CASE LAW UPDATE

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RECENT DEVELOPMENTS IN TEXAS CONSTRUCTION LAW

This paper summarizes recent appellate decisions affecting construction law in Texas.[1] The cases have been selected based on their relevance to construction law, but probably more specifically construction lawyers. A few are not construction disputes but address legal issues common to the construction industry. The selection of cases was made at the authors' discretion.[2] While we have endeavored to make this paper as comprehensive as possible, it should be used as a resource, and not to replace legal research.

For ease of reading, we have attempted to condense the case summaries to those facts most salient to the relevant construction law holdings. A summary that includes every fact mentioned in a judicial opinion would quickly balloon into a regurgitation of the opinions themselves. The summaries are intended to assist readers in identifying if the case is relevant to a particular area or dispute. But the summaries are not the holdings. We have exercised editorial discretion in omitting certain facts that were referenced in the opinions, but which (in the authors' best interpretation) were not decisive. We have also tried to limit discussion of complicated but not relevant procedural background, where possible. If you find any of these summaries useful, you should read the cases themselves to ensure that they are germane for any intended use.

I. CONSTRUCTION CONTRACTS

A. Change orders

In *Wood Group USA, Inc. v. Targa NGL Pipeline Company, LLC*, No. 01-21-00542-CV, 2023 WL 5280249 (Tex. App.—Houston [1st Dist.] Aug. 17, 2023, pet. filed) (mem. op.), the court of appeals held that a change order addressing all schedule or time impacts that the party "knew or should have known" about as of the date of the change order, precluded any recovery for other change orders for information known at that time.

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[1] The cases in this paper are from January 2023 through December 2023.

[2] Virtually every attorney and staff member at Allensworth assisted in the research and preparation of this paper. The firm thanks Karly Houchin, Travis Brown, Amy Emerson, Bo Balagia, Caitlin Larsen, Eddy Perez, Jordan Rhodes, Katherine Beran, Maria Korzendorfer, Matt Roland, Meredith Metaxas, Mikey Figler, Rebecca Busen, Jack Byrom, and Robert Derner for their assistance in tracking down cases and as contributing co-authors to the materials. Amy Emerson, with the assistance of Catherine Saba, took the lead on preparing and ensuring ultimate delivery of this paper in its current form. Nic White deserves special mention for keeping me on task. Christine Davitt, per usual, was indispensable with her help on the presentation. The firm also thanks Grant Nicar and Ian Lancaster for their contributions to the research and the materials incorporated into the paper. I owe a debt to my partners for their patience and support in allowing me to eat up unreasonable amounts of firm resources in the preparation of these materials. Finally, Karly Houchin spent an unimaginable amount of time editing the paper, and I owe her greatly. However, any errors that remain are her fault.

Wood Group is an important case for several reasons and is discussed elsewhere in this paper. The case arose out of a dispute over change orders and claims for additional time or money under a unit-pricing contract for construction of a natural gas pipeline. *Id*. at *1. The contractor had agreed to a $43 million not-to-exceed price based on unit pricing for $164.48 per linear foot for horizontal drilled bores in dirt and $351.58 per linear foot in rock. *Id*. During construction, the parties agreed that there were significant increases in the number and length of bores needed to construct the project and executed several change orders increasing the not-to-exceed to more than $60 million. *Id*. at **1, 5.

The contract had extensive provisions relating to the necessity of signed change orders, and the conclusive effect of same. *Id*. at **2–4. Through change orders and the contract, the parties agreed that authorized and executed change orders would be the sole method for increases to the contract time or price. *Id*. at *3. The contract also had common language requiring the contractor to provide written notice of the existence and circumstances giving rise to a change within 7 days of the date the contractor knew, or reasonably should have known, of the first occurrence of those circumstances. *Id*. at **3–4. The contract also required the contractor to substantiate its claims within 7 days after the first notice and recited that an executed change order (with the required notice) was a condition precedent to any adjustment in contract time or price, and that the contractor's failure to comply with the notice provisions would prejudice the owner. *Id*. at *4. The contract also stated that a change order constituted "full and final settlement and accord and satisfaction of all effects of the change"; that the contractor waived and released any claims arising out of, relating to, or resulting from a change order; and that change orders took precedence over contrary terms in the construction contract. *Id*.

The owner and contractor executed change order 3 on January 28, 2019. *Id*. at *5. The change order addressed additional borings, revised pricing, manpower and scheduling impacts, and additional subcontracting costs. *Id*. Through change order 3 the contractor represented that it had reviewed all information related to the changes and waived and released any claims for changes to the contract time or price "based upon information [the contractor] knew or should have known or events occurring prior to the date of the Change Order." *Id*.

After executing change order 3, the contractor submitted additional change orders seeking increases in the contract price and time. *Id*. at *6. The owner rejected these change orders and funded the remainder of the project (with approved change orders). *Id*. After the contractor submitted additional change orders after the project was completed, the owner filed a declaratory judgment lawsuit seeking to establish that change order 3 precluded recovery of other changes arising out of or relating to events known to the contractor when it executed change order 3. *Id*. The contractor counter claimed for breach of contract and quantum meruit. *Id*. at **6–7. At the trial court, the owner successfully moved for summary judgment on its affirmative declaratory judgment claim and against the contractor's claims for (1) increases in the contract time and price through the rejected change orders and (2) attorney's fees under Chapter 37 of the Texas CPRC (declaratory judgments act). *Id*. at *7. The trial court found that change order 3 was an accord and satisfaction of all claims in the later change orders that were known to the contractor as of change order 3's execution. *Id*. at *9. The court of appeals affirmed. *Id.* at *18.

The contractor argued that change order 3 was limited to its subject matter and did not release or waive "all claims" contained in later proposed change orders. *Id*. at *10. The court of appeals rejected that argument, noting that not "all claims" had been waived, only those arising out of or relating to events known (or that reasonably should have been known) by the contractor as of the date of change order 3. *Id*. The court of appeals held that the later-submitted change orders all addressed circumstances that the contractor knew about when it executed change order 3.

B. Conditions precedent

In *Wood Group USA, Inc. v. Targa NGL Pipeline Co., LLC*, No. 01-21-00542-CV, 2023 WL 5280249 (Tex. App.—Houston [1st Dist.] Aug. 17, 2023, pet. filed) (mem. op.), (discussed above), the court also held that the contractor's claims for extensions of time and price were barred by contractual conditions precedent to change orders.

The construction contract required the contractor to submit two notices as a condition precedent to any right to an adjustment to the contract price or time. *Id*. at **3–4. First, the contractor had to provide written notice to the owner "of the existence of such circumstances" that would give rise to a change to contract price or time within 7 days of the date the contractor "knew or reasonably should have known of the first occurrence or beginning of such circumstance." *Id*. at *3. Second, the contractor had to submit a proposed change order "as soon as reasonably practicable" but in no event later than 7 days after the "completion of each such circumstance." *Id*. at *4. The owner argued on summary judgment and on appeal that the contractor failed to comply with both conditions precedent. *Id*. at **11–12.

The contractor countered that (1) it had complied because it provided notices of weather events causing delays and other workspace interruptions allegedly caused by the owner, and (2) determining the validity of those notices was a fact issue inappropriate for summary judgment. *Id*. at *13. The court of appeals disagreed. *Id*. It held that most of the notices were sent before execution of a change order governing *all* changes up to that date and that preempted recovery for anything known by the contractor as of the date of that change order. *Id*. at *14. While the contractor pointed to weekly progress reports that postdated the change order, the court held that these notices did not comply with the construction contract's conditions precedent. *Id*. at *15. The court noted that the agreement contained a form for submitting written change orders, and weekly progress reports did not comply with that form and did not set forth "in detail all known and presumed facts upon which [the] claim is based[.]" *Id*. Pointing to another provision in the contract, the court held that the weekly progress reports "serve[d] a different contractual function" to keep the owner apprised of the progress of the work. *Id*.

The contractor challenged the conditions precedent on three other grounds. First, it argued that Texas CPRC Section 16.071voided the short, 7-day notice provisions. *Id*. at *12. Section 16.071 states that a "contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void." Tex. Civ. Prac. & Rem. Code Ann. § 16.071. The court rejected this argument relying primarily on *El Paso County v. Sunlight Enterprises Co.*, 504 S.W.3d 922, 926–30 (Tex. App.—El Paso 2016, no pet.). Agreeing with that decision, the court of appeals held that a notice of an event

giving rise to a claim was different from a condition precedent to the right to sue. *Id*. at *13. The court relied on language in the agreement stating that the owner would be prejudiced by the contractor's failure to submit the contractually required notice. *Id*.

Second, the contractor argued that the owner had actual knowledge of the circumstances and breaches by the owner. *Id*. at *15. But the court noted that the contract contained language expressly disclaiming that oral "notice, shortness of time, or [the owner's] actual knowledge of a particular circumstance shall not waive, satisfy, discharge or otherwise excuse" the contractor's "strict compliance" with the notice provisions. *Id*.

Finally, the contractor argued that its notice complied because the "conditions were ongoing or continuous throughout the project" and that the owner's conduct had affected the contractor's work throughout the project. *Id*. The court rejected this argument as well, noting that separate provisions in the agreement specifically addressed reporting of "continuing circumstances." *Id*. The contract did not require the contractor to submit repeated notices for continuing circumstances, but still required the contractor to submit contractually compliant notice for the first circumstance. *Id*. Even so, the court held that the contractor had not submitted compliant notices of the first event, either. *Id*.

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Practice Note: Absent from the decision is any discussion of *substantial compliance* under *James Construction Group, LLC v. Westlake Chemical Corporation*, 650 S.W.3d 392 (Tex. 2022). As of this writing, the Texas Supreme Court has requested a response to Wood Group's petition for review.

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C. Contract formation

In *Chubb Lloyds Insurance Company of Texas v. Buster & Cogdell Builders, LLC*, 668 S.W.3d 145 (Tex. App.—Houston [1st Dist.] 2023, no pet.), the court of appeals held that the owners bound themselves to the terms of an AIA construction contract even though one of the owners did not sign the agreement, and their general contractor never countersigned it.

The contract formation facts here were extensive and contested. Two homeowners, Jeffrey and Mary Meyer, hired a general contractor to expand their home for approximately $360K. *Id*. at 147. The general contractor emailed a draft of an AIA form contract naming both homeowners as parties to the contract, but with only one signature line. *Id*. at 148. Several minutes after sending the single-signature-line contract, the general contractor transmitted a second contract that had separate signature lines for both homeowners. *Id*. Rather than signing the second version, Jeffrey Meyer signed and returned the original contract by email with a subject line reading: "[W]ould you please countersign it and send it back to me?" *Id*. at 149. Mary Meyer never signed the contract. *Id*. The general contractor never executed or returned a countersigned version of the contract but did proceed with performing the work. *Id*. at 150–51. Mary issued several checks to

the general contractor, approved a change order, and generally engaged with the general contractor regarding the requirements of the work, project specifications, materials, and pricing. *Id*. at 149.

During construction, a welding subcontractor started a fire that burned the house down. *Id*. at 147. The Meyers' property insurer, Chubb, paid $4 million to the Meyers, and then attempted to subrogate against the general contractor and its subcontractor. *Id*. The general contractor and the subcontractor moved for summary judgment on waiver of the subrogation claim, relying on the AIA standard provision waiving rights "for damages caused by fire or other causes of loss to the extent covered by property insurance or other insurance." *Id*. at 148. Chubb moved for summary judgment on the general contractor and subcontractor's waiver defense, arguing that the construction contract was not effective due to the failure of all the parties to execute it. *Id*. The trial court granted summary judgment for the general contractor and the welding subcontractor. *Id*. at 147.

The court of appeals held that the contract and the waiver provision were both enforceable, regardless of the parties' failure to fully execute it. *Id*. at 154–55. The court held that Jeffrey executed the contract when he signed the first version, binding him to its terms. *Id*. The court also held that the contract bound Mary without a signature, noting that contracts can be enforceable based on the acts of the parties unless the contract specifically states it is effective only if executed. *Id*. Specifically, the court held that Mary had manifested her assent by conduct, by being CCed on the email transmitting the original contract that listed her as a party, issuing checks, and "performing exactly as required under" the contract. *Id*. at 154.

The court also dispensed with several of Chubb's counterarguments. First, it rejected Chubb's argument that the general contractor had withdrawn its offer by sending a second agreement. *Id*. at 152. Instead, the court held that by signing the first version, Jeffrey rejected the second agreement, and the general contractor accepted the first by performing per its terms. *Id*. Second, the court held that there was a meeting of the minds despite the general contractor abandoning his efforts to get the second version signed, when the general contractor performed after receiving the first executed contract. *Id*. Third, the court rejected Chubb's argument that an executed contract was a precondition to its formation, as Jeffrey had requested a countersigned version of the contract. *Id*. at 153. The court noted that Jeffrey had executed the agreement before requesting a countersignature, indicating that he had not intended to make execution by both parties a condition precedent to the creation of an agreement. *Id*.

Despite the disputed facts, the court affirmed summary judgment for the general contractor and subcontractor, holding there was no genuine issue of material fact as to the creation of the contract, its terms, and the enforceability of the waiver provision. *Id*. at 154–55.

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Practice Note: Summary judgment cases are especially meaningful because they establish sufficient facts as a matter of law. The lack of full signatures issue is common, particularly in residential construction. The case therefore stands for the powerful proposition that if parties (including non-signing parties) treat the contract as effective by performance, legal terms (including the AIA's standard waiver of rights to the extent covered by insurance) remain effective.

Although the case does not break radically new ground on the "manifest assent [to contract] by conduct" case law, it did apply that doctrine to an AIA contract.

The trial court and the appellate court relied on the waiver of rights in the prime construction agreement between the general contractor and the homeowners. But the opinion does not address how the welding subcontractor could rely on that waiver provision even though it does not appear that subcontractor was a party to the prime construction agreement. Perhaps third-party beneficiary status was never challenged or addressed at the summary judgment level. Although Texas law generally presumes that non-signatories to a contract are *not* third-party beneficiaries, Texas courts have extended third-party beneficiary status to subcontractors who are referenced in the prime agreement's waiver. *See, e.g.*, *Am. Zurich Ins. Co. v. Barker Roofing, L.P.*, 387 S.W.3d 54, 62–63 (Tex. App.—Amarillo 2012, no pet.) (holding that inclusion of "Subcontractors" in ambit of waiver provision evidenced intent by parties to prime agreement that waiver would extent to the benefit of subcontractors); *Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 729–30 (Tex. App.—Dallas 1992, writ denied) (holding that inclusion of "Sub-contractors" within ambit of waiver provision evidenced intent that subcontractor could rely on waiver provision as third-party beneficiary).

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In *Borusan Mannesmann Pipe US, Inc. v. Hunting Energy Services, LLC*, No. 14-21-00694-CV, 2023 WL 5487433 (Tex. App.—Houston [14th Dist.] Aug. 24, 2023, no pet. h.)[3] (mem. op.), the court of appeals held that terms and conditions included in invoices from a steel pipe service provider created binding conditions on the recipient of the invoices.

Borusan markets and sells turnkey, finished-end steel pipe products. *Id*. at *1. Hunting offers a proprietary steel threading service called TLW, that is incorporated into Borusan's pipe products. *Id*. In 2019 and 2020, Borusan issued several purchase orders to Hunting (for their TLW threading services), through which Borusan sold its finished-end product to a pipe distributor, Sooner. *Id*. at *2. Sooner then sold the pipes to Concho. *Id*. at *1. Hunting issued invoices to Borusan that stated, "TERMS AND CONDITIONS APPLY AS STATED AT HUNTING-INTL.COM" and Borusan attached those terms and conditions in its correspondence with Sooner. *Id*. at *11. Borusan's purchase orders required Hunting to defend and indemnify Borusan, and Hunting's terms and conditions (incorporated into the invoices) required Borusan to defend and indemnify Hunting. *Id*. at **5, 12.

In mid-2020, Borusan's pipes failed in the field and Borusan and Hunting investigated the causes. *Id*. at *3. The reports demonstrated that although Hunting had complied with all the specifications in its services, Borusan's defective steel sourcing, or defective manufacturing processes caused or contributed to the failiure. *Id*. Sooner and Concho also investigated and reached similar results, functionally absolving Hunting of any responsibility. *Id*.

[3] Out of an abundance of caution, we have treated cases filed after August with no petition history as (no pet. h.) even though sufficient time has probably passed to make them (no pet.). When you are reading this, enough time has definitely passed to establish the petition history. Do not judge the author too harshly; parties sometimes seek extension of time to file a petition for review, and the author did not check every case in the Texas Supreme Court's database to conclude whether the deadline for filing a petition for review had passed without a motion to extend.

Hunting sued Borusan asserting claims for breach of contract based on the purchase orders (and invoices) seeking amounts owed by Borusan under them, testing and related expenses incurred by Hunting due to the pipe failures, expert witness fees, and attorney's fees. *Id*. at *4. Hunting also sought a declaration that Hunting did not owe indemnity to Borusan, but that Borusan owed an indemnity obligation to Hunting. *Id*. at *2. Borusan counterclaimed for breach of contract, claiming Hunting was responsible for the pipe failures, and a declaration that Borusan's purchase orders purchase orders applied to the pipe and required Hunting to indemnify Borusan, and that Hunting needed to defend Borusan from any claims by Sooner. *Id*. at *2.

The case proceeded to a bench trial, and the court issued findings of fact and conclusions of law that Borusan was responsible for the failures, Hunting had no responsibility for any failures, Borusan breached the purchase orders by providing defective pipe, Hunting owed no indemnity or defense to Borusan, but that Borusan must indemnify Hunting. *Id*. at **3–4, 8. The trial court entered judgment awarding Hunting damages and declaratory relief based on the indemnity provisions in Hunting's invoices. *Id*. at *4.

Borusan appealed, arguing that it was not bound by the indemnity provisions in Hunting's contract since the purchase orders constituted the applicable contract. *Id*. at *9. Borusan argued that since its purchase orders state that Borusan's terms and conditions were the only applicable terms "unless Borusan expressly agreed in writing to other terms[,]" no evidence supported the trial court's judgment that Borusan was bound by Hunting's terms and conditions referenced in its invoices. *Id*. The court of appeals disagreed, holding there was sufficient evidence to support incorporation of Hunting's terms and conditions into the parties' contractual relationship. *Id*. at **10–11. The appellate court relied on the trial court's findings of fact that "the Invoices from Hunting to Borusan, as well as the corresponding Borusan-Sooner POs are the commercial documents that govern the relationship between the parties[.]" *Id*. at *9. The court also cited Texas Business & Commerce Code § 2.207(b), which provides that a merchant's terms and conditions become part of the contract unless the original offer expressly limits acceptance to the terms of the offer, they materially alter the terms, or notification of objection to them was given within a reasonable time. *Id*. The court did not engage with a deep analysis of the applicability of that section, noting that Borusan failed to challenge that finding on appeal, and the court "decline[d] to perform the research and analysis for Borusan to argue whether Hunting's invoices were valid and enforceable contracts." *Id*. at *10.

Borusan also argued that there was insufficient evidence to show that the indemnity provision was incorporated into the terms and conditions. *Id*. at *11. But the court disagreed, crediting an email from Borusan to Sooner which attached Hunting's terms and conditions that contained the indemnity obligation. *Id*.

In *Webb v. Dynamic JMC Builders, LLC*, No. 07-22-00247-CV, 2023 WL 4220812 (Tex. App.—Amarillo June 27, 2023, no pet.) (mem. op.), the court of appeals held that there was a valid contract between a contractor and an owner to provide construction services in exchange for payment even without a formal written contract between the parties.

This case arose out of a restaurant remodeling project. The plaintiff, JMC Builders, was a construction company owned by Jeff Coomer specializing in metal work. *Id.* at *1. The defendant, Webb, owned a chain of restaurants and was remodeling a new restaurant in Lubbock. *Id*. Webb was a managing member of Mac's BBQ Partners Catering, which was owned by Mac's BBQ Partners, which itself was owned by Webb and four other individuals. *Id*. Webb and Coomer were friends. *Id*.

Webb told Cooner about his project in Lubbock and asked if he could borrow some equipment for the job. *Id*. Coomer agreed. *Id*. A few days later, Webb invited Coomer to visit the restaurant space and asked Coomer for some "manpower to come help him move some stuff around," and Coomer sent workers to assist. *Id*. Webb also asked Coomer to build tables and chairs for the restaurant and Coomer agreed even though he seldom did that type of work. *Id*. Eventually this arrangement snowballed until Coomer was handling the entire remodel. *Id*. There was no written contract between the parties. *Id*.

JMC filed a lien on the property after Webb failed to pay the amount owed for JMC's work. *Id*. JMC then filed suit against Webb individually for breach of contract when Webb failed to pay the outstanding balance of $104,030.47 after several requests for payment. *Id*. After a bench trial, JMC was awarded $104,040.47 in actual damages and $51,922.99 in attorney's fees. *Id*.

The first issue on appeal was whether there was sufficient evidence to support the trial court's finding that Webb acted in his individual capacity as a party to the contract with JMC. *Id*. at *2. Coomer testified he had no actual knowledge that Webb was acting as an agent of Mac's BBQ Partners Catering. *Id*. Webb confirmed that he never told Coomer outright that he was acting on behalf of Mac's but stated that Coomer knew that Webb had partners and therefore should have known he was contracting with Mac's. *Id*. Webb argued that the lease agreement (for the property where the work was performed) identified Mac's as the tenant and stated that the landlord paid $10,000 toward JMC for the project. *Id*. Webb also argued that Coomer identified "Macs BBQ Partners, LLC/Macs BBQ Partners Catering, LLC" as the contracting party when filing the lien. *Id*.

The court held that Webb's failure to disclose his agency capacity or identify the principal justified the trial court's finding that Webb was acting in his individual capacity. *Id*. The court noted that it was common in the construction business to be paid by entities other than the actual client. *Id*. The court further held that the fact that JMC filed a lien against Mac's did not relate to the time the agreement was entered into and was thus irrelevant to the question of agency. *Id*.

The second issue was whether there was sufficient evidence to support a finding that there was a contract between Webb and JMC, with Webb arguing there was no "meeting of the minds" that Webb was an individual party to the contract. *Id*. at *3. The court rejected this argument, as the record showed a meeting of the minds between Webb and Coomer that Webb would pay JMC to complete the remodel. *Id*.

D. Contract interpretation

In *U.S. Polyco, Inc. v. Texas Central Business Lines Corporation*, --S.W.3d--, 67 Tex. Sup. Ct. J. 62, 2023 WL 7238791 (Tex. Nov. 3, 2023) (per curiam)[4] the Texas Supreme Court held that a contractual provision regarding the division of payment between the contracting parties for certain improvements was not ambiguous because it was not subject to multiple reasonable interpretations.

Polyco and Texas Central contracted to develop and improve a parcel of land for an asphalt plant and rail shipping operations. *Id*. at *1. Under their contract, Polyco agreed to pay the first $1.2 million to make certain improvements that would ultimately be owned by Texas Central. *Id*. at *2. After Polyco incurred costs beyond $1.2 million to construct concrete slabs, Texas Central refused to pay the additional cost, arguing the slabs were not a "TCB Infrastructure Improvement" because Polyco had not obtained its prior written agreement for the slabs. *Id*. at *2.

The dispute turned on the proper interpretation of the italicized language in the following contract provision:

> "TCB Infrastructure Improvements" will mean the following improvements agreed to and shown generally in Exhibit X . . .
>
> (3) various concrete and ground surface improvement, including without limitation slabs for truck scales and racks, tank and appurtenant structures to house personnel, oil heating and steam generation equipment, curbs and planters for parking areas, *and other items in or adjacent to the Designated Areas as are agreed upon by TCB and [Polyco] in writing.*

Id. at *2 (emphasis in original). Polyco contended that the agreed-in-writing requirement applied only to "other items," while Texas Central contended that requirement applied to the entire series listed in the provision. *Id*. at *2.

The trial court sided with Polyco. *Id*. at *3. The appellate court examined the language de novo and applied two canons of construction: the series-qualifier canon and the last-antecedent cannon. *Id*. Under the series-qualifier canon the phrase "as agreed upon by TCB and [Polyco] in writing" would modify all items in the series, including various concrete improvements like the slabs. *Id*. But under the last-antecedent canon, that phrase would only modify the last item in the series—"other items in or adjacent to the [property]." *Id*. Punctuation decided that the last-antecedent canon should apply—the absence of a comma before "as are agreed in writing" indicated that the writing requirement applied only to "other items in or adjacent to the [property]." *Id.* After reaching this conclusion, the court of appeals moved on to "Other Considerations" beyond the contract text, concluding that the provision was ambiguous because the parties' strong disagreement on the provision's intent confirmed it was subject to multiple, reasonable interpretations. *Id*.

[4] Because the opinion has not been released for publication in the permanent law reports, it is subject to revision or withdrawal by the Court. The summary below is based on the opinion available as of the time of this writing. Page cites below are to Westlaw.

The Texas Supreme Court upheld the appellate court's construction of the contractual text but rejected its conclusion that the contract provision was ambiguous. *Id*. at *4. The Court relied on two textual indicators in determining the contract provision was unambiguous. *Id*. First, like the appellate court, the Supreme Court cited the lack of a comma or any other syntactical link between the phrase "in writing" and all items in the listed series. *Id*. Second, the provision stated that the specifically listed items in the series (*e.g.*, slabs for truck scales) were already "*agreed to* and *shown* generally in Exhibit X," which indicated no further agreement was necessary. *Id*. But the last phrase "and other items in or adjacent to the Designated areas as are agreed upon by [the parties] in writing" indicated separate items may be needed and how to proceed when such need arises by requiring written agreement. *Id*.

The Court concluded Texas Central's reading was not reasonable because it would require the Court to hold that the parties intended to mandate an agreement in writing to items that had already been listed as agreed without any textual basis for doing so. *Id*.

E. Indemnity provisions

In *Borusan Mannesmann Pipe US, Inc. v. Hunting Energy Services, LLC*, No. 14-21-00694-CV, 2023 WL 5487433 (Tex. App.—Houston [14th Dist.] Aug. 24, 2023, no pet. h.) (mem. op.) (reported on above) the court of appeals also reversed an award of indemnity for expert fees.

Based on its finding that Hunting had performed its services, but that Borusan's defective pipe caused its failure, the trial court (after a bench trial) entered a final judgment awarding Hunting damages, including "$173,009.72 in reasonable expert witness fees[.]" *Id*. at *4.[5] Borusan argued on appeal that these were not taxable court costs. *Id*. at *12. Hunting claimed the costs were recoverable per an indemnity provision requiring Borusan to indemnify Hunting for "ANY AND ALL CLAIMS." *Id*.

Without much analysis, the court of appeals agreed with Borusan, holding that the indemnity did "not provide that Borusan is to indemnify Hunting for all costs, expenses, or incidental expenses in pursuing Hunting's claims[.]" *Id*. at *13. Instead, the court held that it required Borusan to indemnify Hunting only "for *claims* arising out of the performance of the contract." *Id*. Accordingly, the court reversed the award of $173,009.72 to Hunting for reasonable expert witness fees. *Id*.

