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CASE LAW UPDATE

DAVID A. WEATHERBIE, *Dallas*
Cramer Weatherbie Richardson Walker
dweatherbie@cwrwlaw.com

DAVID A. WEATHERBIE
Cramer Weatherbie Richardson Walker LLP
Dallas, Texas
dweatherbie@cwrwlaw.com
(214) 369-1170
cwrwlaw.com

DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP

EDUCATION:

B.A., Southern Methodist University - 1971
Juris Doctor, *cum laude*, Southern Methodist University - 1976
Order of the Coif
Research Editor, Southwestern Law Journal

PROFESSIONAL ACTIVITIES:

Licensed to practice in the State of Texas
Partner - Cramer Weatherbie Richardson Walker LLP, Dallas, Texas, a U.S News & World Report Best Law Firm – Tier 1 - Real Estate

HONORS

Distinguished Real Estate Attorney Lifetime Achievement Award 2014, given by the State Bar Real Estate, Probate & Trust Law Section.
Namesake and first recipient of the Weatherbie Work Horse Award given annually by the State Bar Advanced Real Estate Law Course
Recipient of the Standing Ovation Award for 2008 given by TexasBarCLE for extraordinary commitment to State Bar continuing legal education programs.
Finalist – Texas Lawyer "Go-To Lawyer" for 2012
Listed Texas Monthly "Super Lawyer" each year since 2003
Listed in Best Lawyers in America and Who's Who Legal

ACADEMIC APPOINTMENTS, AND PROFESSIONAL ACTIVITIES

Past Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas
Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2010-2011
Vice Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2009-2010
Treasurer, Real Estate, Probate & Trust Law Section, State Bar of Texas 2008-2009
Council Member, Real Estate, Probate & Trust Section, State Bar of Texas 2003-2007
Adjunct Professor of Law, Southern Methodist University School of Law / Real Estate Transactions - 1986 to 1995 and 2014
Member, State Bar Standing Committee on Real Estate Forms
Fellow, American College of Real Estate Lawyers
Life Fellow, Texas Bar Foundation
Member, State Bar Real Estate Forms Committee

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Course Director for the State Bar of Texas, Advanced Real Estate Law Course and for the University of Texas at Austin - Mortgage Lending Institute
Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
Author/Speaker for the University of Texas at Austin - Mortgage Lending Institute - 1992 to present
Author/Speaker for Texas Land Title Institute - 1992 to present
Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course
Panel Member for State Bar of Texas, Advanced Real Estate Strategies Course – 2007 and 2008
Author of "Annual Survey of Texas Law -- Real Estate," 51 SMU L. Rev. 1321 (1998) and 52 SMU L. Rev. 1393 (1999)

CASE LAW UPDATE

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

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 489 S.W.3d and Supreme Court opinions released through November 10, 2016.

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

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

This and past Case Law Updates are available at our website cwrwlaw.com.

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PART I
MORTGAGES AND FORECLOSURES

Bauder* v. *Alegria, 480 S.W.3d 92 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Property Code § 51.002(b) requires that a notice of foreclosure be served by certified mail addressed to the debtor's last known address. If the property is a borrower's residence, the notice must be sent to the borrower's residence address. Property Code § 51.002(d). Here, the notice address for the borrower in the loan documents was 704 Roosevelt Street. Several default or payment reminders were sent to that address. In May of 2013, the lender sent a Notice to Cure to the Roosevelt address. Before sending it, he sent the borrower a text message stating that he'd heard she sold the Roosevelt property and also stating that he assumed that her address at 1825 Neuman Street was her primary residence. There were also text messages for an extended period from the borrower for the lender to pick up payments at the Neuman address. A month later, the lender sent a Foreclosure Notice to the Roosevelt address, but none was sent to the Neuman address. The trustee foreclosed.

The borrower sued to set aside the foreclosure, claiming that she did not receive proper notice. The trial court set the foreclosure aside, finding that the lender had reasonable notice of her change of address and that notice was sent to the wrong address.

The lender argued that, because the Roosevelt address was shown in the deed of trust, the borrower was required to give written notice of a change of address. The deed of trust was silent as to the obligation to give a notice of change of address.

The court held, based upon the texting back and forth regarding the Neuman address, that the last known address of borrower as shown by the lender's records was the Neuman address.

Lamell* v. *OneWest Bank, FSB, 485 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). Lamell refinanced his home. After borrowing it, servicing was transferred to IndyMac, a division of OneWest.

Lamell protested the property tax on his home. He did not pay the contested portion of the taxes, but OneWest advanced the funds to pay these and increased Lamell's payments to cover the costs. Lamell sued HCAD and the Harris County Tax Assessor-Collector. He stopped paying on his mortgage and when OneWest threatened foreclosure, he added OneWest to the lawsuit.

Among other things, Lamell challenged the assignment of his loan to OneWest and the securitization of the loan. The court held that Lamell had standing to make the challenges. A homeowner's interest in the title to his property gives the homeowner a sufficient justiciable interest to advance arguments challenging the deed of trust.

Lamell asserts that the deed of trust is void because it was securitized in the mortgage-backed trust in violation of the terms of the Pooling and Servicing Agreement that governs the trust. In particular, Lamell asserts that the deed of trust is void because it was not assigned to the trust before the trust's start-up date and because there is no evidence that the deed of trust was transferred into the trust by the depositor. Even presuming for the sake of argument that the deed of trust was placed into the trust in violation of trust's terms, Lamell has not cited and the court did not find any authority holding that the breach of the securitization agreement renders the deed of trust void. Therefore, Lamell's argument that the deed of trust is void does not show that the trial court erred in granting summary judgment as to his fraud claim.

Lamell also asserts that OneWest, as the servicer of the mortgage, cannot foreclose because OneWest did not prove its status as

owner and holder of the note. However, among other things, the court held that it need not address Lamell's other complaints regarding the note because OneWest did not need to be the owner or holder of the note to foreclose since OneWest was acting on behalf of the CSMC Trust, which held the deed of trust. Non-judicial sales of real property under contract liens are governed by Chapter 51 of the Texas Property Code. Under Section 51.0025, a mortgagee or a mortgage service provider may conduct foreclosure proceedings without proving its status as the owner and holder of the note.

Calvillo* v. *Carrington Mortgage Services, 487 S.W.3d 626 (Tex.App.-El Paso 2015, pet. denied). On December 9, the law firm retained by Carrington sent the Calvillos a notice of acceleration and a foreclosure notice. The notice was posted and filed around December 12. The notice said that one or more of the substitute trustees named in it would conduct the foreclosure sale. The notice letter was not picked up by the Calvillos.

On December 21, an appointment of substitute trustees was executed which authorized the persons named in the foreclosure notice to act as substitute trustees. The foreclosure was held January 3 of the following year.

After the foreclosure, the Calvillos sued claiming, among other things that the required 21-day notice of foreclosure had not been given. They didn't dispute that the notice letter was dated December 9, but claimed it was untimely because the substitute trustees named in it were not appointed until December 21, which was only 12 days before the foreclosure.

Although, as a general rule, a substitute trustee has no power to act prior to his appointment, it has long been settled in Texas that when a substitute trustee signs and posts a notice prior to the substitute trustee's appointment, the subsequent post-appointment acts of the substitute trustee have the effect of ratifying and affirming his pre-appointment acts. Here, the instrument appointing the substitute trustees, which was executed on December 21, was designated to be effective as of December 12. Consequently, the substitute trustee's actions in issuing the notices of foreclosure were ratified by the subsequent appointment, and thus the notices of foreclosure sale were timely. Accordingly, the trial court did not err in granting a directed verdict.

PART II
HOME EQUITY LENDING

Garofolo* v. *Ocwen Loan Servicing, L.L.C., No. 15-0437 (Tex. May 20, 2016). Garofolo borrowed a home equity loan. After Ocwen became the holder, Garofolo paid off the loan. A release of lien was recorded by Ocwen, but Garofolo did not receive a release of lien in recordable form as required by her loan documents. She notified Ocwen, but still didn't get the release. After sixty days, Garofolo sued for violations of the home equity lending provisions of the Texas Constitution, seeking forfeiture of all principal and interest paid on the loan.

Both the release-of-lien and forfeiture provisions of Garofolo's loan are among the terms and conditions the Texas Constitution requires of foreclosure-eligible home-equity loans. Garofolo therefore argues that Ocwen's failure to deliver the release of lien amounted to a constitutional violation for which a constitutional forfeiture remedy is appropriate. And because the release-of-lien and forfeiture provisions were incorporated into Garofolo's loan, she alternatively argues forfeiture is a remedy available through her breach-of-contract action. Because her constitutional claim "raises an important issue of Texas constitutional law as to which there is no controlling Texas Supreme Court authority, and the authority from the intermediate state appellate courts provides insufficient guidance," the Supreme Court accepted the following two certified

questions from the Fifth Circuit:

"(1)Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?

"(2)If the answer to Question 1 is "no," then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?"

Section 50(a) does not constitutionally guarantee a lender's post-origination performance of a loan's terms and conditions. From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible. Nothing in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made.

A lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its word, but it has not violated the constitution. This is not to say the constitution is unconcerned with a lender's post- origination performance of the loan's terms and conditions. On the contrary, the constitution prescribes a harsh remedy through forfeiture, a remedy previously called "Draconian."

If Ocwen sought to foreclose on Garofolo's homestead after she became delinquent in her payments, she could stand on the constitutional right to freedom from forced sale if her loan failed to include the release-of-lien requirement or forfeiture remedy. But that did not happen. Garofolo made timely payments and satisfied the balance in full. Ocwen never sought to foreclose, and there is no constitutional violation or remedy for failure to deliver a release of lien. Section 50(a) simply has no applicability outside foreclosure.

In bringing a breach-of-contract claim, Garofolo has pleaded an appropriate cause of action for relief from a lender's post-origination failure to honor the terms and conditions, constitutionally mandated or not, of a home-equity loan. Her loan incorporates both constitutional provisions at issue in this case: the requirement to deliver a release of lien and the forfeiture remedy. Garofolo acknowledges she has not suffered any damages from Ocwen's failure to deliver the release but argues she need not suffer any to access a contracted-for forfeiture remedy that is not contingent on proof of actual damages.

Section 50(a)(6)(Q)(x) provides for forfeiture of principal and interest if the lender fails to comply with its obligations under the extension of credit and fails to correct the failure within 60 days after notice from the borrower and provides six corrective measures the lender can undertake. Ocwen forfeiture is simply inapplicable here because none of the six corrective measures addresses the failure to deliver a release of lien. Garofolo, though, argues that this sixth and final of the measures could have been done. That would be to refund her $1,000 and offer to refinance her loan. But, noted the court, there was nothing to refinance—Garofolo had already paid off her loan-and a $1,000 payment would not buy her a document only Ocwen can provide.

The terms and conditions required to be included in a foreclosure-eligible home-equity loan are not substantive constitutional rights, nor does a constitutional forfeiture remedy exist to enforce them. The constitution guarantees freedom from forced sale of a homestead to satisfy the debt on a home-equity loan that does not include the required terms and provisions-nothing more. Ocwen therefore did not violate the constitution through its post-origination failure to deliver a release of lien to Garofolo. A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower. If performance of none of the corrective measures would actually correct the underlying deficiency, forfeiture is unavailable to remedy a lender's failure to comply with the loan obligation at issue. Accordingly, the court answered "no" to both certified questions.

The Texas Constitution allows a home-equity lender to foreclose on a homestead only if the underlying loan includes specific terms and conditions. Among them is a requirement that a lender deliver a release of lien to the borrower after a loan is paid off. Another is that lenders that fail to meet their loan obligations may forfeit all principal and interest payments received from the borrower.

Wood* v. *HSBC Bank USA, N.A., No.14-0714 (Tex. May 20, 2016). The Woods borrowed a home equity loan. Nearly 8 years later, the Woods notified the note holder that the loan did not comply with the Texas constitution in several respects, including that the closing fees exceeded 3% of the loan amount. The Woods sued the lender, seeking to quiet title and asserting claims for constitutional violations, breach of contract, fraud, and a declaratory judgment that the lien securing the home-equity loan is void, that all principal and interest paid must be forfeited, and that the Woods have no further obligation to pay.

The Woods moved for summary judgment, arguing that the lien is void because the evidence shows as a matter of law that the closing fees exceeded 3% and the Lenders did not cure after proper notice. The Lenders also moved for summary judgment on traditional and no-evidence grounds, asserting in pertinent part that the lien is voidable, not void, and that the statute of limitations barred all claims. The trial court granted summary judgment in favor of the lender.

On appeal, the only issue raised by the Woods was whether their claims based on constitutional noncompliance, including claims to quiet title and for forfeiture, are subject to a statute of limitations. The court of appeals affirmed, holding that liens securing constitutionally noncompliant home-equity loans are voidable and that the residual four-year statute of limitations applied to the Woods' claims, accruing from the date of closing.

A lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. The Supreme Court therefore conclude that no statute of limitations applies to an action to quiet title on an invalid home-equity lien.

Under the common law, a void act is one which is entirely null, not binding on either party, and not susceptible of ratification. When an instrument is void, a quiet-title action can be brought at any time to set it aside. However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it.

A plain reading of the Constitution necessitates a finding that liens securing

noncompliant home-equity loans are not valid before the defect is cured. Holding otherwise would contravene section 50(c)'s plain language. Section 50(c) dictates that no lien on a homestead "shall ever be valid" unless it secures a debt that meets section 50(a)(6)'s requirements. Such a lien is made valid by the lender's compliance with a Section 50(a)(6)'s cure provisions. Here, the lender chose not to cure after being given notice, but the starting point is the same: the lien is not valid until the defect in the underlying noncompliant loan is cured.

In any event, the text of the Constitution and our decision in Doody do not support a holding that liens securing constitutionally noncompliant home-equity loans are merely voidable. A voidable lien is presumed valid unless later invalidated, while Section 50 contemplates the exact opposite: noncompliant liens are invalid until made valid. Holding otherwise would essentially permit lenders to ignore the Constitution and foreclose on the homesteads of unwitting borrowers who do not realize that their home-equity loans violate the Constitution.

The Woods did not fare as well in their claim for forfeiture. Relying on Garofolo, which held that section 50(a) does not create substantive rights beyond a defense to a foreclosure action on a home- equity lien securing a constitutionally noncompliant loan and that forfeiture is not a constitutional remedy.

Steptoe* v. *JPMorgan Chase Bank, N.A., 464 S.W.3d 429 (Tex.App.-Houston [1st Dist.] 2015, no pet.). Steptoe defaulted on his home equity loan. The Bank filed suit seeking an expedited non-judicial foreclosure of its lien. The suit was dismissed by the Bank when it determined its notice of default was deficient. Steptoe then filed suit alleging that the home equity loan violated the constitution. The action was removed to federal court, which entered a take-nothing judgment in favor of the Bank.

The Bank then filed another suit for an expedited foreclosure. Steptoe claimed that the Bank had waived its right to foreclose because it had failed to counterclaim for foreclosure in the federal suit. The court ruled in favor of the Bank.

On appeal, Steptoe continues to assert that the compulsory counterclaim rule bars the Bank's foreclosure claim in this suit because Bank failed to pursue foreclosure as a counterclaim.

When, as in this case, the security instrument in a home-equity loan contains a power of sale provision, the lender has a choice of remedies. Under these circumstances, the lender may choose to file a claim for judicial foreclosure, but Rule of Civil Procedure 736 furnishes another remedy to the lender. This Rule provides the procedure for obtaining a court order to allow foreclosure of a lien containing a power of sale in the security instrument, including a lien securing a home equity loan. Thus, a home-equity lender, who has contracted for the right of non-judicial foreclosure under a power of sale provision, may choose to pursue the special procedure found in Rule 736 to obtain an order allowing it to proceed with a non-judicial foreclosure under the Property Code.

