CASE LAW UPDATE

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CASE LAW UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault.

The cases end with the first advance sheets from 233 S.W.3d.

In an effort to streamline the case discussions, various statutory and other references have been reduced to a more convenient shorthand. The following is an index of the more commonly used abbreviations.

"Bankruptcy Code" – The Federal Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.

"DTPA" – The Texas Deceptive Trade Practices Act, Texas Business and Commerce Code, Chapter 17.

"UCC" – The Texas Uniform Commercial Code, Texas Business and Commerce Code, Chapters 1 through 9.

"Prudential" – ***Prudential Insurance Co. of America* v. *Jefferson Associates***, 896 S.W.2d 156 (Tex.1995), the leading case regarding "as-is" provisions in Texas.

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

TABLE OF CONTENTS

CASE UPDATE

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PART I
MORTGAGES AND FORECLOSURES

Stephens* v. *Hemyari, 216 S.W.3d 526 (Tex.App.—Dallas 2007, pet. denied). Before its properties could be foreclosed on, two limited partnerships filed bankruptcy. The noteholder moved to lift the automatic stay. The bankruptcy court granted a conditional order to lift the stay to permit posting and foreclosure if a $700,000 payment was not timely made.

Under the bankruptcy court's order, the debtor had to pay $50,000 by noon on June 12 and $650,000 on or before August 1. If the debtor timely made the first payment, then the noteholder could post the property for foreclosure in July for sale on August 1. If the debtor failed to make the $650,000 payment on or before August 1, then the noteholder and the trustee could proceed with the foreclosure sale on August 1 or record a Deed in Lieu of Foreclosure, at their option. The debtor made the June 12 $50,000 payment, but August 1 came and went without his paying the $650,000. On August 15, the substitute trustee posted the property for foreclosure. On September 5, the substitute trustee conducted the foreclosure sale, at which appellants' attorney was present, and sold the property to Hemyari.

Afterward, the debtor sued Hemyari seeking to have the foreclosure sale set aside, the substitute trustee's deed canceled, and the cloud on the partnerships' title to the property removed. They alleged the foreclosure sale and the substitute trustee's deed were void because the sale violated the bankruptcy automatic stay. They argued that the bankruptcy court's order conditionally lifting the automatic stay authorized posting for foreclosure in July 2001 and foreclosure sale "on August 1, 2001. They argued that because the posting occurred in August and the sale in September, contrary to the specific dates permitted in the bankruptcy court's order, the foreclosure sale violated the automatic stay and the sale was void.

An action taken in violation of the automatic stay is void, not merely voidable. A foreclosure sale that occurs during the automatic stay is void and passes no title. The terms of an order modifying the automatic stay must be strictly construed. (But see **In re *Jones***, 63 F.3d 411 (5th Cir. 1995) which says that a foreclosure sale in violation of the automatic stay is "voidable," not void.)

Hemyari's argued that the sale did not violate the automatic stay because the case **In re *Matheson***, 84 B.R. 435 (Bankr. N.D.Tex.1987), held that a foreclosure under similar circumstances did not violate the automatic stay. In Matheson, a bank filed a motion for relief from the automatic stay to permit the foreclosure on Matheson's property. The bankruptcy court's order granted the motion for relief from stay 'in all respects' and specifically permitted a May foreclosure. The foreclosure sale then took place in June. Matheson argued the sale was improper because the court order permitted only a May foreclosure. The bankruptcy court held that by granting the relief in all respects as prayed for in the motion, the lifting of the stay was not limited to a May foreclosure.

In this case, the bankruptcy court's order did not grant relief "in all respects," as the ***Matheson*** court order did, but conditionally lifted the stay to allow foreclosure on a specific date. The order stated, "the trustee may proceed with the foreclosure sale on August 1...." Strictly construing the order did not permit the court to interpret it as allowing foreclosure after August 1.

Herrington v. Sandcastle Condomin-

ium Association, 222 S.W.3d 99 (Tex.App.—Houston [14th Dist.] 2006, no pet.). When Herrington failed to pay assessments to the condo association, the association sent her a notice that said: "Demand is hereby made that you pay $4907.23, plus accrued interest and $150.00 in attorney's fee[s] on or before February 15, 2003....The Declaration provides that the Association is granted a lien in its favor for its assessments, including interest thereon at ten percent (10%) per annum. Therefore, if you fail to pay as demanded, the Association will assert it's [sic] lien on your property by filing of a Notice of Lien in the real property records of Galveston County and proceed with foreclosure by exercising its power of sale pursuant to Section 51.002 of the Texas Property Code."

Property Code § 51.002 requires a lender who wants to foreclose on residential property to serve the debtor with a written notice stating that the debtor is in default and giving the debtor 30 days to cure the default before a notice of sale can be given.

Herrington claimed that the associations letter was not a valid § 51.002 notice, but was merely a demand for payment and a notice of intent to file a lien. She argued that subsection § 51.002(d) mandates use of the word "default" to satisfy the notice requirement. However, she cited no case law supporting this contention. Moreover, Sandcastle's January 16, 2003 letter stated that Herrington had "past due" assessments, demanded payment of the delinquent amount, and referred specifically to section 51.002, entitled "Sale of Real Property Under Contract Lien." The court found this to be sufficient notice under § 51.002.

Kyle* v. *Countrywide Home Loans, Inc., 232 S.W.3d 355 (Tex.App.—Dallas 2007, pet. pending). The Kyles argued that summary judgment against them for foreclosure of the mortgage on their house was improper because the promissory note referred to in the deed of trust was not included among the summary judgment evidence. In order to recover on a promissory note, the note must be introduced into evidence. However, Countrywide did not seek to recover on a promissory note. Instead, it moved for summary judgment seeking to quiet title and a "declaratory judgment for judicial foreclosure" "taking all right, title, interest, and possession of the Property pursuant to paragraph 22 of the Deed of Trust." In support of its motion, Countrywide submitted a self-authenticated copy of that deed of trust and a sworn affidavit of its Foreclosure Specialist and custodian of records stating that the Kyles stopped making payments on their mortgage. The express terms of the deed of trust gave Countrywide the right to seek judicial foreclosure in the event of a default. The trial court granted Countrywide's motion, ordering judicial foreclosure on the deed of trust and removing any clouds on the title to the property. Under the facts of this case, the deed of trust and the testimony about the Kyle's default was sufficient summary judgment evidence to entitle Countrywide to judgment as a matter of law on its claims against the Kyles.

PART II
HOME EQUITY LOANS

LaSalle Bank National Association* v. *White, 217 S.W.3d 573 (Tex.App.—San Antonio 2006, pet. pending). White borrowed a home equity loan from Alliance Funding, which assigned the note to LaSalle Bank. The note was secured by a lien against 10.147 acres of land, which was a portion of a 53.722 acre tract owned by White. At the time the note was executed, a third party held a valid purchase money lien against the 53.722 acre tract. The debt to the lender was paid off with a portion of the home equity loan proceeds. In addition, outstanding property taxes were paid. The remaining balance was advanced directly to White.

White did not make her first payment under the note for several months. She made a few additional payments, but then she quit making payments altogether. LaSalle Bank filed an application for a home equity loan foreclosure. White filed a separate lawsuit seeking a declaratory judgment that LaSalle Bank had forfeited all principal and interest because the loan violated the Texas Constitution. White also sought a declaration that the lien against the property was invalid.

The trial court found that the property was designated for agricultural use and, therefore, the Constitution prohibited it from being used as security for a home equity loan.

The Texas Constitution prohibits "homestead property designated for agricultural use as provided by statutes governing property tax" from being pledged to secure a home equity loan unless the property "is used primarily for the production of milk." White did not use her property for the production of milk. Therefore, the issue is what constitutes "property designated for agricultural use as provided by [t]he statutes governing property tax."

With the exception of one acre, White's land was valued for agricultural use based on the 1998 and 1999 tax rolls. The land valued for agricultural use included the property described in the deed of trust securing LaSalle Bank's note. Smith testified that all appraised land in Mason County valued pursuant to an agriculture use exemption, including White's, was based on Subchapter D of the Texas Property Tax Code. Evidence was introduced to show that a copy of a tax certificate relating to White's property that identified the property as receiving a special valuation based on its use was located in the files of LaSalle Bank and the title company that closed the transaction. The chief appraiser and tax collector for Mason County in 1998 and 1999, agreed that White's land was valued under Subchapter D with the exception of one acre. The chief appraiser also agreed that the tax certificate in LaSalle Bank's files reflected that White's land was receiving a special valuation. The chief appraiser also testified that when White was applying for the loan in question, both the chief appraiser and the lender contacted her and asked that ten acres of White's land be changed from agricultural value to market value. The chief appraiser informed White and the lender that the valuation could only be changed on the following January 1. Because White's land was designated for agricultural use as provided by subchapter D of the property tax code, the Texas Constitution prohibited it from being used as security for a home equity loan.

LaSalle Bank argued in the alternative that if the loan failed to comply with the constitutional requirements, it was equitably subrogated to the liens held by the third parties who were paid the balance of the existing purchase money lien and the accrued ad valorem taxes. Accordingly, LaSalle Bank contended that its rights were not forfeited with regard to the portion of the loan to which its equitable subrogation rights extended.

The trial court found that a portion of the loan proceeds were used to pay the purchase money indebtedness to the existing lender and to pay outstanding taxes. The trial court concluded, however, that LaSalle Bank was not entitled to equitable subrogation for the amount paid to the existing lender or for the taxes because Article XVI, section 50(e) bars any lien based upon equitable subrogation.

LaSalle Bank did not contend that it met the conditions imposed by section 50(e). Instead, LaSalle Bank asserted that the doctrine of equitable subrogation is not eliminated by section 50(e). The court disagreed.

The home equity loan in this case is not simply a "contract" but only exists by means of a constitutional amendment. The constitution imposes specific restrictions and requirements on home equity loans, and the failure to comply with the constitutional restrictions and requirements results in forfeiture if the lender fails to comply with its obligations within a reasonable time after the lender is notified of the lender's failure to comply.

LaSalle Bank conceded that it failed to comply with the specific restrictions imposed on home equity liens that include an advance of additional funds. LaSalle Bank also failed to comply with its obligations within a reasonable time after it was notified of its failure to comply. The doctrine of equitable subrogation cannot be applied to circumvent the constitutionally-mandated penalty of forfeiture.

Curry* v. *Bank of America, N.A., 232 S.W.3d 345 (Tex.App.—Dallas 2007, no pet.).

The home equity loan provisions of the Texas Constitution detail the terms and conditions of a home equity loan and the rights and obligations of the borrower and lender. Relevant to this case on appeal, these provisions require the loan to be closed at the office of the lender, an attorney, or a title company and forbid pre-payment penalty and certain acceleration clauses. Additionally, these provisions require the lender to provide the borrower a copy of all loan documents signed by the borrower. Under these provisions, a loan must comply with all the requirements set forth in the constitution to be a valid home equity loan and create a valid homestead lien.

However, the home equity loan provisions allow a lender to "resurrect" an invalid loan by correcting the failure to comply. Constitution article XVI, § 50(a)(6)(A)-(Q)(x). Under the "cure" provision, a lender has sixty days from the date the borrower notifies it of the non-compliance to correct the defect in the manner described. If the lender fails to cure the defect within the sixty-day period, it forfeits the principal and interest of the loan.

The Currys closed on the loan at issue on October 21, 2003 at Michael Curry's place of business. Four weeks later, in a letter dated November 24, 2003, counsel for the Currys informed the Bank that he had been unsuccessful in trying to obtain a copy of the Currys' file from the closing agent and that the Currys were missing four of the documents made a part of the loan. Without specifying facts, counsel also informed the Bank that his "preliminary determination," from a review of the loan documents in the Currys' possession, was that the loan was invalid because it failed to comply with the "Texas Constitution.

The Currys filed suit. Like the letters, the suit alleged generally that the loan and resulting lien did not comply with the home equity loan provisions of the constitution but did not specify how. The trial court entered summary judgment in favor of the Bank.

Based on the home equity loan provisions, to be entitled to a declaration that their home equity loan is invalid and entitled to summary judgment as a matter of law, the Currys had to conclusively establish the loan failed to comply with the constitutional requirements, they noticed the Bank, and the Bank failed to timely cure upon being noticed.

No dispute exists that the loan failed to comply with at least one requirement-that it be closed at the office of the lender, an attorney, or a title company-nor that the Bank offered to cure this defect, as well as any other defect, on June 16, 2004, but did not tender the cure. As such, whether the Currys met their burden turns on whether they provided the Bank notice, and if they did, whether the Bank's offer to cure fulfilled its obligation to cure.

The court held that the Currys failed to meet their burden because they did not conclusively establish they noticed the Bank. The letter informed the Bank that it was the Curry's counsel's "preliminary determination that the lien ... does not comply with the Texas Constitution." The letter, however, did not contain any factual basis or details in support of this "preliminary determination." Although the home equity loan provisions are silent as to the extent of notice the borrower must give, we conclude the Currys needed to do more than make a general allegation and had to describe how the loan is non-compliant. The court found support for its conclusion in the cure provision itself which specifies how certain defects are to be cured.

To determine how to cure its non-compliance, the lender must be aware of what that non-compliance is. Although a lender could certainly comb through the loan documents and the home equity loan provisions to determine the defect, it would defeat and render meaningless the requirement that the borrower notify the lender of defects if the borrower needed to merely state, without detail, that the loan was infirm.

PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd., 218 S.W.3d 137 (Tex.App.-Houston [14 Dist.] 2007, pet. denied). The three Borrowers, Trafalgar, Royal, and Lexington are all owned by RCA Holdings, and the three Borrowers share a common ownership form. Ninety-nine percent of each company is owned by RCA, and the remaining one percent is owned by a limited liability corporation that acts as the general partner. The general partner is also owned by RCA. Bank of America made commercial real estate loans to the Borrowers totaling $41.4 million, secured by first lien mortgages on three apartment complexes, two located in Texas and one in Mississippi. The loans were conduit loans, and were ultimately assigned to a securitization pool, services by GMAC as Master Servicer, responsible for normal servicing, and Lennar as Special Servicer, responsible for post-default servicing. Lennar was authorized to modify loans but not to make new ones.

After payments were not made, GMAC transferred servicing to Lennar. Lennar sent out a "pre-negotiation agreement" to each borrower, which contained disclaimers of any agreements that were not made in writing by Lennar. The loans were declared to be in default, but work-out negotiations continued. At one point, the principal of RCA sent a proposal to Lennar for a write-down of principal on each of the loans in exchange for payment of the written-down amount within a short period of time. According to RCA, Lennar orally accepted this offer, subject to RCA making a $250,000 "good faith" payment immediately. RCA sent a payment in that amount, along with a letter and a notation on the check that the payment was confirmation of the oral agreement for the write-down of the loans.

Negotiations continued regarding a proposed forbearance, but no further discussions were made regarding the write-down proposal. Ultimately, with no written agreement in hand, Lennar posted the properties for foreclosure. RCA and the Borrowers filed suit to enjoin the foreclosure and asserted claims for breach of contract and declaratory judgment. They alleged that the Lenders accepted the terms of the Proposal by negotiating the $250,000 check, then repudiated the agreement by sending forbearance proposals and attempting to foreclose on one of the properties. After receiving the petition and reviewing the allegations, the Lenders tendered a refund of the $250,000 payment, which RCA and the Borrowers refused.

The trial court ruled in favor of RCA and the Borrowers. The lenders appealed, claiming that the so-called agreement for the write-down of the loans was barred by the Statute of Frauds.

To satisfy the Statute of Frauds, all loan agreements involving amounts exceeding $50,000 must be in writing. Business & Commerce Code § 26.02. Specifically, there must be a written memorandum which is complete within itself in every material detail and which contains all of the essential elements of the agreement so that the contract can be ascertained from the writings without resorting to oral testimony. The written memorandum must, within itself or by reference to other writings and without resort to parol evidence, contain all the elements of a valid contract, including an identification of both the subject matter of the contract and the parties to the contract. In a contract to loan money, the material terms also include the amount to be loaned, the maturity date of the loan, the interest rate, and the repayment terms. Finally, the agreement must be signed by the party to be bound or by that party's authorized representative.

The Borrowers argued that the agreement consists of the proposal, the $250,000 check with its endorsements, and the cover letter accompanying the check. Construing that as a new contract and reviewing only these written documents without reference to parol evidence, the Court of Appeals was unable to ascertain several essential terms with certainty. First, it couldn't determine the identities of the parties to the agreement. The Borrowers argued that RCA had promised to bring the loans current immediately and pay off the mortgage balances within four months in exchange for a twenty percent reduction on the mortgage balances. But, the proposal contained no promises by RCA. Although the proposal was typed on RCA's letterhead, it was signed "Bernard Aptaker, Chairman of the Board of the General Partner." RCA's general partner, however, was identified in the original Loan Documents as Fidelity "S" Corporation. Thus, it appears that the promisor was Fidelity "S" Corporation, an entity not named in any of the documents forming the agreement.

The second failure was that the alleged agreement did not specify an interest rate.

By omitting essential terms such as the applicable interest rate and the identities of the parties, the repayment agreement, if treated as a new contract, contained insufficient information to satisfy the Statute of Frauds.

However, appellees' alternative theory of liability characterizes the agreement as a modification of the original Loan Documents. A contract required to be in writing cannot be orally modified except in limited circumstances inapplicable here. A modification to a contract need not restate all the essential terms of the original agreement. A modification alters only those terms of the original agreement to which it refers, leaving intact those unmentioned portions of the original agreement that are not inconsistent with the modification. Thus, if the court construed the agreement as a modification, terms not addressed in the repayment agreement would be supplied by the original loan documents. Because the original loan documents supply essential terms missing from the repayment agreement, this construction arguably supports the argument that the agreement satisfies the Statute of Frauds.

The lenders argued that even if the repayment agreement satisfied the Statute of Frauds, it was nevertheless unenforceable because the Borrowers materially breached the terms of the contract. The only terms of the original loan documents the proposal purported to modify were (a) the amount of principal, (b) the maturity date of the loans, and (c) certain accounting requirements. But, the repayment agreement did not alter the dates on which principal and interest payments were due, contained no mention of the treatment of late fees and default interest that had already accrued under the original loan documents, and did not address the pre-payment penalties that would be assessed under the original loan documents. The borrowers argued that the proposal excluded these costs because they had no intention of paying them--they simply were not part of the deal. This position ignores the undisputed fact that these past and future penalties were part of the original loan documents, and the proposal contained no request to modify these provisions of the original agreements. Other arguments were put forth, but ultimately the court held that, even if the original loan agreements had been modified in a way that satisfied the Statute of Frauds, the Borrower had breached the modified agreement and thus the lender was entitled to treat the modification as repudiated and was excused from performing.