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Practice Note: Although not crystal clear from the opinion, the expert fees appeared to be those Hunting incurred in pursuing its claims against Borusan. *Id*. The indemnification provision itself did not mention expert witness fees, though even if it had the court's opinion probably would

[5] On appeal, the parties agreed that the correct amount was $170,8859.72 for expert fees, but that the trial court had included $2,150 for mediation services in this amount. *Id*. at *12 n.7. The appellate court concluded that the mediation fees were not recoverable for the same reasons it reversed recovery of the expert fees. *Id*. at *13.

not be any different, since it was limited to indemnity "FROM AND AGAINST ANY AND ALL CLAIMS," not for any claims that *Hunting* might have. *Id*.

Earlier in the opinion, the court analyzed *Borusan's* indemnity demand against Hunting. *Id*. at *5. In what is probably dicta, the court stated that an "indemnity provision does not apply to claims between the parties to the agreement; instead, it obligates the indemnitor to protect the indemnitee against claims brought by a person not a party to the agreement." *Id*. at *5 (quoting *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 20 S.W.3d 119, 130 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)). And the court had separately held that there was no statutory indemnity under Chapter 82, because there was no evidence that the failed pipe's users sued anyone. *Borusan*, 2023 WL 5487433, at *11. The court's reversal on Hunting's expert fees incurred in pursuing Hunting's claims was probably bolstered by the court's separate conclusions that (1) indemnity only applied to third-party claims; and (2) there were no third-party claims at issue. There are lines of cases limiting indemnity provisions to third-party claims, and several of them are included in the *Coastal* decision cited in *Borusan*. These cases should be read in context; it would come as a surprise to an insured that it has no right of indemnity against its first-party property insurer for denying indemnity based on the absence of a claim brought by a person who is not a party to the insuring agreement.

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F. Materiality of breach

In *Leafguard of Texas, Inc. v. Guidry*, No. 09-21-00034-CV, 2023 WL 3369176 (Tex. App.—Beaumont May 11, 2023, no pet.) (mem. op.), the court of appeals held that, because an owner insisted on continuing performance after a material breach, he could not rely on any prior material breach to excuse his own performance.

The dispute arose out of residential damage from Hurricane Harvey, including portions of the owner's roof and some interior drywall. *Id.* at *1. The owner retained the contractor to make repairs, including updating and replacing the siding and windows. *Id.* After installation, the owner notified the contractor of issues with the work, and the contractor made further repairs. *Id.* Despite the repairs, the owner argued that problems remained and refused to pay the contractor anything for the work. *Id.* The contractor filed suit for the contract price plus interest and attorney's fees. *Id.* The owner counterclaimed arguing the work was not only substandard but caused damage to his home, requiring him to incur substantial repair costs. *Id.* After a bench trial, the court found for the owner as to his claims for breach of contract in past and future damages, along with attorney's fees. *Id.* The trial court awarded the owner both past damages ($26,236) and future damages (around $27,703), along with attorney's fees. *Id*. The trial court also found that the contractor materially breached its contract, thereby excusing the owner's failure to pay the contract balance for work performed. *Id.* at *4.

On appeal, the court of appeals noted that, while a material breach may entitle a nonbreaching party to terminate the contract, when the nonbreaching party decides to treat the contract as continuing, the nonbreaching party may not then seek to excuse his own nonperformance. *Id.* (citing *Dowtech Specialty Contractors, Inc. v. City of Weinert*, 630 S.W.3d

206, 216 (Tex. App.—Eastland 2020, pet. denied)). The owner did not elect to terminate the contract, bring in a new contractor to do the job, or file suit as soon as he learned that the contractor had installed wrong siding on his house. *Leafguard*, 2023 WL 3369176, at *4. Instead, he claimed the benefit of the contractual bargain and requested the contractor provide and install the siding specified in the contract. *Id.* Because the owner chose to continue the contract, the court of appeals held he was not excused from paying the contractor under the contracts. *Id.*

Ordinarily, the court's finding would not have mattered, since the owner prevailed on damages and the contractor did not, and so materiality would not be an issue. But the court also found (as discussed below) that the owner's damages claims were not supported by legally or factually sufficient evidence. *Id*. at **5–7. As the court also found that the contractor had exclusively established the owner's breach by nonpayment, and that the owner could not rely on a material breach to excuse the owner's performance, it remanded for a trial on the owner's liability to the contractor on its payment claim. *Id*. at *8.

G. Priority of contract documents

In *Wood Group USA, Inc. v. Targa NGL Pipeline Co., LLC*, No. 01-21-00542-CV, 2023 WL 5280249 (Tex. App.—Aug. 17, 2023, pet. filed) (mem. op.) (discussed above), the court of appeals also addressed an order-of-priority clause's effect on a contractor's entitlement to adjustments in additional time or cost.

The construction contract included a list of clarifications stating that if any of the clarifications did "not meet the intent of your request for bid [they] can be discussed further and negotiated between" the owner and contractor. *Id*. at *4. One of the clarifications addressed costs for "work stoppages" or delays caused by the owner, natural disasters, and other delays. *Id*. The contract also contained an order-of-priority clause, resolving conflicts between contract documents by prioritizing (1) change orders or written amendments over (2) the agreement over (3) exhibits to the agreement. The contractor had relied on that clarification to rebut summary judgment precluding the contractor's recovery for changes. *Id*. at *17. In response, the court pointed to the order-of-priority clause and noted that the clarifications exhibits could not supersede the terms of the subsequently executed change order. *Id*.

H. Waiver of contractual right

In *Momentum Project Controls, LLC v. Booflies to Beefras LLC*, No. 14-22-00712-CV, 2023 WL 4196584 (Tex. App.—Houston [14th Dist.] June 27, 2023, pet. denied) (mem. op.), the court held that the AIA's standard nonwaiver-by-conduct provision did not preclude a party from waiving its right to arbitrate.

Momentum was hired as the general contractor on a daycare facility project. *Id*. at *1. Momentum and the project's owner had a payment dispute, resulting in Momentum suing in 2018. In the meantime, one of Momentum's subcontractors, Young Lee Plumbing, filed a separate suit (in 2020) against Momentum for breach of contract, and against the project's owner for foreclosure on Young Lee's mechanic's lien. *Id*. Young Lee's suit was consolidated with several other subcontractors' suits, and Momentum also asserted a counterclaim against Young Lee. *Id*. Young

Lee successfully moved for partial summary judgment against Momentum, securing a judgment for $57,958. *Id*. at *4. Because Young Lee's claims for attorney's fees remained pending, the lawsuit was set for trial in 2022. *Id*. at **2, 4. Two weeks before the trial Momentum moved to compel Young Lee to arbitrate. *Id*. at *5. As explained below in the arbitration section of this paper, the court of appeals held that Momentum, by substantially invoking the judicial process, had waived its right to compel Young Lee to arbitrate. *Id*. at *6.

Momentum argued that it could not waive its right to arbitrate through conduct, relying on the standard AIA A201-2007 General Conditions nonwaiver provision:

> **§ 13.4.2** No action or failure to act by the… Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing.

Id. at *8–9.[6] The court rejected Momentum's argument, holding that the same litigation conduct (waiting four years to move to compel arbitration, moving to compel arbitration on the eve of trial, and moving to compel only after losing summary judgment) manifesting Momentum's implied waiver of its right to arbitrate, also waived the AIA nonwaiver provision. *Id*. at *9.

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Practice Note: The waiver facts at issue are detailed below, but the court's primary bases for finding waiver were Momentum (1) waiting four years to compel arbitration after filing suit, (2) waiting until the eve of trial to move to compel, and (3) allowing Young Lee to secure summary judgment in the meantime.

Nonwaiver provisions *can* be effective to prevent waiver. In *Shields L.P. v. Bradberry*, 526 S.W.3d 471 (Tex. 2017), a lessee unsuccessfully argued that the landlord waived a nonwaiver provision by accepting late rental payments. *Id*. at *480. But the nonwaiver provision specifically stated that the landlord's "acceptance of late installments of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of this Lease in the future." *Id*. Although the Texas Supreme Court agreed that "a nonwaiver provision absolutely barring waiver in the most general terms might be wholly ineffective" it held that the nonwaiver provision could not result in waiver through conduct (acceptance of late rent) that was expressly referenced in the nonwaiver provision itself. *Id*. at 484.

In distinguishing *Shields*, the appellate court in *Momentum* held that the AIA's "nonwaiver clause is not as specific as the clause" in *Shields*. *Momentum*, 2023 WL 4196584, at *9. Accordingly, the court of appeals held the AIA nonwaiver clause was not effective to categorically vitiate implied waiver and could itself be waived by conduct. *Id*. Parties should not over-rely on the AIA's nonwaiver provision (now § 13.3.2 of the current A201-2017) in resisting waiver

[6] The court held that Young Lee's subcontract incorporated the A201 General Conditions. *Id*. at *4.

arguments. Transactional lawyers should also consider incorporating into the nonwaiver provision specific acts that will not constitute waiver, or risk their client's waiver through conduct.

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II. CONSTRUCTION LITIGATION

A. Attorney's fees

1. Equity of attorney's fees award

In *AdvanTech Construction Systems, LLC v. Michalson Builders, Inc.*, No. 14-21-00159-CV, 2023 WL 370513 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, no pet.) (mem. op.) (discussed in more detail immediately below), the court also addressed whether attorney's fees were equitable under Texas Property Code § 53.156.

Legally sufficient evidence supported the trial court's finding that a subcontractor (through its employee) had filed false information with several liens. *Id*. at *10. The court of appeals concluded that was a sufficient basis to uphold the trial court's attorney's fee award, and it was within the trial court's discretion to find that such fees were "equitable and just" under § 53.156.

2. Segregation of attorney's fees between recoverable and non-recoverable claims

In *AdvanTech Construction Systems, LLC v. Michalson Builders, Inc.*, No. 14-21-00159-CV, 2023 WL 370513 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, no pet.) (mem. op.), the court addressed the requirements for segregation of attorney's fees when a party prevails at trial on claims for which attorney's fees are recoverable and on claims for which attorney's fees are not recoverable.

The dispute involved claims and counter claims between a general contractor and one of its principals against a subcontractor and one of its agents. *Id*. at *1. The general contractor (Michalson Builders) was hired by an owner to build a house, and it engaged a subcontractor (AdvanTech) to construct the foundation. *Id*. The relationship between the general contractor and subcontractor soured, resulting in the subcontractor walking the job. *Id*. The subcontractor (through one of its agents) filed a statutory lien, and later a constitutional lien. *Id*. The general contractor sued the subcontractor for fraudulent lien and breach of oral contract. *Id*. at *2. The subcontractor (and its employee/agent) countersued the general contractor and its principal for breach of contract, recovery under the prompt payment act, lien foreclosure, and misapplication of trust funds. *Id*. at *2. The subcontractor also filed a third-party action against the owner for breach of contract and lien foreclosure that settled before trial. *Id*. The remaining claims proceeded to a three-day bench trial. *Id*.

At trial, the general contractor prevailed and secured a judgment finding that the subcontractor (and its employee/agent) breached its contract and had intentionally filed false mechanic's liens. *Id*. The trial court awarded the general contractor $39,802.34 in damages on the contract action, and $33,866.53 in attorney's fees under Texas Property Code § 53.156. *Id*. at **4, 9–10.

On appeal, the subcontractor successfully challenged the attorney's fees award based on the contractor's failure to segregate between recoverable and unrecoverable claims. *Id*. at *10. The general contractor was not entitled to attorney's fees under Texas CPRC § 38.001 (breach of contract) because the suit predated the amendments to that statute authorizing attorney's fees against LLCs. *Id*. at **7–8. So, the general contractor's entitlement to attorney's fees was limited to its claims for fraudulent liens against the subcontractor (and its employee individually) under Texas Property Code § 53.156. *Id*. at **4, 10.

The trial court found that the fees were segregated based on the testimony of the general contractor's attorney, even though the attorney testified that segregation was not required. *Id*. at **8–10. The court of appeals held that segregation was required. *Id*. at *9. The appellate court concluded that (1) the claims were not so intertwined as to excuse segregation and (2) no evidence justified the trial court's finding that attorney's fees were segregated. *Id*. The appellate court noted that the billing records did not differentiate between recoverable and non-recoverable claims, and that the awarded fees included "substantial attorney's fees" under Chapter 38, which the appellate court had previously disallowed. *Id*. at **9–10. As a remedy, the appellate court reversed and remanded for reconsideration of the amount of attorney's fees. *Id*. at *10. The court reasoned that the unsegregated fees for the entire case were *some* evidence of what segregation should be, and so remand (rather than reversal) was proper. *Id*.

In *Hizar v. Heflin*, 672 S.W. 3d 774, 783–806 (Tex. App.—Dallas 2023, pet. filed), the court of appeals held that a party waived its argument that fees should have been segregated between recoverable and unrecoverable claims.

The dispute (discussed in the section on the economic loss rule below) involved a dispute between homeowners (Heflins) and their contractor (Hizar). *Id.* at 785. The Heflins hired Hizar to remove some popcorn ceiling from their residence, resulting in a complicated payment and deficient work dispute. *Id*. The Heflins sued Hizar and filed several motions to compel. *Id*. After Hizar ignored discovery, the trial court struck Hizar's pleading and entered a default judgment for the Heflins, awarding them damages and attorney's fees. *Id*. at 787. Over the entire course of the trial, the court had periodically awarded the Heflins a total of $29,051.88 in fees. [7]

Hizar argued on appeal that the legal fees should be segregated between recoverable and non-recoverable claims. *Id.* at 802. The court found that Hizar had not raised an objection in the trial court concerning segregation of fees. *Id.* at 802. As such, Hizar's challenge to the trial court's segregation of fees was not preserved for the court's review on appeal. *Id.*

3. Reasonableness

In *Webb v. Dynamic JMC Builders, LLC*, No. 07-22-00247-CV, 2023 WL 4220812 (Tex. App.—Amarillo June 27, 2023, no pet.) (mem. op.) (discussed above), the court of appeals held

[7] *Id*. at 786. The award included: (1) $5,000 in attorney's fees in denying Hizar's motion for new trial; (2) $3,389.84 in attorney's fees for removing Hizar's lien from the property; (3) $29,051.88 in fees through trial; (4) conditional appellate fees of $45,000 through appeal to the Texas Supreme Court 803. *Id*. at 785, 787, 803. It is not obvious whether the $29,051.88 was inclusive of the $5,000 and $3,389.84. *Id*.

that a contractor satisfied the legal sufficiency requirement to support its recovery of attorney's fees.

This case arose from a breach of contract claim after an owner failed to pay the contractor for the work performed at the owner's restaurant. *Id*. at *1. On appeal, the owner argued there was insufficient evidence to support the award of attorney's fees to the contractor. *Id*. at *4. The owner complained that there was no evidence that the hourly rate charged by one of the contractor's two attorneys was reasonable and necessary. *Id*. The owner further argued that there was insufficient evidence of the services performed, who performed them, when they were performed, or the reasonable amount of time they required. *Id*.

At trial, one of the contractor's attorneys testified that the billing practices were on par with other attorneys of their experience level in the area. *Id*. He also testified that the $300 hourly rate was customary and reasonable for construction cases in Lubbock County (where the construction took place). *Id*. But he did not provide testimony specifically related to the contractor's other attorney's experience (although the other attorney also charged $300 per hour). *Id*. While the entries failed to show the exact time spent on each discreet task, they did show the time worked, descriptions for the work completed, and hours spent on work per time quarter, and evidenced 162 total hours of work at $300 per hour. *Id*. The owner did not present evidence contravening the attorney's testimony and could point to no item (or task) in the bill that the owner contended was not reasonable. *Id*. As a result, the court held that the contractor provided sufficient evidence to satisfy the legal sufficiency requirement and support the award of attorney's fees. *Id*. at *4.

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Practice Note: While it is probably not best practice to support attorney's fees evidence with a per-task hourly rate, it is best practice, as a party resisting attorney's fees, to offer up evidence controverting the amount sought, or challenging specific tasks. The court noted that "the evidence on attorney's fees could have been more extensive" but was unwilling to overturn it as "clearly wrong or manifestly unjust" under a factual sufficiency challenge. *Id*.

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In *Challis v. Fiamma Statler, LP*, No. 02-22-00047-CV, 2023 WL 2534470 (Tex. App.—Fort Worth Mar. 16, 2023, no pet.) (mem. op.), the court of appeals held that the trial court's award of attorneys' fees associated with the defendants' successful Rule 91a motion to dismiss was against the great weight and preponderance of the evidence when it awarded only 10% of the allegedly incurred legal fees.

In *Challis*, the trial court granted the defendants' Rule 91a motion to dismiss, so defendants moved to recover attorneys' fees of $668,447 incurred in connection with their motion. *Id*. at *1. Even though the defendants provided uncontroverted evidence to support their fee claim (which included (1) detailed billing records, (2) attorney CVs, and (3) attorney affidavits that addressed the legal fee rates and the various *Arthur Anderson* factors) the trial court entered an order awarding the defendants only 5% of their fees. *Id*. On an initial appeal, the court of appeals reversed and remanded the issue of attorneys' fees, noting the discrepancy in the fees sought (over

$600,000) and the fees awarded ($36,750). *Id*. On remand, the defendants submitted additional evidence to support fees incurred associated with their Rule 91a motion and additional fees incurred in connection with the earlier appeal. *Id*. at *4. The trial court entered an order that awarded the defendants $114,709.87 in attorneys' fees, and the defendants appealed, again. *Id*. at *5.

In the second appeal, the court of appeals noted the uncontroverted evidence submitted by the plaintiff and held that an award of 10% of the defendants' allegedly incurred fees (approximately $1.2 million through the second appeal) was contrary to the great weight and preponderance of the evidence. *Id*. The court of appeals also recognized that the trial court failed to properly apply the lodestar analysis, which is determined by (1) calculating the presumptively reasonable fee (reasonable hours worked multiplied by the reasonable hourly rate) and (2) adjusting the presumed reasonable fees as necessary. *Id*. at **5–7. Here, the trial court—even though it stated it conducted a lodestar analysis and considered the appropriate factors—did not identify the reasonable number of hours worked and did not identify a reasonable hourly rate. *Id*. The court of appeals—for a second time—remanded the case to the trial court for re-determination of the award of attorneys' fees. *Id*. at *7.

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Practice Note: Although not clear from the opinion, the result may be explained by the unique wording in the former version of Rule 91a. The rule in effect for proceedings initiated before September 1, 2019 stated that the trial "court *must* award the prevailing party… *all*… reasonable and necessary attorney fees incurred with respect to the challenged cause of action." Tex. R. Civ. P. 91a.7 (2013, superseded 2019) (emphasis added). Although the current rule makes attorney fees discretionary rather than mandatory (changing "must" to "may"), it still uses "all costs and reasonable and necessary attorney fees." Tex. R. Civ. P. 91a.7. In the prior appeal the court acknowledged that the prevailing party under Rule 91a was "not necessarily entitled to recover all of their requested but contradicted fees[.]" *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470, at *18 (Tex. App.—Fort Worth Oct. 29, 2020, pet. denied) (mem. op.). But since "many aspects" of the "incurred fees were not contradicted, and many others were challenged on grounds rejected by this court in the prior appeal[,]" the court held that an award of less than 10% of the fees was against "the great weight and preponderance of the evidence." *Challis*, 2023 WL 2534470, at *5.

The case is a study in the importance of the lodestar method. It came to the court of appeals on a sufficiency challenge, which usually goes the way of the trial court's judgment. But the appellate court treated the "base lodestar" as "the presumptively reasonable amount of fees" only to be adjusted "if necessary." *Id*. at *2 (citing *Roohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501–02 (Tex. 2019)). The plaintiff had controverted the defendant's affidavit by challenging the rates (which ranged from $408–$850) based on the plaintiff's rate hourly rate ($350). *Challis*, 2023 WL 2534470, at *3. But in a footnote, the court held that "'an opposing party's litigation expenditures are not *ipso facto* reasonable or necessary' and generally, 'comparisons between the hourly rates and fee expenditures of opposing parties are inapt.'" *Id*. at *3 n.6 (quoting *In re Nat'l Lloyds Ins.,* 532 S.W.3d 794, 808–10 (Tex. 2017) (orig. proceeding)). Critically as well, the trial court had findings of fact and conclusions of law that "did not explain how the court arrived at the" <10% award. *Challis*, 2023 WL 2534470, at *5.

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In *Tite Water Energy, LLC v. Wild Willy's Welding LLC*, No. 01-22-00158-CV, 2023 WL 5615816 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, pet. filed) (mem. op.), the court of appeals affirmed and modified the trial court's award of $1,171,697.50 in attorney's fees.

This suit stemmed from underlying litigation over personal injuries sustained during an explosion on a saltwater reclamation plant in Oklahoma owned by Devon Energy. *Id*. at *1. The injured party (Colby Bigbey) sued Devon, Tite Water Energy, and Wild Willy's Welding, among others, for negligence, gross negligence, and premises liability. *Id*.

Wild Willy's demanded defense and indemnity from Tite Water for Bigbey's claims under the controlling agreement, which was governed by Oklahoma law.[8] Wild Willy's prevailed on its indemnity claim at trial and was awarded attorney's fees and costs, including unconditional appellate attorney's fees if the case was appealed. *Id*. at *6. Tite Water appealed the jury's findings and the judgment consistent with it, and the award of attorney's fees to Wild Willy's. *Id*.

The court applied the standards laid out by the Texas Supreme Court for determining the reasonableness and necessity of attorney's fees. *Id*. at *10 (citing *Rohrmoos*, 578 S.W.3d at 50102 and *Arthur Anderson & Co. v. Perry Equip. Corp*., 945 S.W.2d 812 (Tex. 1987)). At trial Wild Willy's attorney testified about the complexity of the lawsuit, the extensive work performed by his firm, the potential liability his client faced (the potential liability for four defendants was $720 million), and the number of hours worked. *Tite Water*, 2023 WL 5615816, at *11. Tite Water argued that Wild Willy's attorney's fees invoices were so heavily redacted that they did not provide a scintilla of evidence to allow the jury to award the amount of attorney's fees. *Id*. The court found that while the invoices Wild Willy's submitted were heavily redacted, when coupled with the testimony given in court, they provided the jury sufficient information to assess the reasonableness and necessity of the legal services. *Id*. at **11–12.

Turning to the award of appellate attorney's fees the court found that the trial court abused its discretion by awarding Wild Willy's unconditional appellate attorney's fees (that is, fees not conditioned on Wild Willy's prevailing on appeal). *Id*. at *12 (citing *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998)). Rather than remanding, the court modified the trial court's judgment to order appellate attorney's fees contingent upon Wild Willy's success at each stage of the appellate process. *Tite Water*, 2023 WL 5615816, at **12–13.

In *Dean v. Mitchell,* No. 09-21-00267, 2023 WL 6317683 (Tex. App.—Beaumont Sep. 28, 2023, no pet.) (mem. op.), the court upheld the trial court's award of attorney's fees to a prevailing party under the Texas Declaratory Judgment Act, affirming a finding that such fees were reasonable and necessary.

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[8] *Id*. at **1–2. There did not appear to be a meaningful difference between Texas and Oklahoma law regarding interpretation of the controlling agreement's indemnity provision. *Id*. at *8 (discussing similarities of Oklahoma and Texas law). In addition, the court evaluated the attorney's fees award through *Rohrmoos*, so the case is germane to Texas law. *Id*. at *10. But because the underlying liability for indemnity was technically governed by Oklahoma law, we have not reported on that part of the decision in this paper.

The complex factual and procedural background of this case arose from a property drainage dispute. Dean sued the defendants, who owned parcels next to the plaintiff's property, alleging that the defendants' development of their neighboring tracts caused his property to flood. *Id.* at *1. Dean filed suit and alleged trespass, water diversion, negligence, negligence per se, temporary and permanent injunctions, diminution in value to his property, and sought attorney's fees under the Declaratory Judgment Act. *Id.* at *2. The defendants counterclaimed alleging trespass, trespass to try title, Water Code violations, injunctive relief, and sought attorney's fees under the Declaratory Judgment Act. *Id*. The defendants' counterclaims arose out of accusations that Dean had entered their property without authorization. *Id.*

After the close of discovery, the defendants filed traditional and no-evidence motions for summary judgment on all of Dean's claims, arguing that (1) Dean's claims accrued in 2018 and were therefore barred by limitations; and (2) the defendants had conclusively established that the floodwaters were an "Act of God" and not the result of "diffuse surface waters" as defined by the Texas Water Code. *Id.* The defendants also sought an affirmative summary judgment on their trespass counterclaim, alleging Dean admitted entering the defendants' property without authorization. The defendants attached, among other things, an affidavit from their counsel with supporting fee invoices. *Id.* In response to the attorney's fees, Dean attached: (1) one fee invoice from October 2020; (2) a document showing average hourly rates for attorneys in the Conroe area and adjacent jurisdictions; and (3) an affidavit of Dean's counsel proving up Dean's attorney's fees. *Id.* at *4. Dean's fee affidavit did not controvert any of the fee evidence submitted by the defendants.

Two days before the summary judgment hearing, Dean filed an amended response attaching similar attorney's fee evidence, which the trial court struck as untimely filed. *Id*. at **4–5. The trial court also sustained the defendants' objections to the document showing average hourly rates for Conroe-area attorneys as inadmissible hearsay, and further sustained the defendants' objections to the affidavit of Dean's counsel as irrelevant. *Id.* at *5. Finally, the trial court granted the defendants' defensive motion for summary judgment on both no-evidence and traditional grounds and granted the defendants' affirmative motion for summary judgment on their trespass claim against Dean. *Id.* The trial court, however, declined to award attorney's fees to either party. *Id.*

Before trial on their remaining claims, the defendants filed a motion for reconsideration, asking the court to award defendants' attorney's fees under the Declaratory Judgment Act. *Id.* Dean filed a response on the day of trial that referenced a controverting fee affidavit, but Dean failed to attach that affidavit to the response or otherwise file it. *Id.* at *6. Dean then filed an amended response attaching, for the first time, an affidavit controverting the reasonableness and necessity of the defendants' attorney's fees. *Id*. After a hearing, the trial court granted the motion for reconsideration and signed a final judgment that included an award to the defendants of $35,647.44 in attorney's fees. *Id.* The final judgment noted that the trial court had considered the "pleadings and evidence on file," but did not otherwise specify the evidence on which the court relied. *Id.*

On appeal, Dean argued that the trial court erred when it determined the defendants' attorney's fees were reasonable and necessary. *Id.* at **9–10. To analyze the issue, the court had

to first determine whether the "evidence on file" considered by the trial court included the controverting fee affidavit Dean filed in his amended response to the motion for reconsideration. *Id.* The court acknowledged that, on a motion for reconsideration of a motion for summary judgment, the trial court "ordinarily may consider only the record as it existed when it first heard and ruled on the summary judgment motion." *Id.* (citing *Foussadier v. Triple B Serv., LLP*, No. 01-18-00106-CV, 2019 WL 2127604, at *3 (Tex. App.—Houston [1st Dist.] May 16, 2019, pet denied.) (mem. op.)). The court further noted, however, that trial courts can accept late-filed evidence so long as the "court affirmatively indicates in the record that it accepted or considered the evidence." *Dean*, 2023 WL 6317683, at *6 (citing *Mathis v. RKL Design/Build*, 189 S.W.3d 839, 842–43 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

These two principles raised a question: if the trial court enters an order stating it considered the "evidence on file," is that an "affirmative indication" the trial court considered late-filed summary judgment evidence? The court said no and held that because the final judgment did not specifically address the late-filed evidence, such evidence is not considered part of the "evidence of file." *Dean*, 2023 WL 6317683 *11. Accordingly, the court concluded, Dean's late-filed controverting fee affidavit was not part of the evidence on file in the case. *Id*. at *11.

