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July 30, 2018

Supreme Court of Texas
Supreme Court Building
201 W 14th Street
Suite 104
Austin, TX 78711

Re: Petition for Review; Cause No. 18-0456; Mehan v. Babel on appeal from the 7th Court of Appeals District at Amarillo, Texas

TO THE SUPREME COURT OF TEXAS:

Founded in 1908, the Texas Land Title Association (TLTA) is a statewide trade association representing the Texas title insurance industry and currently serving over 15,000 professionals involved in the safe and efficient transfer of real estate. In the course of their daily work, our membership serves over a million consumers each year. With active members in every Texas county, TLTA membership comprises approximately 90 percent of the title insurance agents and underwriters licensed to do business in Texas. From time to time, cases come before the Court that have significant impact on real estate commerce in Texas and which impact the ability of TLTA's members to safely insure title to real property. On those occasions, we will endeavor to share with the Court our support of those parties who advocate the sanctity of the Texas real property laws and doctrines. The TLTA has received no compensation for the preparation of this letter.

Easements appurtenant are long-standing, fundamental concepts in Texas real property law. Yet, our courts repeatedly confuse the relative rights of the parties to these easements, creating confusion and inconsistency in land title searches when certainty is needed. The case at bar exemplifies the existing confusion surrounding easements appurtenant. Accordingly, the TLTA requests that the Court grant the Petition for Review and address the following questions:

1. May a grantor reserve or extinguish an easement appurtenant by taking exception to it in the deed of conveyance?
2. If so, does the bona fide purchaser protection of Texas Property Code § 5.030(c) preclude the grantor from correcting the deed to remove an unintended exception?

Here, the access easement was a benefit to the conveyed property and, unquestionably, an easement appurtenant. Could it be extinguished by referring to it in the deed as part of a list of "exceptions to conveyance"? The appellate court held that it was (a possible lay person's reading on the face of the document) leaving the easement with the grantor. However, legal precedent holds that an easement appurtenant cannot be reserved or extinguished in this manner; rather, it passes with the dominant tract.

Similarly, the appellate court determined that the easement failed for lack of purpose after being mistakenly excepted from the conveyance grant, despite a correction deed that plainly reflected the grantor's intent to convey the easement rights. This is illogical and inconsistent with the actual intent of the transaction. But even if the exception of the easement appurtenant from the grant is a valid legal process, the appellate court overreached in its application of Texas Property Code §5.030(c) and disregard of the correction deed. The statute serves only to protect intervening bona fide purchaser rights; yet, there was no bona fide purchaser to protect in this instance, merely a partially encroaching driveway constructed in the interim.

The case is further complicated by the deed itself, which utilizes the State Bar of Texas published form and includes a section entitled "Reservations from and Exceptions to Conveyance and Warranty." Instead of separately listing the reservations and exceptions, the deed only refers to an attachment which appears to be a photocopy of all Schedule B exceptions from the title insurance commitment. This is a common practice and intended to identify encumbrances not part of the estate conveyed nor subject to a warranty of title. It has not been a means to terminate an easement appurtenant.

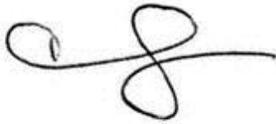
At its core, this case challenges deep-seated principles of conveyancing and easements and raises important questions, such as:

1. If an easement appurtenant exists, does the right to use the appurtenant easement transfer with title to the dominant estate, and does the owner of the servient estate have no independent right to terminate the appurtenant easement? *Hidalgo v. Maverick*, 349 S.W.2d 768 (Tex. App.–San Antonio 1961), *Jones v. Fuller*, 856 S.W.2d 597 (Tex. App.–Waco 1993, writ den.);
2. If an express easement appurtenant exists, can it be excepted from a conveyance and thereby terminated for lack of purpose? *Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911, 915 (Tex. Civ. App.–Beaumont 1934) *aff'd*, 86 S.W.2d 1077 (1935); *McWhorter v. City of Jacksonville*, 694 S.W.2d 182, 184 (Tex. App.–Tyler 1985, no writ); *McDaniel v. Calvert*, 875 S.W.2d 482,484 (Tex. App.–Forth Worth 1994, no writ); *Avery v. Hoskins, Inc.*, 493 S.W.3d 684 (Tex. App.–San Antonio 2016, pet. denied);
3. If an appurtenant easement has been created, can it only be terminated by (i) express agreement; (ii) merger; (iii) abandonment; or (iv) failure of purpose when the easement was created only for that specified purpose? *Kearney v. Fancher*, 401 S.W.2d 897 (Tex. App.–Fort Worth, 1966; *Peterson v. Greenway Parks*, 408 S.W.2d 261 (Tex. Civ. App.–Dallas, 1966); and
4. If a party takes title to a property with constructive or actual knowledge of an exception, reservation, or encumbrance, can the party still be a bona fide purchaser and obtain superior title to the property? Texas Property Code, §§13.001,002.



Title examiners, title insurers, and real estate lawyers regularly encounter these very issues. Now, the Texas Supreme Court has an opportunity to provide a succinct and direct interpretation of this area of easement law and real property titles. The TLTA respectfully requests that the Court do so and thereby provide clarity and continuity to the state's land title system.

Sincerely

A handwritten signature in black ink, appearing to be 'Aaron Day', with a stylized flourish extending to the right.

Aaron Day
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CERTIFICATE OF COMPLIANCE

I certify that this document contains 880 words in the portions of the document are subject to the word limits of the Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ Aaron Day
Aaron Day

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, a true and correct copy of the foregoing amicus letter has been served by electronic mail to all attorneys of record.

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/s/ Aaron Day
Aaron Day