Doss* v. *Homecomings Financial Network, Inc., 210 S.W.3d 706 (Tex.App.—Corpus Christi-Edinburg 2006, no pet.). Bobby and Charlotte Doss owned two properties, each financed by Homecomings. When they divorced, Bobby got Property No. 1 financed by Note No. 1 and Charlotte got Property No. 2 financed by Note No. 2. Charlotte refinanced Property No. 2 after the divorce. The proceeds of the refinancing were delivered to Homecomings, but it erroneously applied them to payment of Bobby’s Note No. 1 rather than Charlotte’s Note No. 2. Homecomings sent a release of lien and also sent him the escrow accounts for Note No. 2. The release of lien was recorded.

Homecomings found out about its mistake and demanded that Bobby (1) agree to set aside the release of lien, (2) revive the lien under the deed financed by Note No.1, (3) refund the deposits sent to Bobby from the escrow account, and (4) give his authorization to apply the misapplied funds to Note 2 for the benefit of Charlotte. Bobby refused to comply with the demands. Homecomings filed suit against Bobby and Charlotte.

Homecomings's claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment when the defendant obtains money, which in equity and good conscience belongs to the plaintiff. A cause of action for money had and received is not based on wrongdoing but instead, looks only to the justice of the case and inquires whether the defendant has received money which rightfully belongs to another. It is essentially an equitable doctrine applied to prevent unjust enrichment.

Bobby did not produce any evidence to challenge the summary judgment motion on any of the causes of action advanced by Homecomings. Instead, Bobby contended that Homecomings was precluded from seeking an equitable remedy because it made a mistake in applying Charlotte's funds to the wrong note. However, wrongdoing is not an element in a claim for money had and received. Moreover, there was no evidence that Bobby materially changed his position in reliance on the misapplication of funds, the release of lien, or the escrow account refund.

Instead, the record conclusively establishes that Homecomings received funds intended for Charlotte's note, mistakenly applied the funds to Bobby's note, and that the funds in equity and good conscience belong to Homecomings so that they can be rightfully applied to Charlotte's note. Therefore, there is no disputed issue of material fact with regard to Homecomings's money had and received claim. Thus the trial court could have granted Homecomings's summary judgment based upon a claim for money had and received.

PART IV
GUARANTIES

First Commerce Bank* v. *Palmer, 226 S.W.3d 396, 50 Tex. Sup. Ct. J. 830 (Tex. 2007). In 1983, the Bank made a loan to JV3. The loan was secured by a deed of trust and guarantied by various individuals, including the Palmers. In March of 1988, after accelerating the note, JV3 executed a renewal note. All of the original guarantors except the Palmers executed new guaranties concurrently with the execution of the renewal note. Several months after the 1988 renewal note was signed, the Palmers executed guaranties of the renewal note. Right after the Palmers signed the new guaranties, JV3 and all of the guarantors executed a document called modification, renewal, and extension of real estate note and lien, reciting the terms of their March 1988 agreement with the Bank.

When the Bank sued JV3 and the Palmers, the Palmers argued that their guaranties were not supported by consideration and were unenforceable.

The trial court viewed the timing of the renewal note's execution as the primary issue. The Bank's president testified that the 1988 note's purpose was to renew and extend J.V.3's 1983 debt. He further testified that the renewal note was executed after all the shareholders had signed their guaranties, including the Palmers, but was backdated to March 30, 1988, the anniversary date on which the original note was to be rolled into the new one.

The court of appeals concluded, however, that the March date on the promissory note was some evidence that it was executed before the Palmers' guaranties and that the trial court was free to disbelieve the Bank president's testimony to the contrary. The court further reasoned that because four months passed between the date of the note and the guaranty agreements that some new consideration, independent of the promissory note, was required. The court gleaned this requirement from Fourticq v. Fireman's Fund Ins. Co., 679 S.W.2d 562 (Tex.App.-Dallas 1984, no writ) in which the court of appeals stated that when "a contract of guaranty is entered into independently of the transaction which created the primary debt or obligation, the guarantor's promise must be supported by consideration distinct from that of the primary debt."

The Supreme Court said, however, "Determining whether a guaranty agreement is independent of the debt it guarantees, however, is not simply a question of the order in which the documents are signed. If the guarantor's promise is given as part of the transaction that creates the guaranteed debt, the consideration for the debt likewise supports the guaranty." Even when the guaranty is signed after the principal obligation, 'the guaranty promise is founded upon a consideration if the promise was given as the result of previous arrangement, the principal obligation having been induced by or created on the faith of the guaranty. Guaranty agreements that post-date the underlying obligation have thus often been enforced in Texas without the requirement of additional consideration to the guarantor.

The question then was whether the Palmers' 1988 guaranties were independent transactions. They were not, of course, because these guaranties without dispute were signed in connection with the renewal of the 1983 note. Had that note not been renewed, JV3 and the guarantors, including the Palmers, would have been responsible for paying it in 1988. The Palmers thus benefited from the renewal and extension of their obligation to repay the earlier note. Thus, the court concluded that there was consideration for the Palmers' 1988 guaranty agreements, consisting of the Bank's forbearance on the 1983 guaranties, as well as its agreement to renew and extend JV3's original debt.

Beal Bank, SSB* v. *Biggers, 227 S.W.3d 187 (Tex.App- Houston [1st Dist.] 2007, no pet.). Glenda Biggers was the sole shareholder and corporate secretary and Alton Biggers was the president of Clark Warehouses. Clark Warehouses executed a note to the SBA. The note was signed by Glenda and Alton in their capacities as president and secretary of the corporation. Glenda and Alton also executed a Small Business Administration Guaranty as guarantors of the note. Among other things, the Guaranty provided that the noteholder could modify any of the terms of the note, except that it could not increase the principal amount.

Later, the Biggerses executed a modification of the note increasing the principal amount considerably. The Biggerses each signed the note in two places, once in their capacity as officers and once as "Borrowers." Beneath these signatures, the modification stated: "The undersigned endorsers, guarantors, and/or sureties on the above described Note hereby join in and consent to the above Modification Agreement." The signature lines under this statement we left blank.

Clark Warehouses filed bankruptcy and the SBA sold the note and guaranties to a third party to a third party, with Beal Bank acting as servicer.

Beal Bank sued to collect on the guaranties. The trial court held that the Biggerses had consented to the modification that increased the amount of the note but had not agreed to increase their liability on their guaranties, so it entered judgment against the Biggereses in the amount of the original note.

Beal Bank contended that, by seeking and consenting to the modification of the note and by signing the modification twice, the Biggerses became personally obligated as guarantors for the increased principal of the loan. Beal Bank argued that, to escape liability, the Biggerses must prove that they did not consent to the increased amount. The Bank's argument centered on the Biggerses affirmative defense of material alteration. A material alteration that lacks the consent of the guarantor and harms the guarantor renders a guaranty void. However, the trial court's judgment was not rendered on the material-alteration defense. Rather, the trial court concluded that the Biggerses liability was determined by the guaranty contract.

The Biggerses contended that their consent to the modification did not effect an increase in their personal liability, as demonstrated by the fact that they did not sign the modification as guarantors. They also pointed out that the guaranties they signed for the original note specify that the lender was not granted the power to increase the principal amount of the note, thus creating a specific, rather than a continuing, guaranty.

Texas case law recognizes that a guaranty may be continuing or specific. A continuing guaranty contemplates a future course of dealing between the lender and debtor, and the guaranty applies to other liabilities as they accrue. A specific guaranty applies only to the liability specified in the guaranty contract. A guarantor may require that the terms of his guaranty be followed strictly, and the guaranty agreement may not be extended beyond its precise terms by construction or implication.

The guaranties granted to the lender the power to modify or change the terms of the note or the interest rate on the loan. However, the guaranties specifically excluded the power "to increase the principal amount of the note of the Debtor to Lender." The guaranties contained no language that contemplated a future course of dealing between the debtor and the lender. Thus, these were specific guaranties.

Although the Biggerses later sought to increase the principal amount of the loan, agreed and consented to that amount, and signed the note twice-once in their corporate capacities and once as "Borrower"-they did not sign in the spaces provided for "endorsers, guarantors, and/or sureties on the above described Note." Their consent to the increased amount could not be construed or implied to be a guaranty of the additional sum.

Lavender* v. *Bunch, 216 S.W.3d 548 (Tex.App.—Texarkana 2007, no pet.). Lavender and three other co-owners of the business borrowed an $80,000 loan from the bank. Each of the four executed a guaranty of the loan and pledged a $100,000 CD owned by Bunch, one of the other three guarantors.

Bunch purchased the note and lien from the bank, released the CD to himself, and brought suit against the remaining guarantors on their guaranty agreements for the full amount of the promissory note with accrued interest. Bunch's petition also sought to recover for loans he urged that he had made to the business, and which he alleged that Lavender and the others had orally agreed to guarantee.

Lavender claimed that Bunch, as the assignee of the note and lien from the bank, attained no more privileges than the bank had held; that when Bunch had received the CD, he had the obligation to apply it to the debt and, in so doing, had satisfied the outstanding debt in its entirety. They also alternatively maintained that Bunch, who was one of the four guarantors of the loan, was responsible for at least twenty-five percent of the debt and could not recover the entire loan amount for which the guaranties were given. Neither Bunch nor Lavender brought suit against the business.

An assignee of a promissory note stands in the shoes of the assignor and obtains the rights, title, and interest that the assignor had at the time of the assignment. Therefore, when Bunch acquired the note from the bank, he stepped into the shoes of Hibernia, having the same rights which the bank possessed.

Among those rights which were granted under the guaranty agreements to the holder of the note and lien was the right to "release any security, with or without substitution of new collateral." This was precisely what Bunch did. He released the CD which was the security for the note; there is no evidence that he actually foreclosed the security interest with which the CD was impressed and did not, therefore, need to follow the dictates of the law in the procedure to be followed in effecting foreclosure. The guaranty agreements signed by the parties permitted the holder of the note to release the security of the note without jeopardizing the holder's claim against the guarantors. Under such an agreement, the release of a secured item does nothing to require application of the proceeds of the security to the underlying debt; accordingly, the release of the CD to the owner of it did not constitute accord and satisfaction of the debt secured by it.

Bunch, in his capacity as the holder of the promissory note, also attempted to release himself from liability as a guarantor of the note. We determine that he could not use this means to unilaterally exculpate himself of any proportional liability he may hold as one of the four guarantors of the note. When Bunch acquired the promissory note from the Bank, he did not trade the hat of guarantor of the note for that of holder of the obligation; he wore both hats. As between the coguarantors, he still maintained some liability to his coguarantors for the satisfaction of the debt.

Surprisingly, this issue of a guarantor cum noteholder seeking relief from his coguarantors had not been presented to Texas courts until 2004, when it was shown as an issue in ***Byrd* v. *Estate of Nelms***, 154 S.W.3d 149 (Tex.App.-Waco 2004, no pet.). As here, a guarantor of a promissory note purchased the underlying obligation and brought action against its coguarantors in its new capacity as the holder of the promissory note. The Waco court concluded that contribution is an equitable remedy that implies a contract between guarantors ensuring that in the event one of the guarantors is called to pay the debt, the other guarantors would contribute their proportionate share, and no more. The assignment of an underlying note and guaranty agreement to a guarantor does not change the status of the guarantor in relation to his co-guarantors. Therefore, as a matter of law, the relationship between guarantors restricts recovery to their contributive share.

Although the particular fact situation presented here has only recently been addressed by the courts of this State, the question of liability of coguarantors to each other has a long history. For well over a hundred years, it has been a "general and familiar rule of law" that, as among coguarantors, each will bear his proportional part of the burden to the effect that should one of them pay more than his proportional part, the others will contribute equally to indemnify him for any amount in excess of his proportional part. Bunch, still being among the joint guarantors of the note, is not entitled to recover the entire amount of the promissory note from his coguarantors. There were four joint guarantors of the note. Therefore, Bunch can recover judgment for only three-fourths of the jointly-owed amount.

PART V
USURY

Sotelo* v. *Interstate Financial Corporation, 224 S.W.3d 517 (Tex.App.—El Paso 2007, no pet.). Sotelo executed a note and deed of trust in favor of Interstate. After a default, Interstate foreclosed. Sotelo brought a wrongful foreclosure action against Interstate, including a claim for usury based on an Alamo Lumber theory. After the usury issue was pled, the trial court abated the action for sixty days to allow Sotelo to notify Interstate of the usury claim. Two days after receiving notice, Interstate responded with an offer to release all of Sotelo's obligations under the note except for the principal. Afterward, Interstate moved for summary judgment and it was granted.

Sotelo argued that summary judgment was improper on the usury claim because Interstate's cure was not timely under Finance Code § 305.103. Section 305.103 provides that a creditor who discovers a usury violation is not liable if it offers to cure within sixty days after the discovery. However, § 305.103 is only one of two alternative cure provisions. The other, § 305.106, requires a debtor, as a condition to bringing a usury suit, to give written notice to the creditor and allows the creditor sixty days to cure. Applying usual statutory interpretation rules here, the court held that the creditor had properly cured under § 305.106.

PART VI
DEEDS AND CONVEYANCE DOCUMENTS

Angell* v. *Bailey, 225 S.W.3d 834 (Tex.App.—El Paso 2007, no pet.). The 1936 deed conveyed the acreage to Warner "save and except" two tracts that the deed said had been previously conveyed to the State of Texas and to various other parties, including among the other parties Bailey and Ellison. The county records showed deeds to some of the people referred to in the "save and except" clause, but did not show any deeds of the property to Bailey or Ellison. Neither Bailey or Ellison ever occupied the land and no record of the existence of Bailey or Ellison in the county exists. Angell brought this action to remove the cloud on title caused by the references to Bailey and Ellison.

As the trial court construed the deed, it concluded that the exceptions were sufficiently described and are therefore valid, resulting in a co-tenancy among Appellants, Bailey, and Jack Ellison, as well as Martin, Norman Ellison, and Anderson.

The references to the Ellison and Bailey interests are said to be "exceptions" to the conveyance. An exception is a mere exclusion from a grant of some interest which may be vested in the grantor or outstanding in another. An interest excepted from a grant is excluded from the conveyance, so it does not pass to the grantee.

Conversely, a reservation or exception in favor of a stranger to a deed does not convey any title to such stranger. By the same token, strangers to the deed have no right to establish title by recitals in such deed. Therefore, neither Bailey nor Ellison can use the conveyance described in this deed to establish his own title to any property.

The court of appeals held that the grantor did not intend to convey anything to Ellison or Bailey by this instrument. The use of the phrase "subject to" indicates the grantors' intent to exclude the Ellison and Bailey interests from the conveyance. The language creates exceptions in favor of Ellison and Bailey and therefore conveyed no interest. As no interest was conveyed to Ellison or Bailey, there is no co-tenancy of undivided interests within the four corners of this deed.

Angell argued that the exceptions themselves cannot be effective, because they lack a description sufficient to identify what acres had been transferred to Ellison and Bailey. He concluded that, because the exceptions are ineffective, the acres were conveyed to the grantee along with the larger tract. For a clause in a deed to operate as exception, it must identify, with reasonable certainty, the property to be excepted from the larger conveyance. Where the subject of the conveyance is sufficiently described, but the excepted portion is not identifiable, the exception fails, rather than the grant, because the uncertainty goes to the exception only. Therefore, if the portion excepted is not specifically described, the deed will operate to convey the whole tract, including that which was intended as an exception.

Angell's argument was rejected by the court because the language of the deed "except ... the following described tracts of land which have heretofore been sold and conveyed to ... 10 acres conveyed to Jack Ellison; ... 2 acres sold to S.A. Bailey ... all of said last mentioned ... acres being out of the Southeast forty acres of said above mentioned [parcel] ..." does sufficiently describe the excepted interests; they are two tracts previously conveyed by the grantors to Ellison and Bailey, respectively. This dispute has arisen, not because of any imprecision in the grantors' exception language, but because Ellison and Bailey never recorded their deeds.

While the exceptions listed in the deed did not create (or convey) any interest in the property which Bailey or Ellison did not already possess, the exceptions are still effective to prevent Angell from denying their existence. Estoppel by deed stands for the general proposition that all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest in the land if it be a deed of conveyance, and binding both parties and privies; privies in blood, privies in estate, and privies in law.

Estoppel by deed or contract precludes parties to a valid instrument from denying its force and effect. Although estoppel by deed operates most commonly against a grantor, a grantee is similarly a party to the deed and bound by the recitals, reservations, and exceptions therein.

Flores* v. *Flores, 225 S.W.3d 651 (Tex.App.—El Paso 2006, pet. denied). Maria claimed ownership of a house based on a parol gift from her husband’s grandfather and aunt.

Generally, the statute of frauds prohibits enforcement of an oral conveyance of real property. To relieve a parol gift of real estate from the statute of frauds, one must show three elements: (1) a gift in praesenti, that is, a present gift; (2) possession under the gift by the donee with the donors consent; and (3) permanent and valuable improvements, the existence of such facts as would make it a fraud upon the donee not to enforce the gift.

To be a gift in praesenti, the donor must, at the time he makes it, intend an immediate divestiture of the rights of ownership out of himself and a consequent immediate vesting of such rights in the donee. Three elements are necessary to establish the existence of a gift: (1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. Further, the owner must release all dominion and control over the property.

Unfortunately for Maria, the evidence would not support her claim of a parol gift. Before the alleged gift to her by the grandfather and aunt, the grandfather and aunt had conveyed the property to Angelica, so they had no title to give her. Further, even if the grandfather and aunt were the owners of the property at the time of the alleged promise of a gift, there was no evidence that they made a present gift of the property. Rather, the evidence showed at most an intent to make a gift at some future date.

Troxel* v. *Bishop, 201 S.W.3d 290 (Tex.App.-Dallas 2006, no pet.). The three elements constituting a gift are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property. All dominion and control over the property must be released by the owner. The one claiming the gift has the burden of establishing these elements. A gift of realty can be made in two ways: either by deed or by parol gift. There are three requisites to uphold a parol gift of realty in equity: (1) a gift in praesenti (i.e., at the present time), (2) possession under the gift by the donee with the donor's consent, and (3) permanent and valuable improvements made on the property by the donee with the donor's knowledge or consent or, without improvements, the existence of such facts as would make it a fraud upon the donee not to enforce the gift.

PART VII
LEASES

Gym-N-I Playgrounds, Inc* v. *Snider, 220 S.W.3d 905, 50 Tex. Sup. Ct. J. 634 (Tex. 2007). The Landlord and Tenant entered into a lease that contained an as-is provision that read as follows: Tenant [Gym-N-I] accepts the Premises "as is." Landlord [Snider] has not made and does not make any representations as to the commercial suitability, physical condition, layout, footage, expenses, operation or any other matter affecting or relating to the premises and this agreement, except as herein specifically set forth or referred to and Tenant hereby expressly acknowledges that no such representations have been made. Landlord makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a [document not legible]. Any implied warranties are expressly disclaimed and excluded." The lease term was extended, but finally the term expired, although the Tenant continued to occupy the premises and to pay rent.