The court's determination also disposed of the reasonableness and necessity of the defendant's attorney's fees. The court noted that the reasonableness of attorney's fees is "generally a fact question," and that without a controverting affidavit, "an affidavit as to the amount of attorney's fees is presumptively reasonable." *Id.* at **11–12. As a result, Dean was left without any evidence sufficient to raise a genuine issue of material fact about the reasonableness of fees. *Id.* at *13. Finding the defendants' affidavit sufficient to support the reasonableness and necessity of attorney's fees, the court affirmed the trial court's judgment. *Id.*

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Practice Tip: The case shows how important it is to obtain written rulings from trial courts when they allow or otherwise consider late-filed summary judgment evidence in any context. It also serves as a warning regarding the use of form orders that contain boilerplate like "considered the pleadings and evidence on file." Crucial evidence, particularly evidence filed late or outside the ordinary course, should be specifically mentioned as considered by the court.

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In *Wildcat Concrete & Construction, LLC v. Vanderlei*, No. 07-23-00078-CV, 2023 WL 8817556 (Tex. App.—Amarillo December 20, 2023 no pet. h.) (mem. op.), the court of appeals affirmed an award of attorney's fees that was insufficiently supported based on a party's concession that it would not contest the fee award if certain conditions were met on appeal.

The dispute in *Wildcat* stems from a breach of construction contract to build dairy facilities. *Id.* at *1. The trial court awarded the owner damages for time spent supervising the completion of the project after the contractor ceased work and $10,000 in attorney's fees. *Id.* at *2. To establish its attorney's fees as reasonable and necessary, the owner's attorney provided the following

testimony stating his legal experience and fee for handling the matter from lawsuit to collection on a judgment:

> I am [his name], licensed to practice law in the State of Texas and other courts and federal courts. United States Supreme Court too, although I've never been there. But anyway, practiced law out here in the South Plains for over 40 years. I've helped people with all kinds of legal issues, had all kinds of lawsuits, including construction lawsuits like this one. It's been my experience that once you get to this point you have to obtain a judgment and then you have to try to collect it. And what we've asked for in this case through the trial court stage is the sum of $10,000 for completion through this case, this trial, and then what will take place if we receive a judgment, and that is collecting and trying to take time to collect the judgment, discover assets, have writs of execution issued. So, we're asking for the sum of $10,000 for attorney's fees. And that's all my testimony.

Id. at *3. The court of appeals determined the attorney's testimony failed under the *Rohrmoos* factors as it did not include the services rendered. *Id.* (citing *Rohrmoos,* 578 S.W.3d at 498).

Rather than remanding the issue for redetermination by the trial court, which the court acknowledged would be the proper remedy, it determined that a remand would be unnecessary because attorney's fees were unrecoverable in a declaratory action to remove a cloud on title. *Wildcat*, 2023 WL 8817556, at *3. Nevertheless, the court upheld the award of attorney's fees on the grounds that the contractor agreed in its briefing not to challenge attorney's fees if the court of appeals upheld any portion of the trial court's judgment, which the court did in affirming the invalidation of the contractor's lien. *Id.* at *4.

In *Hizar v. Heflin*, 672 S.W. 3d 774 (Tex. App.—Dallas 2023, pet. filed) (discussed above), the court of appeals affirmed an award to the plaintiffs of attorney's fees through trial but reversed with respect to conditional fees on appeal.

At trial, the Heflins submitted an affidavit and testimony from their counsel substantiating $29,249.00 in attorney's fees through trial, which the trial court awarded in the amount of $29,051.88. *Id*. at 800–01. The court also awarded conditional attorney's fees in the amount of $45,000, consistent with the amount set forth in Heflins' lawyer's affidavit supporting fees. *Id*. at 803.

Hizar challenged the through-trial fees award on appeal, arguing that the Heflins' lawyer's statements were conclusory. *Id*. at 800. The court of appeals rejected the argument, noting that the attorney had submitted detailed billing records through affidavit, bolstered by testimony at trial. *Id*. at 801. The Heflins' attorney provided the number of hours and the rate supporting the hours, and the tasks associated to successfully prosecute the case. *Id*. The court held that the evidence was legally sufficient to support the trial court's award. *Id*.

However, the court of appeals reversed with respect to the conditional award of appellate attorney's fees. *Id*. at 805. Heflins' attorney did not testify at trial about conditional attorney's fees, but did include the following in her supporting affidavit:

> 8. In addition to my trial practice, I have practiced before courts of appeals in the State of Texas. I have handled cases with board certified and/ or appellate specialists and I am generally familiar with the costs to handle appeals in this type of suit. Based on my experience and training and in my professional opinion, the sum of $20,000.00 is a reasonable and necessary fee should Plaintiffs prevail on any appeal to the Dallas Court of Appeals. In addition, the sum of $10,000.00 is a reasonable and necessary fee for making or responding to a petition for review filed with the Texas Supreme Court. Furthermore, the sum of $15,000.00 is a reasonable and necessary fee in the event a petition for review is granted and briefing is filed and arguing any petition with the Texas Supreme Court.

Id. at 803. The court held that this statement alone did "not identify the services [the attorney] reasonably believes will be necessary to defend the appeal" and failed to specifically identify the hourly rate charged for those services. *Id*. The court therefore held the only evidence on conditional appellate fees was legally insufficient. *Id*. Similarly, the court reversed an award of $5,000 in "responding to any post-judgment motions" filed by Hizar, as the Heflins put on no evidence in support of that amount. *Id*. at 805. As for the conditional fees and the post-judgment motion fees, the court remanded to the trial court for a redetermination of the reasonable amount of fees. *Id*. at 804–05.

B. Certificates of Merit

1. Arising out of the provision of professional services

In *Terracon Consultants, Inc. v. Northern Pride Communications, Inc.*, No. 01-22-00755-CV, 2023 WL 2316351 (Tex. App.—Houston [1st Dist.] March 2, 2023, no pet.), the court of appeals addressed whether a plaintiff's claims arose "out of the provision of professional services" implicating Chapter 150.

The United States Fish and Wildlife Service hired Northern Pride to replace guy anchors on a communication tower project. *Id*. at *1. Northern Pride in turn hired Gulf Coast Concrete and Shell as a subcontractor to design and provide concrete for the project. *Id*. Northern Pride also hired Terracon Consultants (a professional engineering firm), under an "Authorization to Proceed, Construction Materials Engineering and Testing Services" agreement, to obtain six cylinder samples and provide additional materials testing. *Id*. The agreement also noted that the number of tests or trips described in it were not "a minimum or maximum number of tests" and that samples would be "consumed in testing or disposed of upon completion of tests (unless stated otherwise in the Services)." *Id*.

Terracon obtained four (not six) cylinder samples of concrete provided by Gulf Coast and concluded that Gulf Coast's work did not comply with the plans and specifications. *Id*. at **1–2. Northern Pride alleged that it asked Terracon to retain the cylinder samples. *Id*. at *2. But because the cylinders had been used up in testing, "only a fractured piece of a cylinder remained." *Id*. After Northern Pride asked for that sample to be sent for further testing, Terracon advised Northern Pride that the sample had been lost in an office move. *Id*.

Northern Pride later asked Gulf Coast to remobilize, remove, and replace the alleged defective work. *Id*. When Gulf Coast declined to respond, Northern Pride sued Gulf Coast. *Id*. But Gulf Coast successfully moved for a spoliation instruction and sanctions against Northern Pride, since the samples were lost. *Id*. Northern Pride then filed an amended petition adding Terracon, and asserting claims for negligence and breach of contract because Terracon should have taken six cylinder samples (rather than just four), and should have preserved the samples. *Id*.

Because Northern Pride did not attach a certificate of merit to its Amended Petition against Terracon, Terracon moved to dismiss. *Id*. Northern Pride argued at the trial court that its claims were limited to Terracon's failure to obtain six (rather than four) samples, and its failure to retain the samples, and that those claims did not "implicate a professional engineer's education, training, and experience in applying special knowledge or judgment." *Id*. at *3. The trial court denied Terracon's motion to dismiss, and Terracon filed an interlocutory appeal. *Id*.

The court of appeals reversed, holding that Northern Pride's claims were governed by Chapter 150, and that its failure to file a certificate of merit mandated dismissal under the statute. *Id*. at *7. The court of appeals noted that Chapter 150 applies to any action for damages "arising out of the provision of professional services" by an engineer. *Id*. (citing Tex. Civ. Prac. & Rem. Code § 150.002(a)). In determining whether Northern Pride's claims arose out of the provision of professional services, the court looked to the broad definition of "practice of engineering," which includes consultation, testing, construction observation, and "any other professional service necessary for the planning, progress, or completion of an engineering service."[9] As Terracon's professional services all fell under these broad definitions, the court held that Northern Pride's claims "plainly *implicate* Terracon's (through its licensed professional engineers) education, training, and experience in utilizing special knowledge and judgment in determining how many samples to obtain and whether to retain them." *Terracon*, 2023 WL 2316351, at *6. The court further reasoned that since the agreement afforded Terracon some discretion in how many cylinders to test, and discussed disposal of materials, the agreement presumed "Terracon's use of professional discretion" in evaluating how much to test, and how to dispose of testing samples. *Id*.

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Practice Note: The opinion agreed with several other decisions holding that "arising out of the provision of professional services" does not hinge on "whether the alleged mal-acts themselves constituted the provision of professional services, but whether the claims arise out of the provision of professional services." *Id*. at *6 (quoting *Jennings, Hackler & Partners v. N. Tex. Mun. Water Dist.*, 471 S.W.3d 577, 581 (Tex. App.—Dallas 2015, pet. denied)). Claimants should be weary of overreliance on the purported error or omission to bypass Chapter 150, as appellate courts are coalescing on a broader analysis that treats ancillary services (or alleged errors) as part

[9] *Terracon*, 2023 WL 2316351 at **4–5. Texas Civil Practice and Remedies Code Section150.001(3) assigns the "Practice of engineering" the same meaning as it has under Tex. Occ. Code § 1001.003. The latter definition is very broad and includes a catch-all for "any other professional service necessary for the planning, progress, or completion of an engineering service." Tex. Occ. Code § 1001.003(c).

and parcel of the "professional services" that the claims "aris[e] out of." *Terracon*, 2023 WL 2316351 at **4–5. The next few case are further illustrations of that expansive interpretation.

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In *Lina T. Ramey & Assocs., Inc. v. Comeaux*, No. 05-23-00562-CV, 2023 WL 8183272 (Tex. App.—Dallas Nov. 27, 2023, no pet.) (mem. op.) the court of appeals held that all of several plaintiffs' claims must be dismissed under Chapter 150 because they arose out of the provision of professional engineering services by the defendant.

Following a collision on SH 121 in Dallas County, several plaintiffs asserted negligence and premises liability claims against an engineer hired by TxDOT to design and implement a traffic control plan for the construction area. *Id.* at **1–2. After one plaintiff filed his original petition, he subsequently nonsuited when the engineer moved to dismiss the plaintiff's suit due to his failure to file a certificate of merit. *Id.* at *2. The same plaintiff then brought a second suit against the engineer with a certificate of merit signed by an engineer not licensed in Texas. *Id.* Five other plaintiffs filed petitions in intervention, each apparently relying on the same noncompliant certificate of merit. *Id.*

The engineer once again moved for dismissal on the grounds that the plaintiffs failed to comply with Chapter 150's certificate of merit requirements. *Id.* at *3. The plaintiffs then filed a new certificate of merit, which this time was signed by an engineer registered in Texas. *Id*. But the plaintiffs also claimed that a certificate of merit was not required for their claim that the engineer failed to properly inspect the work site to ensure TxDOT's contractor met the standard of care set forth in the Texas Manual on Uniform Traffic Control Devices (TxMUTCD), which required that original pavement markings be removed/obliterated rather than simply painted over, because this alleged failure was not an "engineering service" Chapter 150. *Id.* at **3–4. The trial court partially granted and partially denied the engineer's motion to dismiss, ordering all of plaintiffs' claims be dismissed without prejudice except the plaintiffs' construction inspection and TxMUTCD compliance related claims. *Id.* at *3.

The court of appeals reversed the trial court, finding that all of plaintiffs' claims were subject to Chapter 150's certificate of merit requirements. *Id.* at *5. Applying the definition of the practice of engineering set forth in Chapter 1001 of the Texas Occupations Code, the court of appeals held that plaintiffs' TxMUTCD related claims "directly involves the practice of engineering," given the expansive nature of such definition. *Id.* The court also held that plaintiffs' claims "arose" from the provision of TxMUTCD related services, since engineer's inspection of the worksite "was necessarily done as a component part of the necessary steps for implementing the traffic control plan." *Id.* The court also noted that even if the inspection work "did not itself constitute the provision of engineering services" the issue is whether those non-engineering services "*arise out of* the provision of professional services." *Id*. The court held that the inspection services did arise out of the engineering firm's professional engineering services agreement with TxDOT. *Id*.

In *SAM-Construction Services, LLC v. Maricela Salazar-Linares*, No. 09-23-00040-CV, 2023 WL 8634951 (Tex. App.—Beaumont Dec. 14, 2023, no pet. h.) (mem. op.), the court of appeals held that personal injury claims arising out of an engineering firm's alleged "construction

management services" arose out of the provision of professional services, and therefore had to be supported by a certificate of merit.

In March 2019, Martin Salazar suffered fatal injuries while working as a manual laborer on a construction site in Orange County, Texas. Salazar's wife Maricela sued several defendants, including SAM-Construction Services (SAM). SAM, an engineering firm that also employed a licensed engineer, moved to dismiss the complaint due to a lack of a certificate of merit. The trial court dismissed some, but not all, of Maricela's claims. *Id.* at *1.

On appeal, SAM contended that the trial court erred in failing to dismiss all the plaintiff's claims because she never filed an affidavit of a licensed engineer as required by Chapter 150. *Id.* at *6. SAM further argued the appellate court should look to the allegations in her first amended petition, as those were the allegations made when SAM initially moved to dismiss. *Id.* Because some of Maricela's claims had been dismissed, the court of appeals focused on the allegations in her second amended petition to decide whether her allegations triggered the Certificate of Merit Statute and required her to file an affidavit with her petition of a third-party licensed engineer. *Id.* at *7. Maricela argued her claims were based on the duties SAM owed to Martin to provide him with a safe workplace, duties Maricela argued did not arise out of the provision of professional service. *Id.*

In determining whether Chapter 150 applied, the court analyzed two things: first, whether the petition asserted a claim that involved damages against a licensed engineer or a firm that employed a licensed engineer who practiced with the firm at a time relevant to the dispute with the entity named as the defendant in the suit. *Id.* at *8. Second, whether the allegations in the plaintiff's petition, the plaintiff sought to recover damages that arise out of the provision of professional services by the licensed professional. *Id.*

The court examined several allegations in Maricela's second amended petition that included services that weren't limited to services that occurred onsite. *Id.* For instance, Maricela's second petition alleged SAM was negligent in "providing construction services" and that its negligence included "preparing and providing safety policies and procedures." *Id.* Those services weren't limited to services that occurred onsite. *Id*. Second, Maricela complained that SAM was negligent in "the development of quality manuals and specifications." *Id*. That service also didn't occur solely on the site where Martin's electrocution occurred. *Id*. The court therefore rejected Maricela's argument that her claims were narrowly pleaded and limited to a claim that SAM negligently exercised a retained right of control over Martin's work. *Id.* The court declined to decide whether it is possible to allege a negligent exercise of a retained right of control theory without triggering Chapter 150 when suing an engineering firm. *Id.* at *10. Instead, the court held that Maricela's pleadings were too broad to have accomplished that here when compared to the definition the legislature gave to the practice of engineering. *Id.* For example, although the plaintiff characterized her claims as narrow, her negligent construction administration claims fell in the definition of engineering, since it included "monitor[ing] for compliance with drawings or specifications". *Id*. (quoting Tex. Occ. Code Ann. § 1001.003(c)(9)).

The court further held that, given the broad definition the legislature gave to the practice of engineering, a plaintiff who wishes to avoid triggering Chapter 150 should plead their claims

carefully to avoid pleading an action for damages that arises from the provision by the engineer or the engineer's firm of professional services by the firm's licensed engineer. *SAM*, 2023 WL 8634951, at *10. Because Chapter 150 requires a trial court dismiss "the complaint" when the claimant fails to file the affidavit in accordance with the statute, the court reversed the trial court's order and remanded the case to the trial court, instructing the trial court to dismiss all claims against SAM. *Id.* at *11.

2. Evidentiary burden of establishing applicability of Chapter 150

In *De Leon v. Baker*, No. 10-22-00378-CV, 2023 WL 6885052 (Tex. App.—Waco Oct. 19, 2023, no pet. h.) (mem. op.), the court of appeals addressed the burden of proving whether the defendant is a licensed or registered professional under Chapter 150.

The case involved an alleged survey bust. The Bakers relied on a survey performed by De Leon and Chapa before buying a property in Huntsville. *Id*. at *1. The Bakers alleged that the survey failed to include retaining walls that were built over the property lines and into neighboring lots. *Id*. Although De Leon and Chapa agreed they their survey was inaccurate and that they would pay to rebuild the retaining walls, they did not do so, resulting in the Bakers paying instead. *Id*. The Bakers then sued De Leon and Chapa for fraud, negligent misrepresentation, breach of warranty, breach of contract, unjust enrichment, and under the DTPA. *Id*. But because the Bakers did not include a certificate of merit with their petition, De Leon and Chapa moved to dismiss the Bakers' suit under Chapter 150. *Id*. The trial court denied the motion and De Leon and Chapa filed an interlocutory appeal. *Id*.

The court of appeals affirmed. *Id*. *4. Noting that Chapter 150 "gives certain professionals the right" to avoid protracted litigation, the court agreed with the Bakers that neither De Leon nor Chapa fell within the statute. *Id*. at *3. Although surveyors *are* included in the statute,[10] the court noted that the Bakers had not alleged that De Leon and Chapa were surveyors in their petition. *De Leon*, 2023 WL 6885052, at *3. Because there was "[n]othing in the record" on appeal indicating that De Leon or Chapa were registered surveyors, the court found no abuse of discretion at trial in denying their motion to dismiss. *Id*. at **3–4. The court reiterated, based on prior cases, that it is the Chapter 150 movant's burden to show that they enjoy the protections of Chapter 150. *Id*. at *3.

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Practice Note: Interestingly, in the appellate record were documents indicating that at least Chapa was a registered surveyor. *Id*. at *4. A dissenting justice argued that because it appeared undisputed that Chapa was a registered surveyor, and there was evidence somewhere in the record to support that, the court should have notified the parties of a defect in the record under Texas Rule of Appellate Procedure 44.3 and allowed the parties to cure the record and brief additional issues. *De Leon*, 2023 WL 6885052, at *5.

In any event, the important takeaway for plaintiffs and defendants is that evidence of the licensure of the defendant is critical. If you are a defendant, you should state in your motion that

[10] Tex. Civ. Prac. & Rem. Code § 150.001(1-c)'s definition of a "Licensed or registered professional" includes a "registered professional land surveyor".

your client is a design professional under the statute, and attach affidavit to your motion to dismiss, from your client, reciting that they are a design professional, with reference to their license or registration number, and that all work they performed at issue was done under that license. As registrations and licenses are a matter of public record—you can search the licensing boards' rosters online—this might seem like overkill. But beware. One court of appeals affirmed denial of a motion to dismiss because the defendant used a "nonworking hyperlink to the Texas Board of Professional Engineers' website" as its only evidence of licensure/registration. *FAI Engineers, Inc. v. Logan*, No.02-20-00255-CV, 2020 WL 7252315, at *3 (Tex. App.—Fort Worth Dec. 10, 2020, no pet.) (mem. op.). But the court went farther: "even if the hyperlink had worked, [the defendant] could not put the burden on the trial court to go to a website to obtain evidence, nor did such "proof"—that [the defendant] possibly registered with the Texas Board of Professional Engineers—constitute evidence that a licensed or registered professional practiced within [the defendant] at the time of the occurrence at issue." *Id*. Another court affirmed denial of a motion to dismiss on similar grounds, holding that a hyperlink referenced in a motion to dismiss, even when accompanied by a printout from the engineering board's website, failed to establish that the defendant was entitled to the protections of Chapter 150. *TDIndustries, Inc. v. My Three Sons, Ltd.*, No. 05-13-00861-CV, 2014 WL 1022453 (Tex. App.—Dallas Feb. 14, 2014, no pet.) (mem. op.).

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3. Implied waiver of the right to dismiss under Chapter 150

In *James Deaver Serv., Inc. v. Bichon Roofing & General Contractors, Inc.*, No. 01-22-00743-CV, 2023 WL 5436402 (Tex. App.—Houston [1st Dist.] Aug. 24, 2023, no pet.) (mem. op.), the court of appeals held that an engineering firm had impliedly waived, through litigation conduct, its right to dismissal under Texas CPRC Chapter 150.

In March 2021, an owner sued an engineer (JDSI) along with a contractor (Bichon) for alleged negligence and fraud relating to a commercial roof replacement. *Id*. at *1. In December 2021, Bichon asserted a cross claim against JDSI for professional negligence and breach of contract. *Id*. JDSI challenged the sufficiency of the *owner's* certificate of merit against JDSI early in the lawsuit, which then went up on a prior interlocutory appeal. *Id*. at **1–2. But while that appeal was pending—with no stay—the case (including Bichon's cross claim) moved forward towards a September 26, 2022 trial setting. *Id*. at *1. On September 15, 2022, shortly after prevailing in its appeal on the insufficiency of the owner's certificate of merit, JDSI moved to dismiss Bichon's claims for failure to include a certificate of merit. *Id*.

JDSI's motion was filed: (1) after all pretrial deadlines had passed, including discovery and a dispositive motions deadline; (2) after JDSI had completed and participated in discovery; (3) 490 days after Bichon asserted its cross claim; and (4) just two weeks before trial, and after JDSI had designated deposition testimony for trial, and filed its trial exhibits. *Id*. at **1–3. JDSI defended its delay, arguing that the motion would have been futile until JDSI secured a ruling on the *owner's* certificate of merit, which issued two days before JDSI moved to dismiss Bichon's claims. *Id*. at **2–3. The court of appeals was unpersuaded as there had been no stay of the underlying litigation, and JDSI had taken no steps to seek dismissal of Bichon's claims in the interim. *Id*. at *3.

Under the traditional "totality of the circumstances" analysis, the court of appeals held that JDSI's delay and active preparation through litigation and for trial ultimately resulted in an implied waiver of its right to dismiss Bichon's cross claim under Chapter 150. *Id*. at **3–4.

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Practice Note: In 2019 the Legislature broadened the scope of Chapter 150 by adding definitions of "Claimant" and "Complaint" in response to a Texas Supreme Court decision limiting Chapter 150 to the original claim only (thereby excluding cross claims and third-party claims from the statute's ambit). Act of June 10, 2019, 86th Leg., R.S., ch. 661 § 1 (1-a, 1-b), 2019 Tex. Sess. Law Serv. 661 (West) (codified at Tex. Civ. Prac. & Rem. Code § 150.001). Although the definition of "Claimant" was broadened to "a party, including a plaintiff or third-party plaintiff," that definition did not explicitly mention a cross claimant. *Id*. Even so, the court of appeals noted that Chapter 150 applied to "both an original petition *and an original cross-claim*," relying on the new definition of "Complaint" in the statute. *Id*. at *2 (emphasis added); Tex. Civ. Prac. & Rem. Code § 150.001(1-b) ("'Complaint' means any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional.").

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4. Same area of practice

In *Eric L. Davis Engineering, Inc. v. Hegemeyer*, No.1422-00657-CV, 2023 WL 8270984 (Tex. App.—Houston [14th Dist.] Nov. 30, 2023, no pet.) (mem. op.), the court of appeals addressed Chapter 150's requirement that the affiant practices in the same area as the defendant.

Homeowners (the Hegemeyers) sued several parties, including an engineering firm, alleging problems in their home's foundation. *Id*. at *1. The Hegemeyers attached to their original petition a certificate of merit signed by a professional engineer, alleging errors in the home's foundation design. *Id*. at **1, 3. The engineering firm moved to dismiss, arguing that the certificate of merit failed to establish on its face that the affiant "practiced in [the engineering firm's] area of practice[.]" *Id*. at *1. The Hegemeyers responded and included in their response a copy of the affiant's curriculum vitae. *Id*. In addition, at the hearing on the motion to dismiss, the trial court heard testimony from the affiant about "his experience and qualifications." *Id*. After the trial court denied the motion to dismiss, the engineering firm filed an interlocutory appeal. *Id*.

The primary issue on appeal was whether the affiant's certificate of merit contained sufficient information to show that he was practicing "in the area of practice of the defendant[.]" *Id*. at *2. The engineering firm argued that the trial court could only look to the certificate of merit itself to determine whether the affiant practiced in defendant's area of practice, and that it erred by improperly considering testimony and the affiant's CV. *Id*. Without addressing the propriety of the trial court's reference to extraneous evidence, the court affirmed, finding that the certificate of merit itself was sufficient to show that the affiant practiced in the defendant's area of practice. *Id*. at *3. It noted that the Hegemeyers' petition alleged that the engineering firm had drawn "up the plans for this home" but that the foundation failed, and that the engineering firm's contract was for "foundation design." *Id*. The parties had also agreed that the relevant "area of practice" was

"residential foundation design." *Id*. at *3 n.3. While the engineering firm argued that the affidavit "did not specifically state that the affiant designs residential post-tension foundation[,]" the court found sufficient information in his affidavit to conclude that the affiant practiced in the defendant's area. *Id*. The court credited the affiant's averments that he "routinely perform[s] design and failure analysis of structures and their individual components," and reasoned that since foundations are part of those components for single-family and multi-family homes, the affidavit met the requirements of Chapter 150.

