Business association sought declaratory judgment that statutes authorizing administrative agencies to assess fines for violation of environmental laws are unconstitutional. The 250th District Court, Travis County, upheld statutes, and direct appeal was taken. The Supreme Court, Cornyn, J., held that: (1) statutes authorizing **Air Control** Board and Water Commission to assess fines prior to judicial review violate open courts guarantee of **Texas** Constitution, but (2) statutes do not violate constitutional right to jury trial.

Affirmed in part and reversed in part.

Doggett, Gammage, and Spector, JJ., concurred, dissented, and filed opinions.

West Headnotes (17)

Change View

1 **Action**
Party's standing to sue is implicit in concept of subject matter jurisdiction, and thus issue of standing can never be presumed and cannot be waived.

275 Cases that cite this headnote

13	Action
13I	Grounds and Conditions Precedent
13k13	Persons entitled to sue

2 **Constitutional Law**
Separation of powers clause of Constitution prohibits court from issuing advisory opinions, because such is function of executive rather than judicial department. Vernon's Ann. **Texas** Const. Art. 2, § 1.

26 Cases that cite this headnote

92	Constitutional Law
92XX	Separation of Powers
92XX(C)	Judicial Powers and Functions
92XX(C)6	Advisory Opinions
92k2600	In general (Formerly 92k69)

3 **Declaratory Judgment**

Declaratory Judgments Act is merely procedural device for deciding cases already within court's jurisdiction, rather than legislative enlargement of court's power permitting rendition of advisory opinions. V.T.C.A., Civil Practice & Remedies Code §§ 37.001–37.011.

143 Cases that cite this headnote

118A	Declaratory Judgment
118AI	Nature and Grounds in General
118AI(D)	Actual or Justiciable Controversy
118Ak66	Advisory opinions

4 **Constitutional Law**

Distinctive feature of prohibited "advisory opinion" is that it decides abstract question of law without binding parties.

62 Cases that cite this headnote

92	Constitutional Law
92XX	Separation of Powers
92XX(C)	Judicial Powers and Functions
92XX(C)6	Advisory Opinions
92k2600	In general (Formerly 92k69)

5 **Constitutional Law**

Opinion issued in case brought by party without standing is advisory because, rather than remedying actual or imminent harm, judgment addresses only hypothetical injury; **Texas** courts have no jurisdiction to render such opinions.

79 Cases that cite this headnote

92	Constitutional Law
92XX	Separation of Powers
92XX(C)	Judicial Powers and Functions
92XX(C)6	Advisory Opinions
92k2600	In general (Formerly 92k2601, 92k69)

6 **Action**
Constitutional Law

Standing requirement is implicit in open courts provision of **Texas** Constitution, which contemplates access to courts only for those litigants suffering injury. Vernon's Ann.Texas Const. Art. 1, § 13.

29 Cases that cite this headnote

13	Action
13I	Grounds and Conditions Precedent
13k13	Persons entitled to sue (Formerly 92k328)
92	Constitutional Law
92XIX	Rights to Open Courts, Remedies, and Justice
92k2313	Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2314	In general (Formerly 92k328)

7 **Appeal and Error**

Subject matter jurisdiction is issue that may be raised for

30	Appeal and Error
30II	Nature and Grounds of Appellate

first time on appeal, and need not be raised by parties.

191 Cases that cite this headnote

Jurisdiction
30k23 Determination of questions of jurisdiction in general
30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k185 Organization and Jurisdiction of Lower Court
30k185(1) In general

8 Action
Appeal and Error

Standing of parties, as element of subject matter jurisdiction, cannot be waived and may be raised for first time on appeal by parties or by court; overruling ***Texas*** *Industrial Traffic League*.

205 Cases that cite this headnote

13 Action
13I Grounds and Conditions Precedent
13k13 Persons entitled to sue
30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k174 Capacity or right to sue or defend

9 Courts

To establish subject matter jurisdiction, party must allege facts that affirmatively demonstrate court's jurisdiction to hear cause.

428 Cases that cite this headnote

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k31 Jurisdiction to Be Shown by Record
106k32.3 Allegations, pleadings, and affidavits
(Formerly 106k32)

10 Appeal and Error

When reviewing trial court's dismissal of cause for want of jurisdiction, appellate court construes pleadings in favor of plaintiff and looks to pleader's intent.

372 Cases that cite this headnote

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(2) Dismissal or nonsuit in general

11 Appeal and Error

When appellate court reviews standing of party sua sponte, it must construe petition in favor of party, and if necessary, review entire record to determine if any evidence supports standing.

70 Cases that cite this

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k913 Parties
30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and

headnote

	Findings
30XVI(I)6	Questions of Fact on Motions or Other Interlocutory or Special Proceedings
30k1024.1	In general

12 **Declaratory Judgment**

General test for standing requires that there be real controversy between parties, which will be actually determined by judicial declaration sought.

105 Cases that cite this headnote

118A	Declaratory Judgment
118AIII	Proceedings
118AIII(C)	Parties
118Ak299	Proper Parties
118Ak299.1	In general

13 **Associations**

Association has standing to sue on behalf of its members where its members would otherwise have standing to sue in their own right, interests it seeks to protect are germane to organization's purpose, and neither claim asserted nor relief requested requires participation of individual members in lawsuit.

52 Cases that cite this headnote

41	Associations
41k20	Actions by or Against Associations
41k20(1)	In general

14 **Environmental Law**

Businessmen's association had standing to challenge constitutionality of environmental agencies' statutory authority to assess fines; association members had been assessed penalties under challenged enactments, interests association sought to protect were germane to its purpose, and neither claim asserted nor relief requested required participation of individual members.

46 Cases that cite this headnote

149E	Environmental Law
149EXIII	Judicial Review or Intervention
149Ek649	Persons Entitled to Sue or Seek Review; Standing
149Ek652	Organizations, associations, and other groups (Formerly 41k20(1))

15 **Administrative Law and Procedure**
Constitutional Law
Environmental Law

Statutes authorizing **Air**

15A	Administrative Law and Procedure
15AV	Judicial Review of Administrative Decisions
15AV(A)	In General

Control Board and Water Commission to assess fines prior to judicial review, and to require supersedeas bond in amount of fines assessed as prerequisite to judicial review, violated open courts guarantee of **Texas** Constitution; prepayment requirement was unreasonable financial barrier to access to court. Vernon's Ann.Texas Const. Art. 1, § 13; V.T.C.A., Health & Safety Code §§ 361.252, 382.089; V.T.C.A., Water Code §§ 26.136, 27.1015.

28 Cases that cite this headnote

15Ak674 Supersedeas or stay

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and Justice
92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2317 Costs and fees; indigency
(Formerly 92k328)

149E Environmental Law
149EV Water Pollution
149Ek163 Constitutional Provisions, Statutes, and Ordinances
149Ek166 Validity
(Formerly 199k25.5(2) Health and Environment)

149E Environmental Law
149EVI **Air** Pollution
149Ek243 Constitutional Provisions, Statutes, and Ordinances
149Ek246 Validity
(Formerly 199k25.5(2) Health and Environment)

16 **Environmental Law**
Jury

Statutes authorizing **Air Control** Board and Water Commission to assess fines prior to judicial review did not violate state constitutional right to jury trial; administrative proceedings to enforce state environmental laws were not analogous to any action tried to jury in 1876, when State Constitution was adopted. Vernon's Ann.Texas Const. Art. 1, § 15; V.T.C.A., Health & Safety Code §§ 361.252, 382.089; V.T.C.A., Water Code §§ 26.136, 27.1015.

8 Cases that cite this headnote

149E Environmental Law
149EV Water Pollution
149Ek163 Constitutional Provisions, Statutes, and Ordinances
149Ek166 Validity
(Formerly 199k25.5(2) Health and Environment)

149E Environmental Law
149EVI **Air** Pollution
149Ek243 Constitutional Provisions, Statutes, and Ordinances
149Ek246 Validity
(Formerly 199k25.5(2) Health and Environment)

230 Jury
230II Right to Trial by Jury
230k19 Civil Proceedings Other Than Actions; Special Proceedings
230k19(15) Seizures, penalties, and forfeitures

17 **Environmental Law**

Legislature, in enacting environmental protection statutes, could constitutionally delegate fact-finding function, along with power to assess civil penalties for violation of

149E Environmental Law
149EI In General
149Ek3 Constitutional Provisions, Statutes, and Ordinances in General
149Ek6 Validity
(Formerly 199k25.5(2) Health and Environment)

statutes, to administrative agencies. Vernon's Ann.Texas Const. Art. 16, § 59(a).

3 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

OPINION

CORNYN, Justice.

The **Texas** Association of Business (TAB), on behalf of its members, brought this declaratory judgment action seeking a ruling that statutes empowering two state administrative agencies to levy civil penalties for violations of their regulations conflict with the open courts and jury trial provisions of the **Texas** Constitution. The administrative agencies denied TAB's claims, and along with two Intervenors, [1] filed counterclaims seeking a declaration ***442** that the same statutes and regulations comport with those constitutional provisions.

Following a bench trial, the trial court denied the relief sought by TAB, and as requested by the State and Intervenors, declared that section 4.041 of the **Texas** Clean **Air** Act, sections 26.136 and 27.1015 of the **Texas** Water Code, and section 8b of the **Texas** Solid Waste Disposal Act, as well as the rules and regulations promulgated under those statutes, are constitutional with regard to the open courts and jury trial provisions. We affirm the trial court's judgment as it relates to TAB's jury trial challenge and reverse its judgment as to TAB's open courts challenge.

An overview of the regulatory scheme enacted by the legislature and these agencies is essential to an understanding of this case. In 1967, the **Texas** Legislature enacted the Clean **Air** Act of **Texas**. Clean **Air** Act of **Texas**, 60th Leg., R.S., ch. 727, 1967 Tex.Gen.Laws 1941. The Clean **Air** Act was designed to safeguard the state's **air** resources without compromising the economic development of the state. *Id.* at § 1. The Act created the **Texas Air Control** Board and granted it the authority to promulgate regulations to accomplish the Act's goals. *Id.* at § 4(A)(2)(a). In the event the **Air Control** Board determined that a violation of its regulations had occurred, it was authorized to enforce those regulations in district court. Upon a judicial determination that a violation of the **Air Control** Board's regulations had occurred, two cumulative remedies were available, injunctive relief to prohibit further violations and assessment of a fine ranging from $50 to $1,000 for each day the violations persisted. *Id.* at § 12(B).

In 1969, the **Texas** Legislature enacted the Solid Waste Disposal Act. Solid Waste Disposal Act, 61st Leg., R.S., ch. 405, 1969 Tex.Gen.Laws 1320. The express purpose for this legislation was to protect public health and welfare by regulating the "collection, handling, storage, and disposal of solid waste." *Id.* at § 1. The **Texas** Water Quality Board was designated the primary agency to effectuate the Disposal Act's purpose. *Id.* at § 4(f). Like the **Air Control** Board, the Water Quality Board was authorized to enforce its rules and regulations in state district court. The Solid Waste Disposal Act provided the same remedies as the Clean **Air** Act. *See id.* at § 8(c).

In the last of the relevant statutory enactments, in 1969, the **Texas** Legislature promulgated a revised version of the Water Quality Act. Water Quality Act—Revision, 61st Leg., R.S., ch. 760, 1969 Tex.Gen.Laws 2229. By that Act, the Water Quality Board was given the power to develop a statewide water quality plan, to perform research and investigations, and to adopt rules and issue orders necessary to effectuate the Act's purposes. *Id.* at § 3.01–3.10. The Water Quality Act provided the same remedies as the Solid Waste Management Act and the Clean **Air** Act. *See id.* at § 4.02.

Originally, neither the Water Quality Board nor the **Air Control** Board had the power to levy civil penalties directly in the event it determined that its regulations or orders had been violated. Instead, each board was required first to file suit against the violator in district court. Only the district court had the power to assess civil penalties.

The legislature substantially changed this enforcement scheme in 1985. That year the **Air Control** Board and the Water Commission (formerly the Water **Control** Board) were granted the power to assess civil penalties directly of up to $10,000 per day per violation.[2] Both administrative bodies also retained the option to pursue civil penalties in district court. ***443** TEX.HEALTH & SAFETY CODE §§ 361.224, 382.081; TEX.WATER CODE § 26.123. This was the regulatory scheme in effect when the district court rendered judgment in this case.[3]

After the **Air Control** Board or Water Commission assesses a penalty, the offender must either timely pay the penalty or file suit in district court. However, a supersedeas bond or cash deposit paid into an escrow account, in the full amount of the penalty, is a prerequisite to judicial review. TEX.HEALTH & SAFETY CODE §§ 382.089(a), (b), 361.252(k), (*l*); TEX.WATER CODE § 26.136(j). A party who fails to make a cash deposit or file a bond forfeits all rights to judicial review. TEX.HEALTH & SAFETY CODE §§ 361.252(m), 382.089(c); TEX.WATER CODE § 26.136(k).

TAB alleges that it is a **Texas** not-for-profit corporation, that its members do business throughout **Texas**, and that it is authorized to represent its members on any matter that may have an impact on their businesses.

TAB filed this suit under the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001–37.011, alleging that some of its members had been subjected to civil penalties assessed by either the **Air Control** Board or the Water Commission. TAB further alleged that all of its other members that operate their businesses pursuant to the pertinent provisions of the **Texas** Clean **Air** Act, the **Texas** Water Code, or the **Texas** Solid Waste Disposal Act or any rules or orders issued pursuant to those provisions were put at "substantial risk (if not certainty)" of being assessed civil penalties by the **Air Control** Board or the Water Commission. Thus this suit does not challenge specific instances of the **Air Control** Board's or the Water Commission's exercise, or threatened exercise, of the civil penalty power. Instead, TAB's suit is a facial challenge to the constitutionality of this administrative enforcement scheme under the **Texas** Constitution.

The Defendants and Intervenors counterclaimed seeking a declaratory judgment that the statutes, rules, and regulations challenged by TAB do not, on their face, conflict with the open courts and jury trial provisions of our constitution. The trial court granted the Defendants' and Intervenors' requested declaratory judgment and denied TAB's request for a declaratory judgment. The court also denied TAB's request for injunctive relief.

TAB appealed directly to this court. *See* TEX.GOV'T CODE § 22.001(c);[4] TEX.R.APP.P. 140. In this court, TAB has limited its challenges to claims of unconstitutional denial of a jury trial and violation of our constitution's open courts provision.

I. Standing

Before we reach the merits of this case, we first consider the matter of the trial court's jurisdiction, as well as our own; specifically we determine whether TAB has standing to challenge the statutes and regulations in question. Because TAB's standing to bring this action is not readily apparent, and because our jurisdiction as well as that of the trial court depends on this issue, we requested supplemental briefing on standing at the oral argument of this case. In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal. We disagree.

1 Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in **Texas**, the open courts provision. Subject matter jurisdiction ***444** is never presumed and cannot be waived. [5]

2 3 One limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine. *See* TEX.CONST. art. II, § 1; *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 471–74, 102 S.Ct. 752, 757–60, 70 L.Ed.2d 700 (1982); *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); *see also,* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 18 SUFFOLK U.L.Rev. 881, 889 n. 69 (1983) (noting that the dicta of *Flast v. Cohen,* 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968), suggesting that standing is unrelated to the separation of powers doctrine has since been disavowed). Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution. Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department. [6] *Firemen's Ins. Co. v. Burch,* 442 **S.W.2d** 331, 333 (**Tex**.1969); *Morrow v. Corbin,* 122 **Tex**. 553, 62 **S.W.2d** 641, 644 (**Tex**.1933). Accordingly, we have interpreted the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001–.011, to be merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions. *Firemen's Ins. Co.,* 442 **S.W.2d** at 333; *United Serv. Life Ins. Co. v. Delaney,* 396 **S.W.2d** 855, 863 (**Tex**.1965); *California Prods., Inc. v. Puretex Lemon Juice, Inc.,* 160 **Tex**. 586, 334 **S.W.2d** 780 (1960).

4 5 The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Firemen's Ins. Co.,* 442 **S.W.2d** at 333; *Puretex Lemon Juice, Inc.,* 160 **Tex**. at 591, 334 **S.W.2d** at 783. An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. *See Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). **Texas** courts, like federal courts, have no jurisdiction to render such opinions.

6 The separation of powers doctrine is not the only constitutional basis for standing. Under federal law, standing is also an aspect of the Article III limitation of the judicial power to “cases” and “controversies.” *Sierra Club v. Morton,* 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972). To comport with Article III, a federal court may hear a case only when the litigant has been threatened with or has sustained an injury. *Valley Forge Christian College,* 454 U.S. at 471, 102 S.Ct. at 758. Under the **Texas** Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury. Specifically, the open courts provision provides:

> All courts shall be open, and every person for an **injury** done him, in

> his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13 (emphasis added). Because standing is a constitutional prerequisite to maintaining a suit under both federal and **Texas** law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.

Under federal law, a lack of standing deprives a court of subject matter jurisdiction because standing is an element of such ***445** jurisdiction. *Carr v. Alta Verde Indus.,* 931 F.2d 1055, 1061 (5th Cir.1991); *Simmons v. Interstate Commerce Comm'n,* 900 F.2d 1023, 1026 (7th Cir.1990); *M.A.I.N. v. Commissioner, Maine Dept. of Human Serv.,* 876 F.2d 1051, 1053 (1st Cir.1989); *Haase v. Sessions,* 835 F.2d 902, 908 (D.C.Cir.1987); *Page v. Schweiker,* 786 F.2d 150, 153 (3d Cir.1986); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Heckler v. Mathews,* 465 U.S. 728, 737, 104 S.Ct. 1387, 1394, 79 L.Ed.2d 646 (1984); *Warth,* 422 U.S. at 511, 95 S.Ct. at 2211. Other states have followed this analysis in construing their own constitutions. [7] *See e.g., Prudential–Bache Sec., Inc. v. Commissioner of Revenue,* 412 Mass. 243, 588 N.E.2d 639, 642 (1992); *Bennett v. Board of Trustees for Univ. of N. Colorado,* 782 P.2d 1214, 1216 (Colo.App.1989), *cert. denied,* 797 P.2d 748 (Colo.1990); *Pace Constr. Co. v. Missouri Highway and Transp. Comm'n,* 759 **S.W.2d** 272, 274 (Mo.App.1988); *Terracor v. Utah **Bd**. of State Lands & Forestry,* 716 P.2d 796, 798–99 (Utah 1986); *State by McClure v. Sports and Health Club, Inc.,* 370 N.W.2d 844, 850 (Minn.1985), *appeal dism'd,* 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Smith v. Allstate Ins. Co.,* 483 A.2d 344, 346 (Me.1984); *Ardmare Constr. Co. v. Freedman,* 191 Conn. 497, 467 A.2d 674, 675 n. 4, 676–77 (1983); *Horn v. County of Ventura,* 24 Cal.3d 605, 156 Cal.Rptr. 718, 726, 596 P.2d 1134, 1142 (1979); *Stewart v. Board of County Comm'rs of Big Horn County,* 175 Mont. 197, 573 P.2d 184, 186, 188 (1977); *State ex rel. Albritton v. Moore,* 238 La. 728, 116 So.2d 502, 504 (1959).

7 Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties. ***Texas** Employment Comm'n v. International Union of Elec., Radio and Mach. Workers, Local Union No. 782,* 163 **Tex**. 135, 352 **S.W.2d** 252, 253 (1961); RESTATEMENT (SECOND) OF JUDGMENTS § 11, comment c (1982). This court recently reiterated that axiom in *Gorman v. Life Insurance Co.,* 811 **S.W.2d** 542, 547 (**Tex**.), *cert. denied,* 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). Because we conclude that standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal. [8]

8 If we were to conclude that standing is unreviewable on appeal at least three undesirable consequences could result. First and foremost, appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits. Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury. We therefore hold that standing, as a component of subject matter ***446** jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.

We are aware that this holding conflicts with ***Texas** Industrial Traffic League v. Railroad Commission,* 633 **S.W.2d** 821, 823 (**Tex**.1982) (per curiam). [9] The analysis that leads us to the conclusion we reach here, however, compels us to overrule ***Texas** Industrial Traffic League* and disapprove of all cases relying on it to the extent that they conflict with this opinion. [10] Although our concern for the rule of stare decisis makes us hesitant to overrule any case, when constitutional principles are at issue this court as a practical matter is the only government institution with the power and duty to correct such errors. *See Payne v. Tennessee,* 501 U.S. 808, ——– – ——–,

111 S.Ct. 2597, 2609–11, 115 L.Ed.2d 720 (1991) (observing that reexamination of constitutional decisions is appropriate when "correction through legislative action is practically impossible").

Consequently, we proceed to determine here, on our own motion, whether TAB has standing to bring this suit.

9 10 Because standing is a component of subject matter jurisdiction, we consider TAB's standing under the same standard by which we review subject matter jurisdiction generally. That standard requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Richardson v. First Nat'l Life Ins. Co.,* 419 **S.W.2d** 836, 839 (**Tex**.1967). When reviewing a trial court order dismissing a cause for want of jurisdiction, **Texas** appellate courts "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Huston v. Federal Deposit Ins. Corp.,* 663 **S.W.2d** 126, 129 (Tex.App.—Eastland 1983, writ ref'd n.r.e. 1984); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals,* 21 ST. MARY'S L.J. 865, 870 (1990).

11 Here, however, we are not reviewing a trial court order of dismissal for want of jurisdiction, we are considering standing for the first time on appeal. A review of only the pleadings to determine subject matter jurisdiction is sufficient in the trial court because a litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged. *See* TEX.R.CIV.P. 80. Failing that, the suit is dismissed. When an appellate court questions jurisdiction on appeal for the first time, however, there is no opportunity to cure the defect. Therefore, when a **Texas** appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

12 TAB asserts standing on behalf of its members. The general test for standing in **Texas** requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Board of Water Engineers v. City of San Antonio,* 155 **Tex**. 111, 114, 283 **S.W.2d** 722, 724 (1955). **Texas**, however, has no particular test for determining the standing of an organization, such as TAB. *See e.g., ***447** Touchy v. Houston Legal Found.,* 432 **S.W.2d** 690, 694 (**Tex**.1968); ***Texas** Highway Comm'n v. **Texas Ass'n** of Steel Importers, Inc.,* 372 **S.W.2d** 525, 530–31 (**Tex**.1963). While we agree with the statement of the general test for standing set out in *Board of Water Engineers,* we foresee difficulties in relying on it alone to determine the standing of an organization like TAB. For instance, when members of an organization have individual standing, but the organization was not established for the purpose of protecting the particular interest at issue, it is not necessarily in the members' best interest to allow such a disinterested organization to sue on their behalf. Furthermore, an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association, such as when the members seek to recover money damages and the amount of damages varies with each member.

13 The United States Supreme Court has articulated a standard for associational standing that lends itself to our use. We adopt that test today. In *Hunt v. Washington State Apple Advertising Commission,* the Court held that an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also New York State Club **Ass'n** v. City of New York,* 487 U.S. 1, 9, 108 S.Ct. 2225, 2231, 101 L.Ed.2d 1 (1988); *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock,* 477 U.S. 274, 282, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986). This standard incorporates the standing analysis we adopted in *Board of Water Engineers,*

yet addresses the additional concerns we have noted.

14 We now apply the *Hunt* standard to the case before us. Reviewing the record in its entirety for evidence supporting subject matter jurisdiction, and resolving any doubt in TAB's favor, we conclude that TAB has standing to pursue the relief it seeks in this case.

The first prong of the *Hunt* test requires that TAB's pleadings and the rest of the record demonstrate that TAB's members have standing to sue in their own behalf. This requirement should not be interpreted to impose unreasonable obstacles to associational representation. In this regard the United States Supreme Court stated that "the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club* ***Ass'n***, 487 U.S. at 9, 108 S.Ct. at 2232. We are satisfied that TAB has not manufactured this lawsuit. A comparison of the association's membership roster with the list of businesses subjected to state penalties indicates individual TAB members have been assessed administrative penalties pursuant to the challenged enactments. Additionally, TAB has alleged that other of its members remain at substantial risk of penalty. A substantial risk of injury is sufficient under *Hunt. See e.g., Pennell v. City of San Jose,* 485 U.S. 1, 7 n. 3, 108 S.Ct. 849, 855 n. 3, 99 L.Ed.2d 1 (1988) (concluding that association of landlords had standing based on pleadings that individual members would likely be harmed by rent ordinance). Thus TAB satisfies the first prong of the *Hunt* test.

The second prong of *Hunt* requires that TAB's pleadings and the rest of the record demonstrate that the interests TAB seeks to protect are germane to the organization's purpose. TAB was chartered to "represent the interests of its members on issues which may impact upon its members' businesses." Considering a very similar question in *New York State Club Association,* the United States Supreme Court held that: "[T]he associational interests that the consortium seeks to protect are germane to its purpose: appellant's certificate of incorporation states that its purpose is 'to promote the common business interests of its ****448*** [member clubs].' " 487 U.S. at 10 n. 4, 108 S.Ct. at 2232, n. 4 (bracketed language in original). Likewise, the interests TAB desires to protect are germane to the organization's purpose, and thus the second prong is met.

Under the third and final prong of the *Hunt* test, TAB's pleadings and the record must demonstrate that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. The Supreme Court has interpreted this prong as follows:

> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Hunt, 432 U.S. at 343, 97 S.Ct. at 2441 (quoting *Warth,* 422 U.S. at 515, 95 S.Ct. at 2213).

By seeking damages on behalf of its members, necessitating that each individual prove lost profits particular to its operations, the organization in *Warth* lacked standing to sue; rather, each individual member had to be a party to the suit. These facts are distinguishable from *Brock,* in which the union challenged an administrative interpretation of statutory provisions relating to unemployment compensation. 477 U.S. 274, 106 S.Ct. 2523. Recognizing that the suit raised "a pure question of law," and that "the individual circumstances" of any aggrieved member were not in issue, the Court held that the UAW had standing to challenge the government's actions. *Id.* at

287–88, 290, 106 S.Ct. at 2531–32, 2533; *see also Pennell,* 485 U.S. at 7 n. 3, 108 S.Ct. at 855 n. 3 (facial challenge to rent ordinance does not require participation of individual landlords). Here, TAB seeks only prospective relief, raises only issues of law, and need not prove the individual circumstances of its members to obtain that relief, thus meeting the third prong of *Hunt.*

Having found that TAB meets all three prongs of the *Hunt* test, we conclude that TAB has standing to pursue the relief it seeks in this case.

II. Open Courts

TAB contends that the forfeiture provisions of the statutes and regulations in question violate the open courts provision of the **Texas** Constitution by unreasonably restricting access to the courts. After the agency has found a party to be in violation of any of these statutes and regulations, the offender must either tender a cash deposit or post a supersedeas bond in the full amount of the penalties assessed, or forfeit the right to judicial review.[11]

Historically, we have recognized at least three separate constitutional guarantees emanating from our open courts provision. First, courts must actually be open and operating, so that, for example, the legislature must place every county within a judicial district. *Runge & Co. v. Wyatt,* 25 Tex.Supp. 294 (1860). Second, citizens must have access to those courts unimpeded by unreasonable financial barriers, so that the legislature cannot impose a litigation tax in the form of increased filing fees to enhance the state's general revenue, *LeCroy v. Hanlon,* 713 **S.W.2d** 335, 342 (**Tex.**1986). Finally, meaningful legal remedies must be afforded to our citizens, so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress. *Sax v. Votteler,* 648 **S.W.2d** 661, 665–66 (**Tex.**1983).

15 Here the second guarantee is applicable. This is not a question of the abrogation of any well-established common law ***449** cause of action,[12] just as it is not a question of the physical absence of a court to which a complaint may be brought. The issue before us is access to the courts. In previous cases involving this issue, we did not predicate our decision on whether the party whose access had been restricted was attempting to assert a common law cause of action. In *LeCroy,* for example, the court did not permit increased filing fees for statutory causes of action while denying them for common law claims. 713 **S.W.2d** 335. Likewise in *Dillingham v. Putnam,* when the court struck down a statute requiring a supersedeas bond as a condition of appeal, the court did not concern itself with whether the particular appeal being restricted involved a common law or statutory claim. 109 **Tex.** 1, 14 S.W. 303 (1890). Similarly, in the present case, the issue is simply whether the prepayment requirement is an unreasonable financial barrier to access to the courts in light of the state interest involved.

The stated purpose of the regulatory statutes at issue here is to protect our state's natural resources.[13] There is no question that this is an important state interest.[14] The state argues that the prepayment provisions further this interest by increasing the deterrent effect of the penalties and by aiding in their collection. The state maintains that a violator will be less deterred by an administrative penalty if it can delay payment without bond while appealing the case in the courts. The state also argues that delay may render the penalty uncollectible, as the violator may become insolvent.

In considering these rationales, we note that the prepayment provisions actually consist of two elements. First, the assessed penalty must be paid, or financial security provided, within thirty days; enforcement is not stayed pending any period of judicial review.[15] Second, if payment is not made or financial security provided within the thirty-day period, the right to judicial review is forfeited. We agree that the rationales advanced by the state justify the first of these elements. Requiring expeditious payment of the administrative penalties increases their effectiveness. The legislature, however, could have imposed the first element without the second. It could have

provided the agency with the right to collection of assessed penalties unless a supersedeas bond is posted, yet provided for judicial review. The requirement of immediate payment, without the corresponding forfeiture provision, would not have implicated the open courts provision, as the charged party could have obtained judicial review regardless of payment. This approach would have been in accordance with the usual procedure governing appeals of trial court judgments. *See* TEX.R.APP.P. 40. Any litigant may appeal without superseding the trial court's judgment, but the mere pendency of an appeal does not stay enforcement of the judgment. [16] ***450** Our specific focus for purposes of our open courts analysis, therefore, is not whether the requirement of immediate payment is reasonable, but whether the forfeiture of the right of judicial review, if the penalties are not superseded, is reasonable.

We conclude that the forfeiture provision is an unreasonable restriction on access to the courts. While the requirement of prepayment or the posting of a bond to stay enforcement furthers the state's important environmental interests by creating a strong incentive for timely payment of the assessed penalties, the forfeiture provision serves no additional interest. [17] The state may accomplish its goals by enforcing the prepayment requirements without infringing on a party's right to its day in court. Accordingly, we hold that forfeiture sections of the statutes and regulations at issue facially violate our open courts provision. [18]

III. Jury Trial

TAB also claims that the statutes empowering these agencies to assess civil penalties violate the right to a jury trial guaranteed by the **Texas** Constitution. [19] We disagree.

Article I, section 15 of our constitution [20] preserves a right to trial by jury for those actions, or analogous actions, tried to a jury at the time the constitution of 1876 was adopted. *E.g., State v. Credit Bureau of Laredo,* 530 **S.W.2d** 288, 291 (**Tex**.1975); *White v. White,* 108 **Tex**. 570, 196 S.W. 508 (1917); *Hatten v. City of Houston,* 373 **S.W.2d** 525 (Tex.Civ.App.—Houston 1963, writ ref'd n.r.e.); *Hickman v. Smith,* 238 **S.W.2d** 838 (Tex.Civ.App.—Austin 1951, writ ref'd). A jury trial is not mandated by this provision for any other judicial proceeding. *Id.*

16 In *Credit Bureau,* we concluded that a suit for civil penalties for violation of an injunction issued pursuant to the **Texas** Deceptive Trade Practices Act was analogous to the common law action for debt, tried to a jury at the time our constitution was adopted. 530 **S.W.2d** at 293. Thus, we held that the right to a jury trial for that action remained inviolate. *Id.* We observed in *Credit Bureau,* however, that in certain types of adversary proceedings the constitutional right to a jury trial does not attach. Among the proceedings we referred to are appeals from administrative decisions. [21] *Id.* (citing *State v. De Silva,* 105 **Tex**. 95, 145 S.W. 330 (1912), and ***451** ***Texas** Liquor **Control Bd**. v. Jones,* 112 **S.W.2d** 227 (Tex.Civ.App.—Houston 1937, writ ref'd n.r.e.)). Consistent with this noted exception in *Credit Bureau,* we conclude that these agencies' assessments of environmental penalties are not actions, or analogous actions, to those tried to a jury at the time the constitution of 1876 was adopted. To hold that these environmental statutes and regulations promulgated in the late 1960s merely parrot common law and statutory rights triable to a jury in 1876 would turn a blind eye to the emergence of the modern administrative state and its profound impact on our legal and social order. In the late 19th century, ours was primarily a sparsely-populated agrarian society. *See generally,* T.R. Fehrenbach, *Lone Star: A History of **Texas** and the Texans,* 279–324 (1983). By contrast, concentrated industrial activity and its by-products, including the wide-spread emission of pollutants, with their resulting potential for significant damage to our natural resources are phenomena of relatively recent origin. In response to such phenomena, regulatory schemes, such as those challenged here, were designed to balance mounting environmental concerns with our state's economic vitality. In 1876 no governmental schemes akin to these existed. [22] Thus, we conclude that the contested proceedings are not analogous to any action tried to a jury in 1876. Accordingly, we hold that no right to a jury trial attaches to appeals from administrative

adjudications under the environmental statutes and regulations at issue here. [23]

We should not be misunderstood to say that the legislature may abrogate the right to trial by jury in any case by delegating duties to an administrative agency. Here, we simply reaffirm what this court held almost a half century ago, in *Corzelius v. Harrell,* 143 **Tex**. 509, 186 **S.W**.**2d** 961 (1945). In *Corzelius,* we concluded that certain judicial functions, including fact finding, may be delegated constitutionally by the legislature to administrative agencies in furtherance of the preservation and conservation of the state's natural resources. The decision in *Corzelius* was based on article XVI, section 59(a) of our constitution, which provides in relevant part: "The conservation and development of all the natural resources of this State ... and the preservation and conservation of all such natural resources ... are each and all ... public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." **TEX**. CONST. art. XVI, § 59(a). "By the use of the broad language used in Article XVI, Section 59(a)," the court stated, "the Legislature is authorized to enact such laws as are necessary to carry out the purposes for which such constitutional amendment was adopted." *Corzelius,* 186 **S.W**.**2d** at 964. [24]

17 There is no doubt that the legislature delegated the power to assess these civil penalties to the **Air Control** Board and the Water Commission as a manifestation of the public's interest in preserving and conserving the state's **air** and water resources. That intent is apparent from the policy statements of the relevant statutes. [25] ***452*** We conclude, therefore, that the delegation of the fact-finding function by the legislature to the **Air Control** Board and the Water Commission under this statutory scheme was within the legislature's constitutional authority.

Of course, the fact that no jury trial is provided by the legislature to an alleged violator of these environmental protection laws does not mean that the agencies' power to assess penalties is unbridled. [26] The **Air Control** Board and the Water Commission may act only within constitutional and statutory parameters.

For the reasons set out above, we reverse that portion of the trial court's judgment declaring that section 4.041 of the **Texas** Clean **Air** Act, sections 26.136 and 27.1015 of the **Texas** Water Code, and section 8b of the **Texas** Solid Waste Disposal Act and the rules and regulations promulgated under those statutes comport with the open courts provision of our constitution, article I, section 13. We declare that the requirement of a supersedeas bond or cash deposit paid into an escrow account as a prerequisite to judicial review under TEX.HEALTH & SAFETY CODE §§ 361.252(m) (first clause), 382.089(c) (first sentence), and TEX.WATER CODE § 26.136(k) (first sentence) is unconstitutional. We affirm that portion of the trial court's judgment declaring that the listed statutes, rules, and regulations do not violate the jury trial provision of our constitution, article I, section 15.

Concurring and dissenting opinions by DOGGETT, GAMMAGE and SPECTOR, JJ.

HIGHTOWER, J., not sitting.

DOGGETT, Justice, concurring and dissenting.

"Don't Mess With Texas"

*—A motto that captures the **Texas** spirit.*

Texans understand the directive "Don't Mess With **Texas**"; the majority does not. If the mess is big enough, if the stench is strong enough, no matter how great the danger to public health and safety, an industrial litterer can "mess" with **Texas** without fear of immediate punishment or legally effective citizen action.

And what an occasion for permitting polluters to "mess" with **Texas air** and water. Our state tops the nation in total toxic emissions and ranks dead last among the fifty states in important measures of environmental quality. [1] Although last in **air** ***453*** and

water cleanliness, **Texas** today becomes the first state to strike down the imposition of penalties by administrative agencies to enforce statutes protecting the environment. I dissent from today's manipulation of the law to paralyze anti-pollution efforts, tragically announced at a time when protecting the quality of the **air** we breathe and the water we drink is so critical.

Today's opinion delivers a double whammy to protection of our natural resources. Polluters are first shielded from swift punishment for harming our environment, and then the courthouse door is slammed shut in the face of Texans who organize to object. Incredibly, this second punch was not even sought by the corporate organization that brought this challenge; it was wholly designed by the majority during the three years that this cause has lingered in this court. Announced today is an easily manipulable “friends in, foes out” rule to prevent further actions by those who organize to protect taxpayers, consumers or the environment.

Through its broad writing designed to eviscerate administrative enforcement of our state's environmental laws, the majority has also created significant new uncertainties for a wide range of state governmental activity—tax collection is imperiled, laws to protect nursing home residents are effectively voided, and even a leading weapon in the war on drugs is threatened. At a time of budgetary crisis exacerbated by the majority's great misadventure in public school finance, [2] today's opinion raises a substantial question of whether the State will be required to return to those who despoil **Texas** millions of dollars in administrative penalties collected during the almost eight years this case has wandered through the judicial system.

This major blow to our environment is matched only by the threat to our system of justice lurking in the arcane language of today's opinion. Hidden within its lengthy legal mumbo-jumbo is an unprecedented blow to our jury system. The constitutional right of trial by jury, already suffering at the hands of this majority, is no longer inviolate; it may be abrogated at any time. Instead of walking into a courthouse, where a jury is guaranteed, citizens may be detoured to an administrative agency, to explain their problems to bureaucrats not directly answerable to the community.

Today precedent and tradition have been trampled as the majority's long-standing fear of ordinary people in our legal system has taken firm hold. The drafters of our **Texas** Constitution realized something that the majority has long ceased to appreciate —ordinary Texans can make an extraordinary contribution to our system of justice. The more their collective voice expressed in a jury verdict is disregarded, the more new barriers are contrived to shut them out of our system of justice, the less justice that system will offer.

I. Open Courts

The ability of state agencies to enforce environmental laws through the assessment of administrative penalties is declared unconstitutional by the majority as contradicting our state guarantee of open courts. While concluding that TAB certainly has a right to judicial review on behalf of its members, I disagree that the statutory restrictions it challenges unreasonably restrict access to the courts.

Access to the courts is unquestionably a fundamental constitutional and common law right. Article I, section 13 of the **Texas** Constitution forms the nucleus of this protection:

> ***454** The open courts provision specifically guarantees all litigants the right to redress their grievances—to use a popular and correct phrase, the right to their day in court. *This right is a substantial state constitutional right.*

LeCroy v. Hanlon, 713 **S.W.2d** 335, 341 (**Tex**.1986) (citations omitted). This court has a long history of assuring that the right of access remains guaranteed to **Texas** citizens. [3]

In *Sax v. Votteler,* 648 **S.W.2d** 661 (**Tex**.1983), we required a litigant alleging an unconstitutional denial of access to the courts to show that: (1) a cognizable common law cause of action is being restricted and (2) the limitation is unreasonable or arbitrary when balanced against the purpose and basis of the statute. The majority today appropriately eliminates the first showing in certain cases. In some circumstances the distinction between common law and statutory causes of action clearly does not affect whether access to the courts has been denied.

The second part of the *Sax* test, however, continues to be applied in all open courts cases. [4] Thus, in determining whether the open courts provision of the **Texas** Constitution is violated by the requirement that administrative penalties be paid as a prerequisite to judicial review, we must balance two competing interests: the right of TAB's members to access to the courts and the state's concern with effective and timely enforcement of its laws protecting the environment. The majority today restates in rather vague terms this second prong: "whether the prepayment requirement is an unreasonable financial barrier to access to the courts in light of the state interest involved." **852 S.W.2d** at 449. As we held in *LeCroy:*

> Because a substantial right is involved, the legislature cannot arbitrarily or unreasonably interfere with a litigant's right of access to the courts. Thus, the general open courts provision test balances the legislature's actual purpose in enacting the law against that law's interference with the individual's right of access to the courts. *The government has the burden to show that the legislative purpose outweighs the interference with the individual's right of access.*
> 713 **S.W.2d** at 341 (citations omitted; emphasis supplied).

Applying this test, we have permitted certain restrictions on access to the courts, while disallowing others. *Compare LeCroy,* 713 **S.W.2d** at 341 (court filing fee unreasonably restricts access to judicial system), and *Dillingham v. Putnam,* 109 **Tex**. 1, 14 S.W. 303 (1890) (supersedeas bond as prerequisite to appeal, without regard to ability to pay, unconstitutional), *with Clanton v. Clark,* 639 **S.W.2d** 929 (**Tex**.1982) (court may constitutionally dismiss suit for failure to timely file cost bond), and *Federal Crude Oil Co. v. Yount–Lee Oil Co.,* 122 **Tex**. 21, 52 **S.W.2d** 56 (1932) (requirement that franchise taxes be paid prior to filing suit upheld under article I, § 13); *compare Lucas v. United States,* 757 **S.W.2d** 687 (**Tex**.1988) (limitations on damages for medical malpractice unconstitutional), *with Rose v. Doctors Hosp.,* 801 **S.W.2d** 841 (**Tex**.1990) (same limitations upheld under open courts provision in wrongful death cases). I favor a more complete and predictable open courts analysis designed to discourage such anomalous results.

***455** Today's implementation of the second prong of the *Sax* test demonstrates its malleability. After perfunctorily reciting the purpose of administrative penalties, the majority, without any further analysis, concludes that: "the forfeiture provision is an unreasonable restriction on access to the courts," **852 S.W.2d** at 450, and "the forfeiture provision serves no additional [state] interest." *Id.* at 450. Enacted by the Legislature as an important means of enforcing our state's environmental laws, these penalties are today judicially extinguished. The majority determines that these laudable legislative objectives are not sufficiently "important" to justify the possibility that the use of penalties may perhaps someday impose some slight financial strain on some hypothetical polluter.

Whether examined under either the vague test employed today or my more exacting formulation, the majority's conclusory analysis suffers from at least three major flaws: (1) a failure to recognize the compelling interest, grounded in our state constitution, served by administrative penalties, including prepayment provisions; (2) a disregard of the extensive statutory constraints on penalty usage which represents the least restrictive means to achieve this purpose; and (3) an assumption that the prepayment provision interferes with individual access to the courts unsupported by even a single specific instance of such a restrictive effect.

The balancing required by *Sax* mandates careful consideration of the rights being affected. The more significant the right the litigant asserts, the more onerous the government's burden becomes. TAB has asserted a right to judicial review of penalties imposed against its members. This interest is encompassed within the right of access to the courts, which we declared a "substantial state constitutional right." *LeCroy,* 713 **S.W.2d** at 341.

The State has met its burden by demonstrating a compelling interest in employing administrative penalties reflected in constitutionally-guaranteed protection of our state's natural resources. Although not critical in overcoming an open courts challenge, a constitutional predicate for the state's interest is a highly persuasive factor in the balancing process. As declared in article XVI, section 59(a) [5]:

> [T]he preservation and conservation of all ... natural resources of the State are each and all declared public rights and duties; and the Legislature shall pass all laws as may be appropriate thereto.
> This very mandate of the people, as well as protection of the public health and safety was effectuated in the Clean **Air** Act, [6] the **Texas** Water Code, [7] and the Solid Waste Disposal Act, [8] including the right to assess administrative penalties. Protection of **Texas**' **air**, water and land is undeniably a compelling interest.

***456** The form of these particular administrative penalties has certainly been fashioned to serve this important state interest through the least restrictive means. Penalty usage is substantially limited and can in no way be said to be arbitrarily imposed. All three statutes at issue require that, once a violation is established, the agency assessing a penalty must consider such factors as the seriousness of the violation, including but not limited to the nature, circumstance, extent, and gravity of the prohibited acts; the hazard or potential hazard created to the public health or safety of the public; the history of previous violation; the amount necessary to deter future violations; and efforts to correct the violation. [9] There is thus statutory assurance that the amount of any resulting penalties will be directly related to the conduct.

Requiring that assessed penalties be paid, or a bond in the same amount be posted, prior to challenging the agency action in court is not unreasonable under these circumstances. Unlike the filing fee held violative of the open courts provision in *LeCroy,* the legislative purpose is not to raise money by making it more expensive for citizens to enforce their legal rights. Instead, the legislative objective is to *deter and punish* violations of the law that pose an environmental threat.

The wheels of justice grind slowly, with final resolution often years in reaching. Indeed, in this court they sometimes hardly grind at all. Clearly those willing to profit from polluting our natural resources will not hesitate to employ the delays in the judicial system to their advantage. A declaration of bankruptcy by a perhaps deliberately undercapitalized corporation during the pendency of a suit is likely to relieve the polluter of any responsibility to remedy the damage it has caused.

Showing no awareness of the purpose of and need for administrative penalties, the majority finds that "expeditious payment" is adequately guaranteed by the ability of the agency, through the attorney general, to initiate an enforcement action to collect the amount assessed. **852 S.W.2d** at 449 & n. 15. In other words, the purpose of immediate deterrence of violation of environmental laws is ensured by the filing of a lawsuit that may take as many years to resolve as this case has. These agencies charged with protecting our natural resources have long had the ability to bring an enforcement action in state court. *See* Tex.Water Code § 26.123; Tex.Health & Safety Code § 382.081; *id.* § 361.224. The effort of the **Texas** Legislature to improve the effectiveness of enforcement through the use of administrative penalties is today rendered a nullity.

Given the time and expense that must be devoted to pursuing an enforcement action

in court, the State will have the capability to proceed against only the most egregious wrongs. The vast majority of administrative penalties to date have been relatively small, reflecting technical yet important statutory violations. [10] In the absence of an administrative penalty power, most of these would have gone unpunished, even though collectively the environmental impact of small violations could be more profound than a major catastrophe. Relieving polluters from immediate sanctions dismantles the effectiveness of our laws protecting natural resources; no lesser means has been identified that provides for prompt enforcement. I would hold that the state has demonstrated a compelling interest in environmental protection that has been implemented by the least restrictive means, thus overriding any modest impediment that the prepayment of penalties may impose on access to the courts.

***457** Not even the slightest evidence has been provided to this court to suggest any actual restrictive effect. No affidavit of any member of the **Texas** Association of Business appears in the record stating that an inability to pay an administrative penalty has barred judicial review. As to most of the penalties assessed, $5,000 or less in amount, it is doubtful that such a contention could be made. The majority necessarily concludes that imposing fines of $2,000 against Exxon Chemical Company, Shell Oil Company and Union Carbide Corporation has left those entities financially unable to pursue an appeal. [11] While the enormity of some future penalty could in fact unconstitutionally bar judicial access, that is certainly not the case here. *See Jensen v. State Tax Comm'n,* 835 P.2d 965, 969 (Utah 1992) (payment of assessed taxes, penalties and interest as precondition to suit "not unconstitutional in all cases," but only those in which taxpayer financially barred from prosecuting appeal); *see also Morrison v. Chan,* 699 **S.W.2d** 205, 207 (**Tex**.1985) (medical malpractice statute of limitations not unconstitutional as applied to facts of case).

Eliminating the need to prove actual restrictive effect, the majority declares "irrelevant" that "the affected parties may be able to afford prepayment." **852 S.W.2d** at 450 n. 18. Unexplained is how this statement can be reconciled with *Dillingham,* in which this court found of critical importance the failure to accommodate those financially unable to post a supersedeas bond as a prerequisite to judicial review. Opining that "the guarantee of constitutional rights should not depend on the balance in one's bank account," *id.,* the majority would accord our state's largest businesses the same treatment as indigents in avoiding financial responsibility for court and other litigation costs.

Nor is the majority restrained by **Texas** decisional law validating similar requirements. We long ago upheld against this same type of challenge the condition that a corporation pay its franchise taxes in order to file a court action. *Federal Crude Oil Co. v. Yount–Lee Oil Co.,* 122 **Tex**. 21, 52 **S.W.2d** 56 (1932); *accord Rimco Enterprises, Inc. v. **Texas** Elec. Svc. Co.,* 599 **S.W.2d** 362 (Tex.Civ.App.—Fort Worth 1980, writ ref'd n.r.e.). Various statutory requirements that taxes, penalties and interest be paid prior to contesting them in court have likewise sustained an open courts challenge. *See Filmstrips and Slides, Inc. v. Dallas Central Appraisal Dist.,* 806 **S.W.2d** 289 (Tex.App.—Dallas 1991, no writ) (property taxes); *Robinson v. Bullock,* 553 **S.W.2d** 196 (Tex.Civ.App.—Austin 1977, writ ref'd n.r.e.), *cert. denied,* 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978) (sales taxes).

The majority also ignores the certainty that far more than three statutes are impacted by today's decision. A broad range of regulatory enforcement programs vital to protection of the public health and safety will be stripped of their most timely and effective sanctions to deter harmful conduct. Laws designed to protect the old—residents in nursing homes [12]—the young—our children away at camp [13]—the sick and the injured, [14] and those we have lost [15] will be substantially weakened. Others, ensuring the sanitariness of food, drugs and cosmetics, [16] as well as the slaughter and ***458** disposition of dead animals, [17] will be similarly rendered less effective. [18] Even where such penalties have not been frequently enforced, their potential use may promote law enforcement.

The most widespread damage, however, from today's decision will be in the enforcement of laws protecting our environment, where the Legislature has determined again and again that such penalties are the most effective means of assuring compliance and preventing pollution of our **air**, water and land.[19] The majority ensures that those who pollute will be brought to justice very slowly or not at all.

Other statutes that impose administrative penalties permit the filing of an affidavit of inability to pay in lieu of prepayment or the posting of a bond.[20] Because the majority's reasoning strikes down administrative penalties without reference to financial ability, **852 S.W.2d** at 451, these statutes similarly cannot be enforced.

Today's writing poses a potentially crippling effect for collection of taxes. All of our state statutes in this area require that assessed taxes, penalty and interest be prepaid before a suit challenging them may be filed. *See generally* Tex.Tax Code §§ 112.051, 112.101. If such requirements are unconstitutionally void even to fulfill a constitutional mandate of environmental protection, their validity for tax collection is certainly subject to question. *See R Communications, Inc. v. Sharp,* 839 **S.W.2d** 947 (Tex.App.—Austin 1992, writ granted).

Nor has the majority sought to consider the consequences of its decision for a major weapon in the war against drugs, forfeiting *prior to judicial review* money, vehicles and other property alleged to have been used in violating our criminal laws. Tex.Crim.Proc.Code art. 59.02–.11. Most frequently invoked to seize assets from drug dealers, such as money and cars that could finance their defense, this statute provides for the return of property prior to trial only ***459** on the posting of a bond for the full value. *Id.* art. 59.02(b).

Procedures within our judicial system are also threatened. Why is not the requirement that corporations and other organizations appear in court only through counsel a violation of the open courts provision, since the cost of retaining an attorney in most cases exceeds the average administrative penalty considered here?

Inadequately considered by the majority's opinion is its effect on the millions of dollars in administrative penalties that have already been paid under the statutes now declared unconstitutional. Yet, under the general rule that our decisions apply retroactively, past violators of environmental laws may stand to reap a substantial windfall.[21] In the firm grasp of this majority, "open courts" may have been rewritten to mean open coffers. While claiming that nothing in today's writing suggests that a refund is required, the majority apparently once again concludes that monies extracted by the state under the coercion of an unconstitutional system may be retained. *See Carrollton–Farmers Indep. Sch. Dist.,* 826 **S.W.2d** at 515–23 (holding tax unconstitutional, but requiring taxpayers to continue payment for two years).

The majority today throws a large wrench into the workings of the important administrative mechanism of our **Texas** government. By severely limiting enforcement powers, the majority leaves law enforcers little choice but to forego prosecution of law violators. Our laws designed to protect and conserve our natural resources are substantially weakened at the time their strength is most needed.

II. Trial by Jury

The harm caused to our environment by today's writing is equalled only by the severe blow struck against our fundamental right of trial by jury. In holding that TAB and its members have no right to a jury trial, the majority employs an analysis that has far-reaching ramifications. While I recognize the need to accommodate the evolution of the administrative state, the history of this important guarantee mandates that only the narrowest of exceptions be permitted.

The ability of each individual to have a case heard by other members of the community is a vital part of our heritage and law. Long ago, Texans emphasized the

paramount importance of this guarantee, stating in their grievances against the Mexican government:

> It has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen.

The Declaration of Independence of the Republic of **Texas** (1836), *reprinted in* Tex.Const.app. 519, 520 (Vernon 1955). A strong guarantee of this right had been unsuccessfully sought in an 1833 draft constitution,[22] which was submitted to Mexico by Stephen F. Austin[23] and was later incorporated in the 1836 **Texas** Independence Constitution.[24]

The central role of the jury as a democratic institution was firmly recognized, indeed celebrated, in our early jurisprudence by the Supreme Court of the Republic of **Texas**:

> The institution of jury trial has, perhaps, seldom or never been fully appreciated. It has been often eulogized in sounding ***460** phrase, and often decried and derided. An occasional corrupt, or biased, or silly verdict is not enough for condemnation; and when it is said the institution interposes chances of justice and checks against venality and oppression, the measure of just praise is not filled. Its immeasurable benefits, like the perennial springs of the earth, flow from the fact that considerable portions of the communities at stated periods are called into the courts to sit as judges of contested facts, and under the ministry of the courts to apply the laws.... Let us then preserve and transmit this mode of trial not only inviolate, but if possible purified and perfected.