Rule 736 does not contemplate an ordinary lawsuit. As its name suggests, Rule 736 provides a faster, more streamlined alternative to judicial foreclosure. A lender initiates the "proceeding" by filing an "application," not an original petition, and the borrower may file a "response," not an original answer. Only one issue may be decided under rule 736: i.e., the right of the applicant to obtain an order to proceed with foreclosure under the security instrument and the Property Code. The rule contemplates a single hearing at which the district court must determine whether the applicant has satisfied its burden to prove the grounds for the granting of the order sought in the application; there is no provision for any other determination to be

made by a factfinder. Although not expressly addressed by Rule 736, it is evident that a Rule 736 proceeding cannot be brought as a counterclaim in a borrower's suit against the lender.

Were the court to hold otherwise, it would necessarily be requiring a lender to assert a counterclaim to preserve its foreclosure rights. This would result in the impairment of the lender's right to pursue one its remedies, namely a Rule 736 proceeding. To abridge a creditor's remedy, particularly one specifically crafted to provide a remedy under a special set of circumstances, would curtail a debtor's ability to control what remedy a creditor may pursue.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc., 468 S.W.3d 557 (Tex.App.-San Antonio 2014, pet. denied). Chacon sold a ranch to Double Knobs, taking back a note and deed of trust. A few years later, Schuhardt bought the note and lien. Payments on the note were due on the first of the month. Double Knobs typically paid before the late payment charge was due, on the 10th of the month. Schuhardt sent Double Knobs a letter telling it that, although Chacon had been accepting late payments, Schuhardt wasn't going to.

When the October payment was not received on the first, Schuhardt sent a default notice to Double Knobs and notified it that it was accelerating the balance of the note. Double Knobs tendered the October payment only, which was rejected by Schuhardt. The property was posted for foreclosure. Double Knobs sought a TRO, temporary injunction, and declaratory judgment. Double Knobs also brought claims of inequitable conduct, breach of contract, and tort.

Double Knobs's primary complaint was that the note had been wrongfully accelerated. Schuhardt argues the note clearly provides payment is due on or before the first of the month. Because Double Knobs did not pay on October 1, it was in default. Double Knobs contends the note provided payment was due on the first of the month, but was not late until the tenth of the month. Therefore, by tendering payment before the payment was late under the note, Double Knobs could not have been in default.

Here, the term default is not defined in the note. So, the court looked to its generally accepted meaning. "Default" is defined by Black's Law Dictionary as "the omission or failure to perform a legal or contractual duty." Default may consist of the failure to make a payment on the loan within a specified period or may be the breach of a covenant, representation, or warranty or the occurrence or nonoccurrence of some event.

The Business and Commerce Code, however, does not define the events constituting default on a loan. Instead, a determination of the circumstances giving rise to a default is generally left to the agreement of the parties. If no agreement exists, the parties' course of conduct must be analyzed to determine if an implied agreement exists before a default is declared or payment is demanded.

An implied agreement may arise from the regular course of conduct between the parties and the facts show that the minds of the parties met on the terms of the contract without any legally expressed agreement thereto. An implied agreement may also arise from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract.

Here, the parties agree that Double Knobs did not tender payment by the first of

the month. Double Knobs, however, argues that because the terms of the Note specifically provided that payments made after the first of the month, but before the tenth of the month, were not subject to a late payment, Double Knobs's payment on the fifth of the month was not late and Double Knobs was not in default. In support of its argument, Double Knobs points to its history of payments to Chacon. For almost two years, Chacon accepted twenty-two out of twenty-four payments made after the first, but before the tenth of the month. Double Knobs argues this course of conduct established its payment was not late if paid before the tenth of the month. Double Knobs thus argues that its September 2012 and October 2012 payments were timely and did not constitute a breach.

Double Knobs and Chacon's conduct created an implied agreement, or at least an understanding, that the terms of the Note provided for payment by Double Knobs prior to the tenth day of the month. Although a party who previously allowed late payments can demand strict compliance in the future, the secured party must allow the debtor a reasonable time to comply with the new demands after actual receipt of notice from the secured party.

Schuhardt, on the other hand, claims any course of conduct between Double Knobs and Chacon is irrelevant; as the owner of the note, the only relevant parties and relationships are Schuhardt and Double Knobs. As such, Schuhardt contends there was no course of dealing between Schuhardt and Double Knobs. Moreover, even if a prior relationship existed, Schuhardt contends its letter to Double Knobs repudiated any previous conduct authorizing later payments.

Schuhardt's contention it provided Double Knobs with notice of its intent to demand strict compliance with the Note is disingenuous at best. The record shows Schuhardt took affirmative steps to mislead Double Knobs as to the true owner of the property. It acted in such a way to preclude Double Knobs from discovering the note had been sold. Prior to Schuhardt's October 3rd letter, Double Knobs had no basis to question the identity of the holder of the Note or any changes to the parties' accepted payment practices.

Based on the information available, Double Knobs reasonably relied on its previous relationship with Chacon. The court concluded Double Knobs's October 5th payment was timely based on its previous course of conduct with Chacon.

Schuhardt argues Double Knobs's own actions resulted in foreclosure. When Double Knobs did not timely pay, Schuhardt informed Double Knobs that no late payments would be accepted. Schuhardt, therefore, avers that, when Double Knobs failed to make its October payment on October 1st, Schuhardt was entitled to accelerate.

Texas courts disfavor acceleration because it imposes a severe burden on the mortgagor. Acceleration is a harsh remedy with draconian consequences for the debtor and Texas courts look with disfavor upon the exercise of this power because great inequity may result. Because acceleration is viewed as such a harsh remedy, any ambiguous clause providing for acceleration is construed against acceleration.

The holder of a note must ordinarily give notice to the maker of the holder's intent to accelerate the time for payment as well as notice of acceleration. The maker, however, may waive his right to notice of intent to accelerate and notice of acceleration. Unless the right to notice of intent to accelerate is waived by the debtor, the mortgagee must give the mortgagor clear and unequivocal notice of its intent to accelerate. Here, the note expressly waived notice of intent to accelerate, but the deed of trust did not. When read together, the note and the deed of trust at issue create a reasonable doubt as to whether the parties

clearly and unequivocally intended to waive notice of default and time to cure, which amounts to notice of intent to accelerate. Accordingly, the court concluded that Schuhardt was required to provide Double Knobs with notice of intent to accelerate and an opportunity to cure

In re *Estate of Curtis*, 465 S.W.3d 357 (Tex.App.-Texarkana 2015, no pet.). Although a debt is barred by limitations, limitations can be avoided if the party to be charged acknowledges the debt in writing. Civil Practice and Remedies Code § 16.065 of the Texas provides that an acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged. An acknowledgement of a debt under this statute creates a new obligation. If an agreement meets these acknowledgment requirements, a party may sue for breach of that agreement.

PART IV
GUARANTIES

Abel* v. *Alexander Oil Company, 474 S.W.3d 795 (Tex.App.-Houston [14th Dist.] 2014, no pet.). The Steeles operated a sole proprietor trucking business. They bought fuel from Alexander Oil on an open account. The credit application named the company as "John Steele" and noted its entity form as "sole proprietorship." Abel signed a personal guaranty of the trucking company's account. The guaranty guarantied "full and prompt payment to Alexander Oil Company of all amounts due by Company to Alexander Oil Company."

A few years later, Shannon Steele formed an LLC and did what she could to have all of John Steele Trucking's assets transferred to the LLC. From that point on, the LLC bought fuel from Alexander Oil, without informing Alexander. After formation of the LLC, John Steele Trucking owed nothing on its account with Alexander Oil.

The LLC then began having financial problems. It ended up owing Alexander Oil a bunch of money that the LLC couldn't pay. The Steeles were asked to sign a guaranty of the LLC's account, and did so, but Abel was not asked to do so. Eventually, Alexander Oil sought payment of the debt from Abel. Abel refused to pay and Alexander Oil sued her. Abel claims that a legal principle bars recovery against her because she cannot be held liable under her guaranty of John's sole proprietorship for any debts actually incurred by another legal entity.

A guaranty agreement creates a secondary obligation whereby the guarantor promises to be responsible for the debt of another and may be called upon to perform if the primary obligor fails to perform. To recover under a guaranty contract, a party must show proof of (1) the existence and ownership of the guaranty contract; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform the promise by the guarantor.

According to the rule of *strictissimi juris*, a guarantor may require that the terms of his guaranty be strictly followed, and that the agreement not be extended beyond its precise terms by construction or implication.

The trial court had instructed the jury that a representative of a limited liability company is personally liable for the obligations of the limited liability company unless the representative satisfies his duty to disclose both (1) he is acting in a representative capacity; and (2) the true identity of the company. Thus, in buying fuel under the John Steele Trucking account could impose liability on the Steeles because they didn't disclose their capacities as representatives of the LLC.

Here Abel did not guaranty the obligations of the Steeles personally. The trial court's judgment established that the judgment against John Steele included only amounts for which he was liable as an agent for the LLC. Abel's guaranty made her liable only for the obligations of John Steele, sole proprietorship.

PART V
LEASES

Philadelphia Indemnity Insurance Company* v. *White, No. 14-0086 (Tex. May 13, 2016). White's clothes dryer in her apartment caught fire and destroyed her apartment and belongings as well as several adjacent apartments. She had signed the TAA lease which said the tenant was obligated to pay for any damage for any cause not due to the landlord's negligence or fault. Despite a jury finding that White was not negligent, the landlord took the position that she was still contractually liable pursuant to the TAA lease provision. White argued that the provision violated public policy because it makes a tenant liable for damage to the entire apartment project for accidental losses, acts of God, criminal acts of another or something unassociated with the tenant or the apartment complex. The court of appeals agreed, holding that the broad imposition of liability on a tenant for damage not caused by the landlord is void because it violates public policy as expressed in the Property Code.

As a general rule, parties in Texas may contract as they wish so long as the agreement reached does not violate positive law or offend public policy. In the residential-leasing context, the Legislature has limited the freedom of landlord and tenant to contractually allocate responsibility for repairs materially affecting health and safety but, importantly, has decided as a matter of public policy not to impose a categorical prohibition on such contracts.

The court's initial inquiry is whether the lease provision clearly and unambiguously shifts responsibility to White for the damages at issue. A contract is ambiguous if it is subject to two or more reasonable interpretations. But when a contract provision is worded so that it can be assigned a definite meaning, no ambiguity exists, and the court will construe the contract as a matter of law.

Although the language in the reimbursement provision is clear and definite, White points to an apparent redundancy she contends creates ambiguity as to the provision's actual scope. White finds equivocality in the juxtaposition of a clause imposing broad, nonspecific liability with a clause that identifies specific categories of losses for which the tenant is liable without regard to fault or causation. On one hand, the Reimbursement Provision distinctly imposes responsibility for (1) damage to doors, windows, or screens, (2) damage from windows or doors left open, and (3) damage from wastewater stoppages caused by improper objects, unless the damage or wastewater stoppage is due to the landlord's negligence. On the other hand, the provision includes "catchall" language capturing losses resulting from any cause not due to the landlord's negligence or fault. White thus questions why the contract singles out specific losses for reimbursement absent landlord fault if the catchall language makes the tenant responsible for all loss in the same circumstances. White also points out that specific losses are emphasized by language that is both bolded and underlined, while the ostensibly broader catchall language—which would subsume the specific losses—is less conspicuously presented. White discerns ambiguity in the catchall language's meaning, arguing it potentially imposes significant liability on tenants while receiving relatively obscure treatment in relation to a more specific subclass of repairs.

The court was unable to discern the conflict White proposed, and held that White is contractually obligated to reimburse the landlord for all damage not

due to the landlord's negligence or fault. It therefore agreed with the court of appeals that the Reimbursement Provision is unambiguous. It then turned to the real issue: whether the Property Code precludes judicial enforcement of the reimbursement provision.

The court held that a contract capable of being performed in harmony with the laws and statutes of this State is not *per se* void as against public policy. Unless an agreement cannot be performed without violating the law or public policy, the party seeking to avoid enforcement must establish its invalidity under the particular circumstances. White failed to do so in this case.

The Property Code's restrictions on contractually shifting the landlord's repair obligations do not apply if a landlord has no duty to repair in the first instance. Landlords have no obligation to repair premises conditions that are tenant-caused and therefore are not restrained from contracting with tenants for reimbursement of associated repair costs. White failed to obtain a finding that she did not cause the damages at issue; the jury's failure to find in response to a negligence submission is not a substitute for the essential fact finding; and the record does not conclusively establish that fact. Accordingly, White failed to establish the factual predicate to contractual invalidity in this case. Thus, the court reversed the court of appeals' judgment to the extent it invalidates the reimbursement provision on public policy grounds.

Pointe West Center, LLC* v. *It's Alive, Inc., 476 S.W.3d 141 (Tex.App.-Houston [1st Dist.] 2015, pet. denied). It's Alive leased space in the landlord's shopping center and opened a restaurant called Frank-N-Stein. The lease term expired. The lease contained a holdover provision that said the tenant would be a tenant at will and that rent would increase to 150% of the original rent. It's Alive stayed a month after the expiration. It claimed to have the landlord's permission.

When vacating the premises, It's Alive did some damage. The landlord discovered the damage after It's Alive vacated. The landlord repaired the damage and filed suit against It's Alive.

At trial, photographs admitted into evidence showed, among other things, mold on a wall from a water leak, multiple holes in the drywall, damaged ceiling tiles, damage to the bar on the premises, damage to booth platforms, and exposed wires hanging from the ceiling. There was also evidence that It's Alive left drains to both the bar and sink clogged, and ripped A/C thermostats out of the walls.

The landlord's representative at trial testified that he did not know the details of the purchases made, how the items were applied, or the specific work done by the people who did repairs. He testified that much of the work done on the premises was done by in-house contractors that didn't necessarily even work for just the shopping center. He acknowledged that some of the time reported in the timesheets could not have included work for repairs on the premises in question. No testimony was presented, however, to show what amount of the time reported on each of the timesheets was attributable to It's Alive's space. He also admitted that the entire amount paid would not be attributable to work performed to repair It's Alive's space.

Another matter in dispute during trial concerned whether the landlord had agreed to let It's Alive remain on the premises after the expiration of the lease at the original monthly-rent rate. It's Alive claimed that the landlord had agreed to this, waiving the application of the hold-over penalties under the lease. The landlord's representative testified he could not recall whether he agreed to allow It's Alive to stay in the space.

The jury determined that It's Alive had breached the lease agreement. It awarded

$15,000 for the cost to repair the premises and $0 for the holdover penalty.

The landlord sought $57,373 in damages. The jury awarded $15,000. It's Alive argues that the evidence is legally insufficient to support the jury's award. Specifically, It's Alive argues that the evidence is insufficient to establish how much the landlord actually spent on repairing the damage caused by It's Alive or to show that those expenditures were actually reasonable and necessary.

To recover costs incurred for remedial damages flowing from a breach of contract, the plaintiff must establish that the repairs were reasonable and necessary. To establish that, the plaintiff must show more than simply the nature of the injuries, the character of and need for the services rendered, and the amounts charged therefor. Likewise, proof of amounts charged or paid does not prove that the amounts were reasonable.

The landlord presented ample evidence of the injury caused as It's Alive vacated the premises. The same cannot be said for the landlord's proof of damages. Its only witness for damages admitted that the checks, receipts, and timesheets included costs that were not incurred in repairing It's Alive's space. The landlord's evidence failed to establish the actual costs of repair. While the record indicates that at least some of the costs admitted into evidence were related to the repair of It's Alive's premises, the jury could only speculate about what portion of the damages evidence actually pertained to that space. Because there was no proof of the actual amount of damages, there was no proof that the damages presented were reasonable or necessary.

