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Real Property

J. Richard White
Winstead PC

Amanda Grainger
Winstead PC

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REAL PROPERTY

*J. Richard White**
*Amanda R. Grainger***

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* B.B.A., M.B.A., J.D., LL.M., Southern Methodist University, Attorney at Law, Winstead PC, Dallas, Texas.

** B.S., Cornell University, M.B.A., J.D., Emory University, Attorney at Law, Winstead PC, Dallas, Texas.

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I. INTRODUCTION

This Article covers Real Property cases from Southwestern Reporter (Third) volumes 633 through 652 and federal cases during the Survey period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

A number of significant cases, mostly from the Texas Supreme Court, have been handed down during this survey period. The due process requirements for the scope of inquiry for substituted service have been promulgated in *MAP Resources*.¹ Additional procedural issues for service on financial institutions, which were decided differently by various state and federal courts, were resolved in *Moss*.² The Texas Supreme Court provided helpful guidance on the measurement of consequential damages in *Signature*,³ and offered a cautionary tale to practitioners about the drafting of consequential damage waivers in *James*.⁴

In another cautionary tale to practitioners, the Tyler Court of Appeals in *Tiner* addressed the enforceability of a fixed price 100-year option contract.⁵ Likewise, in *Rancho Viejo*, following guidance from the Texas Supreme Court, the San Antonio Court of Appeals narrowly interpreted a restrictive covenant to allow construction of a solid waste facility.⁶ The narrow interpretation of restrictive covenants was again reiterated by the Texas Supreme Court in *JBrice*.⁷

1. See *Mitchell v. MAP Res. Inc.*, 649 S.W.3d 180, 184–85 (Tex. 2022).

2. See *U.S. Bank N.A. v. Moss*, 644 S.W.3d 130, 131 (Tex. 2022).

3. See *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 184–86 (Tex. 2022).

4. See *James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 397 (Tex. 2022).

5. See *Tiner v. Johnson*, 647 S.W.3d 103 (Tex. App.—Tyler 2022, pet. denied).

6. See *Rancho Viejo Cattle Co., Ltd. v. ANB Cattle Co., Ltd.*, 642 S.W.3d 850 (Tex. App.—San Antonio [4th District] 2021, pet. denied).

7. See *JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n*, 644 S.W.3d 179 (Tex. 2022).

The supreme court has also addressed, in a case of first impression, the issue of implied revocation of an outstanding offer in *Tauch*.⁸ In premises liability cases, it also discussed the “dual capacity” for successor liability in *Eagleridge*,⁹ and the “necessary use” doctrine in *Sandridge*.¹⁰ The Texas Attorney General issued guidance on the meaning of “person” for purposes of nonjudicial foreclosures.¹¹

Unfortunately, the limitations period for equitably subrogated lien claims, under *Howard I* and its prodigy,¹² continued in *Howard III*.¹³ From a governance perspective, the Texas Supreme Court refined the fiduciary duties of directors in the *Poe* decision.¹⁴ Regulatory takings were addressed in *Schrock*, but with significant possible changes in jurisprudence raised in the concurring opinions.¹⁵ Additionally, the Texas Supreme Court jumped on the Dallas to Houston highspeed train project in defining an interurban electric railway.¹⁶

II. MORTGAGES/FORECLOSURES/LIENS

A. TAX LIEN FORECLOSURES/OPTION RIGHTS

Target Corp. v. D&H Properties, LLC, determined whether a Texas tax lien foreclosure would extinguish an option right.¹⁷ A large tract owned by National Oil Well Varco (NOV) was partially sold to Woodland Heights Development, with a small one-acre tract being retained by NOV because it was environmentally contaminated.¹⁸ The conveyance to Woodland Heights Development included an easement for ingress and egress over the entirety of the contaminated retained parcel, as well as an option agreement in favor of Woodland Heights to purchase the environmentally contaminated property.¹⁹ Ultimately, ownership of the larger and smaller tracts was severed.²⁰ Years later, the owner of the smaller tract failed to pay ad valorem taxes and pursuant to a tax foreclosure sale, the property was conveyed to D&H Properties.²¹ At this time, the larger tract was owned by Target, the successor to Woodland Heights, which accessed its loading dock for certain deliveries over and through the smaller one-acre

8. See *Angel v. Tauch*, 642 S.W.3d 481 (Tex. 2022).

9. See *In re Eagleridge Operating, LLC*, 642 S.W.3d 516 (Tex. 2021).

10. See *SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 565 (Tex. 2022).

11. See Tex. Att’y Gen. Op. No. KP-0424 (2023).

12. See *PNC Mortg. v. Howard*, 618 S.W.3d 75 (Tex. App.—Dallas 2019), rev’d on other grounds, 616 S.W.3d 581 (Tex. 2021).

13. See *PNC Mortg. v. Howard*, 651 S.W.3d 154 (Tex. App.—Dallas 2021, pet. granted).

14. See *In re Estate of Poe*, 648 S.W.3d 277 (Tex. 2022).

15. See *City of Baytown v. Schrock*, 645 S.W.3d 174 (Tex. 2022).

16. See *Miles v. Tex. Cent. R.R. & Infrastructure, Inc.*, 647 S.W.3d 613, 619 (Tex. 2022).

17. See *Target Corp. v. D&H Props., LLC*, 637 S.W.3d 816, 822 (Tex. App.—Houston [14th Dist.] 2021, pet. denied).

18. See *id.* at 823.

19. See *id.*

20. See *id.*

21. See *id.*

environmentally contaminated parcel.²² D&H Properties erected a fence around its properties, restricting Target's access to its loading dock.²³ The subject suit resulted, and the appellate court addressed, *inter alia*, whether the foreclosure sale extinguished the option rights then held by Target.²⁴

First, the court considered whether the option agreement represented an interest in real property, and concluded that “an option holder does not hold a legally protected interest in the property,” and “the due process concerns applicable to lienholders do not arise when an option holder is not notified of a delinquent tax suit.”²⁵ Therefore, Target's cases regarding lienholders were deemed not authoritative.²⁶ In fact, the court noted that the private tax lien sale provisions of Texas Tax Code § 34.01(n) specified what title exceptions survive a tax lien foreclosure sale.²⁷ These included: (1) a right of redemption; (2) restrictive covenants recorded before January 1 of the year the tax lien accrued; (3) recorded liens arising under a restrictive covenant not extinguished by the tax foreclosure; and (4) valid easements of record existing before January 1 of the year of the tax lien arose.²⁸ Target could not establish that the option fit any of these categories, and therefore, the option right did not survive the tax lien foreclosure sale. In reaching this result, the court distinguished between a “restrictive covenant” and “affirmative covenant.”²⁹ A restrictive covenant was determined to be a “negative covenant that limits permissible uses of land”; an affirmative covenant “require[d] the covenantor to do something to invoke the right or rights existing by the option—i.e., convey title to the property on certain conditions.”³⁰ Because Target did not establish that the option right was covered by the Texas Tax Code § 34.01(n) exclusions, it was extinguished by the foreclosure sale, and Target had no right to exercise it at a later time.³¹

B. TAX FORECLOSURE SALE—PROCEDURAL DUE PROCESS

Mitchell v. MAP Resources Inc. involved a collateral attack on procedural due process grounds against a 1999 default judgment in a tax lien foreclosure suit.³² Delinquent taxes for 1978–1998 existed against mineral interests owned by Mitchell, who died in 2009.³³ A tax foreclosure suit was filed in 1998 and a judgment was awarded to the taxing authority.³⁴ Mitchell's

22. *See id.*

23. *See id.*

24. *Id.* at 826.

25. *Id.* at 838.

26. *Id.*

27. *See id.* (citing TEX. TAX CODE ANN. § 34.01(n)).

28. *See id.* (citing TEX. TAX CODE § 34.01(n)).

29. *Id.* at 839.

30. *Id.*

31. *Id.*

32. *See Mitchell v. MAP Res. Inc.*, 649 S.W.3d 180, 184–85 (Tex. 2022).

33. *See id.*

34. *See id.*

heirs brought a collateral attack challenging the validity of the 1999 default judgment based upon the denial of constitutional due process rights because Mitchell was not properly served with notice of the underlying foreclosure suit.³⁵ In the foreclosure suit, the taxing authorities' attorney filed an affidavit under Texas Rule of Civil Procedure 117(a)(3) echoing the exact terms of the statutory requirements, which included a statement that "names or residences of [Ms. Mitchell] were unknown and could not be ascertained after diligent inquiry."³⁶ The heirs challenged the diligent inquiry and the notice given by posting on the courthouse door based on the fact that Ms. Mitchell's name and address had been listed in various public records, including eight publicly recorded warranty deeds and the public tax records.³⁷ The trial court granted summary judgment for MAP and the appellate court affirmed by plurality.³⁸

The Texas Supreme Court held that "[a] diligent inquiry by a person who actually desires to find a defendant in a tax suit includes a search of public property and tax records."³⁹ Additionally, the Texas Supreme Court had previously held in *Anderson v. Collum* that where property owners were residents and could have been found with diligent inquiry, and where the state's affidavit showed alternative citation by publication, the tax sale should be set aside.⁴⁰ Such due process cannot be a mere gesture, but required a diligent inquiry consistent with the due process considerations specified in *Mullane*.⁴¹ Consequently, the supreme court held "that citation by publication or posting violates due process when the address of a known defendant is readily ascertainable from public record that someone who actually wants to find the defendant would search."⁴² From the procedural aspect, the court further held that a collateral attack was appropriate "when such public records contain the address of a defendant served by publication or posting," "a court . . . may consider . . . whether service complied with the constitutional demands of due process."⁴³ Because there was no evidence personal service on Mitchell was ever attempted, and the record contained no evidence of a citation or a return of service on Mitchell, the court held that Mitchell was not personally served as required by principles of constitutional due process.⁴⁴ Based on no constitutional due process service on Mitchell, the trial court did not have jurisdiction and, therefore, the default judgment was void.⁴⁵

35. *See id.*

36. *Id.* at 185.

37. *See id.* at 185–87.

38. *See id.* at 186–88.

39. *Id.* at 189 (relying on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1905) (holding that when a defendant's address can be ascertained from publicly recorded instruments, notice by posting or publication is insufficient to satisfy due process)).

40. *Id.* at 190 (citing *Anderson v. Collum*, 514 S.W.2d 230, 230–31 (Tex. 1974)).

41. *Id.* at 189 (citing *Mullane*, 339 U.S. at 315).

42. *Id.* at 190 (citing *In re E.R.*, 385 S.W.3d 552, at 564 (Tex. 2012)).

43. *Id.* at 191.

44. *See id.* at 193.

45. *See id.*

In response to the allegation that the warranty deeds were extrinsic to the underlying foreclosure suit and should not be considered, the supreme court held:

Because the Constitution and [Texas Rule of Civil Procedure] 117a require a plaintiff to consult public deed and tax records as part of its diligent inquiry when a defendant's name or residence is unknown, the contents of those records should be regarded as part of the record of the suit rather than as extrinsic evidence.⁴⁶

Therefore, the supreme court allowed consideration of this extrinsic evidence in the collateral attack in deciding whether service complied with the constitutional demands of due process.⁴⁷ Even though this case turned on procedural issues, it should be instructive to practitioners for documenting the exact diligent inquiry required to avoid the necessity of personal service.⁴⁸

C. BACKDATING DOCUMENTS

FFGGP, Inc. v. MTGLQ Investors, LP, involved claims of res judicata and turned on the backdating of documents, which will be the focus of this discussion.⁴⁹ This case involved three separate liens: a first lien in favor of KB Mortgage and/or JP Morgan, created on March 14, 2001; a second lien in favor of RESMAE Mortgage Corporation on July 17, 2007; and a third lien in favor of the homeowners' association pursuant to a Declaration of Protective Covenants dated December 9, 1977.⁵⁰ The purchaser of the property under the declaration's foreclosure action was a land trust with FFGGP, Inc. as the trustee.⁵¹

A few months after FFGGP acquired title as the purchaser at the homeowner's association's foreclosure sale, it filed a lawsuit, seeking a ruling to quiet title to the property in favor of FFGGP and declaring that the first and second liens were void and extinguished; a default judgment was awarded.⁵² This lawsuit had joined as defendants, KB Mortgage, JP Morgan and MTGLQ.⁵³ However, just before the default judgment was entered, a notice of trustee sale was filed on December 16, 2019, by MTGLQ, with an intended foreclosure date of February 4, 2020.⁵⁴ When FFGGP discovered the foreclosure notice, it filed a second lawsuit on February 3, 2020, seeking injunctive relief against such foreclosure sale and a confirmation that the first and second liens had been extinguished by the default judgment in

46. *Id.* at 191.

47. *See id.*

48. *See id.*

49. *See FFGGP, Inc. v. MTGLQ Investors, LP*, 646 S.W.3d 30, 36 (Tex. App.—San Antonio 2022, no pet.).

50. *Id.* at 33–34.

51. *See id.*

52. *See id.* at 34–35.

53. *See id.*

54. *See id.*

the first lawsuit.⁵⁵ The second lawsuit was answered by MTGLQ and its mortgage servicer, but US Bank intervened alleging that it held the debt and deed of trust by transfer from MTGLQ in 2017.⁵⁶ The problem was the transfer from MTGLQ to US Bank was by instrument dated April 28, 2020, but which recited an effective date of November 26, 2019. Such assignment was not recorded until June 16, 2020.⁵⁷

FFGGP raised a defense of res judicata against US Bank.⁵⁸ The issue presented was whether US Bank was in privity with MTGLQ for res judicata purposes.⁵⁹ The resolution of that issue turned on the dating of the assignment instrument.⁶⁰ There would be privity between US Bank and MTGLQ for purposes of res judicata, if the assignment provided constructive notice; in which case, the failure to obtain service and joinder of US Bank in the first lawsuit would result in res judicata.⁶¹ However, if the assignment was not effective for constructive notice, the opposite result would prevail.⁶² Therefore, the court analyzed the backdating of the document with an effective date before the default judgment was entered, and concluded that “retroactive assignments are not universally impermissible, but they are not *always* permissible or effective, and they cannot be made to the detriment of third persons and cannot be made to avoid claims.”⁶³ In this case, the San Antonio Court of Appeals concluded that US Bank “sought to create a new right in the property by reviving the second lien after it was already extinguished by the default judgment.”⁶⁴

D. QUALIFICATIONS AS SUBSTITUTE TRUSTEE

Texas Attorney General Opinion No. KP-0424 answered the question as to whether a substitute trustee may be a legal entity as well as a natural person.⁶⁵ In this Opinion, the Attorney General concluded that “a court would likely conclude that a corporate entity is a ‘person’ and thus may serve as a substitute trustee for purposes of conducting a mortgage foreclosure sale under [Texas] Property Code chapter 51.”⁶⁶ This Opinion relied upon Texas Government Code § 311.005 (the Code Construction Act), defining a “person” to include all forms of legal entities.⁶⁷ Additionally, other provisions of the Texas Property Code used the term “person” to include

55. *Id.* at 35.

56. *See id.*

57. *Id.*

58. *Id.* at 36.

59. *Id.* at 38.

60. *Id.*

61. *See generally id.* at 38–39.

62. *See generally id.*

63. *Id.* at 39.

64. *Id.*

65. Tex. Att’y Gen. Op. No. KP-0424 (2023).

66. *Id.* at 3.

67. *Id.* at 2.

legal entities.⁶⁸ The Opinion also referenced a federal bankruptcy case holding that a corporation could serve as a mortgage servicer or mortgagee as contemplated in Texas Property Code § 51.0001.⁶⁹ This accords with standard industry practice and should not cause any wholesale problems with completed foreclosures.

III. DEBTOR/CREDITOR/GUARANTIES/INDEMNITIES

A. OFFER AND ACCEPTANCE; IMPLIED REVOCATION

Angel v. Tauch is a case of first impression for the Texas Supreme Court on implied revocation.⁷⁰ South State Bank had a judgment against Tauch for \$4.6 million.⁷¹ Tauch and the bank had been negotiating a settlement of the debt by email exchange over many months.⁷² Tauch made a \$1,000,000 offer to purchase the judgment, which the bank rejected and made a \$2,000,000 counteroffer indicating urgency because the bank would be looking at other collection alternatives.⁷³ The bank's email counteroffer was on April 11, 2016, at which time it was negotiating simultaneously with Angel for the transfer of the judgment.⁷⁴ Those negotiations resulted in an assignment agreement being executed on April 13, but bearing an effective date of April 14, 2016.⁷⁵ Immediately upon the execution of the assignment agreement, Angel's attorney, on April 13, 2016, at 4:27 p.m., emailed Tauch's attorney advising of the assignment and making a demand for payment in full of the judgment.⁷⁶ Tauch's attorney requested the assignment documentation, which he received at 5:23 p.m. on April 13, 2016.⁷⁷ Tauch sent an email at 6:12 p.m. on April 13, 2016, to the bank purportedly accepting the April 11th counteroffer made by the bank.⁷⁸ Therefore, the issue before the supreme court was whether there was a valid offer and acceptance, or the contract had been terminated by the doctrine of implied revocation.⁷⁹

The court of appeals sided with Tauch, concluding that the acceptance of the offer was valid because the assignment agreement's effective date was not until the day after Tauch's purported acceptance.⁸⁰ There was a

68. See TEX. PROP. CODE ANN. § 111.004(10) (defining "person" under the Texas Trust Code); § 163.003(6) (defining "person" for the purpose of which persons can manage institutional funds); § 301.003(12) (defining "persons" under the Texas Fair Housing Act).

69. See Tex. Att'y Gen. Op. No. KP-0424 (2023) (citing *In re AMRCO, Inc.*, 496 B.R. 442, 445 (2013) (holding that "the established canons of construction that similar language contained within the same section of a statute must be accorded a consistent meaning")).

70. See *Angel v. Tauch*, 642 S.W.3d 481, 483 (Tex. 2022).

71. See *id.* at 484.

72. See *id.*

73. See *id.*

74. See *id.*

75. *Id.* at 484–85.

76. See *id.* at 485.

77. See *id.*

78. See *id.* at 485–86.

79. *Id.* at 487.