Bailey v. Haddy, Dallam 35, 40–41 (**Tex**.1841).[25]

In 1845, expanding the scope of this right was the subject of spirited debate in the deliberations over the new constitution for statehood. In addition to the previous guarantee, which was carried forward in a new Bill of Rights,[26] further protection was included in the Judiciary Article. **Tex**. Const. art. IV, § 16 (1845). While under our national Constitution and those of almost all of our sister states trial by jury is available only for those actions that could have been brought at common law, the **Texas** Constitution since 1845 has also preserved that right in cases that historically would have been brought in equity. Thus, even when a private party seeks injunctive relief that will inure to the public's benefit, any derogation of the right to a jury nonetheless violates the **Texas** Constitution.

Urging support of the additional Judiciary Article guarantee, Convention President Thomas Rusk declared:

> It is a dangerous principle to trust too much power in the hands of one man. Would it not be better to trust a power of this nature in the hands of twelve men, than to confide it to the breast of one?

William F. Weeks, *Debates of the **Texas** Convention* 268 (1846). He was opposed by John Hemphill, later the first Chief Justice of this court, who actually "preferred the civil law" system, *id.* at 271–73, and Jefferson County delegate James Armstrong, who insisted the new section would "operate very injuriously." *Id.* at 270. He declared:

> It would be better, in my opinion, to leave it to the legislature to apply these things; it is enough for us to say in the constitution that the trial by jury shall be preserved inviolate. If we intend the jury to determine every thing, it would be better to dispense with the judge altogether, as a useless appendage of the court.

Id. Today it is this same fear of juries, fortunately rejected in 1845, that now

unfortunately prevails.

The original language providing for trial by jury in the Judiciary Article of 1845 was retained in later constitutions, **Tex**. Const. art. IV, § 16 (1861), **Tex**. Const. art. IV, § 20 (1866), but was thereafter extended to "all cases of law or equity." **Tex**. Const. art. V, § 16 (1869). It took its final form in our present Constitution of 1876, which continues to afford not one but two assurances on this vital subject:

> In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right to trial by jury....

Tex. Const. art. V, § 10.

The right of trial by jury shall remain inviolate.
Tex. Const. art. I, § 15. Rather than keeping it "inviolate," the majority today severely violates this right.

***461** Our heritage is now rejected by the majority in favor of a deliberately overbroad writing that treats trial by jury as a mere anachronism. This is consistent with the majority's increasing disfavor of decisionmaking by ordinary citizens composed as a jury. [27] Today's opinion insists that our constitutional assurance of trial by jury does not offer protection against legislative delegation of factfinding to an administrative bureaucracy. In essence, the majority engages in a massive redistribution of power from the people to the bureaucratic arm of state government. This extreme position is totally unjustified in view of the staunch legal and historical underpinnings of our constitutional commitment to afford Texans a jury of their peers.

Today's opinion accurately describes one element of the dual constitutional protection for this fundamental liberty:

> Article I, section 15 of our constitution preserves a right to trial by jury for those actions, or analogous actions, tried to a jury at the time the constitution of 1876 was adopted.

852 S.W.2d at 450 (footnote omitted). Then the majority grossly misconstrues this standard while making selective and misleading use of jurisprudence developed under the further guarantee of article V.

With its hangnail sketch of **Texas** history limited to one historian's very generalized description of **Texas** in the era "between 1835 and 1861", [28] **852 S.W.2d** at 450, the majority ignores our longstanding concerns regarding threats to our natural resources. As early as 1860, the Legislature acted to penalize polluters, providing that:

> If any person ... shall in anywise pollute, or obstruct any water course, lake, pond, marsh or common sewer, or continue such obstruction or pollution so as to render the same unwholesome or offensive to the county, city, town or neighborhood thereabouts, or shall do any act or thing that would be deemed and held to be a nuisance at common law, shall be ... fined in any sum not exceeding five hundred dollars.... [29]

In an early decision considering whether a criminal nuisance was posed by a tallow factory near Galveston at which cattle were slaughtered and their carcasses and offal were allowed to accumulate, this court stated:

> It requires no aid of the common law to convince any one accustomed to pure **air**, and who has been brought by accident or necessity within the sickening and malarious influence of one of our modern tallow and beef factories, that it is a disgusting and nauseous nuisance, even for miles around it ... [those] so offending should be indicted and punished to the extent of the law.

Allen v. State, 34 **Tex**. 230, 233–34 (1871). How significantly has this court's once vigorous enforcement of anti-pollution laws waned.

Defilement of the environment was not only made punishable as a crime, but also subject to a common law action for nuisance. *See generally* Horace Wood, Wood's Law of Nuisances 501–21, 576–692 (2d ed. 1883) (discussing nuisance recovery at common law for various forms of **air** and water pollution). Such actions were regularly brought in **Texas** before 1876 to halt activities harmful to our **air** and water. In 1856, this court recognized that "[w]hat constitutes a nuisance is well defined." [30] ***462** *Burditt v. Swenson,* 17 **Tex**. 489 (1856). Considering an action to enjoin operation of a livery stable on Congress Avenue in Austin because "manure and filth has already accumulated to such an extent, that it now causes an unhealthy and disagreeable effluvia, exceedingly offensive and prejudicial," *id.* at 492, this court concluded such "noisome smells" constituted a nuisance. *Id.* at 502–03. In *City of Fort Worth v. Crawford,* 74 **Tex**. 404, 12 S.W. 52, 54 (1889), an individual asserted that, because of the dumping of garbage, filth and bodies of dead animals on city land,

> his home was rendered almost uninhabitable; his family and himself were kept in bad health; and he was, in the language of a witness, "a walking skeleton." This court further observed that
>
> > The stench was so offensive that he had to shut the doors to eat and sleep.... The testimony shows that the filth on this place of deposit was so indescribable, and was so offensive as to make persons sick, and could be perceived a mile away.
>
> *Id.* Affirming the judgment declaring the dump a common law nuisance, this court declared:
>
> > There is also no doubt that every person has a right to have the **air** diffused over his premises free from noxious vapors and noisome smells....
>
> *Id.* [31]

The majority's suggestion that "pollutants ... are phenomena of relatively recent origin," **852 S.W.2d** at 451, is contradicted by the nineteenth century legislative response of criminalizing pollution and the common use of the common law of nuisance to fight soiling of the **air** and water. With the ongoing construction of the railroads, the mining of coal and sulphur, the emergence of industry and the nascence of our oil and gas industry, our state's natural resources were by no means pure and unthreatened in 1876. *See* James C. Cobb, Industrialization and Southern Society 1877–1984, 128 (1984) (describing pollution relating to increased rail usage, lumbering and urban sewage); *see also* Robert A. Calvert & Arnoldo De Leon, The History of **Texas** 186–191 (1990) (discussing the development of **Texas** industry in the late 1800's, including lumbering, beef processing and mining); Louis J. Wortham, 5 A History of **Texas** (1924) (examining industrial development in the nineteenth century). Only the scope and depth of the problem has changed. But even if the fouling of the environment were a recent technological "innovation" of the past century, that would be irrelevant. As I recently wrote in another context,

> The law is not irretrievably locked in the days before televisions and videocameras, nor limited to operators of telegraphs and horse-drawn carriages.

Boyles v. Kerr (**Tex**.1992) (Doggett, J., dissenting). There is nothing about technological change that has made trial by jury any less vital. [32]

But because there was no modern bureaucracy in 1876, the majority insists: "no governmental schemes akin to these existed." *Id.* at 451. While our laws and society have grown more complicated, the mandate ***463** of our constitution has not. As we

concluded in *State v. Credit Bureau of Laredo, Inc.,* 530 **S.W.2d** 288, 292 (**Tex**.1975): "The right to a trial by jury is not limited to the precise form of action ... at common law." If there was an analogous cause of action with a right to jury trial in 1876, then our article I jury trial guarantee requires it today. Yet the majority ignores the fact that even the earliest of pollution statutes was designed to deter and punish those who harm our environment. Our jury trial article is thus decreed as dependent on form, not substance; not analogy, but exactitude. Under the majority's analysis, *Credit Bureau* was wrongly decided since a regulatory prohibition against deceptive non-disclosure or ambiguous language with the capacity to deceive was beyond the "deceptive acts" of common law fraud or deceit as it existed in 1876.

Seizing upon the rather obvious proposition that the administrative state had not yet been created in 1876, the majority concludes that there is no right to trial by jury in judicial review of an administrative proceeding. But under article I it is the nature of the cause of action that **controls**, not the procedures under which it is enforced. Each of the three statutes considered today defines "pollution" of **air**, water or land to incorporate early nuisance concepts. **Tex**. Health & Safety Code § 382.003(3) (contaminants that "are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property [or] interferes with the normal use and enjoyment of animal life, vegetation, or property"); *id.* § 361.003(44) ("contamination of any land land or surface or subsurface water in the state that renders the land or water harmful, detrimental, or injurious to humans, animal life, vegetation"); **Tex**. Water Code § 26.001(13) (contamination that "renders the water harmful, deterimental, or injurious to humans, animal life, vegetation, or property"). The majority fails to examine these provisions and makes no attempt to distinguish their substance from nuisance actions at the time the constitution was adopted. The focus must be on the nature of civil and criminal nuisance actions as they existed in 1876, not on whether administrative agencies existed then to bring such actions. That the creation of some administrative agency was not contemplated in 1876 does not mean that any type of factfinding transferred to that agency in 1993 or hereafter is beyond the purview of a jury. With its new approach, the majority is only clearing the way for a steady expansion of factfinding and decisionmaking by bureaucracy at the expense of trial by jury.

Concluding that no common law action analogous to the assessment of administrative penalties existed in 1876, the majority professes a superficial limit on its holding tied to article XVI, § 59(a) of the **Texas** Constitution, as interpreted in *Corzelius v. Harrell,* 143 **Tex**. 509, 186 **S.W.2d** 961 (1945). **852 S.W.2d** at 451 n. 24. Nothing in this provision affects the determination of whether a nuisance action for pollution is analogous to an enforcement action for the same conduct. Clearly, the majority's reasoning rests solely on the fact that no administrative agency was charged in 1876 with protecting the state's resources. Nor does *Corzelius* in any way address the right to jury trial. Under the majority's asserted "narrow" holding, the right to trial by jury can be immediately abrogated in any case in which natural resources are even remotely involved, including private disputes that this court has held are subject to jury trial, such as those involving mineral ownership, contract rights, or mineral lease terms. *See, e.g., Amarillo Oil Co. v. Energy–Agri Prod., Inc.,* 794 **S.W.2d** 20, 26 (**Tex**.1990).

The constitutional limitation on legislative power to delegate away the people's right to trial by jury was amply demonstrated by the writing of this court in *White v. White,* 108 **Tex**. 570, 196 S.W. 508 (1917). There a husband had his wife, who apparently did not contest that she was a "lunatic," committed to a state asylum. Commitment proceedings had been statutorily transferred to a "commission" appointed by a county judge and comprised of six members, "as many of [whom] shall be physicians as may be possible." Act of ****464*** April 8, 1913, 33rd Leg., ch. 163, art. 152, 1913 Tex.Gen.Laws 342. Although a review of decisions of other states and of federal practice indicated substantial support for what appeared to be a quite reasonable legislative attempt to entrust the determination of mental competency to the expertise of the medical profession, 196 S.W. at 514–15, this Court rightly concluded there that

> trial by jury means something more than a hearing before a commission....

Id. 196 S.W. at 511. Such "a hearing before a commission, in lieu of the time-honored trial by jury, is invalid." *Id.* 196 S.W. at 515. Moreover,

> [contrary] reasoning [in other jurisdictions] as to the right of the legislature to dispense with jury trials is not applicable to our judicial system and laws, and it is obnoxious to our [**Texas**] Constitution...."

Id. I maintain that the wholesale transfer of authority for factfinding from juries to the bureaucracy announced here is no less offensive to the rights our Constitution guarantees.

Beginning with the constitutional amendment that led to the creation of the Railroad Commission, [33] the use of administrative agencies in **Texas** has steadily increased. Today this arm of government implements broad legislative plans regulating many areas of public concern, including the conduct of public utilities, the development and conservation of energy resources, and the protection of the environment.

To preserve the workings of modern government, some exception for administrative proceedings may be necessary, but it should be drawn narrowly so as not to encompass every conceivable action that could arguably be assigned to some existing or future administrative body. And that is precisely what, until today, our **Texas** courts have usually done. In two decisions concerning administrative cancellation of a permit to sell liquor, courts narrowly recognized that no "cause of action" was involved. The court in *Bradley v.* ***Texas*** *Liquor* ***Control Bd.***, 108 **S.W.2d** 300 (Tex.Civ.App.—Austin 1937, writ ref'd n.r.e.), specifically excluded from its ruling cases "based upon a civil right of [an individual] to compensation." Relying on *Bradley,* [34] the court in ***Texas*** *Liquor* ***Control Bd.*** *v. Jones,* 112 **S.W.2d** 227, 229–30 (Tex.Civ.App.—Texarkana 1937, no writ), noted that unlike other administrative proceedings that might involve rights of the same character as a "cause of action," the cancellation of a liquor license is a proceeding brought by the state pursuant to its police power to protect the "welfare, health, peace ... and safety of the people of **Texas**."

This concern for "the safety of the people of **Texas**"—the rights and needs of the public, *id.,* is not dissimilar from the doctrine of "public rights" rather imperfectly employed by the federal courts. State cancellation of a liquor license essentially represents a "public right." In *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977), the court distinguished between cases involving governmental action to protect the public health and safety and those involving only private rights:

> At least in cases in which "public rights" are being litigated—e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes ... [the constitutional right to a jury trial] does not prohibit ... assign[ment of] the factfinding function to an administrative forum with which the jury would be incompatible.

Id. at 450, 97 S.Ct. at 1266.

Bradley and *Jones* are also consistent with writings in other jurisdictions strictly excluding from any administrative public rights exception actions invoking private ****465*** rights for which the Constitution mandates a right to trial by jury:

> Although the award of general compensatory damages may have substantive effect, in that it deters violation of the regulatory scheme ... when the damages awarded advance a substantial private interest in remuneration that is disproportionate to the concept of public relief, the right to a jury trial is implicated and a jury is required.

*McHugh v. Santa Monica Rent **Control Bd**.*, 49 Cal.3d 348, 261 Cal.Rptr. 318, 344, 777 P.2d 91, 117 (1989) (Panelli, J., concurring); *Bishop Coal Co. v. Salyers,* 181 W.Va. 71, 380 S.E.2d 238, 246 (1989) (subjective determinations of damages are constitutionally entrusted to juries); *Broward County v. La Rosa,* 505 So.2d 422, 424 (Fla.1987) (constitutional right to jury precludes administrative awards of unliquidated damages).

Fortunately the rights of Texans are not constrained by whether the right to a jury trial was preserved in analogous actions in 1876. We have written quite clearly that an even broader right to trial by jury is afforded under article V, section 10 than under article I, section 15.[35] *State v. Credit Bureau of Laredo, Inc.,* 530 **S.W.2d** 288, 292 (**Tex**.1975). Relying on *Walsh v. Spencer,* 275 **S.W.2d** 220, 223 (Tex.Civ.App.—San Antonio 1954, no writ), which described the "much broader guarantee" of the Judiciary Article, and *Tolle v. Tolle,* 101 **Tex**. 33, 104 S.W. 1049, 1050 (1907), which said of the provision, "[l]anguage cannot be more comprehensive than this," we expressly disapproved of earlier cases "mistakenly" treating the two provisions

> as identical in meaning, that is, as protecting the right of trial by jury only as it existed at common law or by statutes in effect at the time of the adoption of the Constitution.
>
> 530 **S.W.2d** at 292 (citing *Hickman v. Smith,* 238 **S.W.2d** 838 (Tex.Civ.App. —Austin 1951, writ ref'd), as improperly assigning the two provisions equivalent meaning). We held that the Judiciary Article affords a unique right to trial by jury even for causes of action unknown at the time of the Constitution's adoption. *Id.*[36]

Instead of heeding this holding, the majority seizes upon a citation to a commentary in that writing as an excuse to rewrite the Constitution. In the discussion of the article V jury trial guarantee in *Credit Bureau,* which involved no administrative action, we noted a few "isolated" proceedings that do not constitute a "cause" that have been identified on a "case-by-case determination." *Id.* at 293. We made shorthand reference to a commentator's brief list of exceptions carved from the otherwise inviolate right to trial by jury. *Id.* (citing Whitney R. Harris, *Jury Trial in Civil Cases—A Problem in Constitutional Interpretation,* 7 Sw.L.J. 1, 8 (1953) (listing child custody by habeas corpus and adoption proceedings, election contests, and contempt proceedings)). Additionally, Harris relied upon *Jones* for the broader proposition that proceedings originally brought before administrative agencies are excepted from constitutional jury rights. 7 Sw.L.J. at 12–13.[37]

***466** Today the majority overexpands this exception before considering the rule it prefers that exception to swallow. In *Credit Bureau* we attributed "broad meaning [to] the word 'cause.' " 530 **S.W.2d** at 292. In defining it, we did not limit its meaning in the past, but turned to a relatively contemporary dictionary as well as older authority. *Id.* Clearly this term must adapt to modern developments; our understanding of a "cause" is not frozen in 1876. *See Davenport v. Garcia,* 834 **S.W.2d** 4, 19 (**Tex**.1992). Both the text of our Constitution and its historical backdrop demand that the right to trial by jury remain "inviolate." When, as here, however, changing circumstances require reexamination of the scope of this right in order to preserve the evolved workings of government, we must ensure that any exception does not destroy the guarantee.[38] We should instead follow the command of our Constitution in light of our contemporary situation, by limiting any exception in the most narrow way possible without completely undermining the administrative state.

I would accordingly clarify any existing exception for administrative proceedings to preserve the right to trial by jury in all suits except those in which the state is enforcing a regulation or statute protecting the public. If construed too broadly, however, even this exception limited to "public rights" could destroy our traditional reliance on the jury system.[39] Indeed, despite the writing in *Atlas Roofing,* such erosion has already begun at the federal level.[40] Properly limited, however, a "public rights" administrative exception to the right to trial by jury is both constitutionally sound and easy to apply.

While perhaps far-reaching in other contexts, “public rights” that conflict with the right of each member of the public to have factual disputes resolved by a public jury must be narrowly construed. I would not permit the concept of “public rights” to be perverted to deny such a fundamental right. In this limited circumstance, I would define proceedings involving “public rights” as those in which the government, as a real party in interest, enforces a regulatory or statutory scheme. Contrary to the majority, I do not suggest that we follow its standard preference for copying a “federal test,” **852 S.W.2d** at 451 n. 24. Rather, I recommend a narrow and clear **Texas** standard that looks to **Texas** law predating *Atlas Roofing,* and which learns from the misapplication of this doctrine in the federal courts.

Here TAB's members are not entitled to a jury trial because the state is enforcing public regulations by imposing administrative penalties. Although this action is analogous to a common law nuisance claim, here the state is protecting the public's right to a clean environment rather than an ***467** individual's use and enjoyment of private property.

The right to trial by jury is a critical state constitutional guarantee. Denigrating my concern with protecting this liberty, the majority dismisses my writing as “trumpeting.” **852 S.W.2d** at 451 n. 23. The trumpet call has sounded from the very earliest days of our Republic, heralding our right to trial by jury, a clarion to our citizens to shout out to preserve their heritage against attack. It demands that any intrusion on this right be narrow in scope, clearly-announced and thoughtfully considered. The majority's refusal to define with certainty its erosion of the right to trial by jury sounds a weak and shaky chord, reflecting a lack of commitment to this fundamental guarantee. Attempting to let the strong note drown the weak, the majority seeks to hide its equivocation by reference to my conclusion that a jury trial is not required under these anti-pollution statutes, *id.,* and by criticizing the narrow, clear and thoughtful exception I have drawn today. *Id.*

The inviolate nature of the right to trial by jury demands that this vital guarantee be circumscribed in only the most extraordinary circumstances and that any exception to it be clearly and narrowly construed. Although I do not disagree with the result announced by the majority, the analysis employed is designed to destroy one of our most precious freedoms as Texans. The alternative I offer would permit our administrative bodies to implement efficiently their regulations, while ensuring that efficiency concerns do not envelop a fundamental civil liberty. [41]

III. Standing

The issue of standing is a stranger to this litigation. No party before this court has ever asserted that the **Texas** Association of Business lacked capacity to challenge the actions of state government. How rare the occasion when all litigants agree on the proper resolution of an issue, but how truly extraordinary is such unanimity when the parties are two state regulatory agencies, the **Texas** Association of Business, the Sierra Club and the League of Women Voters. This, nonetheless, is the exceptional circumstance in which we find ourselves today as all of these diverse parties have urged the court not to decide this matter in the manner adopted. Addressing the question of standing solely at the belated insistence of the majority, all parties asserted that this issue was not in dispute; that, under recent precedent, standing had been waived; [42] and, alternatively, that the record adequately demonstrated the right of the **Texas** Association of Business under **Texas** law to initiate this litigation. Why then does the majority insist on writing? Because it dare not pass up the opportunity to close access to our courts to those citizens who choose to challenge environmental degradation, neighborhood destruction and consumer abuse. Through a narrowly crafted test, the majority extends an invitation to TAB to come into the courts while telling other public interest groups to stay out.

While devoting over half of today's opinion to a nonissue in this litigation, the majority oddly limits its inquiry to only one of the three organizations asserting standing here.

Nothing is said as to the League of Women Voters and the Sierra Club, both of which intervened in the trial court and were aligned as defendants with the State. Asserting the interests of its members in water and **air** quality, as well as its involvement in protecting the state's natural resources, the League of Women Voters claimed standing to defend the challenged regulations. Similarly, the Sierra Club ***468** based its standing on its purpose of environmental enhancement and conservation of natural resources. By completely ignoring whether these groups were proper parties and by embracing a federal standing test hostile to their participation, the majority erects new barriers to deny Texans access to **Texas** courts.

To achieve this result, the majority must overcome what, until recently, was viewed as a considerable obstacle—**Texas** law. This court has repeatedly held that the issue of standing may not be raised for the first time on appeal, either by the parties or by the court. In ***Texas** Industrial Traffic League v. Railroad Comm'n of **Texas***, 633 **S.W.2d** 821, 822–23 (**Tex**.1982), we concluded:

> A party's lack of justiciable interest must be pointed out to the trial court ... in a written plea in abatement, and a ruling thereon must be obtained or the matter is waived.
>
> No plea challenging the standing of [the party] was filed in the district court. *The issue of standing was therefore waived, and the court of appeals erred in writing on the issue at all.*

(Emphasis supplied). The sole issue presented in *Coffee v. William Marsh Rice University,* 403 **S.W.2d** 340 (**Tex**.1966), was whether the court of appeals erred in dismissing a case, on its own motion, for want of standing. This court held that, because standing had not been challenged in the trial court, that issue could not deprive the court of appeals of subject matter jurisdiction. *Id.* at 347–48. Assuming that standing was lacking in *Sabine River Authority of **Texas** v. Willis,* 369 **S.W.2d** 348, 349–50 (**Tex**.1963),[43] this court nonetheless held that dismissal was erroneous, because the absence of a justiciable interest was not first raised in the trial court. We have repeatedly cited these decisions with approval. *See Central Educ. Agency v. Burke,* 711 **S.W.2d** 7, 8 (**Tex**.1986) (per curiam); *American General Fire & Casualty Co. v. Weinberg,* 639 **S.W.2d** 688 (**Tex**.1982); *Cox v. Johnson,* 638 **S.W.2d** 867, 868 (**Tex**.1982) (per curiam).

Time and time again, the courts of appeals have also refused to consider challenges to standing not first raised in the trial court.[44] Until today, the only criticism of our prior holdings to this effect has ***469** consisted primarily of writings authored by one appellate judge.[45]

The majority has a simple way to deal with this venerable body of law—overrule only one case, making today's abrupt change in the law appear less drastic, while ignoring the rest. In fact, six **Texas** Supreme Court cases must be overruled and no less than twenty-five decisions of the courts of appeals must be disapproved to reach today's result. The concept of reliance on the prior decisions of **Texas** courts has long since ceased to offer the slightest restraint on this majority.[46]

Bulldozing a new path through this jurisprudential forest, the majority vaults standing to a new and remarkable prominence by suddenly discovering that it has not just *one* but *two* constitutional bases. And what unusual constitutional pillars each of these new finds represents. First, the proscription of the separation of powers doctrine against issuance of advisory judicial opinions allegedly requires rigorous enforcement of standing even when no party debates its existence. This link between standing and separation of powers is not predicated on any directly relevant prior court decision,[47] but instead is entirely premised on an article openly antagonistic to standing for environmental groups. **852 S.W.2d** at 444, citing Atonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U.L.Rev. 881 (1983). The current majority may be the first in the nation to anchor standing on

this constitutional theory.

The authorities addressing the prohibition on advisory opinions cited in support of this proposition, of course, in no way implicate the question of standing. This precedent-setting concern with advisory opinions contrasts markedly with the eagerness to issue this very type of writing within the last year. *See Edgewood Indep. Sch. Dist. v. Kirby,* 804 **S.W.2d** 491, 501 (**Tex**.1991) (Doggett, J., concurring); *Carrollton–Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.,* 826 **S.W.2d** 489, 537 (**Tex**.1992) (Doggett, J., dissenting) (advisory opinions issued and retracted as necessary to thwart efforts to satisfy the constitutional command of equity and efficiency in our public schools). Writing on an issue not raised by any party, as the majority reaches out to revise the law of standing today, seems to me the very essence of an "advisory" opinion.

The second newly-announced constitutional basis is equally ironic—our state's vital guarantee that "[a]ll courts shall be open," **Tex**. Const. art. I, § 13, in some inexplicable way, mandates that they be closed to some and requires continual judicial monitoring of all who attempt to enter. No authority of any type is cited for this ***470** proposition that "open" courts really means "closed" courts. Nothing in the history or text of the provision justifies this reading nor has any **Texas** court previously attempted such converse interpretation. This constitutional guarantee is used today as a two-edged sword: the majority invokes the open courts provision to bar environmental groups from seeking judicial assistance in enforcing the laws, while in the very same opinion misinterpreting this provision to allow continued violation of statutes protecting our precious natural resources. [48]

Then, with a final flourish, standing is conveniently classified as a nonwaivable component of subject matter jurisdiction. Until today, **Texas** followed the rule, adopted by many of our sister states considering the issue, that objections to a party's standing are waived if not first raised in the trial court. [49] No **Texas** case is cited for the proposition that standing is part of nonwaivable subject matter jurisdiction because, until today, this court had repeatedly stated precisely the very opposite—that standing is *not* jurisdictional. [50]

Texas has with good reason determined that standing is not excepted from traditional rules of appellate procedure. Our appellate system is predicated on the requirement of presentation of complaints to the lower court coupled with preservation and briefing in the reviewing court. *See* Tex.R.App.P. 52; 74(d), 131(e). Appellate courts face considerable difficulties in deciding an issue not presented to the trial court; ordinarily, the necessary facts will not be fully developed. The unstated effect of today's opinion is to require trial courts to develop facts as to undisputed issues or risk subsequent appellate reversal. This is not an effective use of our limited judicial resources.

The requirement that issues first be presented to the trial court serves another function—preventing parties from "laying behind the log":

> The reason for the requirement that a litigant preserve a trial predicate for complaint on appeal is that one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.

Pirtle v. Gregory, 629 **S.W.2d** 919, 920 (**Tex**.1982). While this court has condemned "trial by ambush," ***471** *Gutierrez v. Dallas Indep. School Dist.,* 729 **S.W.2d** 691, 693 (**Tex**.1987), today the majority promotes "ambush on appeal."

Three purported policy justifications for the majority's actions are offered, with not a single supporting authority. The first concern is that a strict standing rule is necessary to prevent collusive litigation. Under **Texas** law, the filing of a fictitious suit constitutes contempt by counsel, Tex.R.Civ.P. 13, and may serve as the basis for a host of

sanctions, including dismissal with prejudice. Tex.R.Civ.P. 215 2b(5). Nor does our **Texas** judiciary lack the ability to reject collusive litigation. *Felderhoff v. Felderhoff,* 473 **S.W.2d** 928, 932 (**Tex**.1971) ("We believe that our laws and judicial system are adequate to ferret out and prevent collusion...."); *cf. Whitworth v. Bynum,* 699 **S.W.2d** 194, 197 (**Tex**.1985) (refusing to uphold **Texas** Guest Statute because of danger of collusion). Adhering to precedent today would in no way undermine the power to dismiss fraudulent suits.

The second virtue proclaimed for today's holding is the guarantee that the lower courts will be restrained from exceeding their jurisdictional powers. **852 S.W.2d** at 445. This concern is derived solely from the federal law mandate that a federal appellate court is duty-bound to verify not only its own jurisdiction but that of the lower courts as well. Federal courts, however, have limited jurisdiction; **Texas** courts do not. Our **Texas** Constitution creates courts of general jurisdiction, investing them with all of the "judicial power of this State." **Tex**. Const. art. V, § 1. The differences are evident in our procedural rules. While a federal court must affirmatively ascertain jurisdiction over parties appearing before it, a **Texas** court's jurisdiction is presumed until proven lacking by a contesting party. *See* Tex.R.Civ.P. 120a.

Lastly, the majority expresses concern as to the res judicata effect on other potential litigants of a judgment rendered in the absence of genuine standing. **852 S.W.2d** at 445–446. Aware of this concern, the very federal judiciary that this majority is so eager to emulate has failed to perceive it as a problem of significance. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock,* 477 U.S. 274, 290, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986). If representation is inadequate, or a conflict of interest between members exists, any judgment will have minimal preclusive effect. *Id.* Instead of completely barring access to the courts, procedural safeguards can ameliorate any potentially overbroad effects. *See generally* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, 18 Federal Practice & Procedure § 4456 at 490–94 (1981 & Supp.1991).

The manufactured nature of the majority's concerns becomes all the more evident when the real world experience of **Texas** is considered. The majority is unable to point to a single example of collusion during the three decades our **Texas** rule, which allows the issue of standing to be waived, has been in place. During this period there have likewise been no examples of lower courts making a grab for extrajurisdictional power, nor of oppressed litigants shackled by the res judicata effect of contrived litigation.

In defining state requirements for standing, we are in no way bound by federal jurisprudence founded upon converse jurisdictional principles from our own. **Texas** courts can afford their citizens access to justice in circumstances where they would have been unable to establish standing in the federal courts. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 113, 103 S.Ct. 1660, 1671, 75 L.Ed.2d 675 (1983) ("state courts need not impose the same standing ... requirements that govern federal-court proceedings"); *Doremus v. Board of Education,* 342 U.S. 429, 434, 72 S.Ct. 394, 397, 96 L.Ed. 475 (1952) (state courts not restrained by "case or controversy" limitations of Federal Constitution); *Greer v. Illinois Housing Development Auth.,* 122 Ill.2d 462, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988) ("We are not, of course, required to follow the Federal law on issues of justiciability and standing.").

The differences between our **Texas** Constitution and the Federal Constitution not only justify, but also require, that citizen groups be accorded a broader right of access ***472** to our state courts. The **Texas** Constitution contains no express limitation of courts' jurisdiction to "cases" or "controversies," as provided by the federal charter. U.S. Const. art. III, § 2. Instead, it affirmatively protects the rights of litigants to gain access to our judicial system:

> All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Tex. Const. art. 1, § 13. As this court has recognized,

> The provision's wording and history demonstrate the importance of the right of access to the courts.... The right of access to the courts has been at the foundation of the American democratic experiment.

LeCroy v. Hanlon, 713 **S.W.2d** 335, 339 (**Tex**.1986).

This constitutional mandate is reflected in decisions of this court adopting an "open courts" approach to standing in general and associational standing in particular. On several occasions, we have recognized the power of the Legislature to exempt litigants from proof of "special injury." *Scott v. Board of Adjustment,* 405 **S.W.2d** 55, 56 (**Tex**.1966) (standing may be shown even in the absence of particular damage); *Spence v. Fenchler,* 107 **Tex**. **443**, 180 S.W. 597 (1915) (under statute, "any citizen" able to seek injunction, without showing particular interest or personal damage). [51] In enacting the Uniform Declaratory Judgments Act, the **Texas** Legislature has granted a broad right of standing: any person "whose rights, status or other legal relations *are affected by* a statute" may seek a declaration of those rights. Tex.Civ.Prac. & Rem.Code § 37.004 (emphasis supplied).

This court has previously extended its "open courts" approach to groups representing the interests of their members. [52] In ***Texas*** *Highway Comm'n v.* ***Texas Ass'n*** *of Steel Importers,* 372 **S.W.2d** 525, 530–31 (**Tex**.1963), we permitted a business association to challenge an administrative order. Although the order addressed only the import of foreign products for highway construction, this court recognized standing of an organization whose interest in foreign imports was not so limited:

> Some of [the respondents] are owners of imported foreign manufactured products suitable for highway construction purposes. All of them are actively engaged in the sale and use of imported manufactured products.... [S]uch parties clearly have the right and litigable interest to have the challenged ... Order declared null and void.

Id. at 531. Similarly, in *Touchy v. Houston Legal Foundation,* 432 **S.W.2d** 690 (**Tex**.1968), the court considered whether an organization of attorneys had standing to maintain a suit against a charitable corporation to restrain violations of ethical canons governing the practice of law. Based solely on "the special interest attorneys have in their profession," the court held standing was established.

The "open courts" approach [53] of *Touchy* and ***Texas*** *Highway Commission* is quite sufficient to allow TAB access to the **Texas** ****473*** courts. [54] These two associational standing cases are all but ignored today, brushed aside as setting forth "no particular test." **852 S.W.2d** at 446.

Yet in these cases in which the merits of standing are preserved for appellate court review, the **Texas** test applied has not been complicated. We simply look to whether a party has a stake in the action sufficient to ensure adversarial presentation of the issues and to whether the court's judgment will have any effect on those before it. *See Board of Water Engineers v. City of San Antonio,* 155 **Tex**. 111, 283 **S.W.2d** 722, 724 (1955) ("there shall be a real controversy between the parties, which ... will be actually determined by the judicial declaration sought."). Because both of these considerations are met in the instant case, reference to federal law is wholly unnecessary.

Today, however, to justify meddling with **Texas** standing law, the majority declares that "we foresee difficulties" not here with TAB, but in future cases involving organizational standing. **852 S.W.2d** at 446. To cure these perceived but as yet totally unrealized woes, the majority imposes a difficult to meet, easy to manipulate standard drawn from federal law "that lends itself to our use." *Id.* at 447. Never needing an invitation to impose more federal requirements on **Texas** citizens, the majority writes into our **Texas** law books the confused and troubling federal standing limitations. Not surprisingly, that law has taken a regressive turn, denying standing to public interest

associations, including those seeking to protect the environment. *See* Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright,* 133 U.Pa.L.Rev. 635, 659 (1985) ("One could perhaps be forgiven for confusing standing's agenda with that of the New Right.").

The benefits of permitting an association to represent the concerns of its members are manifest. As recognized in *United Auto Workers,* 477 U.S. at 290, 106 S.Ct. at 2533, "[T]he primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." Judicial economy is promoted when one litigant can, in a single lawsuit, adequately represent many members with similar interests, thus avoiding repetitive and costly actions. The wider range of resources often available for associations enhances their effectiveness in litigation:

> Special features, advantageous both to the individuals represented and to the judicial system as a whole, ... distinguish suits by associations on behalf of their members.... An association suing can draw upon a pre-existing reservoir of expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." ... These resources assist both courts and plaintiffs.

Id. at 289–90, 106 S.Ct. at 2532–33. In some cases, an injury that is substantial as to many may have an individual financial impact too small to make a challenge economically feasible. Associational representation may be the only means of redressing conduct when the harm is limited in degree but substantial segments of society are affected. Additionally, in challenging policies of government, organizations are generally less susceptible than individuals to retaliation by the bureaucrats they challenge.

These benefits are ignored as the majority declares that henceforth the right of associations to bring suit in **Texas** courts will be constricted by a three-part federal test set forth in *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977), requiring that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's ***474*** purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." [55]

Yet the *Hunt* test won't hunt in **Texas**. It is adopted purportedly because of the similarities between the state and federal constitutional underpinnings of the standing doctrine. Two critical factors are ignored: (1) the significant differences between the **Texas** and United States Constitutions and (2) the fact that much of federal standing doctrine is not mandated by the federal charter, but is imposed solely on the grounds of judicial "prudence." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) ("This [standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.").

The majority works a grave disservice to our **Texas** Constitution by equating our open courts provision, affirmatively guaranteeing all Texans access to our judicial system, with an express federal constitutional limitation on the right to seek redress in court. Despite the fact that the two provisions are vastly different in language, history and purpose, the majority nonetheless determines to "look to the more extensive jurisprudential experience of the federal courts" to determine standing. This is clearly an erroneous course. *See Davenport v. Garcia,* 834 **S.W.2d** 4 (**Tex**.1992, orig. proceeding) (in blindly adhering to federal law, "based on different language, different history and different cases, "[f]rom our treasured state heritage, law and institutions ... [we] derive nothing....").

Even the federal constitutional constraint is a simple one, looking to whether "the

plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of the court's remedial powers on his behalf." *Warth,* 422 U.S. at 498, 95 S.Ct. at 2205, *quoting Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 1103, 7 L.Ed.2d 663 (1962). In fact, this bare-bones test closely resembles the approach that **Texas** courts have long chosen to follow. To the extent *Hunt* constructs additional barriers to access to our judicial system, they are wholly court-created. [56] No justification for their adoption is contained in the majority opinion.

Moreover, in turning to the federal law of standing, the majority invokes a doctrine that has been criticized more heavily and justifiably than perhaps any other. *See, e.g.,* Gene R. Nichol, Jr., *Rethinking Standing,* 72 Cal.L.Rev. 68, 68 (1984); Mark V. Tushnet, *The "Case or Controversy" Controversy,* 93 Harv.L.Rev. 1698, 1713–21 (1980). Even the United States Supreme Court has recognized that federal standing requirements have an "iceberg quality," *Flast v. Cohen,* 392 U.S. 83, 94, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968); yet the majority fails to navigate a course, not unlike the captain of the Titanic, that would steer **Texas** well away from this potential disaster.

The concept of standing is "employed to refuse to decide the merits of a legal claim." Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3531, at 338. Critics of the doctrine's complexity and uncertainty have recognized how subject it is to manipulation: "standing ... is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits." *Id.* at 348 (citing commentaries). [57] Important rights can be left unprotected ***475** as a result. *Id.* at § 3531.3, 416–17 ("Standing decisions present courts with an opportunity to avoid the vindication of unpopular rights, or even worse to disguise a decision on the merits in ... opaque standing terminology.... Unarticulated and arbitrary predilection, cast as standing, defeats rights that deserve judicial protection.").

Even during the three years that this particular cause has been pending here, the federal courts have been hard at work to manipulate standing requirements to bar public interest groups from seeking judicial vindication of rights common to their members. In *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), a nationally-recognized environmental group challenged a new development classification for certain federal wilderness areas that allegedly violated several federal statutes. The suit was dismissed for lack of standing based upon a rigid construction of the requirement of injury to the association's members. This decision has been widely criticized as significantly impairing the ability of public interest groups to represent their members, particularly those that seek to protect this nation's environment and natural resources. [58] Today the majority eagerly positions itself to give the same treatment to those Texans who would petition our state courts to protect the public interest. The majority not only conspicuously relies on *Lujan,* **852 S.W.2d** at 445, but also embraces the extremist anti-environmental stance propounded in an article openly critical of judicial opinions permitting citizens to complain of harm inflicted upon our natural resources. *Id.* at **443**–444, citing Atonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U.L.Rev. 881 (1983).

Rather than a careful consideration of our **Texas** precedent and our unique **Texas** Constitution, today Texans are handed yet another unthinking embrace of federal law. Claiming "guidance" from federal precedent, **852 S.W.2d** at 445, the majority overrules all **Texas** cases treating standing as a procedural issue, then unnecessarily modifies all **Texas** precedent addressing the merits of standing. Without explanation, today's opinion simply photocopies into our **Texas** law books the federal law of standing with all of its much-criticized complexities. Once again the majority chooses more Washington wisdom for **Texas** when what we need is more **Texas** thinking in Washington. *See Bexar County Sheriff's Civ. Service Comm'n v. Davis,* 802 **S.W.2d** 659, 665 (**Tex**.1990) (Doggett, J., dissenting).

While today the corporate members of the **Texas** Association of Business are permitted to challenge the bureaucracy, tomorrow this same reasoning will be employed to bar public interest, neighborhood, environmental and consumer groups from vindicating the rights of their members. Today's opinion not only repudiates our past "open courts" approach to access to the judicial system but also eliminates the long-recognized appellate requirement that ***476** error be preserved. The majority has charged well beyond traditional constraints in its writing.

To the extent this case is about standing, it is about standing still, about closing the courthouse door, once standing open. For today the majority extends a standing invitation to those who would harm our environment to act without fear of citizen challenge in the **Texas** courts.

IV. Conclusion

Today the environment is the immediate victim. Those who pollute our rivers, release toxins into our **air**, and damage our land cannot be promptly penalized. Instead, only after the very slow wheels of our judicial system have creaked to a stop will violators of environmental protection laws be held accountable.

Yet the environment is not the whole story. Much as a river may seem pure and clear even at the place where illegal sewage is being pumped into it, the danger from a court's opinion may not be immediately apparent on its surface. Only after the reasoning is applied in other cases is the severity of the resulting harm to our system of justice revealed. Today's impairment of the ability of concerned citizens to vindicate the rights of many in our courts and the majority's knockout punch to the right of trial by jury will unfold in future cases to bar participation of ordinary citizens in **Texas** courts.

The mess in **Texas** is not only with our environment but with the misinterpretation of the law.

GAMMAGE, Justice, concurring and dissenting.
Though I would prefer not to write separately, I find I am unable to agree entirely with any single opinion of the court's other members. I must write this concurring and dissenting opinion because, while I agree with the disposition of this cause, I disagree with substantial portions of the reasoning and language in the majority's opinion and I agree with part of Justice Doggett's concurring and dissenting opinion.

I agree with the preliminary portion of Justice Cornyn's majority opinion, which correctly sets forth the regulatory scheme and basic dispute.

I agree *substantially* with Part II of Justice Doggett's opinion and his jury trial discussion. In my view, whether or not a suit is a "cause" for purposes of the right to a jury trial is not **controlled** by whether it was first determined by an administrative agency. I also agree with Part III of Justice Doggett's opinion relating to standing, which I will further address below. I agree with Part II of Justice Cornyn's majority opinion. The statutes may not condition access to the courts on prepayment of a *penalty.* The principle here is the same as for a supersedeas bond. The statute may condition the right to restrain the prevailing party (the State) from executing (enforcing) its judgment (administrative order) on the posting of a bond for the full amount. It may not, however, condition the *right to appeal* the judgment on posting of the full *penalty* imposed. *Dillingham v. Putnam,* 109 **Tex**. 1, 5–6, 14 S.W. 303, 304 (1890). This is true even if that "judgment" takes the form of an administrative agency decision. Administrative agency decisions, for the most part, entitle an appellant to only "substantial evidence" as opposed to *de novo* review. To further burden those regulated with prepayment of the "judgment" as the only alternative to total loss of even substantial evidence review violates the basic concept of our constitutional open courts in **Texas**.

As to the issue (or non-issue) of standing, the majority in effect adopts the position of

federal courts that standing is a *jurisdictional* question. Otherwise it cannot be fundamental error to be addressed when no party raises it. Standing was not raised and should not be addressed in this cause.

Even assuming standing is an element of subject matter jurisdiction, the court should not write on the issue in this case. Even though a judgment is void and subject to collateral attack at any point if there is an absence of subject matter jurisdiction, *see* ****477*** *Mercer v. Phillips Natural Gas Co.,* 746 **S.W.2d** 933, 936 (Tex.App.—Austin 1988, writ denied), unassigned error of lack of jurisdiction should be addressed only if jurisdiction is in fact lacking. Since the majority concludes there was standing in this case, and since no party raised its existence as an issue, there is no reason to address it at all, even if it would be *fundamental error* if *lacking.*

The basis for the majority's discussion is its sudden revelation that "[s]tanding is implicit in the concept of subject matter jurisdiction." **852 S.W.2d** at **443**. Their opinion then claims this implication comes from the separation of powers doctrine and the open courts provision of the **Texas** Constitution. It is a curiosity of legal scholarship, however, that in the 156 prior years of its existence, this court never before found standing "implicit" in those constitutional provisions, but in fact wrote that standing could be waived and hence was not fundamental error. ***Texas*** *Indus. Traffic League v. Railroad Comm'n,* 633 **S.W.2d** 821, 823 (**Tex**.1982). Justice Doggett's opinion adequately addresses why there is no implication from those provisions that standing is jurisdictional.

The majority's struggle to put standing in issue whenit is not prompts me to address two statements in its opinion which strike me as either misleading or just plain wrong. The majority asserts, without citation to authority, that "[s]ubject matter jurisdiction is never presumed," **852 S.W.2d** at **443**–444, and in a footnote repeats that assertion in urging that "Justice Doggett confuses subject matter jurisdiction with personal jurisdiction. Only the latter can be waived when uncontested. *See* TEX.R.CIV.P. 120a." **852 S.W.2d** at 444 n. 5. The majority's claim that subject matter jurisdiction is never presumed is at its very best misleading.

Connected with this discussion is the implicit assertion in another footnote that there is a "jurisdictional standing" that is different from "objections to join a real party in interest or to a party's capacity to sue rather than jurisdictional standing." **852 S.W.2d** at 445 n. 7. These remarks are made in an attempt to distinguish the cases cited by Justice Doggett from those of other states holding that standing is not jurisdictional. I suppose we should be encouraged to find out that there are some types of "standing" that will not be jurisdictional, but it occurs to me that by using the term "jurisdictional standing" the court is begging the question—if it is jurisdictional, then it must be fundamental. The problem is that the **Texas** cases, at least as I read them, define "standing" in terms of "the party's capacity to sue,"[1] which is one example we are given of non-jurisdictional standing. The majority opinion is calculated—no, guaranteed—to cause confusion because apparently this court will henceforth tell litigants on a case-by-case basis whether the standing problems in their cases are "jurisdictional" or merely formal.

There is no need to create this confusion. The majority's fomenting it, however, requires that I address it to some extent. I will discuss the "subject matter never presumed" proposition first, then weave into the "jurisdictional standing" language.

I agree that subject matter jurisdiction is never presumed in one respect. Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered to adjudicate under the applicable constitutional and statutory provisions. *See Pope v. Ferguson,* ****478*** 445 **S.W.2d** 950, 952 (**Tex**.1969), *cert. denied,* 397 U.S. 997, 90 S.Ct. 1138, 25 L.Ed.2d 405 (1970); *Bullock v. Briggs,* 623 **S.W.2d** 508, 511 (Tex.App.—Austin 1981, writ ref'd n.r.e.), *cert. denied,* 457 U.S. 1135, 102 S.Ct. 2962, 73 L.Ed.2d 1352 (1982). In this sense, there is no presumption because if the case is not one over which the court had constitutional and statutory

authority to act one does not "presume" subject matter jurisdiction to make it valid. If a justice of the peace grants a divorce, the judgment is void because that is not the type of case the constitution and legislature entrusts to that court, and appellate courts will not "presume" the justice court had jurisdiction in order to make the judgment valid.

But what the majority addresses here under the rubric of "standing" is not a court assuming jurisdiction over a type of dispute for which the statutes do not grant it power. The district court undoubtedly had jurisdiction over the declaratory judgment and injunction action brought there, since district courts may entertain declaratory judgment and injunction actions. The question of standing the majority gratuitously addresses here is related to an incidental *party* issue.

This court has expressly held that some facts or similar matters relating to party issues *are presumed.* For example, for many years the subject matter jurisdiction for certain trial courts as set by the statutes has included a jurisdictional amount, sometimes as a minimum amount in controversy and sometimes as both a maximum and minimum. *Womble v. Atkins,* 160 **Tex**. 363, 370, 331 **S.W**.**2d** 294, 299 (1960). This court has held that jurisdiction, so far as the amount in controversy is concerned, is determined by the pleadings unless facts disclose that a party fraudulently or in bad faith pleaded claims to make it appear there was jurisdiction over the case where there was not. *Brown v. Peters,* 127 **Tex**. 300, 94 **S.W**.**2d** 129, 130 (Tex.Comm'n App. B 1936). Despite the supposed requirement that the pleadings demonstrate jurisdiction, we have also held that unless the pleadings affirmatively show there is *no* jurisdiction, the court will *presume* the existence of jurisdiction in the trial court. *Peek v. Equipment Serv. Co.,* 779 **S.W**.**2d** 802, 804 (**Tex**.1989).[2] This is not the only sense in which subject matter jurisdiction is "presumed" as to collateral matters. If a defendant contests jurisdiction and alleges in a verified pleading that plaintiff's fraudulent pleading amount was for the purpose of conferring jurisdiction on the trial court, but the trial judge still renders judgment in the case, on appeal the fact issue of jurisdiction is *presumed* decided against the defendant. *Ellis v. Heidrick,* 154 **S.W**.**2d** 293, 294 (Tex.Civ.App.—San Antonio 1941, writ ref'd); *see also Maddux v. Booth,* 108 **S.W**.**2d** 329, 331 (Tex.Civ.App.—Amarillo 1937, no writ) (appeal bond from county court to district court did not show filemark making the appeal timely, held "the absence of such a question being made in the trial court the presumption is that the court had jurisdiction"). Further, if the very power of the judge who sits is in question, that authority too may be presumed. It is presumed that the assignment of a retired judge was properly made pursuant to all statutory requirements absent an express showing to the contrary in the record. *Texaco, Inc. v. Pennzoil Co.,* 729 **S.W**.**2d** 768, 855 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

There is a type of lack of standing that this court formerly held to be fundamental error. When there was a joint interest in property involved in the litigation, and the joint owner was not joined as a party, this court earlier held that the party defect was jurisdictional fundamental error that could be raised for the first time on appeal. The injustice which that rule caused prompted ****479*** this court to reduce those "*indispensable* " necessary parties to near nonexistence. *Petroleum Anchor Equip., Inc. v. Tyra,* 406 **S.W**.**2d** 891, 893–94 (**Tex**.1966); *see also Cooper v.* ***Texas*** *Gulf Indus., Inc.,* 513 **S.W**.**2d** 200, 203 (**Tex**.1974). It was no accident that this court listed the case which the majority today overrules, ***Texas*** *Indus. Traffic League v. Railroad Comm'n,* 633 **S.W**.**2d** 821 (**Tex**.1982), as one of the cases showing that "[f]undamental or unassigned error is a discredited doctrine" as applied to these collateral defect-in-party type claims. *Cox v. Johnson,* 638 **S.W**.**2d** 867, 868 (**Tex**.1982). After more than a hundred years of trying to narrow fundamental error exceptions, the majority today takes a quantum leap *backward.*

In an appeal of or other *direct attack* on a trial court default judgment, it is service on the defendant and related due process requirements which must affirmatively appear on the record. In such cases *personal* jurisdiction cannot be presumed. *Capitol Brick, Inc. v. Fleming Mfg. Co.,* 722 **S.W**.**2d** 399, 401 (**Tex**.1986); *Uvalde Country Club v.*

Martin Linen Supply Co., 690 **S.W.2d** 884, 885 (**Tex**.1985); *McKanna v. Edgar,* 388 **S.W.2d** 927, 928 (**Tex**.1965). Lack of personal jurisdiction can be waived by the party, and personal jurisdiction is presumed *in a collateral attack* on the judgment, whereas error in assuming constitutional or statutory jurisdiction not conferred upon the court in question can be neither waived nor ignored. *See Crawford v. McDonald,* 88 **Tex**. 626, 631–32, 33 S.W. 325, 328 (1895). This court has long recognized that there may be party issues, i.e., the matter is "a mere matter of procedure" as opposed to the constitutional or statutory *power* of a court to render judgment, that may be presumed as to either type of jurisdiction. *Id.* at 630, 33 S.W. at 327.

The majority should not adopt the federal courts' position that "standing" is jurisdictional. There is a fundamental difference between federal law and state law that **controls** here. Federal courts are courts of *limited* jurisdiction. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 178–79, 2 L.Ed. 60 (1803). The parties asserting a claim must plead and prove (when not obvious) that jurisdiction exists. FED.R.CIV.P. 8(a). A party suing under a statute must establish his right to claim under that statute—his *standing* —in order to establish jurisdiction. *General Comm., Brotherhood of Locomotive Eng'rs v. Missouri–Kansas–**Texas** Ry. Co.,* 320 U.S. 323, 337–38, 64 S.Ct. 146, 152–53, 88 L.Ed. 76 (1943). Consequently, standing is a part of jurisdiction under federal procedure, related to the "case" or "controversy" requirement of the federal constitution. *Association of Data Proc. Serv. Orgs. v. Camp,* 397 U.S. 150, 151, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). But there is no "case" or "controversy" limitation language in the **Texas** Constitution. In state courts of general jurisdiction, the power to entertain any suit not prohibited by either the federal constitution or federal law is *presumed. Cincinnati v. Louisville & N. Ry. Co.,* 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481 (1912). State courts have all residual jurisdiction that federal courts lack. *Id.; see generally* 2 CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW § 10:1 at 4–5 (1969). We should continue to recognize that "standing," like other procedural issues, may be waived. There is no reason to overrule the ***Texas** Industrial Traffic League* case, or its related progeny.

SPECTOR, Justice, concurring and dissenting.
I agree with the substance of the concurring and dissenting opinion by Justice Doggett. I write separately, however, to explain why I would uphold the statutory requirement that those who run afoul of environmental laws make timely payment of administrative penalties before seeking judicial review.