When liability is contested, courts may not grant a new trial on unliquidated damages solely. Instead, it must remand for a new trial on both liability and damages. Because It's Alive disputes liability, and the cost of repairs constitute unliquidated damages, the court remanded for a new trial on both liability and damages.

The second issue involved the application of the holdover provision. It's Alive had remained on the premises after the lease term ended. It's Alive argues that it did not breach the holdover provision because the parties agreed to modify it. Specifically, It's Alive argues that the parties agreed that it could remain on the premises after the lease expired at its original monthly base-rent rate. The landlord responds that the lease contained a provision requiring all amendments to the lease to be in writing. It is undisputed that there was no written agreement to allow It's Alive to alter the hold-over provision of the lease or in any other way allow It's Alive to remain on the premises at the monthly base-rent rate after the lease expired. This was not dispositive, however.

A written contract not required by law to be in writing, may be modified by a subsequent oral agreement even though it provides it can be modified only by a written agreement. Proof that a contract provision requires modifications to be in writing does not establish as a matter of law that the parties did not modify the contract orally. A lease of real estate for a term longer than one year is subject to the statute of frauds and is required by law to be in writing. Once the main lease expired, the agreement--either under the holdover provision of the lease or the oral agreement--was on an agreed month-to-month basis for an indefinite period. This is referred to as a tenancy at will.

Because the agreement to stay beyond the duration of the main lease is a tenancy at will--and, accordingly, not subject to the statute of frauds--any oral agreement by the parties concerning the tenancy at will was not a contract required by law to be in writing. There is some evidence in the record to support an implied determination by the jury that the landlord agreed to allow It's Alive to remain on the premises at the

monthly base-rent rate in exchange for It's Alive looking for prospective tenants to take over the existing business and presenting them to the landlord. Because there is some evidence to support an oral modification of the contract, the lease provision requiring all modifications to be in writing is not an absolute bar to recovery.

Wood* v. *Kennedy, 473 S.W.3d 329 (Tex.App.-Houston [14th Dist.] 2014, no pet.). Wood rented space from the father under an oral agreement. He agreed to pay $250 a month and said that he had been given an option to purchase the property. The father died, and his daughter Marti became the guardian of the estate. She hadn't known about the rental agreement.

Marti was driving by the premises and notices people moving things in and out of it. She asked Wood about it and he confirmed that he was using the premises. She asked if he had any paperwork and he answered no. She then told him he had 10 days to move out. She later sent a certified letter instructing him to vacate within 30 days. The letter was returned. After the 30 days expired Marti brought a forcible detainer action. Wood did not appear and a default judgment was rendered, ordering him to leave the premises and awarding $7,700 in damages.

Turns out the justice court lacked jurisdiction and the case was sent to the probate court. There, the probate court issued a writ of possession and awarded $6,250 in unpaid rent, plus costs and attorneys' fees.

Wood asserts that regardless of whether a contract or quantum meruit measure of damages applies, the probate court had no evidentiary basis to support the damages it awarded. Because the proper measure of damages in an action for unpaid rent depends on the nature of an individual's tenancy, the court began by examining Wood's tenancy as a foundation for its review of the probate court's award.

A tenant who continues to occupy leased premises after expiration or termination of the lease is a holdover tenant. The status and rights of a holdover tenant differ depending on whether the tenant becomes a "tenant at will" or a "tenant at sufferance." A tenant at will retains possession of the premises with the landlord's consent. By contrast, a tenant who remains in possession without the landlord's consent occupies "wrongfully" and is said to have a tenancy at sufferance. The parties' conduct determines whether the holdover tenant becomes a tenant at will or a tenant at sufferance.

If the holdover tenant continues to pay rent, and the landlord knows of the tenant's possession and continues to accept rent without objection, the tenant is a tenant at will and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary. The prior lease terms do not control in a tenancy at sufferance, however, because there is no new agreement. In such cases, the proper measure of damages is the reasonable rental value of the property during the holdover period.

At all times relevant to this dispute, Wood has asserted that under the terms of his oral lease, he is liable for only $250 per month in unpaid rent. Because the probate court awarded $6,250 in damages--an amount that exceeded a rental rate of $250 per month—the court implied a finding that Wood was a tenant at sufferance. The record supports such a finding. Thus, Marti did not consent to Wood's occupancy. Furthermore, Wood admitted he had not paid rent. Accordingly, the court examined whether the evidence is legally sufficient to support the probate court's finding that the reasonable rental value of the property during the ten-month holdover period was $6,250.

The rental value of a property must be established with reasonable certainty. In

this case, the only evidence offered to support a reasonable rental value greater than $250 per month was the testimony of the owners of the property. Their testimony was admissible under the Property Owner Rule, an evidentiary rule addressing when a non-expert landowner is qualified to testify about the land's value. The Property Owner Rule creates a rebuttable presumption that a landowner is personally familiar with his property and knows its fair market value, and thus is qualified to express an opinion about that value.

But, a qualified owner's testimony does not necessarily provide relevant evidence of value that can support a judgment. Rather, courts insist that the testimony meet the same requirements as any other opinion evidence. For example, an owner's testimony is not relevant if it refers to intrinsic or some other value of the property rather than to market value. In addition, an owner's valuation testimony is not relevant if it is conclusory or speculative. Thus, an owner may not simply echo the phrase "market value" and state a number to substantiate his valuation; he must provide the factual basis on which his opinion rests. Here, the court looked at the testimony and concluded that it was legally insufficient to support the award.

That holding does not end matters, however, because the record provides sufficient evidence to prove a lesser, ascertainable amount of damages with reasonable certainty. Wood did not contest liability or possession in the probate court, and he admitted that he had not paid rent for ten months. Under the terms of his agreement with the father, Wood was supposed to pay $250 per month. Given the probate court's implied finding that Wood was a tenant at sufferance, the prior lease does not govern. Nonetheless, the prior lease's terms can provide evidence of the property's fair market value. There was evidence that the father had accepted Wood's offer to lease the property for $250 per month. Because this evidence demonstrates the price offered by the lessee and accepted by the lessor, it is sufficient evidence of the fair rental value of the property during the holdover period.

In sum, the record contains legally sufficient evidence to support a finding that the reasonable rental value of the subject property during the ten-month holdover period was at least $2,500, but legally insufficient evidence to support the trial court's award of $6,250. Accordingly, the court suggested a remittitur of $3,750, resulting in an award of $2,500 in damages if accepted.

Mohammed* v. *D. 1050 Rankin, Inc., 464 S.W.3d 737 (Tex.App.-Houston [1st Dist.] 2014, no pet.). Mohammed leased a convenience store which Rankin later purchased. The lease contained an option to extend for two additional terms. The first option increased the rent from the intial rate of $1,800 per month to $2,000 per month. The second option was at market rent.

When the initial term expired, Mohammed continued to pay $1,800 per month and continue to operate the premises for another eight years until Rankin notified him that it was terminating the lease in thirty days. Mohammed refused to leave.

The county court held that Mohammed was a month-to-month tenant after the end of the initial terms and that Mohammed had breached the lease when he failed to move out after Rankin's notice. Mohammed challenges these findings and conclusions, arguing that he rightfully possesses the leased premises pursuant to either of the two options to extend the lease contained in the lease agreement.

A party to an option contract may enforce that option by strict compliance with the terms of the option. A failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. Under the statute of

frauds, material modifications to a lease agreement must be in writing and signed by the party against whom the modification is to be enforced.

A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person is a tenant at will or by sufferance. A tenant who occupies leased property after termination of its lease is a holdover tenant. A holdover tenant's rights differ depending on whether the tenant becomes a tenant at will or a tenant at sufferance. A tenant at will is a holdover tenant who holds possession with the landlord's consent but without fixed terms. A tenant at sufferance is a tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired.

Tenants at will have lawful possession, but without a fixed term, and the landlord can deny possession at any time. If the tenant remains in possession and continues to pay rent with the landlord's consent, the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary.

The county court found that the parties never exercised either renewal option in accord with their lease agreement. Mohammed continued to pay rent at a rate of $1,800 a month after the initial lease term ended. Though Mohammed argued that he had provided written notice to Rankin to exercise both options, Rankin disputed that it ever received notice, and neither party asserted that a signed writing by both parties acknowledged the exercise of either option at $1,800 a month. Because the rental amount that Mohammed paid varied from that required in the first option, and the second required mutual agreement to the rent amount upon its exercise, proper execution of either option would require a signed writing memorializing the rental amount

Because the parties never agreed in writing to modify the rent amount--in particular to adjust the rent owed--Mohammed never properly exercised either option to renew.

Espinoza* v. *Lopez, 468 S.W.3d 692 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Espinoza and Sanchez began searching for a home to purchase and Lopez showed them the Property. Espinoza and Sanchez contend that they entered into an oral agreement with Lopez to purchase the Property for $70,000. Espinoza and Sanchez tendered a check to Lopez for a down payment in the amount of $1,000. The memo line of the check stated, “Down Payment for house!” Espinoza and Sanchez alleged that they orally agreed with Lopez to pay $620.19 per month for fifteen years plus seven percent interest. Espinoza and Sanchez took possession of the Property in March and began making monthly payments. The parties dispute whether the transaction was an oral agreement to purchase or a landlord-tenant arrangement.

Lopez filed a forcible detainer action against Espinoza and Sanchez. They, in turn, filed a motion to dismiss for lack of jurisdiction, alleging that the justice court lacked jurisdiction to hear Lopez's forcible detainer action because the case involved title to the Property.

An action for forcible detainer is a summary, speedy, and inexpensive remedy for the determination of who is entitled to the possession of premises. The only issue to be resolved in a forcible detainer action is the right to actual and immediate possession of the property; the merits of title are not adjudicated. When there are issues concerning both title and possession, the issues may be litigated in separate proceedings in different courts with appropriate jurisdiction. However, when a forcible detainer action presents a genuine issue of title so intertwined with the issue of possession that a trial court would be required to determine title before awarding

possession, then a justice court lacks jurisdiction to resolve the matter.

Espinoza and Sanchez contended that they were purchasing the Property from Lopez, not renting it. In support of their contention, Espinoza and Sanchez argue that they entered into an oral agreement with Lopez to purchase the Property and that they have a claim for equitable title under the doctrine of partial performance. In response, Lopez argues that the title issue is moot because the possession issue is moot and, in the alternative, Espinoza and Sanchez cannot show they have equitable title because they have not paid the full purchase price for the Property.

Generally, a contract for the sale of real estate is unenforceable unless it is in writing and signed by the person charged with the promise. Partial performance, however, will operate to exempt an oral contract for the sale or transfer of real property from the statute of frauds. Under the doctrine of partial performance, an oral contract for the purchase of real property is sufficiently corroborated and enforceable if the purchaser: (i) pays consideration; (ii) takes possession of the property, and (iii) makes permanent and valuable improvements on the property with the consent of the seller, or, without such improvements, other facts are shown that would make the transaction a fraud on the purchaser if the oral contract was not enforced.

Espinoza and Sanchez contend that they have raised a genuine issue of material fact with respect to each element. Espinoza and Sanchez took possession of the Property and began making monthly payments in the amount of $620.19. The memo line for the checks stated, "House Payment" or "payment for house we're buying." They also paid taxes on the house. While living in the Property, Espinoza and Sanchez planted trees, changed fixtures, replaced the carpet, repaired holes in the walls, painted, and installed blacktop on some of the gravel driveway. When they asked Lopez for help in getting their children in school, Lopez's wife sent a letter stating that Espinoza and Sanchez were living in the house and further stating "I am selling the property to them."

Based on this record, the court held that the right to possession cannot be determined without first resolving issues regarding title to the Property.

In re *Lippian*, 477 S.W.3d 880 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Quang Tran obtained an eviction from the justice court against Lippian. Lippian perfected her appeal by filing a statement of inability to pay, which was not contested. The following day, Lippian filed a bond, which which is another means by which an appeal of an eviction judgment may be perfected.

Rule 520.9(c)(5)(B) of the Rules of Civil Procedure requires payment of rent during the appeal perfected by a statement of inability to pay. Lippian did not pay the required rent, so Quang Tran sought and obtained an order of immediate possession. Lippian then filed a motion for a writ of mandamus, asking the court to compel the county court to vacate the order.

Lippian argues that she withdrew her statement of inability to pay by filing her bond. However, an appeal can be perfected only once, by filing either a cost bond or an affidavit of indigence. When, as here, the statement of inability to pay is not contested, the appeal is perfected by the statement of inability to pay, not the later filed bond. Therefore, the trial court did not abuse its discretion in enforcing the requirements of Rule 510.9(c)(5)(B) through its order of immediate possession.

Goodman-Delaney* v. *Grantham, 484 S.W.3d 171 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Mary owned a home in Houston when she married James. In addition to James, Mary had five children, including Grantham. Mary died intestate. James continued to live at the house

following Mary's death and later married Rhonda. James dies in 2014. Grantham served a notice to vacate on Rhonda and subsequently file for eviction, which the justice court granted.

On appeal to the county court, Grantham admitted she did not have a landlord-tenant relationship with Rhonda. The county court also ruled in favor of Grantham.

A justice court has subject matter jurisdiction over forcible detainers, but the justice court and the county court at law on appeal lack jurisdiction to resolve title issues. The forcible detainer process is supposed to be a summary, speedy, and inexpensive proceeding to determine who has the right to immediate possession of property. Thus, a forcible detainer only addresses who has the right to possess the property, not who has title to it.

A forcible detainer action is dependent on proof of a landlord-tenant relationship. Without a landlord-tenant relationship, a justice court cannot determine the issue of immediate possession without first determining who has title to the property.

Here, Grantham conceded that she did not have a landlord-tenant relationship with Rhonda. Rhonda entered the property legally when she married James. Grantham alleges she obtained title to the property in part through inheritance and in part by deed from her siblings. Accordingly, the justice court had to determine whether Grantham had title to the property before it could determine whether Grantham had a superior right to possess the property over Rhonda. The justice court, and the county court at law on appeal, did not have jurisdiction to make such a determination.

PART VI
DEEDS AND CONVEYANCES

Orca Assets, G.P., L.L.C.* v. *Burlington Resources Oil and Gas Company, L.P., 464 S.W.3d 403 (Tex.App.-Corpus Christi 2015, pet. denied). This is a dispute over competing oil and gas leases. The Trust owns tens of thousands of acres of mineral interests in south Texas. The Trust leased the mineral rights in 15 tracts to GeoSouthern, which was ultimately assigned in part to Burlington. A Memorandum of Oil and Gas Lease was recorded. Before it was recorded, the Trust and Orca executed a Letter of Intent to lease the minerals in 15 tracts, 10 of which were those previously leased to GeoSouthern.

The LOI stated that Orca had searched the records and determined that the Trust is the owner of the mineral estates free of any recorded leases. It also stated that it was made without warranties of any kind. The LOI was signed and Orca made an $84,000 earnest money deposit.

Orca executed leases on the subject properties as contemplated in the LOI. Despite the fact that the LOI provided for a thirty-day period during which it could re-examine its title work, Orca did not check the real property records before signing the lease to determine if the properties were subject to other leases. Upon signing the lease with the Trust, Orca paid over $3 million and memoranda were recorded.

Burlington filed this suit to quiet title. The trial court ruled in favor of Burlington. Orca appealed. Orca claimed it was a BFP of the properties leased from the Trust.