80. See *id.* at 497 (citing *Tauch v. Angel, Tr. for Gobsmack Gift Tr.*, 580 S.W.3d 808, 817 (Tex. App.—Houston [14th Dist.] 2019), *rev'd*, 642 S.W.3d 481 (Tex. 2022)).

compelling dissent issued by Justice Frost, based on the *Antwine* standard.⁸¹ Here, the supreme court concluded that no acceptance was possible because Tauch's knowledge of the execution of the assignment agreement impliedly revoked the existing offer.⁸² In its analysis, the supreme court looked to its only prior decision, *Antwine*, on the implied revocation doctrine.⁸³ The *Antwine* case involved a direct revocation of a contract to sell land which was communicated to the offeree by the offeror's broker.⁸⁴ Further, the supreme court relied upon the Restatement (Second) of Contracts, §§ 42 and 43 with respect to revocations of an offer, which can either be direct (from the offeror or its agent to the offeree) or indirect (by third-party communications or objective evidence).⁸⁵ *Antwine* involved a direct revocation by the offeror's agent; whereas, *Tauch* involved an indirect revocation through a third-party.⁸⁶ For an indirect or implied revocation, the court noted two elements: (1) inconsistent action; and (2) communication to, or knowledge of same by, the offeree.⁸⁷ In this case, the inconsistent action was evidenced by Tauch's attorney's receipt of a fully signed assignment agreement, which, as the court said, speaks for itself.⁸⁸ Tauch asserted that the implied revocation doctrine was only applicable to real estate cases, which the court rejected.⁸⁹ Its analysis reflected that the implied revocation doctrine dated back to the classic English contract case of *Dickinson v. Dodds*—a real estate case.⁹⁰ Nevertheless, the supreme court concluded that “*Dickinson* imposes no express constraint on the implied-revocation doctrine's application to real-estate transactions, and one cannot reasonably be inferred.”⁹¹ Also, the supreme court cited cases from other jurisdictions applying the implied revocation doctrine to non-real estate cases.⁹²

81. *Tauch*, 580 S.W.3d at 819–24 (citing *Antwine v. Reed*, 199 S.W.2d 482, 484–85 (Tex. 1947) (holding that an implied revocation occurred where the offeree had knowledge of an act inconsistent with the offeror maintaining an open offer)).

82. *See Tauch*, 642 S.W.3d at 501–02.

83. *Id.* at 491.

84. *Id.* at 490.

85. *Id.* at 489.

86. *Id.* at 492.

87. *Id.* at 495.

88. *See id.* at 492.

89. *Id.*

90. *See id.* (citing *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876)).

91. *Id.* at 493.

92. *Id.* at 494 (citing *USHealth Grp., Inc. v. South*, 636 F. App'x 194, 202–03 (5th Cir. 2015) (agreement to arbitrate); *Varney Ent. Grp., Inc. v. Avon Plastics, Inc.*, 61 Cal. App. 5th 222, 275 (Cal. Ct. App. 2021) (settlement offer); *Lasco v. Town of Winfield*, No. 204 CV-467-PPS, 2007 WL 2349685, at *3 (N.D. Ind. Aug. 14, 2007) (settlement offer); *Trs. of Teamsters Union Local No. 142 Pension Tr. Fund v. McAlister, Inc.*, 602 F. Supp. 2d 948, 955 (N.D. Ind. 2009) (settlement agreement); *Gabriel v. Alaska Elec. Pension Fund*, No. 3:06-CV-00192-TMV, 2008 WL 11284863, at *9 (D. Alaska Sept. 30, 2008), *aff'd*, 773 F.3d 945 (9th Cir. 2014) (reinstatement of pension benefits); *Abrams-Rodkey v. Summit Cnty. Child Serv.*, 163 Ohio App. 3d 1 (Ohio Ct. App. 2005) (offer to continue working); *Palmer v. Schindler Elevator Corp.*, 108 Cal. App. 4th 154 (Cal. Ct. App. 2003) (settlement offer); *Wilson v. Sand Mtn. Funeral Home, Inc.*, 739 So.2d 1123, 1125 (Ala. Civ. App. 1999) (offer to buy stock); *Norca Corp. v. Tokheim Corp.*, 227 A.D.2d 458, 458–59, 643 N.Y.S.2d 139 (N.Y. App. Div. 1996) (offer to sell fuel pumps); and *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428, 429–30 (N.Y. 1928) (settle existing mortgage)).

The revocation must have been clearly inconsistent with an intent to proceed with the original proposed offer.⁹³ Therefore, if the revocation was “equivocal,” there must be a determination of how it would be perceived by a reasonable person in the position of the offeree.⁹⁴ Looking at the facts in this case, the supreme court determined that the assignment agreement was clearly inconsistent with the offer to Tauch and it was not made equivocal by reason of the agreement’s next-day effective date.⁹⁵ Agreeing with the dissent of Justice Frost in the appellate court, the supreme court held that the dispositive issue was not the ability to enter into a bargain (i.e., whether or not the inconsistent contract was enforceable), but whether there was a willingness to continue the bargain evidenced by the original offer.⁹⁶ Here, the assignment was deemed an objective manifestation of the bank’s intent to pursue the other collection method by the assignment to Angel.⁹⁷ Furthermore, the assignment’s “without recourse” provision was not sufficient to make the bank’s action equivocal.⁹⁸

On the second element, the supreme court acknowledged that a revocation was only effective when the offeree had knowledge of such revocation.⁹⁹ In *Antwine*, knowledge of the revocation was obtained by a direct communication from the offeror’s agent, and in *Dickinson* the knowledge of revocation was by indirect means through channels other than the offeror.¹⁰⁰ Therefore, the supreme court held:

[A]n indirect communication of revocatory action may be sufficient to terminate the power of acceptance, and in this case, the assignment agreement, which was the revocatory act itself, was as-a-matter-of-law reliable information of the bank’s intent not to settle the debt on the terms stated in [the bank’s] April 11th email.¹⁰¹

The supreme court concluded stating, “in today’s world, the spread of information can be rapid-fire. The policy reasons for recognizing the validity of an indirectly communicated revocation are even more compelling now than 175 years ago when *Dickinson* stated the rule.”¹⁰²

B. GUARANTY—RELEASE OF PRINCIPAL

BBVA USA v. Francis addressed the scope of a guaranty agreement and the effect of a release of the principal debtor.¹⁰³ Spring Excellence

93. *See id.* at 495.

94. *See id.* at 496.

95. *See id.* at 497.

96. *Id.*

97. *See id.* at 498.

98. *Id.*

99. *Id.* at 500.

100. *Id.*

101. *Id.* at 501.

102. *Id.*

103. *BBVA USA v. Francis*, 642 S.W.3d 932, 934 (Tex. App.—Houston [14th Dist.] 2022, no pet.).

Surgical Hospital, LLC obtained a loan from BBVA evidenced by a note and guaranteed by Francis and others.¹⁰⁴ The guaranty executed by Francis was a continuing guaranty, which included debts then existing or thereafter arising on a continuous basis and, by its nature, contemplated that there would be future dealings and indebtedness between the creditor and debtor.¹⁰⁵ Thereafter, the hospital executed a second note that was covered by such continuing guaranty.¹⁰⁶ The hospital defaulted on the first loan, and both the first and the second loans were accelerated.¹⁰⁷ The creditor sued the hospital, Francis and others for breach on the notes and the guaranty.¹⁰⁸ BBVA settled with the hospital and two guarantors, exclusive of Francis.¹⁰⁹ The settlement agreement contained a reservation of rights provision whereby BBVA reserved any and all rights it had against Francis related to the notes and guaranty.¹¹⁰ The settlement and payment of funds extinguished the second note and left a deficiency balance under the first note of over \$300,000.00.¹¹¹ BBVA sued Francis for the deficiency and Francis argued that the release of the principal obligor released Francis' obligations under the continuing guaranty.¹¹²

The Houston Court of Appeals found that Francis' guaranty was very broad in the scope of its guaranty of debt and waivers of available defenses, making Francis still liable for the deficiency amount.¹¹³ Various document provisions supported this conclusion.¹¹⁴ First, the guaranty agreement provided for the guaranty of the "*Indebtedness of Borrower to Lender and . . . of all Borrower's obligations under the Note . . .*"¹¹⁵ The note defined indebtedness as all "liabilities and obligations . . . *barred or unenforceable against [Hospital] for any reason whatsoever.*"¹¹⁶ Secondly, the document provided that the guaranty could be enforced against Francis "even when [BBVA] has not exhausted [its] remedies against anyone else obligated to pay the Indebtedness."¹¹⁷ Third, the settlement agreement contained language that the bank "will not pursue [Hospital] for the deficiency that remains on [the notes] and agrees to release [Hospital] of any and all liability, claims, or causes of action . . . which arose out of or are connected with, or in any way related to [the loans] and [Hospital's] Claims."¹¹⁸ Finally, the settlement agreement reserved all rights and remedies that the bank

104. *See id.* at 935.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *Id.*

110. *See id.*

111. *See id.*

112. *Id.*

113. *Id.* at 934.

114. *See id.* at 935–39.

115. *Id.* at 937.

116. *Id.*

117. *Id.*

118. *Id.*

had against Francis relating to the notes and loans, stating “will in no manner constitute a release or waiver by [BBVA] of Francis . . . for [his] obligations under the [guaranty] for the full indebtedness existing under [the notes].”¹¹⁹ In analyzing these provisions, especially the settlement agreement, the supreme court held that the bank had not discharged the obligations, but rather just agreed not to pursue the hospital and other guarantors for the deficiency amount.¹²⁰ Therefore, the language contained in the guaranty and settlement agreement provided no basis to support any claim that the bank was precluded from enforcing the unpaid indebtedness under Francis’ guaranty.¹²¹

Francis also alleged that his liability could not exceed that of the principal, but the supreme court found that while such proposition may be a general rule of law, that the actual liability can be broader or lesser than the principal obligor’s indebtedness, depending upon the actual language in the document.¹²² This was a guaranty of payment not of collection (the two types of guaranties recognized in Texas), and specific provisions in the guaranty provided that: (1) enforcement of a guaranty against Francis was available without exhaustion of remedies against the hospital, (2) the guaranteed indebtedness included any liability or obligations “barred or unenforceable” against the hospital for any reasons, (3) the hospital’s payments would not “discharge or diminish” Francis’ guaranty obligations, (4) the guaranty continued until all of the indebtedness was “fully and finally” paid and satisfied, and (5) most importantly, Francis waived “all defenses based on suretyship or impairment of collateral . . . other than actual payment.”¹²³ Therefore, the supreme court concluded the language did not release Francis of his guaranty obligations based on the release of remedies against the hospital.¹²⁴

C. HOLDER OF NOTE AND GUARANTY

Texas Champps Americana, Inc. v. Comerica Bank was a suit on a note and guaranty with the principal issue being whether Comerica was the owner and holder of the note and guaranty.¹²⁵ The note was a \$1,550,000 note signed by co-makers, Texas Champps and Jila Development, on November 8, 2007.¹²⁶ Concurrently, guaranties of the note were executed by Azari Tajik and by Sheila T. Ingram, LLC.¹²⁷ The loan, made under the Small Business Administration Loan Program, allowed the borrowers to acquire

119. *Id.*

120. *Id.* at 958.

121. *Id.*

122. *Id.* at 938.

123. *Id.*

124. *Id.*

125. *Tex. Champps Americana, Inc. v. Comerica Bank*, 643 S.W.3d 738, 743 (Tex. App.—Dallas 2022, pet. denied).

126. *See id.* at 743–44.

127. *See id.*

a gas station.¹²⁸ The note and guaranty were modified and extended in 2008 and 2009, but due to failing business conditions the convenience store and gas station were sold in 2009 for \$400,000, which paid off a second loan in the amount of \$189,000, with the balance of the sales proceeds being retained by Texas Champps and Jila Development.¹²⁹ The trial court found in favor of Comerica Bank on various issues, all of which were appealed by the co-borrowers and guarantors.¹³⁰

The most applicable issue on appeal was whether Comerica was the holder of the note and guaranties.¹³¹ This issue arose because the documents were originally executed in favor of Sterling Bank, which merged with Comerica on July 28, 2011.¹³² The trial court and appellate court determined that Comerica presented sufficient evidence that it was the holder pursuant to a Certificate of Merger (which attached the Article of Merger, but not the Plan of Merger), which were accepted by the Texas Department of Banking.¹³³ Testimony showed that the documents were retrieved from the Comerica collateral vault and that the SBA's "transcript of account" listed Comerica as the lender.¹³⁴ The Dallas Court of Appeals also addressed the borrowers' contention that the copies of documents presented at trial should have been inadmissible.¹³⁵ Citing Texas Rule of Evidence 1003, which provides that a duplicate copy "is admissible to the same extent as the original unless a question is raised about the original's authenticity or circumstances make it unfair to submit the duplicate," the court rejected such argument.¹³⁶ Not only did Comerica provide testimony about how the copies were stored and retrieved and viewed as business records, but the borrowers failed to present any questions about the authenticity of the documents.¹³⁷ Therefore, sufficient evidence of ownership was shown by Comerica's possession of the loan documents and management of the loan, coupled with the fact that the Borrower presented no contrary evidence.¹³⁸

Nevertheless, a dissenting Justice Smith, while concurring on all other points, believed that such evidence of ownership was not sufficient.¹³⁹ The dissent thought the bank, not being designated in the original documents, owed a duty to prove an unbroken chain of title.¹⁴⁰ The dissent further stated that possession of copies of the loan documents and managing

128. *See id.*

129. *See id.*

130. *Id.* at 744.

131. *See id.*

132. *See id.* at 744–45.

133. *Id.* at 745.

134. *Id.* at 746.

135. *See id.* at 752.

136. *Id.* at 752.

137. *Id.*

138. *See id.*

139. *Id.* at 756 (Smith, J., concurring in part and dissenting in part).

140. *Id.* at 756–57 (citing *Bean v. Bluebonnet Sav. Bank FSB*, 884 S.W.2d 520, 522, (Tex. App.—Dallas 1994, no writ.); *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (op. on reh'g)).

the loan were not equivalent to showing ownership status.¹⁴¹ Perhaps, most damaging from the dissent's perspective was that Comerica failed to present any evidence that the documents were acquired as a result of the merger with Sterling Bank, and that the actual Plan of Merger was not presented into evidence.¹⁴² Even testimonial evidence of same would have been persuasive to the dissent.¹⁴³ Finally, the dissent pointed out that the SBA's "transcript of account" contained numerous inaccuracies and omissions which did not make the document compelling evidence.¹⁴⁴

In another point of error, the co-borrowers contended that Comerica breached its duty of good faith and fair dealing by failing to adhere to SBA guidelines on loan modifications and restructures.¹⁴⁵ Overruling this allegation, the supreme court referenced prior Texas Supreme Court precedents that an implied covenant of good faith and fair dealing has not been recognized to exist in every contract, but only those which have a special relationship between the parties.¹⁴⁶ Special relationships pursuant to Texas judicial opinions occurred when there was either: (1) an element of trust in relation to the undertaking; (2) an imbalance of bargaining power; (3) a longstanding personal or social relationship; or (4) where the lender had exercised excessive control or influence in the borrower's business activities.¹⁴⁷ The borrowers attempted to show that their personal banker should be charged with a special relationship based on the borrower's discussions of business aspects with the banker and the banker's suggestions of potential business opportunities; but no such activities amounted to excessive lenders control over the borrower's business activities.¹⁴⁸

D. SERVICE ON FINANCIAL INSTITUTIONS

U.S. Bank National Ass'n v. Moss addressed the proper method for service on financial institutions and resolved the conflict on this issue presented by various Texas courts of appeal and the U.S. District Court for the Northern District of Texas.¹⁴⁹ Moss, a homeowner, had a loan held by U.S. Bank, as Trustee, and was served with a notice of acceleration in 2010, and in 2017 brought suit to quiet title.¹⁵⁰ Service on U.S. Bank was accomplished under Texas Estate Code § 505.004(a)(2), which provided that a foreign corporate fiduciary must appoint the Secretary of State

141. *Id.* at 757.

142. *See id.*

143. *See id.* (citing *Comerica Bank v. Progressive Trade Enters.*, 544 S.W.3d 459, 461 (Tex. App.—Houston [14th Dist.] 2018, no pet.)).

144. *Id.* at 757–58.

145. *Id.* at 757.

146. *See id.* at 747–48 (majority opinion) (citing *Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)).

147. *Id.* at 748.

148. *Id.* at 749.

149. *U.S. Bank Nat'l Ass'n v. Moss*, 644 S.W.3d 130, 131 (Tex. 2022).

150. *See id.* at 131–32.

as its agent for service of process in a suit relating to trusts or estates.¹⁵¹ The Texas Secretary of State received such citation and forwarded it to the appropriate mailing address, which was returned as undeliverable.¹⁵² Two months after a default judgment was entered, US Bank learned of the judgment and brought this action alleging that the only appropriate means of service was pursuant to Texas Civil Practice & Remedies Code § 17.028. The Texas Supreme Court acknowledged the conflicting decisions of the lower courts.¹⁵³

The supreme court found that none of the other cases discussing this apparent conflict considered all relevant statutes relating to service on foreign entities, which explained why each of those cases were wrong and were disapproved by the supreme court.¹⁵⁴ Texas Civil Practice & Remedies Code § 17.028(b) provided “citation *may* be served on a financial institution by: (1) serving the registered agent of the financial institutions; or (2) if the financial institution does not have a registered agent, serving the president or branch manager at any [Texas] office.”¹⁵⁵ In analyzing this statute, the court stated that the word “may” can be used either (i) to allow someone to choose or not choose an option, or (ii) require a choice among several permitted options.¹⁵⁶ In that statute, the choice was between multiple options, one of which must be chosen.¹⁵⁷ This conclusion was supported by § 17.028(d), which explained subsection (b): “[i]f citation has not been properly served *as provided by this section*, a financial institution may maintain an action to set aside the default judgment.”¹⁵⁸ Therefore, the supreme court concluded that the legislature meant for subsection (b) to be the exclusive method of service on registered agents for the financial institutions.¹⁵⁹

Also, the supreme court considered other statutes where the Secretary of State was appointed as some form of agent for the business organization.¹⁶⁰ Under the Texas Finance Code § 201.101, the definition of “financial institution” included banks chartered under U.S. law and out of state financial institutions not chartered under Texas law.¹⁶¹ Further, Texas

151. *Id.* at 131–132.