Other than the unexercised renewal option, the sole written instrument in the record contemplating a continuation of the original lease was a holdover clause.

A fire completely destroyed the building and its contents. Gym-N-I sued Snider, claiming that Snider's failure to install a sprinkler system as required by the City constituted gross negligence and negligence per se and that leasing the premises in such a condition violated the DTPA and breached the implied warranty of suitability.

Snider filed motion for summary judgment asserting that all of Gym-N-I's claims were barred by the "as is" clause and by a valid waiver-of-subrogation clause. Snider further argued that the lease contained other valid waivers of express and implied warranties that barred certain claims and that Gym-N-I had admitted that no misrepresentations had been made by Snider.

In its first issue, Gym-N-I asserts that the “as is” clause in the original lease did not survive during the month-to-month tenancy under which it was leasing the property at the time of the fire. Gym-N-I asserts that the holdover provision failed to incorporate the “as is” clause and that only a formal, written, lease extension or renewal could carry that provision beyond the term of the original lease. The court disagreed. The lease’s holdover provision states that “any holding over . . . shall constitute a lease from month-to-month, under the terms and conditions of this lease to the extent applicable to a tenancy from month-to-month . . . .” The court gave this provision its plain, ordinary, and generally accepted meaning and held that the “as is” clause from the original lease was incorporated into the holdover lease and was applicable at the time of the fire. To do otherwise would be to give the phrase “under the terms and conditions of this lease” no meaning or effect.

Gym-N-I argued that the "as is" provision cannot nullify the implied warranty of suitability as to the defects at issue in this case. Gym-N-I contends that ***Davidow* v. *Inwood North Professional Group-Phase I***, 747 S.W.2d 373, 377 (Tex.1988) authorized a waiver of the implied warranty of suitability only when the lease makes the tenant responsible for certain specifically enumerated defects. Consequently, the general "as is" provision in this lease could not waive the warranty. Snider answers that Gym-N-I's claim for breach of the implied warranty of suitability is waived because the lease's "as is" clause expressly disclaimed that warranty. See ***Prudential***. The Supreme Court agreed with Snider.

The court first recognized the implied warranty of suitability for intended commercial purposes in ***Davidow***. The warranty means "that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition." ***Davidow*** did not address whether or how the implied warranty of suitability may be waived; however, the court did say that if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control." The court also listed several factors to consider when determining a breach of the warranty, including the nature of the defect, its effect on the tenant's use of the premises, the length of time the defect persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, and whether the defect resulted from any unusual or abnormal use by the tenant.

In ***Prudential***, the Supreme Court was asked to determine the effect of an "as is" clause on a buyer's claim for damages against the seller based on the condition of the commercial property. The court did not address what effect, if any, an "as is" provision would have on a claim for breach of the implied warranty of suitability, as this warranty applies only to commercial leases and ***Prudential*** involved a sale of commercial property. In this case, the court squarely addressed whether an express disclaimer may waive the implied warranty of suitability in a commercial lease. ***Davidow*** noted that the provisions of the lease would control if the parties expressly agreed that the tenant would repair certain defects. ***Prudential*** stands for the proposition that--absent fraud in the inducement--an "as is" provision can waive claims based on a condition of the property. Taken together, these cases lead to one logical conclusion: the implied warranty of suitability is waived when, as here, the lease expressly disclaims that warranty. Thus, the court held that as a matter of law, Gym-N-I waived the implied warranty of suitability.

The conclusion that the implied warranty of suitability may be contractually waived is also supported by public policy. Texas strongly favors parties' freedom of contract. Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit. A lessee may wish to make her own determination of the commercial suitability of premises for her intended purposes. By assuming the risk that the premises may be unsuitable, she may negotiate a lower lease price that reflects that risk allocation. Alternatively, the lessee is free to rely on the lessor's assurances and negotiate a contract that leaves the implied warranty of suitability intact.

The court recognized that its holding stands in contrast to the implied warranty of habitability, which "can be waived only to the extent that defects are adequately disclosed." ***Centex Homes* v. *Buecher***, 95 S.W.3d 266, 274 (Tex.2002). The implied warranty of habitability "applies in almost all jurisdictions only to residential tenancies" while commercial tenancies are "excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions."

2616 South Loop L.L.C.* v. *Health Source Home Care, Inc., 201 S.W.3d 349 (Tex.App.-Hous. (14 Dist.) 2006, no pet.). The Tenants leased office space in a building in Houston. Health Source contracted to lease a suite on the Property through December 31, 2003, and Pinwatana contracted to lease space through January 3, 2008. Both leases identify Quad Atrium Realty as the lessor, and contain provisions requiring that all notices to the lessor be sent to Quad Atrium Realty at its offices on the Property. The leases were signed by D.H. Virani, who was identified in the leases as the property manager for Quad Atrium Realty. However, at the time the Tenants signed their respective leases, the Property was owned by Quad L.P.

South Loop later bought the property. The day after the sale, South Loop’s property manager notified the Tenants that South Loop now owned the Property, and informed the Tenants that their "month-to-month" leases were terminated "effective immediately." The Tenants were also told they had thirty days to vacate the property unless they entered into new leases with Boxer.

The primary issue involved was whether the leases, signed by Virani on Quad Atrium Realty, were validly executed.

The Statute of Conveyances requires that "a conveyance of an ... estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing." Property Code § 5.021. Its contract law counterpart, the Statute of Frauds, requires a lease of real estate for a term of longer than one year to be in writing and "signed by the person to be charged with the promise ... or by someone lawfully authorized to sign for him." Business and Commerce Code § 26.01(a)(2).

A lessor may validly lease property to another, despite the fact that the title to the property is in a third person, if the lessor lawfully possesses the property. In such a case, the lessee may enforce the lease against the lessor. But, this does not necessarily mean that the lessee can enforce the lease against the property owner. Although the lessee may have had a subjective, good faith belief that the lessor was the owner or an agent of the owner, this is not enough to create an agency relationship between the lessor and the property owner that binds the owner to the lessor's agreement. In the absence of the owner's ratification of the lease or the lessor's actual or apparent authority to act on the owner's behalf, there is no basis on which to enforce the lease against the property owner.

Here, the Tenants failed to produce any document in which Quad L.P. authorized Virani or Quad Atrium Realty to execute the leases on Quad L.P.'s behalf, instead arguing that it was obvious that when South Loop purchased the property, its purchase was subject to the existing leases of the property. But this contention presupposes that the leases were binding on the prior owner of the property, Quad L.P., and were conveyed to South Loop at the time of purchase. The Tenants apparently presume that Quad Atrium Realty had actual or apparent authority to execute the leases on behalf of Quad L.P. Alternatively, the Tenants presume Quad L.P. ratified the leases.

Actual authority includes both express and implied authority and usually denotes the authority a principal (1) intentionally confers upon an agent, (2) intentionally allows the agent to believe he possesses, or (3) by want of due care allows the agent to believe he possesses. Here, the Tenants presented no evidence that Quad L.P. authorized Virani or Quad Atrium Realty--orally, in writing, or through a want of due care--to act as its agents. Thus, there is no support for the Tenant's presumption that Quad Atrium Realty or Virani had actual authority to bind Quad L.P.

The essential elements required to establish apparent authority are (1) a reasonable belief in the agent's authority, (2) generated by some holding out or neglect of the principal, and (3) justifiable reliance on the authority. A court may consider only the conduct of the principal leading a third party to believe that the agent has authority in determining whether an agent has apparent authority. The principal must have affirmatively held out the agent as possessing the authority or must have knowingly and voluntarily permitted the agent to act in an unauthorized manner. In this case, the Tenants presented no evidence that Quad L.P. affirmatively represented that Quad Atrium Realty or Virani were its agents, or that Quad L.P. knowingly and voluntarily permitted them to act in an unauthorized manner.

Cole Chemical & Distributing, Inc.* v. *Gowing, 228 S.W.3d 684 (Tex.App.—Houston [14th Dist.] 2005, no pet.). The tenant became delinquent in his rent payments. The tenant became delinquent in his rent payments. After finding out that the tenant had moved out of its space, the landlord changed the locks on the space. There were disputes about the rent payments and the landlord sued the tenant.

Four and a half months after the lockout, the parties reached an agreement to mitigate damages that allowed the tenant to reoccupy the leased space for the remainder of the contract term. The landlord maintained its suit to recover unpaid rent and late fees in addition to attorneys' fees. The trial court found that the tenant had breached the lease, but awarded only the part of what the landlord claimed in damages based on its finding that the Landlord had failed to make reasonable efforts to re-let the space during the lockout period and therefore failed to mitigate its damages.

Section 91.006(a) of the Property Code provides that "[a] landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease." Though it is the landlord's duty to mitigate damages, the tenant has the burden of proving that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages. The landlord challenged the trial court's finding that the landlord's duty to mitigate commenced on the date of the lockout and that the landlord failed to exercise reasonable efforts to mitigate its damages during the lockout period by making reasonable efforts to find a new tenant.

The court held that it did not need to determine whether or not the landlord had used reasonable efforts to mitigate because, even assuming the landlord's efforts were inadequate, the tenant failed to prove the amount of damages that could have been avoided if the landlord had mitigated. A tenant's proof that the landlord failed to use objectively reasonable efforts to fill the premises, standing alone, is not a bar to recovery. Rather, the landlord's recovery is barred only to the extent that damages reasonably could have been avoided. Thus, where a defendant proves failure to mitigate but not the amount of damages that could have been avoided, it is not entitled to any reduction in damages.

After the trial court found that the landlord had not made reasonable efforts to mitigate, it deducted the full contract rental amount for the entire lockout period. Though it may have been reasonable to use the contract price in calculating the amount of damages that could have been avoided, there is no evidence to support the trial court's implicit finding that the full amount of rent accrued during the lockout period could have been avoided. Even if the landlord had made every mitigation effort identified by the tenant, there is no evidence that such efforts would have been successful at all, much less immediately, or of how much such efforts would have cost.

PSB, Inc.* v. *LIT Industrial Texas Limited Partnership, 216 S.W.3d 429 (Tex.App.—Dallas 2006, no pet. history to date). Forced to move its business, PSB contacted a leasing broker and was shown a new comparable space managed by Crow. Signage on the exterior of the building was important to PSB and it obtained oral assurances from the building's agent that it would be able to have the signage it wanted at the new building. PSB and building owner signed a five-year lease in 1999. The lease prohibited exterior signs without the owner's consent.

After PSB moved in, it asked for permission to put its desired signage on the exterior of the building, but the owner refused to approve the signage. Over the next four years, PSB made more applications to the owner for signs on the building wall with text including the business name and telephone number and larger and illuminated letters. All these requests for signage were rejected. In February 2003, PSB stopped paying rent and, on June 14, 2003, about two weeks before the end of the lease, it vacated the premises. The owner changed the locks and posted notices on the doors relating to the lockout and threatening action for eviction and recovery of rent.

PSB's suit in district court asserted several causes of action, including fraud and business disparagement. The owner filed a counterclaim for breach of the lease seeking actual damages, pre-and post-judgment interest, and attorney's fees. Summary judgment was granted in favor of the owner on all of its claims and against PSB on its.

PSB argued that the trial court erred in granting the owner's motion for summary judgment on its claim that PSB breached the lease because the owner failed to disprove as a matter of law PSB's affirmative defense of fraudulent inducement for PSB to enter into the contract. PSB asserted that the fraud was the representations (1) that PSB could have the same kind of signage it had at the old location, and (2) that PSB could conduct retail sales, but the lease limited sales to wholesale. The owner argued that, even if PSB was fraudulently induced into the lease, PSB ratified the lease by continuing with the lease and not seeking rescission after it learned of the fraud.

A contract procured by fraud is voidable, not void. If a party fraudulently induced to enter into a contract continues to receive benefits under the contract after learning of the fraud or otherwise engages in conduct recognizing the agreement as subsisting and binding, then the party has ratified the agreement and waived any right to assert the fraud as a basis to avoid the agreement. An express ratification is not necessary; any act based upon a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. Here, pretty much all of the evidence showed that PSB knew of any alleged fraud yet decided to remain in the building under the lease. Its conduct was inconsistent with an intention of avoiding the lease, and it ratified the contract.

Volume Millwork, Inc.* v. *West Houston Airport Corporation, 218 S.W.3d 722 (Tex.App.—Houston [1st Dist.] 2006, pet. denied). The original landlord sold the building to the Trust. The Tenant was a tenant of the building. The Trust assigned its rights in the lease to West Houston, as the Landlord. The Tenant defaulted and West Houston brought a forcible detainer action in the justice court, where it prevailed. Volume Millwork appealed to the county court and after a trial de novo, West Houston again prevailed on the issue of the right of possession.

The Tenant then appealed to the court of appeals. As in the trial court, the Tenant questioned West Houston's legal authority to act on behalf of the Trust in claiming to have purchased the airport hangar in November 2001 and to have assumed management rights as Landlord. As in the trial court, tenant's challenges did not question standing, which may be asserted for the first time on appeal to question whether a party has an enforceable right or interest that can actually be determined by the judicial remedy sought.

Subject-matter jurisdiction cannot be conferred by consent, waiver, or estoppel at any stage of a proceeding. Lack of subject-matter jurisdiction is fundamental error that a court may properly raise and recognize sua sponte.

The Texas Constitution and the Legislature vest courts of appeals with jurisdiction over civil appeals from final judgments of district and county courts, provided the amount in controversy or the judgment exceeds $100.

Forcible-entry-and-detainer actions provide a speedy, summary, and inexpensive determination of the right to the immediate possession of real property. In keeping with this purpose, the Legislature has exercised its authority to limit this jurisdiction of courts of appeals in appeals from forcible-entry-and-detainer eviction proceedings by enacting section 24.007 of the Property Code, pursuant to which, "A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only."

It is undisputed that the Tenant used the property at issue as its business location and thus exclusively for commercial purposes and not residential purposes. After the justice court awarded possession to West Houston, the Tenant appealed that issue for trial de novo to the county court, which again awarded possession to West Houston. The court of appeals has no jurisdiction, therefore, to review either the county court's determination on the issue of possession or any finding by the trial court that is essential to the issue of possession.

The Tenant challenged landlord's legal capacity to bring the forcible-entry-and-detainer action to evict tenant. Tenant presented its challenges by means of a Rule 12 motion to show authority. The trial court denied the Tenant's challenge and resolved this issue in favor of West Houston, thus permitting landlord to proceed in the trial de novo. Landlord's capacity, or legal authority, to proceed to evict tenant by forcible-entry-and-detainer was thus a finding by the trial court that was essential to the issue of possession. Because West Houston's capacity or authority to proceed against tenant was an essential finding on the issue of possession, section 24.007 precludes exercising jurisdiction.

Carrasco* v. *Stewart, 224 S.W.3d 363 (Tex.App.—El Paso 2006, no pet.). Stewart leased office space to Carrasco in Pecos, Texas under a one-year, written lease agreement. Carrasco, who is an attorney, drafted the lease. Carrasco was required to pay rent each month with a five-day grace period and $10 per day in late fees for each day the rent was late after the grace period. The lease contained an option to renew, but it did not contain a holdover provision. Carrasco did not timely pay his rent and when the lease expired Carrasco owed $810 in late fee arrearages.

Carrasco claimed to have problems with the HVAC. When Stewart refused to take care of the problem, Carrasco paid for the repairs. Given the problems he had experienced, Carrasco told Stewart at the end of the lease term that he would continue to rent the premises at the rate of $300 per month, but he would not continue to pay late fees. According to him, Stewart agreed to rent the premises to him under these conditions on a month-to-month basis.

Stewart disagreed with Carrasco's version of their discussions and testified that she refused to enter into a new written lease until Carrasco paid the late fees. She agreed to continue leasing the property on a month-to-month basis under the same terms as the written lease, but she claimed the parties never discussed whether she would forego the late fee provision.

Carrasco continued to occupy the premises and to pay his rent late, racking up late fees of over $4,000.

Stewart demanded payment and that Carrasco vacate the premises. He left a month later and Stewart sued for the past due rent and late fees. The trial court found for Stewart.

On appeal, Carrasco argued that he was not a holdover tenant because of the agreement alleged was made at the end of the original lease term. He also argued that, if he were a holdover tenant, a holdover tenancy is limited to one year, so he should only be obligated for late fees for one year.

A tenant who remains in possession of the premises after termination of the lease occupies "wrongfully" and is said to have a tenancy at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a tenant holding under the terms of the original lease. Proof of holding over after the expiration of a term fixed in the lease gives rise to the presumption that the holdover tenant continues to be bound by the covenants which were binding upon him during the term, in the absence of evidence to the contrary. The law implies an agreement on the part of the landlord that he will let and on the part of the tenant that he will hold on the same terms of the expired lease. The holding over is normally a lease for a year binding on both parties in the absence of an express or implied agreement to the contrary. A second and subsequent holdover year can be created by holding over after the expiration of the first holdover year.

It is undisputed that Carrasco did not exercise the option to renew the lease. Thus, the original tenancy expired. Because Carrasco remained on the premises after the lease expired, a holdover tenancy was created under the common law holdover rule, and Carrasco impliedly agreed to remain under the same terms as the expired lease.

Stewart disputed Carrasco's testimony that the parties agreed to no longer be bound by the late fees provision in the original lease. Further, Carrasco's testimony in that regard is directly contrary to his course of conduct which included paying a portion of the late fees assessed by Stewart. While the holdover period is normally for one year, it is undisputed that the parties agreed that Carrasco could remain on the premises on a month-to-month basis. Thus, a month-to-month holdover tenancy was created and it did not expire until Carrasco vacated the premises.

PART VIII
VENDOR AND PURCHASER

Mandell* v. *Mandell, 214 S.W.3d 682 (Tex.App.—Houston [14th Dist.] 2007, no pet.). In settling a messy family situation (involving, at one time, David's father murdering his wife), David agreed to grant a "preferential right of purchase" to other tenants in common of the piece of property that was the subject of the dispute. In order to get to the settlement agreement, David had hired a law firm on a contingency basis and was obligated to pay the firm 50% of any recovery.

Right after the settlement agreement was executed, David executed a deed in favor of the law firm for a portion of his undivided interest in the land. He didn't notify the other tenants in common, his mother's estate and Williams, who held the preferential right. Afterward, though, the law firm sent a letter to the estate and Williams, telling them that David was going to convey a portion of the property to it. The other owners complained back to the law firm that the conveyance to the law firm was a breach of the settlement agreement and the preferential purchase right. The law firm told them that the deed had already been recorded.

Three years later, Williams bought out the estate's interest. David filed suit, claiming that he was entitled to his preferential right to purchase the estate's interest. The Estate countered by arguing that by selling a part of his interest in the property within months of signing the settlement agreement, David breached the agreement first, thereby excusing the estate from performance. David claimed he did not breach the settlement agreement because (1) the conveyance of the property did not trigger the preferential purchase right, (2) the estate had notice of the conveyance because it had notice of David's contingent fee agreement with the law firm, and (3) the estate waived its right of first purchase by failing to timely assert it.