The longstanding general rule in Texas is that earlier title emanating from a common source is the better title and is given prevailing effect. However, status as a bona fide purchaser is an affirmative defense to a title dispute. To qualify as a bona fide purchaser, one must acquire property in good faith, for value, and without notice of any third-party claim or interest. Notice may be constructive or actual; actual notice rests on personal information or knowledge, whereas constructive notice is notice the law imputes to a person not having personal information

or knowledge. The bona fide purchaser doctrine is codified in Property Code § 13.001 which states that a conveyance of real property is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record and that an instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument; and subject to inspection by the public.

The parties do not seem to dispute that Orca paid valuable consideration for the rights conferred in the LOI, nor do they dispute that Orca lacked actual or constructive notice of the GeoSouthern lease as of the date the Letter of Intent was executed. The dispute instead centers on whether the LOI constitutes an acquisition of property such that the bona fide purchaser defense would apply.

Orca produced evidence including the LOI, which it claims constituted a conveyance of equitable title to the subject properties. Burlington disagrees with Orca that the LOI conveyed any sort of property interest, and they further argue that the language of the LOI precludes Orca from claiming BFP status.

The court agreed with Burlington. Even assuming, but not deciding, that the Letter of Intent conveyed an equitable interest in the subject properties to Orca, that instrument explicitly stated that no warranty of title would be provided in any lease eventually executed pursuant thereto. In that regard, to the extent the Letter of Intent conveyed any interest in the subject properties, it was equivalent to a quitclaim deed under which the purchaser agrees to acquire whatever interests are actually owned by the seller. A quitclaim deed is a deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid. And, courts have long held that a party acquiring property under a quitclaim deed is not eligible to claim bona fide purchaser status because it is charged with notice of title defects as a matter of law.

Mueller* v. *Davis, 485 S.W.3d 622 (Tex.App.-Texarkana 2016, pet. pending). In September 1991, Virginia executed a mineral and royalty deed to Davis. Shortly thereafter, Mills also executed a mineral and royalty deed to Davis. Neither of Davis' deeds contains a metes and bounds description or a reference to a volume and page of the Harrison County deed records. Rather, each deed states that the grantor is conveying "[a]ll of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as follows . . . ." Each deed then lists certain parcels identifying a specific number of acres contained within what appear to be oil and gas production units.

The adequacy of a property description in any instrument transferring an interest in real property is a question of law within the purview of the Statute of Frauds. To satisfy the Statute of Frauds, a contract must furnish within itself, or by reference to some other existing writing, the means or data by which the property to be conveyed may be identified with reasonable certainty. The instrument's property description need not be mathematically certain, but only "reasonably certain" so as to enable a person familiar with the area to identify the property to be conveyed to the exclusion of other property.

The legal description in the conveyance must not only furnish enough information to locate the general area, as in identifying it by tract, survey and county, it must also contain information regarding the size, shape, and boundaries of the interest conveyed. If the contract does not sufficiently describe the real property interest to be conveyed, the conveyance is void under the Statute of Frauds. However, a deed should not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain

from the description, aided by extrinsic evidence, what property the parties intended to convey.

In this case, the grantors of both deeds purported to convey to Davis: "all of [their] interest[s] in and to all oil, gas, and other minerals in, on, and under . . . the following lands (the " Lands") . . . situated in the County of Harrison, State of Texas, to-wit: All of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas described as follows: 1) 704.00 acres out of the G. W. PETTY, ET AL, A-582, ET AL, known as the "AMOCO PRODUCING COMPANY -- JOHN HARRISON JR 'B'."

The court held that these descriptions were insufficient as a matter of law to identify the property being conveyed. Yet, the Davis deeds also contain the following paragraph:

"The 'Lands' subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and owned or claimed by Grantors. If the description above proves incorrect in any respect or does not include these adjacent or contiguous lands, Grantor shall, without additional consideration, execute, acknowledge, and deliver to Grant[ee], its successors and assigns, such instruments as are useful or necessary to correct the description and evidence such correction in the appropriate public records. Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described."

The first two sentences of this paragraph constitute what is defined as a Mother Hubbard Clause. The general purpose of a Mother Hubbard Clause is to prevent the leaving of small unleased pieces or strips of land which may exist without the knowledge of one or both of the parties by reason of incorrect surveying, careless location of fences, or other mistake.). Such "catch-all" provisions are not effective in conveying significant property interests that are not adequately described in the deed or clearly contemplated by the language of the conveyance.

The parties dispute whether the third sentence should be read together with the Mother Hubbard Clause or independently. Mueller contends that the last sentence should be read as part of the Mother Hubbard Clause to which it is attached and, therefore, cannot convey any significant property interest. Mueller concludes that because the specific descriptions in the Davis deeds are insufficient to identify the property being conveyed and because those deficiencies cannot be saved by the Mother Hubbard Clause, the Davis deeds are insufficient to convey any mineral interests and are void as a matter of law under the Statute of Frauds.

Davis denies that the last sentence is part of the Mother Hubbard Clause, but contends instead, that it is an independent, valid, county-wide general description of the property being conveyed by his deeds. Davis points to well-settled Texas law holding that a deed purporting to convey all property owned by the grantor in a named state or county is a sufficient description to effect a conveyance. Accordingly, Davis argues that the last sentence should be read independently from the Mother Hubbard Clause and that, when read in that manner, the deeds conveyed to him all of Virginia's and Mills' interests in Harrison County.

The court held that the deeds were ambiguous. The sentence in dispute says that the grantor conveys all of the mineral, royalty, and overriding royalty interest owned by the grantor in Harrison County, whether or not it was correctly described in the deed. If, as Davis asserts, the parties intended that sentence to operate independent of the Mother Hubbard Clause and constitute a county-wide conveyance of

all of Virginia's and Mills' mineral and royalty interests in Harrison County, then the deeds conveyed to Davis everything Cope and Mills owned in Harrison County. On the other hand, if, as Mueller asserts, the parties intended the sentence to be a part of and to modify the Mother Hubbard Clause, then it does not cure the insufficient specific grants, and the deeds convey nothing to Davis. Accordingly, the court said, a jury should hear evidence and determine the parties' intent.

West 17th Resources, LLC* v. *Pawelek, 482 S.W.3d 690 (Tex.App.-San Antonio 2015, pet. denied). The property was owned by several members of the Mika family. Thomas and Pamela didn't own any of it. Their mother, Irene, owned an undivided 1/6 individually and another undivided 1/10 as trustee under her late husband's will. The will provided that, on Irene's death, Thomas and Pamela have title to the trust property. The will also provided that Irene could sell the property if needed for her support.

In 1994, Irene and the other owners of the property executed a deed conveying the property to the Paweleks. The deed's wording conveyed "all" of the described property. Irene signed the deed with only her own name and did not designate whether she was signing individually or as trustee. A dispute arose as to whether Irene had conveyed the trust's interest in the land. Thomas and Pamela argued the 1994 deed did not convey the trust's 1/10 interest because Irene did not explicitly sign "as trustee." The Paweleks argued that the deed, by its express terms, conveyed "all" of the subject property. Alternatively, the Paweleks argued the recitals in the deed estopped Appellants from positing that the deed did not convey "all" of the subject property ("estoppel by deed").

The Paweleks argue the issue of whether the 1994 deed conveyed all of the subject property is an issue of deed construction. The court agreed. Neither side contends the 1994 deed is ambiguous, and the court will construe an unambiguous deed as a matter of law. The court's primary duty when construing an unambiguous deed is to ascertain the parties' true intent. To determine a grantor's intent when conveying real property by deed, courts analyze the four corners of the deed using rules of interpretation and construction. The court discerns a grantor's intent from the plain language of the deed without reference to technicalities or arbitrary rules. All parts of a written instrument must be harmonized and given effect if possible. When courts construe deeds, there is a presumption favoring grantees over the grantor.

The granting clause of the 1994 deed conveys "all" 290.69 acres of the subject property subject only to a utility easement. The only part of the 1994 deed that Thomas and Pamela argue supports Irene's intent not to convey the trust's undivided 1/10 interest is her failure to specify any capacity when signing the deed. Such an implied reservation is disfavored. Construing Irene's failure to specify her capacity as an implied intent to reserve the 1/10's interest would also conflict with the deed's plain, unambiguous language. By the plain, unambiguous language of the granting clause, Irene and the other grantors intended to convey ""all" of the subject property, subject only to a utility easement. The court held that the 1994 deed conveyed "all" of the subject property, including the 1/10 interest Irene held as trustee, to the Paweleks, subject only to the utility easement specified in the deed.

York* v. *Boatman, 487 S.W.3d 635 (Tex.App.-Texarkana 2016, no pet.). The Smiths conveyed a life estate in four acres of their property to York and her husband, with the remainder to vest in York's daughter Gwendolyn. The Smiths died, and York and her sister partitioned the Smith's property, with York being conveyed a fee simple estate in 150+ acres that included the four acres earlier conveyed to York and her daughter.

About 10 years later, in 1995, York conveyed the 150+ acres to her daughter Gwendolyn as her separate property. The deed was subject to all outstanding matters.

Later, in 2003, Gwendolyn executed a gift deed conveying the 150+ acres back to York, but per her instructions, the gift deed was held by her lawyer and was never delivered or recorded. York's attorney demanded that Garrett release and forward the gift deed to him. After learning of York's demand, Gwendolyn requested, by letter, that her lawyer return the deed to her, and when he refused to do so, she filed a rescission of the gift deed in the deed records of Hopkins County. In Gwendolyn's lawyer submitted the gift deed into the registry of the court and filed an interpleader action, naming York and Gwendolyn as defendants. Four months later, Gwendolyn filed a pro se answer, requesting that the gift deed be returned to her. In March 2006, the trial court dismissed the interpleader for lack of prosecution and about five months later, ordered that the gift deed be released to Gwendolyn.

Gwendolyn died leaving a will naming her son Todd as her sole beneficiary. In probate, all of the 150+ acres was conveyed to Todd. York filed suit against Todd. The trial court held in favor of Todd as the owner of the 150+ acres subject to the life estate in favor of York.

The first question on appeal was whether the 1995 deed from York to Gwendolyn was void. York first argues that the 1995 deed was void or invalid because it was not a gift "in praesenti" a gift of a present interest, as it failed to exclude or reserve the four-acre life estate from the 1967 deed or the homestead interest of Henry. Nevertheless, a gift by deed does not require proof that the gift was in praesenti. When conveyed by deed, an estate in realty may be made to commence in the future. A gift may generally not be made to take effect in the future since a mere promise to give is unenforceable without consideration. However, by virtue of statutory authority an estate in realty may be made to commence in futuro by deed.

Yet, even if transfer of a present interest were required, there is no indication in the 1995 deed that York did not immediately convey all of her present rights and title in the 150+ acres or that any part of the conveyance was to take place in the future. The 1995 deed purports to convey York's rights and title in the 150+ acres to Gwendolyn. At the time of the 1995 deed, York owned the 150+ acres subject to the four-acre life estate and homestead rights of her husband. Thus, on its face, the deed purports to grant all of York's interest in the property to Gwendolyn.

York argues, however, that that conveyance is invalid because the deed fails to reserve her husband's rights in the property. Nevertheless, said the court, 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. Moreover, a homestead right 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. Accordingly, even though the deed does not specifically reserve the husband's homestead and life estate rights, the conveyance was made subject to those rights as a matter of law, and the failure of the deed to specifically reserve those rights does not render it void as to York.

York's second argument was that the 1995 deed is invalid because the evidence is insufficient to establish that the 1995 deed was a gift. The trial court's conclusion that Todd was the fee simple owner of the 150+ acres was based on an implied finding that the 1995 deed was a gift from York to Gwendolyn. York argues that the 1995 deed was not a valid gift of the property because

she lacked the requisite donative intent and because no actual delivery and acceptance occurred. Specifically, she argues that she and Gwendolyn agreed to transfer the property to Gwendolyn in order to protect it from seizure by the government to satisfy her husband's nursing home costs and then transfer it back to York upon his death.

A gift of realty can be made either by deed, as is alleged in this case, or by parol gift. The elements of a valid gift by deed are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property. The owner must release all dominion and control over the gifted property. Generally, the party claiming the gift has the burden of establishing the elements of gift, but because the 1995 deed purports to convey the property at issue from York to Gwendolyn it is presumed that York intended the conveyance to be a gift. To rebut this presumption, York had to prove a lack of donative intent by clear and convincing evidence at the trial court level. The court examined the evidence and determined that trial courts determination that the 1995 deed was a gift was not against the great weight and preponderance of the evidence.

PART VII
VENDOR AND PURCHASER

Anderson Energy Corporation* v. *Dominion Oklahoma Texas Exploration & Production, Inc., 469 S.W.3d 280 (Tex.App.-San Antonio 2015, no pet.). A joint operating agreement governed the exploration, development, and operation of mineral interests within the "Contract Area." The Contract Area is defined as "all of the lands, oil and gas leasehold interests, and oil and gas interests intended to be developed and operated" under the agreement as described in Exhibit A attached to the joint operating agreement. Exhibit A attached 8 maps. Each map shows an area outlined with hash marks, as well as smaller areas identified by dots both inside and outside the hash-marked area.

Anderson sued DOTEPI seeking, among other things, to enforce a right to purchase mineral interests within the Contract Area.

The Statute of Frauds, Business & Commerce Code § 26.01(a), (b)(4) requires that contracts for the sale of real property be in writing and signed by the person to be charged. Oil and gas interests constitute real property; therefore, an agreement for the transfer or assignment of a mineral interest must comply with the Statute of Frauds. To satisfy the Statute of Frauds, a contract must furnish within itself, or by reference to some other existing writing, the means or data by which the property to be conveyed may be identified with reasonable certainty. Even if the record is clear that the parties to the contract knew and understood what property was intended to be conveyed, the knowledge and intent of the parties will not make the contract valid. If the contract does not sufficiently describe the real property interest to be conveyed, the conveyance is void under the Statute of Frauds and will not support an action for specific performance or breach of contract.

The sufficiency of a legal description in any instrument transferring a property interest is a question of law subject to de novo review. The contract's property description need not be mathematically certain, but only "reasonably certain" so as to enable a person familiar with the area to identify the property to be conveyed to the exclusion of other property. The purpose of the written description is not to identify the land, but to provide a means of identification. The property description must furnish enough information to locate the general area as in identifying it by tract survey and county, as well as to determine the size, shape, and boundaries of the property. When the language in the contract furnishes a "key or nucleus" description of the property, extrinsic evidence may then be used merely as an aid to identify the property with reasonable certainty from the data contained in the contract, not to supply a missing description.

Here, viewing the JOA and its Exhibit A maps along with the incorporated Letter Agreement and its attached Schedule A, the court concluded that the JOA contains enough information to provide at least a nucleus description of the Contract Area with respect to its physical location and its size, shape, and boundaries.

Marx* v. *FDP, LP, 474 S.W.3d 368 (Tex.App.-San Antonio 2015, no pet.). The Marxes, as sellers, and FDP, as buyer, entered into a Farm and Ranch Contract. Exhibit A contained field notes for a 326.047-acre tract and a 186.152-acre tract. The Marxes agreed to supply FDP with a new survey. In the Special Provisions of the Contract, the Marxes and FDP agreed to some details "to be worked out before closing," including surveying out 21 acres that would be retained by the Marxes and giving FDP a right-of-first-refusal to buy those 21 acres. The purchase price was payable in cash and with seller financing.

The Marxes subsequently refused to sell to FDP. FDP sued for specific performance and damages. They entered into a mediated settlement agreement which contained the following terms: (i) FDP agreed to purchase approximately 421 acres from the Marxes for $5,000.00 per acre—"Closing per existing EMK--October 1, 2013;" (ii) the Marxes agreed to retain the Homestead Property for no longer than eight years after closing; (iii) the parties were to mutually agree on the Homestead Property, not to exceed one hundred acres; (iv) if the parties could not agree on what constituted the Homestead, the issue would be submitted to arbitration; (v) FDP maintained exclusive option to purchase the Homestead Property; and (vi) all claims and causes of action between the parties, except for the undertakings in the MSA, were mutually released. The agreement was filed with the district court as a Rule 11 agreement.