152. *See id.*

153. *Id.* at 133 (citing *U.S. Bank Nat’l Ass’n v. Moss*, 623 S.W.3d 444 (Tex. App.—Dallas 2020, pet. granted), *rev’d*, 644 S.W.3d 130 (Tex. 2022) (holding service under either statute was available); *Bank of N.Y. Mellon v. NSL Prop. Holdings, LLC*, No. 02-17-00465-CV, 2018 WL 3153540, at *7 (Tex. App.—Ft. Worth, June 28, 2018, no pet.), *abrogated by Moss*, 644 S.W.3d 130 (Tex. 2022); *Moss v. U.S. Bank Nat’l Ass’n for Residential Asset Mortg. Prods., Inc.*, No. 3:17-cv-1526-D, 2017 WL 4923894, at *4 (N.D. Tex. October 31, 2017); *Bank of N.Y. v. Chesapeake 34771 Land Tr.*, 456 S.W.3d 628, 635 (Tex. App.—El Paso 2015, pet. denied)).

154. *Id.* at 136–137.

155. *Id.* at 133.

156. *Id.*

157. *Id.*

158. *Id.* at 134 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 17.028(d)).

159. *Id.* at 134.

160. *See id.* at 134.

161. *Id.* (citing TEX. FIN. CODE ANN. §§ 201.101(1)(A), 201.101(2)).

Finance Code § 201.102 provided that out of state financial institutions must register with the Secretary of State, being the same as for foreign corporations doing business in the state.¹⁶² Foreign corporations must file a registered agent with the Secretary of State.¹⁶³ In addition, Texas Business Organizations Code §§5.201(a)(b) and 5.251 provided that the registered agent must be designated and continuously maintained and would be the agent for service of process, notice or other demand required by law.¹⁶⁴ Consequently, based on these other supporting and defining statutes, the Texas Supreme Court held that service on a financial institution under Texas law requires compliance with as Texas Civil Practice & Remedies Code § 17.028.¹⁶⁵

E. EQUITABLE SUBROGATION

PNC Mortgage v. Howard (Howard III) is the third major iteration of the running dispute on equitable subrogation.¹⁶⁶ In *Howard I*, the appellate court upheld the trial court's determination that the statute of limitations barred PNC's foreclosure under its subrogated lien claim.¹⁶⁷ In *Howard II*, the Texas Supreme Court held that even though a lender failed to preserve its contractual rights under a new deed of trust, such failure did not deprive the lender of enforcing its rights under the equitably subrogated lien.¹⁶⁸ *Howard II* remanded the case back to the appellate court for determination of the rights that could be asserted by the lender pursuant to the equitable subrogated lien.¹⁶⁹ Consequently, in *Howard III*, the supreme court needed to determine the accrual date for causes of action under an equitable subrogated lien.¹⁷⁰ Under *Howard II*, the refinancing lender stepped into the shoes of the lender under the equitable subrogated lien; however, that did not answer the question of whether the maturity date of the subrogated lien or the refinancing lien controlled.¹⁷¹

With conflicting law on this issue, the supreme court addressed various cases to reach its conclusion. *Kone v. Harper*,¹⁷² the first case addressing this issue, held that "the refinancing acted in the same way as if the original debt had been renewed and extended and, therefore, the relevant maturity date

162. *Id.*

163. *Id.* at 134–135 (citing TEX. BUS. ORGS. CODE ANN. §§ 9.001(a)(1), 9.004(a)).

164. *Id.* at 135 (citing TEX. BUS. ORGS. CODE §§ 5.201(a)(b), 5.251).

165. *Id.* at 135–36.

166. *See* PNC Mortg. v. Howard (*Howard III*), 651 S.W.3d 154, 156 (Tex. App.—Dallas 2021, pet. granted).

167. *See* PNC Mortg. v. Howard (*Howard I*), 618 S.W.3d 75, 84–85 (Tex. App.—Dallas 2019), *rev'd on other grounds*, 616 S.W.3d 581 (Tex. 2021) (mem. op.).

168. *See* PNC Mortg. v. Howard (*Howard II*), 616 S.W.3d 581, 585 (Tex. 2021) (per curiam) (citing Fed. Home Loan Mortg. Corp. v. Zepeda, 601 S.W.3d 763 (Tex. 2020)).

169. *See id.*

170. *See Howard III*, 651 S.W.3d at 159.

171. *Id.* at 157–58.

172. 297 S.W. 294, 299 (Tex. Civ. App.—Waco 1927), *aff'd sub nom.*, Ward-Harrison Co. v. Kone, 1 S.W.2d 857 (Tex. Comm'n. App. 1928).

was the one for the new loan.”¹⁷³ The *Kone* jurisprudence was followed by the Austin Court of Appeal’s opinion in *Hayes v. Spangenberg*.¹⁷⁴ In *Brown v. Zimmerman*,¹⁷⁵ the Dallas Court of Appeals did not directly address the lien claim accrual date.¹⁷⁶ But two federal district court cases interpreted *Zimmerman* as holding that equitable subrogation lien claims accrued when the original loan was paid off.¹⁷⁷ However, the Texas Supreme Court disagreed with such reading of *Zimmerman*, which involved a divorce action which awarded to the wife the home subject to existing financing which did not have a clear reference to a maturity date.¹⁷⁸ The *Zimmerman* court held that an action on the subrogation lien could be brought within four years after the financing because there was no possibility for a limitations argument.¹⁷⁹ Furthermore, *Gillespie* and *Zepeda* cited *Kone* and *Hayes* as requiring the equitable subrogation accrual date to be the maturity date of the subordinated debt, which was the opposite of the holding in those case.¹⁸⁰ Two other federal court cases, following *Gillespie* and *Zepeda*, held that the accrual date began to run on the maturity of the equitable subordinated lien.¹⁸¹

The supreme court discussed the problems which could follow the results of the federal cases mentioned above.¹⁸² In the supreme court’s opinion, the use of the accrual date of the subrogated debt would create a problem if the borrower defaulted on a refinancing loan more than four years after the maturity date of the subrogated lien, leaving the refinancing lender with no viable subrogation lien claim.¹⁸³ On the other hand, if the accrual date was tied to the maturity of the refinancing lien, and the subrogated lien maturity was significantly beyond the maturity of the refinancing loan, the borrower would be subjected to subrogation claims many years after the refinancing loan became due and payable.¹⁸⁴ The court concluded this would render the limitation periods “practically meaningless.”¹⁸⁵ As a corollary, this result could also force a refinancing bank to wait for an extended period of time after the refinancing loan maturity date before being able to enforce the subrogation lien.¹⁸⁶

173. *Howard III*, 651 S.W.3d at 158 (citing *Kone*, 297 S.W. at 299–300).

174. 94 S.W.2d 899, 901 (Tex. Civ. App.—Austin 1936, no writ).

175. 160 S.W.3d 695 (Tex. App.—Dallas 2005, no pet.).

176. *Howard III*, 651 S.W.3d at 158.

177. See *Gillespie v. Ocwen Loan Servicing, LLC*, No. 4:14-cv-00279, 2015 WL 12582796, at *4 n.5 (S.D. Tex. October 28, 2015); *Zepeda v. Fed. Home Loan Mortg. Ass’n.*, No. 4:16-cv-3121, 2018 WL 781666 at *5 (S.D. Tex. Feb. 8, 2018), *rev’d*, 967 F.3d 456 (5th Cir. 2020).

178. See *id.*

179. *Id.*

180. See *id.* at 158–59.

181. See *id.* at 159 (citing *Priester v. Long Beach Mortg. Co.*, No. 4:16-cv-00449, 2018 WL 1081248, at *4 (E.D. Tex. February 28, 2018); *De La Cruz v. Bank of N.Y.*, No. A-17-cv-00163-SS2018 WL 301 8179, at *6 (W.D. Tex. June 15, 2018)).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 159.

186. See *id.*

Based on the court's analysis, it concluded that the correct result was as reached in *Kone*, which would tie the lender's accrual date to the maturity date of the refinancing loan.¹⁸⁷ Nevertheless, because petition was granted by the Texas Supreme Court, practitioners must wait until *Howard IV* has been decided before there will be certainty what the accrual date will be for claims based on an equitable subrogated lien.

IV. LANDLORD—TENANT RELATIONSHIP/LEASES

A. FORCIBLE DETAINER

Perry v. Wichita Falls Housing Authority, is a forcible detainer case in which the tenant claimed the landlord was responsible for complying with eviction procedures mandated by both federal statute and the Texas Property Code.¹⁸⁸ Specifically, the issue in the case was whether the landlord could send a notice of lease termination and notice to vacate at the same time as permitted by federal law, or, if the landlord was required to send two separate notices as required by the Texas Property Code.¹⁸⁹ The Texas Property Code specifically provides “[i]f the lease or applicable law requires the landlord to give a tenant an opportunity to respond to a notice of proposed eviction, a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired.”¹⁹⁰ The lease in question gave the tenant the right to reply to a lease-termination notice and the right to request a hearing in accordance with the grievance procedure.¹⁹¹ As a result, two different notices were required to be sent in order to comply with the requirements of the Texas Property Code.¹⁹² However, federal law specifically provided that a notice to vacate could be sent at the same time as a lease termination notice.¹⁹³ The landlord only sent one notice and asserted that federal law preempted the Texas Property Code.¹⁹⁴ The court held that, in this case, it was possible to comply with both the Texas Property Code and federal law because federal law only permitted the notices to be combined, but did not *require* that they be combined.¹⁹⁵ As a result, there was no conflict and no preemption.¹⁹⁶

187. *Id.*

188. *Perry v. Wichita Falls Hous. Auth.*, 646 S.W.3d 908, 910 (Tex. App.—Fort Worth 2022, no pet. h.).

189. *Id.*

190. *Id.* at 913 (quoting TEX. PROP. CODE ANN. § 24.005(a)).

191. *See id.* at 910.

192. *See id.* at 910–11.

193. *See id.* at 914 (citing 24 C.F.R. § 966.4(1)(3)(iii) (“A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (1)(3)(i) of this section.”)).

194. *See id.*

195. *Id.* at 914–915.

196. *See id.* at 915.

B. NOTICE/RIGHT OF FIRST REFUSAL

In *SignAd, Ltd. v. BJZ Investments, LLC*, the lessors agreed to lease part of their property to a billboard company (SignAd).¹⁹⁷ The lease provided for a thirty-year term and a one-time payment of \$30,000.¹⁹⁸ The lease agreement also contained a right of first refusal (ROFR) in favor of the billboard company for the duration of the lease.¹⁹⁹ In 2013, the billboard company erected a sign on the property and, thereafter, regularly maintained the billboard.²⁰⁰ In 2017, the lessors received a purchase offer from BJZ Investments, LLC.²⁰¹ The lessors accepted the offer and conveyed the property to BJZ without notifying SignAd.²⁰² In 2019, BJZ contacted SignAd to request a copy of the lease which was how SignAd first learned the property had been conveyed.²⁰³ SignAd then demanded that BJZ sell the property to them for the same price they had paid for it.²⁰⁴ BJZ refused and this suit entailed.²⁰⁵ BJZ filed a motion for summary judgment claiming as an affirmative defense that it was a bona fide purchaser and also claimed equitable estoppel, failure of consideration, laches, and waiver.²⁰⁶ The trial court granted BJZ's motion for summary judgment and SignAd appealed.²⁰⁷

To establish the defense that they were a bona fide purchaser, BJZ needed to establish three elements: "(1) that they acquired the . . . property in good faith, (2) that they paid valuable consideration for the property, and (3) that they had no notice of any third-party claim or interest in the property."²⁰⁸ BJZ attempted to establish a bona fide purchaser defense by producing evidence at trial that they paid \$500,000 for the property and received a title policy which did not disclose the lease.²⁰⁹ SignAd focused on disproving the notice element of BJZ's bona fide purchaser defense.²¹⁰ As most practitioners are aware, notice can be actual or constructive.²¹¹ Actual notice is personal knowledge and constructive knowledge is imputed.²¹²

197. *SignAd, Ltd. v. BJZ Invs., LLC*, 640 S.W.3d 611, 614 (Tex. App.—Houston [14th Dist.] 2022, pet. denied).

198. *See id.* at 614–15.

199. *See id.* at 615.

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.* at 615–16.

207. *Id.* at 616.

208. *Id.* at 618 (citing *Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984) (per curiam); TEX. PROP. CODE ANN. §§ 13.001(a)–(b) (providing that the conveyance of an interest in real property is void as to subsequent purchasers for value unless the conveyance has been recorded, except that an unrecorded instrument is still binding on subsequent purchasers if the purchasers had notice of the instrument)).

209. *See id.*

210. *See id.* at 618–19.

211. *See id.* at 619 (citing *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001) (per curiam)).

212. *See id.*

A person may be charged with constructive notice of the occupation of real property “if those claims could have been reasonably discovered upon a proper inquiry,” “if the possession is visible, open, exclusive, and unequivocal.”²¹³ SignAd argued that BJZ had constructive notice because the billboard was “visible, open, exclusive, and unequivocal.”²¹⁴ The courts in Texas have historically held that regardless of whether a lease has been recorded, possession of property by a tenant puts the prospective purchaser or vendee on notice of the terms of the lease under which the tenant is holding.²¹⁵ As a result, the court of appeals ruled that the trial court erred in granting a summary judgment motion for BJZ because the BJZ parties did not establish they were entitled to summary judgment on the affirmative bona fide purchaser defense.²¹⁶

V. PURCHASER/SELLER

A. STATUTE OF FRAUDS

The enforceability of an oral purchase agreement for real estate was the issue in *Wood v. Wiggins*.²¹⁷ Wood and Wiggins had an informal relationship whereby each would purchase houses as investment property at auction in their individual capacities, then fix them up and sell them.²¹⁸ At some point in the future, often months after the initial purchase, the person who purchased the property would deed 50% of the property to the other.²¹⁹ Sometimes there were third parties involved in the transactions, in which case, the appropriate proportion would be deeded.²²⁰ The investment protocols were unclear, but basically at some point (often months and sometimes years after the purchase) by various methodologies (sometimes cash sometimes or other times an offset against another purchase) the parties would “true-up” the purchase and also the investment to fix up the houses.²²¹ Over a two-year period, Wood and Wiggins bought and sold over twenty homes.²²²

In 2007 Wiggins purchased three homes at a tax sale which the court referred to as the “Waverly Cannon Properties.”²²³ Wiggins apparently sent Wood deeds for the properties in 2007 but Wiggins did not record the deeds until 2010.²²⁴ Meanwhile, JP Morgan Chase Bank, National Association,

213. *Id.*

214. *Id.*

215. *See generally* Whoa USA, Inc. v. Regan Props., LLC, No. 05–13–01412–CV, 2014 WL 6967852, at *7 (Tex. App.—Dallas Nov. 26, 2014, pet. denied) (mem. op.).

216. *SignAd*, 640 S.W.3d at 620.

217. *See* 650 S.W.3d 533, 539 (Tex. App.—Houston [1st Dist.] 2021, pet. denied).

218. *See id.* 539–41.

219. *See id.*

220. *See id.* 542.

221. *Id.* at 540.

222. *See id.*

223. *Id.* at 542.

224. *See id.*

and its successor in interest Bank of New York Mellon (BNYM), was the first lienholder on the Waverly Cannon Properties and had six months to exercise the right of redemption.²²⁵ Ultimately BNYM tendered \$348,714.17 to Wiggins to exercise its right of redemption.²²⁶ Sometime in 2010, after BNYM had foreclosed on the properties and deeded them to third parties, Wood filed the 2007 deeds of record.²²⁷ BNYM filed a declaratory judgment suit against Wood and Wiggins.²²⁸ The trial court granted BNYM's motion for summary judgment and the case proceeded with Wood and Wiggins' numerous cross-claims against each other.²²⁹ For a variety of reasons not relevant to the reader, the substance of the majority of the claims were not addressed by the court.²³⁰ However, one of the claims that was addressed, and is of interest to the practitioner, was Wood's claim that the trial court erred in applying the Statute of Frauds to the case.²³¹ Wood claims that the Statute of Frauds did not apply because the oral agreements at issue were partnerships for the "joint investment and sharing of expenses, losses and profits,"²³² which did not "involve the conveyance of real property."²³³ Furthermore, Woods claimed the agreements could each be performed within one year.²³⁴ As the reader may recall, § 26.01 of the Texas Business and Commerce Code provides—in part—that:

"[A] contract for the sale of real estate" or "an agreement which is not to be performed within one year from the date of making the agreement" is not enforceable unless it "is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him."²³⁵

Wood relied upon the cases of *Sewing v. Bowman* and *Berne v. Keith*, where the court of appeals distinguished partnerships involving dealings in real estate from agreements which result in the transfer of the interest in real estate.²³⁶ The court of appeals distinguished the case at hand from *Sewing* and *Berne* by explaining that "the agreements between Wiggins and Wood contemplated, and in fact required, a transfer of an interest in real property."²³⁷ The court of appeals went on to explain: "[t]he distinguishing factor between property-related agreements that are barred by the statute of frauds and those that are not is whether the agreement provides for

225. *See id.*

226. *See id.*

227. *See id.* at 550.

228. *See id.* at 542.

229. *Id.*

230. *See generally id.*

231. *See id.* at 550–51.

232. *Id.* at 551.

233. *Id.* at 549.

234. *See id.*

235. *Id.* at 550 (quoting Tex. Bus. & Com. Code Ann. § 26.01(a)(1), (2), (b)(4), (6)).

236. *Id.* at 551 (citing *Sewing v. Bowman*, 371 S.W.3d 321, 330 (Tex. App.—Houston [1st Dist.] 2012, pet denied); *Berne v. Keith*, 361 S.W.2d 592 (Tex. App.—Houston [1st Dist.] 1962, writ ref'd n.r.e.)).