A preferential right of purchase is a right granted to a party giving him or her the first opportunity to purchase property if the owner decides to sell it. A preferential purchase right is essentially a dormant option. It requires the property owner, before selling it to another, to offer it to the rightholder on the terms and conditions specified in the contract granting the right. When a sale is made in breach of the right of first purchase, it therefore creates in the rightholder an enforceable option to acquire the property according to the terms of the sale. The option is not perpetual, however, and the rightholder must choose between exercising it or acquiescing in the transfer of the property.

The summary judgment proof showed that David breached the settlement agreement by selling a portion of his interest in the property without first offering William or the estate the first right to purchase the property. Because David failed to give the other owners this opportunity, he breached the contract. The fact that David now called the transfer of the property a "conveyance" instead of a "sale" does not change the nature of the transaction.

David argued that, even if the conveyance is considered a sale, the estate waived its preferential purchase right by failing to timely assert it. David contended that the estate knew of the terms of his agreement with the law firm and was obligated to assert its right at that time. However, the only summary judgment proof regarding David's contingent fee agreement was his deposition testimony in the 1995 lawsuit and his affidavit in support of summary judgment stating that he agreed to give his attorneys 50% of his recovery in the lawsuit. By informing the estate of his contingent fee agreement, David did not express an intention to sell a portion of the property. The only intention expressed by David was that he would pay his attorneys 50% of his recovery in the lawsuit. The estate was not put on notice that David intended to sell the property.

Finally, David argued that the estate received notice of the conveyance in the law firm’s letter to it, but waived its preferential purchase right by failing to timely assert it. Acquiescence in a sale that violates one's preferential purchase right constitutes conduct inconsistent with an intention to purchase. Here, the estate did not acquiesce in the conveyance to the law firm. Upon receipt of the letter notifying it of the potential sale, the estate rejected the proposed sale and informed David it would treat the proposed conveyance as a breach of the agreement.

Startex First Equipment, Ltd.* v. *Aelina Enterprises, Inc., 208 S.W.3d 596 (Tex.App.—Austin 2006, pet. denied). In 1970, the Wilhelms, leased some property to Pioneer Oil Company to operate a gas station on the property. The Lease Agreement granted a right of first refusal to Pioneer. If the right of first refusal was not exercised, the property could be sold to the third party offeror and, the Lease Agreement Stated “such sale shall be subject to the terms of this lease or any renewal thereof.”

During the term of the Lease Agreement, the property was sold a couple of times. The last purchaser before this suit was Favoccia in 1987. In 1996, Favoccia entered into a Retail Store Lease/Purchase Contract with Aelina, allowing it to run the convenience store on the property. The Retail Store Lease/Purchase Contract granted Aelina an option to purchase the property.

In 2002, Startex purchased Pioneer's interest in the Lease Agreement and received an express written assignment from Pioneer.

In May 2003, Favoccia and Aelina entered into an earnest money contract for the purchase of the property. Favoccia notified Startex of the contract pursuant to the right of first refusal provision of the Lease Agreement. Startex exercised the right of first refusal and purchased the property from Favoccia. Soon thereafter, Aelina notified Startex that it was attempting to purchase the property from Startex by exercising the purchase option it acquired from Favoccia in its Retail Store Lease/Purchase Contract. Startex disputed Aelina's right to buy the property and has declined to sell the property.

Startex argued that the right of first

refusal survived two previous sales of the property. To support its argument, Startex pointed to the language in 14C that reads, "only after the expiration of said seven-day period can lessor proceed to accept the offer and sell the premises to such original bona fide offeror, and then such sale shall be subject to the terms of this lease or any renewal thereof." Startex argued that, because the property was sold "subject to the terms" of the Lease Agreement, and one of the terms of the Lease Agreement was the right of first refusal, the right of first refusal survived the previous sales.

Aelina contended that Startex did not acquire a right of first refusal from Pioneer because Pioneer's right expired when it elected not to exercise its right to purchase the property after receiving notice of two different offers to sell. Aelina argued that, because only its right exists, Startex's deed is void, its superiority argument fails, and its equities argument is irrelevant. Aelina also contended that the Lease Agreement did not expressly provide that Pioneer's right of first refusal was assignable. In the alternative, Aelina argued that if the court fiound that Pioneer's right of first refusal did not expire and that Startex's deed was valid, then Startex took title of the property subject to Aelina's lease and the purchase option therein.

The threshold question is whether the right of first refusal in the Lease Agreement survived the previous sales of the property. Citing ***Comeaux* v. *Suderman***, Aelina claimed that rights of first refusal expire if they are not exercised. 93 S.W.3d 215, 223 (Tex.App.-Houston [14th Dist.] 2002, no pet.). The court disagreed and said that ***Comeaux*** was not dispositive of the issue here. ***Comeaux*** specifically resolved a question of adequate notice, holding that when a property owner makes a reasonable disclosure to the holder of a right of first refusal of the terms of a proposed sale, the right holder has a duty to undertake a reasonable investigation of any terms unclear to him. The ***Comeaux*** court further held that when the right holder receives notice and is given the opportunity to exercise his right of first refusal, technical deficiencies in the notice cannot revive the right that was declined. While that issue of adequate notice was dispositive in ***Comeaux***, it is not here.

Additionally, the right of first refusal in ***Comeaux*** lacks the disputed language of the provision in the instant case. Rights of first refusal are bargained-for contractual provisions, and their scope must be determined by interpreting the contractual language at issue. The court held that the plain text of the lease created a right of refusal that survives sales of the property. The disputed language of the provision subjects the sale of the property "to the terms of this lease or any renewal thereof." If the property is sold "subject to the terms" of the Lease Agreement, and one of the terms of the Lease Agreement is the right of first refusal, then the right of first refusal survives all sales of the property. This interpretation is bolstered by the placement of this "survival term" in the right of first refusal provision.

As to Aelina’s contention that, if the right of first refusal did not expire and Startex's deed is valid, Startex took title to the property subject to Aelina's purchase option, the court disagreed. A purchaser, with notice of a previously given option, takes subject to the rights of the optionee. The right of first refusal invoked by Startex was granted to Pioneer in 1970 and filed of record. Aelina obtained its option twenty-six years later, subject to that right. Although Aelina maintained that it was not aware of the prior right of first refusal until it began negotiations to purchase the property from Favoccia in 2002, any proper inquiry would have disclosed this adverse right. Since the Lease Agreement was recorded and available for inspection, Aelina is charged with constructive notice of its contents.

First Permian, L.L.C.* v. *Graham, 212 S.W.3d 368 (Tex.App.—Amarillo 2006, pet. denied). A long time ago, Graham assigned his interest in various oil and gas leases to Pan American. In consideration for the assignment, Graham received an immediate payment and also reserved a production payment. Upon payment in full of the production payment, Graham’s interest in the assigned properties terminated and full title vested in the assignee.

The agreement also granted Graham a preferential right of first refusal to buy any of the leases that the assignee agreed to sell to a third party. The production payment was paid in full in 1975.

After the production payment had been fully paid, there were a number of assignments of the leases. In each instance, the owner of the leases notified Graham and offered to sell to him on the same terms, but none of the offers was ever accepted and the leases ultimately became owned by First Permian. When First Permian agreed to sell to Energen, it gave a notice to Graham and Graham acted like he was going to accept and buy the leases; however, Energen's lawyer sent Graham a letter stating that he had concluded that the right of first refusal terminated when Graham received the final production payment. The letter further revoked any purported notice pursuant to the preferential right, so Graham sued.

Graham pointed out that the preferential right paragraph does not contain any provision terminating the preferential right upon completion of the production payment. Further he argued that production payment paragraph contains no clause specifically connecting the preferential right and the production payment. Additionally, Graham pointed to the fact that the assignment contains a provision that the obligations and rights created by the assignment would be binding on and inure to the benefit of the heirs, survivors, and assignees of either party to the assignment. Interpreting these provisions together, Graham contended that the preferential right is a separate and independent covenant that was not terminated by pay out of the production payment.

Considering the assignment as a whole and giving effect to all of its provisions, the interpretation urged by Graham must be rejected. Rather than creating an independent preferential right for Graham's heirs, successors, and assigns to enjoy forever, the preferential right was intended exist only so long as necessary to protect the interest of Grahams, his heirs, successors, or assigns in the full payment for the leases. This is the only construction that gives full meaning to all of the provisions of the assignment.

Having determined that the preferential right was tied to the production payment, the next issue became what effect the completion of the production payment would have on the preferential right according to the assignment. To understand this, the nature of a preferential right must be ascertained. All of the parties agreed that the preferential right involved in this case is a real covenant. As such the preferential "right runs with land" if it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.

As a real covenant, the preferential right is subject to Texas law governing real covenants. First, a real covenant endures only so long as the interest in land to which it is appended. Second, a real covenant can only be enforced by the owners of the land the covenant was intended to benefit.

Rus-Ann Development, Inc. **v.** ***ECGC, Inc.***, 222 S.W.3d 921 (Tex.App.—Tyler 2007, no pet.). ECGC leased the golf course from Rus-Ann for one year beginning October 1, 2004. ECGC exercised an option to continue the lease through September 30, 2006. On December 6, 2005, Homer A. Lambert, President of Rus-Ann Development Company, sent ECGC a letter declaring that it was in default under the terms of the lease. On December 14, ECGC sent a letter in response stating that it was not in default but asking for more information on the alleged defaults. On December 21, 2005, ECGC filed suit seeking a temporary injunction to prevent Rus-Ann from evicting it under the lease. Correspondence flowed back and forth between Rus-Ann and ECGC over the next several months regarding the alleged defaults under the terms of the lease. On March 21, 2006, Rus-Ann sent ECGC a letter declaring that the lease was terminated. The next day, ECGC sent Rus-Ann a letter declaring that it was exercising its option to purchase the golf course. On April 7, ECGC amended its suit for temporary injunction, stating that it was "prepared and willing to perform in accordance with the [option] agreement." The trial court held two hearings on ECGC's temporary injunction. After the second hearing, the court said it would enter an order granting the temporary injunction if ECGC tendered $400,000 into the registry of the court along with a $1,000,000 promissory note made payable to Rus-Ann Development to be paid over thirty years at six percent interest. These were the terms specified in the option to purchase. Following ECGC's compliance with these terms, the trial court entered an order for a temporary injunction enjoining Rus-Ann from any attempt to evict ECGC from the golf course pending a trial on the merits in the case.

Rus-Ann contends the trial court abused its discretion in granting a temporary injunction enjoining it from proceeding with its forcible entry and detainer action because there was no evidence or insufficient evidence that ECGC had timely exercised its option to purchase the golf course. In the absence of a timely exercise of the option, there can be no cause of action for specific performance.

Rus-Ann first contends that the contract terminated because ECGC failed to notify it in writing, as required by the lease, that it was extending the term of the lease past September 30, 2005. Evidence before the trial court showed that ECGC could continue the lease following September 30, 2005 by increasing its monthly rental payment from $7,500 to $8,500. It did so. Rus-Ann accepted these increased monthly payments. A lessor waives its right to declare a lease terminated after its primary term if it continues to accept monthly rental payments.

Rus-Ann also contends that it terminated the lease by letter dated March 21, 2006, due to alleged breaches by ECGC. Specifically, it complains that ECGC failed to install a new entry gate, replace a shed, and install new carpet in the clubhouse as required by an addendum to the lease. On March 22, 2006, ECGC sent Rus-Ann a letter declaring its intent to exercise its option to purchase the property. The issue of whether ECGC had breached the contract in a manner that allowed Rus-Ann to terminate the lease before ECGC exercised its option to purchase was a question of law for the court to decide. The addendum including the allegedly breached terms is entitled "Promissory Note" and was signed more than two months after the lease was signed. Lambert signed for Rus-Ann, but no one signed for ECGC. The lease does not impose a deadline for accomplishing the three tasks. The court heard evidence from officers of both Rus-Ann and ECGC, who gave conflicting testimony about whether the lease had been breached. The trial court does not abuse its discretion if there is some evidence reasonably supporting its decision.

Rus-Ann contends that the trial court abused its discretion in granting the temporary injunction because there was no evidence or insufficient evidence that ECGC had complied with the material terms of the contract and therefore was entitled to specific performance. Rus-Ann contends that ECGC was required to close the sale within ninety days of the date in which it exercised its option to purchase the golf course. ECGC contends that it is entitled to a temporary injunction and is allowed to show at the final hearing that it is entitled to specific performance even though it did not tender payment within ninety days as required by the option to purchase.

In Texas, the potential loss of rights in real property is a probable, imminent, and irreparable injury that qualifies a party for a temporary injunction. It is thoroughly settled that where a defendant has openly and avowedly refused to perform his part of the contract or declared his intention not to perform it, the plaintiff need not make tender of payment of the consideration before bringing suit. Beginning with its December 6, 2005 letter and subsequent correspondence, Rus-Ann left no doubt that it was refusing any attempt by ECGC to proceed with the purchase of the golf course. Where tender of performance is excused, the party must plead and prove that he is ready, willing, and able to perform. ECGC pleaded that it was "prepared and willing to perform in accordance with the Agreement between Plaintiff and Defendant." During the two hearings on the temporary injunction, ECGC presented testimony that it was ready to tender the $400,000 in cash and the $1,000,000 promissory note into the registry of the court to close the purchase of the golf course. Rus-Ann complains that ECGC changed its manner of financing for the $400,000 between the first and second hearings on the temporary injunction. This is irrelevant. When the trial court required tender into the registry of the court, ECGC did so. The record shows that ECGC was not required to tender payment of the consideration before bringing suit due to Rus-Ann's refusal to perform and that there is sufficient evidence that ECGC was ready, willing, and able to perform its duties under the terms of the option contract.

Rus-Ann contends that the trial court abused its discretion in granting a temporary injunction because the option contract was not sufficiently clear and definite for enforcement by specific performance. It argues that essential terms are missing, eliminating ECGC's right to specific performance.

Before a court will decree the specific performance of a contract for the sale of land, or entertain a suit for damages for the breach thereof, the written agreement or memorandum required by statute must contain the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence. The essential elements required, in writing, for the sale of real property are the price, the property description, and the seller's signature. Those three essential elements are in the lease with option to purchase in the instant case.

Rus-Ann contends that the only terms of the seller financing included in the option to purchase contract were the term of thirty years and the interest rate of six percent. It says that the other terms of the seller financing such as how, when, where, how much, and to whom payments were to be made were not included. However, these terms were part of the provisions of the lease agreement. The court can look at both the option to purchase and the lease in determining the terms of a contract to be enforced by specific performance.

Rus-Ann also contends that because the deed of trust clause stating whether the note is assumable or due on sale is not included in the contract, it is unenforceable by specific performance. Not true. The failure of a real estate sales contract to provide the fundamental provisions of a deed of trust does not render it unenforceable by specific performance.

Rus-Ann further complains that the option contract does not include terms relating to proration of taxes or the place of closing. Again, failure to include these terms in the contract for the sale of real property does not render it unenforceable by specific performance. Finally, Rus-Ann contends that the option to purchase does not include whether ECGC had a right to the partial release of lots that it sold on the golf course during the thirty years. That matter was covered in the lease. Therefore, it is a term that can be determined by the trial court at the final hearing.

LTS Group, Inc.* v. *Woodcrest Capital, L.L.C., 222 S.W.3d 918 (Tex.App.—Dallas 2007, no pet.). LTS entered into an agreement with Mass Mutual to purchase an office building in Fort Worth. Under the terms of the contract, a thirty-day due diligence period followed the signing of the agreement. The agreement gave LTS the right to terminate the agreement at any time during the due diligence period. The agreement also provided, in part, that LTS could not assign this Agreement without Mass Mutual's prior written consent. After the agreement was signed, Mass Mutual gave LTS extensive documents concerning the property, including copies of leases, rent information, current operating statements and property tax statements for the prior three years, commission agreements, service and maintenance agreements, a recent survey, occupancy permits, structural, mechanical, electrical, plumbing, and other engineering reports, ADA or accessibility reports, and notice of violations from a governmental agency. LTS also hired structural engineers, a mechanical engineer, and a company that developed an environmental report "working off of" a report supplied by Mass Mutual.

LTS started talking with Woodcrest about assigning the contract to it. LTS turned over a lot of the due diligence materials to Woodcrest. Because of an environmental concern, LTS terminated the contract. Woodcrest ended up buying the property later on. It had never paid LTS anything for the due diligence materials.

LTS sued Woodcrest under a quantum meruit theory for the due diligence materials it had provided to Woodcrest. While the jury found for LTS, the court entered a take nothing judgment in favor of Woodcrest.

Quantum meruit is an equitable theory of recovery which is based on an implied agreement to pay for benefits received. To recover under the doctrine of quantum meruit, a plaintiff must establish that: (1) valuable services and/or materials were furnished, (2) to the party sought to be charged, (3) which were accepted by the party sought to be charged, and (4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient. A party must introduce evidence on the correct measure of damages to recover on quantum meruit, which is the reasonable value of work performed and the materials furnished.

To recover in quantum meruit, the plaintiff must show that his efforts were undertaken for the person sought to be charged; it is not enough merely to show that his efforts benefited the defendant. The expectation of a future business advantage or opportunity cannot form the basis of a cause of action for quantum meruit.

Here, the president of LTS testified that he provided Woodcrest with all the financial information it had, including financial projections generated by LTS and some proprietary information. He also testified that $200,000 was "the reasonable value of the services and materials that were provided" to Woodcrest. When asked about the basis for his opinion, he testified that $200,000 was "less than 4 percent of the sales price, and a lot of brokers get more than that." It appears from this testimony that the president based his opinion on the fact that LTS expected to get a fee in excess of $200,000 when Woodcrest purchased the property. However, this is no evidence as to the value of the due diligence materials generated by LTS and delivered to Woodcrest. Nor does the reference to what fee a broker might have charged provide any evidence of the reasonable value of the work performed by LTS and the materials actually furnished by LTS.

Further, LTS's agreement with Mass Mutual was not assignable without Mass Mutual's prior written consent, but LTS gave the financial information to Woodcrest anyway. Because the assignment of LTS's agreement could not be assigned without the participation and prior written consent of Mass Mutual, it appears the materials were provided in expectation of a future advantage or business opportunity.

Thus, because there was no evidence to support the elements of LTS's claims, the trial court properly granted Woodcrest's motion for judgment notwithstanding the verdict.

Fletcher* v. *Minton, 217 S.W.3d 755 (Tex.App.—Dallas 2007, no pet.). Salls owned a 12.56 acre parcel of real property in Hunt County, Texas. In 1984, Salls sold two adjoining tracts from the parcel. Tract I, consisting of 3.675 acres, was sold to Malecek. Tract II, consisting of 3.676 acres was sold to Minton. Both sales occurred pursuant to a contract for deed between Salls and the respective purchasers. Neither contract for deed was recorded, but other than the delivery of the deed, both Minton and Malecek contend that the contracts were fully performed.