FDP filed a motion to enforce the agreement. The Marxes answered raising several affirmative defenses, including (1) ambiguity, (2) failure of conditions precedent, (3) fraud, (4) the Marxes' impossibility of performance, (5) lack of mutuality, (6) mutual mistake, and (7) lack of consideration. The Marxes' pleading contended the MSA left essential elements of the contract for future negotiation and agreement. These uncertain terms included the size, location and boundaries of the land to be sold; the identity of the buyer, the manner in which the sale price is to be paid; the portion of the sale price which is to be paid in cash; and the portion of the sales price which is to be owner financed. With these terms being uncertain, the Marxes claimed that performance was impossible and they "rescinded" their agreement to the settlement agreement.

The trial court ordered the parties back to mediation, which was unsuccessful. The court then ordered arbitration to determine the boundaries of the 100-acre and 421-tract. The arbitrator picked the boundaries and the arbitration award was confirmed by the court. FDP then moved for summary judgment for specific performance, which was granted by the trial court.

Specific performance is an equitable remedy that may be awarded, at the trial court's discretion, for a breach of contract. When the recovery of monetary damages is inadequate to compensate the complainant, the transgressor is compelled to perform the promise of its contract. Specific performance is not a separate cause of action, but rather it is an equitable remedy used as a substitute for monetary damages when such damages would not be adequate. To be entitled to specific performance, the plaintiff must show that it has substantially performed its part of the contract, and that it is able to continue performing its part of the agreement. The plaintiff's burden of proving readiness, willingness and ability is a continuing one that extends to all times relevant to the contract and thereafter.

The Marxes argued that specific

performance was not available because there was no meeting of the minds on the method of financing. They contend the contract is unenforceable because the mediated settlement agreement changed the sale price and it lacks a method of financing the new price. The Marxes argue the method of financing was a material or essential term in the real estate transaction, and because the mediated settlement agreement 's new sale price was indefinite, there was no meeting of the minds. In other words, the mediated settlement agreement failed to address the financing associated with the additional acres and the increased price from the original Seller Financing Addendum contained in the Farm and Ranch Contract. Unfortunately for the Marxes, this claim was not preserved on appeal, so it was held to be waived.

They argued ambiguity and indefiniteness as well. A contract is ambiguous if the contract language is susceptible to two or more reasonable interpretations. A contract is not ambiguous if it is so worded that it can be given a definite or certain legal meaning. A contract is not ambiguous simply because the parties disagree over its meaning. Rather, if a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Thus, if an ambiguity is present, the trier of fact resolves the ambiguity, and the contract is enforceable once the ambiguous language is resolved.

Unlike the trial court's obligation to resolve any ambiguity necessary to enforce a contract, indefiniteness in a contract makes the contract unenforceable. Provisions that are too indefinite and uncertain to reflect a meeting of the minds of the parties, cannot constitute an enforceable contract. An indefinite contract results when a material or essential term, a term a party would reasonably regard as a vitally important element of their bargain, is missing at the time the contract was formed.

Specifically, the Marxes argued that the MSA creates a patent ambiguity, a contraction, which renders the new agreement incapable of performance. That section provides, first, that the number of acres being sold by Sellers to Buyer is changed to 421 acres, more or less. Second, it provides that the price per acre is being changed to $5,000. The Marxes further argued the settlement agreement was ambiguous because the Farm and Ranch Contract and the Seller Financing Addendum each contain other numbers which were not changed by the settlement agreement. But, again, the Marxes had raised ambiguity, but not that the settlement agreement was indefinite with respect to FDP's payment obligations. By failing to raise the question of indefiniteness before the trial court, the Marxes waived this issue on appeal.

Cohen* v. *Sandcastle Homes, Inc., 469 S.W.3d 173 (Tex.App.-Houston [1st Dist.] 2015, pet. pending). A properly filed lis pendens is not itself a lien, but rather it operates as constructive notice to the world of its contents. Property Code § 13.004(b) expressly provides that a properly filed notice of lis pendens prevents a purchaser for value from acquiring property free and clear of the encumbrance referenced in the lis pendens. A notice of lis pendens may be expunged, however, if certain procedures are followed and the trial court determines that the party filing the notice either has not pleaded a real-property claim or demonstrated the probable validity of the claim. If an order expunging a notice is properly recorded, there are statutory limitations on the ability of a party to charge a purchaser with notice based upon the notice of lis pendens.

Here, the parties disagree about how the trial court's expungement of the notices of lis pendens impacted Sandcastle's and NewBiss's ability to establish bona-fide purchaser status. The notice of lis pendens on Tract I was expunged after Sandcastle's purchase; the notice of lis pendens was

expunged on Tract II before NewBiss's purchase. Cohen asserts that, in both cases, the purchasers were not entitled to bona-fide purchaser protection because they otherwise had notice of his lawsuit. The court disagreed.

In Texas, prior to 2009, if a party pleaded a real-property claim, it could effectively encumber a property with a lis pendens notice until the underlying proceedings concluded without regard for the merits of the underlying claim. This approach had been criticized because it allowed real-property interests to be significantly burdened with no evidentiary support and with no showing that the notice of lis pendens was filed in good faith. Recognizing that a lis pendens notice produces a cloud on title which may devastate the marketability of the encumbered property, some states enacted statutes requiring a trial court to determine, in a hearing on discharge, that the claim is probably valid, or that the proponent is likely to prevail in the action.

In 2009, the Texas Legislature similarly amended section 12.0071 of the Texas Property Code to require a trial court to order the notice of lis pendens expunged if the court determines that the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim. Probable validity is not defined in the statute, but other jurisdictions have defined this phrase in the lis pendens expungement context to mean where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

Cohen argued that expungement extinguishes only (1) constructive notice caused by the filing of the notice of lis pendens, and (2) actual notice derived by reading the notice of lis pendens. Thus, under Cohen's interpretation, if a party learns of a lis pendens or the underlying lawsuit other than by reading the actual lis pendens notice, the party has "actual notice" of that claim, defeating bona-fide purchaser status regardless of whether the lis pendens is expunged.

Sandcastle and NewBiss argue that Cohen's interpretation eliminates the benefit of--and is contrary to the purpose of--the expungement statute because it allows a party to burden title to property even when that party cannot meet the threshold requirement of adequately pleading and establishing the probable validity of an alleged real-property claim. The court agreed.

A notice of lis pendens is designed to put persons who might acquire the property on notice that there is a potential claim to the property. Section 12.0071 uses the word expunge. "Expunge" means to erase or destroy, to declare null and outside the record, so that it is noted in the original record as expunged, and redacted from all future copies. Once a notice of expungement has been properly filed, the notice of lis pendens and any information derived from the notice does not amount to constructive, actual, or inquiry notice about the underlying lawsuit, and is not enforceable against a purchaser or lender regardless of whether the purchaser or lender knew of the lis pendens action.

Cohen argues the concepts of actual and constructive notice are different and that expungement of a notice of lis pendens can operate only to extinguish constructive notice, but not actual notice (except the actual notice that comes from physically reading a lis pendens notice). The court rejected that argument because the plain language of section 12.0071 shows that--for purposes of establishing bona fide purchaser status--expungement of a lis pendens notice extinguishes both actual and constructive notice.

What is less clear, however, is exactly what expungement extinguishes actual and constructive notice of. The statute states that expungement extinguishes "notice of lis

pendens and any information derived from the notice." Resolution of this appeal turns on what "any information derived from" means. Cohen advances a narrow interpretation of this provision, insisting that expungement of a lis pendens should have no effect on any actual notice unless the purchaser gained the actual notice from reading the notice of lis pendens. Under this interpretation, whether an expungement can remove the cloud of a lis pendens does not turn on whether the party encumbering the real property can demonstrate a probable right of recovery on an underlying real-property claim, but instead on details about exactly how the purchaser seeking to rely on an expungement learns of the underlying claim.

For example, under Cohen's interpretation, if a potential purchaser first learns of a lawsuit involving a claim to real property by reading a properly filed notice of lis pendens in the real property records, then the potential seller's successfully moving to expunge that lis pendens--either before or after the purchaser came across the lis pendens notice--would restore that purchaser's ability to take the property as a bona-fide-purchaser. The result would be different, however, if the day before inspecting the real property records, that same potential purchaser was told by a real estate agent showing the property that there is a lawsuit where someone was claiming an interest in the property and filed a lis pendens. Under Cohen's interpretation, the buyer told about the suit by the realtor could never take the property as a bona-fide purchaser, despite a trial court finding that the plaintiff in the underlying lawsuit failed to establish, by a preponderance of the evidence, the probable validity of the real-property claim.

The statutory provisions providing for expungement of lis pendens notices--the aim of which is to curtail burdening of real property pretrial, for lengthy periods, without evidentiary support--would be of little use if every case necessitated inquiry into, and turned on, whether a purchaser physically read the lis pendens or was told about the lis pendens or the underlying lawsuit by another person. Read as a whole, the lis pendens and expungement scheme is designed to differentiate cases in which the proponent of the notice of lis pendens can demonstrate a probable right of recovery on an underlying real-property claim from cases in which the proponent cannot; nothing indicates that the legislature intended the determination of whether title to a property is encumbered to turn instead on whether each potential buyer learns of an underlying claim that is the subject of a lis pendens notice by literally reading the notice or by some other means.

The court concluded that the more reasonable interpretation intended by the legislature is that a lawsuit identified in a notice of lis pendens does not preclude subsequent purchasers from proving bona-fide purchaser status if the trial court has expunged that lis pendens following a determination that the proponent has not shown the probable validity of the real-property claim.

There was a strong dissent. It pointed out, among other things, that the procedural standard for expunging a notice of lis pendens is much lower than the standard that would apply to defeat the underlying claim on the merits. A notice of lis pendens can be expunged based on the nonmovant's inability--without any right to ordinary discovery--to establish the probable validity of the real property claim. The party seeking expungement has no burden of proof. The expungement of a notice of lis pendens under such circumstances is far from a judicial determination that the claimant could not have ultimately prevailed on the merits of his claim with the benefit of discovery. Yet the court's holding has the effect of imbuing an expungement of a notice of lis pendens with the claim-preclusive effect of a full-blown adverse judgment on the merits. As such, Cohen would have been in a better position today

had he never availed himself of the recording act's protections by recording the notice of his lis pendens

Arbor Windsor Court, Ltd.* v. *Weekley Homes, LP, 463 S.W.3d 131 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). Arbor and Weekley entered into a lot purchase contract pursuant to which Arbor would develop lots and Weekley would purchase them according to a schedule. The Agreement required each party to give the other fifteen days' notice of default and the opportunity to cure. Weekley failed to purchase most of the lots, which caused Arbor to default on its loan. The lender foreclosed, and Weekely bought the property at the foreclosure sale.

Arbor sued Weekley for breach of contract for failing to purchase lots according to the schedule. At trial, the jury found that Arbor had failed to send the required 15-day notice of default to Weekley. The trial court entered a take-nothing judgment in favor of Weekley. On appeal, Arbor argued that the finding of its failure to provide the notice of default does not support the judgment in favor of Weekley. In other words, Arbor argued that the notice requirement was a covenant, not a condition precedent.

The court resolved whether a contractual provision is a covenant or a condition precedent by examining the entire contract to determine the parties' intent. A condition precedent must either be met or excused before the other party's obligation may be enforced. As part of that contract review, the court applied additional common law principles that reflect Texas public policy disfavoring conditions precedent. For example, in construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible. Thus, if the language of the contract is susceptible to a non-condition precedent interpretation, the court accepts that construction and construes the language as a mere covenant.

Neither party argues that the notice provision of the Agreement is ambiguous. As such, neither party undertakes in any way to set forth two reasonable but competing interpretations of the provision. Instead, Arbor points to (a) the parties' use of the word "covenant" and (b) the absurd result that would flow from reading the provision as a condition precedent. And, Weekley points to the parties' use of the term "prior to" and argues that this phrase constitutes conditional language that is completely without meaning unless it creates a condition precedent.

To glean the parties' intent to create a condition precedent, the court looks for conditional language such as " if," "provided that," or " on condition that." Our task is to construe the entire agreement, and that task is not altered by the parties' use of "magic words" in the contract or the absence of such words.

In addition, the conditional language must connect the condition precedent to the conditioned obligation. In other words, the mere existence of conditional language within a contract does not suggest that all obligations of one party are conditions precedent to the performance by the other party.

Turning to Arbor's argument regarding construction, the court acknowledged the appeal of Arbor's first argument that the parties chose the words "covenant and agree" as the introductory phrase to the contested provision. However, a single word or provision cannot be given controlling effect. The words "covenant and agree" do not always signal that a provision is purely a covenant. Nor do those words foreclose review of the remainder of the contract. Although the court must resist any interpretation that results in forfeiture, it must nonetheless construe the entire provision to have meaning. Therefore, the parties' use of the words "covenant and agree" is not dispositive of the construction.

The court was persuaded by Weekley's argument that the provision, as a whole and as written, contains explicit conditional language--"prior to"--that will have no meaning if construed as no more than a mere covenant. The sentence does not contain the oft-cited traditional conditioning language: "if," "provided that," or "on condition that." But, again, the court is not looking for magic words. Texas courts have found other words and phrases to be conditional language.

Ultimately, the court held that to construe the provision as either a covenant or an ambiguous provision in an effort to give meaning to this single phrase—"covenant and agree"—out of context would ignore the remaining language and eviscerate the only reasonable meaning of the paragraph. Having examined the contract as a whole, the conclude that is was compelled to construe the provision as a condition precedent by language that may be construed in no other way.

KIT Projects, LLC* v. *PLT Partnership, 479 S.W.3d 519 (Tex.App.-Houston [14th Dist.] 2015, no pet.). The Buyer and Seller had a contract for the sale of some real estate. The Buyer asked the Seller for an extension of the closing date. In consideration for the extension, the Buyer agreed to pay a $10,000 extension fee. It was to be non-refundable and not applicable to the purchase price. When the Buyer delivered the check for the extension fee it was returned because funds hadn't yet been deposited in the Buyer's account to cover it. Buyer sent an email promising to make good on the check in a few days. The Buyer signed the extension and send another check, but it also bounced. About a week later the Buyer obtained a cashier's check for the extension fee, but never delivered it. The Seller then informed the Buyer that the deal was off.

The Buyer asserts the consideration for the amendment was the Buyer's promise to pay the $10,000 extension fee. The Seller asserts that the consideration for the amendment was either the payment of the $10,000 fee or the valid tender of the $10,000 fee. Essentially, the Seller equates a promise to pay with making payment. The Buyer asserts a promise to pay is not the same as making payment. Though the Seller does not expressly argue that the Buyer's payment of the $10,000 fee was a condition precedent to the Seller's obligation to extend the closing, parts of the Seller's argument seem to suggest that the Seller is asserting the non-occurrence of the payment was an unsatisfied condition to the extension of the closing date.

The words the parties chose are the best indicators of an intent to create a condition precedent. To make performance specifically conditional, a term such as "if," "provided that," "on condition that," or some similar phrase of conditional language normally must be included. If no such language is used, the terms typically will be construed as a covenant, to prevent a forfeiture. Though there is no *per se* requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made, rather than a condition imposed. In construing a contract, courts seek to avoid forfeiture and so when another reasonable reading of the contract is possible, courts will steer clear of finding a condition precedent. When the intent of the parties is doubtful, courts will interpret the agreement as creating a covenant rather than a condition. Because conditions tend to be harsh in operation, conditions are not favored in the law.