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Practice Note: The case implicates but did not directly address two interesting issues about the current version of Chapter 150. The first concerns reliance on extrinsic evidence to meet the statute's requirements. Some parts of the statute specifically require the "affidavit" itself to contain information. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 150.002(b) ("The affidavit shall set forth specifically for each theory of recovery for which damages are sought…"). Other parts of the statute, however, speak to the qualifications of the affiant. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 150.002(a) (requiring filing of "affidavit of a third-party" similarly licensed professional who is competent, holds the same license as the defendant, and practices in the defendant's area). One of these latter requirements (under the current version of the statute), is that the affiant practice in the same area as the defendant "based on the [affiant's]… knowledge[.]" Tex. Civ. Prac. & Rem. Code § 150.002(a)(3)(A).[11] Although the Texas Supreme Court has noted that "the affidavit is a reasonable place to provide" information about "the expert's qualifications[,]" it also noted that Chapter 150 did "not expressly require" that information be "in the affidavit itself." *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 891–92 (Tex. 2017). In *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 494 (Tex. 2017), the Court stated in dicta that with respect to "the statute's knowledge requirement" (under the prior version of the statute), "such knowledge may be inferred from record sources other than the expert's affidavit[.]" Safe practice would be to include the affiant's qualifications in the affidavit itself, though that may not be required.

Relatedly, although not discussed in the opinion, the affiant had stated that he provided "forensic investigation[.]" *Hegemeyer*, 2023 WL 8270984, at *4. The original version of the statute, much like the current one, required that the affiant was "practicing in the same area as the defendant[.]" Acts 2003, 78th Leg., ch. 204, Sec. 20.01, eff. Sept. 1, 2003. In *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492, 495, 498 (Tex. App.—Corpus Christi 2009, no pet.), the court, interpreting the earlier version, held that an affiant who was "engaged in… forensic architectural practice" failed to show that he was actively engaged in the defendant's area of practice, in that case "design restoration architecture."[12] Shortly after *Landreth*, the Legislature

[11] As discussed below, § 150.002(a)(3) used to require that the affiant "is knowledgeable" in the defendant's area of practice, based on the affiant's "knowledge". But "is knowledgeable" was changed to "practices" in 2019. Act of June 10, 2019, 86th Leg., R.S., ch. 661 § 1 (1-a, 1-b), 2019 Tex. Sess. Law Serv. 661 (West) (codified at Tex. Civ. Prac. & Rem. Code Ann. § 150.001).

[12] Interestingly, the court also held that it could not "look outside the 'four corners' of the affidavit to a deposition or other discovery in order to interpret the affidavit filed pursuant to the statute." *Landreth*, 285 S.W.3d at 498.

amended Chapter 150, changing the "practicing" requirement to "is knowledgeable in the area of practice of the defendant[.]" Acts 2009, 81st Leg., R.S., Ch. 789 (S.B. 1201), Sec. 2, eff. September 1, 2009; *see also* House Comm. On State Affairs, Bill Analysis, Tex. S.B. 1201, 81st Leg., R.S. (2009) (discussing the "problem" that an affiant "may have in the past practiced in the "same area" but "now offer[s] services with a different focus"). In *Morrison Seifert Murphy, Inc. v. Zion*, 384 S.W.3d 421, 426 (Tex. App.—Dallas 2012, no pet.), the court held that amendment meant *Landreth* was no longer "applicable because it interpreted a now-superseded statute." The Texas Supreme Court recited *Morrison*'s conclusion in *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 393 n.4 (Tex. 2014) (stating that Landreth was "*superseded by statute on other grounds… as recognized in Morrison…*"). Thus, the earlier amendment seemingly was intended to solve the problem that forensic affiants may not meet a contemporaneous requirement that they practice in the same area as the defendant if their current practice shifted to forensic investigation rather than active design. But now that the statute has reverted to "practicing" language similar to the original version, *Landreth* may be good law again, at least on that issue. Because of the change, plaintiffs should be weary of relying on affiants who are not actively engaged in the same practice as the defendant, which often will include the active design of buildings, rather than merely the forensic investigation of them.

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5. Suit or action for fees

In *McDowell Owens Engineering, Inc. v. The Timaeus Law Firm, PLLC*, 679 S.W.3d 754 (Tex. App.—Houston [1st Dist.] 2023, pet. filed), the court of appeals held that defendant law firm was not required to file a certificate of merit in its counterclaim against an engineering firm that had sued to recover fees from the firm.

The law firm (Timaeus) hired an engineering firm (McDowell) to provide expert testimony and consultation services for a lawsuit Timaeus was litigating. *Id*. at 756. McDowell eventually sued Timaeus for unpaid fees. *Id*. Timaeus counterclaimed against McDowell, alleging breach of contract and seeking damages. *Id*. McDowell moved to dismiss Timaeus's counterclaim under Texas CPRC § 150.002 because Timaeus did not file a certificate of merit. *Id*. The trial court denied McDowell's motion to dismiss, and McDowell filed an interlocutory appeal. *Id*. The court of appeals upheld the trial court's ruling by performing a de novo review of § 150.002(h):

> (h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Tex. Civ. Prac. & Rem. Code § 150.002(h). On appeal, McDowell argued that the term "action" in subsection (h) should be limited to a specific cause of action, claim, or counterclaim regarding payment of fees (by the engineer, presumably), not the entire suit. *Id*. at 758. The court of appeals disagreed and relied instead on the Texas Supreme Court's previous ruling that the plain meaning of "action," in the context of § 150.002(a), was an "entire lawsuit or cause or proceeding, not… discrete 'claims' or 'causes of action' asserted within a suit, cause, or proceeding." *Id*. (quoting *Jaster v. Comet II Construction, Inc.*, 438 S.W.3d 556, 56364 (Tex. 2014)). Thus, the court of appeals held that "applying the plain, common meaning of 'action' as used in subsection (h), the

certificate-of-merit requirement does not apply to an entire lawsuit or proceeding for the payment of fees." *McDowell*, 679 S.W.3d at 758.

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Practice Note: The plurality opinion in *Jaster* addressed a prior version of the statute, which required the "plaintiff" to attach a certificate of merit in "any action or arbitration proceeding[.]" *Jaster*, 438 S.W.3d at 558. The complex, 4-3-4 plurality decision addressed whether "action" meant the *original* action, or also applied to third-party actions within the suit. *Id*. at 563–64. The plurality concluded that "plaintiff" referred to the party who initiated suit, and therefore Chapter 150 only applied to the *original* plaintiff. *Id*. In response to *Jaster*, the Legislature amended Chapter 150, changing "plaintiff[]" to "claimant" and defining "claimant" to include "a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification." Acts 2019, 86th Leg., R.S., Ch. 661 (S.B. 1928), Sec. 1, eff. June 10, 2019.[13] It also added a new definition for "Complaint" including "any petition or other pleading which, for the first time, raises a claim" against a design professional protected by the statute. Acts 2019, 86th Leg., R.S., Ch. 661 (S.B. 1928), Sec. 1, eff. June 10, 2019.

When the Legislature added the definition of claimant and complaint, it did *not* amend § 150.002(h), which references "any suit or action for the payment of fees arising out of the provision of professional services." Tex. Civ. Prac. & Rem. Code § 150.002(h). Since § 150.002(h) used the same phrase as § 150.002(a) ("action"), referring to the original lawsuit (per *Jaster*), the court held that the engineering firm's *original* suit for recovery of fees exempted the law firm from any certificate of merit requirement in its counterclaim. *McDowell*, 679 S.W.3d at 759. The court rejected the engineering firm's argument that the exception at subsection (h) should be interpreted "narrowly to limit it only to claims by design professionals for the payment of fees" as the court sided with the statute's "plain language" in determining legislative intent. *Id*. at 759–60.

The case is pending at the Texas Supreme Court. The Court initially requested a response to the petition for review, and in November requested briefing on the merits. A week after *McDowell*, the other Houston Court of Appeals reached a similar, as discussed below.

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In *Zachry Engineering Corporation v. Encina Development Group, LLC*, 672 S.W.3d 534 (Tex. App.—Houston [14th Dist.] pet. filed) the court of appeals held that a certificate of merit need not be filed by a counterclaimant in any "suit or action" for payment of fees initiated by an engineering firm.

After a dispute arose between a developer and an engineering firm, the engineering firm filed suit against the developer alleging that the developer failed to pay the engineering firm for

[13] The reference to "contribution, or indemnification" appears to be a rebuke of then-Justice Willett's three Justice concurrence, which would have held that the statute's application to a "proceeding for damages" did not apply to claims for contribution or indemnity, since they are not "for damages." *Jaster*, 438 S.W.3d at 573 (Willett, J., concurring).

professional services rendered. *Id*. at 537. The developer counterclaimed against the engineering firm alleging that the professional services were not performed timely and that after terminating the contract, a replacement engineer was hired to perform redesign services. *Id*.

The engineering firm moved to dismiss the developer's counterclaim arguing that the developer failed to attach a certificate of merit. *Id*. The developer responded that the certificate of merit requirement was inapplicable to its counterclaim under § 150.002(h) because the engineering firm began the lawsuit and sought to recover fees arising out of the profession of professional services. *Id*.

The trial court denied the engineering firm's motion to dismiss, and the engineering firm filed an interlocutory appeal. *Id*. On appeal, the appellate court analyzed the meaning of the terms "action" and "suit" and determined that the purpose of the certificate of merit statute (preventing frivolous claims against providers of professional services) is not defeated by the exception in § 150.002(h) exempting the certificate of merit requirement for counterclaims in suits or actions for payment of fees because "the provider's claim for recovery of fees may put into question the quality of services, the performance of services, and the fees owed." *Id*. at 540. Accordingly, the court of appeals held that "a certificate of merit is not required to be filed by a counterclaimant in any "suit or action" for payment of fees arising out of the provision of professional services." *Id*. at 541.

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Practice Note: The court's analysis was substantively the same as that reached in *McDowell*, though the court of appeals did not mention the other decision. The engineering firm petitioned for review, and as in *McDowell*, the Texas Supreme Court has requested briefing on the merits.

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6. Timeliness and sufficiency of certificate of merit

In *Kudela & Weinheimer, L.P. v. Arriaga*, No. 14-21-00300-CV, 2023 WL 3372723 (Tex. App.—Houston [14th Dist.] May 11, 2023, no pet.) (mem. op.), the court of appeals held that injured parties qualified for an extension of the filing deadline but that the filed affidavit was sufficient only as to one of several defendants.

On March 3, 2019, a valet working at a high-rise apartment complex was seriously injured when he was run over by a pickup truck while trying to retrieve a set of keys from a storm drain located in the center of a driveway connecting the apartment garage to the roadway. *Id*. at *2. On January 29, 2021, the valet and his family sued the apartment complex, the driver of the pickup truck, and several design professionals involved in the design of the driveway. *Id*. The plaintiffs' original petition attached a certificate of merit from a licensed professional engineer alleging that the faulty design of the driveway was a cause of the accident and the valet's injuries. *Id*. On March 10, 2021, the day before the applicable two-year statute of limitations expired, the plaintiffs filed a third mended petition adding the project's architect and landscape architect as the defendants. *Id*. In the third amended petition, the plaintiffs did not allege that time constraints prevented a

certificate of merit from being filed by an architect and landscape architect, nor did the plaintiffs request an extension to file such certificates. *Id*. Instead, the plaintiffs attached a new certificate of merit from the same professional engineer that previously submitted an affidavit even though he was not a licensed architect or landscape architect. *Id*. Beginning on April 5, 2021, the defendants moved to dismiss based on the lack of a proper certificate of merit. *Id*. Two days later (April 7, 2021) the plaintiffs amended their petition adding a certificate of merit from a licensed architect adopting the engineer's allegations and asserting that a certificate of merit was not originally provided by a licensed architect due to the quickly running limitations period. *Id*. The trial court denied the motions to dismiss. *Id*.

On appeal, the court analyzed the timeliness and sufficiency of the architectural-focused certificate of merit. The court relied on its prior precedent in *Epco Holdings, Inc. v. Chicago Bridge & Iron Co.*, where the court previously held that § 150.002 did not require a plaintiff's allegation under subsection (c) to be made in the first petition naming a particular design professional as a party but was satisfied so long as the subsection (c) allegation (that limitations would run) was made within the *thirty-day extension period*. *Id*. at *3, (citing *Epco Holdings, Inc. v. Chi. Bridge & Iron Co*. 352 S.W.3d 265, 269 (Tex. App.—Houston [14th Dist.] 2011, pet. dism'd)). Because the plaintiffs, as in *Epco*, made their subsection (c) lack-of-time allegation within the 30-day extension period after filing their lawsuit against the architectural defendants, the court held that the plaintiffs could rely on the amended petition with the architectural certificate of merit attached. *Id*.

Turning to the sufficiency of the certificate of merit arguments, the court of appeals held that the plaintiffs failed to provide a certificate of merit by a registered landscape architect in accordance with the requirements of § 150.002(a)(2) ("holds the same professional license or registration as the defendant"), and therefore reversed the trial court's denial of the landscape architect's motion to dismiss. *Id*. at 5. Finally, the court analyzed the challenge to the adequacy of the certificate of merit filed against the architect. *Id*. at **5–8. In summary, the court of appeals analyzed the certificate of merit affiant's CV to determine whether the affiant was "actively engaged in the practice of architecture" as required in section 150.002(b). *Id*. The court of appeals also weighed the affiant's adoption of the professional engineer's statements and conclusions and held as to both challenges that the affiant's assertions and incorporation of the engineer's allegations in his affidavit "were sufficient to meet the requirements of section 150.002(b)." *Id*. at *8.

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Practice Note: Plaintiffs should not over-rely on *Kudela*. Subsection (c), in its entirety, states:

> (c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, a claimant has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the claimant shall have 30 days after the filing of the complaint to

> supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

Tex. Civ. Prac. & Rem. Code § 150.002(c). The Texas Supreme Court previously stated that the "good cause" extension "is contingent upon a plaintiff: (1) filing within ten days of the expiration of the limitations period; and (2) alleging that such time constraints prevented the preparation of an affidavit." *Crosstex Energy Serv., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 391 (Tex. 2014). As discussed in *Kudela*, several other courts of appeals "have interpreted this language from *Crosstex* as indicating that a subsection (c), lack-of-time allegation filed after the running of limitations, as occurred here and in *Epco*, would not entitle the plaintiff to the 30-day extension under that section even though the plaintiff's lawsuit had been filed within ten days before expiration of limitations." *Kudela*, 2023 WL 3372723, at *3 (citing *Barron, Stark & Swift Consulting Eng'rs, LP v. First Baptist Church, Vidor*, 551 S.W.3d 320, 323 (Tex. App.—Beaumont 2018, no pet.) and *Emerald Waco Invs., Ltd. v. Petree*, No. 05-15-00863-CV, 2016 WL 4010056, at *4 (Tex. App.—Dallas July 25, 2016, no pet.) (mem. op.)).

In any event, the court in *Kudela* "decline[d] to join these court's conclusion regarding the precedential value of *Crosstex*[,]" a Texas Supreme Court decision. *Kudela*, 2023 WL 3372723 at *3. The court instead noted that *Crosstex* involved a plaintiff who filed suit outside the ten-day period, not a plaintiff who filed within the ten-day period, but requested grace within the thirty-day grace period. *Id*. at *4.

There is now a split at the courts of appeals that will need to be resolved by the Texas Supreme Court. A few brief comments on the statutory analysis in *Kudela*. Subsection (c) does not tie the allegation requirement ("a claimant has alleged that an affidavit… could not be prepared") to the thirty-day extension. Tex. Civ. Prac. & Rem. Code § 150.002(c). Rather, the *contemporaneous* filing requirement is exempted if limitations will expire within the ten-day period and the claimant "*has* alleged" that the certificate could not be prepared. *Id*. (emphasis added). The use of "has alleged" (rather than "alleges," for example) may imply a backwards-looking requirement, tied to the ten-day limitations period.

Moreover, as the Texas Supreme Court noted in *Crosstex*, the statute conditions the thirty-day grace period on meeting two conditions: (1) the filing of suit within ten days of limitations "*and*" (2) an allegation that the late filing prevented preparation of the certificate. *Crosstex*, 430 S.W.3d at 390. It is only in (3) "such cases" that the thirty-day grace period applies. *Id*. As a result, the "has alleged" requirement "does not stand alone." *Id*. at 391. But if it does not "stand alone" what does it stand with? Some courts have held (based on *Crosstex*) that it stands with the ten-day requirement, i.e., the plaintiff must meet the allegation requirement before limitations has run, and specifically within that ten-day window. *Kudela* holds that the "has alleged" requirement stands with the thirty-day grace period, independent of condition (1) above. *Kudela*, 2023 WL 3372723, at *3. In detaching (2) from (1), but grafting it on to (3), it is hard to square the reasoning in *Kudela* with (what is arguably dicta) in *Crosstex*. But since *Kudela* was simply following its prior precedent—*Epco*, which was not explicitly overruled in *Crosstex*—the court of appeals declined to "overrule our prior opinion in *Epco*." *Id*. at *4. Hopefully the Texas Supreme Court will resolve the split soon. In the meantime, know your appellate jurisdiction when preparing your certificate of merit.

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In *Bratton v. Pastor, Behling & Wheeler, LLC*, No. 01-23-00015-CV, 2023 WL 8587652 (Tex. App.—Houston [1st Dist.] Dec. 12, 2023, no pet. h.) (mem. op.), the court held that the plaintiffs' certificate of merit was sufficient under Chapter 150, and that the trial court had abused its discretion in granting a motion to dismiss.

Bratton and Mallard, individually and as representatives of the Estate of Jarvie Mallard, Sr. (collectively, Bratton) sued Union Pacific, Pastor Behling & Wheeler (PBW), and Environmental Resources Management Southwest (ERM) for negligence. *Id*. at *1. Bratton alleged that their neighborhood had been contaminated with creosote and other toxic chemicals emanating from Union Pacific's Englewood Rail Yard and suffered injuries including cancer and death because of toxic exposure. *Id*. Bratton alleged that "Union Pacific and its consulting geologists, ERM and PBW, failed to properly test, remediate, and/or warn of the real risks of creosote exposure to the residents [of their neighborhood]." *Id*. at *2. To support their claims against ERM and PBW, Bratton filed a certificate of merit prepared by their expert Dr. Bedient pursuant to § 150.002(a) of the Texas CPRC. *Id*.

According to the certificate of merit ERM and PBW "failed to develop a reasonably reliable Conceptual Site Model (CSM) that captures the key hydrogeological features of the site and the major routes of chemical exposure to the adjacent community[.]" *Id*. The certificate of merit also stated that this CSM should "evolve as data [is] collected over time." *Id*. But that ERM and PBW failed to update their CSM as it did not appear to change since the mid-1990's and currently did not accurately reflect key hydrogeologic features of the site and exposure routes to the surrounding areas. *Id*. at *3. In sum, the certificate of merit asserted that "ERM and PBW failed to (1) fully identify additional areas of potential contamination, such as the Englewood Intermodal Yard, in order to develop an appropriate remediation plan, (2) characterize, assess and develop a plan to mitigate dense non-aqueous phase liquids (DNALP) at the site as required by [Texas Risk Reduction Program], and (3) establish the full extent of community impacts or develop actions to completely stop those releases." *Id*. (internal quotations omitted).

ERM and PBW objected to the certificate of merit and moved to dismiss under § 150.002(e) of the Texas CPRC. *Id*. ERM and PBW claimed that the certificate of merit was insufficient because (1) it contained collective assertions of negligence, (2) Dr. Bedient's sources were unreliable, and (3) Dr. Bedient had not reviewed ERM and PBW's contract with Pacific Union. *Id.* PBW also argued that Dr. Bedient's failure to conduct an independent investigation confirmed he was acting more as Bratton's agent rather than a third-party licensed engineer required by § 150.002(a). *Id*. at *4. The trial court granted ERM and PBW's motions and dismissed Bratton's claims without prejudice. *Id.* Bratton filed an interlocutory appeal. *Id*.

The court of appeals initially noted that "section 150.002(b) does not allow for collective assertions of negligence in the certificate of merit[]" and that "[i]n a case involving multiple defendants, the court must be able to determine which acts or omissions should be ascribed to which company, or the certificate of merit should opine that both companies were involved in all aspects of the work." *Id.* at *6. (citing *T&T Eng'g servs., Inc. v. Danks*, No. 01-21-00139-CV,

2022 WL 3588718, at *7 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022, pet. denied)). Thus, a certificate of merit complies only if the affiant explains why a collective allegation of negligence is appropriate, such as when all the defendants are involved in all aspects of the work at issue. *Bratton*, 2023 WL 8587652, at *6.

ERM and PBW argued that the certificate of merit could not allege that they took part in all aspects of the work because they worked for Union Pacific at different times, for different phases of remediation, and submitted separate reports to regulatory agencies. *Id*. While the certificate of merit did collectively address acts and omissions of negligence with respect to the CSM, "the certificate of merit reflects that it was appropriate to do so because . . . PBW and ERM were both responsible for the preparation and maintenance of an accurate CSM for the Facility." *Id*. at *7. According to the court, even if this were insufficient under § 150.002, the certificate of merit also identified specific acts or omissions attributable to PBW, individually, and ERM, individually. *Id*.

PBW argued that the collective assertions of negligence prevented it from knowing what specific errors, actions, or omissions were attributed to it. *Id*. at *8. Still, from the record and PBW's argument on appeal, the court managed to understand at least some of the errors or omissions attributed directly to it sufficiently enough to challenge the accuracy of the allegations. *Id*. Similarly, the court rejected ERM's authority and sided with the *T&T Engineering Services* holding that a "certificate of merit may be held sufficient when evaluated in conjunction with the record before the trial court." *Id*. at *9. Because the certificate of merit identified specific acts of both ERM and PBW, and ERM and PBW both acknowledged they were involved in aspects of the work, the certificate of merit provided a basis to conclude Bratton's claim was not frivolous. *Id*. at *10.

Additionally, ERM and PBW both criticized the certificate of merit's sources, factual assertions, and opinions because it "simply repeats allegations the Harris County attorney asserted in its letter to [the] TCEQ." *Id*. The Court found that these arguments are more appropriately raised in a motion for summary judgment or a motion to exclude expert testimony and did not implicate the sufficiency of the certificate of merit. *Id*. at *11.

Lastly, PBW argued that Dr. Bedient was not a third-party licensed professional but was instead acting as Bratton's agent because he did not conduct an independent investigation of the facts. *Id*. Again, the court rejected this argument, holding that it was not relevant at the dismissal stage of the litigation and could be raised later. *Id*. at *12.

C. CPRC Chapter 82 indemnity

In *Borusan Mannesmann Pipe US, Inc. v. Hunting Energy Services, LLC*, No. 14-21-00694-CV, 2023 WL 5487433 (Tex. App.—Houston [14th Dist.] Aug. 24, 2023, no pet. h.) (mem. op.) (discussed above) the court also found that a seller of pipe did not owe statutory indemnity in the absence of a lawsuit by another party.

As noted above, Hunting prevailed at trial against Borusan based on the trial court's finding that Borusan had sold defective pipe that incorporated Hunting's proprietary threaded connection services. *Id*. at **1, 4. Borusan sold the pipe to a wholesaler (Sooner), who in turn sold it to end-

user Concho. *Id*. at *1. When the pipe failed, Sooner and Concho investigated though ultimately found that Borusan was responsible. *Id*. at *3. Nonetheless, Sooner sent a demand letter to Hunting (and Borusan) noting that the pipes had failed, and asserting that Borusan and Hunting "had failed to comply with their warranties with respect to these materials[.]" *Id*. at *11. Sooner also asserted that "Concho has sustained significant damage, which it hereby demands compensation for." *Id*.

After a bench trial, the court ordered that Borusan owed statutory indemnity to Hunting per Texas Civil Practice and Remedies Code § 82.002(a):

> A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product for which the seller is independently liable.

The court of appeals reversed, noting that the "duty to indemnify is triggered by the injured claimant's pleadings." *Borusan*, 2023 WL 5487433, at *11. Hunting did not point to any pleading, instead relying on the demand letter from Sooner. *Id*. The court held that "a demand letter is not a 'products liability action' nor a pleading." *Id*. (citing Tex. Civ. Prac. & Rem. Code § 82.001(2)). The court also held that a demand letter by itself failed to supply an inference of the existence of a products-liability claim and reversed the trial court's conclusion of law that Borusan owed Hunting statutory indemnity. *Borusan*, 2023 WL 5487433, at **11–12.

D. Damages

1. Benefit-of-the-bargain and cost of repairs

In *Von Illyes v. Rolfing*, No. 07-22-00129-CV, 2023 WL 2666115 (Tex. App.—Amarillo Mar. 28, 2023, no pet.) (mem. op.), the court of appeals held that the plaintiffs' failure to establish the value of the value of the work performed by a general contractor and the remedial work required to correct defective work precluded the plaintiffs' recovery of their benefit of the bargain and the costs of repair damages.

The case arose from a residential renovation and remodel contract that required the plaintiffs to pay the general contractor one-third of the contract price up front, a second payment at the time of one-third completion, and the final payment at the time of project completion. *Id*. at *1. Shortly after making the second payment, the plaintiffs expressed their dissatisfaction that the project was behind schedule and displeasure with the workmanship of the project. *Id*. The plaintiffs created a punch list of items that needed completion or correction to finish the project. *Id*. When the contractor sought the final payment, the plaintiffs refused until the work was completed and corrected. *Id*. The contractor then filed a lien on the property, resulting in the plaintiffs demanding that the contractor cease work until the matter was resolved. *Id*. The plaintiffs then brought suit seeking the release of the liens, damages for breach of contract and under the DTPA, and attorney's fees. *Id*. at 2. The contractor counterclaimed against the plaintiff for breach of contract for nonpayment and recovery in quantum meruit. *Id*.

At trial, photographs were admitted into evidence depicting poor workmanship and substandard quality of the remodel job. *Id*. The plaintiffs testified that the work was not completed

before the agreed date of August 26 and that less than ten percent of the punch list items had been completed when the work was abandoned. *Id.* The contractor testified that electrical, plumbing, and structural issues were the primary cause of delays. *Id*. The contractor admitted that the plaintiffs were entitled to a $2,000 offset for unfinished work but maintained that the project was completed by the agreed date. *Id*. The contractor also disputed that the plaintiff provided a punch list, arguing that contractor had created its own punch list shortly before the plaintiffs kicked them off the property and that the plaintiffs failed to show up for the final walkthrough. *Id*.

The jury returned a verdict for the plaintiffs, finding that the contractor breached the contract and breached the implied warranty of good and workmanlike performance. *Id*. at *2. The jury awarded $27,150 in damages to the plaintiffs. *Id*.

The first issue on appeal was whether there was sufficient evidence to support the jury's award of $25,150 in loss of the benefit of the bargain. *Id*. at *3. The jury was provided with evidence of the total value of the services ($67,150) and showed that the plaintiffs paid the first two installments for a total of $44,200 but did not make the final payment because the work was not completed. *Id*. While there was evidence about the value of received materials, labor, and appliances as dictated by the contract, there was no testimony as to the nature of the work completed, when the work was completed, the value of the completed work, or the cost of materials provided by the contractor. *Id*. Because no evidence established the value of the work performed, the jury lacked a critical factor required for a benefit-of-the-bargain calculation. *Id*. As a result, the court held that the evidence could not support the jury's finding of $25,150 in loss of benefit-of-the-bargain. *Id*. at *4.