In September 1994, Salls sold the property again. This sale involved the entire 12.56 acre parcel, including the two tracts previously conveyed to Minton and Malecek. Cook, the purchaser of the entire parcel, did not record the deed until 1997. In 1999, Cook sold the 12.56 acre parcel to Fletcher. The general warranty deed Fletcher recorded bears the notation "Drafted without Title Examination."

Fletcher filed a lawsuit against Minton seeking to quiet title to tracts 1 and 2. Minton denied Fletcher's allegations of ownership and asserted that he had dispossessed the owner of the Malecek tract by adverse possession, and owned tract II pursuant to his contract for deed with Salls. Malecek intervened in the lawsuit and asserted that she was the owner tract I. Fletcher subsequently amended her petition to assert that if either Malecek or Minton was awarded possession, she was entitled to reimbursement of the property taxes she paid on the property. Although Fletcher did not plead that she was a bona fide purchaser, the issue was tried by consent. The case was tried to the court without a jury. After conclusion of the trial, the trial judge signed a judgment holding: 1) Malecek is the owner of tract I; 2) Minton is the owner of tract II; and 3) Fletcher is entitled to reimbursement from Malecek for ad valorem taxes paid on tract I.

The Texas Property Code provides for the recording of real property transfers and limits the validity of unrecorded instruments. An unrecorded conveyance is binding on those who have knowledge of the conveyance. A person who acquires property in good faith, for value, and without notice of any third-party claim or interest is a bona fide purchaser. Status as a bona fide purchaser is an affirmative defense to a title dispute.

Notice will defeat the protection otherwise afforded a bona fide purchaser. "Notice" is broadly defined as information concerning a fact actually communicated to a person, derived by him from a proper source, or presumed by law to have been acquired. Notice may be actual or constructive. Actual notice results from personal information or knowledge, as well as those facts which reasonable inquiry would have disclosed. Constructive notice is notice the law imputes to a person not having personal information or knowledge.

A purchaser of land is charged with constructive notice of all claims of a party in possession of the property that the purchaser might have discovered had he made proper inquiry. This duty to ascertain the rights of a party in possession of the property arises when the possession is open, visible, exclusive, and unequivocal.

Sefzik* v. *Mady Development, L.P., 231 S.W.3d 456 (Tex.App.-Dallas 2007, no pet. history to date). A 130 and 110 acre tract were subject to an agricultural exemption. Mady agreed to buy 47 acres located within the two tracts from Sefzik. After the sale, Sefzik retained 10 acres out of the 110 acre tract. The contract contained a typical proration provision as well as a provision relating to roll-back taxes which said: “If this sale or Buyer's use of the Property after closing results in additional assessments for periods before closing, the assessments will be the obligation of Buyer.” At closing, the taxes on the 47 acres were prorated based on the agricultural exemption amounts. After closing, the appraisal district issued a notice of change of use and rollback taxes were assessed on the fair market value of both the 130 acre and 110 acre tracts. Mady sent Sefzik a letter demanding that Sefzik pay its proportionate share of the taxes. Sefzik refused to pay Mady for that share.

Sefzik claimed that Mady was responsible as a matter of law for all of the taxes on the property that resulted from the revocation of the agricultural exemption because the real estate contract between the parties provided that the buyer was responsible for additional taxes caused by the buyer's change of use. Mady argued that the provision in the contract relied upon by Sefzik is limited to rollback taxes and Mady was not looking to Sefzik for reimbursement of any paid rollback taxes. Rather, Mady only sought reimbursement from Sefzik for his pro rata share of the taxes paid by Mady for the tax year of the sale and for taxes paid on those portions of the tract that were owned by Sefzik and incorrectly included in the tax bill sent to Mady.

Sefzik interpreted the provision in the contract as placing the burden for the additional taxes on Mady because it was the party responsible for the change of use and thus the change in tax valuation. He claimed the text of the agreement provides that the buyer, not the seller, is responsible for additional taxes caused by the buyer's change of use and that the additional taxes were imposed on the property because Mady, the buyer, changed the use of the property. Although the heading of the paragraph "Rollback taxes," the text of the provision is broader than the heading and applies to "additional assessments" resulting from the sale or the buyer's use, not just "rollback taxes" as that phrase is interpreted by Mady.

The court agreed with Sefzik. Mady's position rested on the assumption that the term "rollback taxes" as used in the agreement has the same meaning as applied in the Tax Code and the Comptroller's Agricultural Appraisal Manual. There was, however, nothing in the agreement to suggest the parties intended to adopt the Comptroller's understanding.

Furthermore, even if it were appropriate to look outside the agreement to interpret the term "rollback taxes," the text of the provision controls. Texas courts attach greater weight to the operative clauses of a contract than the captions or titles.

In this case, the text of the contract states that "additional assessments" resulting from the sale of or buyer's use of the property after closing, not just "rollback taxes" as that term is advanced by Mady, are the responsibility of the buyer. There was an "additional assessment" in that property taxes for the tax year 2002 greater than those prorated and initially paid by the parties were imposed on the property in 2003 because of the loss of the agricultural exemption on the property. Mady acknowledged that the additional taxes resulted from its use of the property, i.e., an intent to discontinue agricultural activities. Under the plain language of the agreement, Mady was therefore responsible for the 2002 market value taxes caused by the loss of the agricultural exemption.

Haire* v. *Nathan Watson Company, 221 S.W.3d 293 (Tex.App.—Fort Worth 2007, no pet.). While an as-is provision in a purchase contract might preclude an action by a buyer against a seller for misrepresentations regarding the property condition, it did not preclude homeowners from bringing negligence and breach of implied warranty action against subdivision developer and geotechnical engineering firm, neither of whom were either parties to, or third-party beneficiaries of, the contract.

Gnerer* v. *Johnson, 227 S.W.3d 385 (Tex.App—Texarkana 2007, no pet.). By a contract for deed dated the Gnerers as sellers and the Johnsons as buyers entered into an agreement for the sale and purchase of some land and a house. The contract amount was $35,000.00, of which $2,000.00 was paid at the time the contract was entered, with the balance of $33,000.00 bearing interest at ten percent per annum, payable in twenty-three equal monthly installments of $354.64 each, with a balloon final installment equal to the then-remaining principal and interest due on the obligation. When the balloon installment under the written contract became due, the Johnsons were unable pay the entire sum and continued to pay monthly installments through July 2005. The Gnerers contended that the failure of the Johnsons to pay the remaining balance of $30,849.31 due on the twenty-fourth installment constituted a default and that the Johnsons were thereafter in possession only as tenants at will. The Gnerers maintained, further, that all payments paid by the Johnsons after the timely twenty-third installment were only rent.

The Johnsons pleaded that there had been a novation of the original contract by an oral agreement between them with the Gnerers to simply continue the monthly installments which had previously been made until full satisfaction of the debt, that they had made valuable improvements to the realty and maintained possession of the property.

At trial, the Johnsons testified that, when the time for payment of the balloon installment drew near, it became apparent that they were going to be unable to obtain financing from other sources to satisfy the remainder of the obligation because the value of the property would not support such a loan. In telephone conversations between the parties, the Gnerers had indicated that the Johnsons should continue to make monthly installments and that the Gnerers would have an attorney draft an addendum to the agreement to evidence the change. Although the Johnsons had been informed by the Gnerers that an addendum had, indeed, been drafted and awaited the Johnsons' signatures at the Gnerers' attorney's office, the Johnsons had refused to go to the Gnerers' attorney's office to sign it or get it. Even without the addendum having been signed, the Johnsons continued to send monthly installments of approximately the same amount as set out in the contract for deed, with adjustments for late payments, increased taxes, and increased hazard insurance, and the Gnerers continued to accept the payments. During the Johnsons' stay on the property, they made valuable improvements to the property, some of which were made after the maturity date of the written contract and after the date which Dawn had directed Kaye to continue the monthly installments.

The trial court entered an order which included findings that there was a written contract entered into between the Johnsons and the Gnerers for the purchase and sale of the land in controversy, that there had been substantial compliance with the contract by the Johnsons, that there was an agreement between the parties to extend the time for performance under the original contract, that there was $5,000.00 still due and owing from the Johnsons to the Gnerers under the contract, that this sum had already been deposited into the registry of the court by the Johnsons and, thus, that the Johnsons had fully complied with their obligation under the agreements for the purchase of the real estate.

To the court of appeals the evidence was clear that the provisions of the original written contract were not satisfied by the Johnsons because they failed to pay the final installment prescribed in it. The evidence was also undisputed that the Johnsons continued to make a substantial number of monthly installments for a period of about seven years after the date that the balloon payment was due to have been paid. In addition, it was shown that the Johnsons were in possession of the property and made substantial improvements to it, some of which were made before the balloon payment was due and some of which were made thereafter. The area of dispute lay with the characterization of the monthly installments which were made by the Johnsons to the Gnerers after the balloon payment was due.

Section 26.01 of the Texas Business and Commerce Code is Texas's statutory embodiment of what is known as the statute of frauds, requiring certain contracts (including a contract for the sale of real estate) to be in writing. However, some exceptions exist to the general application of the statute of frauds. Texas has long recognized that some situations exist where the nonenforcement of the contract-or the enforcement of the statute-would, itself, plainly amount to a fraud. Very narrowly applied, the exception requires the existence of three indispensable fact circumstances in order to relieve a parol sale of land from the operation of the statute of frauds: (1) payment of the consideration; (2) possession by the vendee; and (3) the making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced.

As to the application of the statute of limitations to the controversy, the Gnerers correctly point out that the original contract was breached more than four years before suit was instituted and that subsection (a) requires that, “An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.” However, Section 2.725(b) specifies, “A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.” The Johnsons' cause of action did not accrue until the Gnerers refused to honor the parol agreement to convey the property. This refusal happened long after the “balloon” installment had become due and occurred well within the four-year period before the suit was filed.

Kupchynsky* v. *Nardiello, 230 S.W.3d

685 (Tex.App—Dallas 2007, no pet. history to date). In a construction defects case, the homebuilder/seller argued that it was not liable for the defects because the contract contained an "as-is" provision. In arguments based on Prudential, the homebuilder/seller argued that the as-is provision negated causation, as a matter of law.

The court noted that various aspects of the transaction may make an as-is provision unenforceable. In particular, the court noted that a buyer would not be bound by an agreement to purchase something "as is" that he was induced to make because of a fraudulent representation or concealment of information by the seller. The nature of the transaction and totality of the circumstances surrounding the agreement must also be considered. Where the "as is" clause is an important part of the basis of the bargain, not an incidental or "boiler plate" provision, and is entered into by parties of relatively equal bargaining position, a buyer's affirmation and agreement that he is not buying on representations of the seller should be given effect.

Here, the provision relied on by the homebuilder/seller was distinctly different from that in Prudential. The provision in Prudential was contained in a contract submitted by the buyer and contained specific language that the buyer took the property as is with all latent and patent defects. In contrast, the provision here is contained in a standard, preprinted form. The provision was neither discussed nor negotiated. The clause was never discussed with the buyers and was not a part of the original negotiations or renegotiations. Rather, the clause was part of the boilerplate language in the contract. Even if the parties were in equal bargaining position, the court could not conclude in light of all circumstances that the clause was an "important basis of the bargain" that negated causation as a matter of law.

PART IX
BROKERS

***Gray & Co. Realtors, Inc.* v. *Atlantic Housing Foundation, Inc*.**, 228 S.W.3d 431 (Tex.App.—Dallas 2007, no pet.). The broker had a commission agreement that entitled it to payment upon consummation of the sale of a number of properties to the Foundation. In order to attempt to qualify for some tax advantages, the seller transferred title to the properties to the Foundation without receiving payment. A few months later, when the transaction died, the Foundation transferred title back to the seller. The broker sued for the commission, claiming it was due upon the transfer of title to the Foundation in the first instance.

The crux of the broker's argument was that the temporary transfer of nominal title to the properties was sufficient to "consummate" the transaction, as that undefined term is used in the brokerage agreement, and thus triggered the Foundation's obligation to pay broker's commission. The court disagreed. Significantly, the language of the brokerage agreement itself expressly dictated that no broker's commission was owed under these circumstances. The agreement required payment on "consummation" of the transaction. "Consummation" means "completed" or "fully accomplished." This transaction was not consummated because the Foundation never performed its obligations under the sales contract.

In another paragraph, the brokerage agreement said the commission would be payable when the transaction closed. The word "closing" is a term of art commonly used in real-estate transactions and is defined as the final meeting between the parties to a transaction, at which the transaction is consummated,, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred. Again, this had not occurred.

PART X
TITLE INSURANCE
AND ESCROW AGENTS

Hanson Business Park, L.P.* v. *First National Title Insurance Company, 209 S.W.3d 867 (Tex.App.—Dallas 2006, pet. denied). Hanson purchased three tracts of land in Irving, Texas. First National provided a title insurance policy covering the tracts. Some time after the purchase, Hanson learned that a portion of one of the tracts lies in a flood plain. Hanson made a claim under the title insurance policy. First National denied the claim. Hanson sued First National for breach of the policy, unfair settlement practices, and breach of the duty of good faith. First National filed a summary judgment motion, arguing that Hanson's claims were not covered by the title insurance policy.

A title insurance policy is a contract of indemnity, imposing a duty to indemnify the insured against losses caused by defects in title. The policy governing this case provides coverage for any loss or damage caused by any defect in or lien or encumbrance on the title.

First National argued that the flood-plain designation of a portion of the property is not a matter that "would be shown in the regular transfers of title." See Civil Practice & Remedies Code § 16.021(4) (Vernon 2002) (defining "title" to mean "a regular chain of transfers of real property from or under the sovereignty of the soil"). First National argued that the property's flood-plain status, rather than being a matter affecting title, is a condition of the land that was "created by nature and merely designated by FEMA." Thus, according to First National's motion, the property's status is distinguishable from title defects or encumbrances, which are "created by parties that own a right or interest in the affected property."

Hanson argued that the flood-plain status was indeed a title defect or encumbrance. Hanson relied on cases that link the concepts of defect and marketable title. For example, Hanson cites the case of ***Alling* v. *Vander Stucken***, 194 S.W. 443 (Tex.Civ.App.-San Antonio 1917, writ ref.), which states, in the context of specific performance of a contract for purchase of land: "A title that is open to reasonable doubt, such as would affect the market value, is not a marketable title.... By a marketable title is meant one reasonably free from doubts that would affect the market value of the land; a title which a reasonably prudent man, in the light of all the facts and their legal effect, would accept as being satisfactory."

Hanson read these and similar cases to state that any condition that decreases the price a seller of property can recover amounts to a defect in the property's marketable title. Hanson argued that "any error, omission, or irregularity that affects the value of the land" amounts to a defect in title. A thorough reading of the cases, however, proves Hanson's understanding to be incorrect. The cases' discussions of "marketable title" actually address whether the property can be sold at all, not whether the property will fetch a lesser price because of some condition on the land. The cases cited by Hanson establish that the concept of "title" speaks to ownership of rights in property, not to the condition or value of the property. Thus, a defect in, or encumbrance on, title (such as would trigger coverage under a title insurance policy) must involve a flaw in the ownership rights in the property.

Hanson's argument that "any error, omission, or irregularity that affects the value of the land" amounts to a defect in title is not a correct understanding of Texas law. Thus, the court concluded that the flood-plain status of that property was a defect, if at all, only in the condition of the property. It refused to equate a defect in the condition of the property with a defect in title to the property. Hanson's claim was not covered under the title insurance policy, and First National was entitled to judgment as a matter of law.

Koenig* v. *First American Title Insurance Company of Texas, 209 S.W.3d 870 (Tex.App.—Houston [14th Dist.] 2006, no pet.). The Arnolds filed suit against the Koenigs claiming title by adverse possession to a 40 inch by 45 foot strip of property situated between the Koenigs' garage and the official property line. The Arnolds based their claim on a fence built by the Arnolds' predecessors in title, which the Arnolds claimed fully enclosed the disputed property. After First American denied coverage to defend the Arnolds' claim, the Koenigs hired an attorney at their own expense and successfully defended the claim. The Koenigs then sued First American, alleging breach of contract, breach of warranty, breach of the duty of good faith and fair dealing, violation of the Texas Deceptive Trade Practices Act, and violation of Article 21.21 of the Texas Insurance Code. First American filed a general denial and also alleged an exception to coverage according to the "rights of parties in possession" exception. First American Title then filed a motion for summary judgment, also based on the "rights of parties in possession" exception, which was granted.

The Koenigs argued that First American denied their claim only because the claim was based on adverse possession, and because an adverse possession claim requires facts to be pleaded that the claim is actual, open and hostile, all adverse possession claims fall within the "rights of parties in possession" title policy exception. First American disagreed and contended that it denied the claim because it considered the facts alleged by the Arnolds in their petition.

The "rights of parties in possession" exception is a standard exception from coverage and relates to claims such as adverse possession. Coverage, however, is not determined by the cause of action but by the facts giving rise to the alleged actionable conduct. The insurer is entitled to rely on the plaintiff's allegations in determining whether the facts are within policy coverage. An allegation of adverse possession alone is not sufficient for a claim to fall within the policy exception for "rights of parties in possession;" the petition must contain factual allegations that establish notice of possession by a third party. The rationale for the policy exception for "rights of parties in possession," at least in part, is that possession of land by a third party should put the insured on notice of an adverse interest. An insurer's duty to defend an adverse possession claim is not based on the legal theory behind the cause of action. Rather it is based on the facts pled by the underlying plaintiff giving rise to the actionable conduct.

The "rights of parties in possession" exception applies if the nature of the possession alleged is such that it charges the purchaser with notice of a third party's possession. An insured is on notice if the possession is open, visible, unequivocal, exclusive, hostile, and actual rather than constructive. Here, a fence separated the two residential properties, the Arnolds landscaped the property by planting trees on the disputed property, and the Arnolds' large dogs utilized the property. In addition, the Arnolds and the Koenigs discussed building an actual fence away from the Koenigs' garage, and according to the Arnolds' petition, the Arnolds allowed the Koenigs to install a fence one foot further onto their alleged property. When taking these facts as true, the Arnolds' possession of the disputed strip of property was open and visible, notorious, exclusive, and not merely constructive. The Koenigs had notice of a potential dispute with the Arnolds because the Arnolds were in actual possession of the disputed strip of property.

PART XI
ADVERSE POSSESSION

Tran* v. *Macha, 213 S.W.3d 913, 50 Tex. Sup. Ct. J. 186 (Tex. 2006). Neighboring relatives shared the use of a driveway for many years, thinking it belonged to one of them when in fact it belonged to the other.

Under Texas law, adverse possession requires an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. The statute requires visible appropriation; mistaken beliefs about ownership do not transfer title until someone acts on them. Thus, there must be adverse possession, not just adverse beliefs.

The statute requires that such possession be "inconsistent with" and "hostile to" the claims of all others. Joint use is not enough, because "possession must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant." Here, the neighbors shared use of the strip, so the use by the adverse claimant was not inconsistent with or hostile to the other party’s ownership.