237. *Id.* at 552.

the transfer of an interest in land from one party to another.”²³⁸ “Those agreements that provide for, contemplate, or require a transfer of an interest in land from one party to another are barred by the statute of frauds.”²³⁹ Unfortunately for Woods, he failed to argue in the alternative that the partial performance exception applied as the court indicated he would likely have been more successful with that claim.²⁴⁰

B. ARBITRATION

Parrish & Co. v. Polidore distinguishes for the practitioner the difference between a non-signatory to an arbitration agreement seeking to compel arbitration and a signatory seeking to compel arbitration on a non-signatory.²⁴¹ In the case at hand two subcontractors, who are non-signatories to an arbitration agreement, sought to compel a home owner, who was a signatory to an arbitration agreement via a purchase agreement, to arbitrate claims for negligent construction of a home.²⁴² The arbitration agreement in question provided, in part:

Purchaser [Polidore] hereby acknowledges that those subcontractors have contractually agreed with Seller [Trendmaker] to resolve *all disputes* according to the terms set out in the Express Limited Warranty, including binding arbitration. Purchaser [Polidore] agrees that any dispute or claim between them and the Seller [Trendmaker] which may in any way involve a subcontractor engaged by Seller [Trendmaker] shall be resolved by the terms set out in the Express Limited Warranty, including binding arbitration. Purchaser [Polidore] agrees and understands that they may not file a lawsuit against Seller [Trendmaker] *or any subcontractor* as a result of this Agreement.²⁴³

In general, a party seeking to compel arbitration must establish: (1) a valid arbitration agreement and (2) that the dispute falls under the

238. *Id.*

239. *Id.* (citing *Bakke Dev. Corp. v. Albin*, No. 04-15-00008-CV2016 WL 6088980, at *3 (Tex. App.—San Antonio Oct. 19, 2016, no pet.) (mem. op., op. on reh’g) (rejecting appellant’s argument that partnership was formed for purpose of jointly developing real property and did not require conveyance of land, such that statute of frauds would not apply to oral partnership agreement, where testimony and pleadings showed “contribution” of respective properties would take place through a formal conveyance to partnership); *Carpenter v. Phelps*, 391 S.W.3d 143, 153 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (explaining that partnership agreement requiring transfer of real estate to partnership violates statute of frauds because “an interest in real estate cannot become a partnership asset unless the agreement concerning the property is in writing the same as any other contract concerning the sale of land”); *Mangum v. Turner*, 255 S.W.3d 223, 227 (Tex. App.—Waco 2008, pet. denied) (“Generally, the statute of frauds applies to an oral agreement when the performance promised requires an act that will transfer property in land.”) (internal quotation omitted)).

240. *See id.* at 553–55.

241. *See Parrish & Co. v. Polidore*, 647 S.W. 3d 469, 472–73 (Tex. App.—San Antonio 2022, no pet. h.).

242. *See id.* at 471–72.

243. *Id.* (emphasis added).

agreement.²⁴⁴ The existence of an arbitration agreement was undisputed in this case but the issue was whether a non-signatory could avail themselves of the benefits.²⁴⁵ The courts have held that there are generally six scenarios in which arbitration may be imposed on a non-signatory to an arbitration agreement: “(1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary.”²⁴⁶ The court of appeals concluded that the purchase agreement “clearly and unmistakably authorize[s] Trendmaker’s subcontractors to submit the issue of arbitrability of disputes arising out of the Purchase Agreement and Limited Warranty to an arbitrator.”²⁴⁷

Lennar Homes of Texas, Inc. v. Rafiei is another case examining a mandatory arbitration clause in a sales contract for the purchase of a home.²⁴⁸ The plaintiff in the case asserted that the arbitration clause was unconscionable because it would cost over \$7,000 just for the initial threshold question of arbitrability to be addressed by the arbitrator.²⁴⁹ The court explained that the analysis of unconscionability of costs involves examining 4 factors:

- (1) [T]he party’s ability to pay the arbitration fees and costs;
- (2) the actual amount of the fees compared to the amount of the underlying claim(s);
- (3) the expected cost differential between arbitration and litigation; and
- (4) whether that cost differential is so substantial that it would deter a party from bringing a claim.²⁵⁰

After examining the evidence presented and weighing it against the factors, the court concluded that the trial court did not abuse its discretion by finding the arbitration clause to be unconscionable.²⁵¹

In *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, the issue was the enforceability of a mandatory arbitration provision in an original purchase agreement for a house with respect to subsequent owners of the house.²⁵² The Kohlmeyer family bought a home constructed by Taylor Morris several years after its original construction for the Davis family.²⁵³ The house ended up having extensive mold damage that the Kohlmeyer family alleged was caused by faulty construction.²⁵⁴ The Kohlmeyer family sued Taylor Morrison for violations of the Deceptive Trade Practices Act and breach

244. *Id.* at 473.

245. *Id.*

246. *Id.* at 473 (citing *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 633 (Tex. 2018)).

247. *Id.* at 475.

248. *See Lennar Homes of Tex., Inc. v. Rafiei*, 652 S.W.3d 532, 533 (Tex. App.—Houston [14th Dist.] 2022, pet. filed).

249. *See id.* at 536.

250. *Id.* at 540 (citing *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 893–94 (Tex. 2010)).

251. *Id.* at 540.

252. *Taylor Morrison of Tex., Inc. v. Kohlmeyer*, 634 S.W.3d 297 (Tex. App.—Houston [1st District] 2021, pet. filed).

253. *See id.* at 302–03.

254. *See id.*

of the implied warranties of habitability and workmanship and negligent construction.²⁵⁵ Taylor Morrison claimed that the suit should be dismissed because the original purchase contract with the Davis Family contained a mandatory arbitration provision.²⁵⁶

As discussed in *Parrish*,²⁵⁷ there are six theories under which a non-signatory to a contract can be bound by an arbitration clause: “(1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel and (6) third party beneficiary.”²⁵⁸ It was undisputed that four of the theories “incorporation by reference, agency, alter ego and third-party beneficiary” did not apply to the facts of the case.²⁵⁹ Taylor Morrison relied on the implied assumption and equitable estoppel/direct benefit theories.²⁶⁰ However, the court of appeals held that neither theory applied because the claims brought by the Kohlmeyer family sounded in tort and not contract.²⁶¹ The Kohlmeyer family did not allege any breach of the contract and did not attempt to avail themselves of the contract’s terms.²⁶²

VI. CONSTRUCTION MATTERS

A. CONSEQUENTIAL DAMAGES

Signature Industrial Services, LLC v. International Paper Co. is an interesting construction case about how to measure consequential damages for breach of contract, and a warning to practitioners about how not to allow your client to conduct its business.²⁶³ The plaintiff had contracted with the defendant to upgrade a piece of equipment used in the paper making process.²⁶⁴ The parties agreed to an initial cost but also agreed that the plans and specs were not definitive enough to allow a firm price and that the plaintiff should, at the end of the job, submit a change order to cover the extra work involved.²⁶⁵ As is completely foreseeable with all situations where parties agree to “agree” at later date, at the end of the work, the parties disagreed on the cost and the defendant refused to pay the plaintiff the amount requested.²⁶⁶ The plaintiff then suffered a series of misfortunes the plaintiff alleged were caused by the defendant’s refusal to pay for the

255. *See id.*

256. *Id.* at 303.

257. *See Parrish & Co. v. Polidore*, 647 S.W. 3d 469, 472–73 (Tex. App.—San Antonio 2022, no pet. h.).

258. *Kohlmeyer*, 634 S.W.3d at 304 (citing *In re Kellogg Brown & Root*, 166 S.W.3d 732, at 739 (Tex. 2005); *accord D.R. Horton-Emerald, Ltd. v. Mitchell*, No. 01-17-00426-CV, 2018 WL 542403, at *3 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018, no pet.)).

259. *Id.* at 305.

260. *Id.*

261. *Id.* at 310.

262. *Id.*

263. *See Signature Indus. Servs., LLC v. Int’l Paper Co.*, 638 S.W.3d 179, 183–84 (Tex. 2022).

264. *See id.* at 184–86.

265. *See id.*

266. *Id.* at 184.

work performed.²⁶⁷ One of the many alleged misfortunes was the fact that the plaintiff had received an offer to purchase the company for \$42 million, which was pulled and ultimately replaced by several lower offers.²⁶⁸ It is important to note, and important to the court's holding, however, that the offer was not public and the defendant had no knowledge of the offer and, therefore, could not have thought at the time of contracting that the loss of the offer would be a natural consequence of failure to pay the plaintiff.²⁶⁹ The plaintiff also alleged they were unable to pay the employment taxes and other vendors and suffered a decline in reputation as a result of the defendant's failure to pay what was owed.²⁷⁰

At the trial court, the jury held the defendant, International Paper Company, liable for \$2.4 million in direct damages and almost twenty times that in consequential damages.²⁷¹ The damages awarded by the jury included the "lost" acquisition deal wherein the company would have been sold for \$42 million.²⁷² In all, the jury awarded the plaintiff \$125 million as a result of the defendant failing to pay \$2.4 million.²⁷³ The court of appeals rejected the jury's award but endorsed another award theory pursuant to which the defendant would be liable for the decline in the "book value" of the company.²⁷⁴ As the Supreme Court of Texas explained, when overruling the court of appeals, consequential damages must be both: (1) foreseeable and (2) calculable with reasonable certainty.²⁷⁵ The supreme court held that neither the lost opportunity to be acquired nor the catastrophic decline in the market value were foreseeable consequences of the breach of contract.²⁷⁶ As the supreme court explained "a loss that is not the 'probable' consequence of the breach, from the breaching parties' perspective, at the time of contracting is not foreseeable."²⁷⁷ Furthermore, the decline in book value was not a reasonable estimate of the damages incurred.²⁷⁸ Although the Supreme Court of Texas did not find any of the claims for consequential damages supportable, the court inferred they believed there were claims for consequential damages that could have been supported but were not plead.²⁷⁹ The most obvious being the lost work as a result of the reputational

267. *See id.*

268. *See id.* at 185.

269. *Id.* at 185.

270. *See id.*

271. *Id.*

272. *See id.* at 185–86.

273. *See id.*

274. *See id.*

275. *See id.* at 184 (citing *Phillips v. Carlton Energy Grp., LLC*, 475 S.W.3d 265, 279 (Tex. 2015); *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998)).

276. *See id.* at 189.

277. *Id.* at 186 (citing *Mead v. Johnson Grp., Inc.*, 615 S.W.2d 685, 687 (Tex. 1981); 24 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 64:17 (4th ed.) ("Consequential damages include those damages that were reasonably foreseeable or contemplated by the parties at the time the contract was entered into as the probable result of a breach").

278. *See id.* at 192.

279. *See id.*

damage.²⁸⁰ In fact, the court stated: “Instead of travelling the well-worn path—calculating the profits it would have made from the business it lost due to IP’s breach—SIS pursued a novel damages model premised on a decline in the company’s overall market value as an asset.”²⁸¹ The court went on to conclude that, “as a general rule, neither the counterparty’s market value nor the impact of the breach on that value will be reasonably foreseeable at the time of contracting.”²⁸²

James Construction Group, LLC v. Westlake Chemical Corp. is another Supreme Court of Texas case that addresses the issue of consequential damages.²⁸³ Westlake Chemical Corporation hired James Construction Group, LLC, as a general contractor to perform civil and mechanical construction work on a plant in Geismar, Louisiana.²⁸⁴ Ultimately, Westlake fired James after a series of serious safety violations, including a death.²⁸⁵ The firing was preceded by a series of emails and meetings focused on James’ safety record.²⁸⁶ Westlake sued for damages.²⁸⁷ The jury decided that some of the damages claimed by Westlake included consequential damages.²⁸⁸ The contract between the parties had a consequential damage waiver.²⁸⁹ James alleged that the consequential damage waiver also included a covenant not to sue and the fact that Westlake sued for consequential damages was a breach of contract.²⁹⁰ The jury agreed with James and awarded damages to James for Westlake’s breach.²⁹¹ The provision in question reads as follows:

WAIVER OF CONSEQUENTIAL DAMAGES

Neither [Westlake] nor [James] shall be liable to the other for any consequential, incidental, indirect or punitive damages . . . arising under this Contract or as a result of, relating to or in connection with the Work *and no claim shall be made* by either [Westlake] or [James] against the other for such damages REGARDLESS OF WHETHER SUCH CLAIM IS BASED OR CLAIMED TO BE BASED ON NEGLIGENCE OR STRICT LIABILITY (INCLUDING SOLE, JOINT, ACTIVE, PASSIVE, CONCURRENT NEGLIGENCE OR GROSS NEGLIGENCE) OR ANY OTHER THEORY OF LEGAL LIABILITY, AND INCLUDING PRE-EXISTING CONDITIONS BUT EXCLUDING GROSS NEGLIGENCE AND WILLFUL MISCONDUCT.²⁹²

280. *See id.*

281. *Id.* at 189.

282. *Id.* at 190.

283. *See James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 397 (Tex. 2022).

284. *See id.*

285. *See id.* at 397–400.

286. *See id.*

287. *See id.* at 400.

288. *Id.* at 416.

289. *See id.* at 415–16.

290. *See id.*

291. *See id.* at 416.

292. *Id.* (emphasis added).

The majority of the court, with one judge dissenting, concluded that the Waiver of Consequential Damages did not include a covenant not to sue.²⁹³ Their reasoning largely rested on the fact that the heading of the section was only “Waiver of Consequential Damages” and did not also include the phrase “Covenant Not to Sue.”²⁹⁴ The supreme court stated that courts should “[g]enerally . . . construe contractual provisions in a manner that is consistent with the labels the parties have given them.”²⁹⁵ This author is curious if the contract had a standard disclaimer regarding the non-binding nature of labels and titles.

Another issue addressed by the court was whether the oral notice to terminate the contract between Westlake and James substantially complied with the written notice requirement in the contract.²⁹⁶ As the court noted:

[W]hile Texas law generally recognizes substantial compliance as a proper standard by which to evaluate satisfaction of contractual notice conditions, we have found no Texas cases holding that a party’s provision of oral notice complies, substantially or otherwise, with a requirement of *written* notice. Indeed, both our own precedent and that of the courts of appeals hold the opposite²⁹⁷

The court found that a writing was a bargained for exchange that served a purpose beyond just notice and that an oral notice did not substantially comply with a requirement for written notice.²⁹⁸

The court also dismissed arguments that a series of emails exchanged between the parties constituted written notice because although the emails expressed concern about James’ safety record, they never specifically referenced the contractual notice provisions of the contract or stated that James was being terminated.²⁹⁹

In a strongly written dissent, four judges, including the chief justice, argued that the majority misapplied long standing Texas law.³⁰⁰ The dissenting justices believe a notice that does not comply with the requirements can still be effective as long as the other party is not prejudiced by the way the notice was delivered.³⁰¹ The dissenting judges relied on a quote from the majority opinion to buttress their argument: “As a general principle of Texas law . . . a party’s minor deviations from a contractual notice condition that do not severely impair the purpose underlying that condition and cause no prejudice do not and should not deprive that party of the benefit of its bargain.”³⁰² The dissent goes on to say that the majority ignores another fundamental premise of Texas law, that “[f]orfeitures are not favored in

293. *Id.* at 417.

294. *Id.*

295. *Id.* (citing *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 121 (Tex. 2015)).

296. *Id.* at 419.

297. *Id.* at 406–07.

298. *Id.* at 408.

299. *Id.* at 413.

300. *See id.* at 418–419 (Hecht, J., dissenting).

301. *See id.* at 418–28.

302. *Id.* at 406.

Texas, and contracts are construed to avoid them.”³⁰³ The dissent felt that the series of in person meetings and emails were sufficient notice and that, by requiring strict compliance with the written notice requirements, the majority opinion amounts to the forfeiture of Westlake’s contractual rights to recover the costs of replacing James as the contractor.³⁰⁴

B. WAIVER OF CERTIFICATE OF MERIT

In yet another of the seemingly endless certificate of merit cases, *Certain Underwriters at Lloyd’s of London v. Mayse & Associates*, examines whether a defendant waived their right to have a case dismissed for failure to file a certificate of merit and, because the court did not find waiver, whether the certificates of merit provided by the plaintiff met the statutory requirements.³⁰⁵ In this case, the trial court had granted both the engineer and architect’s motion to dismiss with prejudice under Chapter 150 of the Texas Civil Practice and Remedies Code.³⁰⁶ As has been discussed in previous years, § 150.002 of the Code requires any lawsuit against a professional engineer or architect be accompanied (at the time of filing) by a sworn “certificate of merit.”³⁰⁷ If a certificate is not properly filed, “professionals have the right to avoid litigation entirely.”³⁰⁸ Chapter 150 does not include a deadline for seeking dismissal.³⁰⁹ In the case at hand, the claimant argued the fact that the defendant participated in discovery and filed a traditional motion for summary judgment indicated that they had waived the right to seek dismissal under Section 150.³¹⁰ The court of appeals did not agree.³¹¹

The second issue in the case was what is the meaning of the phrase “area of practice.”³¹² The code specifically requires that a claimant file an affidavit by a professional who “practices in the area of practice of the defendant.”³¹³ Because the code does not define the phrase “area of practice” the court looked to the “ordinary meaning” in addition to what other courts have said that have considered the issue.³¹⁴ In *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, the Texas Supreme Court specifically found that area of practice was specific to the issue at question in the litigation.³¹⁵

303. *Id.* at 424.

304. *See id.*

305. *See Certain Underwriters at Lloyd’s of London v. Mayse & Assocs.*, 635 S.W.3d 276, 280–82 (Tex. App.—Corpus Christi-Edinburg 2021, pet. filed).

306. *See id.*

307. *Id.* at 282 (citing Tex. Civ. Prac. & Rem. Code Ann. § 150.002; *LaLonde v. Gosnell*, 593 S.W.3d 212, 221 (Tex. 2019)).

308. *Id.* (citing *LaLonde*, 593 S.W.3d at 220).

309. *See id.*

310. *See id.* at 283.

311. *Id.* at 286.

312. *See id.* at 288.

313. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 150.002(a)(3)).

314. *Id.*

315. *Id.* (citing *Levinson Alcoser Assoc., L.P. v El Pistolon II, Ltd.*, 513 S.W.3d 487, 494 (Tex. 2017)).

In this particular case, one of the certificate of merits was provided by a civil engineer while the defendant was a structural engineer.³¹⁶ The court of appeals was asked to determine if the certificate of merit satisfied the “area of practice” and the court held it did because all engineers in Texas are licensed simply as engineers and not by specific discipline.³¹⁷ In contrast, the architect in the case practiced in the area of design of hotels and other similar commercial structures.³¹⁸ The certificate of merit from the plaintiff’s architect simply stated that the architect’s area of practice involved investigation of existing buildings to diagnose problems.³¹⁹ The certificate of merit did not specifically state the architect was involved with the practice of hotel design or other similar construction.³²⁰ The court upheld the dismissal of the case against the architect but not the engineer.³²¹ The holding in this case seems troubling and the opposite of what should have happened. The author suspects the Texas Supreme Court may take up the case.