The second issue was whether the evidence supported the $2,000 awarded by the jury for reasonable costs to repair the property. *Id*. This required the plaintiffs to prove the cost to complete or repair the work, less the unpaid balance of the contract price. *Id*. The plaintiffs failed to testify to any out-of-pocket expenses to repair the work or submit evidence of its costs. *Id*. While the plaintiffs showed that the punch list was not completed, they did not present evidence showing what items were on the punch list, nor did they provide a repair estimate for those items. *Id*. Because the plaintiffs did not establish reasonable value of the costs of repairs, the evidence failed to support the jury's award. *Id*. The court also held that the plaintiffs could not recover the $6,000 in attorney's fees because no evidence supported the award of actual damages. *Id*.

2. Consequential damages

In *MSW Corpus Christi Landfill, Ltd. v. Gulley-Hurst, LLC*, 664 S.W.3d 102 (Tex. 2023), the Texas Supreme Court addressed the evidence required to recover consequential lost opportunity costs.

This is not a construction case, but a real estate transaction dispute addressing the foreseeability of consequential damages. Gulley sold a one-half interest in a landfill to MSW for $7,500,000. *Id*. at 105. MSW paid for the land with a $3,500,000 promissory note to Gulley, along with $5,000,000 in additional loans. *Id*. The parties had some disagreements and entered a mediated settlement, permitting MSW to buy Gulley's remaining one-half interest in the landfill within 120 days of settlement. *Id*. But if MSW did not make the purchase, it was required to sell its own one-half interest to Gulley, and "provide clear title" for same. *Id*. Under the settlement

agreement, if MSW did not exercise its purchase option (thereby becoming the seller of its own one-half interest), Gulley would write off its $3,500,000 promissory note, and refinance the $5,000,000 loan. *Id*.

MSW did not buy the property but conveyed its one-half interest per the settlement agreement; Gulley did not timely refinance the $5,000,000 loan. *Id*. MSW then sued Gulley for Gulley's failure to refinance the $5,000,000 loan, seeking "lost 'opportunity cost' damages of $372,484.70." *Id*. MSW submitted evidence to the jury that Gulley's failure to refinance the loan prevented MSW from receiving another loan, from which MSW would have recovered an invested return of $372,484.70. *Id*. at 105–06. The trial court rendered judgment for MSW based on the verdict, and the court of appeals affirmed. *Id*. at 106.

The Texas Supreme Court reversed and rendered as to the $372,484.70 in lost opportunity costs. *Id*. at 108. It first declared that lost opportunity costs from an inability to invest through new loans were consequential damages. *Id*. at 107 (citing *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 186 (Tex. 2022)). Ordinarily, consequential damages are only recoverable "if 'the parties contemplated at the time they made the contract that such damages would be a probable result of the breach.'" *MSW*, 664 S.W.3d at 107 (quoting *Stuart v. Bayless*, 964 S.W.2s 920, 921 (Tex. 1998)). But MSW cited no evidence that Gulley "knew at the time" of the mediated settlement agreement "that MSW intended to use the refinancing proceeds to obtain another loan, the nature of MSW's intended use of the second loan, or that MSW would be unable to secure alternative financing if [Gulley] breached its commitment to refinance MSW's original loan." *MSW*, 664 S.W.3d at 107–08.

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Practice Note: The consequential damages portion of the Court's holding is unremarkable and consistent with prior decisions. It is included here because the Court focused exclusively on *subjective* foreseeability, specifically what Gulley knew—rather than *should have known*—at the time the parties entered a contract. The Court held that MSW failed to put on evidence that Gulley knew MSW "would be unable to secure alternative financing," suggesting that the plaintiff also had to show how a breach would affect the plaintiff. Although the case is probably limited to the lost opportunity cost context, it is a nice reminder: If your client is claiming damages that may be characterized by a court as consequential damages, they must prove that the other party was aware of those damages.

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3. Mental anguish and suffering damages

In *United Rentals North America, Inc. v. Evans*, 668 S.W.3d 627 (Tex. 2023), the Texas Supreme Court addressed the sufficiency of damages for mental and physical pain and suffering in a catastrophic death case.

United Rentals transported two pieces of large equipment from its San Antonio branch to its Irving branch: a forklift that had an attachment called a "boom arm," and a "Genie S-125 boom lift." *Id*. at 632. The Genie boom lift was oversized and could be transported only with a special

oversized permit from the DMV. *Id*. The permit would specify the permissible route to safely transport the equipment, and also would require a special trailer with a lower-than-normal deck, since the Genie boom lift was over ten feet tall. *Id*. United (or others) hired two companies to transport the equipment. *Id*. Lares Trucking was going to transport the forklift (which was not oversized and did not require a special permit) and "Truckin By the Wild West" was hired to transport the Genie boom lift, both scheduled for transport on the same day. *Id*.

Lares' driver, Valentin Martinez, showed up on the day of delivery and spoke with United Rentals' operation manager and stated he was there to pick up a "boom." *Id*. Evidence at trial indicated that a "boom" could refer to either the forklift (which Lares and Mr. Martinez were there to transport) or to the Genie boom lift. *Id*. The manager knew that it was United Rentals' policy that the bill of lading provided by a transporter matched the bill of lading assigned to the equipment being transported, though Martinez could not initially produce the requested bill of lading. *Id*. The manager then called a different United Rentals' employee, stating that a driver was ready to pick up the "boom" but without a bill of lading. *Id*. The other employee located the Genie boom lift (which Lares was not there to transport) bill of lading number, which United Rentals then accepted to load the Genie boom lift onto Martinez's truck. *Id*. at 632–33. United Rentals did not measure the Genie boom lift when loading it into Martinez's truck, which had a normal flatbed trailer inappropriate for transporting the oversized Genie boom. *Id*. at 633. Although United Rentals' knew that a Genie boom lift could not be transported on a flatbed, the bill of lading did list "Trailer Type: FLATBED" for that equipment. *Id*. Before leaving, Martinez tracked down the bill of lading for the equipment he was supposed to transport (the forklift, not the Genie boom), and showed the bill of lading number to United Rentals' manager. *Id*. Even though the bill of lading did not match the equipment that United Rentals had loaded onto Martinez's truck, United Rentals' manager failed to note the discrepancy, and failed to sign the bill of lading (as required by policy). *Id*. Martinez then departed with the oversized Genie boom on his normal, undersized (for that equipment) flatbed trailer. *Id*.

Just over an hour later, Truckin By the Wild West showed up to transport the Genie boom lift with a specialized trailer that could safely transport it. *Id*. Truckin By the Wild West presented the bill of lading for the Genie boom lift, but United Rentals' manager informed them that the Genie boom lift had left the station. *Id*. By this point, several of United Rentals' employees realized that Martinez had driven off with the wrong equipment but contacted no one about the mistake. *Id*. Instead, United Rentals gave the forklift to Truckin By the Wild West. *Id*.

Later that morning as Martinez was going north on I-35, he entered a construction zone in Salado passing multiple warning signs of a low bridge under construction that was shorter than the Genie boom lift, directing truck drivers who exceeded the height to exit. *Id*. Martinez failed to exit, and the Genie boom lift struck the overpass, causing two massive beams to collapse onto the highway. *Id*. One of the two beams struck the hood of a passing motorist's pickup truck, falling so fast that the driver had no time to react by braking or swerving. *Id*. The motorist suffered catastrophic injuries that resulted in his death at the scene. *Id*. DPS concluded that the cause of the accident was Martinez's error in not exiting, transporting oversized equipment, and concluded that "the incorrect piece of equipment was loaded" but that "the crash would not have occurred" if Martinez was transporting the forklift instead. *Id*.

The motorist's mother and son filed a survival claim on behalf of his estate against United Rentals, Lares, and Martinez, though Lares and Martinez settled or were dismissed before judgment. *Id*. at 633–34. At trial, the plaintiffs sought mental anguish damages for the motorist's anticipation of injury and physical pain and mental suffered after his injury but before his death. *Id*. at 641. The plaintiffs' accident-reconstruction expert testified that the beam that killed the motorist fell in nine-tenths of a second, giving the motorist no time to react by braking or taking any other action, but did believe there was at least time to panic or recognize the situation. *Id*. The expert testified that "there [was] time to [think] oh, my gosh, what's happening, you know, in a moment." *Id*. Understandably, the expert could offer no opinion about whether the motorist "in fact realized the beam was falling before he was killed." *Id*. The medical examiner who performed the autopsy on the motorist also testified that the cause of death was the massive beam falling onto the pickup truck. *Id*. at 642. The plaintiffs argued that because the motorist's "skull was not fractured and the autopsy did not reveal injury to his vertebrae, blood could have continued to travel to his brain for a brief time after the impact." *Id*. But the examiner testified that the motorist "may or may not have been knocked unconscious, and there's no way to know… That's a big question mark that's going to stay a question mark." *Id*. The examiner also agreed that it would be speculative to testify whether the motorist was consciously aware of what happened after the accident (but before death). *Id*. But did testify that "there have been people who" had injuries like the motorist's but "could have been clear as a bell for 10 to 15 seconds." *Id*.

The jury found United Rentals negligent and assigned $1.5 million in damages to United Rentals for mental anguish and physical pain suffered by the motorist before impact, and before death. *Id*. at 634, 641. The Texas Supreme Court held the evidence failed to support any award of mental anguish or pain and suffering before death. *Id*. at 641. United Rentals also argued that mental anguish should not be permitted for "split-second anticipation of injury" though the Court declined to reach this issue. *Id*. at 641 n. 14. For the pre-injury mental anguish damages, the Court held that since the plaintiffs' expert failed to opine that the motorist "in fact realized the beam was falling before he was killed" that testimony could not support any pre-injury mental anguish. *Id*. That the expert opined "there was *time*" for the motorist to anticipate injury was not sufficient because juries cannot infer "conscious pain and suffering from circumstantial evidence" where the inferences are not more probable than another. *Id*. at 641–42. Thus, without evidence that the motorist was aware of the falling beam, there was no legally sufficient evidence to support an inference one way or the other. *Id*. at 642.

As for the motorist's consciousness post-injury, the Court also held that the evidence was not legally sufficient. *Id*. at 643. The Court reasoned that any post-injury damages required evidence that the motorist retained consciousness after the beam fell, but no evidence demonstrated that he was awake after the injury. *Id*. Instead, the medical examiner's testimony established that they "simply did not know" whether the motorist retained consciousness, or not. *Id*. In the absence of that evidence, "any damages awarded for conscious pain and suffering could only have been based on speculation, not evidence." *Id*. Although the medical examiner testified that the motorist "could have been clear as a bell for 10 to 15 seconds[,]" the jury was not free to infer from that statement that the motorist "was actually conscious after impact." *Id*.

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Practice Note: The plaintiffs bore a difficult burden in the case. The Court suggested that evidence that the motorist swerved or avoided the accident could have supported evidence of pre-injury awareness of the beam falling to support mental anguish. *Id*. at 642. But evidence that the motorist did not sufficiently respond to the beam might also have been used against the plaintiffs on a comparative fault basis.

For the post-injury consciousness, any time a plaintiff dies shortly after an injury, there will rarely be testimony of conscious awareness, because the person who could give that testimony is deceased. The Court noted that the medical examiner was "given multiple opportunities" to testify that the deceased "more likely than not retained consciousness." *United Rentals*, 668 S.W.3d at 643. Had the medical examiner so testified, perhaps the Court would have allowed the jury to make an inference, as that inference would arguably be "more probable than another." *Id*. at 642 (citing *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997)). But without some minimal scale-tipping in favor of one theory against another, it will be difficult for a plaintiff's estate to prove mental anguish or physical pain when the plaintiff succumbs quickly to their catastrophic injury.

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4. **Reasonableness and necessity of damages**

In *AdvanTech Construction Systems, LLC v. Michalson Builders, Inc.*, No. 14-21-00159-CV, 2023 WL 370513 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, no pet.) (mem. op.) (discussed above), the court of appeals also upheld an award of damages as reasonable and necessary.

The trial court awarded the general contractor $39,802.34 in remedial damages on a contract claim against a subcontractor who walked the job. *Id*. at *11. The damages were for increased costs to complete the work. *Id*. On appeal, the subcontractor challenged the reasonableness and necessity of the award. *Id*. at *12. The court of appeals recited the general rules that a contract claimant must show more than its out-of-pockets, and must establish reasonableness based on some other evidence. *Id*. Still, the appellate court affirmed the award even though "[n]o trial witness explicitly testified that the expenses incurred to hire another subcontractor were reasonable and necessary." *Id*. The appellate court credited as sufficient the testimony of two witnesses who testified that it was generally more expensive to pay a replacement subcontractor than the original subcontractor. *Id*. The court also noted that the damages awarded were identical to the general contractor's testimony about the total replacement costs. *Id*.

In *Leafguard of Tex., Inc. v. Guidry*, No. 09-21-00034-CV, 2023 WL 3369176 (Tex. App.—Beaumont May 11, 2023, no pet.) (mem. op.) (discussed above), the court of appeals held that an owner's costs to remedy defective work were not supported by legally and factually sufficient evidence.

The trial court awarded the owner past and future damages for the contractor's breach of contract, apparently based on testimony about various costs to repair the alleged damage. *Id.* The court of appeals held that the evidence alleging faulty *installation* did not support that such costs were reasonable and necessary as required. *Id.* at *5. The contractor argued the evidence was legally and factually insufficient to support the trial court's judgment awarding damages—with

respect to repairs of the windows, soffit and fascia, the overhang, and the roof—to the owner. *Id.* at *5. As to the repair of the windows, the court held that the testimony evidence that the remediation work was performed at a certain cost failed to show the price paid for the work performed was reasonable and necessary. *Id.* Relying on *McGinty v. Hennen*, 372 S.W.3d 625 (Tex. 2012), the court held that absent evidence that the amount paid was reasonable, no damages can be awarded based on the record. *Leafguard*, 2023 WL 3369176, at *5. The owner further complained the repairs resulted in the fascia boards and roof line being extended beyond its earlier profile. *Id.* at *6. The court held that the evidence did not support the finding, considering the "before" and "after" photos "extinguish[] any possibility that the trial court's judgment is supported by factually sufficient evidence." *Id.* As for the overhang, the owner presented testimony stating it was "inadequately built." *Id.* The court of appeals held the evidence did not indicate the contractor was in any way responsible for the allegedly substandard construction of the overhang, and therefore could not be liable for the cost of modifying it to meet an acceptable standard. *Id.* Finally, finding the record contained unsupported accusations by the owner that the contractor had damaged the roof "by lifting the shingles," the court held the evidence could not establish the contractor caused the alleged damage. *Id.* at *7.

In *Eduardo Del Bosque v. Juan Barbosa*, No. 05-22-00230-CV, 2023 WL 1097556 (Tex. App.—Dallas Jan. 30, 2023, no pet.) (mem. op.), the court reversed and remanded the trial court's judgment notwithstanding the verdict (JNOV) because the evidence presented to the jury was sufficient to show that contractor's construction costs were reasonable and necessary.

Contractor Del Bosque entered into an oral agreement with Barbosa to construct and operate a restaurant on commercial property owned by Barbosa. *Id*. at *1. Under the agreement, Del Bosque agreed to pay the first $150,000 of construction costs, and the parties agreed to share all remaining costs equally. *Id*. Because Barbosa was serving a federal prison sentence at the time of construction, Del Bosque advanced all costs necessary to complete the project. *Id*. When Del Bosque sought reimbursement, Barbosa denied that the parties had a contract and refused to pay. *Id*. Del Bosque then sued, and its breach of contract and quantum meruit claims were tried to a jury. *Id*. The jury found that the parties had: (i) entered into a contract; (ii) Barbosa breached the contract; (iii) Barbosa's performance was not excused; and (iv) Del Bosque suffered damages in the amount of $117,182.92. *Id*. Barbosa moved for JNOV. *Id*. The trial court granted the motion and rendered a take-nothing judgment against Del Bosque, who then appealed. *Id*.

In analyzing the evidence of damages, the court of appeals found that there was sufficient evidence of probative value to establish that Del Bosque's expenses were reasonable and necessary. *Id.* at *2. Del Bosque testified that he had over twenty-five years' experience in commercial construction and had completed many buildings, had a professional history of honesty and competence, and had never been sued for improper work. *Id*. Del Bosque also testified that he personally inspected the premises, evaluated the state of construction, assessed whether prior work performed at the premises could be used, determined what future work was needed, and personally supervised construction of the project. *Id.* Del Bosque first estimated that $390,000-$400,000 would be required to construct the restaurant. *Id*. And he explained that he was to be responsible for the first $150,000 in expenses, and then the parties were to split the remaining costs. *Id*.

At trial, Del Bosque also presented 375 pages of detailed, dated invoices and receipts for the construction expenses admitted into evidence that his out-of-pocket costs were $430,000. *Id.* at *3. Del Bosque testified that he paid those costs and expected reimbursement in accordance with the parties' agreement. *Id*. The court of appeals concluded that the jury could see what was done and could reasonably conclude that the invoices reflected costs and materials necessary for the completion of a restaurant. *Id*. The court also held that Del Bosque was not required to state that the damages were "reasonable" and "necessary" in his testimony. *Id.* The court of appeals reversed the trial court's judgment, rendered judgment for Del Bosque consistent with the jury's verdict, and remanded to the trial court only to determine attorney's fees and calculating pre- and post-judgment interest. *Id*. at *1.

Barbosa's counsel acknowledged at oral argument that if Del Bosque had used the magic words "reasonable" and "necessary" the evidence would have been sufficient to support the jury's verdict. *Id*. Barbosa also testified that the costs would have been between $200,000 and $300,000 to complete the project. *Id*. at *3. The court held that since the damages awarded to Del Bosque to cover his half share of the costs per the parties' agreement were within that range, the jury could have also relied on Barbosa's estimate of the costs. *Id*. at *4.

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Practice Note: Ordinarily, evidence of costs incurred is not evidence of its reasonableness. The court recited *Mustang* and *McGinty* for generalized statements about the need to prove remedial damages, but otherwise did not engage with those holdings at all. *Id*. at *2. Although impossible to tell, it seems that the saving grace for the reasonableness of the contractor's damages may have been the owner's testimony on what he estimated the construction costs would be. The owner had moved for directed verdict, which was denied. *Id*. *1. But since the owner won on JNOV, it did not appeal the trial court's judgment.

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In *BNM Ventures, LLC v. Green*, No. 05-22-00474-CV, 2023 WL 4042609 (Tex. App.—Dallas Jun. 16, 2023, no pet.) (mem. op.) the court overturned an award to a homeowner on cost-of-completion damages due to insufficient evidence that the costs were reasonable.

BNM Ventures involved a homeowner-homebuilder settlement agreement intended to resolve a construction defect dispute where the homebuilder agreed to perform remediation work outlined in a report prepared by the homeowner's engineer. *Id.* After inspecting the homebuilder's remediation work, the engineer concluded the work "did not conform to the report's specifications." *Id.* The homebuilder subsequently filed suit seeking a declaratory judgment regarding the scope of the settlement agreement and an interpretation of the engineering report. *Id.* at *2. The trial court (i) denied the homebuilder's request for declaratory judgment, (ii) ruled for the homeowner on his breach of contract claim related to the settlement agreement, and (iii) awarded the homeowner amounts paid to a replacement contractor to complete remediation work originally attempted by homebuilder. *Id.* at **2–3.

The court of appeals agreed with the homebuilder's contention that the homeowner failed to adduce sufficient evidence at trial showing the reasonableness of cost-of-completion damages

sought. *Id.* at *4. While the court did not hold that the words "reasonable" and "necessary" must be used to recover cost-of-completion damages, the court determined the evidence necessary to recover such damages must mean more than the conclusory testimony proffered by the homeowner's replacement contractor. *Id.* The court held that the homeowner's only evidence merely proved the "amounts charged or paid" and not their reasonableness. *Id*. The court also noted that while in some cases "evidence concerning the process of how costs were calculated will be sufficient to support the reasonableness of the ultimate price, no such evidence was submitted" by the homeowner. *Id*.

In *Wildcat Concrete & Construction, LLC v. Vanderlei*, No. 07-23-00078-CV, 2023 WL 8817556 (Tex. App.—Amarillo December 20, 2023, no pet. h.) (mem. op.) (discussed above), the court of appeals also overturned an award of $100,000 in damages because they were not supported by legally sufficient evidence for their reasonableness.

The owner's case for damages relied on testimony alleging an indefinite estimate of internal hours spent supervising construction following a contractor's abandonment of the project. *Id.* at **1–2. The indefinite number of hours were then multiplied by an unspecified monetary figure to arrive at the total of $100,000. *Id.* at *2. The court held that testimony failed to establish the owner's expertise in the field of construction necessary to determine if the sum was reasonable. *Id.* at *2. As a result, the court of appeals overturned the trial court's award of damages on the grounds that the components needed to derive it were missing from the record. *Id.* at *3.

E. Default Judgment

In *Hart Custom Homes, LLC v. Palomar Investment Group*, LLC, No. 01-22-00343-CV, 2023 WL 7391878 (Tex. App.—Houston [1st Dist.] Nov. 9, 2023, no pet. h.), the court of appeals reversed a post-defective-answer default judgment based on a lack of evidence to support the judgment.

Palomar contracted with Hart to build three townhomes. *Id*. at *1. After the project stalled, Palomar contacted Keynan Dutton, Hart's principal, for details on the projects accounting and to figure out a timeline of completion. *Id*. Dutton failed to respond, and Palomar sued both Hart and Dutton for breach of contract, violation of the Texas DTPA, and declaratory judgment. *Id*.

Dutton, acting pro se, filed an answer for Hart but not for himself. *Id*. Palomar moved for default judgment arguing that Dutton never answered and that Hart's answer was improper because Dutton was not a licensed attorney. *Id*. The trial court agreed with Palomar and (1) instructed Palomar to move to strike Hart's answer and (2) instructed Dutton to file his own answer. *Id*. After Dutton followed the court's instructions, Palomar again moved for default judgment against Hart, who had no answer on file after their original was struck. *Id*.

At a hearing on Palomar's second motion for default judgment against Hart only, Palomar admitted no evidence during the hearing. *Id*. Nonetheless the trial court signed an order granting Palomar's motion for default judgment against Hart and awarded Palomar $352,105.79 in actual damages and $5,749.49 in attorney's fees. *Id*. Hart then moved to set aside the default judgment arguing that vacating the judgment was proper because Palomar admitted no evidence to prove its

case against Hart, as required for a post-answer default. *Id*. The court denied Hart's motion and Hart appealed. *Id*. at *2.

On appeal, the court first noted the differing standards between no-answer and post-answer default judgments. *Id*. "In a no-answer default context, judgment can be entered on the pleadings alone, and all facts properly pled are deemed admitted." *Id.* (quoting *Whitaker v. Rose*, 218 S.W.3d 216, 220 (Tex. App.—Houston [14th Dist.] 2007, no pet.)). In contract, "a post-answer default constitutes neither an abandonment of the defendant's answer not an implied confession of any issues[,]" and "[b]ecause the merits of the plaintiff's claim remain at issue, judgment cannot be rendered on the pleadings, and plaintiff must prove its claim." *Hart*, 2023 WL 7391878, at *3 (quoting *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 183 (Tex. 2012)).

The court of appeals agreed with the trial court that Hart's answer, filed by Dutton, was defective. *Hart*, 2023 WL 7391878, at *3. However, while Hart's answer was "defective," a corporation's answer filed by a non-lawyer "is not void and thus is sufficient to constitute an answer for default-judgment purposes." *Id*. Accordingly, before the district court could enter a post-answer default judgment against Hart, Palomar had to "prove all aspects of its case." *Id*. at *4 (quoting *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009)). Considering Palomar failed to admit any evidence at the default judgment hearing, there was no legally sufficient evidence supporting the post-answer default judgment. *Hart*, 2023 WL 7391878, at *4. As a result, the court of appeals reversed and remanded. *Id*.

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Practice Note: The reason no- and post-answer default judgments are treated differently should be apparent. In a typical post-answer default case, the defendant has generally denied the plaintiff's allegations, putting them at issue. See *Rouhana v. Ramirez*, 556 S.W.3d 472, 477 (Tex. App.—El Paso 2018, no pet.) ("Rouhana's general denial placed in issue every issue in this case. Accordingly, without any evidence offered at trial to sustain Ramirez's claim, the default judgment must be reversed."). A party who files no answer admits to everything in the plaintiff's pleading, requiring no evidence to support judgment on the pleadings. But what was unmentioned in *Hart* was the *substance* of the deficient answer filed by Dutton on behalf of Hart. There is no mention of a general denial, which is ordinarily "sufficient to put… in issue" the plaintiff's allegations. Tex. R. Civ. P. 92. Does an answer with no general denial put the plaintiff to his proof?

Relatedly, a no-answer default judgment can be taken only if there is no answer on file at the time of the default judgment. In *Hart*, the court held that a deficient answer could implicate the post-answer requirements for default judgment. In *Gomez Paving, LLC d/b/a South Texas Paving v. South Texas Communications, Inc.*, No. 13-22-00433-CV, 2023 WL 4943329 (Tex. App.—Corpus Christi-Edinburg August 3, 2023, no pet.) (mem. op.), the court held that an *untimely* answer (i.e., filed after the answering deadline under Tex. R. Civ. P. 99(b))[14] filed before

[14] In *Gomez* the plaintiff tried to argue that the no-answer default judgment predated the answer because the docket-sheet contained an entry "Tickler" stating "Post Judgment Granted: Pending Order Granted." *Id*. Reciting numerous cases, the court rejected the argument, holding that a docket-sheet entry was insufficient to qualify as a judgment, and that a "tickler" is more "a reminder" than "an official action." *Id*.

default judgment was entered, precluded the trial court from entering a no-answer default judgment as well. *Id*. at *2.

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F. Duty

In *United Rentals North America, Inc. v. Evans*, 668 S.W.3d 627 (Tex. 2023) (addressed above), the Texas Supreme Court held that the rental company's alleged conduct was sufficient to establish a legal duty.

Although unclear from the opinion itself, it appears that United Rentals argued that it had no duty to prevent the delivery companies, or their employee, from causing the catastrophic accident that killed a motorist. *Id*. at 639. The Court acknowledged other courts' holdings that "a mere bystander who did not create the dangerous situation is not required to become the good Samaritan and prevent injury to others." *Id*. (citing *Torrington v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000) (cleaned up)). That said, the Court did find that United Rentals breached its duty "to avoid negligently creating a dangerous situation that has the highly foreseeable consequence of injuring others" like the motorist. *United Rentals*, 668 S.W.3d at 639 (cleaned up). Relying primarily on the foreseeability element of duty, the Court noted that United Rentals often moved heavy equipment on highways, and "had every reason to be well aware of the dangers of oversized loads[.]" *Id*. at 639. The Court held that based on the evidence, United Rentals "had ample opportunity to guard against allowing its equipment to be transported dangerously." *Id*.