In two other causes decided today, this court has considered open courts challenges to the statutory requirement that state mineral lessees prepay administrative deficiency assessments before seeking judicial review of those assessments. *State v. Flag–Redfern Oil Co.* and *State v. Rutherford Oil Corp.,* **852 S.W.2d** 480 (**Tex**.**1993**) (considering Tex.Nat.Res.Code § 52.137). Our analysis in those cases focused on the ***480** public interest at stake: the State's only interest in the prepayment requirement, we noted, was its financial interest in immediate access to disputed royalty payments. *Id.* at 485. Thus, we concluded that the prepayment requirement of section 52.137 was no different, in constitutional terms, from the litigation tax disapproved in *LeCroy v. Hanlon,* 713 **S.W.2d** 335, 342 (**Tex**.1986). *Id.*

The present case, in contrast, does not involve a litigation tax. The Clean **Air** Act, the Solid Waste Disposal Act, and the Water Quality Act embody this state's commitment to protect the environment; and the prepayment requirements struck down today were intended to give force to that commitment, *not* to raise revenue. Without the need to prepay administrative penalties, polluters will be left with little if any incentive to timely comply with environmental laws and regulations.

The effects of today's decision, though, extend far beyond the statutes at issue in this case. By rejecting these prepayment requirements, without regard to the state interest involved, the majority has struck a severe blow to this state's ability to enforce a broad range of regulations in the public interest. The similar statutory provisions identified in

the opinion by Justice Doggett, **852 S.W.2d** at 457, cannot be dismissed as minor technicalities; they are carefully-crafted measures that the legislature considered vital to protect the public from recalcitrant lawbreakers. Casting those provisions aside will seriously disrupt the effective operation of our state government.

The **Texas** Constitution cannot be construed in absolutes. The basic right of access to the courts must be balanced against the need to protect the public's health and safety. While the restriction at issue in this case may be substantial, I would hold that the public's interest in clean **air** and water, combined with the due process afforded to TAB's members in the administrative process, tips the balance in favor of the prepayment requirement. I therefore dissent.

Footnotes

1 The League of Women Voters and the Lone Star Chapter of the Sierra Club intervened in the suit and were aligned as defendants with the **Texas Air Control** Board and the **Texas** Water Commission. Justice Doggett contends that the standing of the Intervenors should be addressed along with TAB's. We disagree. Standing concerns a party's faculty to invoke the court's subject matter jurisdiction. Once it has been invoked by a plaintiff, a court's subject matter jurisdiction is not affected by the status of defendants or intervenors aligned in interest with defendants.

2 Act of June 14, 1985, 69th Leg., R.S., ch. 637, § 33, 1985 Tex.Gen.Laws 2350, 2359 (amending **Texas** Clean **Air** Act codified at TEX.REV.CIV.STAT.ANN. art. 4.041 (Vernon 1976), currently codified as amended at TEX.HEALTH & SAFETY CODE § 382.088; Act of June 15, 1985, 69th Leg., R.S., ch. 795, § 6.001, 1985 Tex.Gen.Laws 2719, 2813 (amending Solid Waste Disposal Act codified at TEX.REV.CIV.STAT.ANN. art. 4477–7 (Vernon 1976), currently codified as amended at TEX.HEALTH & SAFETY CODE § 361.252; Act of June 15, 1985, 69th Leg., R.S., ch. 795, § 5.007, 1985 Tex.Gen.Laws 2719, 2806 (amending TEX.WATER CODE § 26.136).

3 Although some amendments have been adopted since, they are not relevant to the issue presented in this case. *See* Diana C. Dutton, *ENVIRONMENTAL,* 45 SW. L.J. 389 (1991) (summarizing statutory developments).

4 "An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." TEX.GOV'T CODE § 22.001(c).

5 Justice Doggett confuses subject matter jurisdiction with personal jurisdiction. Only the latter can be waived when uncontested. *See* TEX.R.CIV.P. 120a.

6 The analysis is the same under the federal constitution. *See e.g. Correspondence of the Justices,* Letter from Chief Justice John Jay and the Associate Justices to President George Washington, August 8, 1793 in Laurence H. Tribe, *American Constitutional Law* 73 n. 3 (2nd ed. 1988).

7 Of the states listed by Justice Doggett, only Illinois, Iowa, Kentucky, New York, South Dakota, and perhaps Ohio, Pennsylvania and Washington actually treat jurisdictional standing as waivable. *See* **852 S.W.2d** at 469. The other state cases cited deal with the waiver of objections to join a real party in interest or to a party's capacity to sue rather than to

jurisdictional standing. *See International Depository, Inc. v. State,* 603 A.2d 1119, 1122 (R.I.1992) (addressing real party in interest objection); *Princess Anne Hills Civ. League, Inc. v. Susan Constant Real Estate Trust,* 243 Va. 53, 413 S.E.2d 599, 603 n. 1 (1992) (addressing real party in interest objection); *Sanford v. Jackson Mall Shopping Ctr. Co.,* 516 So.2d 227, 230 (Miss.1987) (addressing real party in interest objection); *Jackson v. Nangle,* 677 P.2d 242, 250 n. 10 (Alaska 1984) (addressing real party in interest objection); *Poling v. Wisconsin Physicians Serv.,* 120 Wis.2d 603, 357 N.W.2d 293, 297–98 (App.1984) (addressing real party in interest objection); *Torrez v. State Farm Mut. Auto. Ins. Co.,* 130 Ariz. 223, 635 P.2d 511, 513 n. 2 (App.1981) (addressing real party in interest objection); *Brown v. Robinson,* 354 So.2d 272, 273 (Ala.1977); *Cowart v. City of West Palm Beach,* 255 So.2d 673, 675 (Fla.1971) (addressing capacity objection).

8 Justice Doggett disagrees that standing is a component of subject matter jurisdiction, yet he declines to explain what role standing plays in our jurisprudence. From his harsh critique of the doctrine, it seems that he not only objects to the conclusion that standing cannot be waived but also to the conclusion that standing is a requirement to initiate a lawsuit.

9 ***Texas** Industrial Traffic League* relied on two cases to support its holding that standing cannot be raised for the first time on appeal: *Coffee v. William Marsh Rice University,* 403 **S.W.2d** 340, 341 (**Tex**.1966), and *Sabine River Authority v. Willis,* 369 **S.W.2d** 348, 350 (**Tex**.1963). We need not overrule these two cases, however, because unlike ***Texas** Industrial Traffic League,* we believe that standing was present in the trial court in these cases. Our concern is with a party's right to initiate a lawsuit and the trial court's corresponding power to hear the case *ab initio.* Standing is determined at the time suit is filed in the trial court, and subsequent events do not deprive the court of subject matter jurisdiction. *Carr,* 931 F.2d at 1061.

10 Justice Doggett claims that we overrule three additional decisions of this court. *See Central Educ. Agency v. Burke,* 711 **S.W.2d** 7 (**Tex**.1986) (per curiam); *American Gen. Fire & Casualty Co. v. Weinberg,* 639 **S.W.2d** 688 (**Tex**.1982); *Cox v. Johnson,* 638 **S.W.2d** 867 (**Tex**.1982) (per curiam). We disagree. These cases hold that matters not raised in the trial court are waived. One exception noted by these decisions, however, is a lack of jurisdiction which may be raised by a party, or the court, for the first time on appeal. Justice Doggett does not believe that standing falls within that exception because he contends that standing is not jurisdictional.

11 In most other jurisdictions, such prepayment provisions are required only to stay execution of judgments and are not prerequisites to the right to appeal itself. *See* Gary Stein, *Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?,* 61 N.Y.U.L. REV. 463, 469 (1986).

12 Thus, contrary to Justice Doggett's reading of our opinion, the *Sax* test is inapplicable.

13 The Clean **Air** Act was implemented to "safeguard the state's **air** resources from pollution by **controlling** or abating **air** pollution and emissions of **air** contaminants...." TEX.HEALTH & SAFETY CODE § 382.002(a). The **Texas** Water Code was implemented to "maintain the quality of water in the state consistent with the public health and enjoyment ..." TEX.WATER CODE § 26.003.

14 The importance is evidenced by article XVI, section 59(a) of our constitution, which provides in relevant part that: "The conservation and development of all the natural resources of this State ... and the preservation and conservation of all such natural resources ... are each and all ... public rights and duties." **TEX**. CONST. art. XVI, § 59(a).

15 If the person charged does not make payment or post bond within thirty days, the agency may forward the matter to the attorney general for enforcement. TEX.HEALTH & SAFETY CODE § 382.089(c), § 361.252(m); TEX.WATER CODE § 26.136(k).

16 It has been argued that our procedure of allowing immediate enforcement of trial court judgments violates federal due process when the judgment debtor is financially unable to post a supersedeas bond and immediate enforcement will cause irreparable injury. *Texaco, Inc. v. Pennzoil Co.,* 784 F.2d 1133 (2d Cir.1986), *rev'd on other grounds,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). A similar argument could be fashioned under the **Texas** open courts provision, but TAB does not assert that argument here. TAB's open courts challenge centers not on the requirement of immediate payment, but on the forfeiture of judicial review if payment is not made.

17 Thus, contrary to Justice Doggett's assertion, we do not strike down the penalties themselves. Nothing in this opinion prohibits the state's collection of assessed penalties. We hold as violative of our open courts provision only the requirement that the penalties be paid as a condition to judicial review. Furthermore, nothing in our opinion requires that penalties already paid be refunded.

18 That the affected parties may be able to afford prepayment is irrelevant. The guarantee of constitutional rights should not depend on the balance in one's bank account.

19 TAB claims that the lack of a jury trial before the agency as well as the lack of a trial de novo violate article I, section 15. We limit our inquiry to the absence of a trial de novo because, as this court has said: "Trial by jury cannot be claimed in an inquiry that is non-judicial in its character, or with respect to proceedings before an administrative board." *Middleton v. **Texas** Power & Light Co.,* 108 **Tex**. 96, 185 S.W. 556, 561–62 (1916). Even if the right to a jury is denied before an administrative agency, the dispositive question is whether a trial de novo and the corresponding right to a jury trial is constitutionally required upon judicial review of the agency's decision. *See Cockrill v. Cox,* 65 **Tex**. 669, 674 (1886) ("The right of jury trial remains inviolate, though denied in the court of first instance [in civil cases], if the right to appeal and the jury trial on appeal are secured.") (bracketed language in original).

20 Article I, section 15, provides, in pertinent part:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. * * *.

TAB has not presented in this court, as it did below, its complaint that the statutes and regulations also violate the right to jury trial under article V, section 10 of the **Texas** Constitution.

21 While the *Credit Bureau* court specifically referred to the broader jury trial provision in article V, section 10 when it discussed the administrative proceeding exception, that exception necessarily also applies to the

narrower provision found in article I, section 15.

22 We do not consider nineteenth century criminal nuisance laws comparable to modern environmental regulations. *See* **852 S.W.2d** at 461.

23 Despite Justice Doggett's trumpeting of our constitution's guarantee of trial by jury, he agrees that the right does not attach under the circumstances of this case.

24 Justice Doggett contends that the basis for our jury trial holding is overbroad. Instead, he would have us adopt the "imperfectly employed" federal test first enunciated in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). *Infra,* **852 S.W.2d** at 464. The basis for our decision is more limited, arising as it does out of **TEX**. CONST. article XVI, section 59(a) and our decision in *Corzelius.*

25 The Clean **Air** Act proclaims:

> The policy of this state and the purpose of this chapter to safeguard the **air** resources of the state from pollution by **controlling** or abating **air** pollution and emissions of **air** contaminants, consistent with the protection of public health, general welfare, and physical property of the people, including the aesthetic enjoyment of **air** resources by the public and the maintenance of adequate visibility.
>
> TEX.HEALTH & SAFETY CODE § 382.002.
>
> The **Texas** Water Code proclaims in relevant part:
>
> It is the policy of this state and the purpose of the subchapter to maintain the quality of water in the state consistent with the public health and enjoyment
>
> . . . . .
>
> TEX.WATER CODE § 26.003.

26 The actions of the agencies involved in this proceeding are subject to the Administrative Procedure and **Texas** Register Act (APTRA), which specifically affords a "full panoply of procedural safeguards" to a party to contested case before those agencies. *Southwestern Bell Tel. Co. v. Public Util. Comm'n of* ***Tex****.,* 571 **S.W.2d** 503, 507 (**Tex**.1978). These procedural safeguards include the right to notice, the making of a full record of the proceeding before the agency, the taking of depositions, the right to subpoena witnesses, the application of the rules of evidence, the preparation of proposal for decision and the filing of exceptions and briefs, as well as separately stated findings of fact and conclusions of law. TEX.CIV.STAT.ANN. art. 6252–13a § 19 (Vernon Supp.1993). Judicial review is provided by section 19(e) under the substantial evidence rule, which directs a reviewing court to reverse and remand the agency adjudication if the agency decision is:

> 1) in violation of constitutional or statutory provisions;
>
> 2) in excess of the statutory authority of the agency;
>
> 3) made upon unlawful procedure;
>
> 4) affected by other error of law;
>
> 5) not reasonably supported by substantial evidence in view of the

> reliable and probative evidence in the record as a whole; or
>
> 6) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

> We have held that judicial review under APTRA based on the record developed before the agency "furnishes more assurance of due process and a surer means of determining whether an agency acted arbitrarily, capriciously and without due regard for the evidence." *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n of **Tex**.*, 557 **S.W.2d** 280, 285 (**Tex**.1977); *see also, Southwestern Bell Tel. Co.,* 571 **S.W.2d** at 509.

1 Statistics compiled from data sent by companies to the Environmental Protection Agency show that in 1990 535.7 million pounds of toxic chemicals were released into the **Texas** environment, more than in any other state. **Texas** also ranked first in the release of chemicals known to cause both cancer and birth defects. *See* **Texas** Citizen Action, *Poisons in Our Neighborhoods, Toxic Pollution in **Texas**,* Sept. 1992, at 1; *see also* John Sharp, **Texas** Comptroller of Public Accounts, ***Texas** at Risk: Environmental Hazards Threaten State's **Air**, Land, and Water,* Fiscal Notes Aug. 1991 (noting the release of about 800 million pounds of toxic substances in 1989). Additionally, only two states ranked below **Texas** in the American Public Health Association's Pollution Standard Index, based on data gathered between 1989 and 1991. *See* American Public Health **Ass'n**, *America's Public Health Report Card: A State-by-State Report on the Health of the Public* 59 (1992).

2 *See Carrollton–Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.,* 826 **S.W.2d** 489, 537 (**Tex**.1992) (Doggett, J., dissenting).

3 *See, e.g., H. Runge & Co. v. Wyatt,* 25 Tex.Supp. 291 (1860) (placement of counties within judicial districts); *Dillingham v. Putnam,* 109 **Tex**. 1, 14 S.W. 303 (1890) (striking requirement of supersedeas bond as a prerequisite to appeal); *Hanks v. City of Port Arthur,* 121 **Tex**. 202, 48 **S.W.2d** 944 (1932) (requirement that city be notified of street defect within twenty-four hours of accident unreasonable restriction on right of access to courts); *Sax v. Votteler,* 648 **S.W.2d** 661 (**Tex**.1983) (striking statute of limitations barring action of minor); *LeCroy,* 713 **S.W.2d** 335 (**Tex**.1986) (holding unconstitutional increased filing fees designed to generate state revenues).

4 Oddly, the majority asserts that "the *Sax* test is inapplicable" to today's open courts decision, **852 S.W.2d** at 449 n. 12, even as it explicitly relies on the analysis used in *LeCroy,* which in turn applied the *Sax* test. Nor does the majority attempt to explain how its analysis today differs from that employed in *Sax* and *LeCroy.*

5 This natural resources provision receives conflicting treatment in today's opinion, amply demonstrating both the malleability of the *Sax* test as applied by the majority and the majority's disdain for the right to trial by jury. While declaring that article XVI, § 59(a) will not permit payment of even the most modest penalties under our open courts provision, the majority inexplicably finds that it forms an insurmountable barrier to the right to jury trial. The majority makes no attempt to reconcile its inconsistent analysis of these constitutional guarantees.

6 Tex.Health & Safety Code § 382.002, provides that:

> It is the policy of this state and the purpose of this Act to safeguard the **air** resources of the state from pollution by **controlling** or abating **air** pollution and emissions of **air** contaminants, consistent with the protection of health, general welfare, and physical property of the people, including the aesthetic enjoyment of the **air** resources by the people and the maintenance of adequate visibility.

7 Tex.Water Code § 26.003, provides that:

> It is the policy of this state and the purpose of this subchapter to maintain the quality of water in this state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state....

8 Tex.Health & Safety Code § 361.002, declares that:

> It is the policy of this state and the purpose of this Act to safeguard the health, welfare, and physical property of the people, and to protect the environment, through **controlling** the management of hazardous wastes, including the accounting for hazardous wastes generated.

9 Tex.Health & Safety Code § 382.088(c)(1–5) (Clean **Air** Act), § 361.251(c)(1–5) (Solid Waste Disposal Act); Tex.Water Code § 26.136(c). The **Texas** Water Code imposes additional considerations, including "the impact of the violation on a receiving stream or underground water reservoir, on the property owners ... and on water users," as well as the extent of previous violations, the degree of culpability involved, any good faith effort to correct the violation and any economic benefit gained as a result of the illegal conduct. Tex.Water Code § 26.136(c).

10 See Appendices to Brief of Appellees **Texas Air Control** Board and **Texas** Water Commission.

11 See Appendices to Brief of Appellees **Texas Air Control** Board and **Texas** Water Commission at 27, 44, 55.

12 *See* Tex.Health & Safety Code § 242.066 (administrative penalty for statutory violations "threaten[ing] the health and safety of a resident" of a convalescent or nursing home); *id.* § 242.069 (penalty must be prepaid or a bond posted prior to judicial review).

13 Tex.Health & Safety Code §§ 141.016–141.018 (providing for administrative penalties for violation of laws regulating youth camps and requiring their payment or the posting of a bond prior to judicial review).

14 Tex.Health & Safety Code §§ 773.065–.067 (administrative penalties to enforce Emergency Medical Services Act).

15 Tex.Rev.Civ.Stat.Ann. art. 4582b, § 6G (Vernon Supp.1992) (administrative penalties for violation of statutes governing funeral directing and embalming).

16 Tex.Health & Safety Code §§ 431.054–.056 (**Texas** Food, Drug & Cosmetic Act); *id.* § 466.043 (regulation of narcotic drug treatment programs).

17 Tex.Health & Safety Code §§ 433.094–.096 (**Texas** Meat & Poultry Inspection Act); *id.* §§ 144.081–.083 (**Texas** Renderers' Licensing Act).

18 *See also* Tex.Rev.Civ.Stat.Ann. art. 5069–51.17 (Vernon 1987 & Supp.1992) (administrative penalties for violation of the **Texas** Pawnshop Act).

19 Tex.Rev.Civ.Stat.Ann. art. 1446c, § 73A (Vernon Supp.1992) (permitting assessment of civil penalty for violation of Public Utility Regulatory Act "result[ing] in pollution of the **air** or water of this state or pos[ing] a threat to the public safety"); Tex.Rev.Civ.Stat.Ann. art. 4477–3a, § 16 (Vernon Supp.1992) (**Texas** Asbestos Health Protection Act); Tex.Rev.Civ.Stat.Ann. art. 5920–11, § 30 (Vernon Supp.1992) (**Texas** Coal Mining and Surface Reclamation Act); Tex.Rev.Civ.Stat.Ann. art. 6053–2 (Vernon Supp.1992) (safety standards for transportation of gas and for gas pipeline facilities); Tex.Rev.Civ.Stat.Ann. art. 8905, § 9 (Vernon Supp.1992) (Water Well Pump Installers Act); Tex.Nat.Res.Code § 40.252 (Oil Spill Prevention and Response Act); *id.* § 81.0531–.0533 (assessment of penalties for violation of Railroad Commission statutes and rules "which pertain to safety or the prevention or **control** of pollution"); *id.* § 116.143–.145 (violation of laws relating to compressed natural gas "result[ing] in pollution of the **air** or water of this state or pos[ing] a threat to the public safety"); *id.* § 131.2661–.2663 (violations of Uranium Surface Mining and Reclamation Act "result[ing] in pollution of the **air** or water of this state or pos[ing] a threat to the public safety"); *id.* § 141.013–.015 (violation of geothermal resources regulations "pertain[ing] to safety or the prevention or **control** of pollution"); *id.* Tex.Water Code 13.4151 (regulation of water and sewer utilities); *id.* § 27.1013–.1015 (Injection Well Act); *id.* § 28.067 (regulation of water wells and mine shafts); *id.* § 29.047 (Salt Water Haulers Act); *id.* § 33.009 (regulation of water well pump installers); Tex.Health & Safety Code § 372.004 (water saving performance standards); *id.* § 401.389 (**Texas** Radiation **Control** Act).

20 Tex.Ag.Code § 12.020(*l*) (violation of agricultural statutes); *id.* § 76.1555 (failure to comply with pesticide regulations); Tex.Water Code § 34.011 (irrigation regulation); Tex.Rev.Civ.Stat.Ann. art. 41a–1, § 21D(f) (Vernon Supp.1992) (public accounting); Tex.Rev.Civ.Stat.Ann. art. 135b–6, § 10B(k) (Vernon Supp.1992) (Structural Pest **Control** Act); Tex.Rev.Civ.Stat.Ann. art. 5155, § 5(h) (Vernon Supp.1992) (labor wage laws); Tex.Rev.Civ.Stat.Ann. art. 5282c, § 23A(k) (Vernon Supp.1992) (Professional Land Surveying Practices Act); Tex.Rev.Civ.Stat.Ann. art. 6573a, § 19A(k) (Vernon Supp.1992) (Real Estate License Act); Tex.Rev.Civ.Stat.Ann. art. 9100, § 17(m) (Vernon Supp.1992) (**Texas** Department of Licensing and Regulation).

21 Under recent and highly erratic writings determining retroactivity, of course, anything can happen. *See, e.g., Carrollton–Farmers Indep. Sch. Dist.,* 826 **S.W.2d** at 515–23; *Elbaor v. Smith,* 845 **S.W.2d** 240 (**Tex**.1992) (creating uncertainty by disapproval of a type of pre-trial agreements previously upheld by this court).

22 "The right of trial by jury, and the privilege of the Writ of Habeas Corpus shall be established by law, and shall remain inviolable." *Proposed Constitution for the State of **Texas*** art. 4 (1833), *reprinted in Documents of **Texas** History,* 80 (Ernest Wallace ed., 1963).

23 *See* Eugene C. Barker, *Stephen F. Austin, in The Handbook of **Texas*** 84 (Walter Prescott Webb ed., 1952).

24 Constitution of the Republic of **Texas**, Declaration of Rights, Section 9 (1836), *reprinted in* **Tex**. Const. app. 523, 536 (Vernon 1955), provided

that "the right of trial by jury shall remain inviolate."

25 In our time this great constitutional principle continues to be reaffirmed:

> It is fundamental to our system of justice and the intention and policy of the law to permit all persons to have a trial by jury of disputed fact issues essential for a determination of [their rights]. The right of trial by jury is a valuable right which should be guarded jealously by all state courts.

*Steenland v. **Texas** Commerce Bank Nat'l **Ass'n***, 648 **S.W.2d** 387, 391 (Tex.App.—Tyler 1983, writ ref'd n.r.e.); *see also Lopez v. Lopez,* 691 **S.W.2d** 95, 97 (Tex.App.—Austin 1985, no writ) ("trial by jury should be granted zealously by all the courts of this state").

26 **Tex**. Const. art. I, § 12 (1845) (retaining identical language from 1836 provision).

27 *See, e.g., May v. United Services,* 844 **S.W.2d** 666, 674 (**Tex**.1992) (Doggett, J., dissenting); *Boyles v. Kerr,* 1992 WL 353277 (**Tex**.1992) (Doggett, J., dissenting); *Leleaux v. Hamshire–Fannett Indep. Sch. Dist.,* 835 **S.W.2d** 49, 55–56 (**Tex**.1992) (Doggett, J., dissenting); *Reagan v. Vaughn,* 804 **S.W.2d** 463, 491 (**Tex**.1991) (Doggett, J., concurring and dissenting); *Greater Houston Transp. Co. v. Phillips,* 801 **S.W.2d** 523, 527 (**Tex**.1990) (Doggett, J., dissenting).

28 T.R. Fehrenbach, Lone Star: A History of **Texas** and the Texans 279 (1983).

29 Act of Feb. 11, 1860, Tex.Gen Laws 97, a later version of which was referenced by this court in *Gulf, Colo. & Santa Fe Ry. v. Reed,* 80 **Tex**. 362, 15 S.W. 1105, 1107 (1891).

30 The court further stated: "The word means, literally, annoyance; in law, it signifies, according to Blackstone, 'anything that worketh hurt, inconvenience, or damage.'.... 'So closely (says Blackstone) does the law of England enforce that excellent rule of Gospel morality, of doing to others as we would they should do unto ourselves.' " *Id.* at 492. *Accord Miller v. Burch,* 32 **Tex**. 208, 210 (1869).

31 *See also Rhodes v. Whitehead,* 27 **Tex**. 304, 316 (1863) (remanding for trial a complaint against a dam across the San Antonio river, recognizing that the creation "of pools of stagnant and putrid water" or the "tendency to cause sickness in [the plaintiff's] family or immediate neighborhood," was sufficient to constitute a nuisance); *Jung v. Neraz,* 71 **Tex**. 396, 9 S.W. 344, 344–45 (1888) (nuisance properly alleged by claim that "interment of dead bodies in [proposed cemetery] would infect, poison, and injure [plaintiffs'] wells, and the use of low grounds, and further injure plaintiffs' health by the foul odors from the decomposition of said bodies.").

32 Although some critics allege that juries are not competent to deal with complex scientific and technological issues, empirical data demonstrates otherwise.

> Research shows ... that the opportunity exists for meaningful [juror] participation in a wide range of adjudicatory and regulatory proceedings.... To the extent that juries encounter difficulties, these difficulties often vex judges as well.... The full potential of lay participation in adjudication has not been realized.

Joe Cecil, Valerie Hans, and Elizabeth Wiggins, *Citizen*

Comprehension of Difficult Issues: Lessons From Civil Jury Trials, 40 Am.U.L.Rev. 727, 773–74 (1991).

33 *See* **Tex**. Const. art. X, § 2 and interp. commentary (Vernon 1955) (noting that the provision was added to authorize the Legislature to regulate railroads after the people had issued strong complaints against them).

34 *See also State v. De Silva,* 105 **Tex**. 95, 145 S.W. 330 (1912) (also holding that cancellation of liquor license is not a "cause").

35 In the commentary for recommended article V, section 14(e) of the proposed 1974 Constitution, the significance of holdings regarding this more expansive language was also noted:

> [T]he right of trial by jury guaranteed in Article V, Section 10 of the 1876 Constitution is not dependent on the existence of the right at the time the Constitution was adopted in 1876. The guarantee extends to any "cause" instituted in the district court. A "cause" is defined as a suit or action concerning any question, civil or criminal, contested before a court of justice.

See **Texas** Constitutional Revision Commission, *A New Constitution for* ***Texas****: Text, Explanation, Commentary* 120–21 (1973).

36 The *Credit Bureau* opinion was authored for the court by now former Chief Justice Jack Pope, who had written previously, "[t]he struggle for survival by the institution we call the jury is truly the epic of our law." Jack Pope, *The Jury,* 39 Tex.L.Rev. 426 (1961). That struggle continues today.

37 Though he wrote in unnecessarily global terms regarding this exception, even Harris recognized that

> [t]he plain language of the Judiciary section conferring the right of trial by jury in all causes in the district courts would seem to entitle parties to jury trials irrespective of whether that right existed at the time of the adoption of the Constitution.

Harris, *supra,* at 6–7.

38 The majority notes the existence of other statutory procedural protections, such as those contained in the Administrative Procedure and **Texas** Register Act, Tex.Rev.Civ.Stat. art. 6252–13a, § 19(e). **852 S.W.2d** at 452, n. 26. While important, these measures certainly do not constitute a complete substitute for a jury trial. If the **Texas** Constitution guarantees a right to trial by jury, no lesser protection will suffice.

39 To some extent every action legislatively entrusted to an administrative agency involves a public right. At the same time even actions by private parties may have incidental regulatory effects and are unquestionably invested with a public interest. *See The Dallas Morning News, Inc. v. Fifth Court of Appeals,* 842 **S.W.2d** 655, 663 (**Tex**.1992, orig. proceeding) (Doggett, J., dissenting from overruling of motion for leave to file petition for writ of mandamus).

40 The "public rights" concept has been recently muddled by the federal courts. In *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), the court, although upholding the right to a jury trial for defendants sued for fraudulent conveyance by a trustee in bankruptcy, broadened the scope of its "public rights" exception to include all cases "involving statutory rights that are integral parts of a

public regulatory scheme and whose adjudication Congress has assigned to an administrative agency." *Id.* at 55 n. 10, 109 S.Ct. at 2797 n. 10. *See also Thomas v. Union Carbide Agric. Prod. Co.,* 473 U.S. 568, 586, 105 S.Ct. 3325, 3335, 87 L.Ed.2d 409 (1985) (rejecting the view that the government must bring suit in order for litigation to involve "public rights"). I believe that such an expansive reading of "public rights" would not be consistent with the broad state constitutional protection of the right to trial by jury in **Texas**.

41 In view of recent attacks nationwide on the jury system, a recent study determined that

> Our central conclusion is that the civil jury system is valuable and works well.... It is [not] "broken," and therefore it need not be "fixed." The jury system is a proven, effective, an important means of resolving civil disputes.

The Brookings Institution, *Charting a Future for the Civil Jury System* 2 (1992).

42 As the majority recognizes, "the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal." **852 S.W.2d** at **443**–444.

43 Despite the clear statement in *Sabine River* that "[w]e assume without deciding that Sabine has no justiciable interest," 369 **S.W.2d** at 349, the majority today asserts that "standing was present" in the trial court in that case. **852 S.W.2d** at 446 n. 9.

44 *See, e.g., Espiricueta v. Vargas,* 820 **S.W.2d** 17, 20 (Tex.App.—Austin 1991, writ denied); *Integrated Title Data Systems v. Dulaney,* 800 **S.W.2d** 336 (Tex.App.—El Paso 1990, no writ); *State v. Euresti,* 797 **S.W.2d** 296, 299 (Tex.App.—Corpus Christi 1990, no writ); *Cissne v. Robertson,* 782 **S.W.2d** 912, 917 (Tex.App.—Dallas 1989, writ denied); *Broyles v. Ashworth,* 782 **S.W.2d** 31, 34 (Tex.App.—Fort Worth 1989, no writ); *Horton v. Robinson,* 776 **S.W.2d** 260, 263 (Tex.App.—El Paso 1989, no writ); *L.G. v. State,* 775 **S.W.2d** 758, 760 (Tex.App.—El Paso 1989, no writ); *Wilson v. United Farm Workers of America,* 774 **S.W.2d** 760, 764 (Tex.App.—Corpus Christi 1989, no writ); *Smiley v. Johnson,* 763 **S.W.2d** 1, 4 (Tex.App.—Dallas 1988, writ denied); *Ex Parte McClain,* 762 **S.W.2d** 238, 242 (Tex.App.—Beaumont 1988, no writ); *Goeke v. Houston Lighting & Power Co.,* 761 **S.W.2d** 835, 837 n. 1 (Tex.App.—Austin 1988), *rev'd on other grounds,* 797 **S.W.2d** 12 (**Tex**.1990); *Group Medical and Surgical Service, Inc. v. Leong,* 750 **S.W.2d** 791, 794–95 (Tex.App.—El Paso 1988, writ denied); *City of Fort Worth v. Groves,* 746 **S.W.2d** 907, 913 (Tex.App.—Fort Worth 1988, no writ); *Barron v. State,* 746 **S.W.2d** 528, 530 (Tex.App.—Austin 1988, no writ); *Reynolds v. Charbeneau,* 744 **S.W.2d** 365, 367 (Tex.App. —Beaumont 1988, writ denied); *Champion v. Wright,* 740 **S.W.2d** 848, 851 (Tex.App.—San Antonio 1987, writ denied); ***Texas** Low–Level Radioactive Waste Disposal Authority v. El Paso County,* 740 **S.W.2d** 7, 8 (Tex.App.—El Paso 1987, writ dism'd w.o.j.); *S.I. Property Owners' **Ass'n** v. Pabst Corp.,* 714 **S.W.2d** 358, 360 (Tex.App.—Corpus Christi 1986, writ ref'd n.r.e.); *Gonzales v. City of Lancaster,* 675 **S.W.2d** 293, 294–95 (Tex.App.—Dallas 1984, no writ); *Mabe v. City of Galveston,* 687 **S.W.2d** 769, 771 (Tex.App.—Houston [1st Dist.] 1985, writ dism'd); *Develo-cepts, Inc. v. City of Galveston,* 668 **S.W.2d** 790, 793 (Tex.App. —Houston [14th Dist.] 1984, no writ); *Griffith v. Pecan Plantation Owners **Ass'n**, Inc.,* 667 **S.W.2d** 626, 628 (Tex.App.—Fort Worth 1984,

no writ); *City of Houston v. Public Utility Comm'n of* ***Texas***, 656 **S.W.2d** 107, 110 n. 1 (Tex.App.—Austin 1983, writ ref'd n.r.e.); *Public Utility Comm'n v. J.M. Huber Corp.,* 650 **S.W.2d** 951, 955–56 (Tex.App.—Austin 1983, writ ref'd n.r.e.); *Vaughn Bldg. Corp. v. Austin Co.,* 620 **S.W.2d** 678 (Tex.Civ.App.—Dallas 1981), *aff'd,* 643 **S.W.2d** 113 (**Tex**.1982); *War–Pak, Inc. v. Rice,* 604 **S.W.2d** 498 (Tex.Civ.App.—Waco 1980, writ ref'd n.r.e.).

45 ***Texas*** *Dep't of Mental Health v. Petty,* 778 **S.W.2d** 156, 166 (Tex.App.—1989, writ dism'd w.o.j.) (opinion by Powers, J.); *Public Utility Comm'n v. J.M. Huber Corp.,* 650 **S.W.2d** 951, 954–56 (Tex.App.—Austin 1983, writ ref'd n.r.e.) (opinion by Powers, J.); *Hooks v.* ***Texas*** *Dep't of Water Resources,* 645 **S.W.2d** 874 (Tex.App.—Austin 1983, writ ref'd n.r.e.) (opinion by Powers, J.); *see also Kircus v. London,* 660 **S.W.2d** 869, 872 n. 3 (Tex.App.—Austin 1983, no writ) (opinion by Phillips, C.J.).

46 *See, e.g., Boyles v. Kerr* (**Tex**.1992) (Doggett, J., dissenting) (objecting to majority's overruling of landmark **Texas** Supreme Court decision permitting recovery for negligence resulting in emotional distress); *Walker v. Packer,* 827 **S.W.2d** 833, 835 (**Tex**.1992, orig. proceeding) (Doggett, J., dissenting) (noting majority's "mass execution of precedent," encompassing "a dozen or more **Texas** Supreme Court cases and countless decisions of the courts of appeals"); *Carrollton–Farmers Branch Indep. Sch. Dist.,* 826 **S.W.2d** at 539 (**Tex**.1992) (Doggett, J., dissenting) (discussing rejection by majority of its own decision issued less than one year previously); *Stewart Title Guar. Co. v. Sterling,* 822 **S.W.2d** 1, 12 (**Tex**.1991) (Doggett, J., dissenting) (majority disregards its own recent precedent, looking instead to overruled case); *Rose v. Doctors Hosp.,* 801 **S.W.2d** 841, **852** (**Tex**.1990) (Doggett, J., dissenting) (disapproving of rejection of recent **controlling** precedent).

47 The United States Supreme Court has clearly stated that standing does not implicate separation of powers concerns. *See Flast v. Cohen,* 392 U.S. 83, 100, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968) ("The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of ... Government.").

48 *See* section I, *supra.*

49 *See, e.g., Brown v. Robinson,* 354 So.2d 272, 273 (Ala.1977); *Jackson v. Nangle,* 677 P.2d 242, 250 n. 10 (Alaska 1984); *Torrez v. State Farm Mut. Auto Ins. Co.,* 130 Ariz. 223, 635 P.2d 511, 513 n. 2 (App.1981); *Cowart v. City of West Palm Beach,* 255 So.2d 673, 675 (Fla.1971); *Lyons v. King,* 397 So.2d 964 (Fla.App.1981); *Greer v. Illinois Housing Development Auth.,* 122 Ill.2d 462, 120 Ill.Dec. 531, 552, 524 N.E.2d 561, 582 (1988); *Matter of Trust of Rothrock,* 452 N.W.2d 403, 405 (Iowa 1990); *Tabor v. Council for Burley Tobacco, Inc.,* 599 **S.W.2d** 466, 468 (Ky.App.1980); *Sanford v. Jackson Mall Shopping Ctr. Co.,* 516 So.2d 227, 230 (Miss.1987); *Fossella v. Dinkins,* 66 N.Y.2d 162, 495 N.Y.S.2d 352, 1019, 485 N.E.2d 1017, 1019 (1985); *Public Square Tower One v. Cuyahoga County* ***Bd****. of Revision,* 34 Ohio App.3d 49, 516 N.E.2d 1280, 1281 n. 2 (1986); *Federman v. Pozsonyi,* 365 Pa.Super. 324, 529 A.2d 530, 532 (1987); *McMullen v. Zoning Board of Harris Township,* 90 Pa.Cmwlth. 119, 494 A.2d 502 (1985); *International Depository, Inc. v. State,* 603 A.2d 1119, 1122 (R.I.1992); *State v. Miller,* 248 N.W.2d 377, 380 (S.D.1976); *Princess Anne Hills Civ. League, Inc. v. Susan Constant Real Estate Trust,* 243 Va. 53, 413 S.E.2d 599, 603

n. 1 (1992); *Tyler Pipe Industries, Inc. v. State Dep't of Revenue,* 105 Wash.2d 318, 715 P.2d 123, 128 (1986); *Poling v. Wisconsin Physicians Serv.,* 120 Wis.2d 603, 357 N.W.2d 293, 297–98 (App.1984). The majority's odd attempt to distinguish some of these cases, all of which are predicated in terms of standing, as involving solely the question of whether the litigant was a proper "real party in interest" has never been drawn previously in the published decisions of any **Texas** court addressing the question of standing. *See* cases cited at notes 44, *supra,* and 50, *infra.*

50 *See* ***Texas*** *Industrial Traffic League,* 633 **S.W.2d** at 822–23; *Central Educ. Agency v. Burke,* 711 **S.W.2d** at 8; *American General Fire & Casualty Co. v. Weinberg,* 639 **S.W.2d** 688; *Cox v. Johnson,* 638 **S.W.2d** at 868. To avoid overruling these, the majority claims all three recognized that lack of subject matter jurisdiction can initially be raised on appeal. True, but ignored is the conclusion of each that subject matter jurisdiction cannot be waived while standing can be.

51 Our past acknowledgement of the legislative power to expand access to **Texas** courts is inconsistent with today's conclusion that we must narrowly limit access. *See* Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment,* 62 Corn.L.Rev. 663 (1977) (because court decisions do not question legislative power to confer standing by statute, they suggest that standing rules are not constitutionally grounded).

52 Despite the participation of associational litigants before this court, we have never before questioned standing on our own motion. *See, e.g., Austin Indep. Sch. Dist. v. Sierra Club,* 495 **S.W.2d** 878 (**Tex**.1973).

53 *See Safe Water Foundation of* ***Texas*** *v. City of Houston,* 661 **S.W.2d** 190, 193 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (recognizing precedent of this court as according broad right of standing), *app. dism'd,* 469 U.S. 801, 105 S.Ct. 55, 83 L.Ed.2d 6 (1984); ***Texas*** *Industrial Traffic League v. Railroad Comm'n of* ***Texas***, 628 **S.W.2d** 187 (Tex.App.—Austin) (discussing Supreme Court's expansive approach to standing to allow access to **Texas** courts), *rev'd,* 633 **S.W.2d** 821 (**Tex**.1982) (per curiam), *overruled by* ***Tex. Ass'n of Bus. v. Tex. Air Control Bd.,*** **852 S.W.2d 440** (**Tex.1993**).

54 *Accord Hunt v. Bass,* 664 **S.W.2d** 323, 324 (**Tex**.1984) (recognizing statutorily-granted standing of litigants to seek mandamus to reduce substantial delays in court operations); *Safe Water Foundation of* ***Texas*** *v. City of Houston,* 661 **S.W.2d** 190 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), *app. dism'd,* 469 U.S. 801, 105 S.Ct. 55, 83 L.Ed.2d 6 (1984) (drinking water consumer group had standing to contest fluoridation of city water).

55 These requirements are allegedly necessary to protect "the members' best interest." **852 S.W.2d** at 447. Perhaps an organization's members are in a better position than this court to determine what is in their best interest.

56 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3531.3, at 418 ("The problems [of standing] are difficult enough without the compounding effect of constitutional attribution.").

57 *See also, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 490, 102 S.Ct. 752, 768, 70 L.Ed.2d 700 (1982) (Brennan, J., dissenting); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the*

Burger Court, 96 Harv.L.Rev. 4, 23 (1982) (Having ritually recited the standing formula, "the Court then chooses up sides and decides the case."); Michael A. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard,* 20 St.L.U.L.J. 663, 678 (standing barrier "raised or lowered based on the degree of hostility to, or favoritism for, consideration of the issues on their merits"); Albert Broderick, *The* Warth *Optional Standing Doctrine: Return to Judicial Supremacy?* 25 Cath.U.L.Rev. 467, 504, 516–17 (1976).

58 *See* Katherine B. Steuer and Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in* Lujan v. National Wildlife Federation, 15 Harv.Envtl.L.Rev. 187, 232–33 (1991); Sarah A. Robichaud, Note, Lujan v. National Wildlife Federation: *The Supreme Court Tightens the Reins on Standing for Environmental Groups,* 40 Cath.U.L.Rev. **443**, 470–74 (1991); V. Maria Cristiano, Note, *In Determining an Environmental Organization's Standing to Challenge Government Actions Under the Land Withdrawal Review Program, the Use of Lands in the Vicinity of Lands Adversely Affected by the Order of the Bureau of Land Management Does Not Constitute Direct Injury* —Lujan v. National Wildlife Federation, 2 Seton Hall Const. L.J. 445 (1991); Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit,* 66 Wash.L.Rev. 893, 904–12 (1991); Lynn Robinson O'Donnell, Note, *New Restrictions in Environmental Litigation: Standing and Final Agency Action After* Lujan v. National Wildlife Federation, 2 Vill.Envtl.L.J. 227, 251 (1991); Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of* Lujan v. National Wildlife Federation, 39 Kan.L.Rev. 997, 1042–43 (1991).

1 Before it adopts a federal test and federal gloss, the majority asserts the "general test for standing in **Texas**" is what it quotes from *Board of Water Engineers v. City of San Antonio,* 155 **Tex**. 111, 114, 283 **S.W**.**2d** 722, 724 (1955). The majority overrules the ***Texas*** *Industrial Traffic League* case, which addressed standing in the context of "justiciable interest" discussed in the more recent cases of *Coffee v. William Marsh Rice University,* 403 **S.W**.**2d** 340 (**Tex**.1966), and *Sabine River Authority v. Willis,* 369 **S.W**.**2d** 348 (**Tex**.1963). The context of the cases differed from *Board of Water Engineers,* of course. The precise meaning of "standing" in fact depends on the context. The majority adopts a federal gloss, and the federal courts have stated, "Generalizations about standing to sue are largely worthless as such." *Association of Data Proc. Serv. Orgs. v. Camp,* 397 U.S. 150, 151, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). Using "standing" to mean a party's legal capacity to sue is my best description of the labyrinth of different cases the majority uses interchangeably.

2 *Richardson v. First Nat'l Life Ins. Co.,* 419 **S.W**.**2d** 836 (**Tex**.1967), relied upon by the majority for the proposition that pleadings must "affirmatively show that the court has jurisdiction to hear the cause," **852 S.W**.**2d** at 446, was expressly distinguished in *Peek.* This unanimous opinion written for the Court by Chief Justice Phillips explained that *Richardson* really meant that if the pleadings affirmatively showed there was *no* jurisdiction, then the case should be dismissed, but otherwise there was a presumption that the amount omitted from the pleading would support jurisdiction. *Peek,* 779 **S.W**.**2d** at 804.

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TEXAS CPIA v. Council, Saida II, 706 SW 2d 644 - Tex: Supreme Court 1986

706 S.W.2d 644 (1986)

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION et al., Petitioners,
v.
COUNCIL OF CO-OWNERS OF SAIDA II TOWERS CONDOMINIUM ASSOCIATION et al., Respondents.

No. C-4576.

Supreme Court of Texas.

March 5, 1986.
Rehearing Denied April 23, 1986.

Jim Mattox, Atty. Gen., Allene D. Evans, Office of the Atty. Gen., David C. Duggins, Clark, Thomas, Winters & Newton, Austin, for petitioners.

Stephen Curtis Bonner, Jr., Harlingen, Guy Cade Fisher, Fisher & Cook, Austin, for respondents.

OPINION

HILL, Chief Justice.

Various property owners insured by the Texas Catastrophe Property Insurance Association seek review of an order of the State Board of Insurance denying them recovery for damage done to their property by Hurricane Allen. Each claimant filed a petition in a Travis County District Court seeking "trial de novo" review of the State Board of Insurance's decision. The trial court dismissed each case for want of jurisdiction because the property owners had failed to join the State Board of Insurance as a party-defendant within the time required by the Administrative Procedure and Texas Register Act, Tex.Rev.Civ.Stat. Ann. art. 6252-13a, § 19(b) (Vernon Supp. 1986). The court of appeals reversed and remanded, holding that the
645 State Board of Insurance had no authority to hear the *645 property owners' claims and that the trial court had jurisdiction of the "common law" claims asserted by the property owners. 696 S.W.2d 60. We reverse the judgment of the court of appeals and affirm the trial court's judgment.

The TCPIA was created by the Texas Legislature in 1971, pursuant to the Texas Catastrophe Property Insurance Pool Act, to provide, among other things, insurance for property owners in designated areas of the State of Texas where risk of hurricane is great. *See* *Beacon National Insurance Co. v. Texas State Board of Insurance,* 582 S.W.2d 616, 617 (Tex.Civ.App.-Austin 1979, writ ref'd n.r.e.), *cert. denied,* 449 U.S. 829, 101 S.Ct. 96, 66 L.Ed.2d 33 (1980). *See also* Tex.Ins. Code Ann. art. 21.49, § 1 (Vernon 1981). Pursuant to the Texas Catastrophe Property Insurance Pool Act, the State Board of Insurance has designated fourteen Texas counties along or near the Gulf Coast as the catastrophe area. TCPIA membership is required of all insurance companies authorized to write property insurance in Texas, with certain limited exceptions. *Id.* § 4.

A complex formula for the allocation of risk of loss among TCPIA members is outlined in the

Texas Catastrophe Property Insurance Pool Act. *Id.* § 5(c) (Vernon Supp.1986). A particular member's allocation increases in proportion to the amount of certain types of insurance written outside the catastrophe area by the member, and decreases in proportion to that member's voluntary writing of windstorm policies within the catastrophe area.

The Texas Catastrophe Property Insurance Pool Act requires the State Board of Insurance to supervise all of TCPIA's operations and gives it the general authority to "issue any orders which it considers necessary to carry out the purposes of this Act." *Id.* § 5A(a) (Vernon 1981). Additionally, the State Board of Insurance is given the authority to hear appeals by "[a]ny person insured pursuant to this Act ... who may be aggrieved by an act, ruling or decision of the [TCPIA]...." *Id.* § 9.

Each of the claimants herein, insured by the TCPIA, timely filed appeals to the State Board of Insurance after the TCPIA refused to compensate them for damage to their properties caused by Hurricane Allen. The State Board of Insurance subsequently issued final orders holding that one claimant was entitled to recover $12,371.75 and that the others were not entitled to recover on their policy claims. Within thirty days after their motions for rehearing had been overruled by the State Board of Insurance, each claimant filed a petition in Travis County District Court seeking de novo review of the State Board of Insurance's decision. The TCPIA was the sole defendant named in each petition. The TCPIA filed a general denial and a plea to the jurisdiction in each case on the grounds that each claimant's petition failed to name the State Board of Insurance as defendant, as required by Tex.Ins.Code Ann. art. 1.04(f) (Vernon 1981). Each claimant then filed an amended petition naming the State Board of Insurance as a defendant. The State Board of Insurance answered with a plea to the jurisdiction, contending that claimants failed to name it as a party-defendant within the time required by the APTRA. Tex.Rev.Civ.Stat.Ann. art. 6252-13a, § 19(b) (Vernon Supp.1986). The trial court sustained the TCPIA's and the State Board of Insurance's pleas and dismissed each case for want of jurisdiction. The cases were subsequently consolidated on appeal.

When the Legislature creates an administrative agency, it may also prescribe rules and regulations governing the administrative body and the method by which the rights determined by such body will be enforced, including the procedures for obtaining judicial review of final agency decisions. *See* *City of Amarillo v. Hancock,* 150 Tex. 231, 234, 239 S.W.2d 788, 790 (1951); *Rowden v. Texas Catastrophe Property Insurance Association,* 677 S.W.2d 83, 87 (Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.).

646 The Legislature has done precisely this with regard to the State Board of *646 Insurance's supervision of the TCPIA, by (1) creating the TCPIA, (2) creating the claimant's right to participate in the windstorm plan, (3) authorizing the State Board of Insurance to administer the windstorm plan, and (4) creating the right and procedure to contest claims decisions made under the statutory plan. Tex.Ins. Code Ann. art. 21.49, §§ 1, 4(a), 5A(a), 6, and 9 (Vernon 1981). We have long recognized that if a cause of action and remedy for its enforcement are derived not from the common law but from a statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable. *Mingus v. Wadley,* 115 Tex. 551, 558, 285 S.W. 1084, 1087 (1926); *Alpha Petroleum Co. v. Terrell,* 122 Tex. 257, 265-66, 59 S.W.2d 364, 367-68 (1933). *Accord* *Merida v. Texas Municipal Retirement System,* 597 S.W.2d 55, 57 (Tex.Civ.App.-Austin 1980, no writ). The right of a property owner in the catastrophe area to participate in the windstorm insurance plan and to obtain any benefit from the plan does not derive from the common law, but rather solely from the provisions of the Texas Catastrophe Property Insurance Pool Act. We therefore hold that, in seeking to enforce rights to such statutory insurance benefits, the insured must comply with the Insurance Code and the APTRA. *See* *Mingus v. Wadley,* 115 Tex. at 557-58, 285 S.W. at 1087.

The APTRA sets forth the procedure for the institution of an administrative appeal, which controls unless otherwise provided by statute. Tex.Rev.Civ.Stat.Ann. art. 6252-13a, § 19 (Vernon Supp.1986). Section 19(b) provides that "[p]roceedings for review are initiated by a petition [filed in a District Court of Travis County, Texas] within thirty days after the decision complained of is final and appealable." *Id.* § 19(b). The Insurance Code mandates additional procedures applicable to appeals from final decisions of the State Board of Insurance. Article

1.04(f) of the Insurance Code reads:

If any ... party at interest be dissatisfied with any decision, regulation, order, rate, rule, act or administrative ruling adopted by the State Board of Insurance, such dissatisfied ... party at interest after failing to get relief from the State Board of Insurance, may file a petition setting forth the objection to such decision, regulation, order, rate, rule, act or administrative ruling ... in the District Court of Travis County, Texas, and not elsewhere, against the *State Board of Insurance* as defendant.

Tex.Ins.Code Ann. art. 1.04(f) (Vernon 1981) (emphasis added). The Texas Catastrophe Property Insurance Pool Act, which created the TCPIA, authorizes "the person aggrieved by any order or decision of the [State Board of Insurance to] appeal to the District Court of Travis County, Texas, and not elsewhere, in accordance with Article 1.04(f) of the Insurance Code of Texas." *Id.* art. 21.49, § 9. Because the Legislature has prescribed the method for review of administrative action, that method must be followed to invoke the trial court's jurisdiction. *See* *Lambeth v. Texas Unemployment Compensation Commission,* 362 S.W.2d 205, 206-07 (Tex.Civ.App.-Waco 1962, writ ref'd).

In the present case, the claimants did not follow the statutory procedure for review set forth above. Their original petitions, although filed within thirty days of the State Board of Insurance's final decision, failed to name that agency as a party-defendant. The transcript reflects that the claimants, in their first amended original petitions, eventually did join the State Board of Insurance as a defendant, but this pleading was filed after the thirty-day limitation period set forth in APTRA § 19(b) had expired.

It is well established that a party pursuing an administrative appeal from an agency's decision must name the defendant mandated by statute as a party within the time limit set forth in order to invoke the trial court's jurisdiction. *See, e.g.,* *Lambeth,* 362 S.W.2d at 205, 206-07. In *Lambeth,* an employee commenced an action against the Unemployment Compensation
647 Commission within the ten-day statutory *647 period, but first joined his employer, a party to the Unemployment Compensation Commission's proceedings, as a party by amended pleading *after* that period had expired. The statute in question required that "any other party to the proceeding before the Commission shall be made a defendant." *Id.* at 206. The *Lambeth* court upheld the trial court's dismissal of the employee's appeal because the employee failed to join his employer as a defendant within the ten-day period. *Id.* at 206-07. *Accord* *Charter Oaks Fire Insurance Company v. Gorman,* 693 S.W.2d 686, 687-88 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). It is equally clear that the petition may not be amended thereafter to cure the jurisdictional defect. *Lambeth,* 362 S.W.2d at 206-07; *Gorman,* 693 S.W.2d at 687-88.

The claimants contend, however, that the TCPIA is an arm of the State Board of Insurance and that suit against the TCPIA is tantamount to a suit against the State Board of Insurance; therefore, they have complied with the APTRA's and the Insurance Code's requirements. They cite *Castro v. Harris County,* 663 S.W.2d 502 (Tex. App.-Houston [1st Dist.] 1983, writ dism'd) in support of this proposition. We find *Castro* inapposite for the reason that *Castro* did not involve an appeal of an administrative decision. Thus, the statute of limitation issue present in *Castro* is simply not analogous to the question of administrative procedure involved in the present case.