The court of appeals had held that "adverse possession need not be intentional, so long as it is visible, open, and notorious." It is true that "hostile" use does not require an intention to dispossess the rightful owner, or even know that there is one. But there must be an intention to claim property as one's own to the exclusion of all others; mere occupancy of land without any intention to appropriate it will not support the statute of limitations.

The Supreme Court concluded with a nod to Robert Frost. "It may seem harsh that adverse possession rewards only those who believe 'good fences make good neighbors,' and not those who are happy to share. But the doctrine itself is a harsh one, taking real estate from a record owner without express consent or compensation. Before taking such a severe step, the law reasonably requires that the parties' intentions be very clear."

Session* v. *Woods, 206 S.W.3d 772 (Tex.App.-Texarkana 2006, pet. denied). The fact that the adverse claimant did not receive personal service of a notice of tax sale did not render the tax sale ineffective as to his claim to the property. The adverse claimant was not a record owner of the property, and the taxing entities were not required to search on ground for trespassers who may have had interest in property.

The adverse claimant was a "defendant" in the tax foreclosure action, for purposes of the statute stating that deed issued to purchaser in tax sale vested perfect title as to any interest owned by the defendant. The adverse claimant was served by posting notice to "unknown owners and adverse claimants," and the judgment listed as defendants those parties served by posting.

Kilpatrick* v. *McKenzie, 230 S.W.3d 207 (Tex.App.—Houston [14 Dist.] 2006, no pet.). The plaintiff in a trespass to try title action may recover (1) by proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession and that the possession has not been abandoned. When, as in this case, the defendant is shown to be in possession of the land in controversy and the plaintiffs fail to establish their prima facie right to title, judgment must be entered in the defendant's favor. This is true even though the defendant may have pled a title that he failed to establish, because under this well-settled and unforgiving law, plaintiffs are not entitled to recover unless their own title has been affirmatively proven. Although this rule is a harsh one, it has been the law in Texas for more than a century.

PART XII
EASEMENTS

Krohn* v. *Marcus Cable Associates, L.P., 201 S.W.3d 876 (Tex.App.-Waco 2006, pet. denied). The limitations period for a trespass action is two years after the day the cause of action accrues. In most cases, a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.

A cause of action for a "continuing tort" does not accrue until the defendant's tortious conduct ceases. In determining whether there is a continuing tort, care must be taken to distinguish between (1) repeated injury proximately caused by repetitive wrongful or tortious acts and (2) continuing injury arising from one wrongful act. While the former evinces a continuing tort, the latter does not. Here, the landowners alleged one wrongful act--the placement of the cable line across their property--which has been a source of continuing injury. This type of trespass is not a continuing tort.

The continuing tort doctrine also does not apply in the case of a permanent injury to real property. The presence of the cable line on the landowners' property for more than a decade clearly constituted a permanent trespass as of the time the landowners filed suit. Therefore, because the cable company committed a permanent trespass, the continuing tort doctrine does not apply.

Crone* v. *Brumley, 219 S.W.3d 65 (Tex.App.—San Antonio, pet. denied). Abb severed his tract of land, keeping for himself the northern portion and conveying the southern portion to his son, Pat. Pat conveyed the northern portion of his tract to DeLoach. DeLoach's property was "landlocked," surrounded on all sides by land owned by either Abb, Pat, or third-parties and without immediate access to a public road. However, the northwest corner of Abb's property bordered what is now Highway 277/377, a public road that runs from Sonora and Rocksprings in the north to Del Rio in the south. At the time of this lawsuit, Pat's property was owned by Crone and DeLoach's property was owned by the Brumleys.

After they acquired the DeLoach/Brumley Ranch and until 2002, the Brumleys, as well as the hunters to whom they leased, accessed their ranch from the south on a private road over Crone's Sycamore Ranch by permission. However, after Crone noticed that water lines had been broken, household goods had been taken, a gate had been left open and livestock were missing, several head of livestock were found dead, and grasses had been torn up by the hunters' four-wheelers, Crone locked the gate on the road leading from her ranch to the DeLoach/Brumley Ranch, ultimately permitting only the Brumleys access to their property for maintenance purposes. In response, the Brumleys filed this lawsuit seeking to establish an easement by necessity.

When a grantee seeks an easement by necessity over land once owned by a common grantor but conveyed to third parties, he seeks a way of necessity by implied grant. The elements needed to establish an implied easement by necessity are: (1) unity of ownership prior to separation; (2) access must be a necessity and not a mere convenience; and (3) the necessity must exist at the time of severance of the two estates. The way of necessity must be more than one of convenience for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own.

However, an easement by necessity is not defeated by proof that the party seeking the easement has "a mere license to use a way across the land" of another. Rather, the party seeking to establish an easement by necessity must prove that he has no other legal access to his property. Once an easement by necessity arises, it continues until the necessity terminates.

The Brumleys argued at trial that their right to an easement by necessity south across Crone's Sycamore Ranch arose out of Pat's sale of the northern half of his land to DeLoach. According to the Brumley's, Pat had separate access to the south of his land after the conveyance to him. Crone, on the other hand, argued that an easement by necessity north across what was Abb's land arose when Abb sold the southern half of his land to Pat and continued through Pat's sale to DeLoach and DeLoach's sale to the Brumleys.

The court agreed with Crone that the analysis must start with the severance of Abb's land. The court also concluded that there was no evidence that Pat had any access to the south, thus he would require an easement by necessity across Abb's land to the north. The Brumleys complained that this access was not reasonable access because the road was impassible without a four-wheel drive vehicle. But the impassability of the road gives to a party no right to an easement. Brumley's testimony establishes not that the road to south is necessary but that it is more convenient.

Scown* v. *Neie, 225 S.W.3d 303 (Tex.App.—El Paso 2007, pet. denied). Scown owns a three-acre tract abutting Mosely Lane. Neie owns a ten-acre tract on the other side of Moseley lane and access a portion of the ten-acre tract from the portion of Moseley lane abutting Scown's three-acre tract.

At some point, Scown began construction of a fence across Moseley Lane which would have blocked access to that portion of Moseley Lane which abuts their property. Neie sought a restraining order temporarily halting the construction of the fence by Scown which was ultimately granted by the trial court. Neie also filed suit seeking a declaratory judgment that the disputed portion of Moseley Lane was an implied easement or in the alternative, that the disputed portion of Moseley Lane had been impliedly dedicated as a public roadway.

Neie relied on two theories in his motion for summary judgment: (1) implied dedication to public use; and (2) implied easement by grant. The trial court specifically found that Neie had an implied easement in the disputed section of Moseley Lane and also that Scown's predecessor in interest had impliedly dedicated that section for public use.

An easement is a liberty, privilege, or advantage granted to a person, either personally, or because of that person's ownership of a specified parcel of land, to use another parcel of land for some limited purpose. Easements may be created by express grant, by implication, by necessity, by estoppel, and by prescription.

An implied easement arises where the circumstances surrounding a conveyance of land from a common owner results in an easement being created between the severed tracts. For example, when a common owner uses one tract of land for the benefit of another but subsequently conveys either tract, an implied easement may thus be created. The law will read into an instrument that which the parties would have intended had they been fully aware of the surrounding circumstances and given the transaction proper consideration.

If the dominant estate is retained by the grantor and the servient estate is conveyed, an implied easement is said to have been "reserved." The test for whether an implied easement by reservation exists requires that the party claiming the easement demonstrate: (1) unity of ownership prior to the separation; (2) access must be a necessity and not a mere convenience; and (3) the necessity must exist at the time of severance of the two estates. The degree of "necessity" required to support a finding of implied easement by reservation is strict necessity.

On the other hand, if the dominant estate is conveyed while the grantor retains the servient estate, an easement is said to have been "granted." The test for whether an implied easement by grant exists is (1) whether there was unity of ownership of the dominant and servient estates and that the use was (2) apparent, (3) in existence at the time of the grant, (4) permanent, (5) continuous, and (6) reasonably necessary to the enjoyment of the premises granted. The test required to support a finding of implied easement by grant is less burdensome than that required to support a finding of implied easement by reservation.

Under these facts, Scown's grantor could only have "reserved" an implied easement in the three-acre tract at the time of the conveyance. For Neie to prove the existence of an implied easement, he was required to plead and prove the elements of an implied easement by "reservation." Because the trial court granted the summary judgment motion based on an implied easement by "grant" rather than an implied easement by "reservation," summary judgment on this ground was improper.

Common law dedication can either be express or implied. Implied dedications, such as the one at issue here, are based on the acts and conduct of the landowner. Chapter 281 of the Transportation Code abolished the common law doctrine of implied dedication in counties with populations of less than 50,000. The statute does not apply retroactively and therefore does not affect an implied dedication occurring before its effective date of August 31, 1981. If an implied dedication occurred prior to that date by a previous owner, a subsequent purchase of the property does not affect the dedication.

A valid dedication can only be made by the owner in fee. There are four essential elements of implied dedication: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) he was competent to do so; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication. Whether a public right-of-way has been acquired by dedication is a question of fact. Something more than simply failing to act or acquiescence in the use of land is required to find that a dedication was intended although direct evidence of an overt act or a declaration is not required. There must be evidence of some additional factor which implies a donative intent when considered in light of the owner's acquiescence in the public's use of the roadway.

The additional factors may include: (1) permitting public authorities to grade, repair, or otherwise improve the roadway; (2) selling parcels of land from a plat or plan showing the roadway as a means of access to the parcels; (3) construction of facilities for general public use; (4) an express representation by the owner of a road to a land purchaser that the way is reserved for public use; (5) fencing off the roadway from the remainder of the land; or (6) obtaining a reduction in the purchase price commensurate with the area of the roadway.

Here, the court found enough evidence of implied dedication to hold for Neie.

Cleaver* v. *Cundiff, 203 S.W.3d 373 (Tex.App.-Eastland 2006, pet. denied). The doctrine of easement by estoppel, or estoppel in pais, is an exception to the statute of frauds. Under this doctrine, a landowner may be estopped from denying the existence of an easement created by "representations" upon which another has detrimentally relied. These representations may be verbal or nonverbal. Once created, an easement by estoppel is binding upon successors in title if reliance upon the easement continues.

Whaley* v. *Central Church of Christ of Pearland, 227 S.W.3d 228 (Tex.App.—Houston [1st Dist.] 2007, no pet.). In 1976, the Whaleys purchased a landlocked tract from the Church's predecessor in title. An easement for a driveway was expressly granted so that the Whaleys could access the landlocked tract. In addition to the easement for the driveway, the earnest money contract between the Whaleys and the seller stated that the Whaleys would be allowed "to erect a sign at a designated location." In 1977, the Whaleys opened an automotive repair shop on their tract and erected a sign on the seller's property. The sign was metal, two feet wide by three feet long, and mounted on a three-foot pole. The sign's location did not abut on either the Whaleys' land or the driveway easement. Eight years later, that sign was replaced by a sign 12 feet wide by eight feet high, which sat on the premises for 12 years until it was damaged in a storm. After the sign was damaged, it was replaced in 1997 by a sign that was metal, approximately eight feet long, and on top of a brick base that was two feet deep and eight feet wide. The sign and base together were approximately six feet in height.

In 2002, the Church purchased the tract burdened with the driveway and sign easements. The Church removed the Whaleys' sign because they did not have an easement that expressly allowed the sign. The Whaleys sued the Church for removing the sign, and a temporary injunction was issued to prohibit the Church from interfering with the Whaleys' easement. The Whaleys replaced the sign taken down by the Church with a sign that was similar in size to the 1997 sign.

In an earlier appeal, this court held held that the Whaleys have a sign easement by estoppel at the location on which the sign is and has been erected and remanded the cause for the determination of a legal description of the sign easement and for entry of judgment. The trial court held a hearing on the issue. The trial court's judgment granted an easement of a four-foot by 10-foot area (40 square feet) for the easement, describing it by metes and bounds.

The Whaleys asserted that the evidence was legally and factually insufficient to support the trial court's judgment limiting the easement to 40 square feet, calling the court's decision arbitrary and capricious.

Every easement carries with it the right to do whatever is reasonably necessary for full enjoyment of the rights granted. In determining the scope of an easement, a court may imply only those rights reasonably necessary to the fair enjoyment of the easement with as little burden as possible to the servient owner. Nothing passes by implication as incidental to a grant of an easement except what is reasonably necessary to its fair enjoyment.

The evidence showed that the sign currently in place was eight feet long and sat on top of a brick base that was two feet deep and eight feet wide, which amounts to a 16-square-foot area. Although the trial court did not grant the Whaleys their requested 100 square feet for the easement for the sign, the trial court gave them more than twice the area of square feet that the base of the sign currently occupies. The Whaleys' rights are limited to only those which are necessary to effectuate the purpose of the easement, which is the erection of a sign.

PART XIII RESTRICTIVE COVENANTS, SUBDIVISIONS, AND CONDOMINIUMS

Sonterra Capital Partners, Ltd.* v. *Sonterra Property Owners Association, Inc., 216 S.W.3d 417 (Tex.App.—San Antonio 2006, pet. denied). The Sonterra Property Owners Association Declaration of Covenants provides for four classes of membership: (a) Class A Members are the owners of lots for single-family residences are to be or have been constructed, (b) Class B Members are the owners of townhouse or condominium dwelling lots or units, (c) Class C Members are the owners of commercial properties, and (d) Class D Members are the owners of unplatted, developable acreage which is, or may be in the future, subjected to the Declaration.

The owners of an apartment building claimed that they were not subject to assessments because the apartment complex was not a commercial property. The owners of commercial buildings in the Sonterra subdivision are required pay their allocated share of the assessments necessary to maintain common areas and provide essential services. The primary issue in this appeal is whether, under the Declaration, an apartment complex is a commercial building because its owner's primary purpose in owning it is to generate profits or a residence because its occupants use their individual apartments for residential purposes.

The apartment owners argued that the apartment complex was not a commercial property because they are used by their occupants as residences. To support their argument to the contrary, the Owners argue the apartment complexes are not " 'commercial,' " which "is commonly defined, in relevant part, to mean 'of or relating to commerce.' " However, "commercial" has several definitions. Another definition of "commercial" is "viewed with regard to profit." In support of this argument, the owners rely exclusively on authority holding that residential use restrictions do not prohibit the construction of apartments, condominiums, and duplexes. But, noted the court, we are not dealing here with permitted uses but mandatory assessments. Holding that multi-family dwellings are residential for purposes of use restrictions does not mandate a holding that they are residential for all purposes. Indeed, in other contexts, multi-family dwellings have been considered commercial property.

Finally, the owners argued that, because the Declarations do not expressly mention multi-family rental properties, Sonterra's developer must not have envisioned this type of multi-family property at the time Sonterra was developed; therefore, the owners argue, it necessarily follows that Class C membership cannot be construed to encompass multi-family properties. But this argument is circular. It depends solely upon the definition of "commercial building." If "commercial building" as used in the Declaration includes a multi-family rental property, that type of property was envisioned.

Schecter* v. *Wildwood Developers, L.L.C., 214 S.W.3d 117 (Tex.App.—2006, no pet.). Schecter lived next door to a project that Wildwood was contemplating which was located on an arroyo. The city planning commission and city engineer approved a proposed subdivision plat for the Wildwood land and it was on its way to the city council when Schecter filed suit against the city, claiming that the proposed plat violated city ordinances, failed to meet city design criteria, and was based on fraudulent statements. Wildwood intervened and filed a plea to the court’s jurisdiction, claiming that Schecter lacked standing to maintain the suit.

For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. Standing is a component of subject matter jurisdiction and is properly raised by a plea to the jurisdiction. As a general rule, standing consists of some interest peculiar to the plaintiff individually rather than as a member of the public. To establish common law standing, a plaintiff must show a distinct injury to the plaintiff and a real controversy between the parties, which will be actually determined by the judicial declaration sought. This general rule applies unless standing has been statutorily conferred upon the plaintiff. When standing has been statutorily conferred, the statute itself serves as the proper framework for analysis. If a statute provides that any citizen or taxpayer may bring an action, the plaintiff need only establish that he or she falls within one of these categories to establish standing; it is not necessary to establish an interest peculiar to the plaintiff.

The purpose of the Uniform Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. The Act does not confer jurisdiction on the trial court; it offers the remedy of a declaratory judgment for a cause of action already within the court's jurisdiction. A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.

Schechter sought a declaratory judgment that (1) the subdivision application is void because it does not meet the city's design criteria; and (2) the commission's approval of the subdivision application is void because it was based on Wildwood' fraudulent and false statements. Neither of these claims is based upon or related to Schecter's rights, status, or legal relationship under a statute, municipal ordinance, contract or franchise. Consequently, he lacks standing to seek these declarations.

Girsch* v. *St. John, 218 S.W.3d 921 (Tex.App.—Beaumont 2007, no pet.). A mobile home in question was purchased by the Girshes in 1984 and placed on their property on or about that same year. The restrictive covenants on the Girshes' property, in effect at the time the mobile home was placed on the property stated that "No trailer house or covered trailer shall at any time be erected or placed on any lot or tract for any purpose whatsoever." So, placement of the mobile home was a violation of the restrictions from the very beginning in 1984.

The Girshes argued that limitations had run on St. John's enforcement suit as a matter of law. St. John invoked the discovery rule, claiming she had not discovered the mobile home until 1997 or 1999 because of an overgrowth of forest or trees. With regard to St. John's invocation of the discovery rule, the Girshes note that St. John failed to establish the rule's applicability because she failed to show that the Girshes' violation was undiscoverable even when exercising reasonable diligence.

The statute of limitations for suits to enforce deed restrictions is four years. An enforcement action accrues upon breach of the restrictive covenant. The record evidence establishes the Girshes breached the restrictive covenant when they moved the mobile home onto their property in 1984.

The Texas Supreme Court noted that it has restricted the use of the discovery rule to "exceptional cases" so as to avoid defeating the purposes behind the limitations statutes. The Supreme Court has articulated two unifying principles that generally apply in discovery rule cases. They are that the nature of the injury must be inherently undiscoverable and that the injury itself must be objectively verifiable. There is no serious dispute that the injury-the Girshes' violation of the restrictive covenant--was objectively verifiable by the presence of the prohibited item (the mobile home) on the Girshes' property. The question to be decided is whether this is the type of injury that generally is discoverable by exercising reasonable diligence.

An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence. The type of injury presented in the record is the placing of a full-size mobile home (approximately 12 feet by 46 feet) on a residential lot located in the midst of a populated residential subdivision in violation of a per se prohibition against trailers on residential property for any purpose. The court was unable to hold that such a category of injury is unlikely to be discovered within the four-year limitations period with the exercise of due diligence.