VII. TITLE/CONVEYANCES/RESTRICTIONS

A. CONVEYANCES

Van Dyke v. Navigator Group is an interesting case that seems at first to be straightforward.³²² The case involves the interpretation of a 1924 deed whereby Geo H. Mulkey conveyed property to G.R. White and G.W. Tom.³²³ The deed contains a “double fraction” reservation which stated—in part—as follows: “It is understood and agreed that one-half of one-eighth of all minerals and mineral rights in said land are reserved in grantors, Geo. H. Mulkey and Frances E. Mulkey, and are not conveyed herein.”³²⁴

The heirs of the Mulkey family filed suit claiming ownership of one-half of the minerals and the mineral rights related to the property by virtue of the above described reservation.³²⁵ The White and Tom heirs and assigns claim to own fifteen-sixteenths of the minerals and mineral rights.³²⁶ The court of appeals rejected the various deed interpretations advanced by the Mulkey heirs, including the infamous “double fraction,” and found instead the reservation to be a clear one-sixteenth mineral reservation.³²⁷ This author suspects the Texas Supreme Court will disagree with the court’s

316. *See id.* at 289–90.

317. *See id.* at 289.

318. *See id.*

319. *See id.* at 294.

320. *See id.*

321. *Id.*

322. *See Van Dyke v. Navigator Grp.*, 647 S.W.3d 901 (Tex. App.—Eastland, 2020 pet. granted) (mem. op.).

323. *See id.* at 903–04.

324. *Id.* at 904.

325. *See id.*

326. *See id.*

327. *See id.* at 907–08.

holding.³²⁸ The supreme court has taken up the case and oral arguments on the case were heard on October 6, 2022.³²⁹ A decision from the supreme court should be forthcoming any day.³³⁰

Tiner v. Johnson concerns the enforceability of 100-year option to repurchase property at a fixed price.³³¹ The facts are straightforward. In 1989, Tiner sold Johnson a piece of property located in Van Zandt County, Texas for a purchase price of \$50,800.87.³³² Section nine of the Purchase Agreement contained the following language:

Purchaser hereby grants to Seller the option . . . to repurchase the Property and any improvements subsequently located or constructed thereon . . . from Purchaser in accordance with the following requirements: (1) Seller must provide Purchaser with thirty (30) days['] advance written notice of its intent to exercise this Option; (2) The consummation of the reconveyance of the Property and any new Improvements from Purchaser to Seller (the "Option Closing") shall occur within thirty (30) days of Seller's notice of its intent to exercise the Option; (3) At the Option Closing, Seller shall pay Purchaser a purchase price equal to the total of (i) the Purchase price . . . (iii) plus one-half (1/2) of the fair market value of all New Improvements, if any, located on the Property. . . Option shall commence upon the Closing, and shall automatically terminate on March 31, 2089, at 11:59 p.m.³³³

The agreement went on to provide that it "shall bind and inure to the benefit of Seller and Purchaser and their respective heirs, administrators, executors, successors[,] and assigns."³³⁴

On March 20, 2019, Tiner sent Johnson a notice letter declaring their intent to exercise the option and repurchase their full fifty percent of the property for a purchase price of \$50,800.87.³³⁵ Johnson filed a lawsuit against Tiner, seeking a declaration that the option is void because it constitutes an illegal restraint on alienation and a violation of the rule against perpetuities.³³⁶ The trial court granted Johnson's motion for summary judgment and the court of appeals affirmed the trial court's judgment.³³⁷ The trial court did not state the reason behind their decision, so it was unclear whether it was based on the illegal restraint of alienation or a violation of the rule against perpetuities.³³⁸ However, the court of appeals affirmed the trial court by

328. *See generally id.*

329. *See Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), reh'g denied (June 16, 2023).

330. On February 17, 2023, the Texas Supreme Court issued its opinion. *See Van Dyke*, 668 S.W.3d 353, reh'g denied (June 16, 2023).

331. *See Tiner v. Johnson*, 647 S.W.3d 103, 105 (Tex. App.—Tyler 2022, pet. filed).

332. *See id.*

333. *Id.*

334. *Id.* at 110.

335. *See id.* at 106.

336. *See id.*

337. *Id.* at 107.

338. *See generally id.* at 107.

finding that the option was an illegal restraint on alienation.³³⁹ Relying on the guidance provided by the Restatement (Third) of Property on illegal restraints on alienation, the court found that the fixed price nature of the restraint combined with the 100-year duration constituted an illegal restraint on alienation.³⁴⁰ As the court explained:

The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property at his or her convenience at a price determined by the market. The more a restraint interferes with the owner's ability to transfer, the stronger the purpose justifying a direct restraint on alienation must be . . . If the price is fixed, the effect of the option is to discourage the improvement of the land, and the option is unreasonable unless its duration is specified. Even if the duration is specified, an option for a lengthy period may be unreasonable unless the length is justified by the purpose, or unless it is clear that the parties expressly bargained over the specified duration.³⁴¹

The court also addressed Tiner's argument that the Texas Supreme Court's recent decision in *Yowell v. Granite Operating Company* and § 5.043 of the Texas Property Code mandated reformation rather than declaring the option void.³⁴² The court distinguished the current case from *Yowell* and § 5.043 because neither *Yowell* nor § 5.043 address claims based on illegal restraint of alienation.³⁴³ Both § 5.043 of the Texas Property Code and *Yowell* only address reforming an option that violates the rule against perpetuities.³⁴⁴

B. DEED RESTRICTIONS

Rancho Viejo Cattle Co. v. ANB Cattle Co. is a complex case that dealt with the authority of one cotenant to build solid waste landfill facilities without the approval of another cotenant.³⁴⁵ The facts of the case are complicated, with even the existence of the cotenancy being up for debate, and have been simplified for the purposes of this discussion.³⁴⁶ The relevant facts are that ANB Cattle Co. (ANB) and Rancho Viejo Cattle Co. (RVCC) were entities owned by the families of two brothers that managed their mineral interests collectively.³⁴⁷ A portion of the mineral interest underlying both ranches were "mineral classified lands" where the minerals were owned

339. *Id.* at 108–09.

340. *See id.*

341. *Id.* (citing Restatement (Third) of Property: Servitudes § 3.4) (internal quotation marks omitted).

342. *Id.* at 111 (citing *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 352 (Tex. 2020); TEX. PROP. CODE ANN. § 5.043).

343. *Id.*

344. *See id.*

345. *See Rancho Viejo Cattle Co. v. ANB Cattle Co.*, 642 S.W.3d 850, 854–58 (Tex. App.—San Antonio 2021, pet. denied).

346. *See generally id.* at 854–58.

347. *See id.* at 854–55.

by the state.³⁴⁸ The Relinquishment Act of 1919 provides that the owners of the surface overlying mineral classified lands were entitled to enjoy the benefits of surface use payments equal to fifteen-sixteenths of all oil and gas developed.³⁴⁹ However, the surface use payments can only go to the surface owner of the mineral classified lands, so the two ranches entered into cross-conveyances in 1990 to allow for joint development of the mineral estate and later, in 1998, entered into a stipulation agreement to clarify the respective property holdings.³⁵⁰

In 2011, RVWM, an affiliate of RVCC filed for a permit to construct a municipal solid waste and landfill facility with accompanying floodwater management system and groundwater monitoring wells.³⁵¹ ANB argued that (i) the proposed improvements would prevent the development of the minerals on the tracts and argued that the proposed use violated ANB's rights as a cotenant, and (ii) that the 1990 and 1998 agreements were effectively restrictive covenants that limited the use of the land to hunting and grazing.³⁵² The trial court found that Rancho Viejo had "no legal authority to use the" disputed land as intended because the use was limited by restricted covenants to hunting and grazing.³⁵³ The court of appeals disagreed with the trial court on this point and reversed and remanded the case for further proceedings.³⁵⁴

The 1990 Cross-Conveyance provided in relevant part:

[T]he agreement of the parties that the Limited Partnership which is a co-owner of any portion of any of the [mineral classified lands] which lies within [that limited partnership's ranch] shall remain in exclusive possession of said lands and shall have the exclusive right to continue to occupy all portions of [the mineral classified lands] lying within [that limited partnership's ranch] for hunting and grazing purposes in consideration³⁵⁵

ANB argued that this language created a restrictive covenant which limited the parties use of the land to hunting and grazing.³⁵⁶ Relying heavily on the Texas Supreme Court's analysis in *Tarr v. Timberwood Park Owners Ass'n, Inc.*, the court of appeals looked to a long a string of Texas cases that highlight the fact that, although Texas jurisprudence does not favor restraints on the free use of land, "unambiguous covenants" are valid contracts between individuals and will be enforced.³⁵⁷ However, the concern of the court "when construing covenants is giving effect to the

348. *Id.* at 854.

349. *Id.* at 854–55.

350. *See id.* at 855.

351. *See id.* at 855–56.

352. *See id.* at 856.

353. *Id.* at 857.

354. *Id.* at 871.

355. *Id.* at 861.

356. *See id.*

357. *See id.* (citing *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018)).

objective intent of the drafters of the restrictive covenant as it is reflected in the language chosen.”³⁵⁸ The court focused on the fact that the 1990 Agreement used the phrase “exclusive right to continue to occupy” the land and did not include the words “restricted” or “only” and that the right to use land in a certain way is not the same as being limited to use the land in only that way.³⁵⁹ As the court reiterated, “[t]he words in a covenant may not be enlarged, extended, stretched or changed by construction.”³⁶⁰

JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass’n, is another case relying heavily on *Tarr*.³⁶¹ In *JBrice*, the Texas Supreme Court examined the following deed covenants to determine if the court of appeals and trial court were right to uphold the neighborhood association’s rules forbidding townhome rentals if such rentals would require the owner to remit state hotel tax:

[A]ll leases of any townhouse units must: (i) be in writing, and (ii) provide that such leases are specifically subject in all respects to the provisions of the Declaration . . . and that any failure by the lessee to comply with the terms and conditions of such documents shall be a default under such leases. Other than the foregoing, there shall be no restriction on the right of any townhouse owner to lease his unit. No Owner shall occupy or use his Building Plot or building thereon, or permit the same or any part thereof to be occupied or used for any purpose other than as a private single family residence for the Owner, his family, guests and tenants No Building Plot shall be used or occupied for any business, commercial, trade or professional purposes either apart from or in connection with the use thereof as a residence.³⁶²

The trial court found that *JBrice* had violated the residential use restriction.³⁶³ Although the court of appeals affirmed the trial court’s holding, they based their decision on § 204.010(a)(6) of the Texas Property Code, which provides: “Unless otherwise provided by the restrictions or the association’s articles of incorporation or bylaws, the property owners’ association, acting through its board of directors or trustees, may: . . . regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision”³⁶⁴

The court of appeals held that § 204.010(a)(6) granted the owner’s association the power to impose rules limiting short term rentals because the covenants were silent on any specific lease duration requirements.³⁶⁵ As discussed in *Rancho Viejo*, a covenant “may not be enlarged, extended,

358. *Id.* at 862 (citing *Tarr*, 556 S.W.3d at 280).

359. *Id.* at 863.

360. *Id.* at 864.

361. See *JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass’n*, 644 S.W.3d 179, 184 (Tex. 2022).

362. *Id.* at 182.

363. See *id.* at 183.

364. *Id.* at 187.

365. *Id.* at 188.

stretched or changed by construction.”³⁶⁶ The courts in Texas have consistently held that a limitation on a property owner’s use must be specific and “plainly prohibit that use,”³⁶⁷ or otherwise the owner who purchased the property without such notice “takes the land free from the restriction.”³⁶⁸

The Supreme Court of Texas began its analysis by reviewing the existing covenants.³⁶⁹ The association argued that the residential use requirement in the existing covenant essentially prohibited the use as a short-term rental because it was a commercial use.³⁷⁰ JBrice countered that the revenue from short term use is residential revenue as the residential occupancy of the property generates the revenue not some alternative commercial use.³⁷¹ Furthermore, JBrice pointed out that the language in the covenants prohibited restrictions not expressly contained in the covenants.³⁷² The Supreme Court of Texas sided with JBrice and rejected the association’s interpretation of the covenants that advocated for durational residential restrictions where none expressly included in the text.³⁷³ The court also rejected the argument that § 204.010(a)(6) of the Texas Property Code preempted the express language of the covenant that protected the owner’s ability to lease their property.³⁷⁴ The court held that the language in the covenant, which stated that “no restriction” on an owner’s right to lease is “a covenant that deprives the Association of the independent authority to restrict leasing, effectively preempting any rule-making authority that Section 204.010(a)(6) grants.”³⁷⁵

C. TENANT IN COMMON/REIMBURSEMENT

Henry v. Brooks concerns a reimbursement claim related to cotenants.³⁷⁶ Lelia Henry and Scott Henry married in 1995 and bought an acre of land from Lelia’s relatives to build a home.³⁷⁷ In 2014, Lelia died and left her entire estate to her daughter Lillian.³⁷⁸ Because the property was Lelia and Jerry’s homestead, Jerry had a constitutional right to a life estate in the entirety of the property and Lillian and Jerry became co-tenants subject to Jerry’s right to occupy the property in the entirety.³⁷⁹ Jerry

366. *Rancho Viejo*, 642 S.W.3d at 860 (internal quotations omitted) (citing *Tarr*, 556 S.W.3d at 280).

367. *JBrice*, 644 S.W.3d at 183.

368. *Id.* at 184–85 (citing *Davis v. Huey*, 620 S.W.2d 561, 566 (Tex. 1981)).

369. *Id.* at 184.

370. *Id.*

371. *Id.* at 184–85.

372. *See id.* at 185 (stating “there shall be no restriction on the right of any townhouse owner to lease his unit”).

373. *See id.* at 187–88.

374. *See id.* at 188.

375. *Id.* at 187.

376. *Henry v. Brooks*, 651 S.W.3d 657, 661 (Tex. App.—Tyler 2022, no pet.).

377. *See id.*

378. *See id.*

379. *See id.*

remarried in 2015.³⁸⁰ He continued to live in the house with his new wife, Betty, until his death in 2020.³⁸¹ Jerry left his estate to Betty, and she continued to live in the property after Jerry died.³⁸² In March 2020, Lillian sued for partition.³⁸³ Betty counterclaimed, seeking reimbursement for costs and expenses that benefitted the property and were never paid by Lillian.³⁸⁴ Specifically, Betty claimed reimbursement for three categories of expenses: (1) mortgage payments and insurance made during Jerry's life, (2) mortgage payments and insurance paid after Jerry died, and (3) the cost of procuring an easement necessary to access a garage that had been partially built on adjacent property.³⁸⁵ The trial court held Betty was not entitled to reimbursement and Betty appealed the ruling.³⁸⁶ The court of appeals began by explaining that a surviving spouse has the right to occupy a homestead for the "remainder of his life."³⁸⁷ The court then went on to examine the nature of a reimbursement claim.³⁸⁸ To establish a claim for reimbursement, a party must show "(1) an estate has contributed to another estate, (2) the contributing estate has not received a *quid pro quo*, and (3) the benefitted estate has thereby been unjustly enriched."³⁸⁹ With respect to Betty's first issue, the reimbursement for mortgage and insurance payments made during Jerry's life, the issue is the survivability of a reimbursement claim that would have belonged to the life estate.³⁹⁰ Lillian argued that the reimbursement claim was extinguished upon Jerry's death.³⁹¹ The court of appeals disagreed with Lillian and found that the reimbursement claim became a vested right "when Jerry paid on the mortgage principal and for the insurance."³⁹² The court held it was a right held by Jerry at the time of his death which passed on to Betty.³⁹³ The court distinguished its holding from the Texas Supreme Court's holding in *Clift v. Clift*, where the court held there was no reimbursement owed with respect to a claim for improvements.³⁹⁴ The court of appeals argued that there is a difference between the nature of improvements which will benefit the remainderman and payments for mortgage and insurance.³⁹⁵ However, the court of appeals sided with the trial court on the other two reimbursement claims.³⁹⁶ The court of appeals distinguished Betty's claim

380. *See id.*

381. *See id.*

382. *See id.*

383. *See id.*

384. *See id.* at 662.

385. *See id.*

386. *See id.* at 664–66.

387. *Id.* at 663 (citing Tex. Const. art. XVI, § 52).

388. *See id.* at 664–65.

389. *Id.* at 664 (citing *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988)).

390. *Id.* at 661.

391. *See id.* at 666.

392. *Id.*

393. *See id.*

394. *Id.* (citing *Clift v. Clift*, 72 Tex. 144, 10 S.W. 338 (1888)).

395. *Id.*

396. *See id.* at 667–69.

for reimbursement for mortgage payments and insurance paid after Jerry died because Betty was a cotenant with Lillian, and she had exclusive use of the property.³⁹⁷ The court of appeals found that the trial court did not abuse its discretion because it could have found that “Betty received a *quid pro quo* for her payments in the ability to continue residing on the property.”³⁹⁸

With respect to the third reimbursement claim related to the easement, the court of appeals also found that the trial court did not abuse its discretion.³⁹⁹ The easement was purchased pursuant to a settlement agreement between the parties that contained language releasing each party from future claims related to the easement, so it is possible for the trial court to find all claims relating to the easement had been released prior to Jerry’s death.⁴⁰⁰

VIII. MISCELLANEOUS

A. PREMISES LIABILITY

1. *Cattle—Invitee, Licensee or Trespasser*

Foote v. Texcel Exploration, Inc., discussed whether cattle were invitees, licensees, or trespassers on land being used as a well-site and for storage of tank batteries.⁴⁰¹ Styles owned land in Knox County which was subject to an oil and gas lease in favor of Texcel Exploration, which engaged Decker to operate and maintain the well-site and tank batteries.⁴⁰² Foote owned 650 head of cattle that Cypert agreed to graze for him.⁴⁰³ Cypert made arrangements with Styles for grazing rights on the land.⁴⁰⁴ When Decker was made aware that cattle would be grazing near the well-site, and pursuant to Texcel’s instructions, a single wire electric fence was constructed.⁴⁰⁵ The cattle were placed on the land for grazing on March 22, 2017, and immediately began to knock down the electrified fence.⁴⁰⁶ On April 4, 2017, during his normal morning check of the well and related equipment, Decker verified that the fence was still in position and electrified; however, that afternoon Cypert, checking on the cattle he was responsible for grazing, discovered oil and salt water on the cows in the tank battery area and in the pasture.⁴⁰⁷ The cattle pushed through the fence, broke a PVC pipe on the tank holding the salt water and oil, and caused a spill subjecting 300 head of cattle inside

397. *Id.* at 667–68.