We hold that the Texas Castrophe Property Insurance Pool Act authorizes the State Board of Insurance to resolve disputes arising from the denial by the TCPIA of claims by its policyholders. The appellate procedures available to a party aggrieved by a TCPIA decision, as provided for by the Texas Catastrophe Property Insurance Pool Act and the APTRA, are mandatory and exclusive and must be complied with in order to enforce the rights to statutory insurance benefits held by TCPIA policyholders.

Because the claimants in the present consolidated appeals failed to name the State Board of Insurance as a defendant within thirty days of its final decision, as required by the APTRA and Article 1.04(f) of the Insurance Code, we hold that the trial court properly dismissed their causes for want of jurisdiction.

We reverse the judgment of the court of appeals and affirm the trial court's judgment.

GONZALEZ, J., dissents.

GONZALEZ, Justice, dissenting.

I concur with the court's holding that the property owner's claim to insurance benefits derive from statute and not common law. However, I would apply prospectively the holding that Tex.Ins.Code Ann. arts. 1.04(f) and 21.49, § 9, along with Tex.Rev. Civ.Stat.Ann. art. 6252-13a, § 19(b) be read together to determine jurisdictional prerequisities for appeal.

Neither art. 1.04(f) nor art. 21.49, § 9 provides claimants with notice of any filing time limits. There are no cross references in either article to the APTRA, § 19(b). Further, until now, no case has applied § 19(b)'s thirty-day time limit to this area of the law. Under these circumstances, I would not deny respondents their day in court.

As § 19(b) is now considered as an additional procedural prerequisite for jurisdiction, aggrieved parties must be meticulous in their preparation for an agency appeal. Reference must be made to the APTRA for concurrent or cumulative procedural prerequisites for statutory schemes, unless contrary intent appears in the enabling statute. *See* art. 6252-13a, § 1.

WestlawNext

Texas Loan Agency v. Gray
Court of Civil Appeals of Texas. | February 5, 1896 | 12 Tex.Civ.App. 430 | 34 S.W. 650 *(Approx. 2 pages)*

TEXAS LOAN AGENCY
v.
GRAY. [1]

Return to list **1** of **20 results** Search term

Appeal from district court, Denton county; D. E. Barrett, Judge.

Trespass to try title by the **Texas Loan Agency** against M. **Gray**, Jr. From a judgment for defendant, plaintiff appeals. Reversed.

West Headnotes (2)

Change View

1 **Mortgages** Under Trust Deeds
A trust deed is equivalent to a mortgage with a power of sale, and the legal title does not vest in the trustee on default.

Cases that cite this headnote

2 **Mortgages** Resale
A sale by a trustee at a place other than that named in the deed, being a mere nullity, does not exhaust the trustee's powers, and a second sale at the proper place will pass a valid title to the purchaser.

Cases that cite this headnote

Attorneys and Law Firms

***650 *430** S. M. Kerr and Short & Hill, for appellant. E. C. Smith and H. C. Ferguson, for appellee.

Opinion

Statement of the Case, with Conclusions of Fact.

***431** TARLTON, C. J.

Suit in trespass to try title, brought by the appellant against the appellee to recover certain real estate situated in Denton county, **Tex**. On August 11, 1888, John J. May, Sr., and his wife, M. C. May, executed a trust deed to H. G. Damon, trustee, for the lands in controversy, to secure the plaintiff in the payment of the sum of $3,500 and interest. The instrument authorized Damon, in case of default in the payment of the indebtedness named, to sell the lands at public auction at the courthouse door, Navarro county, **Tex**. On February 16, 1893, J. J. May and his wife conveyed the land to the defendant, M. **Gray**, in part consideration of which the vendee assumed the payment of the indebtedness named in the trust deed. November 7, 1893, the debt not having been paid, Damon sold the lands at the courthouse door in Denton county, complying in all respects with the terms of the trust deed, except as to the place of sale therein provided for, and the plaintiff became the purchaser at this sale.

Afterwards, on December 5, 1893, Damon, as trustee, again sold the lands at the courthouse door in Navarro county, as provided in the trust deed, and at this sale the plaintiff became the purchaser. In January, 1894, the plaintiff sued out a writ of sequestration, which it caused to be levied on the lands. The defendant was accordingly ejected. The plaintiff replevied the lands, and has since had the possession thereof. During the period of its occupancy the property has been of the rental value of $700. Judgment was rendered that the plaintiff was not entitled to recover, that it take nothing by this suit, and decreeing a recovery in the sum of $700 in favor of the defendant, against the plaintiff and the sureties on its replevy bond, on the demand in reconvention for the wrongful suing out of the writ of sequestration.

Opinion.

Upon the foregoing facts his honor concluded (1) that the sale in Denton county passed no title to the plaintiff, because not made at the place designated in the trust deed; (2) that, by reason of the sale in Denton county, Damon divested himself of all interest in the lands, and of all power conferred upon him by the trust deed, for which reason the subsequent sale made on December 5, 1893, in Navarro county, vested no title in the plaintiff. ***432** We are unable to concur in the latter conclusion reached by the learned judge. In our opinion the sale (or, rather, "the ineffectual attempt at sale") in Denton county (a place other than that ****651** named in the deed in trust) was simply a nullity. It was void for all purposes. It could neither construct nor destroy, vest nor divest. After it, the parties in interest stood "as they did before." After it, "we see no reason why the deed might not be executed in the proper manner." Boone v. Miller, 86 **Tex**. 74, 80, 81, 23 **S**. **W**. 574. The contention of the appellee, that by the "ineffectual attempt at sale" in Denton county the trustee had exhausted his powers, rests upon the proposition that by the terms of the deed in trust the legal title was vested in the trustee, and that, having once conveyed, he became powerless to sell in Navarro county, as prescribed by the instrument. Stephens v. Clay (Colo. Sup.) 30 Pac. 43. The doctrine that a trust deed, which is, in legal effect, but a mortgage with a power of sale, vests in the trustee the legal title after default, does not obtain in **Texas**. The mortgage, or the conveyance in trust, is but an incident to the debt. This doctrine is to be regarded as a rule of property in this state. Blackwell v. Barnett, 52 **Tex**. 326; Milling Co. v. Eaton, 86 **Tex**. 411, 25 **S**. **W**. 614; Aggs v. Shackelford Co., 85 **Tex**. 149, 19 **S**. **W**. 1085.

We hold that the sale in Navarro county vested the title in the plaintiff. We consequently reverse the judgment, and here render it for the appellant; ordering that it recover the land in controversy, that the appellee take nothing by his plea in reconvention, and that he pay all costs incurred in this suit.

Parallel Citations

34 S.W. 650

Footnotes

1 Writ of error denied by Supreme Court.

End of Document

Thorn v. Newsom
Supreme Court of Texas. | May 12, 1885 | 64 Tex. 161 | 53 Am.Rep. 747 *(Approx. 4 pages)*

FROST **THORN** ET AL.

v.

D. P. **NEWSOM**.

Case No. 5316. | May 12, 1885.

Return to list **1** of **20 results** Search term

Change View

1 **Judgment** Rights and Liabilities Under Contracts
Where a court of competent jurisdiction has decided that a bond for title was for the conveyance of land, it cannot be shown collaterally that the bond was merely for a quitclaim deed.

2 Cases that cite this headnote

2 **Vendor and Purchaser** Quitclaim
A quitclaim deed, received in good faith and for value, without notice of a prior unrecorded deed, will not prevail over the latter.

7 Cases that cite this headnote

3 **Vendor and Purchaser** Quitclaim
Although nonregistered deeds are void as to subsequent purchasers for value without notice, still it is well settled that a subsequent purchaser, although for value and without actual notice, who takes under a quitclaim deed, will not be protected, since he contracted for only the interest his vendor had at the time of the transaction.

5 Cases that cite this headnote

***161** APPEAL from Wise. Tried below before the Hon. C. C. Potter.

***162** On May 5, 1876, Frost **Thorn**, Jr., Wm. T. and Mary Garner brought this suit against appellee and others, for the recovery of the north half of the league of land patented to George H. Duncan. They derived title through a contract between their deceased father, Frost **Thorn**, Sr., and Geo. H. Duncan, by which the former was to locate the certificate and secure the patent for one-half of the land, alleging compliance upon his part with the contract. Also that after the death of **Thorn** and Duncan, the heirs of the latter acknowledged the right of the heirs of the former to a one-half interest in the land. And in September, 1871, the parties made a partition of the land, in which Duncan's heirs were allotted the south half and **Thorn's** heirs the north half of the league, which is situated on the line partly in Wise and partly in Jack county.

This partition was subsequently reduced to writing in the form of a deed of partition, and signed as well as acknowledged by the parties. This instrument bore date November 25, 1871, but was acknowledged in February and March, 1873.

After the original suit was brought the plaintiffs all died, and thereafter the suit was

RELATED TOPICS

Vendor and Purchaser
Bona Fide Purchasers
Neighbors Purchase of Quitclaim Deeds

Judgment
Conclusiveness of Adjudication
Specific Performance of the Land Contract

prosecuted by their heirs acting through guardians *ad litem.*

Appellee **Newsom** claimed title to two hundred acres of land situated on the north of the league, and properly described in his answer, as an innocent purchaser for value and without notice of any adverse claim, by purchase and deeds of general warranty from Felix Mudd, one for one hundred and twenty-five acres, dated January 17, 1873, and filed for record January 20, 1873; the other for seventy-five acres, bearing the same date and filed for record at the same time as the first deed, disclaiming as to the balance of the land sued for. This title was derived through Mudd as follows: Conveyance by all the heirs of George H. Duncan, deceased, the original grantee, to their brother, James Duncan, conveying their entire interest, right, title and claim to the land. This deed bore date July 3, 1872. James Duncan executed to Felix Mudd a bond for title, by which he bound himself to execute and deliver to Mudd a deed with special warranty by the 1st day of September, 1872, conveying to Mudd "his and all his interest secured in and unto the said land, by deed" from his brother. Mudd brought suit upon that bond in the district court of Wise county, and on November 16, 1872, judgment was therein rendered in favor of Mudd, by which he recovered of James Duncan the land, and which is therein fully described.

Appellants replied that **Newsom** was not an innocent purchaser ****163*** for value and without notice of their rights, but that he had notice at and before his purchase, and if not, then under the facts and circumstances he was chargeable with notice, etc.

Appellee asked for a severance from the other defendants, which was granted. Judgment in favor of **Newsom**, from which this appeal was taken and perfected.

Upon the trial below several bills of exception were saved by appellants to the ruling of the court excluding evidence. Also complaint is made as to instructions given and charges refused. The material question will be fully shown by the opinion.

The following is the bond for title executed by Duncan to Mudd:

"STATE OF **TEXAS**,)
County of Kaufman.)

I, James Duncan, for the consideration of $1,000, gold coin, to me in hand to be paid, on the 1st day of September, 1872, this day made payable by note executed by George M. Hogan, that the said James Duncan, upon the full payment of the aforesaid note, being the full consideration for the said James Duncan's right, title and interest in and unto one league of land situated in the counties of Wise and Jack, state of **Texas**, the same being located in one body, the said lands being patented under date, the 11th day of January, 1858, vol. 11, No. 656, as shown from the records of the general land office of the state of **Texas**. Now, said James Duncan agrees to convey to one Felix Mudd, his and all of his interest, secured in and unto the said lands by deed, bearing even date with this instrument, from his, said James Duncan's, four brothers, to wit: George, Alexander, David and Lacy Duncan; that said James Duncan, by virtue of said deed so executed by the said brothers, does by this instrument agree to convey to the said Mudd, on or about the 1st day of September, 1872, by special warranty title from himself and all persons claiming by, through or under him, the said Mudd, his interest, saving alone six hundred and forty acres deeded to George M. Hogan, which deed is now a matter of record in Wise county; the execution of the deed to Felix Mudd and the payment of this purchase money, $1,000, are to be simultaneous actions. In the event of this money not being punctually paid on the 1st day of September as aforesaid, it shall bear ten per cent. interest until paid. In testimony of which I, James Duncan, have hereto set my hand and signature this 3d day of July, 1872.

Attest: JAMES DUNCAN.
ROBERT C. HOGGINS,
J. J. PYLE,

GEO. M. HOGAN."

Attorneys and Law Firms

***164** *F. B. Sexton,* for appellants, cited: Horton v. Hamilton, 20 **Tex**., 611; Cook v. Burnley, 45 **Tex**., 115-19; Caruth v. Grigsby, 57 **Tex**., 259-65; Stegall v. Huff, 54 **Tex**., 196-7; Harrison v. Boring, 44 **Tex**., 259-**64**; Taylor v. Harrison, 47 **Tex**., 457-60; Wethered v. Boon, 17 **Tex**., 150; Freeman on Judgments, secs. 256, 257 and 258; Hobby's **Texas** Land Law, secs. 532, 540 and 1700; Wheeler v. Yenda, 11 **Tex**., 562; Milam County v. Bateman, 54 **Tex**., 168, 169; Mast v. Tibbles, 60 **Tex**., 305, 306; Hobby's **Texas** Land Law, secs. 231, 239, 242, 250.

Davis & Garnett, for appellee, cited: R. S., art. 4332; Graham v. Hawkins, 38 **Tex**., 628; Harrison v. Boring, 44 **Tex**., 255; Van Rensselaer v. Kearney, 11 How., 322.

Opinion

WATTS, J. COM. APP.

The material question presented by the record is as to the effect to be accorded to the bond for title, and the judgment thereon rendered against James Duncan and in favor of Felix Mudd. It is urged that, by the terms of the bond, Mudd contracted for a quitclaim deed, and the judgment for the recovery of the land must be limited in its operation to the scope and object of the intention of the parties as expressed in the bond. As resulting from these conclusions, it is asserted that **Newsom** is chargeable with all defects in the chain of title under which he purchased, and affected to the same extent by unrecorded conveyances and outstanding equities, as was his vendor, Mudd, who, it is claimed, held under a quitclaim title only.

While non-registered deeds are declared void by the statute as to subsequent purchasers for value and without notice, still the doctrine is well settled that a subsequent purchaser, although for value and without actual notice, who takes under strictly a quitclaim deed, that is, one by which the chance of title, and not the land itself, is conveyed, will not be accorded the protection of the statute, for the obvious reason that he contracted for the interest only that his vendor then had in the land. If the vendor had previously divested himself of the title to a portion or all of the land, to the extent of the divestiture there would be no right remaining in the vendor to pass by the quitclaim to the vendee. It is the then interest of the vendor for which he contracts, and it is to such interest *only* that he is entitled under the quitclaim deed.

In this case it is not necessary to determine whether a vendee who purchases from one holding under a quitclaim deed, pays value and takes a conveyance of the land with covenants of general warranty, without actual notice of an unrecorded deed existing prior to the ***165** execution of the quitclaim deed to his vendor, would be protected by the statute as a subsequent purchaser for value, and without notice. Because it will be seen from an examination of the terms of the bond for title that it is questionable whether the contract was for the chance of title or for an absolute conveyance of the land.

And in the determination of that question resort should be had to the circumstances attending the transaction, the primary object being to arrive at the intention of the contracting parties. For if their intention was that the one purchased and the other intended only to sell his interest in the land, then it would be held that the bond called only for a quitclaim deed. On the other hand, if the obligee intended to contract for an absolute conveyance of the land, and the obligor intended to bind himself to make that character of conveyance, even though it was upon special warranty, nevertheless it would be a conveyance of the land, as distinguished from a release or transfer of merely the obligor's right. Harrison v. Boring, 44 **Tex**., 263; Van Rensselaer v. Kearney, 11 How. (U. S.), 322; Sweet v. Green, 1 Paige, Ch., 476.

That was a practical question for the consideration of the court in the suit by Mudd

upon the bond. And the judgment there was for the recovery of the land, not merely the interest that James Duncan had in it. By the statute then in force the court had full authority to pass the title by the decree. P. D., art. 1481. Such evidently was the intention of the court, and such is the effect of the decree rendered.

Hence it appears that the construction placed by the court upon the bond for title was that it called for an absolute conveyance of the land. And it is not material to inquire whether the court did or not err in that construction of the bond; for, as it had jurisdiction both of the person and subject-matter, so long as that remains a subsisting decree, it is not subject to collateral attack on the ground of error, and will constitute the evidence of Mudd's title, and upon which appellee had the right to rely.

It appears from the evidence that appellee paid full value for the land. The transfer of the small note to an innocent third party, and the recovery of a judgment thereon against appellee, fastens upon him the liability, and, in contemplation of law, is equivalent to a payment by him.

Appellee testified that he purchased the land in good faith, and without notice of any adverse claim whatever, and that he paid a valuable consideration for the same.

***166** There is nothing in the record that militates against his evidence; on the contrary, he is supported by the statements of other witnesses.

Upon that issue the court instructed the jury that, if appellee purchased the land in good faith, and for value, without notice of the claim of appellants, and could not have known of it by the exercise of ordinary diligence, then to find for appellee. But, if appellee knew of the claim of appellants, or by the exercise of ordinary diligence might have known, then to find for appellants.

In our opinion the particular issue was properly submitted by the court, and that the verdict is sustained by the evidence; while the charges asked by appellants and refused by the court assumed that appellee was chargeable with constructive notice of the adverse claim, which, as has been seen, is not true. Therefore the court did not err in refusing these instructions.

All the other questions relate to immaterial matter, which could not have had any effect upon the result.

Our conclusion is that the judgment ought to be affirmed.

AFFIRMED.

Parallel Citations

1885 WL 7145 (Tex.), 53 Am.Rep. 747

End of Document

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 31, 2012
Lyle W. Cayce
Clerk

No. 11-41176
Summary Calendar

WILMER F. TREMBLE and RODA TREMBLE,

Plaintiffs - Appellants

v.

WELLS FARGO HOME MORTGAGE, INC.,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:11-CV-160

Before BENAVIDES, STEWART, and HIGGINSON, Circuit Judges.

PER CURIAM:[*]

Before the Court is Plaintiffs-Appellants Wilmer Tremble's and Roda Tremble's (the "Trembles") appeal of the district court's grant of summary judgment on their claims of wrongful foreclosure by their mortgage lender, Defendant-Appellee Wells Fargo Home Mortgage, Inc. ("Wells Fargo"). We AFFIRM.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2002, the Trembles obtained a mortgage from Wells Fargo for property located at 3615 Sheldon Drive, Pearland, Texas 77584 (the "Property"). Since that time, the Trembles repeatedly defaulted on their mortgage, received numerous notices of default and intents to accelerate, and sought and received two modifications. Nevertheless, the Trembles entirely ceased making payment on the mortgage in November 2008. On April 26, 2009, Wells Fargo again notified the Trembles of their default and began a foreclosure on the Property. In response, the Trembles requested a third modification, which Wells Fargo denied. The Trembles then filed for bankruptcy, postponing foreclosure. After the Trembles' bankruptcy proceeding was dismissed, Wells Fargo notified the Trembles on March 9, 2010 that the Property would be sold on April 6, 2010. Accordingly, the Property was sold to Federal Home Mortgage Corporation, and, on April 8, 2010, Wells Fargo notified the Trembles of the sale and began an eviction process. The Trembles again filed for bankruptcy, delaying their eviction, and the bankruptcy was once again dismissed. Thereafter, the Trembles filed the instant suit against Wells Fargo. On July 20, 2011, the district court granted Wells Fargo's motion for summary judgment, dismissing the Trembles' claims with prejudice. The Trembles then filed this timely appeal.

STANDARD OF REVIEW

"We review a grant of summary judgment *de novo*, applying the same legal standard as the district court." *Croft v. Governor of Tex.*, 562 F.3d 735, 742 (5th Cir. 2009) (internal quotation marks omitted). Summary judgment should be rendered if the record demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "An issue is material if its resolution could affect the outcome of the action." *Daniels v. Cty. of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir.

2001). "In deciding whether a fact issue has been created, the court must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* This Court may affirm summary judgment "on any grounds supported by the record." *Lifecare Hosps., Inc. v. Health Plus of La., Inc.*, 418 F.3d 436, 439 (5th Cir. 2005). We construe a pro se appellant's briefs liberally. *See Yoshey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (internal quotation marks omitted).

ANALYSIS

The Trembles argue that Wells Fargo could not foreclose on the Property because the parties' prior course of dealing, consisting of the Trembles' persistent failure to make timely payments and Wells Fargo's failure to evict them from the Property, altered the terms of their mortgage. The Trembles argue that Wells Fargo was required to notify them that the bank demanded strict compliance with the mortgage before it could seek to foreclose on the Property. We find the Trembles' arguments unavailing.

First, the Trembles argue that the UCC allows for modification of an agreement based on the parties' course of dealing. Texas incorporated the UCC under title 1 of the Texas Business and Commercial Code.[1] *See* TEX. BUS. & COM. CODE ANN. § 1.101. The UCC, however, does not govern the mortgage, a lien on real property. *See* TEX. BUS. & COM. CODE ANN. § 9.109(d)(11) (excluding "interest in or lien on real property"); *Vogel v. Travelers Indem. Co.*, 966 S.W.2d 748, 753 (Tex. App. –San Antonio 1998, no pet. h.) ("Because the Deed of Trust places a lien on *real* property, it is not governed by the UCC.").

Second, the Trembles argue promissory estoppel prevents foreclosure, construing Wells Fargo's acceptance of late payments as a promise to continue to accept such late payments, if any payment at all. Nonetheless, "[f]or many

[1] The parties do not dispute that Texas law governs this action.

years, Texas courts have held that promissory estoppel becomes available to a claimant only in the *absence* of a valid and enforceable contract." *Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 636 (Tex. App. – Houston [14th Dist.] 2004, pet. abated) (collecting cases). The Trembles do not dispute that the mortgage is such a valid enforceable contract, or that the mortgage expressly provides that Wells Fargo does not waive its right to declare a default by accepting late or partial payments.

To the extent the Trembles appeal to any other form of Texas common law, Texas has rejected the argument that a bank's prior permissive relationship with a mortgagor creates any duty to provide notice beyond that required by statute. *See Lambert v. First Nat'l Bank of Bowie*, 993 S.W.2d 833, 835 (Tex. App. – Fort Worth 1999, pet. denied). As the district court found, and which finding the Trembles do not appeal, Wells Fargo complied with Texas's statutory notice requirements.

Accordingly, as Wells Fargo demonstrates that there exists no genuine dispute as to any material fact and that it is entitled to judgement as a matter of law, we find the district court did not err in granting summary judgment.

CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED. The Clerk is directed to issue the mandate instanter.

WestlawNext

University Sav. & Loan Ass'n v. Security Lumber Co.
Supreme Court of Texas. | November 29, 1967 | 423 S.W.2d 287 *(Approx. 11 pages)*

UNIVERSITY SAVINGS & LOAN ASS'N et al., Petitioners,

v.

SECURITY LUMBER COMPANY, Incorporated, Respondent.

Return to list **1** of **46 results** Search term

Action by **lumber company** against construction **company** and its guarantors, and against mortgagee and its purchasers, to recover money judgment and assert liens for materials furnished. The District Court of Harris County, Wilmer B. Hunt, J., rendered judgment, and defendants appealed. The Texarkana Court of Civil Appeals for the Sixth Supreme Judicial District, 413 S.W.2d 745, reversed in part and affirmed in part, and some defendants appealed. The Supreme Court, Calvert, C.J., held that **lumber company's** timely suit against construction **company's** guarantor to recover money judgment for materials sold to construction **company** tolled limitations to permit **lumber company**, after expiration of two-year limitation period, to join mortgagee and owners to assert liens against them, and that under statute providing for materialman's lien with priority over all other liens except those on land or improvement at time of inception of materialman's liens, **lumber company's** lien had its "inception" in first deliveries of materials for improvements, and **company's** lien was prior in its entirety to mortgage which was recorded after first delivery but before last delivery.

Affirmed.

Norvell, Walker and Hamilton, JJ., dissented.

West Headnotes (11)

Change View

1 **Witnesses** Knowledge or Means of Knowledge of Facts
Lumber company's president was qualified witness to testify to identity and mode of preparation of records introduced by **company** in action to recover for **lumber** sold. Vernon's Ann.Civ.St. art. 3737e.

7 Cases that cite this headnote

2 **Evidence** Corporate Acts, Records, and Proceedings
Evidence in action in which plaintiff introduced its business records supported implied finding that records were made in regular course of corporation's business at or near time of recorded acts or events or reasonably soon thereafter. Vernon's Ann.Civ.St. art. 3737e.

3 Cases that cite this headnote

3 **Evidence** Items of Property and Value Thereof; Invoices
Lumber company's invoices for alleged sales to construction **company**, properly qualified, were admissible in **lumber company's** action to prove

RELATED TOPICS

Mechanics' Liens
Operation and Effect
Properly Executed and Recorded Mortgage and Mechanics Liens

Documentary Evidence
Record of Plaintiff Corporation Land Contracts Department

Limitation of Actions
Computation of Period of Limitation
Defendant Loss of Statute of Limitations

that construction **company** had offered to buy listed materials and **lumber company** had accepted offer. Vernon's Ann.Civ.St. art. 3737e.

3 Cases that cite this headnote

4 **Guaranty** Weight and Sufficiency

Evidence in **lumber company's** action against construction **company's** guarantor to recover for materials sold, wherein **lumber company's** invoices were introduced, was sufficient to support inference that prices charged were agreed to or reasonable and that materials were actually delivered and received.

6 Cases that cite this headnote

5 **Evidence** Necessity in General

There is no necessity that there be pleading that business records meet statutory requirements as predicate for their admission in evidence; Love v. Travelers Ins. Co., 395 S.W.2d 682, expressly disapproved. Vernon's Ann.Civ.St. art. 3737e.

1 Case that cites this headnote

6 **Evidence** Parties Against Whom Admissible

Lumber corporation's business records, properly qualified, showing sales to construction **company**, were admissible in action against mortgagee who was not a party to the sale transaction. Vernon's Ann.Civ.St. art. 3737e.

5 Cases that cite this headnote

7 **Limitation of Actions** Intervention or Bringing in New Parties

Lumber company's timely suit against construction **company's** guarantor to recover money judgment for materials sold to construction **company** tolled limitations to permit **lumber company**, after expiration of two-year limitation period, to join mortgagee and owners to assert lien against them. Vernon's Ann.Civ.St. art. 5467.

2 Cases that cite this headnote

8 **Liens** Nature and Incidents in General

Liens are incidents of and inseparable from debt.

10 Cases that cite this headnote

9 **Mortgages** Mortgages and Mechanics' or Contractors' Liens in General

There was no special contract of purchase and sale of all materials for house construction before delivery of materials, such as might have operated to give materialman's lien priority over subsequently-recorded mortgage, where materialman merely quoted its prices to contractor and required guarantors of contractor's account for such materials as it might thereafter elect to purchase.

13 Cases that cite this headnote

10 **Mortgages** Mortgages and Mechanics' or Contractors' Liens in General

Under statute providing for materialman's lien with priority over all other liens except those on land or improvement at time of inception of materialman's liens, **lumber company's** lien had its "inception" in first

deliveries of materials for improvements, and **company's** lien was prior in its entirety to mortgage which was recorded after first delivery but before last delivery. Vernon's Ann.Civ.St. art. 5459; Vernon's Ann.St.Const. art. 16, § 37.

13 Cases that cite this headnote

11 **Mechanics' Liens** Delivery of Materials

Lumber company which supplied materials for construction had one lien securing entire indebtedness, not a series of liens securing separate debts. Vernon's Ann.Civ.St. art. 5459; Vernon's Ann.St.Const. art. 16, § 37.

5 Cases that cite this headnote

Attorneys and Law Firms

***288** Eastham & Meyer, Sam Dawkins, Jr., Townes & Townes, Edgar E. Townes, Jr., Houston, for petitioners.

Bracewell & Patterson, William K. Wilde and Ronald C. Kline, Houston, for respondent.

Opinion

CALVERT, Chief Justice.

The trial court, in a trial without a jury, awarded **Security Lumber Company**, Inc. a joint and several judgment against Wieghard Construction **Company**, Jack C. Westmoreland, Harold A. Currlin and Thomas A. Wieghard for the sum of $12,284.36, plus interest and attorney's fees. The principal recovery represented the value of materials alleged to have been furnished to Wieghard Construction **Company** for construction of improvements on three city lots. Liability of Westmoreland, Currlin and Wieghard was based on written contracts, required by **Security** before it would deliver materials, guaranteeing payment of the construction **company** account. The trial court judgment also established validity of statutory mechanic's and materialmen's liens on the three lots in favor of **Security**; established priority of such liens over deed of trust liens on the three lots held by **University Savings** & **Loan** Association, which had foreclosed its liens under a power of sale and bought the lots, to the extent of material furnished before recordation of **University's** deeds of trust; awarded **Security** a money judgment against **University** in a sum representing the value of materials furnished for improvements on the three lots before execution of the deeds of trust, and against purchasers of two of the lots for their respective shares of such sum; foreclosed the mechanic's and materialmen's liens on the three lots and directed issuance of an order for sale of the three lots to satisfy the judgment. The judgment against Wieghard Construction **Company** and Thomas A. Wieghard was by default.

The court of civil appeals reformed and affirmed the trial court's judgment. **Security's** mechanic's and materialmen's liens ***289** were given priority over **University's** deed of trust liens to the extent of the value of all materials furnished for improvements on the three lots, both before and after execution of the deeds of trust; a money judgment was rendered against **University** for the value of all such materials, and against the purchasers of the two lots for the value of all materials furnished for construction of improvements on their respective lots. **Security Lumber Company** v. Wieghard Construction Co., 413 S.W.2d 745. We affirm the judgment of the court of civil appeals.

A joint application for writ of error was filed in this court by **University** and the two lot owners, and a separate application was filed by Westmoreland. Both applications were granted. Westmoreland's application raises only one basic question, viz: Is there

in the record evidence of probative force supporting that part of the trial court's judgment awarding **Security** a recovery of money for materials furnished? The application filed by **University** and the lot owners raises the same question as Westmoreland's application and two additional questions: (1) Is **Security's** right to assert the priority of and to foreclose its liens barred by the two-year statute of limitation? (2) Are **Security's** liens prior and superior, in whole or in part, to **University's** deed of trust liens? The questions will be discussed in the order in which they are listed.

The court of civil appeals held that the trial court's money judgment for **Security** is supported by evidence. The holding is based in large part on certain business memoranda or records of **Security** which were admitted in evidence over objections by the defendants who are petitioners here. Westmoreland contends that the records were not admissible under Article 3737e, Vernon's Ann. Texas Civil Statutes, the Business Records Act, and are therefore hearsay and incompetent to prove **Security's** claim. **University** contends that even if the records were admissible under the statute to establish **Security's** claim against the construction **company**, they were not admissible against it; that it was not the purpose of the statute to make a record of transactions with one person admissible in a suit against a third person who is not in position to disprove its accuracy.

Admissibility and competency of the business records as proof of **Security's** claim must be determined in the following procedural and factual context. **Security's** action was founded upon a sworn account as authorized by Rule 185, Texas Rules of Civil Procedure. Westmoreland filed a written denial, stating under oath that the account was not just or true, in whole or in part. As proof of the indebtedness, **Security** offered in evidence a large number of invoices and "delivery tickets."

The invoices are printed forms with blank spaces to be filled in showing to whom materials are sold, the quantity of materials ordered, the date of the order, the price of various materials included in the order and the total charge for all included materials. The first line of each of the invoices introduced in evidence contains this statement: "Sold to Wieghard Construction **Company** * * *" The words "Sold to" are printed and the words "Wieghard Construction **Company**" are written in with ink or a pencil. Each invoice contains a list of the materials ordered, the date of the order, the price of the various materials included in the order and the total charge for all included materials.

Security's president testified that the invoices were made in the regular course of business; that in the regular course of business an employee took the orders for the materials and wrote them down on cardboard "loading tickets" which were sent to employees whose duty was to load the materials for delivery; after the listed materials were loaded on trucks, the loading tickets were then returned to the office and from them other employees made up the invoices showing the sale to Wieghard Construction **Company** of the same materials ***290*** as were listed on the loading tickets and the date of sale and delivery; another employee then checked the materials on the trucks against the invoices to make certain the orders were properly filled, and gave the truck drivers two copies of the invoices, one to be turned over to the purchaser upon delivery and the other to be signed by someone at the construction project and returned to the office as a "delivery ticket"; prices were then entered on the invoices and on fourth copies which were mailed to the construction **company**. **Security's** president also testified that the construction **company** was given a written quotation of prices before any materials were ordered.

Article 3737e provides:

"Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

"(a) It was made in the regular course of business.

"(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

"(c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

"Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

" * * * "

1 2 3 Under the provisions of the statute, the invoices were business memoranda and were properly admitted as competent evidence of acts or events included therein if their identity and mode of preparation in accordance with paragraphs (a), (b) and (c) of Section 1 were proved by a qualified witness even though the witness had no personal knowledge as to the various items or contents of the invoices. The president of **Security** was a qualified witness within the meaning and intent of the statute, and his testimony undoubtedly supports the implied finding of the trial judge that the invoices were made in the regular course of business and were made at or near the time of the recorded act or event or reasonably soon thereafter. The testimony of the president also supports a finding that it was the regular course of **Security's** business for an employee having personal knowledge that Wieghard Construction **Company** had ordered certain materials delivered to it to transmit that information to other employees for filling the order and, after the loading for delivery, thence to still other employees to be included in the invoices. The invoices were admissible in evidence and under Art. 3737e the entries therein are competent evidence that Wieghard Construction Co. had offered to buy the listed materials and **Security** had accepted the offer.

4 But Westmoreland argues that there are no entries in the invoices and no independent evidence tending to establish two essential elements of a sale, to wit: (1) that the prices charged were agreed to or were reasonable, and (2) that the materials were actually delivered to and received by the construction **company**. The answer to the argument is that there is ample independent evidence which will support a reasonable inference by the trial court of the existence of these two elements of a sale. Upon proof that in the regular course of ***291* Security's** business materials which were ordered were loaded on trucks for delivery and that the "delivery tickets" were returned to the office only after delivery of the loaded materials, the trial court was authorized to conclude from **Security's** possession of the delivery tickets that the ordered materials had been delivered. Also, proof that Wieghard was furnished a written quotation of **Security's** prices in advance, then ordered the materials, and was thereafter furnished a copy of the invoices with prices shown thereon, furnishes an evidentiary basis for a reasonable inference by the trial court that the prices shown on the invoices were agreed prices. The invoices are evidence only, and petitioners were not precluded from proving, if they could, that the prices charged had not been agreed to or that the materials had not been delivered. See generally Roy R. Ray, Business Records—A Proposed Rule of Admissibility, 5 Sw.L.J. 33.

5 As authority for its position, Westmoreland cites a number of court of civil appeals decisions in which the courts have held that there can be no recovery in a suit on a sworn account which is denied under oath in the absence of proof that the prices charged were agreed to or were reasonable and that the goods or materials were delivered to the person charged. We do not find it necessary either to quarrel with or separately to distinguish those cases. In none of them were business records,

properly authenticated under Article 3737e, admitted in evidence to supply elements of necessary proof. Much emphasis is laid on a statement in the court's opinion in Love v. Travelers Ins. Co., 395 S.W.2d 682, 685 (Tex.Civ.App.—Texarkana 1965, writ ref'd n.r.e.) that "When the records are offered in evidence it must be under pleading [1] and proof that they were made in the regular course of business at or near the time the act or event of [or] condition is recorded or reasonably soon thereafter." The statement is an obviously incorrect statement of the law. We expressly disapprove the holding that there must be pleading that business records meet the requirements of Article 3737e as a predicate for their admission in evidence. The notation on the new account card offered in evidence and excluded in North Texas **Lumber** Co. v. Kaspar, 415 S.W.2d 470 (Tex.Civ.App.—Dallas 1967, writ ref'd n.r.e.) was not shown to have been made by an employee with personal knowledge of the matter recorded and is not in point or persuasive.

6 We hold that the invoices were admissible in evidence and, with other facts and circumstances, constitute competent evidence supporting **Security's** money judgment against Wieghard and the guarantors of the debt. We need not decide whether the invoices alone would support the judgment. A sufficient answer to **University's** contention that business records should not be admissible against a litigant who was not a party to the business transaction is that the statute does not limit their admissibility to suits between the original parties to the business transaction. We would be reluctant to write the limitation into the statute when the Legislature could easily have done so if it had regarded it as wise. We accordingly hold that the invoices also were admissible in evidence and constitute competent evidence supporting **Security's** money judgment against **University** and its co-petitioners.

Under Article 5467, Vernon's Texas Civil Statutes, Wieghard's debt to **Security** is deemed to have accrued on May 25, 1961, the date on which the last materials were furnished. **Security** filed its suit on August 2, 1962, well within the two-year limitation period. The only relief sought in the original petition was a money judgment against Wieghard Construction **Company** and the guarantors of its account. Relief establishing priority and ordering foreclosure of its liens was sought for the first time in a second amended petition filed on July 26, 1963, more than two years after ***292*** the debt accrued. **University** and the lot owners were made defendants for the first time in the amended petition. In this fact situation, **University** and the lot owners contend that while the filing of the suit tolled the statutes of limitation as to **Security's** cause of action for its debt and foreclosure of its liens against Wieghard, it did not toll the statutes as to the cause of action to establish priority of the liens and for foreclosure against them. If we correctly understand their argument, they then contend that inasmuch as they were not sued on the cause of action to establish priority of **Security's** liens and to foreclose the liens as to them until more than two years after accrual of the cause of action on the debt, the cause of action against them was barred by the two-year statute.

7 8 The contention is novel and ingenious, and we can understand why neither party has cited us to any prior decision directly in point. We agree with the holding of the court of civil appeals that **Security's** cause of action for foreclosure of its liens as against **University** and the lot owners was not barred by the two-year statute of limitation. **Security's** suit on its cause of action for its debt was filed before the expiration of two years from the date on which the cause of action accrued. As pointed out by the court of civil appeals, the liens are incidents of and inseparable from the debt. West v. First Baptist Church of Taft, 123 Tex. 388, 71 S.W.2d 1090 (1934); Pope v. Beauchamp, 110 Tex. 271, 219 S.W. 447 (1920); Ball v. Hill, 48 Tex. 634 (1878); McAlpin v. Burnett, 19 Tex. 497 (1857). Since the cause of action for debt was not barred, neither was the cause of action to foreclose the liens. In this respect the position of **University** and the lot owners in the suit does not differ from that of Wieghard. They acquired their titles through foreclosure of the deeds of trust with constructive notice of **Security's** liens. If they had not been made parties to the suit and the suit had proceeded to judgment establishing the debt and foreclosing the liens

against Wieghard, and thereafter a controversy had developed between the purchaser at the judicial sale and **University** and the lot owners, the latter could not successfully have asserted the statute of limitation as a bar to the purchaser's rights against them. This is well settled by our decisions. See Hartel v. Dishman, 135 Tex. 600, 145 S.W.2d 865 (1940); King v. Brown, 80 Tex. 276, 16 S.W. 39 (1891); Paddock v. Williamson, 9 S.W.2d 452 (Tex.Civ.App.—Beaumont 1928, writ ref'd). The fact that they were made parties to the suit does not enlarge their rights.

This brings us to a consideration of the principal problem in the case, i.e., whether **Security's** statutory materialmen's liens are prior and superior, in whole or in part, to **University's** deed of trust liens. The opinion of the court of civil appeals indicates that its holding that **Security's** liens are prior and superior to the extent of the value of all materials furnished is based upon its conclusion that Wieghard and **Security** had entered into a special contract for the purchase and sale of all materials for the erection of the proposed improvements before any materials were delivered, and that **Security's** liens had their inception in and related back to this contract.

9 The record before us does not support a conclusion that a special contract of purchase and sale of all materials was entered into by Wieghard and **Security** before the first delivery of materials. The record reflects that **Security** merely quoted its prices to Wieghard and required guarantors of Wieghard's account for such materials as it might thereafter elect to purchase. Cf. Vaughan **Lumber** Co. v. Martin, 98 Tex. 80, 81 S.W. 1 (1904). We need not decide, therefore, whether in the absence of a general construction contract between an owner of land on the one hand and a building contractor on the other, the lien of one who supplies material pursuant to a special contract with an owner-builder will relate back to the date of the contract.

Security contends that even in the absence of a general construction contract or ***293*** a special contract for materials antedating recordation of a deed of trust, a materialmen's lien for all materials furnished, both before and after such recordation, relates back to the date on which materials were first furnished; that the lien given a supplier of materials by the mechanic's and materialmen's lien statutes is but one lien and its inception is in the first act of furnishing materials. Neither party has cited us to a case which is decisive of the question presented and we have found none in our research. The problem is primarily one of proper interpretation of the applicable statutes, not one of policy or of equities. For this reason, intermediate court decisions, discussed by the parties, which speak of the notice imparted to prospective lienors by the beginning of work on or delivery of materials for construction of improvements are neither controlling nor persuasive.

Article 5459 is one of the series of applicable statutes and controls priority. It provides:

"The lien herein provided for shall attach to the house, building, improvements or railroad for which they were furnished or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which the houses, buildings or improvements, or railroad have been put, or labor performed, and the person enforcing the same may have such house, building or improvement, or any piece of the railroad property, sold separately; provided, any lien, encumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for." [2]

The statute plainly provides priority for mechanic's and materialmen's liens over all liens except those "on the land or improvement at the time of the inception" of the mechanic's or materialmen's liens. The controlling factor in determining the relative standing of such liens with other liens is thus the time of inception of such liens. The narrower question, therefore, is this: When did **Security's** liens have their inception? A brief review of the history of the applicable statutes and of our past decisions will be helpful in arriving at the correct answer.

Some form of **security** for claims of laborers and materialmen has been a matter of major concern in Texas since the days of the Republic. By an Act of the Congress approved in January, 1839, builders and mechanics with written contracts were given a lien on buildings and the land on which they stood, and an exclusive lien on improvements made by them, to secure their accounts for labor and material. 2 Gammel, Laws of Texas 66. Another Act of the Congress, passed in February, 1844, provided additional **security** for the payment of claims of laborers, materialmen and subcontractors, through retainages. The Statutes of the Republic were carried into the statutory law of the State by Art. XII, § 2 of the Constitution of 1845. 2 Gammel, Laws of Texas 1298.

Liens of mechanics and artisans upon chattels manufactured or repaired by them were made constitutional liens by Art. XII, § 47 of the Constitution of 1869. 7 Gammel, Laws of Texas 427. The constitutional lien provision was broadened to include materialmen and to give a lien on buildings by Art. XVI, § 37 of our present constitution, adopted in 1876. By an Act approved in November, 1871, liens were given on buildings and improvements and on lands connected therewith to secure payment of claims for labor, material, machinery, fixtures and tools furnished to erect any house improvement or to repair any building, or article, or improvement whatever. 7 Gammel, Laws of Texas 30. In 1876, the Legislature brought the lien **security** and the retainage **security** of mechanics and materialmen ***294** who erected or repaired buildings or improvements into one act, and repealed all laws in conflict therewith. The act contained no reference to priorities. 8 Gammel, Laws of Texas 927.

All prior laws on the subject were codified in Articles 3164–3179, Chapter 2 of the Revised Statutes of Texas of 1879. There was no mention of priority in any of the Articles. Several of the Articles were amended in 1885. Liens were given to mechanics and materialmen for labor performed and material furnished to erect or repair buildings and improvements "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or contractors." Other provisions made clear that a lien was to exist if a contract were verbal. Article 3171 provided: "The lien herein given shall attach to the buildings * * * in preference to any prior lien or incumbrance or mortgage upon the land * * * ; provided any lien, incumbrance or mortgage existing on the land or improvements at the time of the accrual of the lien herein provided for shall not be affected thereby * * *." 9 Gammel, Laws of Texas 683. By § 8 of an Act of the Legislature, approved in 1889, Article 3171 was rewritten, and the word "accrual" in the proviso emphasized above was changed to "inception." 9 Gammel, Laws of Texas 1138. The priority provisions of the Act of 1889 are now included in Article 5459, supra.

As early as 1886 this court held in Fagan & Osgood v. Boyle Ice Machine Co., 65 Tex. 324, 331, in language not to be misunderstood, that it was not the registration required by the law but the law itself which gave a mechanic's or materialmen's lien. Said the court: "The lien is the creature of the law; the registration provided for, preserves it * * *. The record of the contract * * * did not, therefore, newly encumber the property, but fixed and secured upon it an existing lien." Fagan & Osgood was cited in Trammell v. Mount, 68 Tex. 210, 4 S.W. 377, at 379 (1887), for this judicial dictum: "The lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time." To the same effect, see Keating Implement and Machine Co. v. Marshall Electric Light & Power Co., 74 Tex. 605, 12 S.W. 489 (1889). In Trammell v. Mount, there was no written contract between an owner on the one hand and a general contractor on the other to which the labor done was referable. The statutory lien was enforced to secure payment for labor done under a verbal contract between an owner and an artisan who agreed to build only the walls of a stone house. The court adopted a policy of liberal construction of the statutes for the protection of laborers and materialmen, and the lien was given priority over an attachment lien perfected after the labor was performed but before the artisan

filed his bill of particulars as required by law.

The next case decided by this court having significant bearing on the question before us is Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 33 S.W. 652, 30 L.R.A. 765 (1895). A careful analysis of the opinion in that case is important in determining whether it disavowed the dictum of Trammell v. Mount or extended it further for the protection of mechanics and materialmen, and also in deciding whether and to what extent the interpretation there announced of the priority statute was later modified, if at all, in Sullivan & Co. v. Texas Briquette & Coal Co., 94 Tex. 541, 63 S.W. 307 (1901), and McConnell v. Mortgage Inv. Co. of El Paso, 157 Tex. 572, 305 S.W.2d 280 (1957).

In Oriental Hotel Co. v. Griffiths, the relevant facts were: The Oriental Hotel **Company** began the erection of a hotel in August, 1889, and had completed and paid for the foundation prior to February 24, 1890. On February 24, 1890, the hotel **company** entered into a general contract with Griffiths to erect and construct the hotel ***295** according to an architect's plans and specifications, and Griffiths began his work on April 4, 1890. On May 1, 1890, the hotel **company** executed a deed of trust to St. Louis Trust **Company** to secure the hotel **company's** bonds issued and sold to obtain funds to erect the hotel. When the hotel was completed, Griffiths had not been paid the full amount due under his contract and claims of certain others who had furnished labor and material after recordation of the deed of trust were unpaid. All perfected their liens as provided by statute. The mortgagee's opposition to the claims of priority of those who had no contracts was based upon the Trammell v. Mount dictum, that is, that these liens relate “back to the time when the work was performed or materials furnished,” and thus were secondary to the deed of trust liens.

In deciding the question presented, the court restated its policy of liberal construction of the statutes for the purpose of protecting laborers and materialmen and examined the problem in considerable depth. Because of the change in the wording of the priority proviso—“accrual” to “inception”—the court made several holdings, some of which are of particular significance here, to wit: (1) liens of laborers and materialmen, when perfected, will relate back to the date of their “inception”; (2) the date of “inception” is not necessarily the date on which the labor was performed or the material was furnished as per the dictum in Trammell v. Mount; (3) the date of execution of a contract for erection of a building or construction of an improvement is the date of inception of all liens for labor and material necessary to completion of the building or improvement. Accord: McConnell v. Frost, 45 S.W.2d 777 (Tex.Civ.App.—Waco 1931, writ ref'd). Even a casual reading of the opinion in Oriental Hotel v. Griffiths makes quite clear that the court did not hold (1) that to have priority over a deed of trust or other lien, a mechanic's or materialman's lien must have had its inception in a general bilateral contract antedating recordation of a deed of trust or the date of perfection of such other lien; or (2) that when timely perfected as provided by statute, a mechanic's or materialman's lien for all labor done or material furnished will not relate back to the date when his labor was first performed or his material was first furnished. Neither were any such holdings made in Sullivan & Co. v. Texas Briquette & Coal Co., 94 Tex. 541, 63 S.W. 307 (1901), nor in the recent case, McConnell v. Mortgage Inv. Co. of El Paso, 157 Tex. 572, 305 S.W.2d 280 (1957). In Sullivan & Co. the trial court and court of civil appeals gave priority to liens of materialmen who furnished material and machinery for erection of a mining plant after a deed of trust had been recorded. This court reversed, holding that the deed of trust lien was entitled to priority under the provisions of the statute. We rejected the idea that such liens had their inception when the owner determined to improve his property, and added: “The rights of the parties in this case are fixed by the statute, and cannot be disposed of upon any supposed equitable ground.” In McConnell, we denied priority to mechanic's and materialmen's liens for labor done and material furnished after recordation of a deed of trust, and refused to relate them back to a date, prior to recordation of the deed of trust, when work which had been paid for was done toward erection of the improvements. We were not called upon to decide, and did not decide, that the lien of a mechanic or materialman will not relate back to the

date when his first labor is performed or material is furnished for which payment has not been made. Indeed, the opinion in McConnell has been interpreted as reaffirming the rule of the dictum of Trammell v. Mount in this situation. See Florey, Priority of Mechanic's and Materialmen's Liens in Texas, 40 Texas L.Rev. 872, at 881 (1962).

10 11 On authority of the rule laid down in the dictum in Trammell v. Mount, ***296** we conclude that **Security's** liens on the three lots had their "inception" in the first deliveries of materials to the three lots for erection of the improvements thereon, and that each of such liens had its inception before **University's** deed of trust was recorded. Once that conclusion has been reached, the judgment of the court of civil appeals giving priority to **Security's** liens to the full extent of the value of all materials furnished, both before and after recordation of the deed of trust, must be affirmed. By the express terms of Article 5467, **Security's** indebtedness is "deemed to have accrued at the date of last delivery of such material". [3] It has one lien securing the entire indebtedness as to each lot, not a series of liens securing separate debts. That is the clear meaning of Art. XVI, § 37 of the Constitution and of Articles 5452–5472 of the statutes. There is no provision in Article 5459 for breaking a single lien into segments, and no authority therein for holding that one segment of a lien is prior to a deed of trust lien and another segment is secondary thereto. There is, therefore, no basis in the statute for the trial court's judgment on this phase of the case. The entire lien is made prior or secondary by the statute. Giving the lien priority is in accord with our long-standing rule of liberal construction for protection of laborers and materialmen who by their contribution add to the value of the **security** for the deed of trust debt.

The judgment of the court of civil appeals is affirmed.

WALKER, NORVELL and HAMILTON, J., dissenting.

DISSENTING OPINION

NORVELL, Justice.

Security Lumber Company's cause of action against Weighard Construction **Company** was founded upon a sworn account for materials furnished by **Security Lumber** to the Weighard **Company** at various times during the months of March, April and May of 1961. Apparently, there was no contract between the mentioned parties obligating the Weighard **Company** to pay a definite sum of money for specific materials, but the Weighard **Company's** liability was controlled by the orders for materials which were placed with **Security Lumber** from time to time. Any special agreement that the Weighard **Company** may have had with **Security** was not in the nature of a "general contract" such as that involved in Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 33 S.W. 652, 30 L.R.A. 765 (1895), [1] so that it cannot be said that there was a contract which constituted the "inception" of the materialman's lien. Such "inception" would then necessarily date from the time the materials were delivered upon the job site. Trammell v. Mount, 68 Tex. 210, 4 S.W. 377 (1887). [2] The record shows that three separate deliveries of materials were made to the three separate lots or job sites before the deed of trust securing the **University Savings** and **Loan** Association **loan** was filed for record on April 6, 1961. These deliveries took place on March 7, March 28 and April 3. After April 6, 1961, **Security** made three additional deliveries of materials on April 29, May 15 and May 25. In my opinion, **Security's** lien securing the reasonable values of the materials before April 6, 1961 was superior to the **University** deed of trust, but as to the ***297** reasonable value of the materials delivered after April 6 (on April 29, May 15 and May 25), I find no compulsion in the wording of the material lien statutes which requires us to hold that the lien or liens securing these amounts must come ahead of the deed of trust. In the absence of statutory wording compelling such result, I would not so hold. The greater good lies with the **security** of land titles and the certainty of financial obligations.

I think the trial court's judgment was correct and accordingly dissent from this Court's

order affirming the judgment of the Court of Civil Appeals.

Footnotes

1 Emphasis ours throughout unless otherwise indicated.

2 All Article references are to Vernon's Texas Civil Statutes.

3 This Article was amended by Acts 1961, 57th Leg., p. 863, ch. 382 § 7, but the amendment does not apply in this case.

1 In connection with Oriental, see, Sullivan & **Company** v. Texas Briquette & Coal Co., 94 Tex. 541, 63 S.W. 307 (1901), and McConnell v. Mortgage Investment Co. of El Paso, 157 Tex. 572, 305 S.W.2d 280 (1957).

2 Trammell v. Mount contains language which seems to infer that delivery to the job site would not be essential if delivery were directed to another place by the owner or he refused to accept delivery. When the liens of others are involved, the soundness of this inference may be doubted. However, the question is not before us in this case.

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903 S.W.2d 863 (1995)

Lester W. VANCE, Relator,

v.

The Honorable Mark DAVIDSON, Judge, 11th Judicial District Harris County, Texas, Respondent.

No. 14-95-00648-CV.

Court of Appeals of Texas, Houston (14th Dist.).

July 20, 1995.

864 *864 Thomas Scott Smith, Sherman, for relator.

James Conner Barber, Dallas, for respondent.

Before MURPHY, C.J., and AMIDEI and FOWLER, JJ.

OPINION

FOWLER, Justice.