United Rentals argued that the equipment delivery company had a "'non-delegable' statutory and regulatory" duty under the Transportation Code and relevant administrative codes "to comply with load-height requirements, and to ensure proper loading and securing of cargo." *Id*. (citing Tex. Transp. Code §§ 621.207, .504; 49 C.F.R. §§ 390.11, 392.9(b)(2); and 37 Tex. Admin. Code § 4.11(a)). Without deciding the applicability of those provisions, the Court held that a statutory or regulatory duty did not imply *exclusive*, non-delegable responsibility, noting that Texas law "is premised on the principle that more than one party can be legally responsible for a single injury." *United Rentals*, 668 S.W.3d at 639–40 (citing Chapter 33 of the Texas CPRC). The Court further reasoned that even if the delivery company had breached a "non-delegable" duty, United Rentals owed a separate duty for its own conduct of unsafely loading the Genie boom into the wrong truck. *United Rentals*, 668 S.W.3d at 640. Because United Rentals' "employees mishandled the [bill of lading] numbers…. [r]ealized the error, before the accident," but "failed to make any effort to fix the problem[,]" there was legally sufficient evidence that United Rentals breached its duty not to create a dangerous hazard. *Id*. at 640–41.

G. Economic loss rule

In *Hizar v. Heflin*, 672 S.W.3d 774 (Tex. App.—Dallas 2023, pet. filed) (discussed above), the court of appeals held that the economic loss rule did not bar a homeowners' recovery against its contractor for tort and DTPA claims.

The Heflins hired Hizar to remove popcorn ceilings at their house. *Id*. at 783. Kenneth Heflin (but not his wife) agreed to pay $8,600 for the project, which included $6,300 for the removal of popcorn texture, $500 to prime the ceiling, and $1,800 to apply a smooth surface. *Id*.

Hizar's quote for the work noted that the price was for smooth surface, but the Heflins would still decide whether they wanted "a smooth finish or a light knockdown after job is started." *Id*. Kenneth Heflin agreed to pay fifty percent on acceptance of the quote, and the balance on completion. *Id*. Kenneth paid Hizar $3,350, which was half the cost to remove the popcorn and prime the ceiling. *Id*.

The problems began immediately. Although Hizar said it would only take three or four days to do the work, the job dragged on another four or five days "because the popcorn ceiling was more difficult to remove than" Hizar anticipated. *Id*. Hizar testified that to create a smooth finish, he ended up mudding over the popcorn texture. *Id*. at 784–83. Hizar testified that he told the Heflins that one mud coat would cost $1,800, but that if he had to do two coats the price would be $4,000 to $5,000. *Id*. at 784. The Heflins did not agree to any additional cost. *Id*. At a meeting, Hizar said he could not get the popcorn off and therefore a smooth finish would cost more money. *Id*. As an alternative, Hizar offered to apply a textured finish as it would be "less than the original quoted price for a smooth surface." *Id*. The Heflins went with the cheaper, textured-finish option. *Id*.

Kenneth paid Hizar another $1,400 for materials to finish the job that Kenneth understood to be an advance on the total contract price. *Id*. Two days later, the Heflins inspected Hizar's work and found it incomplete and defective, not cleaned up, etc. *Id*. Hizar testified he did what the owners wanted: applied a coat of mud, knockdown texture, and paint. *Id*. He agreed the ceilings needed "another coat of mud" but said the Heflins would not pay for it, so he applied one and left. *Id*. Because Hizar walked, the Heflins paid a different drywall company $3,500 to complete the work. *Id*. at 784–85.

Hizar demanded $7,400 from the Heflins "plus daily late fees of 6.5%." *Id*. The amount was calculated based on Hizar's estimate that he provided labor and materials "worth at least $12,150" leaving a balance of $7,400 after subtracting the Heflins' prior payments. *Id*. The Heflins responded with a demand of their own, disputing they owed anything and asking for the cost to remedy defective work. *Id*. Hizar countered by filing a lien for $7,400. *Id*. Predictably, the Heflins filed suit. *Id*. Around four months into trial, the court removed Hizar's lien. *Id*. After a discovery dispute resulted in death-penalty sanctions against Hizar, the trial court struck Hizar's pleadings. *Id*. at 787. The Heflins presented evidence on liability and damages to the bench, and the court entered final judgment, awarding the Heflins economic damages of $8,250.00. *Id*. The court's judgment, however, did not say under which theory of recovery the damages were awarded. *Id*. at 796. The trial court's findings of fact and conclusion of law stated that it found for the Heflins "on each cause of action and determined they suffered economic damages of $8,250.00 regardless of the cause of action." *Id*. The conclusions of law referenced the Heflins' DTPA, implied warranty, breach of express warranty, breach of contract, negligence, and negligent misrepresentation claims, and said that the $8,250.00 was the reasonable and necessary cost to repair and complete Hizar's defective and incomplete work. *Id*. According to the Heflins' damage model, they claimed $4,750 for out-of-pocket expenses (functionally monies spent on wasted, useless services) and $3,500 for "benefit-of-the-bargain" damages (functionally cost of repair). *Id*.

On appeal, Hizar argued that the economic loss rule barred the Heflins from recovering on their tort claims as "this is a straight breach of contract case." *Id*. at 797. The court of appeals disagreed, holding that the Heflins' "contract claim is not one and the same as their warranty claims

and DTPA claims." *Id*. The court concluded that "the Heflins' warranty claim is based on [Hizar's] delivery of defective work that was not performed with due diligence and good workmanship as warranted" and therefore "gave rise to a breach of warranty claim, as distinct from a breach of contract claim." *Id*. at 797–98 (citing *CExchange, LLC v. Top Wireless Wholesaler*, No. 05-17-01318-CV, 2019 WL 3986299, at *7–8 (Tex. App.—Dallas Aug. 23, 2019, pet. denied) (mem. op.) (first citing *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 896–97 (Tex. App.—Houston [1st Dist.] 2002, no pet.); and then citing *Med. City Dall., Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60 (Tex. 2008)). For the DTPA claim, the court recognized that a mere breach of contract would not ordinarily constitute a laundry-list violation under the DTPA, but held that the Heflins' claims were based on "breach of an independent duty imposed by law not to make knowing misrepresentations to induce the Heflins to enter the contract." *Hizar*, 672 S.W.3d at 798. The court therefore rejected Hizar's argument that the economic loss rule barred recovery. *Id*.

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Practice Note: Bad facts make bad law. This run-of-the-mill, small residential construction dispute resulted in head-scratching and sweeping statements about the economic loss rule in a published opinion by the Dallas Court of Appeals. The economic loss rule analysis spans just three paragraphs, about half of which are just confusing citations. The court's discussion of the Heflins' warranty claim begins with: "an express warranty claim involve[s] something more than a mere promise to perform under the contract." *Id*. at 797 (internal citations and quotations omitted). But then the court pivots to discussing a warranty for "work … not performed with due diligence and good workmanship as warranted," which sounds a lot more like an implied (rather than express) warranty. *Id*.

It is *possible* for implied warranties to sound in tort. *See, e.g.*, *Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex. 1987) ("Implied warranties are created by operation of law and are grounded more in tort than in contract."). But more recent decisions have cast doubt on that conclusion. For example, in *Nghiem v. Sajib*, 567 S.W.3d 718, 725 (Tex. 2019), which involved tangential and complicated statute of limitations issues, the Court noted that "[e]ven though the implied warranty of workmanlike construction is imposed by operation of law, the obligation still arises from the contract and becomes part of the contract." In *Nghiem*, an intervening claimant successfully argued that their implied warranty claim sounded in contract (not tort) to secure a contractual four-year statute of limitations (rather than a two-year tort statute of limitations) for a *personal injury claim*. *Id*. at 723–24. It is hard to see how a tort-based implied "warranty claim based on [Hizar's] delivery of defective work that was not performed with due diligence and good workmanship as warranted" could *not* be barred by the economic loss rule, no matter if characterized as an express or implied warranty. *Hizar*, 672 S.W.3d at 797. The warranty arose out of the very contract that the Heflins had sued and successfully recovered against Hizar. See also *Certain-Teed Prod. Corp. v. Bell*, 422 S.W.2d 719, 721 (Tex. 1968) (stating that "a warranty which the law implies from the existence of a written contract is as much a part of the writing as the express terms of the contract"); *Lennar Homes of Texas Land and Constr., Ltd. v. Whiteley*, 672 S.W.3d 367, 378 (Tex. 2023) (noting that Court had held that implied warranties of good workmanship and habitability are "*implicit in the contract* between the builder/vendor") (quoting *Gupta v. Ritter*, 646 S.W.2d 168, 169 (Tex. 1983)).

On the DTPA claim, the court was relying on a fraudulent inducement theory. *Hizar*, 672 S.W.3d at 798 (stating that Heflins' claims were based on the "independent duty imposed by law not to make knowing misrepresentations to induce the Heflins to enter the contract."). There is no question that the economic loss rule does not apply to categorically bar fraudulent inducement claims. *Formosa Plastics Corp. v. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46–47 (Tex. 1998). And the Texas Supreme Court has extended that reasoning to DTPA claims, though under limited circumstances. In *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304–05 (Tex. 2006), the Court held that although a seller's "failure to deliver" a promised car "would not alone violate the DTPA," the plaintiff's DTPA claim was based on the seller's representation that the plaintiff "would get one model when in fact she was going to get another." *Id*. at 305. This "initial misrepresentation violates the DTPA." *Id*. The Court still held that the plaintiff had to meet a fraudulent inducement evidentiary burden of proving "no intention of performing at the time a contract is made" which "is not easy, as intent to defraud is not usually susceptible to direct proof." *Id*.[15] The Court reminded that "[b]reach alone is no evidence that breach was intended when the contract was originally made." *Id*. There is simply no discussion in *Hizar* of any subjective intent not to perform by anybody and the only discussion of fraud related to Hizar's filing of a fraudulent lien, although the court overturned the fraudulent lien claim on jurisdictional grounds. *Hizar*, 672 S.W.3d at 804–06.

Even if a DTPA and breach of contract claim can coexist under the economic loss rule, the circumstances should be limited to those involving initial misrepresentations akin to fraudulent inducement. As it is not apparent fraudulent inducement was even at issue in *Hizar*, the holding suggests a narrower economic loss rule than that stated by the Texas Supreme Court. The holding may be explained by the death penalty sanctions, as any fact pleaded would have been conclusively proven once the defendant was without an answer or other defensive pleading. In any event, the case is probably bad for the economic loss rule. Or good, depending on who is asking; if you are trying to get out from under the economic loss rule, *Hizar*'s abbreviated, perplexing analysis is a resource.

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H. Evidentiary sufficiency

In *Rushing v. Divine Homes, LLC*, No. 02-21-00397-CV, 2023 WL 1859454 (Tex. App.—Fort Worth Feb. 9, 2023, no pet.) (mem. op.), the court of appeals held the evidence was legally sufficient to support a jury's finding that an agent of the general contractor had committed fraud in his individual capacity.

In *Rushing*, a general contractor entered an oral contract with a project manager to repair a residential property damaged in a fire. *Id*. *1. The parties generally disputed the terms of the contract; specifically, the parties disagreed about the allocation of the profit from the project. *Id*. Once the project was complete, and after the general contractor failed to pay the project manager under the oral agreement, the project manager sued the general contractor and an agent of the general contractor for fraud, breach of contract, and quantum merit. *Id*. The jury assessed actual

[15] In *Chapa*, the Court ultimately found sufficient evidence to support subjective intent not to perform. *Id*.

and punitive damages against the general contractor's agent, in his individual capacity. *Id*. *6. The court of appeals affirmed, holding that the evidence was legally sufficient to sustain a jury's finding of fraud against the agent, considering the project manager introduced evidence that the agent never intended to pass any profit along to the project manager, despite having agreed to do so in the oral agreement. *Id*. In affirming on evidentiary sufficiency grounds, the court credited evidence that the general contractor (1) had a history of failing to pay this project manager, (2) never tried to pass payment along to the project manager, (3) was failing to make ends meets and thus would have been motivated to keep the profit regardless of any prior representations, and (4) never informed the project manager than it had received payment from the owner. *Id*. at **9–10.

In *Lonis v. Walton*, No. 10-22-00352-CV, 2023 WL 6157344 (Tex. App.—Waco Sept. 21, 2023, no pet. h.) (mem. op.), the court of appeals affirmed the trial court's take nothing judgment based on evidentiary insufficiency to support residential defect claims.

Several homeowners bought an older home in November 2017 knowing at the time of purchase that it had obvious foundation issues. *Id*. at *1. The homeowners also entered a "Services Contract" with a contractor for foundation and other miscellaneous repairs, including the replacement of any damaged or rotten floor joists. *Id*. Following work by the contractor, the homeowners signed a document titled "Satisfactory Agreement" stating that all work had been fully completed and that the homeowners agreed to final payment with complete satisfaction of the work performed at the home. *Id*. at *2. However, the foundation continued to move, and the homeowners experienced additional problems. *Id*. Eventually, the homeowners sued the contractor for violating the Texas Deceptive Trade Practices Act (DTPA), fraudulent inducement, negligence, negligent misrepresentation, negligent hiring, supervision, or management, and breach of contract. *Id*. at *1.

The case was tried to the bench. *Id*. at *3. The trial court found that the homeowners did not prove by a preponderance of the evidence that contractor violated the DTPA or committed fraudulent inducement, negligence, negligent misrepresentation, or negligent hiring, supervision, or management. *Id*. The trial court found that the contractor breached the contract by not replacing damaged or rotten floor joists, but also found no evidence establishing what floor joists were damaged or rotten, and found insufficient evidence that the failure to replace any damaged or rotten floor joists caused the homeowners' damages. *Id.* Therefore, the trial court found that the contractor was not liable for breach of contract. *Id.* The trial court rendered a judgment that the homeowners take nothing against the contractor. *Id.* The homeowners appealed, asserting that their evidence was legally and factually sufficient to show that the contactor violated the DTPA and made material false representations and negligent misrepresentations. *Id.*

Largely on ordinary deference grounds, the court of appeals upheld the trial court's take-nothing judgment, finding no evidence for causation on any of the causes of action asserted by the homeowners. *Id*. at *6. Because there was no evidence of causation, the homeowners could not prevail on their causes of action for negligent misrepresentation and fraudulent inducement, or their DTPA claim. *Id*. The court of appeals also held that because there was no evidence showing a causal connection between the failure to replace the floor joists and any of the damages the homeowners experienced, they could not recover on their breach of contract claim. *Id*. Nor did the homeowners show that the trial court's findings were against the great weight and preponderance

of the evidence. *Id.* So there was legally and factually sufficient evidence to support the trial court's findings that contractor was not liable for violating the DTPA, or for fraudulent inducement, negligent misrepresentation, or breach of contract, and the court affirmed the trial court's judgment.

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Practice Note: The court's holding was largely based on a lack of causation evidence generally. But practitioners are reminded that different causes of action have different causation requirements, and causal proof sufficient to prove one, may not be enough to prove another. This is especially important to keep in mind in the residential construction defect context, as the RCLA has something to say about it. *See* Ian P. Faria, Marcus Miller, et al., *One Sentence and a Cloud of Dust: Making Causation the Focal Point of the RCLA Defense*, 16 CONSTR. L. J., Winter 2020.

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I. Expert-witnesses

In *Tenaris Bay City Inc. v. Ellisor*, No. 14-22-00013-CV, 2023 WL 5622855 (Tex. App.—Houston [14th Dist.] Aug. 31, 2023, pet. filed) (mem. op.), the court addressed the sufficiency and necessity of expert testimony on causation for flood damage claims arising out of the development of an industrial facility.

Tenaris purchased what had been a sod farm in Matagorda County and developed a pipe manufacturing facility on the property. *Id*. at *1. Tenaris retained an engineering firm to design the site's drainage plan per applicable laws and regulations, and to avoid displacement of water to homes surrounding the facility. *Id*. The Matagorda County Drainage District also hired an engineering firm to review and approve the drainage plans for permitting. *Id*. During Hurricane Harvey, the homes around the facility flooded, resulting in numerous nearby landowners suing Tenaris for negligence, negligence per se (based on the Water Code), and negligent nuisance due to the flooding. *Id*.

The case proceeded to trial, and by agreement liability was submitted based on three geographic zones (Zone A, Zone B, and Zone C). *Id*. at *2. The plaintiffs retained an expert who opined that although the design for the drainage system could withstand a hundred-year storm,[16] as-constructed Tenaris's water-drainage system did not meet the engineering firm's specifications. *Id*. at *3. The plaintiffs' expert opined that a berm wall constructed by Tenaris was lower than designed and had holes in it, and that based on the expert's modeling, storm waters flowed through the holes and flooded the neighboring properties. *Id*. Separately, an engineer for Matagorda County testified that they had received complaints of flooding from neighboring landowners even before Tenaris constructed its facility, but that Tenaris never addressed the drainage issues after the County engineer reached out about them. *Id*. Several plaintiffs also testified that their lands never flooded before the construction of the Tenaris facility. *Id*. at *4.

[16] A hurricane expert at trial testified that in Matagorda County, where the plaintiffs' properties were located, the rain fall from Hurricane Harvey was classified as a twenty-year storm. *Id*. at *3, n.5.

The jury returned a liability verdict against Tenaris with respect to all three zones. *Id*. at *2. Tenaris and the plaintiffs stipulated $2,800,000.00 in damages, and Tenaris moved for JNOV challenging the sufficiency of the evidence supporting proximate causation. *Id*. Tenaris relied primarily on testimony it elicited from the plaintiffs' expert where he conceded he had not done "a detailed analysis of any of the specific plaintiff's homes" and testified that he could not speak to what caused the flooding "as to the specific homes[.]" *Id*. at *4. But on re-direct the plaintiffs' expert did state that the "failure of the [drainage] design and its implementation was a factor in the flooding of the plaintiffs' properties." *Id*. Tenaris also sought to exclude the plaintiffs' expert from opining on Zone C, as he had admitted in his deposition that he had not performed an analysis on that zone. *Id*. at *2.

The trial court overruled Tenaris's motion for JNOV by operation of law, and Tenaris appealed. *Id*. Tenaris made three legal sufficiency challenges on appeal: (1) the plaintiffs' expert offered conflicting testimony on causation; (2) there was no legally sufficient and necessary expert evidence on causation; and (3) as Hurricane Harvey was an act of God, the plaintiffs could not establish the foreseeability element of proximate causation. *Id*. at **2–6. Based primarily on deference to the jury's verdict, the court of appeals affirmed. *Id*. For the plaintiffs' engineer's conflicting testimony, the court held that the jury was free to resolve those conflicts in the plaintiffs' favor, crediting the expert's testimony on re-direct over his testimony on examination by Tenaris. *Id*. The court also held that flood cases did not involve sufficiently "complex facts and issues beyond the jurors' common understanding" to require expert testimony on causation. *Id*. at *5. In any event, the court found that the lay testimony (from the witnesses about flooding after the facility was built) and the plaintiffs' expert's testimony on causation were legally sufficient. *Id*. **5–6. On foreseeability, the court held that although Hurricane Harvey may not have been foreseeable, "it is perfectly foreseeable that a negligently built storm-drainage system will cause flooding issues in nearby properties." *Id*. at *6.

Finally, the court rejected Tenaris's argument that the plaintiff's expert opinions should have been excluded regarding Zone C. *Id*. at *7. The court relied on the expert's designation, which included his opinion that Tenaris's "drainage system was inadequate and not proper[l]y developed… and resulted in the flooding of plaintiff's homes and properties." *Id*. at *7. Thus, the court held that the expert "was always of the opinion that the flooding" was caused by Tenaris and therefore his testimony never "materially changed" to require supplementation under Tex. R. Civ. Proc. 193.5(a).

In *Webb v. Dynamic JMC Builders, LLC*, No. 07-22-00247-CV, 2023 WL 4220812 (Tex. App.—Amarillo June 27, 2023, no pet.) (mem. op.) (discussed above), the court of appeals held that the owner of a construction company could serve as its own expert witness as to the reasonableness of the damages sought.

As a reminder, the case concerned a breach of contract claim after the owner failed to pay its contractor for the work performed at the owner's restaurant. *Id*. at *1. The owner moved to exclude the contractor's principal from testifying as an expert regarding the reasonableness of the contractor's damages for nonpayment. *Id*. at *3. The property owner argued that the contractor's principal's testimony was inherently unreliable due to his interest in the construction company. *Id*. The court held that the owner's attempt to challenge the reliability of the contractor's testimony was instead an attack on the witness's credibility as an expert witness, an issue for the jury to

consider. *Id*. The court therefore held there was no abuse of discretion in rejecting the owner's motion to exclude. *Id*.

J. Governmental immunity and liability

1. Jurisdictional bar to suit

In *Six Brothers Concrete Pumping, LLC v. Texas Workforce Commission and Martin Tomczak*, No. 01-22-00357-CV, --S.W.3d--, 2023 WL 3311165 (Tex. App.—Houston [1st Dist.] 2023, pet. filed), the court of appeals affirmed the trial court's grant of the Texas Workforce Commission's plea to the jurisdiction and found, as a matter of first impression, that the mandatory venue requirement in Chapter 61 of the Labor Code was a statutory prerequisite to suit, making the contractor's failure to adhere to it a jurisdictional bar to suit.

Tomczak filed a wage claim with the Texas Workforce Commission (Commission) against a concrete company (Six Brothers) under Chapter 61 of the Labor Code. *Id*. at *1. After the Commission found that Six Brothers owed Tomczak $1,000 in unpaid wages, Six Brothers challenged the finding by suing Tomczak and the Commission in Harris County. *Id*. The suit was pending for six months before the Commission filed a plea to the jurisdiction, claiming that Chapter 61 imposed a mandatory venue in the county where Tomczak resided, which was Montgomery County. *Id*. The district court granted the plea to the jurisdiction agreeing with the Commission that, in a suit against a governmental entity, venue is a statutory prerequisite that implicates the court's jurisdiction and may be raised at any time. *Id*. Six Brothers appealed arguing that the Commission waived its objection to improper venue by answering without objection. *Id*.

Section 61.062 of the Labor Code provides a limited waiver to the Commission's sovereign immunity to suit; a party can sue the Commission under that section if the party strictly satisfies the procedural requirements outlined in that section. *Id*. at *2. Specifically, § 61.062(d) of the Labor Code establishes a mandatory venue requirement—a suit must be brought in the county of the wage claimant's residence. *Id*. Generally, venue requirements are not jurisdictional and can be waived "if not challenged in due order and on a timely basis." *Id*. (quoting *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.)). But in 2005, the Legislature added a final sentence to Section 311.034 of the Government Code (governing waiver of sovereign immunity) providing:

> Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

Six Brothers, 2023 WL 3311165, at *2 (quoting Tex. Gov't Code Ann. § 311.034). Thus, the court of appeals had to determine whether the mandatory venue requirement in § 61.062(d) was a statutory prerequisite to suit against a governmental entity depriving the trial court of subject-matter jurisdiction. *Six Brothers*, 2023 WL 3311165, at *3. The Texas Supreme Court previously defined "statutory prerequisite" for the purpose of applying the final sentence of Section 311.034 as a requirement that (1) is found in the relevant statue; (2) is required by the relevant statute; and (3) must be met before the suit is filed. *Id*. at *2 (citing *Prairie view A&M Univ. v. Chatha*, 381 S.W.3d 500, 511–12 (Tex. 2012)).

The first two requirements were easily satisfied because § 61.062(d)'s mandatory venue requirement is found in the relevant statute and is required by it. *Six Brothers*, 2023 WL 3311165, at *4 (citing *Chatha*, 381 S.W.3d at 511–12). The Court also found that § 61.062(d)'s use of the word "*must"* created a condition precedent. *Six Brothers*, 2023 WL 3311165, at *4. And the court noted that a condition precedent was "as an event that must happen or be performed before a right can accrue to enforce an obligation." *Id*. (quoting *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992)). Thus, the Court concluded that the mandatory venue requirement was a statutory prerequisite and a jurisdictional requirement under Texas Government Code § 311.034 and the failure to adhere to the mandatory venue requirement was a jurisdictional bar to suit. *Six Brothers*, 2023 WL 3311165, at *6.

2. Waiver of immunity from suit under Texas Civil Practice and Remedies Code Chapter 114

In *Pepper Lawson Horizon International Group, LLC v. Texas Southern University*, 669 S.W.3d 205 (Tex. 2023), the Texas Supreme Court held that a contractor seeking claims for delays and unapproved change orders had successfully pleaded facts implicating the state's immunity waiver at Chapter 114 of the Texas CPRC.

Texas Southern University (TSU) contracted with "Pepper-Lawson/Horizon International Group" to construct a student housing project. *Id*. Those two contractor entities subsequently formed a joint venture called PLH.[17] The construction contract mandated substantial completion of the project by July 1, 2015 (and final completion a month later), with typical construction industry provisions justifying time extensions or equitable price adjustments. *Id*. The contract entitled PLH to an extension of the contract time for excusable delays for design errors, unanticipated site conditions, certain weather events, and changes affecting the critical path, among others. *Id*. at 207–08, n.1, 2. But the contract also stated that if the contractor incurred additional *costs* because of certain excusable delays "within the control of [TSU], the Contract price" would be "equitably adjusted[.]" *Id*. at 207 n.1.[18] The contract entitled TSU to withhold $20,000 per day for liquidated damages. *Id*. The contract also "expressly required TSU to comply with" Texas's public prompt payment act.[19] Finally, the contract stated that executed change orders were "final and not subject to adjustment" for "all costs and time issues regarding" them. *Id*. at 209 n.4.

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[17] *Id*. TSU later claimed that PLH was not a party to the contract since it was not listed as the "Contractor" under the agreement. *Id*. at 212–13. The Court declined to take the issue up for reasons set forth below, but for ease of reading, we treat PLH as the contracting party, as the Court did. *Id*.

[18] Confusingly, the contract separately stated that PLH had "no claim for monetary damages for delay or hindrances to the work from any cause, including without limitation any act or omission of [TSU]." *Id*. at 207.

[19] *Id*. at 208 n.3. Specifically, the contract stated that if "Contractor's payment applications are submitted by the last day of each month and approved by [TSU], [TSU] shall pay Contractor the approved amount in accordance with Chapter 2251 of the Texas Government Code[.]" *Id*.

PLH alleged various excusable delays during construction, including (1) undisclosed underground obstructions that pushed the project into the wet season, resulting in over two months of additional weather delays; and (2) TSU's 192-day delay in providing the project with permanent power. *Id*. at 208. Through executed change orders, TSU approved some more price increases for the underground obstructions, and more days for weather, but otherwise denied PLH's requests for extensions of time. *Id*. PLH completed the project in February 2016, about 155 days after the contractually stipulated completion date. *Id*. at 207. PLH then invoiced TSU for around $3.3M for the remaining contract balance, and around $3.6M for costs PLH allegedly incurred for excusable delays that TSU had not approved. *Id*. After TSU refused to pay (relying in part on a no-damages-for-delay clause), PLH filed suit, seeking delay and other damages, and attorney's fees through the contract's incorporation of the public prompt payment act. *Id*.[20] In response, TSU filed a plea to the jurisdiction, arguing that PLH had failed to plead a cause of action under the state's immunity waiver in Chapter 114 of the Texas CPRC. *Pepper Lawson*, 669 S.W.3d at 209. TSU argued that PLH (1) failed to identify a "breach of an express provision of the contract"; (2) failed to invoke a contractual provision that allowed recovery of damages for owner-caused delays or attorney fees; (3) only sought damages and days for claims governed by executed, conclusive change orders; and (4) could not rely on the public prompt payment act because it did not waive immunity from suit. *Id*. at 209.