The text of the amendment does not point to a condition. There is no language in which the parties state that the closing date will be extended "if," "provided that," or "on condition that," the Buyer pays the extension fee. Rather, the parties state that they amend their agreement to change the closing date. This phraseology typifies covenant language, not condition-precedent language. The parties state that in

consideration for this extension the Buyer "agrees to pay" the extension fee. After considering the amendment instrument under the applicable legal standard, the court concluded that, under the unambiguous language of that instrument, payment of the $10,000 is not a condition precedent to the extension of the closing date.

The Seller argued that, because the $10,000 was not paid, there was no consideration for the extension. The court held that under the clear wording of the amendment instrument, the consideration for the extension of the closing date was the Buyer's agreement to pay the $10,000 extension fee rather than the Buyer's payment of the extension fee or the Buyer's valid tender of the fee.

The Seller also argued that there was a failure of consideration so there was never a binding agreement to extend. This argument raises a legal issue regarding the effect of an alleged failure of consideration. Though courts have described the "failure of consideration" affirmative defense in various ways, courts agree that this defense is distinct from "lack of consideration." A "failure of consideration" does not mean that there never was any binding amendment. Instead, the failure-of-consideration defense comes into play when a party does not receive the promised performance under a binding contract. Therefore, to the extent that the trial court granted summary judgment based on a conclusion that the amendment was never binding on the parties due to a failure of consideration, the trial court erred.

Rancho Esperanza, Ltd.* v. *Marathon Oil Company, 488 S.W.3d 354 (Tex.App.-El Paso 2015, no pet.). It is a well-established rule in Texas that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere subsequent purchaser does not have standing to recover for injuries committed before his purchase. The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. A subsequent landowner may assert a cause of action for pre-existing injuries only if there is an express assignment of the cause of action.

PART VIII
EASEMENTS

Staley Family Partnership, Ltd.* v. *Stiles, 483 S.W.3d 545 (Tex. 2016). Two tracts of land are involved – the Stiles Tract and the Staley Tract. Both properties were once part of a single tract the State granted to Thompson Helms in 1853. In 1866, after Helms and his wife died, a probate court partitioned the tract among their six children. Three children received tracts relevant to this suit. The three properties were generally rectangular in shape; their long axes ran in an east-west direction, and they were " stacked" from north to south. Axia Ann Helms received the northernmost tract; James Helms, the tract immediately to the south of hers; and Frances Helms, the tract immediately to the south of James's. Except for the Staley Tract in the northwest corner of his portion, Frances conveyed his land to James in the 1870s, with the last conveyance being in 1876.

The Staley Tract is landlocked amidst the Stiles Tract. The Staley Family Partnership acquired the Staley tract, then sued for a declaratory judgment that an easement runs across the Stiles tract to the county road, either by necessity, estoppel, or implication. The trial court ruled that there was no easement.

Staley appealed, claiming only an easement by necessity. The court of appeals upheld the trial court's judgment. The court of appeals held that an essential element of an easement by necessity is that, at the time the alleged dominant property was severed from the alleged servient property, the

easement was necessary for the landlocked dominant property to have roadway access to a public road. It held that there was no evidence of necessity at the time of severance.

Staley argues that it proved, and Stiles does not dispute, that the Staley and Stiles Tracts were part of the Thompson Helms Tract until they were partitioned in 1866; Honey Creek and its tributary forming the western, southern, and eastern borders of the Staley Tract are impassable by vehicles and have been in the same condition at all times relevant to this matter; and the only possible overland access to the Staley Tract has been and is to the north through the Stiles tract. Staley says that is all it was required to prove. It is not, said the court.

Establishing the "necessity" part of an easement by necessity requires, in part, proof that at the time the dominant and servient estates were severed, the necessity arose for an easement across the servient estate in order that the dominant estate could in some manner gain access to a public road. But a right of way that does not result in access to a public roadway is not, under long-standing precedent, necessary because it does not facilitate use of the landlocked property.

Because Staley did not prove that a public roadway existed at severance where the county road now exists, Staley could not have an easement by necessity.

Union Pacific Railroad Company* v. *Seber, 477 S.W.3d 424 (Tex.App.-Houston [14th Dist.] 2015, no pet.). The Sebers sued Union Pacific claiming the railroad had wrongfully removed the Sebers' private railroad crossing. The Sebers claimed a right to use the crossing pursuant to an implied easement by prior use. The trial court granted summary judgment in favor of the Sebers, declaring that the Sebers have a right to use the crossing and ordering Union Pacific to reinstall the crossing.

The Texas Supreme Court decided ***Hamrick* v. *Ward***, 446 S.W.3d 377 (Tex. 2014), "to provide clarity in an area of property law that ha[d] lacked clarity for some time: implied easements." In Hamrick the Supreme Court held that the easement-by-necessity doctrine -- and not the easement-by-prior-use doctrine -- must apply to claims of landowners asserting implied easements for roadway access to their landlocked, previously unified parcel.

The court held that the trial court erred in granting summary judgment in favor of the Sebers on their pleaded theory of easement by prior use. To prevail on a traditional motion for summary judgment, the movant must show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. The court held that the Sebers are not entitled to summary judgment on their pleaded easement by prior use claim because the Sebers cannot prevail on this claim as a matter of law. The court remanded the case to allow the Sebers to plead easement by necessity.

Trant* v. *Brazos Valley Solid Waste Management Agency, Inc., 478 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). This case is also discussed in Easements. The Trants entered into an Option Contract with the Cities of Bryan and College Station, pursuant to which the Cities obtained the right to purchase approximately 382 acres of land in Grimes County from them. The Option Contract stated that the Cities contemplated using the property as a Landfill. The Cities later purchased the property and the deed conveying the property to the Cities incorporated the "Terms, Conditions, and Representations" in the Option Contract.

The Cities formed the Waste Management Agency, a governmental entity that currently operates a landfill on the property. The Trants learned that the Cities had decided to put a firing range on a portion of the property near their land. The

Trants sent a letter to the Cities and the Agency, contending that the property could be used only as a landfill. Counsel for the Agency responded by letter that while the Option Contract contemplated an intended use of the property as a landfill, the contract did not restrict the Cities' use of the property to such purpose.

The Trants filed suit against the Agency. The Agency filed a plea to the jurisdiction, asking the trial court to dismiss the suit on the basis that governmental immunity bars the Trants' claims. The Trants responded that (1) the Agency is not immune from suit to enforce the Option Contract, which the Trants construe as a condemnation settlement agreement, or from their claim to enforce land use restrictions; and (2) the Agency's immunity has been waived under Chapter 271 of the Local Government Code. The trial court granted the Agency's plea and dismissed the Trants' claims for want of jurisdiction.

The Agency describes itself as a local governmental non-profit corporation wholly owned by" the Cities and a "governmental unit" as defined in Chapter 101 of the Civil Practice and Remedies Code. Local governmental entities enjoy governmental immunity from suit, unless immunity is expressly waived. Governmental immunity includes both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. A governmental entity that enters into a contract necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit.

The Trants argued that the Agency is not immune from an action to enforce restrictive use covenants in the General Warranty Deed and Easement Agreement. The court did not get to the immunity issue because it found that the Trants had not raised a material issue of fact regarding the existence of any restrictive use covenant in the General Warranty Deed or Easement Agreement that the Agency may have violated.

When a restrictive covenant may reasonably be interpreted in more than one way, the court will resolve all doubts in favor of the free and unrestricted use of the property, strictly construing the restrictive clause against the party seeking to enforce it. The words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched, or changed by construction. The party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable.

The Trants argue that the deed includes a restrictive use covenant allowing the land to be used only as a landfill. The deed incorporates the "Terms, Conditions, and Representations" in the Option Contract. The Option Contract states that the Cities “contemplate using the Property as a . . . Municipal Sanitary Landfill.” However, nothing in the language of the deed or Option Contract indicates that the Trants retained a possessory interest in the property contingent on the Cities' using it as a landfill. The Option Contract and the deed do not include a restrictive use covenant. The only language referencing any use of the property, discussed above, merely reflects how the Cities anticipated using the property--the Cities did not agree to use the property only as a landfill.

North Texas Municipal Water District* v. *Ball, 466 S.W.3d 314 (Tex.App.-Dallas 2015, no pet.). The rules of contract construction and interpretation apply to easement agreements. Unless the agreement is ambiguous, and no such claim is made in this case, the court interprets its provisions as a matter of law. Whether a structure is "permanent" is necessarily a fact-specific inquiry that will depend on such factors as the nature of the structure and its location on the restricted area.

Any structure can be removed from land, so that isn't the determining factor in determining permanence. A structure which is designed as a continuous fixture is permanent as a matter of law.

Lewis owned a twenty-one acre tract of land in Collin County, across which the District wished to install a water pipeline. Lewis conveyed a thirty-foot-wide permanent Easement to the District. The District received the right to construct, operate, and maintain water pipelines within the Easement's boundaries; Lewis retained the right to use the land making up the Easement except for the purposes of erecting buildings or permanent structures" on the land. The District agreed to pay for damage caused to fences and crops while performing its functions on the Easement.

Over the years, Lewis's tract was subdivided. In 2013, the Tissings owned a subdivided piece of the Lewis property, a two-and-one-half acre tract facing Stinson Road. The Easement and its pipeline run across the width of the Tissings' property, parallel to Stinson Road.

The Tissings began to erect a structure across the front of their property, and within the Easement boundaries. The District learned of the construction in April 2013 and contacted the Tissings to demand that the construction stop and the portion of the structure already built be removed from the Easement. When the Tissings refused to stop construction, the District filed suit. The District sought a declaration that it held a valid existing Easement across the Tissings' property and that the structure erected within its Easement was a permanent structure that violated the terms of the Easement. The District also pleaded that the construction of the structure constituted an impermissible use and wrongful interference with the District's reasonable use and enjoyment of the Easement. Finally, the District sought a mandatory injunction, requiring the Tissings to remove the structure being built within the Easement. The trail court issued a TRO, which it extended once.

The structure being constructed by the Tissings was built by anchoring galvanized steel poles into holes with concrete, building a base with concrete blocks that encased the poles and created a wall across the front of the property, facing the wall with flagstone on both sides, and topping this base with a wood privacy fence.

The District's fundamental position is that the structure is " permanent" within the meaning of the Easement, so the Tissings had no right to erect it over the Easement's right-of-way. The Tissings contend the structure is not permanent in nature. But they also argue that--even if the structure is permanent within the meaning of the Easement--it is a fence, and the Easement contemplates an exception for fences when it states the District will pay for any damage it does to fences while working on the Easement.

The Tissings argue that the court's inquiry into the permanent nature of the structure is asking the wrong question. They contend the Easement intends fences to be an exception to the prohibition against erecting permanent structures. According to the Tissings, the plain language of the Easement contemplates the presence of fences within its boundaries. However, the language relied upon by the Tissings speaks only to this remedy of compensation for damage, not to any additional rights reserved by the original landowner. It is true the court avoids burdening the servient estate when possible. But it is not reasonable to create an exception to an express prohibition within an easement agreement--here, construction of a permanent structure--when that exception, by its very nature, would significantly interfere with the easement holder's ability to carry out the purposes specifically granted to it by the Easement. The Tissings' interpretation of the Easement's reference to fences gives that provision control over not only the permanent-structure prohibition,

but also the essential purpose of the Easement. The court would not give a single provision, taken alone, controlling effect in this Easement. It must consider all provisions with reference to the purpose of the whole instrument.

The court held that the structure was a permanent structure and that the Easement's prohibition contains no exception for fences.

PART IX
ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Gipson-Jelks* v. *Gipson, 468 S.W.3d 600 (Tex.App.-Houston [14th Dist.] 2015). Mae and her mother Beulah bought a house in 1974, each taking a one-half interest in the house. Mae's sister Rose moved into the house and lived with Beulah. Beulah died, but Rose stayed in the house. Mae tried to evict Rose on the grounds that Mae was the sole owner of the house because Beulah had deeded her half interest in the house to Mae in a 2008 deed. Rose claimed that Beulah lacked capacity to execute the deed.

Mae filed a petition in which she asserted she held title to the house and sought a judgment declaring that Mae is the sole owner of the house, and a writ of possession. Rose filed a general denial. After a bench trial, the trial court signed findings of fact and conclusions of law followed by a judgment declaring Mae the sole and exclusive owner of the house and granting her immediate and exclusive possession of this property. The trial court ordered Rose to vacate the house immediately.

Rose argues that the evidence is legally insufficient to prove Mae holds title to the house. In particular, Rose argues that Mae did not prove a certified copy of a deed showing a chain of title emanating from and under a common source. To prove a common source, Rose argues, Mae needed to place into evidence a certified copy of the 1974 deed to Mae and Beulah.

Mae and Rose both agree that the 1974 deed granted a one-half interest in the property to Mae and a one-half interest in the property to Beulah. Both parties assert that they have a claim to the house because they have a claim to Beulah's one-half interest in the property. Because Beulah's one-half interest in the property is the common-source of their competing claims, Mae needed to prove only that she had a superior title to Beulah's one-half interest.

The trial evidence contains a 2008, notarized general warranty deed conveying Beulah's one-half interest in the house to Mae. In addition to the warranty deed, Mae testified that her mother wanted to deed the property to her. Mae's granddaughter and the notary both testified that they were present when Beulah signed the deed. Mae's granddaughter stated that Beulah signed the deed of her own free will. The court concluded that the record contains sufficient evidence to enable a reasonable factfinder to determine that Mae had superior title from a common source.

Nac Tex Hotel Co., Inc.* v. *Greak, 481 S.W.3d 327 (Tex.App.-Tyler 2015, no pet.). The DeWitts leased a building to operate a KFC franchise, and later purchased the building and the land it stood on. The landlord/seller also granted the DeWitts an access easement allowing access to Chestnut Street. Sometime in the early 1980s, the DeWitts added a drive-through, paved the parking lot, and built a bridge over a triangular shaped piece of property between the KFC land and the easement area. The triangle was owned by Temple. The DeWitts used the triangle for access and employee parking, landscaping it and otherwise maintaining it.

In 1988, the DeWitts sold the business and its real estate to a Corporation owned by their daughter. The daughter continued to use the triangle as if she owned it. She

never discussed the triangle with Temple because she didn't think there was anything to discuss. She further stated, "I wouldn't never [sic] intentionally take anything from that man."

In 2007, Temple sold his property to a Partnership controlled by Greak. In 2009, Greak contacted the daughter and told her that her employees were parking on his property. They were actually parking on the easement area. However, by 2012, the use of the triangle became an issue. When the parties could not reach an agreement on the Corporation's use of the triangle, the Corporation filed a trespass to try title action against the Partnership alleging that it had acquired title to the triangle by adverse possession. The Partnership filed an answer stating that it was not guilty as to the trespass to try title claim, making a general denial, and seeking attorney's fees pursuant to Section 16.034 of the Texas Civil Practice and Remedies Code. The trial court ruled in favor of Greak's Partnership. The Corporation appealed.

Adverse possession means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person. To prevail on a claim of adverse possession, a claimant must establish, by a preponderance of the evidence, (1) the actual and visible possession of the disputed property; (2) that is adverse and hostile to the claim of the owner of record title; (3) that is open and notorious; (4) that is peaceable; (5) that is exclusive; and (6) that involves continuous cultivation, use, or enjoyment throughout the statutory period. To satisfy a limitations period, peaceful and adverse possession does not need to continue in the same person or entity, but there must be privity of estate between each holder and his successor.