In this original proceeding, Lester W. **Vance**, relator, urges this court to issue a writ of mandamus to the 11th Judicial District Court directing the Honorable Mark **Davidson**, respondent, to set aside a portion of the judgment signed June 5, 1995, entered in trial court cause number XX-XXXXXX, styled *Jimmie Lynn Garcia, Individually and As Next Friend for Jimmy F. Garcia, Jr., Christopher B. Garcia, Dustin Kyle Garcia, and Jeremy R. Garcia, minor children; Simon Garcia; and Estella Garcia v. Missouri Pacific Railroad Company, a Delaware corporation, d/b/a Union Pacific Railroad Company, and Levorn J. Cellars.* **Vance** claims that the portion of the judgment relating to the payment of attorney referral fees is void. On June 23, 1995, we granted leave to file and set the case for argument on June 30, 1995. We now grant the writ without a prior conditional grant because the trial court's plenary jurisdiction has expired.

THE ISSUE

At the outset we note that the only issue in this case is whether a trial court, in a lawsuit involving minor plaintiffs, may void or reform a lawyer's referral fee agreement when the court has no jurisdiction over one of the attorneys who is a party to the agreement. This case does not concern or abrogate the trial court's broad discretion to set attorney's fees in a case involving minor plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

Vance, a licensed attorney with a practice in Grayson County, was contacted by Ms. Jimmie Garcia concerning possible legal representation. Ms. Garcia was seeking representation because her husband and the father of her children was killed in a railroad accident. Ms. Garcia sought to file suit on behalf of herself and her children. The parents of the deceased also sought to file suit. On July 17, 1992, Ms. Garcia executed a retainer agreement with **Vance**. After this agreement was signed, it was decided that James C. Barber, an attorney with offices in Dallas, would represent Ms. Garcia and her children. **Vance** and Barber executed a written referral agreement under which **Vance** would receive from Barber one-third of the attorney's fees paid
865 in connection with the Garcias' claim. Ms. Garcia was fully apprised of the *865 referral agreement and approved of it before executing a contingent fee agreement with Barber. The parents of the deceased were also referred to Barber by another attorney who also entered into a referral agreement with Barber.

The Garcias' suit was filed in Harris County by Barber. The claims of Ms. Garcia, the children, and the parents of the deceased were settled for a collective sum of $500,000. On June 5, 1995, respondent entered a final judgment based on the settlement. In

the judgment, respondent made the following determinations as to attorney's fees:

> It further appearing to the Court, after reviewing the pleadings and hearing testimony regarding the issue of attorney's fees and expenses in this matter, that although plaintiffs' counsel has done an excellent job, and although plaintiffs' counsel initially had a 50% contract with plaintiffs, but has voluntarily cut that amount to 40%; that nevertheless an attorney's fee of no more than 33 1/3% should be approved in this case, because minors are involved;
>
> And it further appearing to the Court that plaintiffs' counsel James C. Barber, formally [sic] of Barber, Hart and O'Dell and now d/b/a Law Offices of James C. Barber, has done all the professional work on this case himself, and has advanced all costs on the case; THE COURT THEREFORE ORDERS that no referral fees be paid by Barber in this case, in excess of $150.00 [per] hour for time supported by contemporaneously kept time records; because any such referral fees would be in violation of the Disciplinary Rules of the State Bar of Texas, Rule 1.04, and the Court specifically finds that the payment of such fees would be unconscionable under the circumstances.

Judgment of June 5, 1995, in trial court cause no. 93-021415 (emphasis added).

The judgment then awarded $50,000 in expenses to the Law Offices of James C. Barber, and $166,667 in attorney's fees to Barber. **Vance** complains about the one paragraph in the judgment concerning referral fees.

On June 9, 1995, Barber sent a letter to **Vance** stating that respondent had the authority to void the referral contract between the parties and did so in the judgment based on "public policy." Barber enclosed a copy of the judgment and stated that he could not pay the referral fee because he would be subject to contempt of court if he did pay it. **Vance**, who was not a party to the litigation or present during any of the proceedings, received the copy of the judgment from Barber on June 12, 1995 and hired an attorney to help him get his referral fee. On June 12, **Vance's** attorney talked with Barber about the referral fees and requested that Barber file a motion for new trial in order to extend the trial court's plenary power. Barber did not file a motion for new trial and, therefore, the trial court's plenary power expired on July 5, 1995.

RESPONDENT'S AUTHORITY TO ALTER THE REFERRAL AGREEMENT

Vance brought this mandamus action alleging that the portion of the judgment relating to referral fees is void because the court had no personal jurisdiction over him and, thus, deprived him of property without due process.[1] In considering **Vance's** claim, we note that these facts are undisputed: (1) **Vance** never appeared in the action and was never served with notice; and (2) the portion of the judgment complained of affected a right or benefit belonging to **Vance**.

A court must have jurisdiction to act or its acts are void. *Hjalmarson v. Langley,* 840 S.W.2d 153, 155 (Tex.App.— Waco 1992, orig. proceeding) (citing *State v. Olsen,* 360 S.W.2d 398, 399 (Tex.1962)). A judicial act is void if the court lacks: (1) jurisdiction
866 of the parties or property; (2) jurisdiction of the subject matter; (3) jurisdiction to enter the particular judgment; or *866 (4) the capacity to act as a court. *Austin Indep. School Dist. v. Sierra Club,* 495 S.W.2d 878, 882 (Tex.1973); *Bakali v. Bakali,* 830 S.W.2d 251, 254 (Tex.App.—Dallas 1992, no writ).

Jurisdiction over a party depends on whether the party is properly before the court as authorized by procedural statutes and rules. *Perry v. Ponder,* 604 S.W.2d 306, 322 (Tex.Civ.App.—Dallas 1980, no writ). Jurisdiction over a party is acquired by voluntary appearance, by service of process as provided by law, or by waiver of service. *Jones v. Fitch,* 435 S.W.2d 252, 254 (Tex.Civ. App.—Houston [14th Dist.] 1968), *rev'd on other grounds,* 441 S.W.2d 187 (Tex.1969).

There is no dispute that **Vance** never appeared, was never served with process, and did not waive service in this case. *See Jones v. Fitch,* 435 S.W.2d at 254. Moreover, the only contract relating to attorney's fees before Respondent was *Barber's* contingency fee agreement with the plaintiffs. The referral agreement formed no part of the case before the trial court and **Vance** was not a party to the suit. Thus, under the case law cited above, the trial court clearly never had any jurisdiction over **Vance**. In spite of this, Respondent took a substantial property right away from **Vance**. This action by the trial court, taken without personal jurisdiction over **Vance** is, therefore, void. *Austin Indep. School Dist. v. Sierra Club,* 495 S.W.2d at 882; *Perry v. Ponder,* 604 S.W.2d at 322.

Respondent, who filed a brief on his own behalf, argues that **Vance** has "misunderstood the effect of the Trial Court's order." Respondent claims that the portion of the judgment relating to referral fees did not deal with the contract rights between Barber and **Vance**. Respondent argues that the judgment only addresses what could be paid from the funds that the plaintiffs received in the settlement. We disagree.

First, the exchange between Barber and respondent at the hearing clearly shows that respondent meant to void any referral agreement between Barber and **Vance**. During the settlement hearing the following exchange took place between Barber and respondent:

> THE COURT: If you did all the work, then it is improper for the referring attorneys to get anything. If you want me to, I will be glad to give you the benefit of an order voiding any referral agreement you had.
>
> MR. BARBER: I can't ask the Court to do that because I feel like I have a professional obligation to them.
>
> THE COURT: Let me repeat what I said. If they didn't do any work, it's unethical for you to pay them a referral fee.

Statement of facts from hearing, May 8, 1995, p. 7 (emphasis added). The record clearly shows that respondent meant to void the contract between **Vance** and Barber, and the judgment did exactly that, for it orders Barber not to pay **Vance** what Barber had agreed to pay him under the contract. Respondent, sua sponte, intervened in and modified the referral contract between relator and Barber.

Second, the portion of the judgment relating to referral fees does not simply address what could be paid from the funds the plaintiffs received in the settlement. It deals with funds already carved out of the settlement proceeds to go to someone other than the plaintiffs. When Respondent determined at the hearing and in the judgment that Barber could receive $166,667 in attorney's fees from the settlement monies, *this* was a determination of "what could be paid from the funds received by the Plaintiffs."[2] However, when respondent then went on to tell Barber what he could and could not do with funds that he was to
867 receive from the settlement, *this* was a determination of what *867 could be paid from funds already separated from the settlement money, *not* a determination of "what could be paid from the funds received by the plaintiffs."

RESPONDENT'S BASES FOR ALTERING THE REFERRAL FEE

Respondent raises numerous arguments in response to **Vance's** petition for writ of mandamus; however, all of these arguments are irrelevant in light of our holding that the trial court did not have personal jurisdiction over **Vance**. Therefore, we will not specifically address the merits of these contentions.[3]

THE AVAILABILITY OF MANDAMUS

Finally, respondent and Barber contend that **Vance** is not entitled to mandamus relief because he has an adequate remedy at law. Again, we disagree. The Texas Supreme Court has long held that mandamus will lie in the case of a void judgment and that it is unnecessary for the relator to pursue other remedies even if they exist. *Dikeman v. Snell,* 490 S.W.2d 183, 186 (Tex.1973); *Buttery v. Betts,* 422 S.W.2d 149, 151 (Tex.1967); *Fulton v. Finch,* 162 Tex. 351, 346 S.W.2d 823, 827 (1961). *See also Amateur Athletic Found. v. Hoffman,* 893 S.W.2d 602, 603 (Tex.App.—Dallas 1994, orig. proceeding) (holding that because order was void, relator could secure mandamus relief without showing he has no adequate remedy at law); *Miller v. Woods,* 872 S.W.2d 343, 346 (Tex. App.—Beaumont 1994, orig. proceeding) (holding that mandamus is available when trial court's action is void); *NCF, Inc. v. Harless,* 846 S.W.2d 79, 83 (Tex.App.—Dallas 1992, orig. proceeding) (recognizing that void action by trial court is exception to general rule that relator must show no adequate remedy to obtain mandamus relief).

The Texas Supreme Court specifically stated in *Buttery,* a case involving a void order granting a new trial, that "Relators are entitled to their final judgment in the *Buttery* case without establishing that right after a needless retrial and an appeal." 422 S.W.2d at 151. The Court ordered the trial court to reinstate the judgment it set aside.

Fulton v. Finch also involved a void order, and the Texas Supreme Court had this response when the respondent argued that the relator had an adequate remedy by appeal:

> It is one thing to say that a void order *may* be appealed from but it is another thing to say that it *must* be appealed from for it would be anomalous to say that an order void upon its face must be appealed from before it can be treated as a nullity and disregarded. An order which must be appealed from before it is ignored can hardly be characterized as "void" and binding on no one.

346 S.W.2d at 830 (emphasis in the original).

Likewise, it would be anomalous, needless, and wasteful to require **Vance** to pursue a separate contract action in another county to validate the referral fee agreement and obtain a ruling that respondent's order invalidating the referral fee agreement is void. That a remedy at law may technically exist will not defeat an applicant's entitlement to the writ when the remedy is "so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate." *Kozacki v. Knize,* 883 S.W.2d 760, 762 (Tex.App.—Waco 1994, orig. *868 proceeding) (citing *Stearnes v. Clinton,* 780 S.W.2d 216, 225 (Tex.Crim.App.1989)). Thus, mandamus is the proper remedy in this case.

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CONCLUSION

In summary, we conclude that respondent abused his discretion by modifying the referral agreement between **Vance** and Barber because Respondent had no personal jurisdiction over **Vance**. Thus, we hold that the portion of the judgment relating to referral fees is void as a matter of law and relator is entitled to mandamus relief. Respondent's plenary jurisdiction has expired and he has no authority to take any action concerning the judgment except for that ordered by this Court. *See White v. Baker & Botts,* 833 S.W.2d 327, 329-330 (Tex.App.—Houston [1st Dist.] 1992, writ requested) (holding that only Texas Supreme Court can enlarge a jurisdictional limit); *See also* Tex.R.Civ.P. 329b(d) (trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed).

We order respondent to vacate from the final judgment dated June 5, 1995, the entire paragraph which states:

> And it further appearing to the Court that plaintiffs' counsel James C. Barber, formally [sic] of Barber, Hart and O'Dell and now d/b/a Law Offices of James C. Barber, has done all the professional work on this case himself, and has advanced all costs on the case; THE COURT THEREFORE ORDERS that no referral fees be paid by Barber in this case, in excess of $150.00 [per] hour for time supported by contemporaneously kept time records; because any such referral fees would be in violation of the Disciplinary Rules of the State Bar of Texas, Rule 1.04, and the Court specifically finds that the payment of such fees would be unconscionable under the circumstances.

The remainder of the judgment remains unchanged.[4]

[1] **Vance** begins his argument by claiming that he is an indispensible party under Tex.R.Civ.P. 39. We disagree with this argument. Relator had no interest in the suit until the moment the judgment was signed and thus, was not indispensable. Further, we note that the failure to join "indispensable" parties does not render a judgment void; rather, it merely renders it voidable. *Browning v. Placke,* 698 S.W.2d 362, 363 (Tex. 1985).

[2] The trial court had jurisdiction over Barber because, as the attorney of record for the Garcias, it is as if Barber were a party to the suit. *See Newman v. Link,* 866 S.W.2d 721, 725 (Tex. App.—Houston [14th Dist.] 1993), *writ denied per curiam,* 889 S.W.2d 288 (Tex.1994) (holding that by representing a client in an action in which attorney's fees are requested and awarded, attorney becomes a party to the judgment). *See also Roberts v. Roberts,* 144 Tex. 603, 192 S.W.2d 774, 777 (1946) (holding that attorneys were as bound by judgment "as if they had been parties to the suit"); *Akin v. Akin,* 276 S.W.2d 323, 326 (Tex. Civ.App.—Austin 1955, writ dism'd) (holding that attorneys representing a party were themselves parties to the suit "literally and legally").

[3] Respondent first argues that he acted properly because trial courts have broad discretion in setting attorney's fees in cases pending before them, especially when minors are involved. We do not disagree with this general proposition; however, a trial court must have jurisdiction over a party before it takes any action affecting her rights. In his second argument, respondent contends that the portion of the judgment relating to referral fees is not void because an attorney is not entitled to a referral fee if she does not actually work on the case. This is not the law in Texas. *See* Supreme Court of Texas, Rules Governing The State Bar of Texas art. X, § 9 (Rules of Professional Conduct Rule 1.04(f) (1995). Lastly, respondent cites two appellate court opinions for the proposition that "appellate courts have placed strict rules on alleged `entitlements' of referring attorneys to receive massive amounts of money for no work." The two cases cited by respondent did not hold and, in fact, did not even discuss or comment on whether a referring attorney must work on a case to be entitled to a referral fee. *See Lemond v. Jamail,* 763 S.W.2d 910 (Tex.App.—Houston [1st Dist.] 1988, writ denied); *Fleming v. Campbell,* 537 S.W.2d 118 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

[4] We note here that vacating this one void paragraph from the judgment does not affect the rest of the judgment. The rule in this state is that a judgment may be void in part and valid in all other respects. *Twichell v. Askew,* 141 S.W. 1072, 1075 (Tex.Civ.App.—Amarillo 1911, no writ) (opinion on reh'g). *See also Preferred Life Ins. Co. v. Dorsey,* 281 S.W.2d 368, 372-73 (Tex. Civ.App.-Waco 1955, writ ref'd n.r.e.) (holding that portion of judgment relating to appellate attorney's fees was void and affirming the remainder of the judgment).

966 S.W.2d 748 (1998)

Anita De Armond VOGEL and Garrett Vogel, Appellants,
v.
THE TRAVELERS INDEMNITY COMPANY, Appellee.

No. 04-97-00774-CV.

Court of Appeals of Texas, San Antonio.

March 25, 1998.

749*749 Glenn Grossenbachler, Kenneth J. Burch, Law Office of Glenn Grossenbacher, San Antonio, for Appellant.

Jerry T. Steed, Baucum & Steed, P.C., Patrick K. Sheehan, Cauthorn Hale Hornberger Fuller Sheehan & Becker, San Antonio, for Appellee.

Before HARDBERGER, C.J., and LÓPEZ and GREEN, JJ.

OPINION

HARDBERGER, Chief Justice.

Appellants, Anita De Armond Vogel and Garrett Vogel ("Vogels"), appeal a summary judgment granted in favor of appellee, The Travelers Indemnity Company ("Travelers"). The Vogels sued Travelers for various claims relating to Travelers' refusal to renew and extend certain indebtedness and its foreclosure of the real property securing the payment of that debt. In this appeal, the Vogels raise seven points of error, contending that the trial court erred in considering certain affidavits as summary judgment evidence and in rendering summary judgment as to each of the Vogels' claims. We overrule the Vogels' points of error and affirm the trial court's judgment.

FACTUAL AND PROCEDURAL HISTORY

On March 1, 1976, George L. De Armond, Anita's father ("George"), and Drucilla De Armond, Anita's stepmother ("Drucilla"), executed 750*750 a First Mortgage Note in favor of Travelers in the principal sum of $250,000 (the "Note"). The Note was secured by a First Deed of Trust Security Agreement and Financing Statement, pledging approximately 605 acres of land in Bandera County, Texas as security (the "Deed of Trust"). The unpaid balance due under the Note matured on October 1, 1990.

The Vogels allege that George, and possibly Drucilla, executed a contract for deed contemporaneously with the execution of the Note and Deed of Trust. The terms of the contract for deed conveyed the real property pledged to secure the Note to Anita in exchange for Anita's

agreement to pay the Note and the execution of one or more notes totaling $50,000. No documentation evidencing this transaction could be located; however, the Vogels asserted that Travelers knowingly and willingly accepted payments on the Note from them.

In August of 1979, George died, and he devised all of his separate property to Anita. The real property pledged to secure the Note was allegedly separate property. The Vogels admitted that the debt evidenced by the Note became an obligation of the estate. George's estate was closed in or about 1981.

Anita failed to pay the installment due under the Note on April 1, 1985. Travelers agreed to refrain from accelerating the Note and to allow Anita to cure the default by making the payment in installments. In exchange, Anita agreed to a modification of the Note, increasing the interest rate on matured unpaid amounts to 15%.

The loan was scheduled to mature on October 1, 1990. Prior to the maturity date, the Vogels and Travelers began negotiating a renewal and extension of the loan. On October 4, 1990, Travelers forwarded a letter agreement to the Vogels, conditionally agreeing to review and consider a two year renewal. The conditions to Travelers' agreement included obtaining evidence of title and a title policy.

The Vogels accepted the terms of the letter agreement on October 25, 1990. The Vogels also paid the $2,000 non-refundable application fee which was due upon acceptance of the letter agreement proposal. In January of 1991, the Vogels obtained an appraisal of the real property which was one of the conditions in the letter agreement. The property appraised at $515,600.

On March 27, 1991, Travelers' attorney forwarded a letter to the Vogels, setting forth five prerequisites that the title company required the Vogels to meet before the title company would be in a position to issue the necessary title policy.[1] The letter states that if the listed requirements are not satisfactorily completed on or before April 26, 1991, "a very reasonable period of time under these circumstances, then it will be apparent that the terms of the October 4, 1990 letter will not (and cannot) be satisfied in order to accomplish renewal of the loan."

On May 22, 1991, Travelers demanded payment in full from Anita by June 11, 1991. When payment was not received, the substitute trustee under the Deed of Trust executed a notice of sale for the real property. On July 2, 1991, the morning of the date noticed for the sale, the Vogels filed an application for temporary restraining order and temporary and permanent injunction. The 216th District Court of Bandera County issued the temporary restraining order and set the temporary injunction for hearing for July 11, 1991. On July 10, 1991, Travelers removed the case to federal court.

Travelers re-noticed the sale of the real property for August 6, 1991. Although the Vogels again attempted to enjoin the sale in district court, the applications for temporary restraining orders were denied, and the property was sold at foreclosure and purchased by Travelers on August 6, 1991. On August 30, 1991, the federal court considered 751*751 Anita's motion to dismiss that cause for mootness. The federal court noted that the sole relief sought in that action was

injunctive relief to prevent the foreclosure sale. Since the foreclosure sale had taken place, the federal court dismissed the cause as moot.

The Vogels pursued the possibility of repurchasing the property from Travelers. On October 8, 1991, Travelers' general manager forwarded a letter to the Vogels containing a proposal for the Vogels purchase of the property. The proposal was to expire on October 15, 1991, if not accepted in writing. There is no indication in our record that the offer was accepted. Garret Vogel stated in his affidavit in response to Travelers' motion for summary judgment that the Vogels met with Travelers' representatives on October 25, 1991, and the obstacles for the resale were an increase in the interest rate and an increase in the principal amount of the loan to include costs relating to the foreclosure.

On or about August 5, 1993, the Vogels sued Travelers. On February 12, 1997, Travelers filed an amended motion for summary judgment. On March 27, 1997, the Vogels filed a response to the motion and an amended original petition in which they raised two additional claims: breach of contract and restitution. On April 8, 1997, the trial court held a hearing on the motion, taking certain evidentiary issues under advisement. On May 14, 1997, the trial court forwarded a letter to the attorneys for the Vogels and Travelers, stating that he intended to grant the motion for summary judgment. The trial court requested that the Vogels' attorney review the proposed order and determine whether he had any objections. The order was subsequently signed by the trial court on June 3, 1997, and the Vogels appeal that order.

STANDARD OF REVIEW

The general standard for reviewing a motion for summary judgment has been clearly established. The movant for summary judgment is first required to disprove at least one of the essential elements of each of the plaintiff's causes of action in order to prevail on summary judgment. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex.1991). This initial burden requires the movant to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the non-movant is taken as true, and all reasonable inferences are indulged in favor of the non-movant. *Id.* Any doubt is resolved in favor of the non-movant. *Id.*

A defendant moving for summary judgment based on an affirmative defense must conclusively prove all elements of that defense as a matter of law such that there is no genuine issue of material fact. *See* *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494-95 (Tex.1991); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex.1984). Once the defendant produces sufficient evidence to establish a right to summary judgment, the plaintiff must set forth sufficient evidence to give rise to a genuine issue of material fact. *Pinckley v. Dr. Francisco Gallegos, M.D., P.A.*, 740 S.W.2d 529, 531 (Tex.App.—San Antonio 1987, writ denied).

In the instant case, the trial court granted a general summary judgment. Therefore, we must consider whether any theory asserted in Travelers' motion supports the summary judgment. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993). We will affirm the summary judgment if any theory is meritorious. *Id.*

SUMMARY JUDGMENT AFFIDAVITS

In their first and second points of error, the Vogels contend that the trial court erred in failing to sustain their objections to the affidavits of Billy Walker and James Norman. Travelers counters that the objections were waived or, alternatively, were without merit. We do not find it necessary to reach this issue. Travelers sought to introduce the affidavits as evidence that the conditions to the renewal agreement had not been met. One of those conditions was a title policy, and the title company required a warranty deed from Drucilla before it would issue that policy. Since Garrett admitted in his affidavit 752*752 that they could only obtain a quitclaim deed from Drucilla, the summary judgment evidence conclusively established that the conditions to the renewal agreement were not met even if we do not consider the affidavits of Walker and Norman.

RES JUDICATA

In their third point of error, the Vogels contend that summary judgment would be improper based on Travelers' affirmative defense of res judicata.

Res judicata is only applicable where there is: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *McGee v. McGee*, 936 S.W.2d 360, 363 (Tex.App.— Waco 1996, writ denied). Res judicata, or claims preclusion, prevents not only the relitigation of claims actually and finally adjudicated in a prior suit but also the litigation of related matters that, with the use of diligence, should have been litigated in the prior suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex.1992). The voluntary withdrawal or dismissal of claims from an earlier suit will not preclude the operation of res judicata to bar their assertion in a subsequent suit, even where such claims are dismissed without prejudice. *Jones v. Nightingale*, 900 S.W.2d 87, 89-90 (Tex.App.—San Antonio 1995, writ ref'd).

Determining what constitutes the subject matter of a suit requires an examination of the factual background of the claim or claims in the prior litigation. *Barr*, 837 S.W.2d at 630. Texas has adopted the "transactional" approach to res judicata. *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 798 (Tex.1992), *cert. denied*, 510 U.S. 820, 114 S.Ct. 76, 126 L.Ed.2d 45 (1993). In determining whether claims arise out of the same subject matter and thereby constitute a single "transaction," the court considers: (1) their relatedness in time, space, origin or motivation; (2) whether the claims form a convenient trial unit; and (3) whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage. *See id.* at 799.

In order to establish that the res judicata defense applies, the party moving for summary judgment "must produce summary judgment evidence, including verified or certified copies of the judgment and pleadings that establish the applicability of the doctrine." *Jones*, 900 S.W.2d at 88-89. Travelers' summary judgment evidence consisted of: (1) a certified copy of Travelers' Notice of Removal, with the state court pleadings and order attached; (2) a certified copy of the Certificate of Notice of Filing of Notice of Removal; (3) a certified copy of the order granting

plaintiff's motion to dismiss for mootness; and (4) a certified copy of the federal court's dismissal judgment.

Clearly, the Vogels' claims in this case were not previously litigated in the federal suit, and there was no prior final judgment on the merits. *See* *McGee*, 936 S.W.2d at 363. In addition, the claim asserted in the federal suit and the claims asserted in this suit are not related in time, space, origin or motivation. The action seeking an injunction arose prior to the foreclosure, and the action seeking recovery based on the wrongful act of foreclosure and the breaches of any duties relating thereto could only arise after the actual foreclosure. *See* *Getty Oil Co.*, 845 S.W.2d at 798. Furthermore, treating the claims as a trial unit did not conform to Anita's expectations, or she would not have voluntarily dismissed her foreclosure claim as moot. *See id.* Finally, Travelers failed to meet its burden of proving its res judicata defense based on the absence of a certified copy of the motion to dismiss that Anita filed in federal court. *Jones*, 900 S.W.2d at 88-89. For each of these reasons, we conclude that the trial court's judgment was not proper based on Travelers' res judicata defense, and the Vogels' third point of error is sustained. Although summary judgment was not proper based on the res judicata defense, we still must consider whether the summary judgment was proper under any other theory. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d at 380.

753*753 GOOD FAITH AND FAIR DEALING

In their fourth point of error, the Vogels claim that the trial court erred in granting summary judgment because Travelers owed them a duty of good faith and fair dealing under the Note. The Vogels allege that the duty arises from two sources: the Texas UCC and Texas common law.

The Vogels argue first that the Deed of Trust expressly established a duty of good faith and fair dealing by providing that it was to be construed as a security agreement governed by the UCC. Because Travelers acknowledged that Anita assumed the duties under the Note, the Vogels contend that Travelers implicitly agreed to extend the UCC duty of good faith and fair dealing arising under the Deed of Trust to the Vogels. *See* TEX. BUS. & COMM.CODE ANN. § 1-203 (Vernon 1994).

Travelers argues that the relevant agreement is not the Note but the October 4 agreement by which Travelers promised to consider extending the loan if certain conditions were met. Such an agreement is not a UCC agreement, because it is neither an agreement for the sale or lease of goods nor is it a security agreement. Travelers also argues that because the Deed of Trust was an agreement between Travelers and George, any duty created thereunder did not extend to Anita.

Because the Deed of Trust places a lien on *real* property, it is not governed by the UCC. *See* TEX. BUS. & COMM.CODE ANN. § 9.104(10) (Vernon 1991) (excluding interests in and liens on real property from section 9 of UCC); *Long v. NCNB-Texas Nat'l Bank*, 882 S.W.2d 861, 864 (Tex.App.—Corpus Christi 1994, no writ). The Deed of Trust merely recites that it is to be construed as a security agreement under the UCC with respect to goods that are or are to become fixtures. Travelers does not owe a duty of good faith under the UCC with respect to its right to foreclose on the real property based on this recital in the Deed of Trust relating to fixtures.[2] Nor

is there such a duty arising from the October 4 agreement, which is not a contract for the sale or lease of goods.

Furthermore, the Vogels have not shown that any common law duty of good faith and fair dealing exists between these parties. Ordinarily, there is no such duty in lendor/lendee relationships. *Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 709 (Tex.1990); *English v. Fischer*, 660 S.W.2d 521, 522 (Tex.1983). The supreme court has recognized this duty only where a "special relationship," marked by a shared trust or an imbalance in bargaining power, exists. *Coleman*, 795 S.W.2d at 708-709; *see also Great American Ins. Co. v. North Austin Municipal Utility Dist. No. 1*, 908 S.W.2d 415, 418-20 (Tex.1995). The Vogels claim that they have a special relationship with Travelers, but they have presented no summary judgment evidence raising a fact issue to support their claim.

The Vogels' fourth point of error is overruled.

FRAUD

In their fifth point of error, the Vogels claim that Travelers committed actionable fraud in the October 4 agreement. The Vogels assert that Travelers lied when it said in the agreement that it would consider a two-year extension of the loan. Travelers argues that it always intended to honor that promise, but the promise was conditioned on the Vogels satisfying several conditions that were not met.

To prove fraud, a plaintiff must show that (1) there has been a material misrepresentation, (2) the speaker knew the statement was false or made recklessly, (3) the speaker made the statement with the intention that it be acted upon in reliance, and (4) the other party suffered damages as a result. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex.1992). If, as here, the claim is that the speaker falsely promised to do an act in the future, the plaintiff must show that the speaker had no intention of performing the act at the time the promise was made. *Id.* at 222. Failing 754*754 to discharge a promise to do an act in the future is not fraud unless the promise is made with an intent not to perform. *M.J. Sheridan & Son Co. v. Seminole Pipeline Co.*, 731 S.W.2d 620, 624 (Tex.App.—Houston [1st Dist.] 1987, no writ).

The Vogels ask this court to infer from the surrounding circumstances that Travelers' promise was false. The basis for this inference would be that the Vogels "reasonably and substantially performed all conditions precedent" to renewal and, therefore, Travelers' failure to renew raises a fact question as to whether it ever intended to renew. However, the Vogels admit Drucilla would not execute a warranty deed, which was one of the title company's requirements. In addition, the Vogels assert that it was not necessary to reopen the estate to amend the inventory, which was another of the title company's requirements. A title policy was one of the conditions to renewing the loan. By failing to meet the requirements imposed by the title company, the Vogels failed to meet the renewal conditions. We decline to infer that Travelers' promise to renew the loan was false when the Vogels failed to meet the conditions precedent to Travelers' obligation to perform on that promise. The Vogels' fifth point of error is overruled.

PROMISSORY ESTOPPEL

The Vogels claim that the doctrine of promissory estoppel should have defeated summary judgment. They assert that they relied, to their detriment, on Travelers' assurances that the loan agreement would be extended. However, promissory estoppel is inapplicable in this case.

Promissory estoppel operates to enforce an otherwise unenforceable promise that a party has relied upon to his or her detriment. It cannot replace an enforceable contract. *Pasadena Assoc. v. Connor*, 460 S.W.2d 473, 481 (Tex.Civ.App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.) (written contract renders promissory estoppel inapplicable). Here, the parties had an enforceable agreement, and the Vogels failed to satisfy the conditions contained therein. As Travelers states, the Vogels had no basis for relying on a promise to consider extending the loan without first complying with the conditions put on the promise. *See T.O. Stanley Boot Co.*, 809 S.W.2d at 288; *Henderson v. Texas Commerce Bank-Midland, N.A.*, 837 S.W.2d 778, 781 (Tex.App.—El Paso 1992, writ denied). The Vogels' sixth point of error is overruled.

WRONGFUL FORECLOSURE

In their seventh point of error, the Vogels contend that trial court erred in granting summary judgment in favor of Travelers on their wrongful foreclosure claim. The Vogels assert that the foreclosure was wrongful because Travelers failed to comply with the contractual terms of the Note and Deed of Trust by breaching its obligation of good faith in its performance and enforcement of those instruments. For the reasons previously stated, we hold that Travelers did not owe the Vogels any duty of good faith and fair dealing. Therefore, Travelers could not have breached the contractual terms of the Note and Deed of Trust by failing to comply with such a duty. Since the Vogels have admitted the foreclosure sale complied with the statutory foreclosure requirements, we overrule the Vogels' seventh point of error.

RESTITUTION AND BREACH OF CONTRACT

In their eighth point of error, the Vogels contend that the trial court erred in granting a general summary judgment in favor of Travelers that disposed of their restitution and breach of contract claims because those claims were not addressed in Travelers' motion for summary judgment. Travelers acknowledges that it did not amend its motion to expressly address these new claims. However, Travelers asserts that the thrust of its motion conclusively negated potential recovery on these claims.

This court has previously recognized that reversing a summary judgment would be a meaningless exercise if the questioned recovery is precluded as a matter of law. *Chale Garza Investments, Inc. v. Madaria*, 931 S.W.2d 597, 601 (Tex.App.—San Antonio 1996, writ denied). In *Madaria*, the trial court's judgment encompassed a ruling on the defendant's counterclaims that were not 755*755 addressed in the summary judgment motion. *Id.* at 600-01. This court held that the defendants were precluded from recovering on those counterclaims as matter of law; therefore, a reversal of the trial court's judgment would be meaningless. *Id.; see also Mackie v. McKenzie*, 900 S.W.2d 445, 451-52 (Tex. App.—Texarkana 1995, writ denied); *Bieganowski v.*

El Paso Medical Center Joint Venture, 848 S.W.2d 361, 362 (Tex.App.—El Paso 1993, writ denied).

In this case, Travelers' motion expressly presents the Vogels' failure to satisfy the conditions imposed in the letter agreement as a ground for summary judgment. In addressing Vogels' other claims, we have concluded that the evidence established that the Vogels failed to satisfy the conditions to the loan extension as a matter of law. Because the Vogels failed to satisfy those conditions, they were not entitled to performance of the letter agreement by Travelers, and Travelers did not breach any contractual duty as a matter of law. *See* *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex.1976); *Marsh v. Marsh*, 949 S.W.2d 734, 743-44 (Tex.App.—Houston [14th Dist.] 1997, no writ). Therefore, a reversal of the summary judgment for consideration of the Vogels' breach of contract claim would be meaningless. *See* *Madaria*, 931 S.W.2d at 601.

With regard to the restitution claim, the Vogels alleged the following:

Plaintiffs bring this suit against Defendant TRAVELERS for the recovery of all or part of the payments made by Plaintiffs on the Note. Plaintiffs would show that Defendant TRAVELERS expressly or impliedly acknowledged or represented to Plaintiffs that it recognized Plaintiff ANITA DE ARMOND VOGEL as the owner of the Property and payor, in fact, under the loan documents. In reliance on these facts and circumstances, Plaintiffs made the payments on the loan and paid the Property taxes. Plaintiffs would not have made the payments otherwise. By reason of Defendant's conduct, Plaintiffs have suffered damages in a sum within the jurisdictional limits of the Court.

Travelers asserts that the summary judgment evidence conclusively negates causation. Travelers contends that Anita made the payments under the Note in furtherance of the contract for deed she entered into with her father; she did not rely on Travelers' acknowledgment of her status as payor and owner in making payments.

We hold that reversal of the summary judgment is not required as to the restitution claim for the same reason reversal is not required as to the breach of contract claim. In its petition, the Vogels state that they are instituting suit to recover damages arising out of Travelers' failure and refusal to renew and extend the Note and Deed of Trust. Thus, the Vogels' complaint lies with Travelers' failure to extend the Note, not its failure to recognize Anita as the payor under the Note or owner of the property.

Even if Travelers had recognized Anita as the payor and owner, the Note had matured. When the Note matured, the parties entered into an agreement setting forth the terms and conditions of a renewal. One of those conditions was a title policy. The title company required proof of ownership, including a warranty deed from Drucilla. The motion for summary judgment raised the failure to satisfy the conditions to the loan renewal, including the conditions to the issuance of the title policy, as a ground for summary judgment, and the summary judgment evidence conclusively established that the Vogels failed to satisfy those conditions. We hold that the Vogels could not recover on the restitution claim as a matter of law and recognize that reversing

the summary judgment for consideration of this claim would be a meaningless exercise. *See* *Madaria*, 931 S.W.2d at 601. The Vogels' eighth point of error is overruled.

CONCLUSION

Travelers proved that no genuine issue of material fact existed as to any of the causes of action alleged by the Vogels and that it was entitled to judgment on those claims as a matter of law. The judgment of the trial court is affirmed.

[1] The requirements included: (1) a warranty deed from Drucilla, individually and as independent executrix of George's estate, conveying the real property to Anita; (2) an amendment to the estate's inventory to include the real property in the schedule of separate property; (3) evidence of no payment of, or no assessment of, estate taxes and state inheritance taxes; (4) evidence that the inclusion of the real property did not increase the estate's tax liabilities, and if so, evidence of payment of such additional taxes; and (5) evidence that three abstracts of judgments had been paid or otherwise satisfied and released.

[2] Because we hold that no duty of good faith arises under the Deed of Trust, we do reach the question of whether Anita would have been owed such a duty by Travelers if it had arisen.

WestlawNext

West v. First Baptist Church of Taft
Supreme Court of Texas. | May 16, 1934 | 123 Tex. 388 | 71 S.W.2d 1090 *(Approx. 15 pages)*

WEST et al.

v.

FIRST BAPTIST CHURCH OF TAFT et al.

Return to list **1** of **62 results** Search term

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by the **First Baptist Church** of Taft against Mrs. Ethelyn **West**, a Mrs. Morris, individuals constituting the Taft Bank, Unincorporated, and others, in which defendants Morris and another filed a cross-complaint. A judgment canceling plaintiff's notes and trust deeds, held by cross-complainants and a codefendant, and a judgment for the bank against plaintiff, were affirmed by the Court of Civil Appeals (42 S.W.(2d) 1078), and defendants **West** and others bring error.

Reversed and remanded.

West Headnotes (25)

Change View

1 **Bills and Notes** Burden of Proof as to Bona Fides in General
Payee's agreement not to negotiate construction loan notes until completion of building and payment of money to maker constituted infirmity in notes, and negotiation thereof in violation of agreement rendered seller's title defective, as respects necessity of proof of good faith (Vernon's Ann.Civ.St. art. 5935, §§ 52-55).

Cases that cite this headnote

2 **Bills and Notes** Knowledge as to Consideration or Collateral Agreements or Securities
Knowledge that note was given in consideration of executory agreement by payee will not deprive indorsee of character of holder in due course, unless he has notice of breach of agreement (Vernon's Ann.Civ.St. art. 5935, §§ 52, 56).

Cases that cite this headnote

3 **Bills and Notes** Good Faith and Payment of Value
Evidence in suit to cancel notes held not to support trial court's finding that one purchasing them knew of infirmity therein and defect in seller's title because of premature negotiation thereof in violation of payee's agreement (Vernon's Ann.Civ.St. art. 5935, §§ 52-56).

Cases that cite this headnote

4 **Bills and Notes** Good Faith in General
One purchasing negotiable instrument in good faith for valuable consideration may recover thereon, even if grossly negligent, regardless of

how seller acquired possession thereof (Vernon's Ann.Civ.St. art. 5935, § 56).

Cases that cite this headnote

5 **Bills and Notes** Good Faith in General

Knowledge of facts merely sufficient to cause person of ordinary prudence to make inquiry as to infirmity in negotiable instrument and defect in holder's title, with failure to make such inquiry before purchasing it, is not evidence of purchaser's bad faith barring recovery thereon by him (Vernon's Ann.Civ.St. art. 5935, § 56).

Cases that cite this headnote

6 **Bills and Notes** Good Faith in General

Even gross negligence does not establish bad faith in purchasing negotiable instrument from holder whose title was defective (Vernon's Ann.Civ.St. art. 5935, § 56).

Cases that cite this headnote

7 **Bills and Notes** Good Faith in General

To constitute evidence of bad faith in purchasing negotiable instrument from holder whose title is defective, facts known to taker must reasonably warrant inference that he acted in dishonest disregard of payee's rights (Vernon's Ann.Civ.St. art. 5935, § 56).

Cases that cite this headnote

8 **Bills and Notes** Good Faith in General

To support finding of bad faith in purchasing negotiable instrument from holder whose title is defective, unheeded suspicious circumstances must be so substantial and strong that bad faith, rather than mere negligence, can reasonably be inferred therefrom (Vernon's Ann.Civ.St. art. 5935, § 56).

Cases that cite this headnote

9 **Evidence** Importance in General

Evidence may be admissible as tending to prove fact without being sufficient to support finding of such fact.

Cases that cite this headnote

10 **Bills and Notes** Good Faith and Payment of Value

Evidence in suit to cancel notes held not to support trial court's finding of bad faith of one paying full value therefor in purchasing them from corporation prematurely negotiating them in violation of payee's agreement (Vernon's Ann.Civ.St. art. 5935, § 56).

Cases that cite this headnote

11 **Bills and Notes** Good Faith in General

"Gross negligence," as in acquiring negotiable instrument from holder with defective title, consists of omission of care which even inattentive and thoughtless men never fail to take of their own property.

Cases that cite this headnote

12 **Mortgages** Bona Fide Purchasers of Negotiable Instruments Secured by Mortgage

Mortgage securing negotiable note is but incident to note and partakes of latter's negotiable character.

Cases that cite this headnote

13 **Mortgages** Bona Fide Purchasers of Negotiable Instruments Secured by Mortgage

Bona fide purchaser of notes for value before maturity became bona fide holder of trust deed securing them.

Cases that cite this headnote

14 **Mortgages** Necessity

Trust deed must be delivered to be effective.

Cases that cite this headnote

15 **Mortgages** Evidence

Undisputed evidence in suit to cancel notes and trust deeds securing them *held* to establish constructive delivery of deeds to payee.

Cases that cite this headnote

16 **Mortgages** Record or Delivery for Record

Mortgagor's filing for record in proper office of mortgage given pursuant to parties' previous agreement to place and accept mortgage on specific property is sufficient delivery thereof.

Cases that cite this headnote

17 **Mortgages** Record or Delivery for Record

Sufficient delivery of mortgage by mortgagor's filing thereof for record is not counteracted by fact that mortgagor subsequently obtained possession thereof from recorder's office and retained it.

Cases that cite this headnote

18 **Mortgages** Record or Delivery for Record

Mortgagor's retention of trust deed, executed and filed for record by mortgagor for purpose of creating lien securing latter's notes, *held* unimportant in determining question of constructive delivery thereof.

Cases that cite this headnote

19 **Mortgages** Necessity

Title may pass by trust deed without actual manual delivery thereof; controlling question being grantor's intention.

Cases that cite this headnote

20 **Mortgages** Bona Fide Purchasers of Negotiable Instruments Secured by Mortgage

Trust deeds, filed for record by mortgagor with intention to create liens securing construction loan notes, which payee corporation orally agreed to hold until completion of building, passed to one purchasing notes from payee's parent corporation discharged of equities, to which subject while in payee's hands, to same extent as notes.

Cases that cite this headnote

21 **Mechanics' Liens** Advances of Money

Mechanic's or materialman's lien does not exist in favor of person advancing money to pay for labor or material furnished (Vernon's Ann.Civ.St. art. 5452; Const. art. 16, § 37).

Cases that cite this headnote

22 **Liens** Express

Lien on realty cannot be given by parol agreement.

Cases that cite this headnote

23 **Mortgages** Priorities of Mortgages in General

Bank's lien on realty for money advanced to owner after latter's execution of notes to mortgage company for loan of money, agreed to be paid **church** when building on property was completed, and filing of trust deeds securing them, *held* inferior and subordinate to lien of such deeds.

Cases that cite this headnote

24 **Estoppel** Acts Making Injury Possible as Between Actor and Another Equally Blameless

If one of two innocent persons must suffer by deceit, one who puts trust and confidence in deceiver, rather than stranger, would be loser.

Cases that cite this headnote

25 **Mortgages** Necessity and Sufficiency of Writing in General

Mortgage on realty cannot be given by parol agreement.

Cases that cite this headnote

Attorneys and Law Firms

***390 **1091** Milling, Godchaux, Saal & Milling, of New Orleans, La., John C. North, of Corpus Christi, and Robert W. Stayton, of Austin, for plaintiffs in error.

***391** Gordon Boone and Felix Raymer, both of Corpus Christi, and Templeton, Brooks, Napier & Brown, of San Antonio, for defendants in error.

Opinion

SMEDLEY, Commissioner.

The **First Baptist Church** of Taft, for the purpose of constructing a **church** building on lots owned by it in Taft, Tex., made application to Southern Mortgage Company, of Abilene, Tex., for a loan of $20,000. Before the building was begun, the **church**, on the request of the mortgage company, executed and ***1092** delivered to the mortgage company, for the purpose of 'closing the loan,' twenty-two promissory negotiable notes aggregating the principal sum of $20,000, payable to Southern Mortgage Company, at the office of Mortgage & Securities Company in New Orleans. At the same time the **church** executed a deed of trust securing the notes and covering the lots upon which the **church** was to be built and also other lots owned by the **church** upon which a parsonage was situated. This deed of trust expressly provided that it covered also all brildings, fixtures, furniture, and equipment then located or thereafter to be located upon the lots upon which the **church** was to be ***392** built. A second and subordinate deed of trust was executed securing the two other promissory negotiable notes payable to Southern Mortgage Company, aggregating the principal sum of $1,000. The notes and deeds of trust, while dated March 9, 1929, were in fact executed May 2, 1929. On the same day, at the request of Southern Mortgage Company, the

church caused the two deeds of trust to be filed for record in the office of the county clerk of San Patricio county, and on May 8, 1929, pursuant to the same request, the **church** mailed the notes to Southern Mortgage Company at Abilene, together with a certificate of the county clerk showing that the two deeds of trust had been filed for record.

It had theretofore been agreed, in the course of the negotiations for the loan, that none of the money should be paid to the **church** until the building had been entirely completed according to the plans and specifications. It had further been agreed by Southern Mortgage Company that the notes would be held by it in Abilene 'until after the money was furnished on the loan.'

The **church** made arrangements with the Taft Bank, Unincorporated, whereby the bank agreed to furnish money to the amount of $20,000 to pay for labor and material in the construction of the building, the money to be advanced as the work progressed and to be repaid the bank when the proceeds of the loan from Southern Mortgage Company were procured. There was an oral agreement between the **church** and the bank that the bank should have a lien to secure the money so advanced.

Building operations were begun about May 2, 1929, the bank advancing something more than $20,000, which was used in payment for labor and material. The building was completed about October 1, 1929, after the trial of this suit in district court.

A short time after receiving the notes, Southern Mortgage Company forwarded them to Mortgage & Securities Company at New Orleans, advising that the construction of the building had just begun, and that some time would elapse before the loan would be ready for closing. Southern Mortgage Company was a subsidiary of Mortgage & Securities Company, being wholly owned by it and organized by it for the purpose of doing business in Texas, and all the money loaned by Southern Mortgage Company was procured from Mortgage & Securities Company.

On June 25, 1929, the company last named sold and delivered the twenty-two **first** lien notes to plaintiff in error Mrs. ***393*** Ethelyn **West**, who bought them for her sisters, plaintiffs in error Mrs. Morris and Mrs. Barham, paying for the same their full face value, the principal and accrued interest. The notes had been indorsed without recourse by Southern Mortgage Company, and their payment was guaranteed by Mortgage & Securities Company. A short time thereafter Mortgage & Securities Company failed, and its property was placed in the hands of a receiver. The **church** received nothing for the notes.

This suit was filed by the **church** against the two mortgage companies, the receiver of Mortgage & Securities Company, the manager of Southern Mortgage Company, Mrs. **West** and her sisters, Mrs. Morris and Mrs. Barham, and several individuals who constituted the Taft Bank, Unincorporated. The relief sought is cancellation of the notes and the deeds of trust and the removal of clouds from the property of the **church**. In the alternative, and in the event and notes and deeds of trust are determined to be valid obligations and liens, the **church** seeks judgment against the two mortgage companies and the manager of Southern Mortgage Company for the amount so determined, with foreclosure of a lien upon any property of the two companies which might be disclosed or discovered.

By cross-action, Mrs. Morris and Mrs. Barham allege their ownership of the twenty-two notes, and of the lien securing them, and that they purchased the notes before maturity for value and with no knowledge or notice of the alleged infirmities, and they pray for judgment for the principal of the notes, interest, attorney's fees, and for foreclosure of lien.

The Taft Bank alleges the advancement of funds by it for labor and material aggregating about $24,000, that it has a lien securing same which is superior to the lien claimed by Mrs. Morris and Mrs. Barham, and prays for judgment against the

church for the amount ***1093** advanced, with interest and attorney's fees, and for foreclosure of lien.

The case was tried without a jury, the trial court making elaborate findings of fact and conclusions of law. Judgment was rendered canceling the twenty-two notes held by Mrs. Morris and Mrs. Barham and the deed of trust executed to secure the notes, and also canceling the two notes aggregating $1,000 held by Southern Mortgage Company and the deed of trust executed to secure them; and judgment was rendered in favor of the Taft Bank against the **church** for $22,300, with interest, and for foreclosure of lien upon the property of the **church**. The **church** dismissed its suit against the manager of ***394** Southern Mortgage Company, and it was adjudged that it take nothing by its alternative suit.

The trial court found that the notes were negotiated and sold by the two mortgage companies to Mrs. **West** in violation of the agreement under which they were executed and delivered, and in fraud of the rights of the **church**; that the proceeds of the notes were appropriated by Mortgage & Securities Company; and that the **church** never received any part of the proceeds of the notes, or any consideration for them.

The trial court further found that, at the time she purchased the notes for her sisters, Mrs. **West** 'had actual knowledge of the fact that the notes were for a construction loan, that said loan was not completed, that said notes were not ready for negotiation, and that same were not in fact then negotiable'; and also that 'defendants Mrs. **West**, Mrs. Morris and Mrs. Barham, at the time the notes were purchased by them and delivered to them, as aforesaid, took same with notice of the defects in the title of Mortgage and Securities Company mentioned in preceding paragraphs of these findings, and did not purchase same without notice in good faith and are not purchasers in good faith for value or holders in due course.'

The Court of Civil Appeals on **first** hearing reversed and remanded the cause, holding that there was no evidence charging Mrs. **West** and her sisters with fraud or bad faith, and that they were innocent purchasers of the notes for value before maturity. On rehearing, the judgment of the trial court was affirmed, the majority of the Court of Civil Appeals holding that there was evidence sufficient to sustain the finding of the trial court upon the issue of bad faith. 42 S.W.(2d) 1078.

1 Within the terms of the Negotiable Instruments Law there was infirmity in the notes, and the title of Mortgage & Securities Company which negotiated them was defective, because it had been agreed that the notes were to be held and not negotiated until the building was completed and the money represented sented by the notes paid, and because the notes were negotiated in violation of this agreement, in breach of faith and in fraud of the **church**. Sections 52-55, art. 5935, R. C. S. 1925.

2 3 The important question presented is whether there is any evidence to sustain the findings of the trial court that Mrs. **West** had actual knowledge of the infirmity or of the defect in the title, and that she did not act in good faith in acquiring the notes.

By the terms of section 52 of of article 5935 one is not a holder in due course who, although he purchased a negotiable instrument before maturity and for value, had notice at the time it ***395** was negotiated 'of any infirmity in the instrument or defect in the title of the person negotiating it.'

Section 56 of the said article is as follows: 'To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.'

The **first** inquiry is whether there is any evidence that Mrs. **West** at the time she purchased the notes had actual knowledge of the infirmity or defect.

As has been stated, the infirmity in the notes was the agreement of Southern Mortgage Company that they would be held and not negotiated until the building was completed and the money represented by the notes paid to the **church**, and the defect in the title of Mortgage & Securities Company, which negotiated the notes, was that it negotiated them violation of that agreement.

Neither Mrs. Morris nor Mrs. Barham had any connection with the negotiations by which the notes were acquired. Mrs. **West** acted for her two sisters, buying part of the notes for one and part for the other. The three sisters resided in Louisiana. None of them had any acquaintance with or in Taft, Tex. They had no communication with the **church** at Taft. Mrs. **West** had bought other notes from Mortgage & Securities Company. The representatives of that company knew that she would take no construction loans, that is, loans secured by buildings to be completed.

***1094** The notes were **first** presented to Mrs. **West** in the early part of May, 1929, by one Wood, who was a salesman for Mortgage & Securities Company. He submitted to her and left in her possession for examination a prospectus of the loan, the written application of the **church** to Southern Mortgage Company for the loan, and certain other written and printed information. The application described the notes to be executed, stating that they were to be dated on or about May 1, 1929, and would be secured by a deed of trust upon the property owned by the **church**, describing it, and that the lots would be improved by a two-story and basement brick **church** building estimated to cost $37,500. It stated that the building would be completed on or before July 1, 1929. Contrary to the agreement between the **church** and Southern Mortgage Company that no money would be advanced until the building was finished, the application stated that the proceeds of the loan would be available as the construction proceeded, no payment ***396** to be made, however, until construction had reached the point where the net proceeds to be advanced by the mortgage company would complete the building, and that 15 per cent. of the total amount of the contract price should remain in the hands of the mortgage company until completion of the work and final inspection.

Mr. Wood testified substantially as follows: That he showed Mrs. **West** the data which he had received from the files of Mortgage & Securities Company, including the application for the loan; that he discussed the merits of the loan with Mrs. **West**, but did not recall making any particular statements or representations to her concerning the notes or the deed of trust other than what was shown in the data submitted to her; that he was informed while handling the account of Mrs. **West** and her sisters that all securities purchased by them must be on completed properties and not on properties in process of construction; that when he made the preliminary offering of the loan he knew that the building was in process of construction, but, when the notes were delivered to her, he was convinced that the building had been fully completed; and that at the time he delivered the notes and accepted payment for them he did not know that the money represented by the notes had not been paid to the **church**, and did not advise Mrs. **West** that it had not been paid.

Mr. Jackson, vice president of Mortgage & Securities Company, testified that some time before the notes were sold Mrs. **West** asked him whether or not he considered the Taft **church** loan a sound one, and he told her he considered it a good loan when ready for delivery, and that he made no other statements to her as to the loan, the notes, of the deed of trust.