The trial court denied TSU's plea to the jurisdiction, but the court of appeals reversed. *Id*. at 210. The appellate court reasoned that there was no express contract provision requiring TSU to perform as PLH had alleged, and that the public prompt payment act did not itself waive immunity from suit. *Id*. Although CPRC § 114.004(a)(3) waives immunity for "reasonable and necessary attorney's fees … if the contract expressly provides that recovery of attorney's fees is available to all parties to the contract[,]" as the court had found no waiver under Chapter 114, it did not separately address PLH's entitlement to attorney fees under the public prompt payment act. *Id*.

Per curiam, the Texas Supreme Court reversed, holding that because PLH had pleaded sufficient facts to implicate the immunity waiver at Chapter 114, the trial court properly denied the plea to the jurisdiction. *Id*. at 213. The Court noted that in examining a plea to the jurisdiction, courts should limit their inquiry to the pleadings and evidence "necessary to resolve the jurisdictional issues raised" but should not inquire "so far into the substance of the claims that plaintiffs would be required to put on their case to establish jurisdiction." *Id*. at 211 (quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)). The Court held that PLH identified at least two specific provisions that TSU breached, specifically the provision relating to extensions of time for excusable delay, and equitable adjustments to the contract for certain delays within TSU's control. *Pepper Lawson*, 669 S.W.3d at 211. The Court also rejected TSU's argument—and the appellate court's reliance on it—that the change orders resolved the jurisdictional issue. *Id*. The Court characterized those as "contract defenses pertaining to the merits of PLH's claims" rather than jurisdictional impediments. *Id*. The Court held that "PLH was not required to prove

[20] Tex. Gov't Code § 2251.043 states that in a "judicial action to collect an invoice payment or interest due under this chapter, the opposing party, which may be the governmental entity or the vendor, shall pay the reasonable attorney fees of the prevailing party."

that the parties' contract unambiguously waives TSU's immunity from suit" but only had to establish that "Chapter 114 … unambiguously waived immunity." *Id*. (cleaned up).

As a reminder, TSU argued that since PLH did not comply with conditions precedent entitling PLH to time extensions, then TSU's immunity remained intact. *Id*. at 212. PLH "pleaded that it had satisfied all conditions precedent, and TSU neither specifically denied that PLH satisfied the payment conditions nor challenged the facts that were actually pleaded." *Id*. The Court held that because TSU had not complied with Texas Rule of Civil Procedure 54, requiring them to "specifically deny that PLH satisfied all conditions precedent[,]" TSU could not rely on any alleged failures of a condition precedent through its plea. *Id*.

On attorney's fees, the Court held that because "the construction contract expressly incorporates and requires compliance with the" public prompt payment act, and because attorney's fees are included in the damages waived under Chapter 114, PLH pleaded sufficient facts to implicate waiver of immunity. *Id*.

In an argument it first made at the Supreme Court level, TSU contended that PLH lacked standing to sue under the contract since it was not a party to it, as the joint venture of PLH was formed *after* execution of the contract. *Id*. at 212–13. The Court did not address the argument even "if the issue implicated subject-matter jurisdiction" as PLH did not have a full and fair opportunity to develop the record in the trial court, or amend its pleadings, to address any defect in the parties. *Id*. at 213.

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Practice Note: This is an important decision for many reasons, especially since it is the Texas Supreme Court's first opportunity to address the waiver of immunity from suit under Texas CPRC § 114.004. In *Zachry Const. Corp. v. Port of Houston Authority of Harris County*, 449 S.W.3d 98, 110–11 (Tex. 2014), the Court did analyze similar provisions waiving immunity for contract claims against certain *local* governmental entities under Texas Local Government Code § 271.153 (Texas LGC). In a footnote, the Court distinguished § 271.153(a)(1) from Texas CPRC § 114.004(a)(1), noting that the latter but not the former only permitted recovery of damages for owner-caused delays "if the contract expressly provides for that compensation." *Id*. at 114 n.73. The "addition of the proviso suggests that [Texas CPRC § 114.004(a)(1)] was not intended in the other three statutes waiving immunity from suit on contract claims." *Id*. As a reminder, one issue in *Zachry* was how a no-damages-for-delay clause interacted with an immunity waiver that only extended to damages for "the balance due and owed by the local governmental entity under the contract[.]" *Id*. at 106–07. In *Pepper Lawson*, the Court identified an apparent run-of-the-mill no-damages-for-delay clause ("Contractor has no claim for monetary damages for delay or hindrances to the work from any cause, including without limitation any act or omission of [TSU]"), but there was a separate provision entitling the contractor to an equitable adjustment in contract time due to certain delays within the owner's control. *Id*. at 207–08. It remains to be seen whether a construction contract with the state containing a no-damages-for-delay clause, and no other provisions entitling the contractor to delay, waives immunity from suit under Chapter 114 for delay claims.

Immunity challenges are complicated by the fact that most times they are evaluated exclusively by reference to the pleadings, though a governmental defendant can introduce evidence to negate jurisdiction. TSU tried to do so, here, by attaching the change orders to its plea to the jurisdiction. *Id*. at 211. The Court noted that it was not PLH's burden "to prove" that the *contract* waived immunity, only to prove that *Chapter 114* waived immunity. *Id*. But the Court relied on *TSU*'s failure to specifically deny conditions precedent that PLH pleaded had been met. *See id.* ("Because TSU did not specifically deny that PLH satisfied all conditions precedent, the court of appeals erred in holding that PLH failed to plead a cognizable Chapter 114 claim based on any failure to satisfy contractual conditions precedent to requesting a time extension."). Texas Rule of Civil Procedure 54 is a mixed pleading and proof requirement. It says that if a party alleges all conditions precedent have been met, the party need "prove only such of them as are specifically denied by the opposite party." PLH would not have "failed to plead" a claim just because TSU denied that the condition precedents were met. *Pepper Lawson*, 669 S.W.3d at 212. But a governmental entity can also negate jurisdiction if it "conclusively establish[es]" its entitlement to immunity. *Id*. at 211. So maybe the Court was simply refusing to allow TSU to conclusively establish something it had failed to plead through Rule 54.[21]

Unfortunately, we are still waiting for an answer from the Texas Supreme Court as to whether the public prompt payment act (Tex. Gov't Code Chapter 2251) itself waives immunity from suit. The statute does not contain any explicit waiver of immunity. That usually means the statute does not waive immunity. See Tex. Gov't Code § 311.034 ("a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language"). The Court did not reach that issue, since it found waiver under Chapter 114, and got to the prompt payment act only through its incorporation in the PLH-TSU contract. *Pepper Lawson*, 669 S.W.3d at 212 n.6. At least one court has held that the public prompt payment act waives immunity from *liability*. *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 730–31 (Tex. App.—Austin 2007, pet. denied) (holding that public prompt payment act "waived sovereign immunity from liability for the award of attorney's fees). But most appellate courts have held that it does not waive immunity from *suit*. See, e.g., *City of San Antonio v. KGME, Inc.*, 340 S.W.3d 870, 878 (Tex. App.—San Antonio 2011, no pet.) ("We, too, must conclude the [public prompt payment act] does not waive sovereign immunity from suit for attorney's fees and interest.").

Relatedly, Chapter 114's attorney's fees provision is unique among the immunity waivers. Both of the *local* governmental entities waivers authorize "reasonable and necessary attorney's fees that are equitable and just[,]" full stop. Tex. Loc. Gov't Code §§ 262.007(b)(3); 271.153(a)(3). But Texas CPRC§ 114.004(a)(3) only authorizes "reasonable and necessary attorney's fees based on an hourly rate that are equitable and just *if the contract expressly provides that recovery of attorney's fees is available to all parties to the contract*" (emphasis added). The Court held that the PLH-TSU contract did just that through incorporation of the public prompt payment act. *Pepper Lawson*, 669 S.W.3d at 212 ("Chapter 114 waives immunity for [attorney's fees and interest] because the [public prompt payment act] through incorporation into the construction contract… makes attorney's fees available to all parties[.]").

[21] See also *Priority One Title, LLC v. Andrado*, No. 14-21-00379-CV, 2023 WL 2259092 (Tex. App.—Houston [14th Dist.] Feb. 28, 2023, no pet.) (mem. op.) (holding on summary judgment that party need not prove performance of a condition precedent that was not specifically denied under Tex. R. Civ. Proc. 54 by party opposing summary judgment).

The statute says:

> In a formal administrative or judicial action to collect an invoice payment or interest due under this chapter, the opposing party, which may be the governmental entity or the vendor, shall pay the reasonable attorney fees of the prevailing party.

Tex. Gov't Code § 2251.043. As a matter of statutory construction, it is not obvious that the public prompt payment act authorizes mutual recovery of attorney's fees. First, the statute says the "opposing party … shall pay" in a "judicial action to *collect* an invoice payment or interest due under this chapter[.]" *Id*. (emphasis added). That is, there is only one *payor*, the party *opposing* a "judicial action to collect" interest. In favor of the Court's construction, "opposing party" may modify "prevailing party"; the opposing party is the one opposing the prevailing party. (Or maybe prevailing party modifies, by contrast, "the opposing party.") But the Texas Supreme Court follows the rule that "a modifier … applies to the nearest reasonable referent." *Zachry*, 449 S.W.3d at 107.[22] In the statute, "opposing party" is nearer to "[a] judicial action to collect an invoice payment" than it is to "prevailing party" since another adjective phrase separates the "prevailing party" clause from "the opposing party" clause. Tex. Gov't Code § 2251.043.

Second, the statute contrasts with most attorney's fees provisions that direct action towards *the court*, expressing ambivalence about who the payor is. See Tex. Prop. Code § 28.005 (saying "court may award… reasonable attorney's fees as the court determines equitable and just" without specifying payor); Tex. Civ. Prac. & Rem. Code § 37.009 (same). Some statutes specify the circumstances in which one party, or the other, is entitled to attorney's fees. *See* Tex. Bus. & Comm. Code §§ 17.50(c) (entitling DTPA defendant to attorney's fees if the DTPA claim is groundless, brought in bad faith, or for harassment); 17.50(d) (entitling consumer who prevails on DTPA claim to attorney's fees); Tex. Prop. Code § 53.156 (authorizing attorney's fees to a party foreclosing a mechanic's lien or suing to declare the lien invalid). The Legislature has at its disposal ample means of clarifying when attorney's fees are recoverable to both parties but did not use them in the public prompt payment act.[23] In any event, the Texas Supreme Court has spoken. The public prompt payment act "makes attorney's fees available to all parties." *Pepper Lawson*, 669 S.W.3d at 212. Go get them.

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[22] One might respond that the statute says an "opposing party… may be the governmental entity or the vendor[.]" Tex. Gov't Code § 2251.043. However, that does not resolve the issue as a "vendor" can be liable for prompt payment interest to downstream subcontractors, and therefore oppose a judicial action to recover interest. The statute requires a vendor to pay subcontractors within ten days of receiving an invoice and be liable for interest. Tex. Gov't Code §§ 2251.002 (addressing timing of payment by vendor); 2251.028 (requiring vendor to pay interest).

[23] The author acknowledges that this level of statutory pedantry is precisely the sort of "picky and detached from reality" analysis that "risks being viewed as conducting a contest among the Pharisees in the Temple of Textualism over who is the most devout." *Jaster*, 438 S.W.3d at 576 (Hecht, C.J., dissenting).

3. Waiver of immunity under Texas Local Government Code Chapters 212 and 245

In *City of Jarrell v. BE Theon E. P'ship No. 3, Ltd*., No. 03-21-00651-CV, 2023 WL 2588567 (Tex. App.—Austin Mar. 22, 2023, pet. denied) (mem. op.), the court of appeals held that the trial court erred by denying the city's plea to the jurisdiction as to an owner's Texas LGC Chapter 245 claim for declaratory relief, but upheld waiver under Texas LGC Chapter 212.

The City of Jarrell and BE Theon (owner) entered into a property development agreement concerning undeveloped property that BE Theon owned near the intersection of Ronald Reagan Boulevard and I-35 in Williamson County. *Id*. at *1. Under the development agreement, the owner agreed to voluntarily annex the property to the City. *Id*. The City agreed, pursuant to a water and wastewater provision, to provide water and wastewater services to the property within three years of the completion of Ronald Reagan Boulevard at its intersection with I-35 and to waive the City's governmental immunity regarding the development agreement. *Id*. Neither party disputed that the City did not provide water and wastewater services to the property within three years of the completion of Ronald Reagan Boulevard. *Id*.

The owner sued the City for specific performance of the development agreement or, alternatively, damages. *Id*. at *2. In its suit, the owner alleged that the City had breached the development agreement by not complying with the water and wastewater provision or, alternatively, that the City's promises in that provision were enforceable by promissory estoppel. *Id*. The owner referenced a "ribbon cutting for the completion of the final, northern portion of Ronald Reagan Boulevard and the intersection at Interstate 35 [that] took place on March 5, 2014" and emails from the City manager in May 2019 demonstrating the owner's "first indication that the City would not fulfill its obligations under the Development Agreement." *Id*. The owner sought declaratory judgment under chapter 245 of the Texas LGC to establish owner's vested rights and the City's obligations under the development agreement and enforcement of the development agreement pursuant to a waiver at Texas LGC § 271.172. *Id*. at **2, 6.

Chapter 245 governs vested rights of certain owners and protects those owners from changes in regulations once an owner has filed a development permit application.[24] *Id*. at *4. Chapter 245 contains a waiver of immunity from suit. *Id*. The owner alleged that the City waived its immunity from suit and the trial court had jurisdiction over its claims under chapter 245. *Id*. The City filed a plea to the jurisdiction, arguing that owner's pleadings did not allege a justiciable claim and that chapter 245 did not apply because owner did not complain that the City was trying to apply subsequently enacted land-use regulations to its development. *Id*.at *5. The trial court denied the City's plea to the jurisdiction. *Id*. at *3

The court of appeals disagreed, holding that the trial court erred by failing to dismiss the owner's chapter 245 claim for declaratory relief because the owner did not allege that the City had changed its regulations, ordinances, rules or other requirements and impermissibly attempted to apply those changed requirements to the owner's development of the property. *Id*. at *6. But the court of appeals concluded that the owner's pleadings did not affirmatively negate jurisdiction as

[24] The parties did not dispute that the development agreement constituted a "permit" under the meaning of the statute. *Id*. at *5.

argued by the City and remanded owner's claim for declaratory relief under chapter 245 to allow the owner an opportunity to replead. *Id*.

As for the waiver from immunity for suit for breach of the development agreement, the court of appeals explained that a development agreement, which is defined as a "contract" that falls within the purview of § 212.172, is binding on the municipality and the landowner and a municipality that enters into a contract subject to that section waives immunity from suit to adjudicate a claim for breach of the contract. *Id*. Further, consistent with the waiver of immunity from suit in § 212.172, the development agreement included the City's express agreement that its governmental immunity was waived. *Id*.

The court of appeals concluded that the owner's pleadings and attached exhibits supported that the development agreement was a contract within the purview of § 212.172 and thus sufficient to invoke the trial court's jurisdiction over owner's breach of contract claim. *Id*. at *7. The court of appeals rejected the City's argument that the applicable provisions of the development agreement was void ab initio and unenforceable under the reserved powers doctrine, as those arguments went to the merit of owner's claim and not the trial court's jurisdiction. *Id*. Because the development agreement was a contract subject to § 212.172, the court of appeals held that the trial court did not err in denying the City's plea to the jurisdiction as to owner's breach of contract claim.

Interestingly, the court also held that the City had waived its immunity from suit on the owner's promissory estoppel claim. *Id. at* *8. The court held that a "governmental entity may be prevented from asserting immunity from a promissory estoppel claim when a plaintiff shows that justice requires the application of promissory estoppel, that its application does not interfere with the entity's exercise of its governmental functions, and that the entity accepted and retained benefits arising from the contract." *Id*. The City had defended against the promissory estoppel claim based on the illegality of portions of the development agreement, which the trial court held related to the merits, rather than jurisdiction. *Id*.

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Practice Note: In the opinion, the court noted that the owner was "seeking promissory estoppel in the alternative." *Id*. at *9. It is unclear how much this "alternative" pleading affected the court's conclusion. Only one of the two cases cited by the court of appeals regarding promissory estoppel—*Bexar Metro. Water Dist. v. Education & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. dism'd) and *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 366 (Tex. App.—Texarkana 2002, pet. denied)—supported its recitation of the law on promissory estoppel claims, and that one (*Maguire*) predates major developments and limitations in governmental immunity law. A petition for review has been filed in the case.

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4. Waiver of immunity under Texas Local Government Code Chapter 252

In *City of Dallas et al. v. Gadberry Construction Company*, No. 05-22-00665-CV, 2023 WL 4446291 (Tex. App.—Dallas 2023, no pet.), the court of appeals held that a construction

company failed to establish a city's waiver of immunity to suit under Chapter 252 of the Texas LGC.

In September 2021, the City of Dallas issued a request for sealed bids from contractors related to its "Hi Line Connector Trail" project, which would include developing walking trails near downtown Dallas. *Id.* Along with details related to the project scope and timing, the City's bid terms specified that the project would be awarded to the lowest responsible bidder. *Id.* In addition, the City reserved the right to request additional information related to a bidder's experience and reject any and all bids. *Id.* The City received six bids for the project, including from Gadberry Construction Company, which submitted the lowest bid. *Id.* at *2.

After reviewing bid information and contacting references, the City, in consultation with TxDOT and the Circuit Trail Conservancy, disqualified Gadberry for lack of relevant experience. *Id.* at *2. Gadberry protested the decision and the City permitted the company to submit additional information. *Id.* Yet the City again disqualified Gadberry, finding that the company's experience was not relevant enough. *Id.* Gadberry filed suit shortly after seeking temporary injunctive relief for procurement violations under Chapters 252 of the Texas LGC and 2269 of the Texas Government Code. *Id.* at *3.

The trial court granted Gadberry a temporary injunction to prevent the City from awarding the project to another contractor. *Id.* The City filed a plea to the jurisdiction, arguing that Gadberry failed to establish a waiver of immunity for its claim under Chapters 252 and 2269. *Id.* The trial court denied the plea as to Gadberry's claim for injunctive relief under Chapter 252, but granted the plea as to Gadberry's claims under Chapter 2269. *Id.* The City appealed both the temporary injunction and the denial of its plea to the jurisdiction. *Id.*

On appeal, the court found that the City had a rational basis for disqualifying Gadberry's bid, including its lack of experience with similar scale projects, and further found that Gadberry failed to allege or provide evidence that the City illegally or fraudulently exercised its discretion to reject bids. *Id.* at **7–8. Relying on *Sterrett v. Bell*, 240 S.W.2d 516, 519–520 (Tex. App.—Dallas 1951, no writ), the court reasoned only cases of "very extreme and arbitrary conduct on the part of the [government]" could justify interference in the exercise of government discretion in rejecting bids during the procurement process. *Id.* at *6. In this case, the City considered reasonable criteria, reserved the right to reject bidders for lack of experience, and rejected Gadberry based on those reasonable criteria. *Id.* at **7–8. As a result, the court held that the trial court erred in denying the City's plea to the jurisdiction as to Gadberry's Chapter 252 claim and dismissed the case for want of jurisdiction.

5. Waiver of immunity under Texas Local Government Code Chapter 271

In *City of Houston v. James Construction Group, LLC*, No. 14-21-00322-CV, 2023 WL 3301739 (Tex. App.—Houston [14th Dist.] May 8, 2023, no pet.) (mem. op.), the court of appeals held that the City of Houston's governmental immunity was not waived under Texas LGC.

Desiring repairs to taxiways at Bush Intercontinental Airport, the City of Houston entered three contracts with James Construction for a total of $64,445,036.30. *Id.* at *1. In the contracts, the City and James agreed that the City's engineer would "serve a central role in making final

decisions" in determining change orders or claims, including post-termination claims. *Id*. According to James, the projects experienced "setbacks" due in part "to the City's gross mismanagement[,]" including the City's acceleration demands, misapplication of inspection criteria, and the replacement of the City's internal management team. *Id*. The City, for its part, blamed the delays on James Construction's inadequate labor, materials, and sequencing. *Id*.

On March 9, 2018, James submitted a change order (PCO 3) seeking a contractual adjustment of $2,207,512 for "increased cost to perform the work as a direct result of City-caused delays and acceleration." *Id*. The City's engineer then notified James that the City was terminating all three contracts for convenience per the contracts' general conditions. *Id*. at *2. The City terminated all three projects in April and May, contemplating a contractual "notice-of-termination-claim deadline" in October and November. *Id*. Under the contracts, James had a right to make a post-termination demand per article 14.2.3 of the general conditions:

> 14.2.3 After receipt of the Notice of Termination, Contractor shall submit to the City its termination Claim, in forms required by City Engineer. The Claim will be submitted to the City promptly, but no later than six months from the effective date of termination, unless one or more extensions are granted by City Engineer in writing. If Contractor fails to submit its termination Claim within the time allowed, in accordance with Paragraph 14.2.4, City Engineer will determine, on the basis of available information, the amount, if any, due to Contractor because of termination, and City Engineer's determination is final and binding on the Parties. The City will then pay to Contractor the amount so determined.

Id. at **2, 6. James was entitled to reasonable termination expenses, along with the "Contract Price for all work performed in accordance with the Contract up to date of termination… in the manner provided in Article 9[.]" *Id*. James submitted, through PCO 7, its termination-for-convenience costs. *Id*. In October and November, however, James requested several extensions and notified the City's engineer that James would supplement PCO 7. *Id*. On November 21, the City's engineer awarded James $1,048,374.23 on PCO 3, and the City ultimately paid James $1,032,991.40 on its termination claims. *Id*. Shortly after, the City's engineer notified James that per the terms of the contracts, James' deadline to submit information on the claims was November 12, 2018, and that the City's engineer was denying any extensions. *Id*. James filed suit contending that the City's engineer's "final determination" departed from the contract documents and claimed an additional $13,416,633 in damages. *Id*. at **2–3. The City filed a plea to the jurisdiction claiming James had failed to establish waiver of the City's immunity from suit. *Id*. at *3. The trial court denied the plea to the jurisdiction, and the City appealed. *Id*.

The primary issue on appeal was the applicability of Texas LGC § 271.152's waiver of immunity from suit. *Id*. at *4. The immunity waiver is limited to the recoverable damages under § 271.153, which includes "the balance due and owed by the local governmental entity under the contract" and "the amount owed for change orders or additional work the contractor is directed to perform by the local government" under the contract. *Id*. (citing Tex. Loc. Gov't Code Ann. § 271.153). The City's argument relied primarily on the City engineer's role in evaluating James' claims, effectively claiming that if the contract did not entitle James to more money than the

engineer awarded, there could be no waiver of immunity under Chapter 271. *City of Houston*, 2023 WL 3301739, at **5–8.

The court noted that it was "[u]ndisputed … that the parties contractually designated the [City's engineer] to resolve claims," that James submitted those claims to the City's engineer, and that the City's engineer made determinations on them. *Id*. at *5. And since James and the City had made the City's engineer the designated decider, it was "final and conclusive; unless in making it [the engineer] is guilty of fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment." *Id*. (citing *Tex. Dep't of Transp. v. Jones Bros. Dirt & Paving Contractors, Inc.*, 92 S.W.3d 477, 481–82 (Tex. 2002)). Thus, the court of appeals framed its role as "evaluating the pleadings and evidence" to determine if James had alleged facts showing that the City's engineer "was guilty of fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment." *City of Houston*, 2023 WL 3301739, at *5.

In a December 13 letter, the City's engineer notified James that it was closing the contract and directing the City to pay according to the approved PCO 3, rendering a final decision. *Id*. at *6. But according to the court, James did not plead or submit evidence that the *City's engineer* had "acted with partiality, fraud, misconduct, and/or gross error with respect to" his final determination. *Id*. (internal quotations omitted). The court held that with respect to PCO 3, James had not met the pleading requirements to implicate any waiver of the City's immunity under Chapter 271. *Id*.

On the termination claims, James contended that the City's engineer had arbitrarily refused to allow James to supplement its claims with additional information submitted on December 14. *Id*. James urged that under section 14.2.3, it only had to submit a *notice* of claim within six-month period, not all supporting documentation for those claims in that timeframe. *Id*. The court rejected this argument, holding instead that the plain terms of 14.2.3 required James "to submit a termination claim… no later than six months from the effective date of termination unless the [City's engineer] grants an extension." *Id*. at *7 (internal quotations omitted). This deadline also included any information substantiating "termination claims." *Id*. The court held that 14.2.3 required James to submit claims "in forms required by [the City's engineer]" and held that the contracts only permitted claims "in a particular manner; essentially, in a manner that informs the [City's engineer] as he or she requests[.]" *Id*. The court elaborated that "the phrase" forms "denotes… sets of required information, descriptions, or explanations called for by the [City's engineer]." *Id*. The court also recited that under section 14.2.4 of the contracts, if James failed to submit information in the six-month window, the City's engineer's determination was limited to the information available to the engineer when it rendered a decision. *Id*. As the engineer made its determination on December 13, the court reasoned, neither the City nor the engineer could not be faulted for neglecting information that James submitted on December 14. *Id*.

Turning to section 14.2.3's extension provision ("unless one or more extensions are granted by [the City's engineer] in writing"), the court held that any extensions under it could "only reasonably be construed as a matter of the [City's engineer's] discretion" and would not authorize "unlimited submission of substantiating documents beyond the six-month claim period" absent written permission from the City's engineer. *Id*. Given the court of appeals' construction of the agreement, it rejected the trial court's "implicit conclusion that [James]" alleged fraud,

misconduct, or gross mistake by the City's engineer. *Id*. Functionally, the court of appeals treated the City's engineer as having exercised discretion afforded him under the contracts, and that his determination was final. *Id*.

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Practice Note: Many industry forms designate the design professional as the initial decision maker. But sometimes they also designate the engineer as the final decision maker. In *City of Houston*, the court cited *Texas Department of Transportation v. Jones Bros. Dirt & Paving Contractors, Inc.*, 92 S.W.3d 477, 481–82 (Tex. 2002), which in turn relied on the Texas Supreme Court's 1941, *City of San Antonio v. McKenzie Const. Co.*, 150 S.W.2d 989 (Tex. 1941). In a precursor to the deference courts now give to arbitrators, the Court held:

> We copy into this opinion the above portions of the contract to demonstrate that it, in a very comprehensive and certain way, constitutes the engineer Col. Crecelius, the arbitrator or umpire to consider and decide all questions which might arise during the construction of the project. In this regard we particularly call attention to Subdivision 28, supra, which in no uncertain terms places the supervision of this work under the general control of the engineer, and provides that 'He shall determine all questions in relation to said work, and the construction thereof. He shall in all cases decide every question which may arise relative to the execution of this contract on the part of said Contractor.'
>
> We think the agreements above quoted, and especially subdivision 28 of the contract, constituted Col. Crecelius, the engineer, the arbitrator or umpire of all questions 'which might arise relative to the execution' of the contract between the City and McKenzie. *We think, further, that the decisions of such engineer should be accorded the same effect and finality that the law of this State accords to the decisions of arbitrators and umpires agreed on by the interested parties themselves*.