398. *Id.* at 668 (citing *Penick v. Penick*, 783 S.W.2d 194, 195 (Tex. 1988); *In Interest of W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984)).

399. *Id.* at 668–69.

400. *See id.* at 669.

401. *See Foote v. Texcel Expl., Inc.*, 640 S.W.3d 574, 578 (Tex. App.—Eastland 2022, no pet. h.).

402. *See id.* at 578–79.

403. *See id.*

404. *See id.*

405. *See id.* at 579.

406. *See id.*

407. *Id.*

the fenced area to such contamination.⁴⁰⁸ According to Cypert, 132 head of cattle died as a result of ingesting oil.⁴⁰⁹ Foote brought suit based on premises liability claims, asserting that Texcel and Deckert owed a duty to protect the cattle and failed in such duty.⁴¹⁰ At the trial court, the jury found that the cattle were trespassers, not licensees, thereby activating the lower standard of duty under premises liability actions.⁴¹¹

On appeal, the court noted established Texas jurisprudence holding that the surface estate owner had to prove one of two elements to recover against the mineral lessee: (1) "that the lessee[] intentionally, willfully[,] or wantonly injured the cattle; or (2) that the lessee[] used more land than was reasonably necessary" for the intended purpose which "proximately caused an injury to the surface owner's[] cattle."⁴¹² Foote asserted that the cattle were licensees because they were there with express or implied permission of the mineral lessee.⁴¹³ Foote's theory, based on his invitee status, was that a business relationship existed between Foote, as the pasture lessee, and the landowner, and that such status should be extended to his cattle.⁴¹⁴ Notwithstanding Foote's argument, the Texas Supreme Court had previously held that, "in the absence of a lease provision to the contrary, the only duty owed by the operator of an oil and gas lease to the owner or lessee of the surface that is pasturing cattle is not to injure the cattle intentionally, willfully, or wantonly."⁴¹⁵ Under the *Warren Petroleum* decision, cattle are trespassers on the area of the well-site operations.⁴¹⁶ Therefore, the only duty owed to a trespasser is not to intentionally, willfully, or wantonly injure such trespasser.⁴¹⁷ Further, Texas jurisprudence has held that oil and gas operators have "no duty to fence, or otherwise protect" against livestock entering the premises under a mineral lease.⁴¹⁸ Because the trespasser standard of duty was not breached, Texcel and Decker were not liable.⁴¹⁹ It should also be noted that, on the claim of failure to provide appropriate warning of the potential danger of the fence (although the fence caused no injury to the cattle; the injury was caused by the cattle damaging the saltwater and oil holding tanks), the court relied upon the standard Texas rule that the landowner has no duty to warn or protect trespassers from obvious defects or conditions.⁴²⁰

408. *See id.*

409. *See id.* at 579–80.

410. *See id.* at 580.

411. *See id.* at 584.

412. *Id.* at 580 (citing *Satanta Oil Co. v. Henderson*, 855 S.W.2d 888, 889–90 (Tex. App. — El Paso 1993, no writ)).

413. *See id.* at 583.

414. *See id.*

415. *Id.* at 582 (citing *Warren Petroleum Corp. v. Martin*, 153 Tex. 465, 271 S.W.2d 410, 413 (Tex. 1954)).

416. *See id.* at 582.

417. *See id.*

418. *Id.* at 582 (citing *Brown v. Lundell*, 344 S.W.2d 863, 865–66 (Tex. 1961)).

419. *See id.* at 583.

420. *Id.* at 564.

2. *Dangerous Condition*

United Supermarkets, LLC v. McIntire involved injuries sustained by reason of a three-quarter inch divot in a grocery store parking lot.⁴²¹ McIntire, a regular customer at Market Street Grocery Store in Frisco, on June 11, 2018, parked her Ford F250 truck and exited the truck.⁴²² One of her heels caught on the divot, causing her ankles to buckle and break her foot and leg.⁴²³ McIntire sued the grocery store for premises liability based on the unreasonably dangerous condition of the three-quarter inch divot in the parking lot.⁴²⁴ The trial court granted the grocery store's motion for summary judgment, finding that there was no evidence showing that United had notice of the defect, that the defect posed an unreasonable risk of harm, and that the defect was not open and obvious to McIntire.⁴²⁵ The court of appeals reversed holding that McIntire's engineer report cited sufficient factual information as to the unreasonable risk and obvious nature of the defect, that it should be considered by the jury.⁴²⁶

However, the Texas Supreme Court determined the trial court decision was proper.⁴²⁷ As to the grocery store's duty to make safe or warn against dangerous conditions of which it was or should have been aware, the supreme court held that this divot was governed by prior supreme court decisions holding that "particularly innocuous or common place hazards are not unreasonably dangerous *as a matter of law*."⁴²⁸ Specifically, the supreme court pointed out what it had previously considered as relevant considerations: (1) clearly marked condition, (2) size of the condition, (3) previous injuries or complaints, (4) the subject condition was different from other conditions of the same type, and (5) whether the condition was naturally occurring.⁴²⁹ Here, the divot clearly did not satisfy any of those conditions, being less than an inch deep, no prior complaints or injuries had been reported, such divot was no different than other pavement defects, and that such defects are ubiquitous and naturally occurring.⁴³⁰ However, the court was quick to caution that its ruling was not a pronouncement on all pavement defects, certainly not as to larger or differently situated defects which could pose an unreasonable risk of harm.⁴³¹

421. See *United Supermarkets, LLC v. McIntire*, 646 S.W.3d 800, 801 (Tex. 2022) (per curiam).

422. See *id.*

423. See *id.*

424. See *id.*

425. See *id.*

426. *Id.* at 802.

427. *Id.* at 805.

428. *Id.* at 802 (emphasis added) (citing *Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 415 (Tex. 2010)).

429. *Id.* at 803.

430. *Id.* at 805.

431. *Id.*

3. Successor Owner Liability; Dual Capacity

In re Eagleridge Operating, LLC, involved a gas pipeline explosion.⁴³² The gas pipeline was installed by Aruba Petroleum, a minority working interest owner, which had an agreement with USG Properties Barnett II, LLC, the majority working interest owner, to act as the operator of record.⁴³³ The gas line was installed in 2013 during the time that Aruba was the well-site owner/operator, but Aruba's ownership interest was conveyed to USG in April 2017.⁴³⁴ In May 2017, USG engaged Eagleridge to serve as operator; the gas line ruptured a few months after Eagleridge assumed its operator position, and Eagleridge was sued by the injured plaintiff, Lovern.⁴³⁵ In its defense, Eagleridge alleged that Aruba should be responsible because it was the owner and operator at the time of installation of the gas line.⁴³⁶ The Texas Supreme Court viewed the dual capacity argument of Eagleridge as being controlled by the supreme court's prior decision in *Occidental Chemical Corp. v. Jenkins*.⁴³⁷ The *Occidental* decision rejected the "dual capacity" proposition that a property owner acts as both an owner and independent contractor when making improvements, and that, in general, upon subsequent conveyance of the property, the new owner assumed responsibility for the property's dangerous condition.⁴³⁸ Eagleridge, nevertheless, argued that *Occidental* was distinguishable because in *Occidental* there was a sole owner, whereas here there were joint tenant-in-common owners, with one charged with the operations of the property.⁴³⁹ In essence, Eagleridge contended that the joint ownership role constituted an exception to the rejection of the dual capacity holding in *Occidental*.⁴⁴⁰ Eagleridge also alleged other reasons, which were not asserted or pled previously; therefore, the supreme court reviewed the case only on whether the *Occidental* rejection of the "dual capacity" was applicable in a joint owner context.⁴⁴¹

Eagleridge relied upon the holding in *Strakos v. Gehring*, which rejected the "accepted work" doctrine pursuant to which an independent contractor is relieved of responsibility for faulty work because the work had been completed and accepted, even though in an unsafe condition.⁴⁴² However, the supreme court distinguished *Strakos* because it dealt with a third-party contractor, and not a property owner which made the improvements which contained dangerous property conditions.⁴⁴³ In accordance with

432. *In re Eagleridge Operating, LLC*, 642 S.W.3d 518, 520 (Tex. 2021).

433. *See id.* at 521–22.

434. *See id.* at 522.

435. *See id.*

436. *See id.* at 523.

437. *See id.* at 524 (citing *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 647 (Tex. 2016)).

438. *See id.* at 521.

439. *See id.*

440. *Id.*

441. *Id.* at 524.

442. *See id.* at 524 (citing *Stakos v. Gehring*, 360 S.W.2d 787, 790–91 (Tex. 1962)).

443. *See id.* at 526–27.

Occidental, responsibility for the dangerous condition was transferred to the new property owner upon conveyance of the property.⁴⁴⁴ The *Occidental* decision was not altered by the fact that the majority working owner, USG, made payments (fees and reimbursements of costs) to Aruba for the improvements made to the property.⁴⁴⁵ *Occidental* was based upon ownership and the compensation paid to Aruba did not alter its owner status.⁴⁴⁶ Specifically, the supreme court declined “to create an exception to *Occidental*’s dual-capacity analysis for a fractional working-interest property owner who also takes responsibility for wellsite operations as an operator of record.”⁴⁴⁷

4. *Adequate Warning—Open and Obvious Condition; Necessary-Use Exception*

SandRidge Energy, Inc. v. Barfield involved injuries to Barfield, a lineman working near an energized line.⁴⁴⁸ SandRidge had engaged Barfield’s employer, OTI Energy Services, to modify electrical distribution lines to SandRidge’s oil and gas operations.⁴⁴⁹ There were numerous energized electrical lines on each pole; the lower lines were de-energized, but the upper lines were left energized as a condition of the work.⁴⁵⁰ Barfield used an elevated bucket and an eight-foot-long “hot stick” to remove various energized apparatus on the pole.⁴⁵¹ This work was within four feet of the higher energized wires.⁴⁵² On one occasion, Barfield made contact with the energized wire, was knocked unconscious and had fifteen percent of his body covered in burns, which resulted in the amputation of his left arm at the shoulder and right arm below the elbow.⁴⁵³ Barfield sued SandRidge on a premises liability theory alleging SandRidge failed to provide adequate notice to Barfield of the dangerous condition.⁴⁵⁴

Upon review, the Texas Supreme Court looked at the issue of appropriate notice to warn of dangerous property conditions.⁴⁵⁵ The premises liability statute did not define adequate warning and the court concluded that such term would have the same meaning as used at common law.⁴⁵⁶ Pursuant to Restatement (Second) of Torts § 343, comment , an adequate warning at common law was such a warning that allowed the invitee to “decide intelligently whether or not to accept the invitation, or . . . protect himself

444. *See id.* at 528–29.

445. *Id.* at 528.

446. *See id.* at 528–29.

447. *Id.* at 529.

448. *See SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 563–64 (Tex. 2022).

449. *See id.* at 564.

450. *See id.*

451. *Id.*

452. *See id.*

453. *Id.*

454. *See id.*

455. *See id.*

456. *Id.* at 566 (discussing TEX. CIV. PRAC. & REM. CODE ANN. § 95.002).

against the danger if he does accept it.”⁴⁵⁷ Therefore, when the invitee had “knowledge and full appreciation of the nature and extent of danger,” the owner had no duty to warn of such danger.⁴⁵⁸ Barfield admitted that he knew the supply line was energized and dangerous, and he had performed such work hundreds of times.⁴⁵⁹ Therefore, Barfield had adequate knowledge that could not be improved upon by SandRidge.⁴⁶⁰

Furthermore, the supreme court addressed the purported “necessary-use exception” to the open and obvious doctrine.⁴⁶¹ The essence of such exception is that, if the dangerous condition is so dangerous an invitee is unable to take measures to avoid the risk, no warning can be adequate; therefore, the only solution is to make the condition safe.⁴⁶² But, the court concluded that the application of that doctrine was inapplicable to the facts in this case because such work could, in fact, be performed safely (as evidenced by months of such work prior to the accident), and the worker had appropriate knowledge of the danger and appropriate working equipment and conditions.⁴⁶³ Therefore, the court did not address the necessary-use doctrine exception to the open and obvious condition requirement as it applied to the contractor.⁴⁶⁴

B. BUSINESS ORGANIZATION

1. *Indemnification and Reimbursement*

In re DeMattia involved a writ of mandamus concerning the right of a former member of a limited liability company to seek indemnification and reimbursement for legal fees.⁴⁶⁵ DeMattia was previously a managing member of Restoration Specialists, LLC (Restoration).⁴⁶⁶ Restoration was suing DeMattia relating to certain actions he took while he was the managing member.⁴⁶⁷ DeMattia was seeking the advance of legal fees as permitted by Restoration’s regulations.⁴⁶⁸ Restoration argued that DeMattia was not entitled to legal fees because the regulations only applied to current and not former members and, even if they did apply, DeMattia had unclean hands and should not be granted advance of his legal fees.⁴⁶⁹ Although there was limited case law in Texas on the subject of advancement, there was case

457. *Id.* at 566–67 (citing *Austin v. Kroger Tex.*, 465 S.W.3d 193, 203 (Tex. 2015)).

458. *Id.* at 567 (quoting *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 788 (Tex. 2021)).

459. *See id.* at 564.

460. *Id.* at 568.

461. *Id.*

462. *See id.*

463. *Id.* at 569.

464. *See id.*

465. *In re DeMattia*, 644 S.W.3d 225, 227 (Tex. App.—Dallas 2022, no pet. h.).

466. *See id.* at 228.

467. *See id.*

468. *See id.*

469. *See id.*

law in Delaware.⁴⁷⁰ As the court explained, advancement is an “‘important corollary to indemnification’ because it provides corporate officials with immediate interim relief from the burden of paying for a defense.”⁴⁷¹ The court of appeals further explained that advancement and indemnity were separate but interrelated concepts, and a person can be entitled to advancement even though they may not be entitled to indemnity.⁴⁷² The language in the regulations stated:

To the fullest extent permitted by the Act: (a) the Company shall *indemnify* each Member who was, is, or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding (Proceeding), any appeal thereof, or any inquiry or investigation preliminary thereto, by reason of the fact that *he or she is or was a Member*; (b) the Company shall pay or *reimburse* a Member for expenses incurred by such Member (i) in advance of the final disposition of a Proceeding to which such Member was, is, or is threatened to be made a party, and (ii) in connection with his or her appearance as a witness or other participation in any Proceeding.⁴⁷³

Restoration argued that the plain language of the regulation applied indemnification to current and future members, but advancement was limited to current members.⁴⁷⁴ The court of appeals disagreed, holding that the advancement clause incorporated the definition of “Proceeding” from the previous clause.⁴⁷⁵ Restoration also argued that public policy prevents the enforcement of the advancement provision because it would “(1) . . . radically skew the litigation dynamics and (2) [DeMattia] has unclean hands.”⁴⁷⁶ Relying on the strong public policy favoring preservation of the freedom to contract, the court upheld the advancement condition, reasoning that to hold otherwise would “turn every advancement case into a trial on the merits of the underlying claims of official misconduct,” and “Restoration’s allegations of misconduct do not change the nature of the right relator has to advancement of fees.”⁴⁷⁷

2. *Directors—Fiduciary Duty to Corporation Only*

In re Estate of Poe involved a corporate transaction for the issuance of shares to the sole director.⁴⁷⁸ In a somewhat unusual structure, Dick Poe, the

470. *See id.* at 230 (explaining that while “[t]here is limited Texas case law concerning advancement under the Texas Business Corporation Act or the Texas Business Organizations Code[,] the courts of Delaware have addressed advancement on numerous occasions, and courts throughout the United States, including Texas, look to Delaware on matters of corporate law”).

471. *Id.* at 230 (citing *In re Aguilar*, 344 S.W.3d 41, 46 (Tex. App.—El Paso 2011)).

472. *Id.*

473. *Id.* at 230–31 (emphasis added).

474. *See id.* at 232.

475. *Id.* at 233.

476. *Id.*

477. *Id.* at 234 (citing *L Series, L.L.C. v Holt*, 571 S.W.3d 864, 875 (Tex. App.—Ft. Worth 2019, pet. denied); *Reddy v. Elec. Data Sys. Corp.*, No. CIV.A. 19467, 2002 WL 1358761, at *5–6 (Del. Ct. Ch. June 18, 2002)).

478. *See In re Est. of Poe*, 648 S.W.3d 277, 280 (Tex. 2022).

father and patriarch of a business empire—consisting of three automobile dealerships, a shopping center, and other properties—controlled all of the business operations through PMI, a corporation which acted as general partner of each of the limited partnerships owning the various business activities.⁴⁷⁹ PMI's sole shareholder was Richard Poe, Dick Poe's son, and its sole director was Dick Poe.⁴⁸⁰ When Dick Poe became ill and close to death, he caused the board of PMI to issue 1,100 shares of stock for \$3.2 million consideration.⁴⁸¹ Richard Poe's ownership interest was only 1,000 shares.⁴⁸² Therefore, the controlling ownership of PMI passed to the Estate of Dick Poe upon his death.⁴⁸³ Because Richard Poe knew nothing of this transaction, had not been notified of it, and did not approve of it, he filed suit against the Estate alleging Dick Poe's breach of an informal fiduciary duty owed to Richard and self-dealing.⁴⁸⁴ The trial court ruled against Richard Poe on all accounts, and submitted jury instructions which the Texas Supreme Court held were erroneous.⁴⁸⁵

The standard of review for issues relating to erroneous jury submissions was whether same were harmful to the jury's consideration and determination.⁴⁸⁶ Therefore, the court reviewed the entire record to determine its harmful effects.⁴⁸⁷ Relying on its prior decision in *Ritchie v. Rupe*, the court stated that Texas law concerning directors' fiduciary duty was that said duty ran directly to the corporation and not to individual shareholders.⁴⁸⁸

In *Richie*, which involved a minority shareholder in a closely held corporation, the Texas Supreme Court stated that absent other contractual or legal obligations, "the officer or director has no duty to conduct the corporation's business in a manner that suits an individual shareholder's interest when those interests are not aligned with the interest of the corporation and the corporation's shareholders collectively."⁴⁸⁹ The *Richie* court used as a measuring stick both the interests of the corporation and the shareholders collectively.⁴⁹⁰ Even though the *Poe* court recognized prior cases arising from a "moral, social, domestic or purely personal relationship of trust and confidence";⁴⁹¹ it, nevertheless concluded that "[o]n the contrary, *Richie* suggests those two duties [to the corporation and to

479. *See id.* at 281.