Mrs. **West**, after going over the instruments left with her and considering the loan for three or four days, advised Mr. Wood that she would take the loan when it was ready for delivery. About six weeks after her **first** conversation with Mr. Wood he telephoned her that the loan was ready for delivery. Thereupon she went to the office of the Mortgage & Securities Company, examined the notes, the indorsement of Southern Mortgage Company, and the guaranty of Mortgage & Securities Company, and completed the purchase. She made no inquiry about the building or the loan of any

other person than those who represented the mortgage company with which she dealt. She did not undertake by correspondence or otherwise to ascertain whether the building had been completed or whether it had been erected at all. She testified that she relied upon the statement made to her by Mr. Wood that the loan was ready ***397** for delivery; that nothing had occurred to cause her to be suspicious about the legality or validity of the notes; and that she did not know that the **church** had raised any question as to the notes until a short time before this suit was filed.

Mrs. **West**, when interrogated on cross-examination as to her knowledge with respect to the notes, testified as follows:

'As to whether or not it struck me as being worthy of investigation that the application showed that it was a construction loan, I desire to state that the loan was not to be bought by me until it was a finished thing. I knew at the time it was **first** presented to me that it was not a finished thing. When Mr. Wood **first** approached me with reference to buying these notes and exhibited to me the papers, including the application, I did look it over. I wanted to see what security I was getting. From that application I saw it was on a building not yet completed. I thought the application stated that the building had not yet been completed. I did not know that it had not been started. At the time he **first** presented the loan to me he did not offer it for sale. He gave me these notes, if I wanted the loan, when it was a finished thing. He gave me that prospectus and this descriptive matter and this application so I could go over it and consider it and determine if I wanted the loan when it was finished. With reference to my taking his word for it when he told me the loan was ***1095** finished, I had no reason to doubt his statement. I took the notes. I had this application in my possession at the time, but I had every reason to believe the building was completed. * * *

'With reference to my making any attempt to ascertain whether or not this **church** building had been erected as contemplated to be erected and completed, I desire to state that Mr. Wood had called me and said that the building was completed and that the loan was ready for delivery. It was perfectly understood by me and everybody in the Mortgage & Securities Company that I would take no loan except completed loans. * * *

'With reference to whether or not I made any attempt to ascertain from the officials of this **church** whether or not that building had been completed, and with reference to whether or not I merely took the word of Mr. Wood that the loan was ready for delivery, I desire to state that I took the word of a supposedly reputable man. * * *

'I did ask for a picture of the completed **church**. When the notes were being delivered to me I saw Mr. Ogden when I got up to leave with the notes. He asked me if Mr Wood fixed me up all right and I said, 'Yes, but I want a picture of ***398** the finished **church**.' I told him that I had just bought the **First Baptist Church** of Taft notes, and he said, 'You have not got it?' and I said 'No, and I want it,' and he said, 'We will have to get it for you,' and I said, 'I want Mrs. Morris and Mrs. Barham to see the churh upon which they have loaned their money.' He told me that he thought he would get it for me in about a week. * * *

'With reference to whether or not it occurred to me that the best source of information with reference to the character of the building and as to whether or not the building had been completed and had been accepted by the **First Baptist Church** of Taft as completed would be the officers of that **church**, I desire to state that I had no reason to doubt any of the representations that were made by an entirely responsible company. * * * With reference to whether or not I knew as a matter of fact that if that building had not been completed there would have been a question raised about those securities, I had no knowledge of any dealings between Mortgage & Securities Company and the **Church** of Taft, Texas. * * *'

Mrs. **West** testified with reference to another loan offered her: 'I said to him, 'That

loan was offered to us before, and it is a construction loan, and I said I would not touch a construction loan with a forty foot pole.'"

It is apparent from the testimony of Mrs. **West** and the other two witnesses, as above quoted and stated, that in their use of such phrases as 'the loan is not ready for delivery,' 'the loan is not a finished thing,' and the like, they were referring to the fact that the building was not completed, and that, knowing that Mrs. **West** would not accept a construction loan or one secured by an unfinished building, they meant to say that the notes therefore were not ready for delivery to her. Thus the information which she acquired from the application for the loan and from the statements made to her by the representatives of Mortgage & Securities Company was that when the notes were **first** presented to her the building was not completed, and that at least a part of the consideration for the notes had not been paid by the mortgage company. She knew that the consideration was executory or in part executory. But this did not amount to knowledge that there would be a breach of the mortgage company's executory obligation. Knowledge that a note was given in consideration of the executory agreement of the payee will not deprive the indorsee of the character of a holder in due course unless he has notice of a breach ***399*** of such agreement. In the absence of knowledge or notice of a breach he may presume that the agreement will be performed as stipulated. Lozano v. Meyers (Tex. Com. App.) 18 S.W.(2d) 588; C. H. Mountjoy Parts Co. v. San Antonio National Bank (Tex. Civ. App.) 12 S.W.(2d) 609; Foster v. Enid, etc., R. Co. (Tex. Civ. App.) 176 S. W. 788; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077; 3 R. C. L. p. 1067.

The fact that the building was unfinished, in the absence of knowledge of the oral agreement to hold the notes, in no way affected the negotiability of the notes. There is no evidence that Mrs. **West** ever knew of the agreement between the **church** and Southern Mortgage Company that the notes would be held at Abilene and not negotiated until the building had been completed and the money paid. The finding of the trial court that Mrs. **West** and her sisters knew at the time of their purchase of the notes of the infirmity in them and of the defect in the title of the mortgage company is not supported by evidence.

The second inquiry is whether there is any evidence that Mrs. **West**, at the time the notes were acquired, had knowledge of such facts ***1096*** that her action in taking them amounted to bad faith.

The trial court found both actual knowledge of the infirmity and defect in title and bad faith on the part of Mrs. **West**. The affirmance by the Court of Civil Appeals appears to rest upon the conslusion that there was evidence sufficient to support the trial court's finding that Mrs. **West** acted in bad faith in acquiring the notes.

4 Judge Garrett, in Wilson v. Denton, 82 Tex. 531, 535, 18 S. W. 620, 622, 27 Am. St. Rep. 908, thus stated and explained the settled rule in this state and in practically all of the other states, and of which section 56 of article 5935 is but a restatement: 'The ordinary rule of constructive notice which applies to the purchaser of property is not applicable in the case of negotiable instruments. As promotive of their circulation, a liberal view is taken, which makes the bona fides of the transaction the decisive test of the holder's right. He is entitled to recover upon it if he has come by it honestly. Greneaux v. Wheeler, 6 Tex. 525; 1 Daniel, Neg. Inst. s 775. It matters not how the vendor came in possession of the bill or note, whether by theft or fraud or honestly. The title of the transferee does not depend upon the title of the vendor, but upon his possession; and if the buyer has acted in good faith, and paid a valuable consideration, his title cannot be impugned. An early English case (Gill v. Cubitt, 3 Barn. & C. 466) laid down the ***400*** principle that, although the holder had given value for the bill or note, yet, if he took it under circumstances which ought to have excited the suspicions of a prudent and careful man, he could not recover. This was a departure from the earlier rule, which regarded the bona fides as the crucial test by which it was to be determined whether or not the purchaser should be protected

against defenses that would be valid against the transferrer of the note. But the earlier rule was soon again reverted to, and afterwards made even more liberal; and it became the law that, while gross negligence might be evidence tending to show mala fides, and, as such, admissible, it did not in itself amount to proof of mala fides, and was not sufficient to deprive the holder of his right to recover. If it should be left to a jury to determine as to the degree of caution which a prudent man must exercise on taking such an instrument, it would lead to much perplexity, and to frequent injustice. Thus is the law deduced from the English decisions by Mr. Daniel in his admirable work on Negotiable Instruments (section 770 et seq.).' (Italics ours.)

In that case, Wilson, the payee, intrusted negotiable notes to Denton to sell for him to a designated person. Denton, in violation of his trust, sold the notes to Cotter and McMullan for their two notes payable to Denton's wife, and at a substantial discount. The purchasers, although they met both the payee and the maker daily, did not speak to them about the transaction or about the notes. They relied implicitly upon the statements made to them by Denton. A judgment in favor of the purchasers of the notes was affirmed, the court holding that they did not have actual knowledge of the invalidity of Denton's title, and that the facts were not sufficient to charge them with a want of good faith.

In the comparatively recent case, Campbell v. Rosenow (Tex. Civ. App.) 32 **S.W**. (**2d**) 372, in which application for writ of error was refused, it was held that there was not even a circumstance to sustain the judgment of the trial court that an indorsee of promissory notes was not a purchaser in good faith, although the evidence was that notes in the principal sum of $9,050 payable to the order of the maker and bearing no other indorsement than his in blank were bought for $7,500 from a stranger a short time after their execution and without any inquiry whatever.

Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934, one of the leading cases on the question under consideration, announces substantially the same rule as that quoted above from Wilson v. Denton. It holds that facts and circumstances which ***401** would excite the suspicion of a careful and prudent man are not sufficient to destroy the title of the purchaser of a negotiable instrument for value. It approves what the opinion states to be the settled law in all English courts that proof that the plaintiff had been guilty of gross negligence in acquiring the bill ought not to defeat his right to recover.

The case last referred to is approved and followed in Murray v. Lardner, 2 Wall. 110, 121, 17 L. Ed. 857, 859, in which the court thus states its conclusion: 'Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.' The same rule is announced in Cromwell v. County of Sac, 96 U. S. (6 Otto) 51, 24 L. Ed. 681, 686.

In ****1097** Foster v. Augustanna College & Theological Seminary, 92 Okl. 96, 218 P. 335, 337, 37 A. L. R. 854, the court, after stating there must be either actual knowledge or bad faith to deprive a purchaser before maturity and for value of the privilege of being a holder in due course, said: 'Even gross negligence on the part of a taker of a negotiable instrument will not defeat the title of a holder for value and before maturity.'

A carefully written article by George W. Rightmire, entitled 'The Doctrine of Bad Faith in the Law of Negotiable Instruments,' appearing in volume 18, pp. 355 and following, of Michigan Law Review, contains, among others, the following conclusions: That when bad faith is the point of inquiry, suspicious ciscumstances must be of a substantial character, and, if such circumstances do not appear, the court can arrest the inquiry; that we are not brought nearer to an answer to the inquiry, Did he take in bad faith? by considering matters of being put upon inquiry and the reasonably prudent man; that it is not failure to inquire, but the dishonest purchase which establishes bad faith, that is, the facts known to the taker must be such that his buying

with such knowledge amounts to dishonest dealing toward the defendant. The views expressed are in harmony with the rules announced by the authorities which have been cited.

5 To summarize:

1. Knowledge of facts merely sufficient to cause one of ordinary prudence to make inquiry, with failure to make such inquiry, is not evidence of bad faith. To apply the contrary ***402** rule would be to return to the rejected doctrine of the earlier English case, that one acquiring a negotiable instrument under cirsumstances which ought to excite the suspicion of a prudent person could not recover, for, in the application of such contrary rule, the jury would be permitted to find bad faith where the evidence proves only ordinary negligence.

6 2. Even gross negligence is not the same thing as bad faith and does not of itself amount to proof of bad faith, although it may be evidence tending to prove bad faith.

7 3. To constitute evidence of bad faith, the facts known to the taker must be such as reasonably to form the basis for an inference that in acquiring the negotiable instrument with knowledge of such facts he acted in dishonest disregard of the rights of defendant.

8 9 Statements are found in the declsions, as for example in Kaufman Oil Mill v. North Texas National Bank (Tex. Civ. App.) 16 S.W.(2d) 143 (application for writ of error refused), to the effect that such evidence, as would be admissible in an ordinary case to show that the purchaser had knowledge of facts that should put a reasonably prudent person upon inquiry, is admissible as tending to prove that the purchaser of a negotiable instrument in taking it with knowledge of such facts acted in bad faith. This does not mean, however, that knowledge of suspicious cirsumstances of whatever character constitutes evidence from which bad faith may be inferred. The consummation of the purchase of a negotiable instrument with knowledge of suspicious circumstances sufficient only to put an ordinarily prudent person upon inquiry would convict the purchaser of negligence, not of dishonesty. To serve as evidence to support a finding of bad faith, the unheeded suspicious circumstances must be of a substantial character and so strong that bad faith rather than merely negligence can reasonably be inferred from them. Evidence may be admissible as tending to prove a fact to be established without being sufficient of itself to support a finding of the fact.

10 Applying the rules which have been discussed to the facts in the record, we are unable to find any evidence supporting the trial court's finding of bad faith on the part of Mrs. **West**. A circumstance indicating good faith in her payment of full value for the notes. Such fact is not conclusive evidence, but it tends strongly to prove good faith. Canajoharie National Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Kelso & Company v. Ellis, 224 N. Y 528, 121 N. E. 364. She was not dealing with a stranger, but with a mortgage company from which she had bought other notes and which, as ***403** she testified, she believed responsible. While she did learn six weeks before she bought the notes that they represented a construction loan, the proceeds of which were to be advanced as construction proceeded, and that the building was not then completed, the information thus acquired gave her no knowledge of an infirmity in the notes. Furthermore, she was assured at the time of her purchase, and by the salesman from whom she obtained her **first** information about the notes, that they were then ready for delivery. In the absence of anything to cause her to doubt the truth of the representations last made to her, she must reasonably have believed from them that during the six weeks the building had been completed and the proceeds of the loan paid. There is not evidence that Mrs. **West** knew or ****1098** had reason to believe that the mortgage company was in financial straits, and no evidence of any statements or acts by representatives of the company which should have aroused suspicion.

Even if Mrs. **West**, in buying the notes without making inquiry of the maker, or of some person other than the seller, in order to ascertain with certainty that the building had been completed and the consideration fully paid, failed to exercise that care which a cautious person, or even one of ordinary prudence, would have exercised (which we need not and do not decide), her action in acquiring the notes without such inquiry would be nothing more than negligence; it would not amount to dishonesty, and would not be evidence of bad faith.

11 Nor do we believe that the facts in the record constitute evidence of gross negligence which, as said in Goodman v. Simonds, 20 How. 343, 367, 15 L. Ed. 934, 942, 'is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property.'

The trial court found that the deeds of trust, although filed for record by the **church** upon the request of Southern Mortgage Company, were not filed with the intention to deliver the same, but with the intention that they were not to take effect as liens unless and until the amount of money evidenced by the notes had been advanced by Southern Mortgage Company to the **church**; and further found that the deeds of trust after they were recorded were not forwarded to the mortgage company or to the trustee, but remained in the possession of the **church**. Following this finding the trial court concluded that the deeds of trust were ineffective and did not create any lien.

Based upon this finding and conclusion defendants in error contend that no lien was created by the deed of trust securing ***404*** the twenty-two notes because there was not an effective delivery.

There is no direct testimony that the deed of trust was not to become effective until the money represented by the notes was paid. Although there is a general statement in the testimony of the witness Binford to the effect that in the preliminary negotiations a representative of Southern Mortgage Company stated that all papers and notes would be held until the completion of the building, the testimony of the witness Tackett to the particular agreement relied upon by the **church** and definitely stated is that Mr. Polk, acting for Southern Mortgage Company, agreed that the notes would be held in Abilene until the money was paid. Later the mortgage company prepared the notes and deeds of trust and forwarded them to the **church**, requesting that after the execution of them the deeds of trust be filed for record and the notes and a certificate of the county clerk, showing that the deeds of trust had been filed, be returned to the mortgage company. These instructions were followed, and the **church**, a few days later, mailed the notes and the clerk's certificate to the mortgage company, with a letter stating that it was mailing 'all closing papers pertaining to the **First Baptist Church** loan.' Thereafter the **church** caused the deeds of trust to be included in a supplemental abstract and sent it to the mortgage company. If a condition attached to the deeds of trust, it was but the one and same condition that attached to the notes. The deeds of trust were executed for the purpose of securing the notes and were intended to be effective for that purpose and to the same extent that the notes were effective.

12 The trial court's finding and conclusion ignore the settled principle that a mortgage securing a negotiable note is but an incident to the note and partakes of its negotiable character. As stated in the opinion in Carpenter v. Longan, 16 Wall. 271, 274, 21 L. Ed. 313, 315: 'The note and mortgage are inseparable; the former as essential, the latter as an incident.'

13 The Supreme Court of Texas, in Pope v. Beauchamp, 110 Tex. 271, 219 S. W. 447, 448, held that the rule of lis pendens does not affect the right to the debt or lien of the bona fide purchaser of a negotiable note, basing its decision upon the necessary inseparability of the note and lien. Justice Greenwood quoted with approval from the opinion of the Supreme Court of the United States in the case last cited, and said: 'We are further of the opinion that the protection which the law gives the bona fide holder of negotiable paper extends ***405*** to a lien which is a mere incident of the debt

evidenced by the paper, in the absence of actual or constructive notice of some defect in the lien. The bona fide purchaser has the same right to rely on an incidental and inseparable lien as on any other feature of a negotiable note. Hamblen v. Folts, 70 Tex. 135, 7 S. W. 834. We therefore regard as thoroughly sound the declaration of the Supreme Court of Missouri, in Mayes v. Robinson, 93 Mo. 114, 5 S. W. 611, that-'If the defendant took the note discharged of any equities to which it ***1099** was subject in the hands of the payee, the deed of trust passed to him discharged of such equities to the same extent. Logan v. Smith, 62 Mo. 455. The deed of trust, being incident to the note, partook of the negotiability of its principal. Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73, and authorities cited. If the defendant was a bona fide holder of the note, for value, before maturity, without notice, he was in equal measure such bona fide holder of the deed of trust." (Italics ours.)

On this authority we conclude that, when Mrs. **West** became the bona fide holder of the notes for value before maturity, she became in equal measure such bona fide holder of the deed of trust which was executed to secure them.

14 15 It is, of course, true that a deed of trust to be effective must be delivered, but we are of the opinion that a constructive delivery was proven by the undisputed evidence.

16 17 'If the mortgage is made in pursuance of a previous agreement of the parties to place a mortgage on the specific property, which the mortgagee has agreed to accept, then the act of the mortgagor in filing it for record in the proper office is a sufficient delivery of it. * * * And when a sufficient delivery has thus been effected, it is not counteracted by the fact that the mortgagor obtains the possession of the mortgage from the recorder's office, after it is recorded, and retains it.' 41 C. J. p. 427.

See, also, the following authorities which hold that the filing for record by the grantor at the request or with the consent of the grantee or mortgagee amounts to a contructive delivery. Newton v. Emerson, 66 Tex. 142, 18 S. W. 348; Russell v. Beckert (Tex. Civ. App.) 195 S. W. 607; Red River National Bank v. Summers (Tex. Civ. App.) 30 S.W.(2d) 726; 8 R. C. L., p. 1006.

18 19 The retention of the deed of trust by the **church** after it was filed for record is unimportant if, as clearly appears to be true, it was executed and filed for record for the purpose of creating a lien to secure the notes. Title may pass without actual manual delivery of the instrument. The controlling question is ***406** the grantor's intention. Taylor v. Sanford, 108 Tex. 340, 345, 193 S. W. 661, 5 A. L. R. 1660; McCartney v. McCartney, 93 Tex. 359, 364, 55 S. W. 310.

20 In Koppelmann v. Koppelmann, 94 Tex. 40, 57 S. W. 570, it is held that the depositing of a deed for record by the grantor is sufficient evidence of delivery, but that it is not conclusive, and that, in the absence of actual delivery to the grantee, the effect of a deed thus recorded depends upon the intent with which the acts relied upon as taking the place of actual delivery were done. In the instant case the filing of the deeds of trust was a part of the closing of the loan, and the intention of the grantor undoubtedly was to create liens fully effective to secure the notes if and when they were effective. There is nothing in the record to limit or qualify the grantor's intention, except the oral agreement that the notes would be held until the **church** was completed. By reason of that oral agreement, the notes and the deeds of trust were subject to equities while the notes were in the hands of the payee, but under the rule announced in Pope v. Beauchamp, above discussed, the deed of trust securing the twenty-two notes sold to Mrs. **West** passed to her discharged of such equities to the same extent that the notes were discharged of them.

21 Since there is no assignment by the **First Baptist Church** complaining of the judgment in favor of the Taft Bank for foreclosure of lien, the only question presented here with respect to such lien is whether the bank has a lien superior to that securing

the notes purchased by Mrs. **West**.

A lien is asserted to exist in favor of the bank, **first**, on the ground that it advanced money to pay for labor and material in the construction of the building; and, second, on the ground that the **church** orally agreed that the bank should have a lien to secure the repayment of the money so advanced.

The Constitution and the statute give liens to mechanics and materialmen for the value of labor done and material furnished. They do not provide for liens in favor of persons advancing money to pay for labor or material. Constitution, art. 16, s 37; Revised Civil Statutes, 1925, art. 5452. It was held in Gaylord v. Loughridge, 50 Tex. 573, that a mechanic's lien statute in substantially the same terms as article 5452 did not protect a loan of money made and used for the purchase of material and the payment of labor. That case is cited with approval in Hess & Skinner Engineering Co. v. Turney, 110 Tex. 148, 156, 216 S. W. 621, and in ***407** Employers' Casualty Co. v. County of Rockwall, 120 Tex. 441, 448, 35 S.W.(2d) 690, 38 S.W. (2d) 1098. See, also, note and citation of many authorities in 74 A. L. R. pages 522 and following, supporting the general rule that a mechanic's or materialman's lien does not exist in ****1100** favor of a third person advancing money with which to pay for labor or material.

22 As to the oral agreement, a mortgage or other lien upon real estate cannot be given by parol. Allen v. Allen, 101 Tex. 362, 107 S. W. 528; Home Investment Co. v. Fidelity Petroleum Co. (Tex. Civ. App.) 249 S. W. 1109 (application for writ of error refused); Aaron Frank Clothing Co. v. Deegan (Tex. Civ. App.) 204 S. W. 471 (application for writ of error refused); 20 Tex. Juris. p. 288, 25 Tex. Juris. p. 796.

23 The bank was fully informed about the negotiations for the loan to be made upon the **church** property by Southern Mortgage Company, and did not agree to make the temporary advancement to the **church** until it was shown the definite commitment of the loan company to pay the $20,000 to the **church** when the building was completed. Two of the members of the partnership constituting the bank were signers of the written instrument guaranteeing the payment of the notes to the Southern Mortgage Company, which instrument described the notes and the deed of trust to be executed. The money advanced by the bank was evidenced by notes executed by the **church**, the **first** of date June 4, 1929, and on which date the **first** money was advanced by the bank. This was long after the execution of the notes to Southern Mortgage Company and the filing of the deeds of trust securing them.

Without determining, as between the **church** and the bank, the correctness of the trial court's judgment that a lien exists in favor of the bank, we conclude, from the facts in the record and under the authorities above cited, that such lien, so adjudged to exist, is inferior and subordinate to the lien created by the deed of trust securing the twenty-two notes.

24 Any decision of this case would work a regrettable hardship upon one or more of the parties. This unfortunate result has its source in the misplaced confidence of the **church** and the bank in the mortgage company, and more particularly it flows from the act of the **church** in intrusting the negotiable notes to the mortgage company. 'If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger. " Carpenter v. Longan, 16 Wall. 271, 273, 21 L. Ed. 313, 315.

The judgment of the Court of Civil Appeals and that of the ***408** district court are reversed, and the cause is remanded for trial in accordance with this opinion.

Opinion adopted by the Supreme Court.

Parallel Citations

71 S.W.2d 1090

End of Document

RELATED TOPICS

Executors and Administrators

Claims Against Estate

Valid Claim of Estate Representative

Western M. & I. Co. v. Jackman

Supreme Court of Texas. | June 13, 1890 | 77 Tex. 622 | 14 S.W. 305 *(Approx. 3 pages)*

WESTERN M. & I. CO.

v.

JACKMAN *et al.*

Return to list **1** of **24 results** Search term

Appeal from district court, Hays county.

West Headnotes (2)

Change View

1 **Executors and Administrators** Allowance by Executors or Administrators

In passing on a claim an administrator is authorized to pass on the question of indebtedness only and the power of classifying the claims, including those for the payment of which a lien on property is asserted, devolves on the court.

4 Cases that cite this headnote

2 **Executors and Administrators** Jurisdiction

Mortgages Jurisdiction of Subject-Matter

Under Rev.St. art. 2067, (V.A.T.S. Probate Code, § 297), which provides that "any creditor of a deceased person holding a claim secured by a mortgage, *** which claim has been allowed and approved, ** may obtain from the county court *** an order for the sale of the property upon which he has such mortgage," where an administrator has allowed a claim, but rejected in part the lien of the mortgage securing it, he can only enforce his lien in the county court, and no jurisdiction for that purpose is conferred on the district court by article 2028, (222), provides that "when a claim for money against an estate has been rejected by an ** administrator in whole or in part the owner may bring suit to establish it in any court having jurisdiction."

23 Cases that cite this headnote

Attorneys and Law Firms

***623 **306** *S. Fisher* and *Browne & Beaseley*, for appellant.

W. O. Hutchison and *Denman & Franklin*, for appellee.

Opinion

GAINES, J.

A demurrer to the petition in this case was sustained upon the ground that the court did not have jurisdiction of the cause of action. Whether that ruling be correct or not is the sole question presented upon this appeal. In 1885, S. D. **Jackman** executed a promissory note payable to the appellant, the plaintiff in the court below, and, in order

to secure its payment, at the same time executed a mortgage upon a tract of land which is described in the petition. He subsequently died, and appellee W. T. **Jackman** was appointed and qualified as administrator of his estate. Default having been made in the payment of the interest upon the note, and the debt having become due according to the terms of the contract, the appellant presented the note and mortgage duly verified for allowance to the administrator, who placed upon it the following indorsement: 'Presented on the 8th day of October, 1887, and examined, and allowed ***624** to be paid in due course of administration, but the lien given on the 200 acres of land set apart as a homestead is rejected, and also the lien on the undivided half interest in the remainder of the land that belongs to the children of S. D. **Jackman** by his first marriage. [Signed] W. T. **JACKMAN**, Adm'r of S. D. **Jackman**, Deceased.' The mortgaged premises embrace 1,500 acres, but at the time the claim was presented 200 acres thereof had been set apart to an unmarried daughter and four minor children of the deceased as his homestead, by the county court of Hays county. The land was acquired during the existence of the relation of husband and wife between S. D. **Jackman** and the mother of the defendants, who are their children. The mortgage was executed after the death of the wife. The administrator of the deceased husband, and the heirs of the deceased wife, were all made parties defendant, and the petition after alleging the facts as above stated prayed for a judgment for the debt and interest, for the establishment of a lien upon the entire tract of land, and for its foreclosure by a sale by the administrator for the satisfaction of the judgment, and for general relief. The petition contained other averments intended to show that the entire tract of land was subject to their mortgage, but in the view we take of the case these need not be further noticed.

It is seen from the statement just made that, according to the allegations of the petition, the administrator allowed the claim for the debt, but rejected the claim for the lien as to a part of the premises upon which the mortgage was executed. The question is: Did the refusal of the administrator to recognize a lien upon a part of the land claimed to be subject to the mortgage authorize the plaintiff to sue in the district court to subject the entire land to the payment of the debt? So far as we have been able to ascertain, the question has never been distinctly decided by this court. It depends upon the proper construction of articles 2018 and 2028 of the Revised Statutes, which, so far as this question is concerned, are the same as the corresponding provisions of the act of 1848. Under the Revised Statutes it is only where a claim for money against the estate of a deceased person has been rejected by the administrator that the holder of a claim is entitled to bring an independent suit for its establishment. Article 2028. The language of article 2018 is: 'No executor or administrator shall allow any claim for money against the testator or intestate, nor shall the county judge approve the same, unless the same is accompanied by affidavit in writing,' etc. Article 2028 provides that 'when claim for money against an estate has been rejected by an executor or administrator either in whole or in part the owner may bring suit to establish it in any court having jurisdiction.' If the words 'claim for money' mean not only the debt, but also any lien that may exist for securing its payment, then it would seem that the rejection of the ***625** lien either in whole or in part would authorize the bringing of an ordinary action for its establishment in any court having jurisdiction under the constitution. But to our minds these terms exclude the idea that the lien was intended to be embraced. A claim for money means literally the claim that a debt exists. A claim for a lien is something more, a claim not only that there is a debt but also that a lien exists for its enforcement. The lien is no part of the debt, it is a mere incident of the claim for the money. In Cannon v. McDaniel, 46 Tex. 306, it is said to be the better practice to present a mortgage with the claim to the administrator, but the purpose suggested for that course is merely 'to apprise the administrator and the court of its existence.' That case is authority for the proposition that it is not necessary to make such presentation in order to give the county court jurisdiction to enforce the lien. The statement of the case shows that the debt only had been presented, allowed, and approved, and yet it was held that the county court, and that court alone, had jurisdiction to establish the lien, and to order a sale of the land for its

enforcement. The ruling in Cunningham v. Taylor, 20 Tex. 127, is to the same effect. Without an allowance by the administrator of a claim, or its establishment by a court of competent jurisdiction after its rejection, the county court has no power to approve it or to order its payment. It would seem therefore that if he has power to reject a mortgage intended to secure a debt against an estate, without his allowance, the county court would acquire no jurisdiction to order a sale for its enforcement. Yet in Cannon v. McDaniel, supra, it is distinctly held that the county court could enforce the mortgage, although it had not been presented to the administrator with the claim secured by it. The language of the article of the Revised Statutes which confers authority ***307** upon the county court to sell property of an estate subject to a mortgage or other lien is also significant: 'Any creditor of a deceased person holding a claim secured by a mortgage or other lien, which claim has been allowed and approved, or established by suit, may obtain at a regular term of the court, from the county court of the county where the letters testamentary or of administration were granted, an order for the sale of the property upon which he has such mortgage or other line,' etc. Rev. St. art. 2067. This clearly distinguishes the claim from the mortgage by which it is secured, and indicates that the claim only need be allowed and approved, or established by suit. If we should hold that an administrator has power to reject a lien in whole or in part, and to compel the lienholder to resort to an ordinary action for its enforcement, we see no reason why the same ruling should not apply to all other claims which are given preference by the statute. Yet we know of no case in which the right of the administrator to pass upon the question of preference has been recognized. ***626** Our opinion is that in passing upon a claim the administrator is authorized to pass upon the question of indebtedness only, and has not the power of classifying the claims, including those for the payment of which a lien upon property is asserted.

We conclude that the claim for money against the estate having been allowed by the administrator the plaintiff should have proceeded in the county court to have its claim approved, and to enforce its lien, and that the district court did not have jurisdiction of the cause. The court below did not err in so holding. What we decide here is that the district court has no jurisdiction of the cause of action now presented. If, as a measure of safety, the plaintiff has caused its claim to be approved by the county court in due time, then that court has authority to determine the question of the exemption of the homestead, and to order a sale of the mortgagor's interest in the land to pay the debt. It may be that in order to subject the interest of the deceased wife upon the ground that the money was borrowed to pay community debts a resort to the district court will be proper. The judgment is affirmed.

Parallel Citations

14 S.W. 305

End of Document

Williams v. Countrywide Home Loans, Inc.
United States District Court, S.D. Texas, Houston Division. | July 18, 2007 | 504 F.Supp.2d 176 *(Approx. 33 pages)*

504 F.Supp.2d 176
United States District Court,
S.D. Texas,
Houston Division.

COUNTRYWIDE HOME LOANS, INC., Banker's Trust of Calif., Deutsche Bank National Trust Co., Secretary of Veterans Affairs, Defendants.

Civil Action No. H–06–2874. | July 18, **2007**. | Opinion Denying New Trial Aug. 8, **2007**.

Synopsis

Background: Borrower brought action in state court against mortgage lenders, alleging violation of Truth in Lending Act (TILA), the Fair Debt Collection Practices Act (FDCPA), the Real Estate Settlement Procedures Act (RESPA), violation of the automatic stay in bankruptcy, breach of contract, and other claims. Action was removed to federal court. Lenders moved for summary judgment.

Holdings: The District Court, Rosenthal, J., held that:
1 TILA applied to mortgage loan;
2 borrower could not prevail in TILA action, based on lender's alleged failure to notify him of his right to rescind;
3 TILA damages claim was not a recoupment claim, for purpose of avoiding limitations bar;
4 lenders were not "debt collectors" under the FDCPA;
5 clerical error in foreclosure documents did not deprive borrower of the due process afforded under Texas law;
6 mortgage lender and borrower did not have fiduciary relationship; and
7 claim for violation of the Equal Credit Opportunity Act (ECOA) was time-barred.

Motion granted.

West Headnotes (45)

Change View

1 **Consumer Credit** Truth in lending, in general
The purpose of the TILA is to promote the informed use of consumer credit by requiring disclosures about its terms and costs. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

1 Case that cites this headnote

2 **Consumer Credit** Persons, Businesses, and Transactions Subject to Regulations
TILA requirements applied to mortgage loan; the mortgage lenders offered

borrower credit, the lenders regularly offered or extended credit, the mortgage loan was subject to a finance charge and payable in more than four installments, and the loan was used primarily for personal, family, or household purposes. Truth in Lending Act, § 125(a), 15 U.S.C.A. § 1635(a); 12 C.F.R. § 226.1(c).

1 Case that cites this headnote

3 **Consumer Credit** In general; validity of transactions

Borrower's TILA claim against mortgage lender, alleging that lender failed to notify him of his right under TILA to rescind the mortgage loan was time-barred, where it was brought more than three years after the loan transaction was consummated. Truth in Lending Act, § 125(f), 15 U.S.C.A. § 1635(f).

2 Cases that cite this headnote

4 **Consumer Credit** Judgment and relief; injunction; attorney fees

Conceptually, statutory and actual damages under TILA perform different functions: statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain. Truth in Lending Act, § 130(a)(1, 2), 15 U.S.C.A. § 1640(a)(1, 2).

1 Case that cites this headnote

5 **Consumer Credit** Judgment and relief; injunction; attorney fees

TILA plaintiffs need not show that they sustained actual damages stemming from the TILA violations proved before they may recover the statutory damages TILA also provides for. Truth in Lending Act, § 130(a)(1, 2), 15 U.S.C.A. § 1640(a)(1, 2).

1 Case that cites this headnote

6 **Consumer Credit** Judgment and relief; injunction; attorney fees

Statutory damages provided for by TILA are explicitly a bonus for the plaintiff, designed to encourage private enforcement of TILA, and a penalty against the defendant, designed to deter future violations. Truth in Lending Act, § 130(a)(2), 15 U.S.C.A. § 1640(a)(2).

2 Cases that cite this headnote

7 **Limitation of Actions** Liabilities Created by Statute

Nondisclosure under TILA is not a continuing violation for purposes of the statute of limitations. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

8 **Limitation of Actions** Liabilities Created by Statute

A credit transaction is “consummated,” and the statute of limitations under TILA commences, when a contractual relationship is created between the creditor and the consumer. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

1 Case that cites this headnote

9 **Consumer Credit** Time to sue and limitations

Consumer Credit Judgment and relief; injunction; attorney fees

Borrower's claim against mortgage lender seeking damages for alleged violations of TILA's disclosure requirements was not a “recoupment” claim, for purpose of avoiding limitations bar, although it was filed following lender's

foreclosure action, where borrower initially filed bankruptcy petitions in response to the foreclosure proceedings, borrower did not seek to reduce the sums he owed to lender, but to obtain affirmative relief, and he failed to show he was entitled to actual damages under TILA. Truth in Lending Act, § 130(a)(1, 2), (e), 15 U.S.C.A. § 1640(a)(1, 2), (e).

9 Cases that cite this headnote

10 **Limitation of Actions** Set-offs, counterclaims, and cross-actions

A recoupment defense under TILA is never barred by the statute of limitations so long as the main collection action asserted by the creditor is itself timely. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

11 **Set–Off and Counterclaim** Equitable Set-Off

A "set-off" claim is a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action.

12 **Consumer Credit** Judgment and relief; injunction; attorney fees

To meet the requirements for recoupment under TILA, a debtor must show that: (1) the TILA violation and the debt are products of the same transaction, (2) the debtor asserts the claim as a defense, and (3) the main action is timely. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

1 Case that cites this headnote

13 **Consumer Credit** In general; validity of transactions
Consumer Credit Judgment and relief; injunction; attorney fees

The mere fact that the debtor is the plaintiff in a TILA case does not preclude a finding that the debtor's recoupment claim was raised defensively. Truth in Lending Act, § 130(e), 15 U.S.C.A. § 1640(e).

3 Cases that cite this headnote

14 **Consumer Credit** Judgment and relief; injunction; attorney fees

To recover actual damages under TILA, a consumer must show that: (1) he relied on the particular terms of the loan, (2) the disclosure violation deterred him from inquiring into other alternatives, and (3) the alternatives would save money. Truth in Lending Act, § 130(a)(1), 15 U.S.C.A. § 1640(a)(1).

15 **Consumer Credit** Judgment and relief; injunction; attorney fees

A claim for statutory damages under TILA is not asserted as a defense to or denial of the creditor's claim, and it cannot be classified as a recoupment. Truth in Lending Act, § 130(a)(2), (e), 15 U.S.C.A. § 1640(a)(2), (e).

1 Case that cites this headnote

16 **Antitrust and Trade Regulation** Harassment and abuse

The purpose of the Fair Debt Collection Practices Act (FDCPA) is to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses. Fair Debt Collection Practices Act, § 802(e), 15 U.S.C.A. § 1692(e).

18 Cases that cite this headnote

17 **Antitrust and Trade Regulation** Persons and transactions covered

Mortgage lenders collecting debts are not "debt collectors," within the meaning of the Fair Debt Collection Practices Act (FDCPA). Fair Debt Collection Practices Act, § 802(a)(6)(A), 15 U.S.C.A. § 1692(a)(6)(A).

43 Cases that cite this headnote

18 **Constitutional Law** Enforcement; proceedings
Mortgages Right to foreclose

The apparent clerical or typographical error in the foreclosure documents, in incorrectly referencing the mortgage loan, did not deprive borrower of the due process afforded under Texas law, and did not prevent lender from lawfully foreclosing; borrower received notice of default and acceleration, and was given proper notice of the foreclosure sale. U.S.C.A. Const.Amend. 14.

19 **Consumer Credit** Regulations in general

The purpose of Real Estate Settlement Procedures Act (RESPA) is to insure that consumers are provided with greater and more timely information on the nature and costs of the settlement process in connection with the purchase of real estate and are protected from unnecessarily high settlement charges caused by certain abusive practices. Real Estate Settlement Procedures Act of 1974, § 2(a), 12 U.S.C.A. § 2601(a).

1 Case that cites this headnote

20 **Limitation of Actions** Liabilities Created by Statute

Borrower's claim that mortgage lender violated the provision of Real Estate Settlement Procedures Act (RESPA), requiring lender to give notice to borrower not less than 15 days before the effective date of transfer, accrued, for limitations purposes, on date of transfer. Real Estate Settlement Procedures Act of 1974, §§ 2(a), 6(b)(2)(A), 12 U.S.C.A. §§ 2601(a), 2605(b)(2)(A).

21 **Mortgages** Nature and existence of lien in general

Lien provisions of the Texas version of the Uniform Commercial Code (UCC) did not apply to a loan, secured by a mortgage in residential real property. V.T.C.A., Bus. & C. § 9.109(d)(11).

1 Case that cites this headnote

22 **Fraud** Fiduciary or confidential relations

Under Texas law, the elements of a cause of action for breach of fiduciary duty are: (1) that the plaintiff and defendant had a fiduciary relationship, (2) the defendant breached its fiduciary duty to the plaintiffs, and (3) the defendant's breach resulted in injury to the plaintiff.

4 Cases that cite this headnote

23 **Attorney and Client** The relation in general
Fraud Fiduciary or confidential relations

Under Texas law, in certain formal relationships, such as an attorney-client or trustee relationships, a fiduciary duty arises as a matter of law.

24 **Fraud** Fiduciary or confidential relations
Under Texas law, not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.

25 **Fraud** Fiduciary or confidential relations
Under Texas law, to impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.

26 **Mortgages** Between parties to mortgage or their privies
Under Texas law, mortgage lender and borrower did not have "fiduciary relationship," precluding borrower's claim for breach of fiduciary duty in connection with the mortgage loan, where loan was arm's length transaction, and there was no special relationship of trust apart from the loan agreement.

8 Cases that cite this headnote

27 **Fraud** Fiduciary or confidential relations
Under Texas law, the fact that a person trusts another does not transform their business arrangement into a fiduciary relationship.

28 **Consumer Credit** Disclosure Requirements
Mortgage lender had a duty under the Equal Credit Opportunity Act (ECOA) to provide borrower with a copy of the appraisal report on his home, where the loan was secured by a lien on the home. Real Estate Settlement Procedures Act of 1974, § 2(a)(1–2), 12 U.S.C.A. § 2601(a)(1–2); 12 C.F.R. § 202.14(a).

29 **Limitation of Actions** Liabilities Created by Statute
Borrower's claim for violation of the Equal Credit Opportunity Act (ECOA), based on mortgage lender's failure to provide borrower with a copy of the appraisal report on his home, accrued, for limitations purposes, on date that mortgage loan transaction occurred. Real Estate Settlement Procedures Act of 1974, § 2(a)(1–2), 12 U.S.C.A. § 2601(a)(1–2); 12 C.F.R. §§ 202.14(a), 202.17(b)(2).

30 **Mortgages** Liabilities of mortgagor on transfer in general
Under Texas law, a "due-on-sale clause" in a mortgage agreement gives a lender the right to demand full payment of the balance due on the loan secured by the mortgage if the borrower sells his interest in the property.

31 **Mortgages** Right to foreclose
Mortgages Stipulations for Maturity of Debt on Default
Under Texas law, an "acceleration clause" in a mortgage agreement specifies that if the debtor defaults on his mortgage payments, the lender may foreclose on the property.

32 **Mortgages** Right to foreclose
Mortgages Stipulations for Maturity of Debt on Default
Under Texas law, an "acceleration clause" in a mortgage agreement permits the lender to call due, upon default by the borrower, the entire

indebtedness of the borrower.

2 Cases that cite this headnote

33 **Bankruptcy** Notice to creditors; commencement

The automatic stay in bankruptcy is effective upon the filing of the bankruptcy petition even though creditors may have no notice of its existence. 11 U.S.C.A. § 362(a).

34 **Bankruptcy** Validity of acts in violation of injunction or stay

In general, acts taken in violation of the automatic stay in bankruptcy are void and without legal effect. 11 U.S.C.A. § 362(a).

35 **Bankruptcy** Determination and relief; conditions

A bankruptcy court may take some action, such as annulling the stay, to retroactively validate actions taken in violation of the automatic stay. 11 U.S.C.A. § 362(a).

36 **Bankruptcy** Determination and relief; conditions
Bankruptcy Validity of acts in violation of injunction or stay

A foreclosure sale conducted in violation of the automatic stay in bankruptcy remains invalid unless the bankruptcy court annuls the stay. 11 U.S.C.A. § 362(a).

37 **Bankruptcy** Duration and termination

A bankruptcy court's dismissal of a bankruptcy proceeding terminates the automatic stay. 11 U.S.C.A. §§ 362(a), 349(b)(3).

38 **Bankruptcy** Foreclosure proceedings

Mortgage lender did not violate automatic stay in bankruptcy by foreclosing on borrower's home when borrower defaulted on the mortgage loan, where bankruptcy court conditioned the automatic stay on borrower's continued payment of the mortgage loan, and the automatic stay was lifted when borrower defaulted on the loan. 11 U.S.C.A. §§ 362(a), 349(b)(3).

39 **Antitrust and Trade Regulation** Purpose and construction in general

The purpose of the Texas Deceptive Trade Practices Act (DTPA) is to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection. V.T.C.A., Bus. & C. § 17.44(a).

40 **Antitrust and Trade Regulation** Consumers, purchasers, and buyers; consumer transactions
Antitrust and Trade Regulation Private entities or individuals

To maintain a private cause of action under the Texas Deceptive Trade Practices Act (DTPA), the plaintiff must be a consumer.

2 Cases that cite this headnote

41 **Antitrust and Trade Regulation** Finance and banking in general; lending

The Texas Deceptive Trade Practices Act (DTPA) applies to a loan transaction if the borrower's objective is to use the loan to purchase goods or services. V.T.C.A., Bus. & C. § 17.45(1).

2 Cases that cite this headnote

42 **Antitrust and Trade Regulation** Finance and banking in general; lending

Mortgage lender did not violate the Texas Deceptive Trade Practices Act (DTPA) by accelerating the promissory note after borrower defaulted and foreclosing on the mortgaged property without giving lender the opportunity to cure, where the loan documents clearly stated that notice of acceleration was not required if the borrower defaulted on his payments, and lender did give borrower notice of foreclosure 20 days before the foreclosure sale. V.T.C.A., Bus. & C. § 17.45(1).

1 Case that cites this headnote

43 **Federal Civil Procedure** Process, defects in
Federal Civil Procedure Effect

The dismissal of a defendant named in the complaint but not served with process results in dismissal without prejudice.

44 **Federal Civil Procedure** Error in general
Federal Civil Procedure Further evidence or argument

A motion to alter or amend the judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence, and cannot be used to raise arguments which could, and should, have been made before the judgment issued. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

45 **Federal Civil Procedure** Further evidence or argument

Grant of a motion to alter or amend a judgment is appropriate when there has been an intervening change in the controlling law. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

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Opinion

MEMORANDUM AND OPINION

ROSENTHAL, District Judge.

The plaintiff, Wayne Williams ("Williams"), sued the defendants, Countrywide Home Loans Inc. ("Countrywide"), Banker's Trust of California ("Banker's Trust"), Deutsche Bank National Trust Company ("Deutsche Bank") (together, the "lender defendants"), and the Secretary of ***182** Veterans Affairs. Williams alleges that the lender defendants violated federal and state statutes governing mortgage documents, breached the mortgage lending contract, violated the automatic stay that was triggered when Williams filed for bankruptcy, and committed other offenses related to his mortgage loan. Williams alleges that both the Note and Deed of Trust on his home

are invalid and that the lender defendants wrongfully foreclosed on that home.

The lender defendants have moved for summary judgment on Williams's claims. (Docket Entry No. 6). The motion is based on the statute of limitations and on Williams's failure to prove an essential element of each claim. Williams has responded (Docket Entry No. 11) and the lender defendants have replied (Docket Entry No. 12).

Based on the motion, the response, and the reply; the pleadings; the parties' submissions; and the applicable law, this court grants the lender defendants' motion for summary judgment on all claims and enters final judgment by separate order. The reasons are explained in detail below.

I. Background

On July 25, 1995, Williams signed a Deed of Trust Note with the Secretary of Veterans Affairs and a Deed of Trust securing payment on the Note with real property located on Claridge Drive, Houston, Texas. The Note amount was $83,566.00. Countrywide was the servicer for the mortgage loan.

On September 19, 1995, Williams received a letter from Countrywide stating that the loan was being transferred. The letter stated:

> Your home loan is in the process of being transferred to Countrywide ... The effective date of your transfer is Sept. 30, 1995. Beginning Oct. 1, 1995, your payments should be mailed to Countrywide.

(Docket Entry No. 1, Ex. C–2). The Note and Deed of Trust were transferred to Banker's Trust, which acted as trustee for "Lender Mortgage Trust 1995–3." Deutsche Bank purchased Banker's Trust in 1999 and became its successor-in-interest.

Williams defaulted on his monthly payments to Countrywide. In early 2003, Countrywide moved to foreclose on Williams's property. Williams filed for bankruptcy in January 2003, December 2003, May 2004, and June 2005. The first three bankruptcies were dismissed because Williams did not make the confirmation payments to the trustee. During the third bankruptcy, the court entered an order stating that "in the event Debtor's case is dismissed and Debtor or Co–Debtor files another petition for an order of relief under Title 11, then the automatic stay of 11 U.S.C. §§ 362 and 1301 shall not apply to [Countrywide] and [the Property] described above." (Docket Entry No. 6 at 5).

The bankruptcy court dismissed Williams's third bankruptcy case in February 2005. Williams filed a fourth bankruptcy petition on June 1, 2005. Countrywide reposted the property for sale on June 7, 2005. Countrywide and Williams reached an agreement under which the sale was rescinded. The bankruptcy court entered an agreed order that conditioned the automatic stay on Williams continuing to make mortgage payments. Williams defaulted. The property was sold to Deutsche Bank in a foreclosure sale on April 4, 2006.

Williams filed this suit in state court in April 2006. Countrywide was served with process on August 8, 2006. (Docket Entry No. 1). Banker's Trust and Deutsche ***183** Bank timely joined Countrywide in removing the case based on federal question jurisdiction. The Secretary of Veterans Affairs and John Does 1–10 were not served.

Williams alleges that the lender defendants violated the Truth–in–Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.* Williams alleges that he hired a professional consumer advocate to analyze the loan documents. The consumer advocate found that the lender defendants failed to make certain required disclosures. (Docket Entry No.1, Ex. C–1 at 8). Williams alleges that the lender defendants did not inform him of his right to rescind the contract and failed to provide him with the required three-day cooling-off period. Williams also alleges that the lender defendants violated the Fair

Debt Collection Practices Act, 15 U.S.C. § 192(g)(a)(1)-(5); the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(b)(2)(B); the UCC, TEX. BUS. & COM.CODE §§ 9.101 *et seq;* breached their fiduciary duty; violated the Equal Credit Opportunity Act, 12 C.F.R § 202.14(a); breached the mortgage loan contract; violated the automatic bankruptcy stay; violated the Texas Deceptive Trade Practices Act, TEX. BUS. & COM.CODE § 17.46; and committed acts that were "unfair." Williams seeks damages, relief from the foreclosure, and other equitable relief. The lender defendants have moved for summary judgment on all claims.

II. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. *Lincoln Gen. Ins. Co. v. Reyna,* 401 F.3d 347, 349 (5th Cir.2005) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

If the burden of proof lies with the nonmoving party, the movant may either (1) submit evidentiary documents that negate the existence of some material element of the opponent's claim or defense, or (2) if the crucial issue is one on which the opponent will bear the ultimate burden of proof at trial, demonstrate that the evidence in the record insufficiently supports the essential element or claim. *Celotex,* 477 U.S. at 330, 106 S.Ct. 2548. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co., Inc.,* 402 F.3d 536, 540 (5th Cir.2005). "An issue is material if its resolution could affect the outcome of the action." *DIRECTV, Inc. v. Robson,* 420 F.3d 532, 536 (5th Cir.2005) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.,* 289 F.3d 373, 375 (5th Cir.2002).

When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim. *Johnson v. Deep E. Texas Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 305 (5th Cir.2004). This burden is not satisfied by "some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions, or only a scintilla of ***184** evidence." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1076 (5th Cir.1994).

In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505. "Rule 56 mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548.

III. Analysis

A. The Truth–in–Lending Act Claims

1 The TILA is a federal consumer protection statute that provides consumers with a cause of action against creditors that fail to make required disclosures. 15 U.S.C. §§ 1601 *et seq.;* 12 C.F.R. § 226 ("Regulation Z"). The purpose of the TILA is to "promote the informed use of consumer credit by requiring disclosures about its terms and costs. Regulations give consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes." 12 C.F.R. § 226.1(b). Regulation Z applies to each individual or business that offers or extends credit when four conditions are met:

(i) credit is offered or extended to consumers;

(ii) offering or extension of credit is done regularly;

(iii) credit is subject to a finance charge or is payable by a written agreement in more than 4 installments; and

(iv) credit is primarily for personal, family, or household purposes.

12 C.F.R. § 226.1(c).

2 The TILA applies in this case. Williams meets the requirements of a "consumer" [1] and the lender defendants meet the definition of a "creditor." [2] The lender defendants offered Williams credit; the lender defendants regularly offer or extend credit (Countrywide is a loan servicer); the credit was subject to a finance charge and payable in more than four installments; and the credit was used primarily for personal, family, or household purposes.

Under the TILA, consumers who place a mortgage on their home have the right to rescind the contract for up to three days after the loan transaction is consummated. Section 1635(a) provides:

> In the case of any consumer credit transaction in which a security interest ... is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery ***185** of the information and recision forms.

15 U.S.C. § 1635(a). Notice of the right to rescind must be given when the consumer signs the loan papers. *Id.*

Williams alleges that the lender defendants violated the TILA because they failed to provide him notice of his right to rescind within the three-day cooling-off period. Williams claims that the lender defendants did not give him recision forms and did not otherwise "clearly and conspicuously" disclose the right to rescind.

3 Under the TILA, a consumer's right to rescind expires three years after the transaction is consummated.

> An obligor's right of recision shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor.

15 U.S.C. § 1635(f). In *Beach v. Ocwen Federal Bank,* 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998), the United States Supreme Court held that § 1635(f) was not a statute of limitations but an "expire provision." *Id.* at 417, 118 S.Ct. 1408. In *Beach,* the Court rejected the debtor's efforts to rescind the mortgage contract because the three-year expiration period had passed. In 1986, the debtor obtained a loan from Great Western Bank and secured it by executing a mortgage on his residence. In 1991, the debtor defaulted on his mortgage payments. In 1992, the bank began the foreclosure process, and the debtor responded by filing a TILA claim against it. The Court held that the debtor was entitled to actual damages under § 1640(a)(1) and statutory damages under § 1640(a)(2), but that his right to rescind had expired. "The quite different treatment of recision stands in stark contrast to this [Section 1640], however, there being no provision for recision as a defense that would mitigate the uncompromising provision of [Section] 1635(f) that the borrower's right 'shall expire' with the running of the time." *Id.* at 418, 118 S.Ct. 1408. "We respect Congress's manifest intent by concluding that the Act permits no federal right to rescind, defensively or otherwise, after the 3–year period of [Section] 1635(f) has

run." *Id.* at 419, 118 S.Ct. 1408. Like the debtor in *Beach,* Williams brought his TILA claim more than three years after the loan was consummated. The loan was consummated in 1995. Williams did not bring suit until 2006. Williams's right to recision has expired.