To prevail pursuant to the ten-year statute, a person must bring suit not later than ten years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

Of the six above-named elements required to prove adverse possession, a discussion of the element of hostile intent is dispositive here. The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. Mere occupancy of land without any intention to appropriate it will not support the statute of limitations. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by intent on the part of the occupant to make it so. There must be an intention to claim the property as one's own to the exclusion of all others.

The Corporation argues that when a claimant believes that it owns the land, it is not required to prove an intention to remove the legal owner or even know if someone else owns the land.

Here, the daughter testified that she thought she owned the property. She then created a fact issue when she testified that she would ""never intentionally take anything" from the record owner of the property. Where the evidence in an adverse possession case is conflicting, its weight is a question of fact for the court or jury. Other evidence showed that, while the Corporation made some improvements to the disputed area, it was not included in the Corporation's deed, and the Corporation made no attempt to keep anyone off that property. In short, the evidence supports a finding of no hostile intent.

PART X
CONSTRUCTION AND MECHANICS' LIENS

Liverman* v. *State of Texas, 470 S.W.3d 831 (Tex.Crim.App. 2015). The Livermans filed mechanic's lien affidavits on Katheryn's house. As a result of these filings, the State charged the Livermans with securing the execution of documents by deception. The indictments alleged that the Livermans caused the county clerk, to sign or execute the mechanic's lien affidavits. They were convicted, fined, and placed on community supervision.

The statute under which appellants were charged—Penal Code § 32.46(a)(1)--provides:

"(a) A person commits an offense if, with intent to defraud or harm any person, he, by deception: (1) causes another to sign or execute any document affecting property or service or the pecuniary interest of any person."

The court of appeals reversed the convictions and rendered judgments of acquittal. The court of appeals held that the evidence was legally insufficient to support the convictions because the conduct of the court clerk filing and recording the mechanic's lien affidavit in each case was not the signing or executing of a document as contemplated by Penal Code § 32.46(a)(1).

On discretionary review, the State contends that a clerk's actions of filing and recording a lien equate to "signing or executing" under Penal Code § 32.46(a)(1) and that the legislature intended to criminalize such activity under that provision. The State argues that "execute" must mean something different or broader than "sign" because "execute" was included in the statute for a reason.

"Execute" means to perform or complete (a contract or duty), to change (as a legal interest) from one form to another, to make (a legal document) valid by signing, or to bring (a legal document) into its final, legally enforceable form." This formulation involves several definitions and that the term "execute" does not mean only "sign."

To perfect a mechanic's lien under Chapter 53, Subchapter C, of the Property Code, a person must comply with certain requirements. One of those requirements is that the person file a mechanic's lien affidavit with the county clerk. A mechanic's lien affidavit has no legal effect until it is filed. When it is filed, the affidavit has the legal effect of contributing to the perfection of the mechanic's lien under the Property Code. So the mechanic's lien affidavit is executed when it is filed.

It is not enough, however, to conclude that filing a mechanic's lien affidavit constitutes the execution of that affidavit. Under § 32.46(a)(1), the defendant must cause "another" to execute the document. The issue, then, is who executes the mechanic's lien affidavit when it is filed.

The Property Code imposes upon the person "claiming" the lien the obligation to "file" the affidavit. Clearly, then, the person claiming the lien "executes" the affidavit when he files it. Does the county clerk also "execute" the affidavit by filing and recording it, as the State contends? The court concludes that the answer to that question is no. The Property Code requires the county clerk to record and index any mechanic's lien affidavit that is filed, but it also provides that the failure of the county clerk to properly record or index a filed affidavit does not invalidate the lien. This provision is similar to the general rule applicable to the filing of deeds that a deed is effective against subsequent purchasers upon filing, even if the county clerk neglects to record it. Therefore, the mechanic's lien affidavit becomes legally effective upon filing, and the subsequent recording or indexing by the clerk does not in any way alter the legal effect of the filing.

The remaining question, then, is whether the county clerk's acceptance of the document at the time of filing constitutes execution of the document by the clerk. The

court concludes that it does not. The Property Code characterizes the filing in question as the person claiming the lien filing the affidavit with the county clerk. This language in the Property Code describes the county clerk as a mere recipient of the filing; the clerk need not have any active involvement in that occurrence. For many courts, electronic filing is now possible, and in those situations the entire transaction of receiving and acknowledging the filing may be handled by machine. The court concluded that it is the filing person, not the clerk, who brings the mechanic's lien affidavit into its final, legally enforceable form. Because the county clerk does not execute the mechanic's lien affidavit when the affidavit is filed, the appellants did not cause "another" to "execute" the documents at issue in the present case. Consequently, the court agreed with the court of appeals that the evidence is legally insufficient to support the conviction, and the court affirmed its judgment

Guniganti* v. *C & S Components Company, Ltd., 467 S.W.3d 661 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Guniganti created the 1999 Trust, naming his brother-in-law as Trustee. Guniganti later founded Triple PG for the purpose of operating a sand processing plant on the property. An employee of Triple PG asked C&S for a quote for sand plant components, and ultimately Triple PG and C&S entered into a contract for the components. Disputes arose, the parties met and also e-mailed each other, which resulted in a reduction of the contract price. C&S wasn't paid all it thought was due and demanded payment, but the demands went unanswered so C&S sued.

C& S filed an affidavit in support of a constitutional lien against the property which was owned by the 1999 Trust. In its pleadings in the present case, C& S sought a declaratory judgment that it was entitled to a lien against the 1999 Trust's property, that its lien was valid and sought foreclosure against the property. The 1999 Trust filed a counterclaim seeking to establish that C& S had no right to a constitutional lien against the property and to have the lien declared invalid on that basis.

A constitutional lien requires the lienholder to be in privity of contract with the landowner. It is undisputed that C&S did not have a contract with the 1999 Trust. The trial court submitted questions to the jury asking whether Guniganti or Triple PG effectively control the 1999 Trust through ownership of voting stock, interlocking directorships, or otherwise. The jury answered no. However, even though the jury had found no privity between C&S and the 1999 Trust, the trial court did not declare the lien invalid or order it discharged.

C& S suggests that this issue is moot because (1) the judgment contains a Mother Hubbard clause, declaring that all relief not expressly granted therein is denied, and (2) C& S itself filed a release with the County Clerk's office. The court did not agree. The 1999 Trust had also requested a declaratory judgment that it was not a party to any contract with C& S, C& S's lien was invalid, and the property in question belongs solely to the 1999 trust and not Triple PG or Guniganti. These declaratory judgment requests were, in effect, mirror image counterclaims of C& S's claims regarding the lien. Thus, denying all relief not granted did not indicate the lien was invalid or discharged; in fact, the Mother Hubbard clause denied relief to both sides on the issue of the lien's validity as well as C& S's entitlement to a lien on the 1999 Trust's property, leaving these issues--although fully tried and disposed of by the judgment—unanswered. The 1999 Trust was legally entitled to relief it did not receive in the judgment; the judgment itself, therefore, did not moot the issue.

C& S further suggests that this appellate issue became moot when C& S filed a release during the pendency of the appeal and asked the court to take judicial notice of

the release and to determine that it discharged the lien. The court noted, however, that the release of the lien did not prevent C&S from refiling in the future and C& S steadfastly declined to stipulate or even acknowledge that it would not attempt to refile its lien. So, despite the release, a live controversy still exists between the parties. Release of the lien did not extinguish C& S's request for a declaration that it was in privity with the 1999 Trust or the 1999 Trust's request for declarations that it was not a party to any contract with C& S and the property in question belongs solely to the trust. These issues were resolved on the merits at trial and should have been resolved in the judgment. Accordingly, the court reformed the judgment to state that no privity of contract existed between C& S and the 1999 Trust and therefore C& S was not entitled to a lien against the 1999 Trust's property.

The court then looked at whether the trial court should have found the lien to be fraudulent. A lien is fraudulent if the person who files it has actual knowledge that the lien was not valid at the time it was filed. While the jury effectively declined to find that C& S was in privity with the 1999 Trust, it also declined to find that the lien was fraudulent.

The 1999 Trust asked the jury to determine whether C&S file its lien with knowledge that the lien was a fraudulent lien or claim against the 1999 Trust's property, with the intent that the lien be given the same legal effect as a valid lien, and with intent to cause financial injury. The jury answered no.

Even though the jury declined to find that a preponderance of the evidence established Triple PG or Guniganti effectively controlled the 1999 Trust, there is significant evidence of a close, interconnected relationship between Guniganti, Triple PG, and the 1999 Trust. Moreover, it is clear that C&S dealt exclusively with Guniganti and other Triple PG representatives, even though the sand processing plant in question was to be built on property owned by the 1999 Trust. The jury may therefore have reasonably concluded that the evidence did not show, more likely than not, that C& S was not in privity with the 1999 Trust and thus that the lien was fraudulent at the time it was filed. In other words, the evidence supported the conclusion that because of its dealings with Triple PG and Guniganti and their apparently close, interconnected relationship with the 1999 Trust, C&S believed that it was also dealing with the 1999 Trust and did not realize he could not take a valid constitutional lien on the trust's property when he filed for the lien. The jury's refusal to find that C& S filed a fraudulent lien was therefore not so contrary to the overwhelming weight of the evidence so as to be clearly wrong and manifestly unjust.

Moore* v. *Brenham Ready Mix, Inc., 463 S.W.3d 109 (Tex.App.-Houston [1st Dist.] 2015, no pet.). A subcontractor, or, as in this case, a supplier to a subcontractor, is a derivative claimant and, unlike a general contractor, has no constitutional, common law, or contractual lien on the owner's property. As a result, a subcontractor's lien rights are totally dependent on compliance with the statutes authorizing the lien. The Texas Supreme Court has recognized, however, that substantial compliance with the statutes is sufficient to perfect a lien.

Property Code § 53.056 sets out the notice requirement for lien claimants who are not general contractors. This section provides that if the lien claim arises, as here, from a debt incurred by a subcontractor, the claimant must give the original contractor written notice of the unpaid balance not later than the fifteenth day of the second month following each month in which all or part of the claimant's material was delivered. The claimant must then give the same notice to the owner or reputed owner of the property and the original contractor not later than the fifteenth day of the third month following each month in which all or part of the

claimant's material was delivered. . Section 53.056(f) provides that copy of the statement or billing in the usual and customary form is sufficient as notice under this section.

For the concrete that Brenham delivered to the worksite in July 2007, Brenham was required to give written notice of the claim to the original contractor, Stability Homes, by September 15, 2007, which was the fifteenth day of the second month following the month in which Brenham delivered part of its materials. Brenham did not present any specific testimony or other evidence that the project manager, on behalf of either L& F or Stability Homes, the two original contractors on the project, received written notice of Brenham's lien claim for the concrete delivered in July 2007, either in the form of an unpaid invoice or otherwise, by September 15, 2007. Even if the project manager had actual notice by September 15, 2007, that Brenham had not been paid courts have held that liberal construction the materialman's liens statute does not save the materialman's lien from his failure to provide timely written notice.

For the concrete that Brenham delivered to the worksite in September 2007, Brenham was required to give written notice of the claim to Stability Homes, the general contractor, by November 15, 2007, which was the fifteenth day of the second month following the month in which Brenham delivered part of its materials. It is undisputed that Brenham sent a written notice dated November 21, 2007, to Mott, Stability Homes, and Art DePue concerning its claim. Brenham contends that it satisfied the statutory notice requirement because the project manager testified that he received and approved invoices for the project and that Brenham showed him documents about the unpaid invoices in September, October, and early November.

As stated above with respect to the July deliveries, the project manager testified that he did not receive invoices from Brenham until the November 21 notice letter. Even if the project manager's testimony supports an argument that Stability Homes had actual notice that Brenham had not been paid for its September 2007 deliveries, actual notice of an unpaid claim does not satisfy the statutory notice requirements of § 53.056.

The court held that Brenham had not substantially complied with the statutory notice requirements.

The homeowners also claimed that the trial court had erred in enforcing the full amount of Brenham's fill-dirt lien which covered all thirty-seven lots in the project. They argue that the extent of Brenham's lien on their individually-owned lots is limited by the proportionate share of the entire property represented by their lots as defined on the recorded subdivision plats and that the total amount of the lien against the entire property cannot be applied to each lot sold individually. Instead, the trial court can only apply the value of the proportion of the materials used on each lot in relation to the total value of the lien on the entire property.

Brenham contends that because it delivered materials to the project pursuant to a single contract with the contractor, the contract did not designate which materials were to be used on which lot, and it was not paid by the lot, the lien may extend to more than one lot and the aggregate amount of the lien may be applied to each lot. The individual homeowners respond that the amount of actual materials used on the entire property is immaterial. It is the proportionate share of the value of the lien that is at issue, not the proportionate value of the actual amount of materials used. The court agreed with the individual homeowners.

In is clear from case law that a materialman's lien attaches to the entire contiguous property, or tract, on which the owner contracted to have the materials used. But the cases do not address the issue presented by this case: the enforcement of

the value of a lien that attached to undivided property against subsequent purchasers of a specified portion of the tract, here the subsequent owners of individual lots in a subdivision platted into individual lots prior to the delivery of the materials but sold after the material had been supplied to the entire undivided property.

Brenham contends that because the lots in Phase Three were contiguous, because it delivered the materials to the project pursuant to a single contract, and because the contract did not specify the amount of materials to be used on each specific lot, the entire amount of the fill-dirt lien can be enforced against any given individual lot. The court agreed that the lien attached to all the properties. But the issue is not whether the lien could be placed on the entire property to which materials were supplied when all the lots were contiguous and the property was owned by a single owner. The issue is whether the lien may be enforced in its entirety against the subsequent purchasers of individual lots of the property.

It is undisputed that the materials delivered by Brenham to the project were not solely applied to one particular lot in the project; instead, the materials were applied to each of the thirty-seven lots. The court therefore concluded, under the particular facts of this case, that Brenham may not enforce the full value of its fill-dirt lien against any individually-owned lot but may instead only enforce its fill-dirt lien to the proportion the individual improved lot bears to the entire tract. Were the court to hold otherwise, a cascade of absurd and unreasonable results would follow in violation of the rules of statutory construction and the case law applying those rules.

For one thing, the purchaser of an individual unit in a multi-million-dollar complex of condominiums or a mixed-use development or a subdivision could--as here--be held liable for the entire value of a debt incurred by someone else for the benefit not simply of the individual property purchased but for all contiguous property in the project benefitted by the original owner's contract with a materialman. The result could be--as it is here--the court-ordered enforcement of the entire value of the lien against an individual lot owner for many times the value of the labor and materials proportionately supplied to the property purchased by that individual lot owner. And the result could well be--again, as it is here--the court-ordered sale of the individual lot owner's property to satisfy a debt incurred by another on a much larger piece of property than that owned by the person against whom the debt is enforced. Such a result also allows for multiple recoveries of the same total value of the lien against multiple individual property owners, violating the one-satisfaction rule.

PART XI
CONDEMNATION

State of Texas* v. *Treeline Partners, Ltd., 476 S.W.3d 572 (Tex.App.-Houston [14th Dist.] 2015, pet. pending). The State contends that the trial court erred in cutting off four lines of questioning in voir dire: whether potential jurors believe that (1) the government's right to take private property is too great a power, (2) landowners should be paid more than market value for condemned property, (3) landowners should be compensated for sentimental value, and (4) the State lowballs its fair-market-value appraisals.

The first of these was duplicative of many other questions regarding the State's right to take private property. The next two lines of inquiry present closer questions, not only because of the dearth of case law on these types of inquiry, but also because the record of voir dire shows that Treeline's counsel already had strongly implied to the jury that Treeline's property had sentimental value for which the State's offer was inadequate.

The last line of inquiry, however, does

not present a close question. The trial court refused to allow the State's attorney to ask potential jurors "whether anybody believes that the State lowballs," and told the attorney that if she asked the question, then the trial court probably would hold her in contempt. When the attorney sought clarification about what she was not allowed to ask, the trial court not only refused to do so, but expanded the threat of contempt.