480. *See id.*

481. *See id.*

482. *See id.*

483. *See id.*

484. *See id.*

485. *Id.* at 282.

486. *Id.* at 286.

487. *Id.*

488. *Id.* at 287 (citing *Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014)).

489. *Id.* (citing *Richie*, 443 S.W.3d at 888–89).

490. *See Richie*, 443 S.W.3d at 888–89.

491. *See In re Est. of Poe*, 648 S.W.3d at 287 (citing *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005)).

shareholders] are incompatible.”⁴⁹² Therefore, the supreme court held: “We reaffirm this principle today and hold that a director cannot simultaneously owe these two potentially conflicting duties.”⁴⁹³ In conclusion, the *Poe* court restricted the *Richie* holding to exclude the phrase “shareholders collectively” and has taken a hardline stand to limit a director’s duty to the corporation’s interest only.⁴⁹⁴

3. *Convertible Debt*

Hotze v. IN Management, LLC, concerned a dispute among brothers in a closely held entity.⁴⁹⁵ Five brothers—David, Bruce, Richard, Mark, and Steven—owned and controlled the family-owned business, Compressor Engineering Corporation (CECO).⁴⁹⁶ The family business was structured in a number of limited partnerships of which of the general partner was IN Management, LLC.⁴⁹⁷ Prior to this dispute, all five brothers were managers and members of IN Management, LLC.⁴⁹⁸ When financial difficulties arose from a large uncollectable account receivable, three of the brothers sought financing to save the business’ existence.⁴⁹⁹ Prior to this, David was removed as a director and Bruce’s role as CEO was terminated.⁵⁰⁰ The remaining three brothers, to satisfy the existing bank’s forbearance agreement requirements, obtained a \$2.5 million loan from an outside investor to a new partnership, Troika Partners, which loaned the money to CECO.⁵⁰¹ The note executed by CECO to Troika contained a conversion provision allowing such debt to be converted to CECO stock.⁵⁰² The then existing CECO board approved the loan and terms.⁵⁰³ Three months after the loan, Troika sent a notification requiring conversion of \$38,000 in principal and \$203,000 in interest for shares in CECO, which gave Troika over a ninety percent ownership interest.⁵⁰⁴ David and Bruce sued the other brothers and Troika, alleging that the partial conversion was not consistent with the terms of the note.⁵⁰⁵

On appeal, the court reviewed the applicable provisions of the note, with the understanding that convertible debt terms are required to be specifically stated in the debt instrument, pursuant to Texas Business Organizations Code § 21.168.⁵⁰⁶ The court concluded that the promissory

492. *Id.* at 288 (citing *Richie*, 443 S.W.3d at 888–89).

493. *Id.*

494. *Id.* at 287–88.

495. *See Hotze v. IN Mgmt., LLC*, 651 S.W.3d 19, 21–22 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

496. *See id.*

497. *See id.* at 22.

498. *See id.*

499. *See id.* at 22–23.

500. *See id.* at 23–24.

501. *See id.* at 24.

502. *See id.*

503. *See id.*

504. *See id.*

505. *Id.*

506. *Id.* at 27 (citing TEX. BUS. ORGS. CODE ANN. § 21.168).

note did not, by its terms, allow a partial conversion based on the following provisions in the note.⁵⁰⁷ First, the note provided for the conversion of “the outstanding aggregate amount of principal . . . and unpaid interest.”⁵⁰⁸ The use of “aggregate” was held to mean total or combined, and would thus not allow a partial conversion, rather than the concept of including both principal and interest in the conversion, especially considering the note made no mention of any partial conversion.⁵⁰⁹ Second, the note terms required the note to be surrendered upon conversion, which the court held to be inconsistent with a partial conversion right.⁵¹⁰ Third, in contrast to the suggestion that the aggregate concept related to the combining of principal and interest, the court concluded that the phrase “*the* outstanding aggregate amount” referred to the entirety and stood in contradiction to a hypothetical phrase, “*an* outstanding amount,” which might have indicated a partial conversion was contemplated.⁵¹¹ Fourth, the court concluded that a right to convert all of the note does not necessarily mean that the right to convert a portion of the debt exists, because convertible debt instruments terms must be specified in the debt instrument.⁵¹² Fifth, the note contained and required an allocation notice as to whether and what amount of Class A or Class B stock would be the subject of the conversion; this allowed selection between classes of stock, not whether a partial conversion was allowed.⁵¹³ Sixth, although the board resolution allowed a partial conversion, the court found this third-party document to be extraneous and should not have been considered if it conflicted with the clear intent of the language in the note.⁵¹⁴ Finally, the contention that the resolution was a part of the loan agreement was thoroughly rejected, stating such interpretation:

[W]ould turn the rules and goals of contract construction on their heads if a separate writing by only one party to an agreement—not signed or agreed to by the other party and potentially not even known by the other party—could change the terms of an unambiguous agreement between two parties.⁵¹⁵

C. GOVERNMENTAL MATTERS

1. Zoning/Platting—Plat Approval

Schroeder v. Escalera Ranch Owners’ Ass’n involved a writ of mandamus brought by a homeowner’s association against the city planning and zoning commission.⁵¹⁶ The subject plat related to a single-family subdivision that

507. *Id.*

508. *Id.* at 27.

509. *Id.*

510. *Id.*

511. *Id.* (emphasis added).

512. *See id.* (citing TEX. BUS. ORGS. CODE § 21.168).

513. *Id.*

514. *See id.* at 27–28.

515. *Id.* at 28.

516. *See Schroeder v. Escalera Ranch Owners’ Ass’n*, 646 S.W.3d 329, 332 (Tex. 2022).

(1) had as its only access the Escalera Parkway, which traversed through the Escalera Ranch Subdivision, and (2) did not have a second access for fire access as required in the International Fire Code.⁵¹⁷ The commission approved the plat based on the city's Unified Development Code and the condition that the new development, Patience Ranch Subdivision, would be connected with a future development to provide a second access point, reducing traffic flow on Escalera Parkway and meeting the International Fire Code requirement for two access routes.⁵¹⁸ The Escalera Ranch Owners' Association sued the commission members asserting that the plat was nonconforming and that the commission members abused their discretion.⁵¹⁹

The trial court granted the commission's plea to the jurisdiction, but the court of appeals reversed.⁵²⁰ In its review, the Texas Supreme Court noted that governmental immunity was subject to an exception for *ultra vires* acts where the governmental officer acted outside of their scope of authority.⁵²¹ As a general rule, mandamus would not be available in a simple exercise of discretion type of case; the only exception to such general rule was where the public officials clearly abused their discretion.⁵²² The court explained the difference between governmental immunity based upon the exercise of absolute discretion and cases where there was the exercise of judgment or limited discretion.⁵²³ When the public official's duty was to interpret various items, a misinterpretation or error in that discretion was not equivalent to overstepping the authority of such official and was not an *ultra vires* act.⁵²⁴ In this case, the commission duly considered the Unified Development Code requirements, including the International Fire Code, and determined the plat's compliance and approved the preliminary plat.⁵²⁵ These actions satisfied the requirements under Texas Local Government Code § 212.009(a) and the applicable provisions of the city's Unified Development Code.⁵²⁶ Having complied, even if erroneous, with its duty to review and interpret the required items, mandamus was not an appropriate attack.⁵²⁷

2. Condemnation

a. Inverse Condemnation—Water Shut-Off

City of Baytown v. Schrock was a federal Fifth Amendment takings case.⁵²⁸ Schrock owned rental property in Baytown for which the tenants

517. *See id.* at 331.

518. *See id.*

519. *Id.*

520. *Id.* at 332.

521. *Id.*

522. *Id.*

523. *Id.* at 333.

524. *Id.* at 334.

525. *Id.* at 335.

526. *Id.* at 336.

527. *See id.* at 336.

528. *City of Baytown v. Schrock*, 645 S.W.3d 174, 176 (Tex. 2022).

should have paid the utility bills, but they did not.⁵²⁹ Though there was some history with the attempted payment and then refusal to pay, the bottom line was that Schrock owed approximately \$1,157 in outstanding utility bills which he refused to pay, and for which the city refused to connect utility services to this and his other properties.⁵³⁰ The city's refusal to connect utility services was in violation of Texas Local Government Code § 552.0025(a), which read: "A municipality may not require a customer to pay for utility service previously furnished to another customer at the same service connection as a condition of connecting or continuing service."⁵³¹ Consequently, Schrock sued the city for inverse condemnation under the Fifth Amendment of the United States Constitution.⁵³²

The trial court directed verdict for the city and the court of appeals reversed based on *Penn Central Transportation Co. v. City of New York*, concluding additional facts as to the city's bad faith needed to be explored.⁵³³ Consequently, the issue presented to the court was whether the claim of economic harm resulting from the improper enforcement of a municipal ordinance amounted to a federal regulatory taking.⁵³⁴ The Texas Supreme Court determined that *City of Houston v. Carlson* was the operative precedent,⁵³⁵ which held that enforcements of municipal statutes which did not regulate property use cannot constitute regulatory takings even with invalid enforcement action by the state.⁵³⁶ A contrast must be made between ordinances with a basis of land use regulation and those which do not. Therefore, based on the facts in this case, the court concluded that the "[p]roperty damage due to civil enforcement of an ordinance unrelated to land use, standing on its own, is not enough to sustain a regulatory takings claim."⁵³⁷ On the other hand, the court did state that under appropriate facts and circumstances, the enforcement of such an ordinance might be considered a taking.⁵³⁸

Importantly, there was a concurring opinion by four justices, the point of which was to distinguish between a federal United States Constitution Fifth Amendment taking and a Texas Constitution article I § 17(a) taking.⁵³⁹ These clauses are not identical, although many courts have treated them as being equivalent.⁵⁴⁰ The Fifth Amendment of the United States

529. *See id.* at 176–77.

530. *See id.*

531. *Id.* at 177 n.7 (quoting TEX. LOC. GOV'T CODE ANN. § 552.0025(a)).

532. *See id.* at 177.

533. *See id.* at 178 (citing *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (setting forth the following factors: (1) economic impact of the regulation, (2) extent of interference by the regulation with distinct investment expectations, and (3) the extent and character of the government action)).

534. *Id.* at 180.

535. *See id.* at 176 (citing *City of Houston v. Carlson*, 451 S.W.3d 828, 833 (Tex. 2014)).

536. *See id.* at 179–80 (citing *Carlson*, 451 S.W.3d at 832).

537. *Id.* at 180.

538. *Id.*

539. *See id.* at 182 (Young, J., concurring).

540. *See id.*

Constitution provides: “[N]or shall private property be taken for public use without just compensation.”⁵⁴¹ Whereas, the Texas Constitution provides: “No person’s property shall be taken, damaged, or destroyed . . . or applied to public use without adequate compensation”⁵⁴² Therefore, the Texas Constitution was more broad, having included “damaged, destroyed” and applied to public use, in addition to a taking as set forth in the United States Constitution.⁵⁴³ Further, the concurrence suggested additional questions that should be addressed in appropriate future cases: (1) obligation to mitigate property damage, and (2) the doctrine of proximate cause.⁵⁴⁴ Therefore, for future Texas taking cases, practitioners should be keenly aware of the additional possible claims under the broader Texas Constitution provisions for taking, as well as the possible adoption of mitigation and causation factors in assessing damages.

b. *Common Carrier—Pipeline*

Hlavinka v. HSC Pipeline Partnership, LLC, determined whether polymer-grade propylene is an oil product qualifying for a common carrier, and provided additional color on what may be the highest and best use of land.⁵⁴⁵ HSC brought a condemnation action for a thirty-foot pipeline easement across Hlavinka’s property for the transportation of its polymer-grade propylene to a third-party user.⁵⁴⁶ Hlavinka challenged whether this use qualified HSC for condemnation powers and provided evidence of a higher and better use of its land than its then existing agricultural value.⁵⁴⁷ The trial court agreed with HSC on all points, but the court of appeals determined that public use was a fact for jury determination, not a legal determination, and held that the evidence on the change in use should have been excluded.⁵⁴⁸

The Texas Supreme Court held that HSC could be a common carrier under either Texas Business Organizations Code § 2.105 or Texas Natural Resources Code § 111.002, and that polymer-grade propylene was a byproduct of crude petroleum, which was sufficient to recognize the condemnation authority for common carrier pipelines.⁵⁴⁹ The loop was closed when the Texas Supreme Court, relying on its prior decisions in the *Texas Rice* cases,⁵⁵⁰ held that public use was satisfied if the pipeline served

541. *Id.*

542. *Id.*

543. *See id.* 182–83.

544. *See id.* at 185.

545. *See Hlavinka v. HSC Pipeline P’ship, LLC*, 650 S.W.3d 483, 487–488 (Tex. 2022).

546. *See id.* at 489.

547. *See id.*

548. *Id.* at 490.

549. *Id.* at 492.

550. *See id.* at 494 (citing *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC (Texas Rice I)*, 363 S.W.3d 192 (Tex. 2012); *Denbury Green Pipeline-Texas, LLC v. Tex. Rice Land Partners, Ltd. (Texas Rice II)*, 510 S.W.3d 909 (Tex. 2017)).

just one customer unaffiliated with the pipeline owner.⁵⁵¹ Here, the court rejected the Hlavinka's assertion that the *manufacturer* of the product and the *pipeline owner* (as compared to the user of the product and pipeline owner) must both be unaffiliated.⁵⁵² Further, the supreme court overruled the court of appeals holding that the question of whether a particular use is a public use is a judicial question and not a factual question for the jury.⁵⁵³

On the issue of the market value for condemnation purposes, the court reiterated the standard rule that a fact finder should determine the highest and best use in setting a market value for condemned property.⁵⁵⁴ The current use (in this case agricultural) is generally considered the highest and best use, but that presumption can be rebutted only if the "property [is] adaptable and needed or would likely be needed in the near future for another use."⁵⁵⁵ This was an unusual case inasmuch as Hlavinka had acquired the property not for agricultural use, but to be used a pipeline farm.⁵⁵⁶ Hlavinka had within the past two-years sold two other pipeline easements at significantly greater values than the value of farmland, and the court held that such arms-length sales within the recent past (two years), could be admitted as evidence for the fact finder to determine valuation.⁵⁵⁷ In other words, a different use valuation could be shown if there was a "'reasonable probability' that the land would 'likely be needed in the near future for another use.'"⁵⁵⁸

c. *Interurban Railroad.*

Miles v. Texas Center Railroad & Infrastructure, Inc., determined whether the proposed Dallas to Houston highspeed rail project run by the defendant had eminent domain powers.⁵⁵⁹ A landowner, Miles, objected to Texas Central and its sister corporation, Integrated Texas Logistics, Inc. (collectively, Texas Central Entities), entering onto Miles' land for the purpose of surveying for the potential highspeed rail project.⁵⁶⁰ The highspeed rail project would consist of trains up to 672 feet long carrying 400 passengers at 205 mph, with rights-of-way of 328 feet on average and 100 feet at a minimum, with some embankments and viaducts as part of the 240 mile highspeed rail project.⁵⁶¹ The Texas Central Entities claimed eminent domain power (including the right to enter upon Miles' land for surveying purposes) under three Texas statutes: Texas Transportation Code

551. *Id.* at 495.

552. *See id.*

553. *Id.* at 495.

554. *See id.* at 496.

555. *Id.* (citing *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002)).

556. *See generally id.*

557. *Id.* at 497.

558. *Id.* at 498 (quoting *Zwahr*, 88 S.W.3d at 628).

559. *Miles v. Tex. Cent. R.R. & Infrastructure, Inc.*, 647 S.W.3d 613, 616 (Tex. 2022).

560. *See id.* at 617.

561. *See id.* at 642 (Young, J., concurring).

§§ 81.002(2), 112.002(b)(5) and 131.011–.012.⁵⁶² On the other hand, Miles asserted that the Texas Central Entities did not qualify under any of the statutes as a railroad or as an interurban electric railway.⁵⁶³ Essentially, in what was a 5-4 decision, the Texas Supreme Court determined that Texas Central Entities qualified as an interurban electric railway with eminent domain power, without addressing whether they qualified as a railroad.⁵⁶⁴

In its review of Texas Transportation Code, Chapter 131, the supreme court found no limitation in the statute on speed, size, distance, extent of right-of-way, utilization over water bodies (or bridges related thereto), or other right-of-way systems (such as streets, railways, turnpikes or the like).⁵⁶⁵ Also, the court found that statutory construction, even for eminent domain statutes, allowed construction “to embrace later-developed technologies when that statutory text allows.”⁵⁶⁶ Although Miles claimed that the statute became outdated when the early twentieth century usage of electric interurban railcars became extinct, the supreme court noted that this statute remained in effect after the 2009 recodification, which had the purpose to eliminate older statutes which have been repealed, were duplicative, or had expired.⁵⁶⁷ Based on the above and other matters addressed, the majority concluded that the plain language “confer[ed] eminent-domain authority on the Texas Central Entities.”⁵⁶⁸

Also addressed by the court was Mikes’ argument that the eminent domain authority carried the requirement under *Texas Rice I*, that there must be a reasonable probability of completion of the project, rather than merely filing articles of formation purporting to be an interurban electric railway.⁵⁶⁹ The court disagreed with this interpretation of *Texas Rice I* and *Texas Rice II*, stating they “do not support the reasonable-probability-of-completion test Miles propose[d], which would constitute an unwarranted sea change in eminent-domain law with far-reaching consequences.”⁵⁷⁰ Further, the supreme court explained that its language was focused on whether there was a reasonable probability of public use after construction, not as to the probability of completion of construction.⁵⁷¹ Finally, the court concluded that the Texas Central Entities did not just check a box, but, according to the requirements of the statute, were incorporated for the specifically authorized purposes expressed in Texas Transportation Code

562. *See id.* at 618.

563. *See id.* at 618–19.

564. *See id.* at 630 (majority opinion).

565. *See id.* at 621–22.

566. *Id.* at 623 (citing *San Antonio & A.P. Ry. Co. v. SwS. Tel. & Tel. Co.*, 93 Tex. 313, 55 S.W. 117 (Tex. 1900) (applying telephone use as an extension of telegraph); *Kaufman v. Islamic Soc’y of Arlington*, 291 S.W.3d 130 (Tex. App.—Ft. Worth 2009, pet. denied)).

567. *Id.* at 625.

568. *Id.* at 626.