4 5 6 Williams also seeks damages under 15 U.S.C. § 1640. Four types of damages may be recovered under the TILA. First, the injured party may recover actual damages. 15 U.S.C. § 1640(a)(1). Second, the injured party may recover "statutory damages." *Id.,* § 1640(a)(2). In an individual action, statutory damages may be "twice the amount of any finance charge in connection with the transaction." *Id.* Statutory damages perform a different function than actual damages. [3] TILA plaintiffs "need not show that they sustained actual damages stemming from the TILA violations proved before they may ***186** recover the statutory damages the Act also provides for. The statutory damages are explicitly a bonus for the plaintiff, designed to encourage private enforcement of the Act, and a penalty against the defendant, designed to deter future violations." *Dryden v. Lou Budke's Arrow Finance Co.,* 630 F.2d 641, 647 (8th Cir.1980). Third, the injured party may recover litigation costs, including reasonable attorney's fees. *Id.,* § 1640(a)(3). Fourth, if the other party failed to comply with § 1639, the injured party may recover the finance charges and fees he paid. *Id.,* § 1640(a)(4). Williams seeks actual damages under § 1640(a)(1), statutory damages under § 1640(a)(2), and litigation costs under § 1640(a)(3).

Williams argues that he is entitled to damages because the lender defendants violated the TILA by failing to inquire about his income. Under the TILA, "there is a presumption that a creditor has violated [the act] if the creditor engages in a pattern or practice of making loans subject to § 226.32 without verifying and documenting consumers' repayment ability." 12 C.F.R. § 226.34(a) (4). Williams alleges that the lender defendants violated this provision because the loan application did not require him to state his income.

Williams also alleges that the lender defendants violated the TILA when they failed to disclose the total sale price. (Docket Entry No. 1, Ex. C–1 at 20). The TILA requires that "for each transaction, the creditor shall disclose the following information as applicable ... [including the] total sale price." 12 C.F.R. § 226.18(j). The "total sale price" is "the sum of the cash price, the items described in paragraph (b)(2) [any other amounts that are financed by the creditor and are not part of the finance charge], and the finance charge disclosed under paragraph (d) of this section." *Id.* Williams alleges that the lender defendants did not supply this information.

Williams further alleges that the lender defendants violated the TILA because they failed to give him notice of acceleration of the Note before foreclosing on the property. (Docket Entry No. 1, Ex. C–1 at 24). Under the TILA, the lender must disclose the date "by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges." 12 C.F.R. § 226.7(j). The lender must also provide the consumer with periodic statements that disclose other related information, such as previous balances or periodic rates. *Id.,* § 226.7(a)-(k). Williams claims that the lender defendants did not provide this information.

7 8 9 The lender defendants seek summary judgment on the basis of limitations. The general statute of limitations for damages claims under the TILA is one year after the violation. "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of occurrence of the violation." 15 U.S.C. § 1640(e). "The violation 'occurs' when the transaction is consummated. Nondisclosure is not a continuing violation for purposes of the statute of limitations." *In re Smith,* 737 F.2d at 1552. The credit transaction is consummated when "a contractual relationship is created between [a creditor and consumer]." *Bourgeois v. Haynes Construction Co.,* 728 F.2d 719, 720 (5th Cir.1984). The violation in this case occurred in September 1995 when the loan transaction was consummated. Williams did not sue until eleven years

later.

In his affidavit, Williams stated that when he signed the loan documents in 1995, he knew he was not receiving important information:

> ***187** When we left the VA administration office I felt like a lack of information was given. And I wasn't given a proper explanation of the negotiating process, everything I had just underwent [was] confusing, but I was happy that I had just closed on my home.

(Docket Entry No. 1, Williams Aff.).

The cases recognize a "recoupment exception" to the limitations bar on TILA actual damages claims. *See* *Moor v. Travelers Ins. Co.,* 784 F.2d 632, 633 (5th Cir.1986). In *Moor,* the plaintiff brought a claim under the TILA against a lender for damages and sought recision of the loan contract. *Id.* The plaintiff in *Moor* based his claims on the lender's failure to disclose information when the loan was executed. *Id.* Like Williams, the plaintiff in *Moor* received a loan secured by a deed of trust on his property and later defaulted on the mortgage payments to the lender. *Id.* The lender then moved to foreclose. *Id.* In April 1985, the plaintiff in *Moor* sued the lender, seeking recision of the loan under 15 U.S.C. § 1635(a), statutory damages under § 1640(a)(2)(A), and attorney's fees under § 1640(a) (3). *Id.* The plaintiff did not seek actual damages under § 1640(a)(1). The court found that the lender violated the TILA by failing to make required disclosures. While the court recognized that the lender violated the TILA, it nonetheless rejected the plaintiff's claims because the statute of limitations had run. *Id.* The transaction in *Moor* occurred in February 1978. The plaintiff sued seven years later. The damages claims were barred by the one-year statute of limitations, 15 U.S.C. § 1640(e). The recision claim was barred by the three-year statute of limitations, 15 U.S.C. § 1635(f).

The court held that the plaintiff in *Moor* did not meet the "recoupment" exception for damages claims to the TILA general statute of limitations. To meet the "recoupment" exception, a party must show that the TILA claim was brought as a recoupment or set-off claim in response to a creditor's "action to collect the debt." 15 U.S.C. § 1640(e). "This subsection does not bar a person from asserting a violation of this subchapter [§ 1640] in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." *Id.* The Fifth Circuit held that "a recoupment or set-off claim will be exempt from the one-year statute of limitations only when the debtor's claim is raised as a defense." *Moor,* 784 F.2d at 633.

10 11 The United States Supreme Court defines "recoupment" as "in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely." *Bull v. U.S.,* 295 U.S. 247, 262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935). Recoupment has also been explained as the following:

> Recoupment goes to the foundation of the plaintiff's claim; it is available as a defense, although as an affirmative cause of action it may be barred by limitation. The defense of recoupment, which arises out of the same transaction as plaintiff's claim, survives as long as the cause of action upon the claim exists. It is a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced.

Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 415 A.2d 689, 694 (1980). A "set-off claim" is "a counter demand which a defendant holds against a ***188** plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action." *In re Smith,* 737 F.2d 1549, 1552 (11th Cir.1984) (quoting BALLENTINE'S LAW

DICTIONARY 1167 (3d ed.1969)).

12 To meet the requirements for recoupment, a debtor must show that: (1) the TILA violation and the debt are products of the same transaction; (2) the debtor asserts the claim as a defense; and (3) the main action is timely. *Moor,* 784 F.2d at 634 (citing *In re Smith,* 737 F.2d at 1553). In *Moor,* the court held that the plaintiff/debtor failed to establish the second and third elements because the debtor's claim was not a defensive response. “When the debtor hales the creditor into court, as Moor has done in this case, the claim by the debtor is affirmative rather than defensive. As such, it is subject to the one and three-year limitations provisions.” *Moor,* 784 F.2d at 633.

The lender defendants argue that, like *Moor,* Williams's suit was affirmative rather than defensive because he brought them into court. *Moor,* 784 F.2d at 633. Williams argues that his actions were defensive because he filed his complaint in response to the lender defendants' foreclosure sale.

13 The mere fact that the debtor is the plaintiff in a TILA case does not preclude a finding that the claim was raised defensively. *Matter of Coxson,* 43 F.3d 189, 194 (5th Cir.1995). The plaintiff in *Coxson* obtained a loan by executing a deed of trust on his property, defaulted on his mortgage payments, and filed for bankruptcy. *Id.* The bankruptcy court entered an agreed order that conditioned the automatic stay on the debtor's timely mortgage payments. A few months after the order was entered, the defendants sent Coxson notice that he was in default and moved to foreclose. In response to the defendants' foreclosure efforts, Coxson filed an adversary proceeding in the bankruptcy court, claiming that the loan documents violated the TILA. The court held that Coxson's acts were defensive because they were in response to the defendants' proof of claim filed in the bankruptcy court. *Id.* (citing *In re Jones,* 122 B.R. at 249) (holding that the recoupment claim was raised defensively in response to the creditor's foreclosure efforts). “[T]he filing of a proof of claim, by its very nature, is an action to collect a debt.” *In re Jones,* 122 B.R. at 250. “The right of a debtor in bankruptcy to invoke the doctrine of recoupment to reduce a secured proof of claim of a mortgage lender by the amount of statutory TILA damages has been recognized again and again in case law.” *In re Woolaghan,* 140 B.R. 377, 383 (Bankr.W.D.Pa.1992).

The present case is distinguishable from *Coxson* and *In re Woolaghan.* While Williams satisfies the first element of the *In re Smith* test, his claim fails the second element. Williams is not seeking to reduce the sums owed to the lender or to reduce its recovery, but is instead seeking affirmative relief for an independent claim.

14 15 In addition, Williams has not alleged or identified facts that would allow him to recover actual rather than statutory damages. Courts have held that when the debtor can prove only statutory damages, the recoupment exception does not apply. *In re Sallings,* 357 B.R. 646, 649 (Bankr.N.D.Ala.**2007**). To recover actual damages, a consumer must show that: (1) he relied on the particular terms; (2) the disclosure violation deterred him from inquiring into other alternatives; and (3) the alternatives would save money. *Perrone,* 232 F.3d at 436. “In essence, the statute is addressing and seeking to combat detrimental reliance.” *Id.* All Williams has done is request actual damages; that is not enough to satisfy the *Perrone* test. A claim for statutory damages is not asserted ***189** “as a defense to or denial of the creditor's claim, [and] it cannot be classified as a recoupment.” *Id.* at 650.

Williams's claim also fails the second element of the *In re Smith* test because he did not timely file a TILA claim in response to the lender defendants' foreclosure efforts. Instead, Williams filed bankruptcy petitions four times in response to notices of foreclosure. He did not assert a TILA claim until his use of the bankruptcy process to avoid foreclosure finally proved unavailing. In *Coxson,* by contrast, the debtor filed his TILA claims when the creditor first sought to foreclose. 43 F.3d 189. Similarly, in *In re Jones,* the debtor filed his TILA claim in response to the creditor's proof of claim “in

order to limit the extent of recovery by [the creditor] on its claim." 122 B.R. at 250.

In both *Coxson* and *In re Jones,* the courts held that the debtors met the recoupment exception because they promptly raised their TILA claims in response to the creditor's initial effort to foreclose or assert proof of claim. Williams did not raise his TILA complaint as a defense to the lender defendants' foreclosure notice in January 2003, December 2003, May 2004, or June 2005. In contrast to *Coxson* and *In re Jones,* Williams waited until after the bankruptcy court allowed the foreclosure sale to occur. Williams did not file his TILA claims until April 2006. This chronology makes it clear that Williams's claims for TILA damages were not raised defensively to reduce the amount of the lender defendants' claims, but as an affirmative claim.

The general statute of limitations for damages under TILA has run. Because Williams's claim was not raised defensively, he does not meet the recoupment exception. The lender defendants' summary judgment motion on the TILA claims is granted on the basis of limitations.

B. The Fair Debt Collection Practices Act Claim

16 The purpose of the Fair Debt Collection Practices Act ("FDCPA") is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). If the court finds that a party has violated the FDCPA, the court may hold that party liable for monetary damages. *Id.,* § 1692k.

Williams alleges that the lender defendants violated the FDCPA when they attempted to collect a debt without first obtaining verification. Williams claims that the lender defendants did not provide him with the following information required under the FDCPA:

(1) amount of the debt;

(2) name of the creditor to whom the debt was owed;

(3) statement that unless the plaintiff, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the defendant;

(4) statement that if the plaintiff notifies the defendant in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the defendant will obtain verification of the debt or a copy of a judgment against the plaintiff and a copy of such verification or judgment will be mailed to the plaintiff by the defendant; and

(5) statement that, upon the plaintiff's written request within the thirty-day period, the defendant will provide ***190** the plaintiff with the name and address of the original creditor, if different form the current creditor.

15 U.S.C. § 1692(g)(a)(1)-(5). Williams claims that the lender defendants violated the FDCPA by using "unfair or unconscionable" means to collect or attempt to collect a consumer debt. *Id.,* § 1692(f).

17 Williams's FDCPA claims fail because the lender defendants are not "debt collectors" under the statute. The term "debt collectors" refers to "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a) (6). That term does not include "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." *Id.,* § 1692(a)(6)(A). Mortgage companies collecting debts are not "debt collectors." *Perry v. Stewart Title Co.,* 756 F.2d 1197, 1208 (5th Cir.1985) (noting that the legislative history of the act indicates that a "debt collector" does not include the

consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned).[4] Because the lender defendants are not "debt collectors" as defined by the FDCPA, Williams's claim fails as a matter of law.

Williams also alleges that the lender defendants violated the FDCPA because Deutsche Bank lacked standing to foreclose on his property. (Docket Entry No. 11 at 1–2). In September 1995, Williams executed "Vendee Mortgage Trust 1995–3." When Deutsche Bank foreclosed on Williams's property in 2006, it claimed that it was acting under "Trust 1994–2." Williams claims that this discrepancy prevented Deutsche Bank from foreclosing on his property.

18 The apparent clerical or typographical error in the foreclosure documents did not deprive Williams of the due process afforded to debtors under the Texas Property Code and did not prevent Deutsche Bank from lawfully foreclosing. Williams received notice of default and acceleration and was given notice of the foreclosure sale under the Texas Property Code. The foreclosure notice and sale were not otherwise defective. *Hausmann v. Texas Sav. & Loan Ass'n,* 585 S.W.2d 796, 799 (Tex.App.-El Paso 1979, writ ref'd n.r.e.) (stating that the purpose of the foreclosure statute is to provide a minimum level of protection for the debtor). The clerical or typographical error did not change the fact that Deutsche Bank had the power to foreclose on Williams's property if he defaulted in his mortgage payments. Jacob Bass, the manager in the servicing/acquisitions department of Countrywide Home Loans, stated in his affidavit that Deutsche Bank was the proper entity to foreclose on Trust 1995–3 and 1994–2.[5] There is no competent controverting evidence.

Williams further alleges that the lender defendants should be held liable because their attorneys violated the FDCPA. This claim fails because vicarious liability has ***191** not been extended to lenders in the context of FDCPA claims. *Wadlington v. Credit Acceptance Corp.,* 76 F.3d 103, 108 (6th Cir.1996) ("We do not think it would accord with the intent of Congress, as manifested in the terms of the Act, for a company that is not a debt collector to be held vicariously liable for a collection suit filing that violates the Act only because the filing attorney is a 'debt collector.' ").

The lender defendants are entitled to summary judgment on Williams's FDCPA claims.

C. The Real Estate Settlement Procedures Act Claim

19 The Real Estate Settlement Procedures Act ("RESPA") is a federal statute designed to "insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of this country." 12 U.S.C. § 2601(a). The goal is to promote "more effective advance disclosure to home buyers and sellers of settlement costs." *Id.,* § 2601(b)(1).

20 Williams alleges that the lender defendants violated the RESPA by failing to meet the statute's timing requirements. (Docket Entry No. 1, Ex. C–1 at 11). In particular, Williams alleges that the lender defendants violated the RESPA's 15–day rule. Under the RESPA, the lender must give notice to the borrower "not less than 15 days before the effective date of transfer of the servicing of the mortgage loan." 12 U.S.C. § 2605(b)(2)(A). The lender must "notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person." *Id.,* § 2605(b)(1). "Effective date of transfer" means "the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan." *Id.,* § 2605(i)(1). Countrywide, the loan servicer, sent a letter to Williams on September 19, 1995 stating that the loan was in the process of being transferred. (Docket Entry No. 1, Ex. C–1 at 29). Taking this as the "effective date of the transfer," Williams alleges that the defendants did not give him the required notice.

Williams's claim is barred under the three-year statute of limitations. The RESPA provides:

> Any action pursuant to the provisions of section 2605 [the 15–day rule], 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction ... within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation.

12 U.S.C. § 2614. The violation of the 15–day rule occurred in 1995. Williams did not sue until 2005. Because Williams filed suit more than three years after the violation of the 15–day rule, he is barred from recovery. The defendants are entitled to summary judgment on this claim.

D. The Uniform Commercial Code ("UCC") Claim

Williams alleges that the lender defendants violated Article 9 of the UCC because they failed to acquire a UCC–1 lien on his property. [6] (Docket Entry No.1, Ex. C–1 at 24). Williams also alleges that the ***192** lender defendants never had him sign UCC1 lien papers. (*Id.*).

21 Article 9 of the UCC does not apply to the creation or transfer of a security interest in real property. TEX. BUS. & COM.CODE § 9.109(d)(11); *Kimsey v. Burgin,* 806 S.W.2d 571, 576 (Tex.App.-San Antonio 1991, writ denied) ("Chapter 9 does not apply to the creation or transfer of an interest in or lien on real estate."); *Huddleston v. Texas Commerce Bank–Dallas,* 756 S.W.2d 343, 347 (Tex.App.-Dallas 1988, writ denied).

To secure the Note for the loan, Williams executed a Deed of Trust secured by his residential property. Executing a deed of trust results in the "creation or transfer of an interest in or lien on real property." [7] Because this case involves the "creation or transfer of an interest in or lien on real property," Williams cannot recover under TEX. BUS. & COM.CODE §§ 9.101 *et seq.* The lender defendants are entitled to summary judgment on Williams's UCC claim.

E. The Breach of Fiduciary Duty Claim

22 Under Texas law, the elements of a cause of action for breach of fiduciary duty are: (1) that the plaintiff and defendant had a fiduciary relationship; (2) the defendant breached its fiduciary duty to the plaintiffs; and (3) the defendant's breach resulted in injury to the plaintiff. *Jones v. Blume,* 196 S.W.3d 440, 447 (Tex.App.-Dallas 2006, pet. denied). Williams's breach of fiduciary claim fails to meet these elements.

23 24 25 A cause of action for breach of fiduciary duty requires a fiduciary relationship between the parties. "In certain formal relationships, such as an attorney-client or trustee relationships, a fiduciary duty arises as a matter of law." *Meyer v. Cathey,* 167 S.W.3d 327, 330 (Tex.2005). However, "not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, **176**–177 (Tex.1997). "To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Associated Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 287 (Tex.1998).

26 Texas courts have held that the relationship between a borrower and lender is not a fiduciary one. *1001 McKinney Ltd. v. Credit Suisse First Boston Mortgage Capital,* 192 S.W.3d 20, 36 (Tex.App.-Houston [14th Dist.] 2005, pet. denied) ("Generally, the relationship between a borrower and a lender is an arm's length business relationship in which both parties are looking out for their own interests."); *Manufacturers Hanover Trust Co. v. Kingston Inv. Corp.,* 819 S.W.2d 607, 610 (Tex.App.-Houston. [1st Dist.] 1991, no writ) (holding as a general rule that a "bank and its customers do not have a special or confidential relationship").

27 Williams's claim also fails the second and third elements necessary for a breach of fiduciary duty claim. Although Williams alleges that the lender defendants breached their fiduciary duty, he does not specify what duty was breached or what injury was caused. Williams simply alleges that the lender defendants breached their fiduciary duty because "arguably the lender has the role of advisor and knows or should have known the borrower trusted him. In the alternative, the ***193** lender created a quasi-fiduciary relationship of trust and confidence, which at least gives rise to a duty of disclosure." (Docket Entry No. 1, Ex. C–1 at 35). The fact that a person trusts another "does not transform their business arrangement into a fiduciary relationship." *Meyer,* 167 S.W.3d at 331. Because Williams fails to raise a fact issue as to all three elements of his fiduciary duty claim, the defendants' summary judgment motion is granted.

F. The Equal Credit Opportunity Act Claim

28 Under the Equal Credit Opportunity Act ("ECOA"), a creditor must "provide a copy of an appraisal report to an application for credit that is to be secured by a lien on a dwelling." 12 C.F.R. § 202.14(a). The creditor must either (1) deliver the report or (2) give notice to the borrower that he or she has the right to receive the report. *Id.,* § 2601(a)(1)-(2). Because Williams's loan was secured by a lien on his home, the lender defendants had a duty to provide him a copy of this report. Williams alleges that the lender defendants failed to do so. The ECOA provides that "any creditor that fails to comply with a requirement imposed by the Act or this regulation is subject to civil liability for actual and punitive damages in individual or class actions." 12 C.F.R. § 202.17(b).

29 Williams's ECOA claim is barred by the statute of limitations. The ECOA provides:

> A civil action under the Act or this regulation may be brought in the appropriate United States district court without regard to the amount in controversy or in any other court of competent jurisdiction within two years after the date of the occurrence of the violation, or within one year after the commencement of an administrative enforcement proceeding or of a civil action brought by the Attorney General of the United States within two years after the alleged violation.

12 C.F.R. § 202.17(b)(2). The alleged violation occurred in September 1995 when the Note and Deed of Trust were transferred. Williams did not bring suit until April 2006, eleven years later. The lender defendants are entitled to summary judgment on the ECOA claim on the basis of limitations.

G. The Breach of Contract Claim

30 31 32 Williams alleges that the lender defendants breached the Note and Deed of Trust by wrongfully foreclosing on his property. (Docket Entry No. 1, Ex. C–1 at 26). Williams alleges that the lender defendants failed to give him notice of acceleration. Williams claims that the contract required the lender defendants to give him notice of acceleration before foreclosing, citing the following provision:

> If all or any part of the property or any interest in it is sold or transferred ... without Lender's prior written consent, Lender is in breach of contract if Lender exercises and [sic] option to accelerate without providing notice not less than 30 days from the date the notice is delivered or mailed within stating that Borrower must pay all sums secured by the Security Instrument.

(Docket Entry No. 1, Ex. C–1 at 27). The provision that Williams cited is not an acceleration clause but a "due-on-sale" clause.[8] "A 'due-on-sale' clause is a common provision in deeds of trust and mortgages. ***194** It gives a lender the right to demand full payment of the balance due on the loan secured by the deed of trust or mortgage if the borrower sells his interest in the property. In effect, it prohibits the

would-be buyer of the property from assuming the existing loan without prior approval of the lender." *Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1548 (5th Cir.1996). An acceleration clause specifies that if the debtor defaults on his mortgage payments, the lender may foreclose on the property. "The acceleration clause permits the lender to call due, upon default by the borrower, the entire 'indebtedness' of the borrower." *Bernie's Custom Coach of Texas, Inc. v. Small Business Admin.,* 987 F.2d 1195, 1197 (5th Cir.1993).

In addition, the Note and Deed of Trust provided for a waiver of notice of acceleration:

> If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, at the option of the holder, this note shall become immediately due and payable without notice and the lien given to secure its payment may be foreclosed.

(Docket Entry No. 6, Ex. 1 at 1).

The lender defendants did not breach the contract when they foreclosed on the property. The defendants are entitled to summary judgment on the breach of contract claim.

H. The Breach of the Automatic Stay Claim

33 34 35 36 The filing of a petition in bankruptcy operates to stay actions and proceedings against the debtor. 11 U.S.C. § 362(a). "The stay is effective upon the filing of the petition even though the parties have no notice of its existence." *Huddleston v. Texas Commerce Bank–Dallas,* 756 S.W.2d 343, 345 (Tex.App.-Dallas 1988, writ denied). In general, acts taken in violation of the automatic stay are void and without legal effect. *Kalb v. Feuerstein,* 308 U.S. 433, 438, 60 S.Ct. 343, 84 L.Ed. 370 (1940). However, "the bankruptcy court may take some action, such as annulling the stay, to retroactively validate actions taken in violation of the stay." *Claude Regis Vargo Enter., Inc. v. Bacarisse,* 578 S.W.2d 524, 528 (Tex.Civ.App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.). A foreclosure sale conducted in violation of the automatic stay remains invalid unless the bankruptcy court annuls the stay. *Id.*

37 A bankruptcy court's dismissal of a bankruptcy proceeding terminates the automatic stay. "[U]nless the court orders otherwise, dismissal of a bankruptcy case revests property in the entity in which the property was vested immediately before the commencement of the case." 11 U.S.C. § 349(b)(3). The "dismissal of a petition terminates [the] automatic stay and restore[s] rights of creditor to their position as of commencement of the case." *Huddleston,* 756 S.W.2d at 346.

38 Williams filed four bankruptcies. The bankruptcy court dismissed the first three. Williams filed his fourth bankruptcy petition on June 1, 2005. Although Countrywide posted Williams's property for foreclosure and sold it on June 7, 2005, Countrywide and Williams agreed to rescind the sale. The automatic stay was conditioned on Williams making the mortgage payments. Under the court order, if Williams defaulted in his payments, the defendants had the right to foreclose on the property:

> In the event that Movant does not receive any payments by the dates set forth ... Movant shall send written notice ... to Debtor, Counsel for Debtor/Debtors, and allow a 15–day period from the date of such written notice to ***195** cure such delinquent payments.... In the event Debtor fails to cure such delinquent after one notice of default, the Automatic Stay shall terminate as to the Movant without further recourse to this Court and Movant shall be allowed to take any and all steps necessary to exercise any and all rights [including foreclosure] it may have.

(Docket Entry No. 6, Ex. 7).

When Williams defaulted on his payments in April 2006, the automatic stay was lifted.[9] The property was sold to Deutsche Bank in a foreclosure sale on April 4, 2006. Because the automatic stay was conditional, and because Williams did not satisfy the condition, the lender defendants did not violate the automatic stay when they foreclosed on the property. The automatic stay lasted only as long as Williams made his mortgage payments. As soon as Williams defaulted in those payments, the automatic stay was lifted. The lender defendants did not foreclose on the property until after Williams defaulted on his mortgage payments. The lender defendants did not wrongfully foreclose on the property. They are entitled to summary judgment on this claim.

I. The Texas Deceptive Trade Practices Act Claim

39 40 The purpose of the Texas Deceptive Trade Practices Act ("DTPA") is to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." TEX. BUS. & COM.CODE § 17.44(a). To maintain a private cause of action under the DTPA, the plaintiff must be a consumer.[10] *Flenniken v. Longview Bank & Trust Co.,* 661 S.W.2d 705, 706 (Tex.1983); *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535 (Tex.1981); *Riverside Nat'l Bank v. Lewis,* 603 S.W.2d 169 (Tex.1980).

41 The DTPA applies to a loan transaction if the borrower's objective is to use the loan to purchase goods or services. *La Sara Grain v. First Nat'l. Bank of Mercedes,* 673 S.W.2d 558, 566 (Tex.1984); *Flenniken,* 661 S.W.2d at 707 (holding that the lender was subject to the DTPA because the borrower's purpose in obtaining the loan was the purchase of a house). "Goods" are defined as "tangible chattels or real property purchased or leased for use." TEX. BUS. & COM.CODE § 17.45(1). "Services" are defined as "work, labor, or service purchased or leased for use." *Id.,* § 17.45(2). Because Williams used the loan to purchase goods or services, the DTPA applies.

42 Williams alleges that the lender defendants violated the DTPA because they accelerated the Note and foreclosed on Williams's property without giving him the opportunity to cure. Williams alleges that not giving him the opportunity to cure was "unconscionable." Under the DTPA, a person may bring an action for "any unconscionable action or course of action by any person." TEX. BUS. & COM.CODE § 17.50(a)(3).

The loan documents clearly stated that notice of acceleration was not required if Williams defaulted on his payments. (Docket Entry No. 6, Ex. 1 at 1). In addition, the record shows that the lender ***196** defendants gave Williams notice of acceleration. Williams received notice of his default on March 13, 2006. A letter sent from the lender defendants stated that Williams had defaulted in his payments, that the note was accelerated, and that a foreclosure sale would occur on April 4, 2006.[11] The lender defendants gave Williams notice of foreclosure more than twenty days before the foreclosure sale, pursuant to TEX. PROP.CODE § 51.002(d).[12] The record shows that Williams had ample opportunity to cure. The claim of a DTPA violation based on the lack of notice of acceleration is without basis as a matter of law.

In addition, Williams's DTPA claim is barred by the two-year statute of limitations:

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

TEX. BUS. & COM.CODE § 17.56(a). Williams's filed his DTPA claim eleven years

after the violation, well past the statute of limitations. The lender defendants are entitled to summary judgment on this claim.

J. The Unfairness Allegation Claim

Williams alleges that the "lender's practice of nondisclosure is offensive to society's sense of justice; the practice offends public policy, taking advantage of the elderly, the practice is immoral, unethical ..." (Docket Entry No.1, Ex. C–1 at 31). A general claim of "unfairness" is not a sufficient basis for relief. The defendants are entitled to summary judgment on this claim.

IV. Conclusion

43 The lender defendants' summary judgment motion is granted on all claims. This case is dismissed by separate order. [13]

MEMORANDUM AND OPINION

Wayne Williams sued the defendants, Countrywide Home Loans Inc., Banker's Trust of California, Deutsche Bank National Trust Company (together, the "lender defendants"), and the Secretary of Veterans Affairs. [1] Williams alleges that the lender defendants violated federal and state statutes governing mortgage documents, breached the mortgage lending contract, violated the automatic stay that was triggered when Williams filed for bankruptcy, and committed other offenses related to his mortgage loan.

This court previously granted summary judgment for the lender defendants and dismissed this case. (Docket Entry ***197** Nos. 13, 14). Williams has filed a "motion for new trial on the granting of defendants' motion for summary judgment and order of dismissal." (Docket Entry No. 15). In that motion, Williams reasserts the same legal arguments made before judgment was entered.

Based on a careful review of the motion, the applicable law, and the record, this court denies Williams's motion. The reasons are explained below.

I. The Applicable Legal Standard

A motion for a new trial following a summary judgment is treated as a motion to reconsider entry of summary judgment under Federal Rule of Civil Procedure 59(e). *Piazza's Seafood World, LLC v. Odom,* 448 F.3d 744, 748, n. 9 (5th Cir.2006) (citing *Patin v. Allied Signal, Inc.,* 77 F.3d 782, 785 n. 1 (5th Cir.1996)); *see also Harcon Barge Co. v. D & G Boat Rentals, Inc.,* 784 F.2d 665, 669–70 (5th Cir.1986) (" '[A]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label.' ") (quoting 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1], at 4–67 (1985)).

44 A Rule 59(e) motion "calls into question the correctness of a judgment." *Templet v. HydroChem Inc.,* 367 F.3d 473, 478–79 (5th Cir.2004) (citing *In re Transtexas Gas Corp.,* 303 F.3d 571, 581 (5th Cir.2002)). "A motion to alter or amend the judgment under Rule 59(e) 'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.' " *Rosenzweig v. Azurix Corp.,* 332 F.3d 854, 863–64 (5th Cir.2003) (quoting *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990)).

45 Relief is also appropriate when there has been an intervening change in the controlling law. *Schiller v. Physicians Res. Group Inc.,* 342 F.3d 563, 567 (5th Cir.2003). The Fifth Circuit warns that altering, amending, or reconsidering a judgment under Rule 59(e) is an extraordinary remedy that courts should use sparingly. *Templet,* 367 F.3d at 479; *see also* 11 CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2810.1, at 124 (2d ed.1995). The Rule 59(e) standard "favors denial of motions to alter or amend a judgment." *S. Constructors Group, Inc. v. Dynalectric Co.,* 2 F.3d 606, 611 (5th Cir.1993).

II. Analysis

Williams presents three legal arguments, all of which he made previously. Williams presents no new facts and alleges no intervening change in the law.

Williams first argues that an unauthorized party foreclosed on his property. (Docket Entry No. 15 at 2–4). Williams argues that there is no proof in the record that Rex Kesler, the person responsible for signing the foreclosure sale in April 2006, was appointed as a substitute trustee. (*Id.*). Williams made this argument in his response to the defendants' motion for summary judgment. (Docket Entry No. 11 at 1). "Defendant's Exhibit 3 attached to its Motion for Summary Judgment shows very clearly that Plaintiff's mortgage was assigned to Vendee Mortgage Trust 1995–3. There is no evidence, or even an allegation, of a change in ownership since then. That means that only someone working on behalf of Trust 1995–3 had the right to enforce any alleged defaults on the Note and Deed of Trust." (Docket Entry No. 11 at 1). This court considered and rejected this argument as a basis for relief, given the limitations and other bars, in granting the lender defendants' summary judgment motion.

Second, Williams argues that even if Rex Kesler was the substitute trustee for ***198** Vendee Mortgage Trust 1994–2, he did not have the power to foreclose on Mortgage Trust 1995–3. (Docket Entry No. 15 at 4–5). Williams also made this argument in his response to the defendants' summary judgment motion, (Docket Entry No. 11 at 2), and this court did not find that it precluded the entry of judgment.

Third, Williams argues that the court should not follow the defendants' "misnomer" argument. (Docket Entry No. 15 at 6–8). "The Plaintiff strongly disagrees that the foreclosure and eviction authorized by a party that did not show it had the right to do so can be summarily excused as a mere misnomer. Each trust [Vendee Mortgage Trust 1995–2 and 1995–3] is a separate, distinct, and unique legal entity that can only exist as a creature of law." (Docket Entry No. 15 at 2). Williams maintains that Vendee Mortgage Trust 1995–2 is not the same as Vendee Mortgage Trust 1995–3, and that the lender defendants lacked standing to foreclose on Vendee Mortgage Trust 1995–3. (*Id.*). Williams made this argument, without success, in his response to defendants' summary judgment motion. (Docket Entry No. 11 at 2).[2] He does not present an additional basis for the argument here.

Williams has failed to show a manifest error of law or fact. Instead, Williams has presented legal arguments previously ruled on by this court. His motion for new trial is denied.

III. Conclusion

The motion for a new trial is denied. (Docket Entry No. 15).

Footnotes

1 A person is a "consumer" if the "party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1602(h).

2 A "creditor" is a person "who (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness, or if there is no such evidence of indebtedness, by agreement." 15 U.S.C. § 1602(f)(1)-(2).

3 "Conceptually, however, statutory and actual damages perform different

functions: statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain. Actual damages may be recovered where they are probably caused by the violation. In this way, the damage measures are complementary rather than duplicative." *Perrone v. Gen. Motors Acceptance Corp.,* 232 F.3d 433, 436 (5th Cir.2000).

4 Williams also fails to prove an essential part of the Section 1692(f) claim because he does not identify what actions were "unconscionable" or "unfair."

5 "As successor-in-interest to Bankers Trust Company of California, N.A., Deutsche Bank National Trust Company is also the trustee for Vendee Mortgage Trust 1994–2. As such, Deutsche Bank National Trust Company is the trust entity with authority to enforce the notes and deeds of trust held in both Vendee Mortgage 1994–2 and 1995–3." (Docket Entry No. 12, Bass's Aff., ¶ 3).

6 Texas adopted Chapter 9 of the UCC through TEX. BUS. & COM.CODE §§ 9.01 *et. seq. Merritt–Campbell, Inc. v. RxP Products, Inc.,* 164 F.3d 957, 964 (5th Cir.1999).

7 A "mortgage" means "a consensual interest in real property, including fixtures, that secures payment or performance of an obligation." TEX. BUS. & COM.CODE § 9.102(a)(55).

8 A "due-on-sale" clause has also been defined as a "mortgage provision giving the lender the option to accelerate the debt if the borrower transfers or conveys any part of the mortgaged real estate without the lender's consent." BLACK'S LAW DICTIONARY 538 (8th ed.2004).

9 "In the event Debtor files another petition for an order of relief under Title 11, then the automatic stay of 11 U.S.C. § 362(a) shall not apply to Movant and the property described above." (Docket Entry No. 6, Ex. 7).

10 A consumer is "an individual who seeks or acquires by purchase or lease any goods or services." TEX. BUS. & COM.CODE § 17.45(4).

11 "Payment of the past due balance on the Debt has not been received by the Mortgage Servicer. Because of the default, the Mortgagee has elected to accelerate the maturity of the debt." (Docket Entry No.6, Ex.8).

12 "Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or other contract lien." TEX. PROP.CODE § 51.002(d).

13 Williams's claims against the Secretary of Veterans Affairs are dismissed without prejudice for failure to effect service. The dismissal of a defendant named in the complaint but not served with process results in the dismissal without prejudice. *See Nagle v. Lee,* 807 F.2d 435, 438 (5th Cir.1987).

1 Williams's claims against the Secretary of Veterans Affairs were previously dismissed without prejudice for failure to effect service.

2 This court held that the "apparent clerical or typographical error in the foreclosure documents did not deprive Williams of the due process afforded to debtors under the Texas Property Code and did not prevent Deutsche Bank from lawfully foreclosing." (Docket Entry No. 13 at 19).

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WestlawNext

RELATED TOPICS

Constructive Trust of Property or Equitable Lien

Sales

Remedies of Seller

Purchase Money of Personal Property

Statutory Liens

Common Law Lien Rights

Williams v. Greer
Court of Civil Appeals of Texas, Dallas. | November 12, 1938 | 122 S.W.2d 247 *(Approx. 5 pages)*

WILLIAMS
v.
GREER ET AL.

Appeal from Dallas County Court; Tom Nash, Judge.

Suit by A. B. Williams against A. L. Greer and another for debt, to enforce a lien, and for a writ of sequestration. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed and cause remanded.

West Headnotes (13)

Change View

1 **Courts** Amount Claimed or Value of Property
The alleged value of the property on which a lien is sought to be foreclosed determines the jurisdiction of the court.

1 Case that cites this headnote

2 **Chattel Mortgages** Pleading
Where a petition, which does not allege the value of the mortgaged property or which does not sufficiently allege a lien thereon, will not support a judgment, it is subject to general demurrer.

3 **Liens** Nature and Incidents in General
A "lien," in its most extensive significance, is a charge on property for the payment or discharge of a debt or duty.

4 **Liens** Nature and Incidents in General
Liens are common-law, equitable, or statutory liens, depending on the source from which they are derived.

1 Case that cites this headnote

5 **Liens** Nature and Incidents in General
A "common-law lien" is a right extended to a person to retain that which is in his possession belonging to another, until the demand or charge of the person in possession is satisfied.

1 Case that cites this headnote

6 **Liens** Equitable Liens
After a transaction resolves itself into a security, whatever may be its form,

and whatever name the parties may choose to give it, it is an "equitable lien."

3 Cases that cite this headnote

9 **Sales** Nature and Grounds in General

Where buyer allegedly obtained possession of automobile by the fraudulent means of giving a check in part payment and then having payment on the check stopped, title to the automobile did not pass, and seller had a lien thereon.

1 Case that cites this headnote

10 **Sales** Nature and Grounds in General
Vendor and Purchaser Price or Consideration and Mode or Medium of Payment

Where a check is given in payment of real or personal property, the vendor has a lien on the property by implication, as between the parties and their privies with notice, until the check is paid, unless the lien is waived by the vendor.

11 **Sales** Waiver, Loss or Discharge
Vendor and Purchaser Waiver, Loss, or Discharge of Lien

Where a check is given in payment of real or personal property, a voluntary surrender of possession does not indicate a waiver of the vendor's right to a lien as between the parties and their privies with notice until the check is paid.

1 Case that cites this headnote

12 **Courts** Allegations and Prayers in Pleadings

In suit for debt in the sum of $90 and to enforce a lien on an automobile, the county court had jurisdiction, where it was alleged that plaintiff delivered possession of automobile worth $325 to defendant for $235 in cash and a check for $90, and that defendant fraudulently stopped payment of the check.

1 Case that cites this headnote

13 **Appeal and Error** Jurisdiction

On appeal, every presumption must be indulged in favor of the jurisdiction of the trial court as against a general demurrer.

1 Case that cites this headnote

12 **Liens** Equitable Liens

Where one is deprived of the possession of real or personal property by artifice or fraud of another, equity implies and declares out of general consideration of right and justice, as between the parties, a lien on the property to secure the charge legally or equitably assessed against it.

1 Case that cites this headnote

13 **Liens** Equitable Liens

Equity will apply the relations of the parties and the circumstances of their dealings in establishing a lien based on right and justice, since it is not necessary that a lien be created by express contract or by operation of statute.

2 Cases that cite this headnote

Attorneys and Law Firms

***247** J. L. McNees and W. C. Graves, both of Dallas, for appellant.

***248** W. H. Reid and Tom Greer, both of Dallas, for appellees.

Opinion

BOND, Chief Justice.

Appellant, A. B. Williams, as plaintiff, instituted this suit in a county court at law, Dallas County, against appellees, A. L. Greer and Tom Greer, as defendants, for debt in the sum of $90 and to enforce a lien on an automobile alleged to be of the reasonable market value of $325; also, applied for a writ of sequestration, alleging that the value of the automobile was $325 and that "plaintiff fears the defendants will injure, ill-treat, waste or destroy said automobile during the pendency of the suit".

The trial court sustained appellees' general demurrer to plaintiff's petition, quashed the sequestration proceedings, and dismissed the suit, assigning as grounds therefor that plaintiff's suit only involved an amount in the sum of $90, below the jurisdiction of that court, and no pleadings existed "upon which the plaintiff can predicate an equitable lien, or any other kind or character of lien upon the automobile in question, thus the county court was without jurisdiction to entertain the suit". In this, we think, the court committed error.

1 2 The courts of this state uniformly hold that the alleged value of the property upon which a lien is sought to be foreclosed determines the jurisdiction of the court; and, where a petition which does not allege the value of the mortgaged property or which does not sufficiently allege a lien thereon, will not support a judgment, thus, subject to general demurrer. Campsey v. Brumley, Tex.Com.App., 55 S.W.2d 810.

Plaintiff's petition, in effect, alleged that on or about the 13th day of April, 1937, he contracted to sell and did sell to the defendants one Master Chevrolet sedan, 1935 model, engine number 4789086, license number 262405, for a cash consideration of $325; that the defendants gave to him $235 in cash and a check for $90 on Grayson County State Bank, Sherman, Texas, executed by one E. E. Saunders, payable to A. L. Greer and endorsed by A. L. Greer and Tom Greer; and that, on the faith of the cash paid and the check given, plaintiff delivered possession of the automobile to the defendants. Plaintiff further alleges that, after receiving the check endorsed as aforesaid, without his knowledge or consent, one of the defendants inserted the word "to" after the signature of A. L. Greer so as to make the endorsement read: "A. L. Greer to Tom Greer", and that, with no knowledge of the change in endorsement, the automobile was delivered to the defendants; and, immediately thereafter, the defendant Tom Greer wired the Grayson County State Bank: "Stop payment, E. E. Saunder's check Ninety Dollars specially endorsed. Does not bear Tom Greer's endorsement", thereby stopping payment on the check. Plaintiff further alleged that the artifice practiced in the endorsement of the check and the stopping payment thereof was done for the avowed purpose of defrauding plaintiff of the possession of the automobile and the value of part of the selling price, and on account thereof, he has a valid and subsisting lien on the automobile to the amount of $90.

3 4 5 6 9 78 A lien, in its most extensive significance, is a charge upon property for the payment or discharge of a debt or duty. Liens may be broadly classified as common law, equitable and statutory, depending on the source from which they are derived. A common law lien is a right extended to a party to retain that which is in his possession belonging to another, until the demand or charge of the person in possession is satisfied. Common law liens are used to designate all the various charges of debt upon land or personal effects which are created by statute or

recognized in equity, although neither connected with nor dependent upon possession. Thus, we have the lien of a judgment, the lien of an execution, the lien of a partner, the lien of a pledgee, the lien of a legal or equitable mortgage, and various other named charges which are denominated liens. After a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, is in equity a lien. Hence, one deprived of the possession of real or personal property by artifice or fraud of another, equity implies and declares out of general consideration of right and justice, as between the parties, a lien on the property to secure the charge legally or equitably assessed against it. It is not necessary that a lien is created by express contract or by operation of the statute; courts of equity will apply the relations of the parties and the circumstances of their dealings in establishing a lien based on right and justice. 37 C.J. 307, 308. On the facts alleged in this case, defendants' possession ***249** of the automobile was obtained by fraudulent means, thus, the title to the automobile did not pass and, constructively, plaintiff still retained the legal possession of the automobile, although in the hands of the defendants, until the cash consideration was paid; and, the mere fact that the actual possession was extended to the defendants, under circumstances alleged, does not destroy plaintiff's charge against it for the payment of the consideration.

In the case of American Railway Express Co. v. Voelkel, Tex.Com.App., 252 S.W. 486, goods were shipped C.O.D. by the seller, a supply company, and were delivered without the payment of the purchase price. The Commission of Appeals held that, where the seller delivers personal property sold to the carrier under C.O.D. terms by which the carrier is to collect at destination from the consignee the purchase price, the seller has the right of possession of the goods until payment of the purchase price, and that this right of possession is in the nature of a lien on the goods. In dealing with the question, the court pointedly asked and answered the question [page 488]: “Do the courts of Texas recognize a lien in favor of the supply company for the C.O.D. payment of $1,080.? We think they do.” (Citing authorities.) And, in the cases cited, the court, with approval, quoted from Frech v. Lewis, 218 Pa. 141, 67 A. 45, 11 L.R.A.,N.S., 948, 120 Am.St.Rep. 864, 11 Ann.Cas. 545: “Possession, however, having passed, and the buyer, by the act of the seller, having been invested with the indicia of ownership, the policy of our law requires that this situation--the possession in one and the right of property in another-- shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right, in such case, to reclaim his goods; but he must do so promptly; otherwise he will be held to have waived his right, and can only thereafter look to the buyer for the price.”

In Denny et al. v. White House Lumber Co. et al., 54 S.W.2d 86, the Commission of Appeals, approved by the Supreme Court, Judge Critz, for the court, said [page 87]: “As already shown, the Gibson Supply Company sold this casing to McCorkle as a cash transaction. McCorkle gave his check therefor at the time it was purchased by and delivered to him. The check was worthless and never paid. Under such a record the title to this casing remained in the vendor, Gibson Supply Company, and never passed to McCorkle. Lang et al. v. Rickmers, 70 Tex. 108, 7 S.W. 527.”

10 11 So, we think, where a check is given in payment of real or personal property, the vendor has a lien on the property by implication, as between the parties and their privies with notice, until the check is paid, unless the lien is waived by the vendor. A voluntary surrender of possession as suggested by pleadings in this case does not indicate a waiver of the vendor's rights in the property.

12 13 We conclude that the pleadings were sufficient to show jurisdiction in the county court, and nothing in the record to show otherwise, no statement of facts accompanying this appeal, and every presumption must be indulged in favor of the jurisdiction of the court as against a general demurrer; therefore, the judgment of the court below is reversed and cause remanded.

Reversed and remanded.

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52 S.W.3d 171 (2001)

David WILLIAMS, in his capacity as Sheriff of Tarrant County, Texas, and Tarrant County, Texas, Petitioners,

v.

Ruth Maree LARA and Michael Huff, Respondents.

No. 99-0273.

Supreme Court of Texas.

Argued February 23, 2000.
Decided June 28, 2001.

174 *174 Russell A. Friemel, Van Thompson, Jr., Assistant District Attorney, Kristi LaRoe, Office of the Criminal District Attorney, Fort Worth, for Petitioners.

Laurance L. Priddy, Aledo, Richard A. Rohan, Carrington Coleman Sloman & Blumenthal, Dawn Ryan Budner, Bell Nunnally &
175 Martin, Barbara M.G. Lynn, Christopher John Scanlan, Carrington *175 Coleman Sloman & Blumenthal, Dallas, for Respondents.

Justice HANKINSON delivered the opinion of the Court.

This case involves a dispute over a religious-education program in a Tarrant County jail facility. Our inquiry focuses on the Chaplain's Education Unit (CEU), a separate unit within the Tarrant County Corrections Center (TCCC), where inmates can volunteer for instruction in a curriculum approved by the sheriff and director of chaplaincy at the jail as consistent with the sheriff's and chaplain's views of Christianity. Ruth Maree **Lara** and Lee Huff, former inmates at the TCCC, and Dr. Ronald Flowers, a Tarrant County resident, sued Tarrant County and its sheriff, David **Williams**[1] (collectively, "the County"), for operating the CEU in violation of the Establishment, Free Exercise, and Equal Protection Clauses of the United States and Texas Constitutions, and for violating their civil rights under 42 U.S.C. § 1983. The plaintiffs asserted claims for damages, injunctive and declaratory relief, and attorney's fees.

This appeal presents two principal questions: first, whether any of the plaintiffs have standing to assert their claims; and second, whether the operation of the CEU is an unconstitutional establishment of religion. The County contends that the plaintiffs do not have standing to obtain the relief they seek. Alternatively, it urges that the CEU's purpose is secular and that its operation is not unconstitutional. Flowers and **Lara** respond that they have standing as Tarrant County taxpayers, and Huff and **Lara** respond that they have standing as former TCCC inmates. Collectively, the plaintiffs argue that the CEU operates to advance the personal religious beliefs of the unit's administrators. They further maintain that involving county employees in the CEU's operation not only excessively entangles the government with religion, but also improperly suggests that the County favors the religious views taught in the CEU over the views of other religions or nonreligion.

In the trial court the parties filed cross-motions for summary judgment. Concluding that the CEU program was constitutional, the court granted the defendants' summary-judgment motion, denied the plaintiffs' motions, and ordered that the plaintiffs take nothing. The court of appeals affirmed in part, and reversed and remanded in part. 986 S.W.2d 310. The court of appeals determined that Flowers lacked standing, but that **Lara** and Huff had standing as former inmates. *Id.* at 315. In considering the parties' Establishment Clause claims, the court concluded that fact issues precluded summary judgment for either side. It therefore reversed and remanded for the trial court to determine whether the operation of the CEU violates the Establishment Clauses of our state and federal constitutions. *Id.* at 319. The court affirmed the trial court's judgment favorable to the defendants in all other respects, including its disposition of the plaintiffs' Free Exercise, Equal Protection, and section 1983 claims. *Id.* at 320-23.

176 We disagree with the court of appeals' conclusions concerning standing. Because public funds are expended in running the CEU, we conclude that Flowers has standing as a taxpayer to enjoin its operation. We also conclude that while **Lara** and Huff have standing as former inmates to pursue monetary relief, they lack standing to pursue injunctive and declaratory relief; those

claims are moot. We further disagree with the court of appeals' conclusion that *176 the Establishment Clause dispute in this case presents a fact question. Instead, we conclude as a matter of law that based on the record in this case, the County's operation of the CEU is an unconstitutional establishment of religion. Therefore, the trial court should determine whether injunctive relief, as sought by Flowers, is appropriate, and whether **Lara** is entitled to damages under section 1983. We also disagree with the court of appeals' conclusion concerning Huff's free-exercise complaint. We conclude that fact issues preclude summary judgment on Huff's free-exercise challenge, and thus whether his free-exercise rights were violated is again an issue for the trial court. Finally, because no party with standing to do so seeks monetary relief for violations of the Equal Protection Clause, we cannot address the merits of the parties' equal-protection complaint. For these reasons, we vacate in part and reverse in part the court of appeals' judgment, dismiss for want of jurisdiction the equal-protection claims, render judgment declaring the operation of the CEU unconstitutional, and remand the remaining claims to the trial court for further proceedings consistent with this opinion.

I. Background

The Tarrant County Corrections Center is a county jail facility that houses inmates who are serving sentences, awaiting trial, or awaiting transfer to the Texas Department of Criminal Justice. The Chaplain's Education Unit is one of many jail pods, or cluster of jail cells within the TCCC, where inmates live. Tarrant County, at the behest of Warden James Skidmore and other county employees, created the original CEU in 1992. It was initially open only to male inmates, but a women's CEU was added the following year. Admission to the CEU is voluntary. To be admitted, an inmate must receive security clearance. He or she also must sign an "Application and Agreement," acknowledging that the CEU is "based on orthodox Christian biblical principles" and confirming a willingness to "cooperate fully with the program." Inmates are admitted into the CEU for 120 days and then released back into the jail's general population.

The CEU's purported goals are to promote rehabilitation and reduce violence, which, according to the Director of Chaplaincy, Hugh Atwell,[2] are best accomplished through the teaching of what **Williams** and Atwell labeled "orthodox Christianity." Atwell explained their views as "generally believing in Jesus Christ as deity, with the Bible being the scripture that is utilized in that belief system ... and that the scripture is holy and it is accepted as an infallible truth," and that a person must be "born again" to attain salvation. Sheriff **Williams** and Chaplain Atwell testified that they would not allow instructors to discuss any other religious viewpoint, and the sheriff acknowledged that he would limit what could be taught in the CEU to that which comported with his own personal religious views. As part of the CEU program, inmates are taught in accordance with those views at least four hours a day. They spend the rest of their day completing assignments, studying the Bible, and reviewing other religious books or videotapes. Volunteer chaplains teach the inmates using donated materials. To maintain their positions, the volunteer chaplains must remain members in good standing of a local church.

Sheriff **Williams** had ultimate authority over and responsibility for the county jail, *see* Tex. Loc. Gov't Code § 351.041, which in
177 this case includes the CEU and its *177 curriculum. Chaplain Atwell was second-in-command. Like the sheriff, he was a paid employee of Tarrant County. Chaplain Atwell interviewed and selected the CEU's volunteer instructors, who were subject to background checks, and met with them weekly. He also met weekly with Sheriff **Williams** to apprise him of the CEU's progress and to discuss periodically the CEU's curriculum. Directly under Chaplain Atwell was Volunteer Chaplain Don Anderson, the CEU Director. Anderson was responsible for the CEU's daily operation. He was not a county-paid employee but was required to work a minimum of thirty hours a week to retain his position. He too participated in interviewing instructors and determining the appropriate curriculum for the CEU.

Except for a Tuesday night service, which is open to the jail's general population but follows the same curriculum as does the CEU, living in the CEU is the only opportunity county jail inmates have for any type of group religious study. Inmates outside the CEU may meet with spiritual advisors, but the advisor's local religious body must grant him or her permission to represent the religion, and the meeting must occur across a glass window via telephone. Sheriff **Williams** and Chaplain Atwell expressed a willingness to allow representatives from other religions to take part in the Tuesday night service, but only if those representatives taught from the CEU curriculum.