In attempting to ask potential jurors whether they believe that the State "lowballs," the State's attorney properly inquired about whether the venire members held a preexisting bias or prejudice that the State underestimates property values. This inquiry goes to whether the prospective jurors could impartially judge the credibility of the State's witnesses regarding value.

Because the State was denied the opportunity to intelligently exercise its peremptory strikes and to discover whether any prospective juror was subject to a challenge for cause based on a preconception that the State undervalues property, the court concluded that the State was denied the right to trial by a fair and impartial jury. This constitutes harmful error.

Enbridge G & P (East Texas) L.P.* v. *Samford, 470 S.W.3d 848 (Tex.App.-Tyler 2015, no pet.). Compensation for land taken by eminent domain is measured by the market value of the land at the time of the taking. "Market value" is defined as the price that the property would bring when it is offered for sale by one who desires but is not obligated to sell and is bought by one who is under no necessity of buying. The three traditional approaches to the determination of market value are the comparable sales method, the cost method, and the income method. The fact finder is entitled to consider every factor that would affect the price for which a willing buyer and seller would exchange for the property. However, the fact of condemnation must be excluded. Fair market value must, by definition, be computed as if there were no proceedings in condemnation to eliminate that market. Testimony of a witness who uses an unauthorized and improper valuation method should be excluded.

When only a part of the tract is taken, the "just compensation" to which the owner is entitled consists of two elements: (1) the market value of the part taken, and (2) the diminution in value of the remainder due to the taking and construction of the improvement for which it was taken. In the case of a partial taking, the part taken for the easement is to be considered as severed land," but is to be valued as a proportionate part of the parent tract or economic unit to which it belongs. However, where the part taken is a self-sufficient economic unit, its value should be determined by considering the part taken alone, and not as a portion of the entire tract of which it was a part.

Ordinarily, a landowner has a right to claim consequential or severance damages to the entire remainder of the parent tract provided it is contiguous to the part taken and there is unity of use. But he is not compelled to do so. Where a substantial portion of the remainder is suitable to some higher or better use, such as a commercial or industrial use, and the other part of the remainder is not suitable for the same purpose, the landowner is permitted to claim remainder damages to only that portion of the remainder suitable for the higher use. The new economic unit created from the parent tract thus becomes the appropriate unit from which to determine the market value of the severed tract.

When, as in the instant case, an easement is taken for a pipeline, a power line, or similar purposes, the owner is left with some beneficial use of the part taken. In such a case, the damages for condemnation will be, as a matter of law, less than the full value of the fee. Therefore, the proper measure of damages is the difference in value of the part taken (the easement strip), considered as severed land,

before the taking, and the value of the same tract considered as severed land after the taking (now burdened by the easement).

When a partial taking occurs, as is the case with an easement, the landowner is entitled to any diminution in the fair market value of the remainder of the tract lying outside the part taken. The parties have the right to introduce evidence of everything that would tend to affect the value of the land, in the estimation of a proposed purchaser, or that would tend to make it more or less valuable to the present owner.

Here, the landowners called on Hoyt to provide expert opinion on market values. Hoyt was a lawyer and the County Attorney of San Augustine County. based his opinion on the numerous occasions he had negotiated sales of pipeline easements "before it got into litigation," and his conversations with hundreds of landowners. He rejected the traditional market value approach because "that standard manner of valuation is not true, and not accurate, because that's not what actually happens out here in the real world in the industry."

The jury issues in a partial taking for a pipeline easement are the diminution in the fair market value of the part taken considered as severed land, and the diminution, if any, in the fair market value of the remainder because of the taking. Neither Hoyt's report nor his testimony spoke to the separate issues the jury was required to answer. He did not attempt to value the part taken as severed land nor did he separately assess the diminution in the market value of the remainder. Hoyt, instead, combined the value of the part taken and the consequential damages to the remainder and expressed his opinion of total damages, including both elements of recovery, at $850.00 per linear rod for all of the tracts. The distortion and unreliability inherent in Hoyt's per linear rod approach is obvious. Almost always a pipeline will cross tracts of varying sizes and shapes. A pipeline may traverse a large tract for a short distance while requiring a greater distance to cross a smaller one. Therefore, there is generally little or no relation between the length of the pipeline easements and the size and value of the remainders created.

Hoyt's report and testimony could not have assisted the jurors in addressing the issues they were charged to resolve. But their verdict shows that his per rod approach served to confuse them. The objective of the judicial process in condemnation is to make the landowner whole and to award him only what he could have obtained for his land in the free market. Hoyt's method was not designed to achieve this objective. His report and testimony were neither relevant nor reliable and were therefore inadmissible.

City of Justin* v. *Rimrock Enterprises, Inc., 466 S.W.3d 269 (Tex.App.-Fort Worth 2015, pet. denied). Colorado Avenue runs north and south along the eastern side of Rimrock's property. Colorado Avenue appeared on the City's original town plat, but wasn't a street at that time – it was a dirt trail "but cars could use it if it had not rained." An earlier owner of the property covered the road with gravel to help make it passable. He also built a fence around the property, but the fence did not extend to the eastern portion of the property that Colorado Avenue crossed. The public has used the property for decades.

As part of an effort to improve the quality of the roads located in the City's industrial park, the City constructed concrete roads over the existing dirt or gravel roads, including Colorado Avenue. Rimrock sued the City for inversely condemning the part of the property where Colorado Avenue crosses it.

The City pleaded, among other things, that Rimrock's inverse condemnation claim was barred by limitations and that no taking had occurred because the portion of Colorado Avenue that crossed Rimrock's property was impliedly dedicated to the public before Rimrock purchased the

property.

The jury was not asked to determine when Rimrock's cause of action accrued. When the jury is not asked to determine when the cause of action accrued for purposes of supporting a limitations defense, the defense is waived unless the date was conclusively established by the evidence. There is no statutory provision specifically providing a limitations period for inverse condemnation actions.). However, Texas courts agree that a plaintiff's claim for inverse condemnation is barred after the expiration of the ten-year period of limitations to acquire land by adverse possession. For cases of adverse possession, a cause of action accrues and limitations begins to run when entry upon the land is made.

The City claimed that the public used Colorado Avenue as early as the 1930s, but this is no evidence for purposes of the accrual inquiry because it is not evidence that the City --the governmental defendant in this case--entered the land. Nonetheless, the City points to evidence that it entered the land, and even maintained it, well before Rimrock purchased the property in 1994. Rimrock claimed that the City did no maintence before it constructed the concrete road. Because the record contains conflicting evidence regarding when Rimrock's inverse condemnation claim accrued, the City did not conclusively establish its limitations affirmative defense.

The jury found that 7,095 feet of Colorado Avenue had been impliedly dedicated and that the remainder was inversely condemned. The City claimed that the entire street had been impliedly dedicated. Rimrock claimed the trail had been no wider than 12 or 15 feet. The City, relying of ***State of Texas* v. *NICO-WF1, L.L.C.***, 384 S.W.3d 818 (Tex. 2012) argued that the entire width had been dedicated because land dedicated as a street includes the whole width of the public right of way, including sidewalks and parkways, which are a part of the street itself, and pavement, shoulders, gutters, curbs, and other areas within the street lines. However, NICO involved an express dedication with clearly defined boundaries and a lower court ruling that misapplied the law in determining the extent of those undisputed boundaries. In this case, there was an implied dedication of an unspecified size and jury questions inquiring about the extent of the dedication.

The City claimed bore the burden of proof on its implied dedication claim. A party challenging the legal sufficiency of an adverse finding on an issue on which the party had the burden of proof at trial must demonstrate on appeal that the evidence conclusively established, as a matter of law, all vital facts in support of the issue.

Sloan Creek II, L.L.C.* v. *North Texas Tollway Authority, 472 S.W.3d 906 (Tex.App.-Dallas 2015, pet. pending). Sloan Creek lies south of the center of the interchange of SH 121 and U.S. 75 on the east side of U.S. 75. The creek generally runs towards the southeast then more easterly across the southern edge of approximately 219 acres owned by Sloan Creek II. Before 2008, the surrounding watershed drained rainwater into Sloan Creek, including drainage from the interchange of SH 121 and U.S. 75. Expanding SH 121, changing it into a tollway, and constructing a new interchange of SH 121 and U.S. 75 was part of section 4 of the Sam Rayburn Tollway project of the Texas Department of Transportation. TxDOT awarded the Tollway project to the North Texas Tollway Authority. The project was designed by, and the construction overseen by, engineering firms under contract with NTTA. The Tollway improvement design included additional acres of roadway surface and a drainage system that were designed to discharge rainwater runoff into Sloan Creek.

Third, Sloan Creek II argues the erosion of the banks of Sloan Creek was foreseeable to NTTA and TxDOT from the designed

discharge into Sloan Creek so they should have known the erosion would result, which is sufficient to raise a fact issue regarding the knowledge component of NTTA's and TxDOT's intent.

First, Sloan Creek II argues mere designed discharge of rainwater runoff onto Sloan Creek II's land was by itself a taking. An owner of the bed of a watercourse is not entitled to compensation for a governmental entity's use of that watercourse to transport water across the property for a public purpose. When a governmental entity does not damage downstream properties, it is not a taking or damage for a governmental entity to significantly increase discharge into a watercourse. But a governmental entity's discharge of water into a watercourse that floods downstream owners can give rise to a takings or damages claim under the Texas Constitution. Discharge of water that unnaturally erodes a substantial amount of a downstream owner's land can also be a taking or damage.

Sloan Creek II has not cited any authority supporting its argument that mere use of a watercourse by a governmental entity to transport water across a creek bed is by itself a taking or damage. There is no dispute Sloan Creek has been a watercourse at least since 1872 when it was depicted as a watercourse on a map. There is also no dispute that Sloan Creek has not flooded since the Tollway improvements and Sloan Creek II does not contend that flooding caused its damage. Accordingly, the court concludes NTTA's and TxDOT's designed discharge of rainwater runoff into Sloan Creek is not "by itself" a taking or damage under the Texas Constitution.

Second, Sloan Creek II argues all it had to prove was that the design intentionally provided for discharge of rainwater into Sloan Creek and that the erosion to the banks of Sloan Creek resulted from that intended design. The court disagreed. When a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under the Texas Constitution if it (1) knows that a specific act is causing identifiable harm or (2) knows that the specific property damage is substantially certain to result from an authorized government action -- that is, that the damage is "necessarily an incident to, or necessarily a consequential result of' the government's action." Because the entity's knowledge is a necessary component of the entity's intent, Sloan Creek II failed to meet the test.

Third, Sloan Creek II argues the erosion of the banks of Sloan Creek was foreseeable to NTTA and TxDOT from the designed discharge into Sloan Creek so they should have known the erosion would result, which is sufficient to raise a fact issue regarding the knowledge component of NTTA's and TxDOT's intent. Again, the court disagreed. For a governmental entity to be culpable for a taking or damage under article I, section 17 there must be evidence of objective indicia that the governmental entity whose conduct is under scrutiny knew its conduct was causing the damages complained of or knew the specific property damage was substantially certain to result from its conduct.

PART XII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Trant* v. *Brazos Valley Solid Waste Management Agency, Inc., 478 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). This case is also discussed in Easements. The Trants entered into an Option Contract with the Cities of Bryan and College Station, pursuant to which the Cities obtained the right to purchase approximately 382 acres of land in Grimes County from them. The Option Contract stated that the Cities contemplated using the property as a Landfill. The Cities later purchased the property and the deed conveying the property to the Cities incorporated the "Terms, Conditions, and Representations" in the Option Contract.

The Cities formed the Waste Management Agency, a governmental entity that currently operates a landfill on the property. The Trants learned that the Cities had decided to put a firing range on a portion of the property near their land. The Trants sent a letter to the Cities and the Agency, contending that the property could be used only as a landfill. Counsel for the Agency responded by letter that while the Option Contract contemplated an intended use of the property as a landfill, the contract did not restrict the Cities' use of the property to such purpose.

The Trants filed suit against the Agency. The Agency filed a plea to the jurisdiction, asking the trial court to dismiss the suit on the basis that governmental immunity bars the Trants' claims. The Trants responded that (1) the Agency is not immune from suit to enforce the Option Contract, which the Trants construe as a condemnation settlement agreement, or from their claim to enforce land use restrictions; and (2) the Agency's immunity has been waived under Chapter 271 of the Local Government Code. The trial court granted the Agency's plea and dismissed the Trants' claims for want of jurisdiction.

The Agency describes itself as a local governmental non-profit corporation wholly owned by" the Cities and a "governmental unit" as defined in Chapter 101 of the Civil Practice and Remedies Code. Local governmental entities enjoy governmental immunity from suit, unless immunity is expressly waived. Governmental immunity includes both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. A governmental entity that enters into a contract necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit.

The Trants argued that the Agency is not immune from an action to enforce restrictive use covenants in the General Warranty Deed and Easement Agreement. The court did not get to the immunity issue because it found that the Trants had not raised a material issue of fact regarding the existence of any restrictive use covenant in the General Warranty Deed or Easement Agreement that the Agency may have violated.

When a restrictive covenant may reasonably be interpreted in more than one way, the court will resolve all doubts in favor of the free and unrestricted use of the property, strictly construing the restrictive clause against the party seeking to enforce it. The words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched, or changed by construction. The party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable.

The Trants argue that the deed includes a restrictive use covenant allowing the land to be used only as a landfill. The deed incorporates the "Terms, Conditions, and Representations" in the Option Contract. The Option Contract states that the Cities "contemplate using the Property as a . . . Municipal Sanitary Landfill." However, nothing in the language of the deed or Option Contract indicates that the Trants retained a possessory interest in the property contingent on the Cities' using it as a landfill. The Option Contract and the deed do not include a restrictive use covenant. The only language referencing any use of the property, discussed above, merely reflects how the Cities anticipated using the property--the Cities did not agree to use the property only as a landfill.

PART XIII
MISCELLANEOUS

J***&D Towing, LLC* v. *American Alternative Insurance Corporation***, 478

SW 3d 649 (Tex. 2016). "Nearly a century ago, a Texas attorney argued that the rule at issue in this case made it "cheaper to kill a mare in Texas than it is to cripple her." No American Pharoah herself, this one-eyed, underfed mare lived a simple life. One night, however, she was caught roaming the city streets in search of food and was placed in the city pound. Her owner failed to pay her board bill. Thus, the city marshal hired a man known as Panhandle Pete to put her out of her misery. As the court of appeals then put it, "when Panhandle Pete's pistol popped, she petered, for which the poundkeeper paid Pete a pair of pesos." Her owner protested her death and sued for damages, including $350 for the loss of her services in his occupation of hauling. The court rejected that claim, holding that although "[d]amages occasioned by the loss of the use and hire of an animal are recoverable where the animal is injured," "no such damages are recoverable for the total loss or death of an animal." Rather, "[t]he measure of damages in the case of a wrongful killing of an animal is its market value, if it has one, and if not, then its actual or intrinsic value, with interest." That rule, the owner's attorney responded, makes it "cheaper to kill a mare in Texas than it is to cripple her."

This case places a modem twist on that rule and addresses whether it should be cheaper to totally destroy a truck than it is to partially destroy it. J&D Towing lost its only tow truck when a negligent motorist collided with the truck and rendered it a total loss. The question presented is simply put: In addition to recovering the fair market value of the truck immediately before the accident, may J&D recover loss-of-use damages, such as lost profits?

Tracing case law regarding damage or destruction of personal property from the days of slavery through Panhandle Pete to the present, the court ultimately held that loss of use damages are recoverable in a total destruction case.