The restrictive covenant in question authorizes any property owner to enforce all provisions contained therein. As an owner of property in Tall Timbers, St. John had some obligation to exercise reasonable diligence in protecting her interests. The record evidence indicates the mobile home was present in the Girshes' back yard openly, and there is no evidence of the use of artificial devices or methods to camouflage or hide it. St. John's request for application of the discovery rule would require the court to hold a full-size mobile home's presence on a residential lot in violation of a restrictive covenant, with said lot located in a highly populated subdivision, is a category of injury inherently undiscoverable even with the exercise of reasonable diligence, because of the presence of indigenous flora spontaneously growing nearby. A decision by the court favorable to St. John would mean that she had established that the category of reasonably diligent property owners would not discover the existence of a full-size mobile home on a residential lot in the midst of a populated subdivision during the four-year limitations period. The court refused to do so.

Goddard* v. *Northhampton Home-owners Association, Inc., 229 S.W.3d 353 (Tex.App.—Amarillo 2007, no pet.). The homeowners association's bylaws, which allowed the association's board to establish, levy, and collect annual assessments from homeowners, were filed in county property records, and as such became part of the dedicatory instruments that had also been filed in the property records, allowing the association to impose assessments against the homeowner in an amount determined by the association's board, even though the amount exceeded the maximum assessment figure set forth in the association's declaration of covenants, where the declaration of covenants established the maximum assessment for a specific period of time, and the bylaws controlled after such time expired.

PART XIV
HOMESTEAD

Norris* v. *Thomas, 215 S.W.3d 851, 50 Tex. Sup. Ct. J. 398 (Tex. 2007). In their bankruptcy, the Norrises claimed a 68-foot boat, valued at $399,000, as their homestead. The boat includes four bedrooms, three bathrooms, a galley, and an upper and lower salon. In the bankruptcy, they listed a San Antonio street address, a business postal center, in the bankruptcy petition because they receive their mail there, rather than at the marina in Corpus Christi where his boat is moored. After selling his home in Lake McQueeney, Texas in 2000, Mr. Norris had taken up permanent residence on his boat.

The bankruptcy court denied the Norrises’ claim for exemption, holding that the Texas homestead exemption, even broadly construed, does not include boats. The district court agreed that language in the Texas statutes addressing homesteads indicates that the legislature intended homesteads to include only estates in land and improvements affixed to land. That court concluded that structures unattached to land, such as a boat, even if used as a debtor’s primary residence, are moveable chattels and do not fall within the definition of homestead under Texas law.

Given this tension between, on the one hand, the above-quoted language in the Texas Constitution and Property Code and in other Texas Supreme Court opinions referring to the homestead estate as an estate in land, and, on the other hand, our duty to construe the Texas homestead exemption broadly and the novelty of the question presented, the Fifth Circuit was reluctant to be the first court to decide this public policy-bound state law issue. It asked Texas Supreme Court address and answer the following certified question:

> "Does a motorized waterborne vessel, used as a primary residence and otherwise fulfilling all of the requirements of a homestead except attachment to land, qualify for the homestead exemption under Article 16, §§ 50 and 51 of the Texas Constitution?"

Neither the Texas Constitution nor the Property Code defines homestead with specificity. Section 50 of article XVI of the Constitution shields homesteads from forced sale, providing generally that "[t]he homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts...." Section 51 of the Constitution, in turn, restricts the maximum size of a protected homestead, limiting rural and urban homesteads by acres of land and including any land-based improvements. The Texas Property Code resembles section 51 and likewise describes a homestead as a home or a home and business with certain acreage limitations with any "improvements thereon." Though neither of these provisions expressly exclude boats from homestead protection, they both discuss homesteads in terms of land and any improvements that sit atop the land. More specifically, when describing the scope of the protection, section 51 and the Property Code state the acreage limitation and then variably say, when describing any attached structures, "with the improvements thereon" or "with any improvements on the land" or "with any improvements thereon."

Texas's strong pro-homestead tradition pre-dates statehood, and the Republic of Texas was determined to protect homesteads from creditors. In 1886, roughly a half-century after Texas homestead laws originated, the Texas Supreme Court opined on their reach and limits. In ***Cullers* v. *James***, 66 Tex. 494, 1 S.W. 314, 315 (1886), it held that a house may be a homestead even if the owner has no proprietary interest in the land on which the house stands.

Cullers established that a house can be a homestead even if the owner has no ownership interest in the land. It also made clear that the term "improvements" as protected by article XVI, section 51 includes the residence itself. In the 121 years since ***Cullers***, the court has defined improvements to real property with greater precision, distinguishing them from mere personalty, and holding that "personalty does not constitute an improvement until it is annexed to realty."

Since ***Cullers***, courts of appeals have issued several homestead-related opinions that bear more directly on this issue, and they share a common thread: homestead protection turns not on who owns the underlying land, but on the degree to which the residence "thereon" or "on the land" is attached to it. The Supreme Court reviewed four of these pertinent cases, refusing the writ in the first and finding no reversible error in the others.

Applying precedents to the instant facts, the court held that the proper test for whether a residence attains homestead status is whether the attachment to land is sufficient to make the personal property a permanent part of the realty. Significantly, both the Constitution and the Property Code use the word "thereon" when describing any protected homestead improvements; the Constitution also stipulates "on the land," which is plainly not the same as "in the water."

Here, although Norris's dock-based connections to utilities and plumbing are like land-based utility, a boat is sufficiently distinct from a mobile home or house trailer to justify a different outcome, particularly given the Constitution's unequivocal requirement that protected improvements be on the land. Norris's boat, unlike a dwelling that is permanently affixed to land, retains its independent, mobile character even when attached to dock-based amenities because it has self-contained utility and plumbing systems and also boasts its own propulsion. Norris, in fact, traveled in the boat extensively prior to filing for bankruptcy, and he moved the boat from Port Aransas to Corpus Christi after the bankruptcy filing. Though Norris took steps to tether the boat to realty, these steps do not sufficiently alter the boat's mobile character or, apparently, prevent Norris from cruising. Thus, the court held that Norris's boat remains a movable chattel; it does not rest "thereon" or "on the land" as Texas homestead law clearly requires; it has not become a permanent part of the real estate; and it has not sufficiently attached to real property to merit homestead protection. In its view, the homestead exemption from creditors found in the Constitution and the Property Code contemplates a requisite degree of physical permanency and attachment to fixed realty--"thereon" and "on the land" constitute the operative language--that is not present in this case.

Unless and until Texas law changes, a boat can be a home, but it cannot be a homestead. Our realty-focused constitution and laws frame a homestead in terms of tracts, parcels, acres, and lots together with any land-based improvements.

In order to qualify as a homestead, a residence must rest on the land and have a requisite degree of physical permanency, immobility, and attachment to fixed realty. A dock-based umbilical cord providing water, electricity, and phone service may help make a boat habitable, but the attachment to land is too slight to warrant homestead protection.

Geldard* v. *Watson, 214 S.W.3d 202 (Tex.App.—Texarkana 2007, no pet.). In January 1976, Geldard married Wanda and moved into her house in Longview, and the two resided together at that residence. The property appears to have been Wanda's separate property and estate. Wanda and Geldard continued to reside together in the residence from their marriage in 1976 until Wanda entered a nursing home in October 2005, despite the fact that, in 1990, Wanda executed a quitclaim deed of the Timberline residence to Watson, her daughter from her earlier marriage. Geldard did not sign the deed or any other instrument to cede any right he had in the home and Geldard continued to reside alone in the house after Wanda entered the nursing home.

On November 15, 2005, Watson posted a "Notice to Vacate" on the property and gave Geldard thirty days to quit his possession of the residence. Geldard refused to leave and, on December 19, 2005, Watson filed her petition for eviction in the justice court. Geldard asserted his spousal homestead right as a defense. Wanda died during the pendency of this action.

Geldard's asserted homestead right in defense of the forcible detainer action raises an interesting question: does a homestead interest go to "the merits of title" so as to defeat jurisdiction over the forcible detainer cause of action in the justice court (and the county court or county court at law on appeal)?

Spousal homestead rights have been constitutionally guaranteed since the first constitution of the State of Texas. The Texas Family Code makes it clear that the requirement of the joining of both spouses to a conveyance of the homestead is mandatory, irrespective of the community or separate property nature of the realty constituting that homestead. For over a century's consistent caselaw, the signature of one spouse to a lien on or a conveyance of the homestead, even if separate property, may not act to the detriment of a nonsigning spouse who would benefit from the homestead right.

One spouse's conveyance of her separate property family homestead, without the joinder of the other spouse, is not void as to the conveying spouse. It is, however, inoperative against the continuing homestead claim of the nonjoining spouse.

Justice courts' limited jurisdiction forecloses its adjudication of "the merits of the title" to real property. The merits of title were called into question in this suit due to Geldard's claim of his nonjoining spouse homestead right. The question, then, is whether the homestead "right" implicates the "merits of the title."

The homestead right constitutes an estate in land. This estate is analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character. The homestead estate is a vested interest. So long as a spouse continues to assert his homestead right, a conveyance without his joinder is wholly inoperative as against that nonjoining spouse. The continuing right to the homestead estate does not exist in a legal vacuum. The homestead right is asserted under the title from which it arose: the signing spouse's title to her separate property. Indeed, one court has recognized that the signing spouse retains legal title while the nonjoining spouse exercises the homestead right. On the termination of the homesteading spouse's homestead right, the legal title passes to the grantee and becomes operative. The court thus held that a nonjoining spouse exercising the homestead right to his spouse's conveyance of a separate property homestead exerts a right to possession under the granting spouse's title.

The court concluded that the determination of Watson's right to possession in her forcible detainer action necessarily required an adjudication of the merits of title between Watson (by conveyance from Wanda) and Geldard (as the claimant of a homestead right under Wanda's separate title). Thus, the justice court adjudicated the merits of title in determining Watson's right to possession in her forcible detainer action. The justice court's judgment, and the county court at law judgment on appeal, are void.

Cadle Co. v. Ortiz, 227 S.W.3d 831 (Tex.App.—Corpus Christi 2007, pet. pending). The Ortizes were married. During the marriage, Mrs. Ortiz bought a house in her own name, keeping Mr. Ortiz's name off the title to protect against creditors. A few years later, they borrowed a home improvement loan. Mrs. Ortiz signed all the documents, again omitting any reference to her husband. In getting the loan, she marked the "unmarried" block on the HUD forms. The loan was acquired by Cadle and the Ortizes defaulted. Cadle foreclosed and the Ortizes sued to set the foreclosure aside, claiming that the lien was invalid because the property was homestead and Mr. Ortiz had not joined.

Cadle agreed that the property was homestead, but argued that the Ortizes had waived their homestead rights by committing a fraudulent misrepresentation intended to deceive creditors.

Under the existing homestead law, Cadle's lien on the Ortiz home must be found invalid because it depends upon three documents-the assumption deed, the note, and the trust deed-that are not signed by both Mr. and Ms. Ortiz as the Texas Constitution explicitly requires. Cadle attempted to overcome the two-spouse signature requirement with an affirmative defense: Cadle argued that Ms. Ortiz misrepresented her marital status by omitting Mr. Ortiz's name from the lien documents, and thus a finding that the Ortizes did not waive their homestead rights by deliberately misrepresenting creditors is against the great weight and preponderance of the evidence. The court disagreed.

Texas law recognizes that homestead protection can dissolve if the owners deliberately misrepresent their marital status in order to defeat the rights of an innocent party who, in good faith, without notice, for valuable consideration, has acquired valid liens. Such an assertion of misrepresentation is an affirmative defense upon which the defendant bears the burden of proof. If an individual affirmatively misrepresents himself or herself on documents as single when he or she is married, a question arises concerning whether the couple's homestead rights have been waived.

The home was purchased during the marriage and that the Ortizes occupied the home as their homestead. Rather than represent herself as "unmarried" or "single" on any of the documents Cadle relied upon, Ms. Ortiz merely signed her name and made no mention of her husband. This is different than, for example, the affirmative misrepresentation of the married man in Brown who falsely signed his name "Vincent Brown, a single man." Moreover, because a person may hold a homestead interest in his or her spouse's separate property, it is not necessary to have one's name on real property documents in order to maintain a homestead interest in the property. Thus, the fact that Mr. Ortiz's name was not on the assumption deed, note, or trust deed does not mean that he lacked a homestead interest in the Ortiz household. Regardless of Cadle's ability to defeat Ms. Ortiz's homestead exemption, it has shown nothing to defeat Mr. Ortiz's homestead exemption.

Wilcox* v. *Marriott, 230 S.W.3d 266 (Tex.App.—Beaumont 2007, pet. pending). Wilcox and obtained a judgment against the Rascom in 1999 and filed an abstract of judgment soon after. Substantial changes were made to the homestead laws on January 1, 2000, including an expansion of the maximum size of an urban homestead from one acre to ten acres. Roscom sold the approximately 1-½ acre property on which he and his wife lived to Marriott after the effective date of the amendments. The jury found that Roscom intended to claim the property as his homestead when he sold it to the Marriotts. The trial court ruled the entire parcel is included in the homestead exemption from forced sale, and that the judgment lien did not attach to the property.

The primary issue in this appeal concerns the effect of the 1999 amendments to the homestead provisions in the Texas Constitution and the Texas Property Code. In integrating the constitutional amendment into the Property Code, the Legislature provided that the changes in the law dealing with the size of the homestead, designation of homestead, and excess acreage apply to execution under a writ of execution issued on or after January 1, 2000, and that a lien on real property acquired before January 1, 2000, is governed by the law in effect on the date the lien was acquired.

Wilcox contends the change in the law can have no effect on the judgment lien perfected by abstract of judgment, so execution should issue according to prior law. To reach this construction, Wilcox must ignore the unequivocal language that the new law applies to execution under a writ of execution issued on or after January 1, 2000.

The Marriotts contend the judgment lien did not attach to Roscom's homestead, which extended to the entire property as of January 1, 2000. Because Wilcox did not determine and seize the excess while one existed, the Marriotts contend the entire tract is exempt. To reach this construction, the Marriotts must ignore the unequivocal language that the change in the law does not affect the validity of a lien acquired before January 1, 2000.

The trial court resolved the issue by applying the rule that homestead laws are to be liberally construed to effectuate their beneficent purpose. Because the purpose of the law is to protect homesteads from seizure, the trial court's ruling effectuates the purpose of the statute.

Nonetheless, the Legislature expressed its intention to continue the prior law for liens perfected before the effective date of the constitutional amendment. Generally, when the property has not become a homestead at the execution of the mortgage, deed of trust or other lien, the homestead protections have no application even if the property later becomes a homestead. In this case, the property was always Roscom's homestead; it is the homestead protections that did not apply to the entire parcel when Wilcox filed the abstract of judgment.

The execution on a money judgment may be had only upon property of the judgment debtor which is subject to execution by law.

Effective January 1, 2000, Roscom's homestead rights expanded to the entire parcel and the new law governed any writ of execution issued in 2000. Thus, regardless of the validity of the judgment lien, the entire property was exempt from execution effective January 1, 2000. As of January 1, 2000, what had been property in excess of the one acre homestead exemption became property within the ten acre homestead exemption and was no longer subject to execution.

Whether the change in the law disencumbered the property from the pre-existing lien is another matter. The statutory construction applied by the trial court determined the validity of the lien based upon the homestead law in effect on the date the writ of execution issued. A judgment lien attaches to the non-exempt real property of the judgment debtor when an abstract of judgment is filed and indexed in the county where the property is located.

Assuming the filed abstract was properly indexed prior to January 1, 2000, the lien attached to any non-exempt property before the effective date of the amendments. A literal reading of the 1999 Property Code amendments gives Wilcox a lien on Roscom's excess acreage; however, Wilcox cannot have execution because no writ of execution issued before the homestead exemption expanded to include the entire tract.

Florey v. ***Estate of McConnell***, 212 S.W.3d 439 (Tex.App.-Austin 2006, pet. denied). A lien to secure the payment of attorney's fees is not among the permissible homestead exceptions in the Texas Constitution.

PART XV CONSTRUCTION AND MECHANICS' LIENS

Fondren Construction Co., Inc.* v. *Briarcliff Housing Development Associates, Inc., 196 S.W.3d 210 (Tex.App.—Houston [1st Dist.] 2006, no pet.). In January 1999, Westbrook Construction contracted with BHDA to perform services at the Briarcliff Apartments. John Deere, acting as surety, filed a payment bond covering the work to be performed under the contract. Around the same time, Lubkeman contracted with Westbrook, subject to Westbrook's contract with BHDA, to perform supervisory work in an individual capacity and to perform contracting work in his capacity as owner of Fondren Construction Company. Westbrook paid Fondren initially. At some point, Westbrook stopped work, and another contractor completed the work at Briarcliff. At the time, Westbrook owed additional amounts to Fondren. After Westbrook stopped work, Fondren alleges BHDA and DPMC promised full payment of the amounts due under the contracts with Westbrook. Fondren further contends this promise encouraged it to continue work on the property for BHDA and DPMC.

In February 2000, Lubkeman filed liens against the Briarcliff property on behalf of himself and Fondren. Lubkeman testified that none of the work he performed for which he demands payment occurred after he filed the liens. In October 2000, Lubkeman sued BHDA and Westbrook. In August 2003, he amended the petition, removing Westbrook as a party to the suit, adding DPMC and John Deere as parties, and adding a cause of action on the payment bond.

Fondren contends that the payment bond is not a valid defense to either John Deere's motion for summary judgment or DPMC and BHDA's motion for judgment because the bond fails to comply with the requirements of the Property Code.

First, Fondren argues John Deere's bond does not prominently display contact information as Texas Property Code section 53.202(6) requires. John Deere issued the bond in this case in January 1999. The Legislature added subsection 6 to the statute in May 2001, and it did not take effect until September 1, 2001. The statutory contact information requirements did not exist when John Deere filed the bond; thus, no fact issue exists regarding John Deere's compliance with subsection 6.

Second, Fondren relies on section 53.202(1) of the Property Code, which requires that the penal sum of the bond be at least equal to the original contract amount. Because the penal sum sets the financial limits of the surety's obligations, it is the most material aspect of a payment bond. Here, Fondren sued John Deere on a payment bond it executed on January 11, 1999. The bond covers the contract entered into between Westbrook and Briarcliff on January 12, 1999. The original amount of the contract between Westbrook and Briarcliff is \$4,224,485.00, and the amount of the payment bond issued by John Deere is \$4,224,485.00--exactly equal to the amount of the contract. The contract and the bond are evidence that the bond is in a penal sum equal to the total of the original contract, and Fondren did not offer any controverting evidence. Thus, no fact issue exists regarding compliance with subsection 1 of the statute. The payment bond complied with the Property Code's requirement with respect to section 53.202(1).

As its sole ground for summary judgment, John Deere contends that Fondren cannot recover on the valid payment bond because Fondren failed to bring suit within the one year allowed by the Property Code.