569. *See id.* (citing *Texas Rice I*, 363 S.W.3d 192, 204 (Tex. 2012); *Texas Rice II*, 510 S.W.3d 909 (Tex. 2017) (stating that eminent domain powers cannot be obtained “merely by checking boxes . . . and self-declaring its common-carrier status”)).

570. *Id.* at 626.

571. *See id.* at 627.

§ 131.012, and that the Texas Central Entities were acting in furtherance of such statutory requirements.⁵⁷² Public use of the proposed high-speed railway was considered a given.⁵⁷³

The concurring opinions by Chief Justice Hecht and Justice Young determined that the Texas Central Entities could have qualified as a railroad company.⁵⁷⁴ Because the Texas Central Entities did not have railroad trains, railroad cars, or railroad tracks, there was an issue as to whether, under the railroad company statute, it qualified as an entity “operating a railroad.”⁵⁷⁵ These Justices pointed to the eminent domain powers under Texas Transportation Code § 112.053, which included condemnation for items such as right-of-way and roadbeds, all of which are required before laying track and operating trains.⁵⁷⁶

Three justices dissented, with two dissenting opinions written, respectively, by Justice Devine and Justice Huddle.⁵⁷⁷ In essence, all dissenting justices believed that the general rule requiring eminent domain decisions to favor the landowner should be strictly construed.⁵⁷⁸ For Justice Devine, the focus was on whether this project constituted a public use.⁵⁷⁹ Texas Constitution article 1, § 17(b), has excluded from public use “the taking of property . . . for transfer to a private entity for the primary purpose of economic development.”⁵⁸⁰ Justice Devine did not address the majority’s assertion that the public use issue was resolved under Texas Constitution article X, § 2, and in *West v. Whitehead*.⁵⁸¹ However, the dissent did raise the issue presented in *KMS Retail Rowlett, LP v. City of Rowlett*, in which the majority opened for further discussion on “Section 17(b)’s impact on public-use jurisprudence” concerning the elimination or limitation of deference to governmental entities’ declarations of public use.⁵⁸² The dissent considered the court to have squandered such opportunity; however, this ignored the distinction between a local municipality declaring a public use for an

572. *See id.* These activities included: \$125 million expenditures on the project, engagement of 100 technical experts and 200 employees and contractors, over 2,000 surveys of land for the project’s routing, an agreement to connect with Amtrak’s interstate rail system, hiring of prior successful operators as consultants and engineering companies with successful projects, and years of engagement with various federal and state employees regarding permits and safety rules. *Id.* at 618.

573. *Id.* (citing Tex. Const. art. X, § 2 (“Railroads . . . are hereby declared public highways, and railroad companies, common carriers.”); *West v. Whitehead*, 238 S.W. 976, 978 (Tex. App.—San Antonio 1922, writ ref.)).

574. *Id.* at 631 (Hecht, C.J., concurring), 635 (Young, J., concurring).

575. *Id.* at 631 (Hecht, C.J., concurring).

576. *Id.* at 631 (Hecht, C.J., concurring), 635 (Young, J., concurring) (both citing Tex. Trans. Code Ann. § 81.002(2)).

577. *Id.* at 636 (Devine, J., dissenting), 638 (Huddle, J., dissenting).

578. *See id.* at 639 (Huddle, J., dissenting).

579. *Id.* at 636 (Devine, J., dissenting).

580. *Id.*

581. *See id.* at 636–38.

582. *Id.* at 636–37 (citing *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 194 (Tex. 2019)). The KMS case was discussed in more detail by this author in J. Richard White & Amanda Grainge, *Real Property*, 6 SMU ANN. TEX. SUR. 289, 357 (2020).

easement and the constitutional declaration that a public railroad system is a public use.⁵⁸³ Therefore, this author does not believe the majority opinion in *Miles* squandered the opportunity to reconsider the deference to or limitation upon local governmental authorities' declaration of public use.⁵⁸⁴

Justice Huddle's dissent focused on the interpretation of the original interurban electric railway statute and the differences between that mode of transportation and modern highspeed railways, noting the "radically different land-use requirements," "scale of infrastructure," and "amount of property" utilized.⁵⁸⁵ Justice Huddle concluded that the majority exceeded a well-recognized general rule, that eminent domain statutes should be strictly construed in favor of the landowner, by disregarding the differences between the early 20th century interurban electric railways and the proposed highspeed electric railway in this case.⁵⁸⁶ Justice Huddle said the majority's focus on two words—electric and railway—allowed the interpretation of the statute out of context with the overall meaning of the statute.⁵⁸⁷ Further, the dissent argued that the later-developed technologies expansion, as authorized under *Kyllo v. United States*,⁵⁸⁸ was misplaced because *Kyllo* prevented the expansion of electronic technology under the unlawful search provisions of the United States Constitution, thereby protecting fundamental rights.⁵⁸⁹

As to the basic underlying tenants of eminent domain law, the majority, concurring, and dissenting justices all agreed.⁵⁹⁰ The Texas Constitution limits the power of eminent domain to purposes which benefit the public or specific entities granted eminent domain power under applicable law.⁵⁹¹ Further, the majority, concurring, and dissenting justices all agreed that eminent domain statutes are to be "strictly construed in favor of the landowner."⁵⁹² However, the various justices diverged on the interpretation and construction of the statutes granting eminent domain authority to railroad companies,⁵⁹³ and for interurban electric railway companies.⁵⁹⁴ The operative provision for a railroad company required that it must be a "legal entity operating a railroad."⁵⁹⁵ Justice Huddle's dissent cited the legislative enactment of the Texas High-Speed Rail Act, which created a public-private entity to develop a high-speed rail line where the government would

583. *See generally id.*

584. *See generally id.*

585. *Id.* at 639 (Huddle, J., dissenting).

586. *See id.* at 639–45.

587. *See id.* at 643.

588. *See id.* at 644 (citing *Kyllo v. United States*, 533 U.S. 27, 40 (2001)).

589. *Id.* at 645.

590. *See generally id.*

591. *Id.* at 619–20 (majority opinion) (citing Tex. Const. art. I, § 17(a)(1)).

592. *Id.* at 619 (citing *Texas Rice I*, 363 S.W.3d 192, 198 (Tex. 2012)).

593. *See id.* at 630–31 (Hecht, C.J., concurring), 639–40 (Huddle, J., dissenting) (both citing Tex. Transp. Code Ann. §§ 112.002(b)(5), .051(a)).

594. *See id.* at 623, 629 (majority opinion), 639 (Huddle, J., dissenting) (all citing Tex. Transp. Code §§ 131.011, .012).

595. *Id.* at 620 (majority opinion).

exercise eminent domain power and the private entity would operate the rail line, which was later repealed.⁵⁹⁶ Such statute, the dissent asserted, would not have been necessary had the existing electric interurban railway statute granted eminent domain authorities to such an interurban electric railway operation.⁵⁹⁷

Notwithstanding nor in spite of the doctrine of *stare decisis*, this opinion hangs on a 5-4 decision, and could be upset by future changes in the Texas Supreme Court composition.⁵⁹⁸

3. Governmental Immunity

a. Economic Development Contract

Town Park Center, LLC v. City of Sealy involved the issue of governmental immunity pursuant to an economic development contract under chapter 380 of the Texas Local Government Code.⁵⁹⁹ Town Park Center owned 71 acres of land within the Sealy city limits and entered into an Economic Development Agreement (EDA) to develop a commercial shopping center on the property including a HEB grocery store.⁶⁰⁰ The EDA provided for the developer to (1) develop the shopping center according to city approved plans; (2) construct and maintain a storm water collection and drainage system; and (3) provide infrastructure for water and waste water service from existing service lines.⁶⁰¹ The EDA also provided for the city (1) to make grant payments based on municipal sales and use tax revenues collected from the property; and (2) to provide an allocation of storm water capacity in a designated storm water retention pond.⁶⁰² However, when Town Park Center asked for the allocation of storm water capacity necessary to meet the center's needs, the city refused.⁶⁰³ Town Park Center filed suit against the city for breach of contract, and the city responded with a plea to jurisdiction and for governmental immunity.⁶⁰⁴ The trial court granted the city's plea to the jurisdiction and governmental immunity; the developer appealed.⁶⁰⁵

On appeal, the Houston Court of Appeals considered whether the EDA fell within the exception for governmental immunity when the governmental entity is authorized by statute or constitution to enter into a contract and does in fact enter into such contract.⁶⁰⁶ In such case, the

596. *Id.* at 645 (Huddle, J., dissenting) (citing Tex. High-Speed Rail Act, 71st Leg., R.S., ch. 1104, § 1, secs. 2(b), 6(b)(3), (9), 12, 1989 Tex. Gen. Laws 4564, 4564–75 (repealed 1995)).

597. *See id.*

598. *See generally id.*

599. *See Town Park Ctr., LLC v. City of Sealy*, 639 S.W.3d 170, 177 (Tex. App.—Houston [1st Dist.] 2021, no pet. h.).

600. *See id.*

601. *See id.*

602. *See id.*

603. *See id.*

604. *See id.* at 718.

605. *Id.*

606. *Id.* at 185.

sovereign immunity would be waived with respect to breach of claim suits.⁶⁰⁷ But, the city claimed it did not receive any services under the contract and, therefore, the waiver was inapplicable.⁶⁰⁸ Because the waiver requirements under Chapter 271 of the Texas Local Government Code did not define the term “services,” the court looked to other judicial authority defining such term, and held that services included “any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed.”⁶⁰⁹ Those services were not required to be the primary purpose for the agreement, but the contract must have provided for services to be rendered.⁶¹⁰ Additionally, the court of appeals noted that the requirements for immunity waiver under Texas Local Government Code § 271.152 generally required the contract to obligate the governmental entity to pay the claimant for goods or services.⁶¹¹ In construing the EDA, the court of appeals held that it was a contract for goods and services despite the fact that street improvements and infrastructure improvements were paid directly by the developer, and that the government’s only obligation was conditioned upon receipt of sales and use taxes.⁶¹² Sufficient services were provided to the city based upon the terms of the EDA, including: (1) the creation of employment opportunities, (2) promotion of economic development, (3) stimulation of business and commercial activity, (4) the city’s agreement to make grant payments to the developer, (5) the development requirements pursuant to development standards and land use and design requirements in the EDA, and (6) the dedication of the internal roads as a public right-of-way.⁶¹³ Such items constituted services within the definition of Texas Local Government Code § 271.151(2)(A).⁶¹⁴ In reaching this holding, the court distinguished *CHW-Lattas Creek, L.P. v. City of Alice*, where the construction was paid by the city, unlike the EDA which required Town Park Center to provide the construction.⁶¹⁵ Further, the court noted that in the EDA, there was language of the purpose of the agreement, including the stimulation of business and commercial activity—contribution to the economic development of the city by generating employment and other economic benefits to the city.⁶¹⁶ Therefore, the EDA was held to be a contract for goods or services within the meaning of Texas Local Government Code § 271.151(2).⁶¹⁷ This case should be instructive

607. *See id.* at 186 (citing TEX. LOC. GOV’T CODE ANN. § 271.152).

608. *Id.* at 180.

609. *Id.* at 186 (citing Hous. Cmty. Coll. Sys. v. HV VTW, LP, 589 S.W.3d 204, 210 (Tex. App.—Houston [14th Dist.] 2019, no pet.)).

610. *Id.*

611. *See id.* (citing Lubbock Cty. Water Control & Improvement Dist. v. Church & Akin, L.L.C., 442 S.W.3d 297, 304 (Tex. 2014)).

612. *Id.* at 189.

613. *See id.* at 187.

614. *Id.*

615. *See id.* at 188–89 188 (citing CHW-Lattas Creek, L.P. v. City of Alice, 565 S.W.3d 779, 782 (Tex. App.—San Antonio 2018, pet. denied)).

616. *Id.*

617. *Id.*

to practitioners for documenting Chapter 380 contracts as to the goods and services provided to the city, which should include provisions on the purposes and benefits to the city, in order to preserve breach of contract actions against the city, if necessary.⁶¹⁸

b. *Services Contract*

City of San Antonio v. Campbellton Road, Ltd. involved a dispute concerning an alleged breach of a contract between a developer and the city's agency, San Antonio Water System, regarding the construction of upsized sewer facilities and allocation of sewer capacity.⁶¹⁹ The contract provided that if Campbellton constructed the upsizing of the designated sewer facilities and paid the cost of same within 10-years, then it would be entitled to the sewer capacity allocation.⁶²⁰ Campbellton finished construction within the 10 years and claimed vested rights under the contract; however, the sewer system had allocated most of the upsize capacity to other users.⁶²¹ Although there was some issue about whether the appropriate impact fees had been timely paid by Campbellton, that aspect was remanded for further evidentiary proceedings.⁶²² In the trial court, the city pled to the jurisdiction, claiming that it had not waived its governmental immunity pursuant to such contract under Texas Local Government Code § 271.152, which was the issue addressed by the court of appeals.⁶²³ The relevant provisions of this statute applied only to contracts "providing goods or services to the local governmental entity."⁶²⁴ The appellate court determined that this contract did not meet the requirements of providing services to the government, based on numerous authorities with respect to governmental waiver of immunity.⁶²⁵ The vast majority of those cases dealt with purchase obligations undertaken by the government; whereas, in the subject case, the upsizing of the sewer facilities was solely for the benefit of Campbellton's two single family residential developments.⁶²⁶ The court distinguished other instances in which the governmental entity had agreed to purchase some item by payment of money or other consideration, such as building a parking facility for the benefit of the city.⁶²⁷ Further, the court held that if the city obtained an indirect and attenuated benefit, such would not satisfy the statutory requirements.⁶²⁸ Consequently, good practice

618. *See generally id.*

619. *See City of San Antonio v. Campbellton Rd., Ltd.*, 647 S.W.3d 751, 753 (Tex. App. — San Antonio 2022, pet. filed).

620. *See id.* at 754–55.

621. *See id.*

622. *Id.* at 757.

623. *Id.* at 758.

624. *Id.* at 758 (emphasis added) (citing TEX. LOC. GOV'T CODE § 271.152(2)(A)).

625. *Id.* at 758–59.

626. *Id.* at 761.

627. *Id.* at 761.

628. *Id.* at 762.

would dictate the establishment of a non-contingent payment obligation by the city for specific goods or services provided by the developer.

IX. CONCLUSION

Although there were no landmark cases, there were many significant decisions. Many of those were procedural in nature, such as in *MAP Res*, where the Texas Supreme Court reiterated the need for diligent inquiry and review of public records as a condition to satisfying the procedural due process requirements for substituted service, and in *Moss*, which overruled all conflicting cases and advised that service on a financial institution must be accomplished pursuant to Texas Civil Practice & Remedies Code § 17.028.⁶²⁹ The Texas Supreme Court's holdings in both *Signature* and *James* provided significant guidance to practitioners with respect to consequential damages, while *JBrice* reiterated the court's consistent guidance that practitioners should explicitly draft restrictive covenants because the court will narrowly interpret all restrictions.⁶³⁰

For those holding option rights to property, *D&H Properties* confirmed that a tax foreclosure sale extinguished that interest; therefore, practitioners need to create ways to monitor any valuable option rights and the underlying property's tax status.⁶³¹ While in *Tiner*, the court provided practitioners with invaluable drafting guidance when it invalidated a 100-year option.⁶³²

The saga on limitations for equitable subrogation of lien claims continued in *Howard III*.⁶³³ Recall that in *Howard II*, the Texas Supreme Court upheld an equitable subrogation lien claim when the refinancing loan maturity and bar date had lapsed, but remanded the case for determination of the accrual date for this creditor's equitably subrogated lien claims.⁶³⁴ *Howard III* analyzed conflicting law and held that the accrual date should be the maturity date of the refinancing loan.⁶³⁵ But with petition granted to the Texas Supreme Court, practitioners must wait for *Howard IV* for a final conclusion on this issue.

As a case of first impression, the Texas Supreme Court has now spoken on implied revocation of an existing offer in *Tauch*, concluding that an implied revocation by indirect means voids the initial offer and that the contact by a new holder of a loan voided any loan sale or assignment offers made to

629. See *Mitchell v. MAP Res. Inc.*, 649 S.W.3d 180, 184–85 (Tex. 2022); *U.S. Bank N.A. v. Moss*, 644 S.W.3d 130, 131 (Tex. 2022).

630. See *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 184–86 (Tex. 2022); *James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 397 (Tex. 2022); see also *JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n*, 644 S.W.3d 179 (Tex. 2022).

631. See *Target Corp. v. D&H Props., LLC*, 637 S.W.3d 816, 822 (Tex. App.—Houston [14th Dist.] 2021, pet. denied).

632. See *Tiner v. Johnson*, 647 S.W.3d 103 (Tex. App.—Tyler 2022, pet. denied).

633. See *PNC Mortg. v. Howard (Howard III)*, 651 S.W.3d 154, 156 (Tex. App.—Dallas 2021, pet. granted).

634. See *PNC Mortg. v. Howard (Howard II)*, 616 S.W.3d 581, 585 (Tex. 2021) (per curiam).

635. See *Howard III*, 651 S.W.3d at 156.

the debtor from the initial creditor.⁶³⁶ Expanding its rejection of the “dual capacity” argument in premises liability situations, *Eagleridge* held that a fractional working interest owner who inadequately constructed a pipeline and sold its ownership interest before the defective condition caused an injury was no longer a property owner and would not be liable under premise liability for defective construction.⁶³⁷ The scope of the fiduciary duty of a director was further limited in *Poe* to only the corporation’s interest; the *Poe* court expressly rejected the *Ritchie* opinion which allowed a dual appreciation for the corporation’s interests and the interests of all the shareholders collectively.⁶³⁸

Schrock is important, not for its holding, but rather for its advice to practitioners that a taking claim under the Texas Constitution is broader than under the Fifth Amendment of the United States Constitution.⁶³⁹ Similarly, *Miles* did not represent a significant legal holding, but has practical ramifications for the proposed Dallas/Houston highspeed train project.⁶⁴⁰

636. See *Angel v. Tauch*, 642 S.W.3d 481 (Tex. 2022).

637. See *In re Eagleridge Operating, LLC*, 642 S.W.3d 516 (Tex. 2021).

638. See *In re Estate of Poe*, 648 S.W.3d 277 (Tex. 2022); see also *Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014).

639. See *City of Baytown v. Schrock*, 645 S.W.3d 174 (Tex. 2022).

640. See *Miles v. Tex. Cent. R.R. & Infrastructure, Inc.*, 647 S.W.3d 613, 619 (Tex. 2022).