Plaintiffs Ruth Maree **Lara** and Lee Huff are former TCCC inmates who did not participate in the CEU program. They, along with Dr. Ronald Flowers, a Tarrant County resident and taxpayer, sued Tarrant County and Sheriff **Williams** for operating the CEU in violation of the Establishment, Free Exercise, and Equal Protection Clauses of the United States and Texas Constitutions, and for violating their civil rights under 42 U.S.C. § 1983. *See* U.S. Const. amends. I, XIV; Tex. Const. art. I, §§ 3, 3a, 6, 7. They seek

damages, injunctive and declaratory relief, and attorney's fees.

In the trial court the parties filed cross-motions for summary judgment, each side urging that the CEU is either constitutional or unconstitutional as a matter of law. The plaintiffs moved for partial summary judgment requesting only declaratory relief and acknowledging that assessing any other relief would require a factual inquiry. The court initially denied the motions on public-policy grounds. Later, a second judge who presided over the proceedings indicated her intent to reconsider the summary-judgment motions. The parties filed an agreement pursuant to Texas Rule of Civil Procedure 11 providing, in part, that the court could consider their earlier filed motions. **Lara** submitted a renewed motion for partial summary judgment, while Huff and Flowers chose to rely on their previous motion. The County again moved for summary judgment.

Four TCCC inmates who were then participating in the CEU program filed a petition in intervention. They asserted that granting the plaintiffs' partial summary-judgment motion would infringe upon the free exercise of their religious beliefs. **Lara** moved to strike the intervention.

Upon concluding that there were no questions of material fact to be determined, the trial court granted the County's summary-judgment motion, thereby upholding the constitutionality of the CEU program, and denied the plaintiffs' motions, ordering that the plaintiffs take nothing. The court also granted **Lara's** motion to strike the intervention. The plaintiffs appealed. The court of appeals affirmed in part, and reversed and remanded in part. 986 S.W.2d 310.

178 *178 The court of appeals first addressed standing. Because it determined that public funds are not expended in administering the CEU, the court concluded that Flowers and **Lara** did not have standing as taxpayers to enjoin its operation. *Id.* at 314-15. But the court held that **Lara** and Huff had standing as former TCCC inmates. *Id.* at 315-16. The court reasoned that **Lara's** and Huff's standing arose from the "capable of repetition, yet evading review" exception to the mootness doctrine. *Id.* at 316. The court next concluded that under the standard set out in *Guaranty Federal Savings Bank v. Horseshoe Operating Co.,* 793 S.W.2d 652, 657 (Tex.1990), the trial court did not abuse its discretion by striking the petition in intervention.[3] 986 S.W.2d at 316.

In considering whether the County's operation of the CEU constituted an impermissible establishment of religion, the court determined that the existence of fact issues precluded summary judgment for any party. *Id.* at 319. It therefore reversed and remanded for the trial court to determine whether the operation of the CEU violates the Establishment Clauses of our state and federal constitutions. *Id.* at 320. The court affirmed the trial court's judgment in all other respects, including the trial court's conclusion that the CEU violates neither the Free Exercise and Equal Protection Clauses nor the parties' rights under 42 U.S.C. § 1983. *Id.* at 320-24.

The plaintiffs petitioned this Court for review, again complaining that the operation of the CEU violates the Establishment Clause as a matter of law. Additionally, **Lara** and Flowers contend that the court of appeals erred in concluding that they lack standing as taxpayers, and Huff alleges that the court erred in holding that the County did not violate his rights under the Free Exercise and Equal Protection Clauses. The County also petitioned for review. It complains that the court of appeals erred in concluding that **Lara** and Huff have standing as former TCCC inmates and in remanding to the trial court the plaintiffs' Establishment Clause claims. We granted the parties' petitions to determine whether the County's operation of the CEU is unconstitutional. We first decide who has standing to assert which claims.

II. Standing

Standing is a constitutional prerequisite to maintaining suit in either federal or state court. *See Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 444 (Tex.1993). The parties in this case assert standing on various grounds. Alleging taxpayer standing, Flowers relies on his status as a Tarrant County property taxpayer, and **Lara** relies on her payment of rent and sales tax. Alternatively, **Lara** and Huff claim that as former TCCC inmates, they have suffered injuries sufficiently particular to confer standing. Relying on state law to analyze the standing issues, we address each of the parties' arguments separately. *See Bateman v. Arizona,* 429 U.S. 1302, 1305, 97 S.Ct. 1, 50 L.Ed.2d 32 (1976) ("The courts of a State are free to follow their own jurisprudence as to who may raise a federal constitutional question....").

Taxpayer Standing

As a general rule of Texas law, to have standing, unless it is conferred by statute, a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the
179 plaintiff some particular injury. *179 *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex.1984). Taxpayers, however, fall under a limited exception to this general rule. *See Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 556 (Tex.2000). Taxpayers in Texas have standing to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury. *See id.; Calvert v. Hull,* 475 S.W.2d 907, 908 (Tex.1972); *Osborne v. Keith,* 142 Tex. 262, 177 S.W.2d 198, 200 (1944). Implicit in this rule are two requirements: (1) that the plaintiff is a taxpayer; and (2) that public funds are expended on the allegedly illegal activity. *See Bland,* 34 S.W.3d at 556; *Calvert,* 475 S.W.2d at 908; *Osborne,* 177 S.W.2d at 200.

Flowers asserts that his status as a Tarrant County resident and property taxpayer gives him taxpayer standing to pursue his claims. He argues that because taxpayers have standing to enjoin the illegal expenditure of public funds, and public funds are required to administer the CEU, he has standing as a taxpayer to enjoin its illegal operation. According to Flowers, the County spends tax dollars to feed, clothe, and house the prisoners who participate in the CEU program. And he emphasizes that Sheriff **Williams** and Chaplain Atwell were county-paid employees, and that their time was partially occupied with supervising and monitoring the CEU.

Applying the same reasoning, **Lara** maintains that she too has standing as a taxpayer. Unlike Flowers, however, **Lara** does not own property and thus does not pay property taxes. She alleges that her taxpayer standing arises from her payment of rent on her Tarrant County residence and her payment of sales tax on the goods she purchases. **Lara** urges that her interest as a taxpayer is not lessened simply because she pays taxes when she purchases products rather than in connection with the ownership of property.

Tarrant County responds that neither Flowers nor **Lara** has standing as a taxpayer. First, it asserts that no authority supports **Lara's** contention that paying rent and sales tax confers taxpayer status. Second, the County contends that even if **Lara** is a taxpayer, neither she nor Flowers can prove that public funds are expended in operating the CEU. While we agree with the County that **Lara** is not a taxpayer for purposes of standing, we disagree that public funds are not expended in administering the CEU.

Whether **Lara** has taxpayer standing depends upon the type of tax she claims to have paid. **Lara** alleges that both her payment of rent on her Tarrant County residence and her payment of sales tax on the goods she purchases bestow taxpayer standing on her. We are unable to find any authority to support her contention that paying rent secures her status as a taxpayer. **Lara** is not liable to Tarrant County for the tax on the property she rents, and even if she presented proof that her landlord uses her rent to pay the tax, the connection between paying rent and her status as a taxpayer is too attenuated to confer taxpayer standing on her. We therefore decline to hold that paying rent confers taxpayer status.

Turning to **Lara's** argument that her payment of sales tax confers taxpayer standing, we first note that no Texas court has answered that question. Other jurisdictions, however, have held that merely paying sales tax does not confer taxpayer standing. *See Cornelius v. Los Angeles County Metro. Transp. Auth.,* 49 Cal.App.4th 1761, 57 Cal.Rptr.2d 618, 627-29 (1996) (payment of gasoline, sales, and state income taxes is insufficient to confer taxpayer standing); *Torres v. City of Yorba Linda,* 13
180 Cal.App.4th 1035, 17 Cal.Rptr.2d 400, 406-07 (993) (payment of sales tax is insufficient for standing); *Collins* *180 *v. State,* 750 A.2d 1257, 1261 (Me.2000) (payment of sales tax alone cannot confer standing); *Stumes v. Bloomberg,* 551 N.W.2d 590, 593-94 (S.D.1996) (absent ownership of property, paying sales tax did not make an inmate a taxpayer). In reaching this conclusion, these courts have determined, under their applicable state statutes, that a sales tax is imposed on the seller of goods, not on the purchaser. Thus they reason that although a retailer may pass the sales-tax cost on to the purchaser, paying sales tax cannot make a purchaser a taxpayer for purposes of standing. *See Cornelius,* 57 Cal.Rptr.2d at 628; *Torres,* 17 Cal.Rptr.2d at 407; *Collins,* 750 A.2d at 1261; *Stumes,* 551 N.W.2d at 593.

Texas law characterizes our state sales tax differently. Texas courts recognize that although sellers have the legal duty to collect sales tax from purchasers, *see* Tex. Tax Code § 151.052, because it is a transaction tax, *see* Tex. Tax Code § 151.051 (tax imposed on "each sale" of a taxable item), both sellers and purchasers are liable to the state for sales tax. *See Serna v. H.E. Butt Grocery Co.,* 21 S.W.3d 330, 333-34 (Tex.App.-San Antonio 1999, no pet.); *Rylander v. Associated Technics Co.,* 987 S.W.2d 947, 948 n. 6 (Tex.App.-Austin 1999, no pet.); *Davis v. State,* 904 S.W.2d 946, 952 (Tex.App.-Austin 1995, no writ); *Bullock v. Foley Bros. Dry Goods Corp.,* 802 S.W.2d 835, 838 (Tex.App.-Austin 1990, writ denied); *Bullock v. Delta Indus. Constr. Co.,* 668 S.W.2d 502, 504 (Tex.App.-Austin 1984, no writ). Therefore, in Texas, unlike the other jurisdictions discussed

above, both sellers and purchasers are considered taxpayers. *See Davis,* 904 S.W.2d at 952. Despite this distinction, we are not persuaded that paying sales tax should be grounds for conferring taxpayer standing.

Taxpayer standing is a judicially created exception to the general standing rule. We have already limited the applicability of this exception by narrowly defining the type of action a taxpayer can maintain. A taxpayer may maintain an action solely to challenge proposed illegal expenditures; a taxpayer may not sue to recover funds previously expended, *Hoffman v. Davis,* 128 Tex. 503, 100 S.W.2d 94, 96 (1937), or challenge expenditures that are merely "unwise or indiscreet," *Osborne,* 177 S.W.2d at 200. Underpinning these limitations is the realization that "`[g]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review'." *Bland,* 34 S.W.3d at 555 (quoting *Osborne,* 177 S.W.2d at 200). Extending taxpayer standing to those who pay only sales tax would mean that even a person who makes incidental purchases while temporarily in the state could maintain an action. This would eviscerate any limitation on taxpayer suits. It would allow a person with virtually no personal stake in how public funds are expended to come into court and bring the government's actions under judicial review. This is not what this Court envisioned in crafting the taxpayer-standing exception. *See Osborne,* 177 S.W.2d at 200. Accordingly, we hold, for prudential reasons, that paying sales tax does not confer taxpayer standing upon a party. **Lara** therefore does not have standing as a taxpayer to assert her claims.

In determining whether Flowers has taxpayer standing, we need not question whether he satisfies the taxpayer requirement; the parties do not dispute that Flowers is a Tarrant County resident who pays taxes on the property he owns. The dispositive issue
181 regarding Flowers' standing is whether Tarrant County is actually *181 expending public funds in operating the CEU. Because this Court has yet to consider what constitutes expending public funds, we look for guidance to the more extensive jurisprudential experience of the federal courts.

Under federal law, taxpayer standing is divided into three categories—federal, state, and municipal—depending on which entity's expenditures are being challenged. To have standing to challenge a federal expenditure, taxpayers must establish a logical nexus between being a taxpayer and the type of action challenged, and demonstrate a link between their taxpayer status and the precise nature of the constitutional violation alleged. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 479-80, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Flast v. Cohen,* 392 U.S. 83, 102-03, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). State taxpayer standing involves a similar test derived for the most part from *Doremus v. Board of Education,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952).[4] In that case, which involved allegations of both state and municipal taxpayer standing, the Court rejected the taxpayers' standing to challenge a state statute providing for the reading of Old Testament verses at the opening of each public-school day. The Court held that the plaintiffs had not shown "the requisite financial interest that [was], or [was] threatened to be, injured by the unconstitutional conduct." *Id.* at 435, 72 S.Ct. 394. The test for municipal taxpayer standing, on the other hand, clearly involves less stringent requirements.[5] *See ASARCO Inc. v. Kadish,* 490 U.S. 605, 612, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (Kennedy, J.) (explaining that the relative closeness between municipalities and their taxpayers justifies a more lenient test for establishing municipal taxpayer standing than for establishing federal-taxpayer standing). Municipal taxpayers need only establish that they pay taxes to the relevant entity, and that public funds are expended on the allegedly unconstitutional activity. *See Massachusetts v. Mellon,* 262 U.S. 447, 486-87, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *ACLUNJ v. Township of Wall,* 246 F.3d 258, 262-63 (3d Cir.2001); *Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 793-96 (9th Cir.1999); *Doe v. Duncanville Indep. Sch.Dist.,* 70 F.3d 402, 408 (5th Cir.1995); *Gonzales v. North Township of Lake County,* 4 F.3d 1412, 1416 (7th Cir.1993). Because these requirements mirror what is necessary to establish taxpayer standing in Texas, we look to the jurisprudence of municipal taxpayer standing to guide us in determining whether Tarrant County expends public funds in operating the CEU.

To be entitled to municipal taxpayer standing, a litigant must prove that the government is actually expending money on the activity that the taxpayer challenges; merely demonstrating that tax dollars are spent on something related to the allegedly illegal
182 conduct is not enough.[6] *182 The County alleges that the operation of the CEU does not satisfy this requirement because the money used to feed, clothe, and house the CEU inmates would be spent regardless of the CEU's existence. While we agree with the County's argument regarding these specific expenditures, we are convinced that other aspects of the CEU's operation involve the use of public funds.

The record establishes that the County uses tax dollars to manage the CEU. Although Don Anderson, a volunteer chaplain, directed the CEU's day-to-day operations, the record shows that Sheriff **Williams** and Chaplain Atwell—county-paid employees —spent a significant amount of county time overseeing and managing the CEU and its curriculum. Chaplain Atwell testified by

deposition that he selected and monitored the CEU curriculum, and either approved or rejected any materials Anderson chose. He also testified that Anderson kept him apprised of the CEU's daily affairs, that Anderson submitted to his authority, and that "Anderson runs the CEU in accordance with [Atwell's] vision." Atwell further testified that he drafted the CEU inmate application form and submitted it to the district attorney's office for review. He interviewed the volunteer chaplains and then met weekly with them to discuss the CEU's progress, convey information, and advise them on how to handle problems. Atwell acknowledges that he reviewed the hours that the volunteers worked to determine if they were meeting their requirements, and had "ultimate authority to hire and dismiss" them. In fact, Atwell fired one volunteer chaplain "for not submitting to [his] authority."

Sheriff **Williams** was also involved in overseeing and managing the CEU and its curriculum. The sheriff's deposition testimony confirms that he met weekly with Atwell to review the CEU's activities, and that he required Atwell to discuss with him any significant decisions that could affect the CEU, including any changes to the curriculum. Sheriff **Williams** acknowledged that he held the power to veto, narrow, or broaden the teachings in the CEU, and thus in contrast to Chaplain Atwell, he could change a CEU policy without obtaining anyone's permission. **Williams** further testified that although "Atwell is responsible for maintaining the structure within the entire chaplaincy program," Atwell ultimately answered to the sheriff "with regard to all issues ongoing within the chaplaincy program, including Chaplain Anderson and all other volunteers that come in and minister." Finally, when
183 asked if he considered it a sacrifice *183 of county time to have "Chaplain Atwell, or to the extent it's needed [himself], look at curriculum [and] evaluate instructors to make sure that the content of what's being taught is appropriate," **Williams** acknowledged that there was some sacrifice, though he did not believe that it was an "inordinate amount."

Both Sheriff **Williams** and Chaplain Atwell managed a religious program that involves numerous volunteers and hundreds of inmates. As the record shows, they selected the CEU curriculum, supervised the weekday volunteers, selected the volunteer chaplains, monitored the chaplains' hours and directed their activities, determined the requirements for inmate participation, met weekly to discuss the unit's affairs, and reviewed all information pertaining to the CEU. Based on their own testimony, we conclude that Sheriff **Williams** and Chaplain Atwell spent a significant amount of the County's time operating the CEU, including shaping and promoting its religious curriculum, and therefore that county funds were expended in operating the CEU.

In contrast to the cases that have deemed an employee's time an insufficient basis for standing,[7] Sheriff **Williams** and Chaplain Atwell's involvement with the CEU is anything but incidental. The record demonstrates that Sheriff **Williams** and Chaplain Atwell personally and directly operated and managed the CEU while on the county payroll. Moreover, although the sheriff and chaplain would be necessary employees even if the unit were not part of the TCCC, that fact alone is insufficient to defeat taxpayer standing. *See Marsh v. Chambers,* 463 U.S. 783, 786 & n. 4, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (taxpayer had standing to challenge Nebraska's practice of opening each legislative day with a prayer; state-employed chaplain conducted the prayer and taxes were used to fund the chaplaincy). It would be illogical to conclude that standing exists if a county hires an employee to administer an illegal activity, but that it does not exist if an otherwise necessary employee spends significant time doing the administering. We conclude that Tarrant County is expending public funds in operating the CEU. Accordingly, because Flowers is a Tarrant County taxpayer, and because public funds are expended in running the CEU, we conclude that Flowers has standing as a taxpayer to seek injunctive relief. The County is therefore not entitled to summary judgment on the issue of Flowers' standing, and the court of appeals erred in concluding to the contrary.

Standing as Inmates

Lara maintains that even if she does not have standing as a taxpayer, she has standing as a former TCCC inmate. Huff similarly alleges that as a former inmate, he has suffered an injury sufficiently particular to confer standing. They argue that they were emotionally harmed by the County's unwelcome unconstitutional establishment of religion. The court of appeals agreed that
184 **Lara** and Huff have standing. It concluded that although they *184 have been released from the TCCC, because **Lara** and Huff may again find themselves incarcerated in the jail, their claims for injunctive and declaratory relief are not moot. 986 S.W.2d at 316.

Tarrant County disagrees. It emphasizes that because **Lara** and Huff are no longer TCCC inmates, they are not currently subject to the allegedly unconstitutional activity they seek to enjoin, and thus their claims for injunctive and declaratory relief are moot. The County contends that the court of appeals erred in concluding that because **Lara** and Huff may again find themselves incarcerated in the TCCC, they satisfy the "capable of repetition, yet evading review" exception to the mootness doctrine.

For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including

the appeal. *See United States v. Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950). If a controversy ceases to exist—"the issues presented are no longer `live' or the parties lack a legally cognizable interest in the outcome"—the case becomes moot. *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982); *see also O'Shea v. Littleton,* 414 U.S. 488, 495-96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects."). If a case becomes moot, the parties lose standing to maintain their claims. *See generally City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Murphy,* 455 U.S. at 481, 102 S.Ct. 1181. Because **Lara** and Huff have been released from jail, they lack a legally cognizable interest in obtaining injunctive or declaratory relief. They no longer face the unconstitutional conduct about which they complain, and thus any prospective relief we might grant cannot help them. **Lara's** and Huff's claims for injunctive and declaratory relief are therefore moot.

Lara and Huff contend that even if their claims are moot, they fall under the "capable of repetition, yet evading review" exception to the mootness doctrine. We disagree. This exception applies only in rare circumstances. *See Lyons,* 461 U.S. at 109, 103 S.Ct. 1660. To invoke the exception, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *See Murphy,* 455 U.S. at 482, 102 S.Ct. 1181; *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Blum v. Lanier,* 997 S.W.2d 259, 264 (Tex.1999); *General Land Office v. OXY U.S.A., Inc.,* 789 S.W.2d 569, 571 (Tex.1990).

The TCCC is a county jail facility where inmates serve sentences or await trial, transfer, or release. The duration of any inmate's stay, however, may be so short that it would be unlikely that any inmate would reside in the TCCC during the entirety of a legal proceeding challenging the existence of the CEU. Therefore, **Lara's** and Huff's claims meet the evading-review element of the mootness-exception test. *See Cox v. McCarthy,* 829 F.2d 800, 803 (9th Cir.1987); *Clark v. Brewer,* 776 F.2d 226, 229 (8th Cir.1985).

Lara and Huff cannot, however, meet the capable-of-repetition element. Whether and when **Lara** and Huff may be charged with a crime that would lead to their incarceration in the TCCC is speculative. To conclude that there is a reasonable expectation that
185 they will again *185 be subjected to the allegedly unconstitutional operation of the CEU requires us to assume that **Lara** and Huff will commit another crime. But **Lara** and Huff are required by law to prevent their own recidivism. *See O'Shea,* 414 U.S. at 497, 94 S.Ct. 669 ("We assume that [the plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by [the defendants]."). Only by ignoring well-established precedent[8] can we conclude that **Lara** and Huff satisfy the "capable of repetition, yet evading review" exception to the mootness doctrine. Because we are unwilling to do so, we conclude that **Lara's** and Huff's claims for prospective relief are moot. Thus neither this Court nor the trial court has jurisdiction to render the injunctive and declaratory relief they seek. Accordingly, the County is entitled to summary judgment on **Lara's** and Huff's claims for injunctive and declaratory relief because **Lara** and Huff do not have standing to assert those claims. But **Lara's** and Huff's release from the TCCC does not render moot their claims for damages under section 1983. *See Lyons,* 461 U.S. at 105, 103 S.Ct. 1660; *Kerr v. Farrey,* 95 F.3d 472, 476 (7th Cir.1996); *Reimers,* 863 F.2d at 632.

Having concluded that each party has standing to pursue certain relief, we briefly clarify the issues we must address. As a taxpayer, Flowers has standing to seek declaratory and injunctive relief for the County's alleged violation of the Establishment Clause. Because **Lara** and Huff no longer reside in the TCCC, they lack standing for such relief under the Establishment, Free Exercise, and Equal Protection Clauses; those claims are moot. **Lara**, however, asserts claims for damages under 42 U.S.C. § 1983 for violations of the Establishment Clause, and Huff asserts claims for damages under 42 U.S.C. § 1983 for violations of his free-exercise rights; those claims are not moot. But while we must consider Flowers' and **Lara's** Establishment Clause claims and Huff's free-exercise claim, because no party with standing to do so seeks monetary relief for violations of the Equal Protection Clause, we cannot address the merits of the parties' equal-protection complaint. Rather, absent proof that any party has standing to pursue an equal-protection challenge, we must dismiss those claims for want of jurisdiction. *See Douglas v.*
186 *Delp,* 987 S.W.2d 879, 882 (Tex.1999); *Texas Ass'n of Bus. v. Texas Air Control Bd.,* *186 852 S.W.2d 440, 443-45 (Tex.1993). We begin by examining Flowers' and **Lara's** Establishment Clause challenge.

III. Establishment Clause

Our national Bill of Rights begins with the mandate: "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I. This mandate applies equally to the states and their political subdivisions through the Fourteenth Amendment. *See Everson v. Board of Educ.,* 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Although the language of the Establishment Clause does not specify what conduct it prohibits, the Supreme Court has encapsulated its essential precepts in this often-quoted summary:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson, 330 U.S. at 15-16, 67 S.Ct. 504; *see also County of Allegheny v. ACLU,* 492 U.S. 573, 591, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 216, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel v. Vitale,* 370 U.S. 421, 430-31, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

Our state constitution guarantees protections similar to those provided by the federal constitution:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

Tex. Const. art. I, § 6. In addition, article I, section 7 of the Texas Constitution states: "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." Tex. Const. art. I, § 7. Together, these provisions are considered Texas' equivalent of the Establishment Clause.

The plaintiffs contend that in creating and operating the CEU, Tarrant County has accomplished exactly what the Establishment Clauses of our state and federal constitutions seek to prevent: Tarrant County has effectively endorsed one religious view, and excluded all others. They contend the County has conveyed a message that nonadherents to the sheriff's and chaplain's personal religious views—those inmates who do not participate in the CEU program—are outsiders or second-class citizens.
187 The plaintiffs urge that the *187 County's purpose in maintaining the CEU is suspect in that even Chaplain Atwell acknowledged that the County's goal of promoting rehabilitation and reducing violence could be accomplished through means other than instructing inmates in the principles espoused by the sheriff and chaplain. Finally, the plaintiffs insist that the ceaseless involvement of county employees in the CEU's operation excessively entangles the government with religion, a result they argue is unquestionably proscribed by Establishment Clause jurisprudence.

The County responds that the CEU's purpose is secular and that its operation is not unconstitutional. It asserts that the constitutional standard against which the CEU must be measured is whether its operation is reasonably related to a legitimate penological interest. Moreover, the County asserts that even if the standard is higher, operating the CEU neither impermissibly endorses religion nor excessively entangles the government with religion.

Turner v. Safley

Before we can address whether the CEU is an unconstitutional establishment of religion, we must determine the appropriate standard against which to measure the County's actions. While this Court has not considered the standard for analyzing an inmate's constitutional challenge, our courts of appeals have. Those courts have relied on *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), in holding that a prison regulation is valid if it is reasonably related to legitimate penological

interests.[9]

In *Turner,* the United States Supreme Court reviewed a challenge to two prison regulations. One limited correspondence between inmates at different institutions, while the other prohibited inmates from marrying absent the prison superintendent's permission. 482 U.S. at 81-82, 107 S.Ct. 2254. In examining the regulations, the Court articulated the proper standard for assessing the constitutionality of a prison regulation that allegedly violates an inmate's rights. Declining to engage in a strict-scrutiny analysis, the Court stated that a regulation is valid if it is "reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254. The Supreme Court then identified factors relevant to determining the reasonableness of a regulation: (1) whether there is a rational relationship between the prison regulation and the governmental interest justifying it; (2) whether there are alternative means for exercising the right that are consistent with the prison setting; (3) the extent to which accommodating the right will affect other prisoners, guards, or the allocation of prison resources; and (4) the availability of ready alternatives that could accommodate the inmate's complaint. *Id.* at 89-90, 107 S.Ct. 2254. Applying these factors, the Court upheld the inmate-correspondence rule as being reasonably related to legitimate security interests, but struck down the marriage restriction as constituting "an exaggerated response to [the prison's] rehabilitation and security concerns." *Id.* at 91, 107 S.Ct. 2254.

Although the regulations at issue in *Turner* implicated the inmates' freedom-of-association and due-process rights, the Supreme
188 Court has applied the *Turner* test to other alleged constitutional violations.[10] *188 It has not, however, addressed whether *Turner*'s standard of review applies to an Establishment Clause complaint. Since *Turner* was decided, an overwhelming majority of the courts that have considered an inmate's Establishment Clause challenge have declined to apply *Turner* in assessing the constitutionality of a prison's actions.[11] For the reasons that follow, we similarly decline to apply *Turner* to an Establishment Clause claim.[12]

In adopting the *Turner* standard of review, the Supreme Court sought to ensure that even when the needs of prison administration implicate an inmate's constitutional rights, corrections officials retain the discretion to anticipate security problems and then adopt innovative solutions to those problems. *See id.* at 89, 107 S.Ct. 2254. Subjecting the day-to-day judgments of prison officials to an inflexible strict-scrutiny analysis would, according to the Court, "distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.*

We agree that prison officials must have the discretion to deal effectively with the increasingly urgent problems of prison
189 administration. The difficulties attendant to accommodating every inmate's free-exercise *189 request, or the security risk inherent in an inmate's desire to have contact visits, are readily apparent. But these concerns are less significant in connection with the Establishment Clause. An Establishment Clause inquiry focuses not on whether an inmate has a right to do something, but rather on whether the government should refrain from acting in a particular way. *See Scarpino v. Grosshiem,* 852 F.Supp. 798, 804 (S.D.Iowa 1994). In that context, the unique circumstances of imprisonment are of lesser relevance, and the risk that a court will improperly second-guess a prison official's judgment concerning prison administration or security is less of a concern. *See id.* We therefore hold that absent the policy concerns that prompted the Court in *Turner* to adopt its "reasonableness" test, applying the same standard of review to an inmate's Establishment Clause complaint is unjustified.[13] We thus will evaluate the County's operation of the CEU according to traditional Establishment Clause jurisprudence.

Establishment Clause Jurisprudence

The Supreme Court has rejected any absolute approach in applying the Establishment Clause. At times it has relied on the principles enunciated in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), to guide it through this "extraordinarily sensitive area of constitutional law."[14] *Lemon,* 403 U.S. at 612, 91 S.Ct. 2105. Under *Lemon,* a government practice is constitutional if: (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion;
190 and (3) it does not excessively entangle the government with religion. *Id.* at 612-13, 91 S.Ct. 2105. But the *190 *Lemon* test has been criticized by a majority of the current justices,[15] and the Court has used other analyses in attempting to achieve the First Amendment's underlying purpose. *See, e.g., Doe v. Beaumont Indep. Sch. Dist.,* 240 F.3d 462, 468 (5th Cir.2001) (observing that the Court has developed three lines of analysis for Establishment Clause claims); *Simmons-Harris v. Zelman,* 234 F.3d 945, 951-53 (6th Cir.2000) (recognizing that the Court "has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses.").

What we can infer from the Supreme Court's evolving Establishment Clause jurisprudence is that at a minimum, "the Constitution guarantees that the government may not coerce anyone to support or participate in religion," *Lee v. Weisman,* 505 U.S. 577, 587, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), nor may the government appear "to take a position on questions of religious belief" or make "`adherence to a religion relevant in any way to a person's standing in the political community.'" *Allegheny,* 492 U.S. at 592, 109 S.Ct. 3086 (quoting *Lynch,* 465 U.S. at 687, 104 S.Ct. 1355 (O'Connor, J., concurring)). In recent years, the Court has become particularly attuned to whether the challenged government practice purposefully or effectively "endorses" religion, an inquiry courts generally consider a component of the *Lemon* test's first and second parts. *Allegheny,* 492 U.S. at 592-94, 109 S.Ct. 3086; *Lynch,* 465 U.S. at 688-94, 104 S.Ct. 1355 (1984) (O'Connor, J., concurring); *Books,* 235 F.3d at 304-05; *Brooks v. City of Oak Ridge,* 222 F.3d 259, 264 (6th Cir.2000); *Granzeier v. Middleton,* 173 F.3d 568, 572-73 (6th Cir.1999); *Cammack v. Waihee,* 932 F.2d 765, 773-80 (9th Cir.1991).

Thus in determining whether the challenged government practice in this case violates the Establishment Clause, we begin by inquiring whether the purpose of the government's practice is legitimately secular, *Lemon,* 403 U.S. at 612, 91 S.Ct. 2105, that is, whether the actual intent of the government's action is to endorse or disapprove of religion. *See Stone v. Graham,* 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (concluding that the purpose behind posting the Ten Commandments on a school wall was not secular, regardless of claimed educational intent); *Abington,* 374 U.S. at 223-24, 83 S.Ct. 1560 (concluding that the purpose behind beginning the school day with Bible verses was not secular, despite claim that doing so promoted moral values). If both religious and secular objectives motivate the government's practice, the practice does not violate the Establishment Clause as long as the government's avowed purpose is sincere. *See Bowen v. Kendrick,* 487 U.S. 589, 602-03, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *Lynch,* 465 U.S. at 680 & n. 6, 104 S.Ct. 1355; *Cammack,* 932 F.2d at 773; *see also Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266 (explaining that while the government's characterization of its policy deserves deference, its stated purpose must not be a sham).

191 The County posits that the CEU curriculum promotes rehabilitation and reduces violence, which it alleges are the secular *191 purposes behind its operation. We recognize that prisons across this state face, among other problems, overcrowding, gang activity, and inmate violence, and thus we do not question whether the County is sincere in declaring that its actions are motivated by rehabilitation and security concerns, or that those concerns represent legitimate penological interests. Nor do we question whether the County could employ means other than the CEU curriculum to achieve these goals; even Chaplain Atwell conceded that it could. *See Lynch,* 465 U.S. at 681 n. 7, 104 S.Ct. 1355 (noting irrelevancy of whether nonreligious means could be used). *But see Abington,* 374 U.S. at 265, 83 S.Ct. 1560 (Brennan, J., concurring) (suggesting that government may not employ religious means without clearly demonstrating the insufficiency of nonreligious means). Indeed, we acknowledge that prison programs that involve religious instruction can comport with the Constitution. *See generally Lynch,* 465 U.S. at 672-73, 104 S.Ct. 1355 (acknowledging that a hermetic separation between government and religion is an impossibility that has never been required). In this case, evidence that **Williams** and Atwell intended to exclude other religious groups suggests that **Williams**' and Atwell's purpose was not only to promote religion, but to promote their own personal religious views. But there is also evidence that the County was motivated by legitimate penological concerns with rehabilitation and safety. Accordingly, we cannot conclude as a matter of law that the CEU had no legitimate secular purpose.

The propriety of the County's purpose does not, however, immunize its actions from further scrutiny. We must also consider whether its actions in fact convey a message that endorses or inhibits religion. *Lemon,* 403 U.S. at 612-13, 91 S.Ct. 2105; *accord Allegheny,* 492 U.S. at 594-95, 109 S.Ct. 3086; *Lynch,* 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring). Sheriff **Williams** and Chaplain Atwell acknowledged that they were personally involved in selecting and screening the religious teachings offered in the CEU, not for penological reasons, but to ensure compliance with their own personal religious beliefs. In fact, Chaplain Atwell acknowledged that he had never considered allowing other religious views to be taught in the CEU. Sheriff **Williams** admitted to making "no bones about the fact that [he] applies the yardstick of [his] own belief system to what may permissibly go on in the CEU." He also conceded that denying the existence of the Holy Trinity would have been a sufficient reason for excluding certain instruction from being part of the CEU. Although **Williams** and Atwell expressed a willingness to allow representatives from other religions to instruct TCCC inmates, that instruction had to be based on the CEU curriculum; other religious instruction was prohibited. **Williams**' and Atwell's actions could be perceived as reflecting county endorsement of the specific religious content offered in the CEU.

192 To contradict this appearance of religious endorsement, the County relies heavily on the fact that participation in the CEU is voluntary. Voluntariness, however, is not dispositive of the Establishment Clause claims in this case. The fact that participation in the CEU was voluntary does not detract from **Williams**' and Atwell's intention to allow only one religious viewpoint to be

expressed. *Cf. Nyquist,* 413 U.S. at 786, 93 S.Ct. 2955 ("The absence of any element of coercion ... is irrelevant to questions arising under the Establishment Clause."); *Abington,* 374 U.S. at 223, 83 S.Ct. 1560 ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended...."); *192 *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion...."). *But cf. Good News Club v. Milford Cent. Sch.,* ___ U.S. ___, ___, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) (holding that allowing religious club to meet in school facility would not create "valid Establishment Clause interest" for the school in part because "[t]he children cannot attend without their parents' permission, [and therefore] they cannot be coerced into engaging in [the club's] religious activities"); *Chaudhuri v. Tennessee,* 130 F.3d 232, 239 (6th Cir.1997) (upholding nonsectarian prayer or moment of silence at the beginning of certain meetings or ceremonies when an adult's attendance was voluntary); *Tanford v. Brand,* 104 F.3d 982, 985 (7th Cir.1997) (same). Thus the fact that inmates were willing to submit to the instruction offered does not mean that **Williams** and Atwell did not promote their own personal religious beliefs over other religious teachings, and their official endorsement of the substance of the religious instruction offered in the CEU goes beyond what the Establishment Clause can tolerate.

On this record, no fact issues exist that prevent us from concluding that the County's operation of the CEU endorses one religious view while excluding others, and thus conveys the impermissible message of official preference for one specific religious view. Providing moral guidance to inmates is certainly an important mission, and we recognize that hiring a chaplain may be necessary to secure prisoners' rights under the Free Exercise Clause. *See Abington,* 374 U.S. at 296-98, 83 S.Ct. 1560 (Brennan, J., concurring); *Theriault v. A Religious Office in the Structure of the Gov't,* 895 F.2d 104, 107 (2d Cir.1990). But the County cannot, consistent with the Establishment Clause, convey a message that endorses the personal religious beliefs of county officials in attempting to rehabilitate criminal offenders. Such an endorsement of religion is, by any test of which we are aware, unconstitutional.

IV. Texas Constitution

Flowers and **Lara** also seek relief under the Establishment Clauses of our state constitution. Tex. Const. art. I, §§ 6, 7. Because we have concluded that the operation of the CEU is unconstitutional under the United States Constitution, we need not consider these claims.

V. Free Exercise Clause

Huff seeks monetary relief for the County's alleged violation of his free-exercise rights.[16] The First Amendment's Free Exercise Clause provides that Congress shall make no law "prohibiting the free exercise" of religion. U.S. Const. amend. I. Huff, a Jehovah's Witness, maintains that by refusing his numerous requests for group discussion and instruction in his own faith, the County violated this First Amendment guarantee. He emphasizes that the denial of his request was based not on legitimate penological considerations, but rather on the sheriff's and chaplain's fear that these sessions would involve proselytizing beliefs with which they disagreed. The County responds that economic and security constraints prevented it from fulfilling Huff's request.

Prisons cannot discriminate against inmates based on their religious preferences. *See Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct.
193 1079, 31 L.Ed.2d 263 (1972) (holding that a prison could not *193 deny a Buddhist inmate a reasonable opportunity to pursue his faith comparable to that afforded adherents of other religions); *Al-Alamin v. Gramley,* 926 F.2d 680, 686 (7th Cir.1991) ("The rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations."). But while inmates must be given a reasonable opportunity to exercise their religious freedom, the Constitution does not require prisons to provide every religious sect with a spiritual advisor. *See, e.g., Cruz,* 405 U.S. at 322 n. 2, 92 S.Ct. 1079; *Swoboda v. Dubach,* 992 F.2d 286, 290 (10th Cir.1993); *Blair-Bey v. Nix,* 963 F.2d 162, 163-64 (8th Cir.1992); *Tisdale v. Dobbs,* 807 F.2d 734, 740 (8th Cir.1986). Nor are prisons required to allow inmates to participate in unrestricted group worship. *See Anderson v. Angelone,* 123 F.3d 1197, 1198-99 (9th Cir.1997); *McCabe v. Arave,* 827 F.2d 634, 637 (9th Cir.1987); *Brown v. Johnson,* 743 F.2d 408, 412 (6th Cir.1984). Incarceration necessarily limits many of the privileges and rights available to nonprisoners. *See Price v. Johnston,* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948). These restrictions arise both from the fact of incarceration and from the legitimate penological interests underlying the corrections system. *See id.*

This is not to say that prison walls form a barrier separating inmates from all of the Constitution's protections. *See Turner v. Safley,* 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Under *Turner,* which the Supreme Court applies to inmates' free-exercise claims, a prison regulation that allegedly impinges upon a prisoner's free-exercise rights is valid if it is "reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254; *see also O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (applying *Turner* to the Free Exercise Clause). The factors relevant to determining the reasonableness of a regulation are: (1) whether there is a rational relationship between the prison regulation and the governmental interest justifying it; (2) whether there are alternative means for exercising the right that are consistent with the prison setting; (3) the extent to which accommodating the right will impact other prisoners, guards, or the allocation of prison resources; and (4) the availability of ready alternatives that could accommodate the inmate's complaint. *Turner,* 482 U.S. at 89-90, 107 S.Ct. 2254.

Using this analytical framework as our guide, we first note our disagreement with the court of appeals' review of the record. Our review of the evidence does not reveal exactly what type of religious accommodation Huff requested. While Huff's briefs and the court of appeals' opinion frame Huff's request in terms of allowing Jehovah's Witnesses to participate in group worship, the record does not make apparent whether Huff sought a CEU-type environment or merely one similar to that afforded inmates in the Tuesday night service, during which the jail's general population may participate in CEU-curriculum-based group study and prayer. Nor is the record clear about why the jail denied Huff's request. While the evidence supports Huff's contention that the sheriff and chaplain did so because they feared that the Jehovah's Witnesses would proselytize, it does not support the County's contention that it denied Huff's request for economic and security reasons. Although the County's purported economic and security reasons do represent legitimate penological interests, based on the record before us we cannot determine whether those reasons actually motivated the County's decision. *See O'Lone,* 482 U.S. at 348, 107 S.Ct. 2400; *Turner,* 482 U.S. at 90,
194 107 S.Ct. *194 2254. Because the evidence does not conclusively establish what Huff requested and why his request was denied, we cannot conclude, as a matter of law, that Huff's free-exercise rights were not violated. The court of appeals therefore erred in affirming summary judgment for the County on Huff's free-exercise claim. Huff is similarly not entitled to summary judgment on this record, and we remand his free-exercise claim to the trial court.

VI. Section 1983

Lara and Huff contend that even if their claims for injunctive and declaratory relief are moot, they have claims against Tarrant County for damages under 42 U.S.C. § 1983.[17] A municipality may be liable for damages under section 1983 if its policy or custom caused a constitutional injury. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). While **Lara** bases her section 1983 claim on the County's violation of the Establishment Clause, Huff claims he is entitled to damages for the County's violations of the Free Exercise Clause. The court of appeals concluded that because the County established that as a matter of law Huff's free-exercise rights were not violated, he did not state a viable section 1983 claim. 986 S.W.2d at 323. Similarly, it concluded that because **Lara** did not prove that any alleged emotional distress caused by the County's operation of the CEU rose to the level of a constitutional violation, she too did not state a viable section 1983 claim. *Id.* We disagree with both conclusions.

Whether Tarrant County's actions caused **Lara** emotional distress goes not to the viability of her claim under section 1983 for an Establishment Clause violation, but rather to the amount of damages, if any, she may recover. Upon proper proof a plaintiff may recover compensatory damages for emotional distress under section 1983. *See Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 306-07, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986); *Carey v. Piphus,* 435 U.S. 247, 264, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Because we have concluded that the County's operation of the CEU violated the Establishment Clause, **Lara** has presented a claim under section 1983. In addition, because we are remanding Huff's free-exercise claim to the trial court, his ability to maintain that claim under section 1983 is once again an issue for that court.

VII. Conclusion

195 Tarrant County's operation of the Chaplain's Education Unit so as to endorse one religion over other religions or nonreligion conveyed the impermissible message that the County preferred the personal religious views of the sheriff and chaplain over other views. This official endorsement of religion is, as a matter of law, unconstitutional. The trial court should determine whether injunctive relief, as sought by Flowers, is appropriate, and whether **Lara** is entitled to damages under section 1983

because of this constitutional violation. The record in this case precludes us, however, from determining whether Huff's free-exercise rights were violated as a matter of law. And no party has standing to pursue the equal-protection claims presented here. We therefore vacate in part *195 and reverse in part the court of appeals' judgment, dismiss for want of jurisdiction the equal-protection claims, render judgment declaring the operation of the Chaplain's Education Unit unconstitutional, and remand the remaining claims to the trial court for further proceedings consistent with this opinion.

[1] **Williams** is no longer the sheriff of Tarrant County.

[2] Atwell is no longer employed by the County.

[3] The intervenors have not filed a petition for review.

[4] *See, e.g., Johnson v. Economic Dev. Corp.,* 241 F.3d 501, 507-08 (6th Cir.2001); *Koenick v. Felton,* 190 F.3d 259, 263 (4th Cir.1999); *Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 793-94 (9th Cir.1999); *see also Tarsney v. O'Keefe,* 225 F.3d 929, 940-41(8th Cir.2000) (Magill, J., dissenting) (collecting cases).

[5] *See, e.g., Board of Educ. v. New York State Teachers Ret. Sys.,* 60 F.3d 106, 110-11 (2d Cir.1995); *Colorado Taxpayers Union, Inc. v. Romer,* 963 F.2d 1394, 1400-02 (10th Cir.1992); *Cammack v. Waihee,* 932 F.2d 765, 770 (9th Cir.1991); *Taub v. Kentucky,* 842 F.2d 912, 918-19 (6th Cir.1988).

[6] *See, e.g., Altman v. Bedford Cent. Sch. Dist.,* 245 F.3d 49, 74 (2d Cir.2001) (no taxpayer standing when plaintiffs failed to show "a measurable appropriation or loss of revenue attributable to the challenged activities"); *Madison Sch. Dist. No. 321,* 177 F.3d at 793-96 (no taxpayer standing to challenge a graduation prayer because spending tax dollars on renting a hall, printing programs, buying decorations, and hiring a security guard is necessary even if the ceremony does not include a prayer); *Duncanville Indep. Sch. Dist.,* 70 F.3d at 408 (no taxpayer standing to challenge Gideon Bible distribution at school when Gideons supply the Bibles and place them on a table, no school employees handle the Bibles, and there is no evidence that the school district bought the table for the Bible distribution); *Gonzales,* 4 F.3d at 1416 (no taxpayer standing to challenge a crucifix in a park when government money was not used to buy or maintain it, and although funds are spent maintaining the park, that cost would be incurred without the crucifix); *Friedmann v. Sheldon Cmty. Sch. Dist.,* 995 F.2d 802, 803 (8th Cir.1993) (no taxpayer standing to challenge a graduation prayer absent evidence that funds were spent on the invocation; mere funding of diplomas is insufficient); *Freedom from Religion Found., Inc. v. Zielke,* 845 F.2d 1463, 1470 (7th Cir.1988) ("The allegedly unconstitutional activity ... is the display ... of the Ten Commandments in Cameron Park, and the appellants concede that no tax money has been spent on this activity. Thus, Grams' possible status as a municipal taxpayer is irrelevant....").

[7] *See ACLU-NJ,* 246 F.3d at 263-64 (taxpayers did not have standing because even if holiday display was erected by municipal employees, taxpayers produced no proof of more than de minimis expenditure by municipality); *Alabama Freethought Ass'n v. Moore,* 893 F.Supp. 1522, 1542-43 (N.D.Ala.1995) (proof that janitors occasionally dust plaque, or that a judge spends time uttering prayer, is insufficient for standing). *But see Harvey v. Cobb County,* 811 F.Supp. 669, 675-76 (N.D.Ga.1993) (because county inmates moved a Ten Commandments panel to new location and crew cleaned it, county funds were expended, and thus plaintiff had taxpayer standing), *aff'd without opinion,* 15 F.3d 1097 (11th Cir.1994).

[8] *See, e.g., Lyons,* 461 U.S. at 105-10, 103 S.Ct. 1660 (it is presumed that plaintiff will follow the law); *Lane v. **Williams**,* 455 U.S. 624, 632-33 n. 13, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982) (plaintiffs required by law to prevent their own recidivism); *Weinstein,* 423 U.S. at 149, 96 S.Ct. 347 (once permanently paroled, there is no demonstrated probability that plaintiff will be subjected to the parole procedure again); *O'Shea,* 414 U.S. at 497, 94 S.Ct. 669 (it is presumed that plaintiffs will follow the law); *McAlpine v. Thompson,* 187 F.3d 1213, 1214 (10th Cir.1999)(prisoner's claim for mandamus relief is moot once he is placed on supervised release); *Hickman v. Missouri,* 144 F.3d 1141, 1143 (8th Cir.1998) (former inmates did not meet capable-of-repetition prong because they are required by law to prevent their own recidivism); *Knox v. McGinnis,* 998 F.2d 1405, 1413-14 (7th Cir.1993) (must assume that an inmate will abide by prison rules and will not be segregated again); *Reimers v. Oregon,* 863 F.2d 630, 632 (9th Cir.1988) (courts are reluctant to invoke this mootness exception when the possibility of reoccurrence depends on plaintiff's own wrongdoing); *Magee v. Waters,* 810 F.2d 451, 452 (4th Cir.1987) (prisoner's transfer moots his request for injunctive relief against the conditions of confinement in the facility from which he was transferred); *Beyah v. Coughlin,* 789 F.2d 986, 988 (2d Cir.1986) (same); *Ex parte Nelson,* 815 S.W.2d 737, 739 (Tex.Crim.App.1991) (refusing to assume that an inmate will again violate parole conditions).

[9] *See, e.g., Umar v. Scott,* 991 S.W.2d 512, 516 (Tex.App.-Fort Worth 1999, no pet.) (free-exercise claim); *Thomas v. Brown,* 927 S.W.2d 122, 126 (Tex.App.-Houston [14th Dist.] 1996, writ denied) (access to the courts); *Morris v. Collins,* 916 S.W.2d 527, 528 (Tex.App.-Houston [1st Dist.] 1995, no writ) (equal-rights amendment).

[10] *See, e.g., Shaw v. Murphy,* 532 U.S. 223, ___ - ___, 121 S.Ct. 1475, 1476-77, 149 L.Ed.2d 420 (2001) (applying *Turner* to claim that First Amendment provided enhanced protection to inmate-to-inmate communications containing legal advice); *Thornburgh v. Abbott,* 490 U.S. 401, 413-14, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (applying *Turner* to free-speech claims); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 350-52, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (applying *Turner* to free-exercise claims); *see also Washington v. Harper,* 494 U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (applying *Turner* to due-process claims).

[11] *See, e.g., Kerr v. Farrey,* 95 F.3d 472, 476-80 (7th Cir.1996) (analyzing an Establishment Clause claim without applying *Turner*); *Muhammad v. City of N.Y. Dep't of Corrs.,* 904 F.Supp. 161, 195-99 (S.D.N.Y.1995) (applying *Turner* to free-exercise and equal-protection claims, but not to an

Establishment Clause claim), *appeal dismissed as moot,* 126 F.3d 119 (2d Cir.1997); *Scarpino v. Grosshiem,* 852 F.Supp. 798, 804 (S.D.Iowa 1994) (explicitly stating *Turner* does not apply to an Establishment Clause claim); *Card v. Dugger,* 709 F.Supp. 1098, 1103-10 (M.D.Fla.1988) (applying *Turner* to a free-exercise claim but not an Establishment Clause claim), *aff'd,* 871 F.2d 1023 (11th Cir.1989); *see also* Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State,* 47 Duke L.J. 785, 822-36 (1998) (arguing that applying *Turner* to an Establishment Clause claim has a devastating effect). *But see Warburton v. Underwood,* 2 F.Supp.2d 306, 316 (W.D.N.Y.1998) (applying *Turner* to an Establishment Clause claim); *Boyd v. Coughlin,* 914 F.Supp. 828, 831-32 (N.D.N.Y.1996)(same).

[12] Other courts have declined to apply *Turner* to other constitutional claims by inmates. *See, e.g., Jordan v. Gardner,* 986 F.2d 1521, 1530 (9th Cir.1993) (holding that *Turner* does not apply to Eighth Amendment claims); *Dunn v. White,* 880 F.2d 1188, 1194 n. 3 (10th Cir.1989) (questioning the application of *Turner* to Fourth Amendment claims); *Vigliotto v. Terry,* 873 F.2d 1201, 1203 (9th Cir.1989) (examining an Eighth Amendment claim without reference to *Turner*); *Pitts v. Thornburgh,* 866 F.2d 1450, 1453-56 (D.C.Cir.1989) (applying heightened scrutiny to an equal-protection claim and distinguishing *Turner*); *Austin v. Hopper,* 15 F.Supp.2d 1210, 1255 (M.D.Ala.1998) (declining to apply *Turner* to an Eighth Amendment claim); *Griffin v. Coughlin,* 743 F.Supp. 1006, 1010-19 (N.D.N.Y.1990) (applying *Turner* to equal-protection claim but not to an Eighth Amendment claim); *see also* Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims Under the Americans with Disabilities Act,* 98 Mich. L.Rev. 482, 492 (1999) (recognizing that "despite the language used in *Turner* and its progeny, there is a fairly broad consensus that the *Turner* test should not apply in all constitutional rights cases").

[13] *See Jordan,* 986 F.2d at 1530 (concluding that *Turner* has been applied only when a constitutional right may be limited because of the unique circumstances of imprisonment; because Eighth Amendment rights do not conflict with incarceration, *Turner* does not apply); *Thornburgh,* 866 F.2d at 1453-56 (suggesting that because general budget and policy choices do not involve the prison's daily operation, security, or inmate behavior, *Turner* should not apply); *Sturm v. Clark,* 835 F.2d 1009, 1013-14 (3d Cir.1987) (explaining that issue of whether attorneys can consult with clients at prison does not implicate prison's interest in deterring crime, encouraging rehabilitation, or ensuring security, and thus it should be evaluated under conventional First Amendment doctrine, not the less demanding *Turner* standard); *Lyon v. Vande Krol,* 940 F.Supp. 1433, 1438 (S.D.Iowa 1996) (stating that because the case involved a statute affecting prisoner litigation and court administration, it raised none of the concerns present in *Turner,* and thus the usual strict-scrutiny test should apply); *Scarpino,* 852 F.Supp. at 804-05 (explaining that when accommodation issues do not arise, Establishment Clause rights are not ones that may be limited because of imprisonment).

[14] *See, e.g., Mitchell v. Helms,* 530 U.S. 793, 807-08, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000); *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 314, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000); *Agostini v. Felton,* 521 U.S. 203, 218, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 484-85, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703, 708, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985); *Wallace v. Jaffree,* 472 U.S. 38, 55-56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985); *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 123, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982); *Stone v. Graham,* 449 U.S. 39, 40, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980); *Committee for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 653, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980); *Sloan v. Lemon,* 413 U.S. 825, 829-33, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 772-73, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Hunt v. McNair,* 413 U.S. 734, 741, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty,* 413 U.S. 472, 481-82, 93 S.Ct. 2814, 37 L.Ed.2d 736 (1973).

[15] *See, e.g., Santa Fe,* 530 U.S. at 319-20, 120 S.Ct. 2266 (Rehnquist, C.J., dissenting) (collecting cases); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398-99, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring); *Allegheny,* 492 U.S. at 655-56, 109 S.Ct. 3086 (Kennedy, J., concurring in part and dissenting in part); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 346-49, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (O'Connor, J., concurring); *Regan,* 444 U.S. at 671, 100 S.Ct. 840 (Stevens, J., dissenting).

[16] **Lara** does not contest the court of appeals' conclusion that her free-exercise and equal-protection rights were not violated as a matter of law.

[17] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.