An original contractor who has a written contract with the owner may furnish a bond for the benefit of claimants, such as subcontractors who are not paid for their work. The bond protects anyone with a claim perfected in a manner prescribed for fixing a lien under subchapter C of the Code. Section 53.052 allows a claimant to perfect a claim by filing an affidavit with the county clerk no later than the fifteenth day of the fourth month after the day on which the indebtedness accrues. Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or material furnished. A claimant may sue the surety on a bond "if his claim remains unpaid for 60 days after the claimant perfects the claim." If the bond is recorded at the time the lien is filed, the claimant must sue on the bond within one year following perfection of his claim.

Here, Fondren failed to sue on the bond within the statutorily allowed period. Fondren alleges that the work performed at Briarcliff ended in December 1999, and thus the indebtedness accrued on December 31, 1999. Fondren perfected its claim by filing affidavits with the county clerk on February 24, 2000, within the time allowed for perfection under the statute. John Deere recorded its bond on January 13, 1999; thus, Fondren had one year from February 24, 2000 to file suit on the bond. Fondren did not sue on the bond, or add John Deere as a party to the suit, until August 18, 2003, well after the time limit. Fondren argues that appellees conspired to withhold the existence of the bond despite his repeated request that they produce it. However, the bond was on file in the county records beginning January 13, 1999, before Fondren filed its liens. An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.

***Reliance National Indemnity Company, L&T, J.V.* v. *Advance'd Temporaries, Inc.*,** 227 S.W.3d 46 (Tex. 2007). Lamar agreed to serve as general contractor during construction of the Corpus Christi crosswinds Apartments and obtained a performance bond as its contract with the project's owner required. Thereafter, Lamar subcontracted with Cesar Gonzalez, doing business as Gonzalez Construction, who agreed to frame, drywall, and roof the apartment project. Gonzalez, however, did not have an adequate work force for the job, and therefore sought additional workers from Advance'd Temporaries, Inc.

The agreement between Gonzalez and Advance'd identified these temporary workers and specified a number of other agreements relating to temporary workers' status and benefits. Advance'd recruited and supplied more than 100 workers for Gonzalez, qualified the legal status of each worker, and completed the necessary paper work and insurance requirements. Advance'd also paid the temporary workers and their payroll taxes, invoicing Gonzalez weekly for its services.

This relationship was only a few months old when Lamar abruptly terminated Gonzalez's work. Lamar apparently paid Gonzalez all that was owed for his work, but Gonzalez failed to pay the full amount owed to Advance'd. Advance'd nevertheless took care of the temporary workers, paying them for their labor. Advance'd then gave notice of its claim under the mechanic's lien statute, which Lamar disputed. Advance'd thereupon filed an affidavit claiming a mechanic's lien. Advance'd sued Gonzalez for the balance owed under its contract after it was unable to collect from Gonzalez's or Lamar's surety bond. The Crosswinds Apartments, Lamar, and the surety were also joined in the litigation.

The trial judge held that Advance'd was not entitled to recover against Lamar's surety bond because Advance'd had not furnished labor as the mechanic's statute requires, but had simply extended credit to Gonzalez for its payroll. Advance'd appealed, complaining that it had furnished labor at the Crosswinds project under a contract with a subcontractor and was thus entitled to the benefits of the mechanic's lien statute, including a judgment against the general contractor's bond. The court of appeals agreed, reversed the trial court's judgment, and remanded the case for the trial court to determine the remaining issues regarding the validity and amount of Advance'd's claim.

Lamar and its surety, Reliance, appealed, asserting three errors. First, Reliance argued that, contrary to the court of appeals' analysis, Advance'd did not "furnish labor" on the Crosswinds project and thus was not entitled to a mechanic's lien. In a related issue, Reliance argued that the court of appeals applied an erroneous standard of review by mistakenly viewing the question of whether Advance'd "furnished labor" as a legal question rather than a fact question. Finally, Reliance complains that even if Advance'd might have been entitled to a lien, it did not timely perfect its rights, and the court erroneously failed to consider that as an alternative basis for affirming the trial court's judgment.

Relevant to the first two issues is how one qualifies under the mechanic's lien statute as a person who "furnishes labor." The statute provides, in relevant part, that a person has a lien if the person labors or furnishes labor or materials for construction or repair in this state of a house, building, or improvement and the person labors or furnishes the labor or materials under or by virtue of a contract with the owner or the owner's agent which includes contractors and subcontractors among others." Chapter 53 defines "labor" as "labor used in the direct prosecution of the work" and defines "work" as "any part of construction or repair performed under an original contract." An "original contract" is "an agreement to which an owner is a party either directly or by implication of law." These provisions led the court of appeals to conclude that Chapter 53 protects those who labor in Texas as well as those who furnish labor under contract for the benefit of an owner's construction project.

Reliance argued, however, that Advance'd did not "furnish labor" for the project because it did not control or supervise the temporary workers and was not responsible for the quality of their work. Reliance further argued that the temporary workers were Gonzalez's employees under the borrowed-employee doctrine. Under the borrowed-employee doctrine, an employee ceases to be the employee of his general employer if he becomes the borrowed employee of another.

The Supreme Court agreed with the Court of Appeals that the temporary workers were Advance'd's employees. The contract clearly identifies the temporary workers as Advance'd's employees and makes Advance'd the responsible party. Advance'd was responsible for recruiting and screening these workers. Advance'd was responsible for hiring, firing, paying and insuring them. Advance'd also had the final word on whether these workers could be exposed to certain working conditions.Clearly, Advance'd did not control the details of the work at the construction site, but that does not mean it ceased to be their employer. The borrowed-employee doctrine does not provide otherwise. The borrowed-employee doctrine is a tort doctrine that is concerned with vicarious liability and apportionment of responsibility for employees who have more than one master. The doctrine has no application here because this case is one of contract and the responsibilities are spelled out in the parties' agreement.

The nature of the temporary employment business is that clients of the temporary employment agency will direct and control the work that needs to be done; otherwise, the agency's service would have little value to the client. The contract indicated that the temporary workers were, and continued to be, Advance'd's employees and the responsibility Advance'd assumed for these workers confirms that relationship. Moreover, Advance'd retained a degree of control over these workers, requiring prior notice and agreement for certain hazardous duties, immediate notification of any injury, paid time and one-half for certain holidays, and a minimum work day of four hours per employee. Gonzalez had the right to reject any temporary worker, but he could not dismiss the worker or affect that worker's continuing relationship, if any, with Advance'd. In sum, Advance'd did not merely perform administrative services but rather assumed actual responsibility as the employer of these workers.

Reliance also attacks the court of appeals' decision from a procedural perspective, arguing that the court applied the wrong standard of review. Among the trial court's findings of fact and conclusions of law was the conclusion that Advance'd was not entitled to recover under the surety bond because it "did not perform 'labor' as that term is defined in the mechanic's lien statutes." The court of appeals reviewed this conclusion of law as a legal question, ultimately disagreeing with the trial court.

Reliance argued that the question is actually one of fact that should have been reviewed under a sufficiency of the evidence standard rather than the court of appeals' de novo approach. Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence. What might otherwise be a question of fact becomes one of law when the fact is not in dispute or is conclusively established.

The relevant legal question here is whether the mechanic's lien statute applies to this temporary employment agency, but that determination rests on the existence of the factual basis required by the statute; i.e., whether Advance'd furnished labor to a Texas construction project under a contract with the owner or its agent. Reliance contended that some of these facts were at issue and that the court of appeals improperly substituted its view of the evidence for that of the trial court. For example, Reliance claimed that Advance'd's contract was inadequate because it did not identify the Crosswinds project as the workplace for the temporary workers. As a legal matter, the mechanic's lien statute does not require this, but more importantly, the temporary workers undisputedly did labor for the owner's agent, under contract, at the Crosswinds project. Reliance's factual dispute is therefore immaterial. Similarly, Reliance argued that Advance'd did not control the temporary workers at the construction site and thus did not furnish labor.

In the parlance of this procedural attack, Reliance's argument was that this lack of control at the work site is some evidence that Advance'd did not furnish labor. But again the factual dispute is immaterial. Gonzalez's control over the work site did not contradict or supplant the terms of the contract and was not evidence material to the employment question or to the relationship between Advance'd and its employees.

The court of appeals, however, proposed a seven-factor test, gleaned from other jurisdictions, that it submits as a generic aid for determining when a party has "furnished labor." The Supreme Court did not adopt that test. Although these "factors" might be relevant for determining employee status in general, balancing them against one another is not the answer to the legal question posed here. Whether Advance'd "furnished labor" and is therefore entitled to a mechanic's lien depends on its relationship to the workers. Because the evidence conclusively establishes that Advance'd was the employer, and was the party responsible for the worker's pay and related benefits, the court of appeals did not err in its legal conclusion that Advance'd was entitled to a mechanic's lien.

TA Operating Corporation* v. *Solar Applications Engineering, Inc., 191 S.W.3d 173 (Tex.App.—San Antonio 2006, pet. granted). Solar was the contractor building a multi-use truck stop for TA Operating. When everyone agreed that the project was substantially complete, TA sent Solar a punch list of items to be corrected or completed. Solar disputed several items on the list and delivered a response to TA listing the items Solar would correct, and listing the subcontractor responsible for each item. Solar began work on the punch list items and filed a lien affidavit against the project. TA understood the lien affidavit to be a request for final payment.

Shortly thereafter, TA sent notice to Solar that Solar was in default for not completing the punch list items, and for failing to keep the project free of liens. TA stated in the letter that Solar was not entitled to final payment until it completed the remainder of the punch list items and provided documentation that liens filed against the project had been paid. TA ultimately sent Solar a letter of termination citing Solar's failure to complete the punch list items as grounds for termination. In its reply letter, Solar disputed that the termination was for cause. Solar acknowledged at least two items on the punch list had not been completed, and submitted a final application for payment in the amount of the unpaid retainage. TA refused to make final payment, however, contending that Solar had not complied with section 14.07 of the contract, which expressly made submission of an all-bills-paid affidavit a condition precedent to final payment.

Although Solar did not comply with this condition precedent to final payment, Solar sued TA for breach of contract under the theory of substantial performance. Solar did not dispute that the liens existed, nor did it dispute that it was contractually obligated to submit an all-bills-paid affidavit as a condition precedent to final payment.

The first issue on appeal was whether the doctrine of substantial performance excuses the breach of an express condition precedent to final payment that is unrelated to completion of the building. TA acknowledged that Solar substantially performed its work on the project, but contends its duty to pay was not triggered until Solar pleaded or proved it provided TA with documentation of complete and legally effective releases or waivers of all liens filed against the project. TA argued that Solar's failure to plead or prove that it fulfilled this condition precedent to final payment barred its right to recover final payment. TA contended that when the parties have expressly conditioned final payment on submission of an all-bills-paid affidavit, the owner's duty to pay is not triggered until the contractor pleads or proves it complied with the condition precedent.

The issue of whether the doctrine of substantial performance applies in construction contracts when the submission of an all-bills-paid affidavit is an express condition precedent to final payment has not yet been decided by a Texas court.

While the common law did at one time require strict compliance with the terms of a contract, this rule has been modified for building or construction contracts by the doctrine of substantial performance. The rule of substantial performance is an equitable doctrine adopted to allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to a cause of action for quantum meruit.

The doctrine of substantial performance recognizes that the contractor has not completed construction, and therefore is in breach of the contract. Under the doctrine, however, the owner cannot use the contractor's failure to complete the work as an excuse for non-payment. Substantial performance is regarded as a condition precedent to a contractor's right to bring a lawsuit on the contract.

Solar argued that by agreeing substantial performance occurred, TA acknowledged that Solar was in "full compliance" with the contract and any express conditions to final payment did not have to be met. Solar argued that TA may not expressly provide for substantial performance in its contract and also insist on strict compliance with the conditions precedent to final payment.

The court disagreed. While the substantial performance doctrine permits contractors to sue under the contract, it does not ordinarily excuse the non-occurrence of an express condition precedent. The substantial performance doctrine ordinarily applies to constructive conditions precedent and not to express conditions precedent--substantial performance by the builder is a "constructive condition" of the owner's duty to pay.

TA, seeking protection from double liability and title problems, expressly conditioned final payment on Solar's submission of an all-bills-paid affidavit. Solar did not dispute that it was contractually obligated to submit the affidavit as a condition precedent to final payment, and it was undisputed at trial that liens had been filed against the project. Though the doctrine of substantial performance permitted Solar to sue under the contract, Solar did not plead or prove that it complied with the express condition precedent to final payment. Had Solar done so, it would have been proper to award Solar the contract balance minus the cost of remediable defects. While harsh results occasioned from Solar's failure to perform this express condition precedent, the court recognized that parties are free to contract as they choose and may protect themselves from liability by requesting literal performance of their conditions for final payment. The parties agreed to the conditions for final payment, and Solar did not plead or prove it performed the condition precedent of submitting an all-bills-paid affidavit.

PART XVI
AD VALOREM TAXATION

Citizens Nat. Bank* v. *City of Rhome, 201 S.W.3d 254 (Tex.App.-Fort Worth 2006, no pet.). Fuel dispensers, mounted and installed on concrete islands with the owner's intent that they would remain there permanently, were realty, not personalty, and constituted improvements. They were not subject to sale pursuant to tax warrant regarding delinquent personal property ad valorem taxes.

Reinmiller* v. *County of Dallas, 212 S.W.3d 835 (Tex.App.—Eastland 2006, pet. denied). When Reinmiller made a payment with respect to delinquent taxes, penalties, and interest, he sent a letter instructing the tax collector to apply the payments first to the "base tax" amount (i.e., the taxes as opposed to interest and penalties). Reinmiller testified that he wanted to pay the "base tax" first to "stabilize the interest" and to prevent the interest from increasing. The tax collector didn't do so. The policies and procedures for applying payments to delinquent accounts specify that penalties and interest begin to accrue when an account becomes delinquent and that the percentage of penalty and interest increases as the account remains delinquent. When the taxpayer makes a payment, the penalty and interest is subtracted from the total payment, and the base tax is reduced accordingly. The penalty and interest would then continue to accrue on the unpaid balance. Frier stated that a taxpayer cannot direct that a payment only be applied to the base tax.

Reinmiller argued that the debtor has the right to direct the application of his payments and that the doctrine of accord and satisfaction applies because the tax collector accepted his payments with the designation for application. He cited City of Houston v. First City, 827 S.W.2d 462 (Tex.App.-Houston [1st Dist.] 1992, writ denied), as authority, which, indeed, held just as Reinmiller argued. Unfortunately for him, after that case, the legislature enacted Tax Code § 31.073, which provides that "A restriction or condition placed on a check in payment of taxes by the maker that limits the amount of taxes owed to an amount less than that stated in the tax bill is void unless the restriction or condition is authorized by this code." So Reinmiller was not allowed to direct the payment in a way that would limit his tax liability.

PART XVII
CONDEMNATION

City of San Antonio* v. *TPLP Office Park Properties, 218 S.W.3d 60, 50 Tex. Sup. Ct. J. 393 (Tex. 2007). In response to complaints from area residents regarding increased traffic on Freiling Street, the City began taking action to block access from a private business driveway to the street. TPLP, a property owner in the business park where the private drive was located, filed suit for injunctive relief and a declaratory judgment seeking to keep the access open. Among many other arguments made by TPLP was the claim that the closure of the driveway was a compensable taking.

If access to a landowner's property is materially and substantially impaired, the landowner is entitled to compensation. The question of whether access rights have been materially and substantially impaired is a question of law. Diminished access is not compensable if suitable access remains.

If the access to Freiling Street were closed, at least six points of egress and ingress along the I-10 access road would remain at the front of the business park. TPLP argued that the access along I-10 will not be reasonable because (1) around 80 percent of TPLP's tenants enter the business park via the driveway, (2) entering the business park from I-10 would require those individuals currently using the driveway entrance to travel an additional two miles, (3) the decreased access would result in lower lease rates, and (4) an increase in traffic exiting onto the I-10 access road and traveling through the business park to get to those exits will cause safety hazards and congestion.

The Supreme Court has previously held that access to a business was not materially and substantially impaired when one access point was closed, but another access point on a public street remained unaffected. The issue of whether reasonable access remains should not be fragmented to focus only on the closed access point without considering remaining access points. Therefore, while the driveway may be used by up to 80 percent of TPLP's tenants to access the business park, the court cannot consider only whether the entrance used by those individuals will be closed. It must also consider the existence of remaining entrances. Closing an access point and merely causing diversion of traffic or circuity of travel does not result in a compensable taking. A reduction in lease rates that results merely from traffic being required to travel a more circuitous route is not compensable.

Wells Fargo Bank Minnesota, N.A.* v. *North Central Plaza I, L.L.P., 194 S.W.3d 723 (Tex.App.—Dallas 2006, no pet.). NCPI owned some land and a building on Central Expressway in Dallas. Wells Fargo held the mortgage on the property. Before NCPI bought the property, a condemnation was commenced for a taking of a part of the property to build the High Five interchange at LBJ and Central in North Dallas. NCPI was joined in the condemnation and filed an objection to the jurisdiction and to the amount of the award.

NCPI defaulted on its loan. Wells Fargo foreclosed and ended up with the property and a sizeable deficiency. It then intervened in the condemnation case to protect its rights to the award. Both NCPI and Wells Fargo claimed the right to the award. The trial court held that NCPI was entitled to the award.

Wells Fargo contends the trial court erred in its determination that NCPI was entitled to the condemnation proceeds. Specifically, Wells Fargo contends that the proceeds were trust property that it acquired through the foreclosure sale. Neither NCPI nor Wells Fargo contend that the deed of trust is ambiguous. The parties disagree over the interpretation of certain provisions contained in the deed of trust.

Pursuant to the definition of the "Trust Property" (i.e., the property covered by the Deed of Trust), if the High Five condemnation of does not result in a decrease in the property's value, then, NCPI retains the award. On the other hand, if the High Five Condemnation results in a decrease in the property's value, then the award is part of the trust property. Upon default under the non-recourse deed of trust note, the lender may sell the property through foreclosure. Pursuant to the terms of the deed of trust, a foreclosure sale operates to "divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Trustor in and to the properties and rights so sold, and shall be a perpetual bar both at law and in equity against Trustor and against any and all persons claiming or who may claim the same, or any part thereof from, through or under Trustor."

NCPI claimed that the condemnation provision in the deed of trust, which provided that condemnation awards would be paid to the borrower, controlled over this definition, but the court noted that the definition applied to the specific High Five condemnation and the condemnation provision applied to other condemnation actions arising after the date of the deed of trust.

NCPI then argued that the court's holding rendered the definitional provision meaningless, since a condemnation would always result in a decrease in the value of the property. The court disagreed. A condemnation does not necessarily result in a decrease in the value of the property. Where a property's value actually increases after a portion of the property has been condemned, the owner is still entitled to an award equal to the market value of the property taken. When only a portion of property is taken, the constitution requires adequate compensation both for the part taken and severance damages, if any, to the remaining property. Because the undisputed evidence showed that the property's value did, in fact, decrease, the trial court erred in its determination that NCPI was entitled to the Condemnation proceeds.