City of San Antonio, 150 S.W.2d at 995–996 (emphasis added). "Col. Crecelius" was the City of McKenzy's flood prevention engineer. *Id*. at 994.

It would probably surprise many construction lawyers, that a project's engineer, who is hired by the owner, and who may be involved (as the designer) in the very issues that a contractor raises as bases for seeking more time or money, benefits from the same deference given a third-party arbitrator. There will be limits, as it is more difficult to show impartiality when the decider is involved in the disputed final call. But that impartiality condition—along with fraud, gross mistake and so on—place a much higher proof and persuasion burden on parties seeking to overturn the final decision maker's ruling, as shown in *City of Houston*. If construction participants wish to have their disputes resolved by neutral third parties, as opposed to other project participants, they should say so in their contract.

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In *City of Ames v. City of Liberty*, No. 09-22-00092-CV, 2023 WL 2180967 (Tex. App.—Beaumont Feb. 23, 2023, pet. denied) (mem. op.), the court of appeals held a city's governmental immunity from suit had been waived under Chapter 271 of the Texas LGC.

The City of Liberty owned and operated a wastewater collection system and received wastewater from the City of Ames and City of Hardin. *Id.* at *1. The contracts required the cities to operate their wastewater systems in compliance with certain codes and the law and required them to prevent "Seepage and Infiltration" into the systems. *Id.* Liberty alleged the other cities had violated their contracts, subjecting Liberty to an enforcement action from the Texas Commission on Environmental Quality. *Id.* Liberty further alleged the contracts required the cities to pay service charges for wastewater volumes that exceeded the "Total Acceptable Volumes," the cities hadn't paid the charges owed, and the Legislature had waived immunity for claims relating to the charges. *Id.* In response, Ames contended that Liberty had failed to plead a valid waiver of governmental immunity, and that immunity had not been waived. *Id.*

First, Ames argued the additional service charges sought by Liberty are consequential damages for which Chapter 271 does not waive immunity. *Id.* at *6. Ames also contended that because delivering more wastewater than the "total acceptable volume" breached the contract, the additional service charge was a penalty. *Id.* Applying the rationale from *San Antonio River Authority v. Austin Bridge & Road, L.P.*, 601 S.W.3d 616, 631 (Tex. 2020), the court held the additional service charge flowed naturally and necessarily from Ames' delivery of volumes that exceeded the total acceptable volume specified by the contract, and therefore the damages Liberty sought were amounts due and owing under the contract for which Section 271.153 waived immunity, rather than non-waived consequential damages. *Id.* at *7. The court further held the service charge did not constitute an exemplary damage or a penalty because the additional service charge resulted from delivering volumes that exceeded the total acceptable volumes, as the excess volumes exposed Liberty to a higher cost of treatment pursuant to the contract. *Id.*

Ames further argued the contract lacked the essential terms of the agreement, a requirement for immunity to be waived under § 271.152. *Id.* Although Chapter 271 does not define "essential terms," the court held that, because the contract contained the "vitally important ingredients" of the bargain including the parties' names, the property at issue, the basic obligations, the time of performance, the price to be paid, and the service to be rendered, the contract contained essential terms. *Id.* at *8. Ames also contended the contract was not one for "goods and services" as required under Chapter 271. *Id.* at *9. First, Ames argued that, because the contract provided only services, it was not a contract for "goods *and* services." *Id.* The court rejected this argument, as Section 271.151(2) does not require the plaintiff plead both "goods" and "services." *Id.* Next, Ames argued that the contract called for only a "passive" receipt of wastewater by Liberty, and thus was not a service contract. *Id.* Citing the Texas Supreme Court, the court rejected this argument, stating that "services" under Chapter 271 is "'broad enough to encompass a wide array of activities' and 'includes generally any act performed for the benefit of another.'" *Id.* (quoting *Austin Bridge*, 601 S.W.3d at 628–29).

Next, Ames argued the contract under which Liberty sued was an interlocal agreement under Chapter 791 of the Government Code for the performance of a governmental function and not one for provision of a "service" as provided for under Chapter 271. *City of Ames*, 2023 WL

2180967, at *10. Ames contended that the Texas Interlocal Cooperation Act distinguishes between governmental functions and governmental services because it refers to "all or part of a function *or* service," and that the Legislature has identified the operation of sanitary sewers and sewer service as a "governmental function." *Id.* Ames argued that under the Interlocal Cooperation Act, a contract for the performance of a governmental function must specify that payments must be made from current revenues, and since the contract at issue provided that payments must be made from current revenue, it was a contract for governmental function. *Id.* The court rejected this argument holding that the distinction made no difference, as nothing in Chapter 271 exempts interlocal agreements. *Id.* Next, Ames argued that the contract provided only an indirect, attenuated benefit and therefore did not invoke chapter 271's waiver of immunity. *Id.* The Texas Supreme Court has held that when a party has no right under a contract to receive goods or services, yet incidentally does them, the contract provided only an indirect, attenuated benefit, and therefore does not invoke a waiver of immunity from suit. *Id*. (citing *Lubbock Cty. Water Control & Improvement Dist. v. Church & Akin, LLC*, 442 S.W.3d 297, 303 (Tex. 2014)). Ames contended the ultimate consumer of the sewer service was not Ames, but those residents of Ames who connected to Ames' sewer collection system. *City of Ames*, 2023 WL 2180967, at *11. The court held that the main thrust of the contract was the provision of sewer service to Ames for which Ames agreed to pay, and the contract therefore did not provide only an indirect or attenuated benefit to Ames. *Id.* Next, Ames contended Liberty did not meet its burden to affirmatively demonstrate the contract was properly executed by Ames. *Id.* Ames argued that Liberty had provided no city council resolutions or other documents indicating that the mayors of both cities had the necessary authority to properly execute the contract, and Liberty produced no resolutions, minutes, or ordinances showing "the governing bodies' assent to the contract." *Id.* The court held that Liberty's pleadings alleged facts that affirmatively demonstrated subject-matter jurisdiction, and Ames failed to meet its burden to create a disputed fact issue on this point. *Id.* at *12.

Finally, Ames argued Chapter 271 does not apply to a contract dispute between two governmental entities. *Id.* Ames cited *Austin Bridge*, which dealt with a contract dispute between a governmental entity and a private party. *Id.* at *13. The court also found the statute's plain language allows for enforcement of contracts between local governmental entities by waiving their immunity from suit. *Id.* Accordingly, the court held that Ames' arguments lacked merit, and concluded that the trial court did not err in denying the plea to the jurisdiction. *Id.* at *14.

In *City of San Antonio v. DHL Express (USA), Inc.,* No. 04-22-00603, 2023 WL 380341 (Tex. App.—San Antonio, Jan. 25, 2023, no pet.) (mem. op.), the court held that the City of San Antonio's immunity from suit was not waived under Chapter 271 for claims by DHL arising out of a lease to use airport property.

DHL had been a tenant of the San Antonio International Airport since 1990. *Id*. at *1. From 1990 to 2020, DHL had received air freight from flights landing in San Antonio and used the leased airport property for that purpose. *Id.* In 2020, DHL and the City negotiated and executed a new five-year lease. *Id*. The lease gave DHL the right to use property at the eastern edge of the San Antonio airport, but only for "aeronautical activities or those that directly support the aeronautical activities." *Id.*

Three weeks into the lease, the City sent DHL a notice of default, alleging that DHL had stopped receiving air freight from San Antonio flights. *Id*. Instead, the City contended, DHL was receiving air freight at Austin-Bergstrom International Airport and then trucking the freight to the San Antonio airport. *Id.* The City argued that receiving air freight by truck from a different airport did not constitute "aeronautical activities or those that directly support the aeronautical activities," and DHL was therefore violating the lease. *Id.*

DHL filed a declaratory judgment action against the City, seeking a declaration that DHL had not violated the lease. *Id.* The City filed a plea to the jurisdiction, alleging it had not waived governmental immunity. *Id.* DHL amended its petition to add a claim for breach of contract. *Id.* After a hearing, the trial court denied the City's plea, and the City filed an interlocutory appeal. *Id.*

The court of appeals first considered whether the lease constituted a "governmental function," a requirement for the City to be immune from suit. *Id.* at **2–3 (citing *San Antonio River Auth.,* 601 SW.3d at 622-23 *and Wasson Insts. v. City of Jacksonville (Wasson I)*, 489 S.W.3d 427, 439 (Tex. 2016)).[25] The court found that because the lease concerned "the planning, acquisition, establishment, construction, improvement, equipping, maintenance, operation, regulation, protection, and policing of an airport," it was a contract for the performance of a governmental function. *DHL*, 2023 WL 380341, at *3 (citing Tex. Transp. Code Ann. § 22.002(a) *and* Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(10)). As a result, the court determined the City was immune from suits arising out of the lease unless a statutory waiver of immunity applied. *DHL*, 2023 WL 380341, at *3.

DHL argued the City waived immunity under § 271.152 of the Texas LGC. The statute provides waver of immunity for contracts "stating the essential terms of the agreement for providing goods and services to the local government entity." *Id.* at *2. To determine whether the lease met the statute's requirements, the court examined two provisions of the lease. The first, Article 13, provided that DHL "had the *right* to erect, alter, remodel and renovate buildings and other improvements on the Lease Premises . . . ." *Id*. at *4 (emphasis original). The court held that because DHL *could* build such improvements, but was not *required* to do so, Article 13 was "insufficient to invoke chapter 271's waiver of immunity." *Id.* (quoting *Lubbock Cnty.*, 442 S.W.3d at 302). The second provision, Article 15, required DHL to "assume the entire responsibility, cost and expense, for all repair and maintenance of the Lease Premises." *DHL*, 2023 WL 380341, at **4–5. The court held this language also insufficient, finding "no language in Article 15 states or implies that the City will pay DHL to maintain and repair the leased premises." *Id.* at *5.

Ultimately, the court held that the lease was not a contract for goods and services, and therefore Chapter 271 did not waive the City's immunity from DHL's breach of contract claim. *Id*. The court also held that nothing within the text of Chapter 271 waived immunity for DHL's declaratory judgment and attorney's fee claims. *Id.* at *6. As a result, the court of appeals reversed

[25] The distinction between governmental functions and proprietary functions is important, as the latter do not implicate sovereign or governmental immunity. See *Wwasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 436–37 (Tex. 2016) ("Like *ultra vires* acts, for which government officers do not enjoy immunity, a city's proprietary functions are not performed under the authority or for the benefit of the state, and thus such functions do not share a common root with the state's sovereign immunity.").

the trial court's order and rendered judgment dismissing DHL's suit for lack of subject matter jurisdiction. *Id.*

6. Waiver of immunity from suit under Texas Tort Claims Act (Texas CPRC 101)

In *Housing Auth. of City of Austin v. Garza*, No. 03-22-00085-CV, 2023 WL 4872981 (Tex. App.—Austin July 31, 2023, no pet.) (mem. op.), the court of appeals held that a housing authority retained governmental immunity under the Texas Tort Claims Act (TTCA) in the context of a premises defect claim brought by an individual against the housing authority—including whether the housing authority exercised sufficient control over a subcontractor's work on its premises to give rise to a duty of care to the injured individual.

The dispute arose from a renovation project at an apartment complex owned and managed by a housing authority. *Id.* at *1. As part of the project, several of the apartment complex's units were renovated to ensure compliance with the Americans with Disabilities Act (ADA). *Id.* The housing authority entered a prime contract with an affiliate entity (Austin Affordable Housing Corporation) to serve as the project's developer/prime contractor. *Id.* The developer/prime contractor entered into a separate agreement with a contractor to provide all of the construction services and materials for the project. *Id.* The contractor entered into a subcontract agreement with Specialty Tractor Landscaping to provide landscaping services and construct porches for some of the apartment units. *Id.*

Julia Garza's apartment was one of the renovated units. *Id.* at *2. During the renovation project, Garza slipped and fell into a construction trench outside her unit after she stepped on unstable dirt. *Id.* She sued the housing authority, contractor, and subcontractor for personal injury alleging premises defects. *Id.* She contended that the subcontractor placed thin wooden planks over the construction trenches and then covered the planks with dirt—thus making them unstable and invisible to Garza before she slipped and fell. *Id.* The housing authority filed a plea to the jurisdiction and argued that Garza could not establish that the authority's governmental immunity was waived under the TTCA. *Id.* at *3. The trial court disagreed and denied the housing authority's plea to the jurisdiction. *Id.*

The first issue on appeal was whether the housing authority was a governmental entity entitled to immunity under the TTCA. *Id.* The court of appeals started its analysis by acknowledging that governmental units are generally entitled to immunity unless a valid waiver of immunity applies. *Id.* It clarified that one such waiver is found in the TTCA—and waives immunity from personal injury claims rooted in premises defect where the governmental unit would be liable to the plaintiff if the governmental unit were a private person. *Id.* The housing authority asserted that, as a municipal corporation, it was entitled to immunity unless that immunity was waived under the TTCA. *Id.* The court of appeals agreed. *Id.*

The second (and primary) issue on appeal was whether the housing authority's immunity from suit was waived. *Id.* at *4. That required the court of appeals to determine whether the housing authority could be liable for Garza's claim if the housing authority were a private person. *Id.* It began by emphasizing that the "threshold issue" in a premises-defect case is whether the property owner owed a duty to the injured person. *Id.* It explained that in cases where the alleged defect

was created by an independent contractor's work activity, the property owner has no duty unless the property owner retained a right to control the work that created it. *Id.* at *5. It then clarified that, to retain a right to control the work, the property owner must have had the right to control the means, methods, or details of the independent contractor's work so much that the independent contractor could not perform the work in its own way. *Id.* It added that the requisite right to control could be established in two ways: (a) by evidence of a contract that explicitly assigns the property owner a right to control; or (b) by evidence that the property owner exercised actual control over the means, methods, or details of the independent contractor's work when no such agreement exists. *Id.*

The court of appeals turned first to the contractual agreements governing the renovation project to determine whether the housing authority had retained the requisite contractual right to control the subcontractor's work. *Id.* at *6. It determined that the agreements showed the subcontractor performed its work on the renovation project as an independent contractor and was responsible for all means, methods, and techniques for the performance of its work. *Id.* It also rejected the notion that evidence showed the housing authority exercised actual control over the means, methods, or details of the subcontractor's work. *Id.* It explained that Garza had only relied on evidence that showed the housing authority generally managed the premises—and not evidence that the housing authority exercised actual control over the subcontractor's work. *Id.* Accordingly, the court of appeals concluded that the appellee failed to show the housing authority owed her a duty of care such that it could be liable to her if it were a private person and held that the housing authority's immunity under the TTCA was not waived. *Id.*

7. Equitable estoppel against governmental entities

In *City of Dallas v. PDT Holdings, Inc.*, No. 05-22-00730-CV, 2023 WL 4042598 (Tex. App.—Dallas June 16. 2023, pet. filed) (mem. op.), the court of appeals held that the City of Dallas was not equitably estopped from enforcing a zoning ordinance limiting building height to 26 feet after twice permitting plans for a 36-foot building.

PDT obtained a permit from the City of Dallas to build a 36-foot-high duplex townhome in October 2017. *Id*. In January 2018, the City issued a stop work order on the project because a parapet wall violated code. *Id*. The City then approved amended plans that addressed the parapet wall but kept the 36-foot overall building height. *Id*. In April 2018, the City again issued a stop work order because the building did not comply with an ordinance limiting the maximum building height to 26 feet. *Id*. The project was 90% complete. *Id*. PDT applied three times to the City's Board of Adjustments for a variance, but each application was denied. *Id*. PDT appealed to the district court and after a fight over governmental immunity proceeded to a bench trial. *Id*. at **1–2. The trial court entered a final judgment in favor of PDT estopping the City from enforcing the ordinance in connection with the project. *Id*. at 2. The City appealed. *Id*.

The primary issue on appeal was whether the application of the zoning ordinance presented "an exceptional case where manifest justice demand departure from the general rule precluding estoppel against a municipality." *Id*. at *1. Applying the standard set out by the Texas Supreme Court in *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770 (Tex. 2006), the court of appeals concluded that the justice did not require that the City be equitably estopped. *Id*. at *7.

The Texas Supreme Court recognizes a very limited exception to the general rule that a governmental entity exercising its governmental powers is not subject to estoppel. *Id*. at 2. "[A] municipality may be estopped in those cases where justice requires its application and there is not interference with the exercise of governmental functions." *Id*. at 2 (quoting *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 836 (Tex. 1970)). "The exception 'is applied with caution and only in exceptional cases where circumstances demand its applications to prevent manifest injustice.'" *City of Dallas*, 2023 WL 4042598, at *2 (quoting *Prasifka*, 450 S.W.2d at 836)).

The court noted that evidence of the following would support the estoppel exception:

1. City officials acted deliberately to induce a party to act in way that benefitted the city and prejudiced the party;

2. The City received a direct benefit from the act to be estopped;

3. Estoppel is the only available remedy;

4. Reasonable reliance on the City's erroneous action; and

5. That upon learning of the error, the City delayed in rectifying the error.

City of Dallas, 2023 WL 4042598, at **3–4. Here, the court of appeals found that issuance of the permits was a costly mistake but not a misrepresentation or deliberate action to induce reliance. *Id*. at *6. Further, PDT could not have reasonably relied on the issuance of the permits because it was charged with notice of all applicable ordinances and the permits noted that they did not excuse failure to follow those ordinances. *Id*. The court determined these two factors alone were sufficient to preclude estoppel because the estoppel exception cannot "be applied in the absence of an affirmative misrepresentation inducing reasonable reliance," even where other factors weighed in favor of its application. *Id*. at *7.

8. Waiver of immunity for takings claims

In *City of Houston v. Commons of Lake Houston, Ltd.*, No. 01-21-00369-CV, 2023 WL 162737 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023, pet. filed), the court of appeals held that a developer's unconstitutional takings claim against the City of Houston was barred by governmental immunity.

Commons, the developer of a master-planned community (called The Commons) located on Lake Houston had begun work on its development when the City passed an ordinance altering the design requirements for new developments within the City's floodplains. *Id.* at *2. The ordinance would require that new developments within the City's 500-year floodplain, which portions of The Commons existed in, be built at least two feet above the flood elevation. *Id*. at *3.

Commons filed suit asserting a takings claim against the City, alleging that the amended floodplain ordinance "intentionally and unreasonably" restricted their use and enjoyment of property and "unreasonably interfered" with their expectations for the property. *Id.* at *4. Commons specifically alleged that "the City's actions constituted a taking, damaging, or destruction of its property without adequate compensation in violation of Article I, Section 17 of

the Texas Constitution." *Id.* In response, the City asserted a general denial and defenses, including governmental immunity. *Id*. The City then filed a plea to the jurisdiction, arguing, among other things, that the takings claim was barred by governmental immunity because the floodplain ordinance at issue "does not give rise to a takings claim as a matter of law" and, so the City had not waived its governmental immunity. *Id.* at *5. The trial court denied the City's plea, and an interlocutory appeal followed. *Id*.

The City contended that the takings claim was barred by governmental immunity because, "as a matter of law, requiring compliance with local laws consistent with FEMA/NFIP requirements does not constitute a taking." *Id.* at *7. The City also contended that the floodplain ordinance's elevation requirements, as applied to the development, could not constitute a taking because *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732 (5th Cir. 1988) "demonstrates conclusively that reasonable minds could conclude that such requirements were adopted to accomplish legitimate goals, are substantially related to the public's health, safety, and general welfare, and are reasonable." *Id.* Commons countered arguing, among other things, that a valid exercise of police power can still constitute a taking and that there is no justification for exempting floodplain regulations from constitutional limitations on governmental powers. *Id.*

The court of appeals stated that for an ordinance to be "a valid exercise of the city's police power, not constituting a taking," it must satisfy two related requirements: (1) the regulation must be adopted to accomplish a legitimate goal (must be substantially related to the health, safety, or general welfare of the people); and (2) the regulation must be reasonable and not arbitrary. *Id.* at *10 (citing *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984)). "If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare . . . the ordinance must stand as a valid exercise of the city's police power." *City of Houston*, 2023 WL 162737, at *10 (internal quotation marks omitted). The court of appeals held that the ordinance imposed by the City met both requirements of *Turtle Rock* and therefore did not constitute a taking, barring the takings claim due to governmental immunity. *Id.* at *11.

9. *Ultra vires* acts

In *Martinez v. Northern*, No. 01-22-00435-CV and No. 1-22-022-0811-CV, 2023 WL 162743 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023, pet. denied) (mem. op.), the court of appeals held that governmental immunity had not been waived for suit against a housing authority (and its CEO) and a municipality's Planning and Development Department (and its public officials) for claims relating to the approval of a variance for an affordable housing construction project.

The Houston Housing Authority (HHA) purchased 26 acres for a planned affordable housing development. *Id*. at *1. As part of the development, HHA submitted, to the City's Planning Commission, two variances from the City's ordinances relating to street extensions. *Id*. at *3. After the Commission's staff signaled approval of the variances, several property owners affected by the proposed development sued the HHA, the Planning Commission, and related government officials

under the Uniform Declaratory Judgment Act (UDJA), and for *ultra vires* actions by the agencies and their officials. *Id*. at *4.[26]

The government agencies and officials filed pleas to the jurisdiction based on governmental immunity from suit. *Id*. at *6. The property owners asserted two bases for waiver of immunity from suit: the UDJA and the *ultra vires* acts by the government officials. *Id*. The trial court granted the pleas to the jurisdiction based on immunity, and the court of appeals affirmed. *Id*. at **7, 16. As for the UDJA claim, the court reminded that the UDJA only waives immunity for challenges to the validity of an ordinance or statute. *Id*. at *8. But the plaintiffs were challenging the approval of the variance, not the underlying ordinance the variance sought exception from. *Id*. at *9. For the *ultra vires* claim, the court noted that immunity is waived only if the governmental actors were without legal authority, and it is not enough to allege that the actors "simply got [their] determination wrong." *Id*. at *11 (quoting *Schroeder v. Escalera Ranch Owners' Ass'n, Inc.*, 646 S.W.3d 329, 337 (Tex. 2022)). As the HHA and Planning Commission both had authority to submit for, and grant, variances, there was no *ultra vires* action available to the plaintiffs. *Martinez*, 2023 WL 162743, at **12–14.

In *Samaniego v. Associated General Contractors of Texas, Highway, Heavy, Utilities & Indus. Branch*, 668 S.W.3d 898 (Tex. App.—El Paso 2023, no pet.), the court of appeals held that the plaintiffs had sufficiently pleaded *ultra vires* acts against members of a commissioners court for failing to properly consider evidence in establishing prevailing wage rates.

Under Texas law, political subdivisions determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed. *Id.* This determination is made by either surveying the wages received by classes of workers employed on projects of a character like the contract work in the political subdivision in which the work is to be performed, or by using the prevailing wage rate as determined by the United States Department of Labor. *Id.* at 902. The AGC (with others) sued members of the El Paso County Commissioners Court seeking declaratory and injunctive relief, asserting that the members had acted *ultra vires* in setting prevailing wage rates. *Id.* at 901–03. The members of the Commissioners Court filed a plea to the jurisdiction, which the trial court denied. *Id.* at 903. On appeal, the members contended that governmental immunity shielded them from suit unless immunity has been expressly waived by the legislature—and neither of AGC's claims against each of them provides an express waiver. *Id.*

The court began by noting that a lawsuit against a state official in his or her official capacity can proceed in the absence of a waiver of immunity if the official's actions are *ultra vires*. *Id.* at 904 (citing *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017)). Thus, an action may be brought against individual state actors sued in their official capacity if a plaintiff alleges, and ultimately proves, that the official acted without legal authority or failed to perform a purely ministerial act. *Samaniego*, 668 S.W.3d at 904. The court then reaffirmed that an *ultra vires* suit based on actions taken without legal authority, therefore, has two components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority. *Id.*

[26] *Ultra vires* claims are premised on a governmental actor, in their official capacity, acting without legal authority. *Id*. at *5.

In determining the bounds of the commissioner court's authority, the court looked to the authority-granting law itself—§ 2258.022(a) of the Texas Government Code. *Id.* The members argued that while § 2258.022(a) requires that they either conduct a survey or adopt the U.S. DOL's prevailing wage rates, the Legislature otherwise left it to their discretion on how the survey of wages could be conducted. *Id.* The members argued that, because they exercised their discretion in conducting the survey, they each were immune from the AGC's suit. *Id.* The AGC countered, arguing that, by calculating the wage rates based on incomplete and inaccurate data, the members exceeded their discretion by conducting a survey that did not in fact determine the "prevailing rate" paid for similar work in the area as prescribed by the statutory terms. *Id.*

The court noted that the Legislature did not permit absolute discretion on how the survey is conducted, and, at minimum, workers employed by or on behalf of a public entity shall receive the general prevailing rate of per diem wages for their class of labor in the specific locality. *Id.* at 904–905 (citing Tex. Gov. Code §§ 2258.021(a), 2258.022(a)). This prevailing wage rate may be determined by "conducting a survey of the wages received by classes of workers employed on projects of a character similar to the contract work in the political subdivision of the state in which the public work is to be performed[.]" *Samaniego*, 668 S.W.3d at 905 (citing Tex. Gov. Code § 2258.022(a)(1)). Thus, the court held that although the precise method public bodies use in conducting the survey is not specified, the data designed to be collected must reflect the prevailing rate of per diem wages for each class of worker needed to execute the contract in the specific locality. *Samaniego*, 668 S.W.3d at 905. The AGC successfully argued that the members' survey (1) was not designed to find the accurate prevailing wages for the classes of workers necessary for heavy-highway construction in El Paso County; (2) failed to reach a sufficient number of relevant contractors to make the data reliable; and (3) incorporated rates from outside of El Paso County and for incorrect worker classifications. *Id.* at 906. Construing the pleading liberally in the AGC's favor, the court of appeals held that they had affirmatively plead that the members exceeded their discretion by failing to properly establish wages in El Paso County, including for the heavy-highway class of construction workers. *Id.*

Citing the Texas Government Code, the members also argued that their determination of the prevailing wages was unreviewable. *Id.* at 907 (referencing Tex. Gov't Code § 2258.022(e) (providing the "public body's determination of the general prevailing rate of per diem wages is final."). Because the court found that the AGC alleged in its petition that the officials acted *ultra vires* in setting such prevailing wages, the court held the wage determination was no longer a "final" determination. *Samaniego*, 668 S.W.3d at 907.

K. Illegality

In *Wolfe's Carpet, Tile & Remodeling, LLC v. Bourelle*, --S.W.3d--, No. 14-22-00579, 2023 WL 4770069 (Tex. App.—Houston [14th Dist.] 2023, no pet.), the court of appeals addressed the enforceability of a contract that violated provisions of the Insurance Code.

The Bourelles contracted with Wolfe's to perform remediation work on their homestead after it was damaged by Hurricane Harvey. *Id*. at **1, 7. The contract stated that the Bourelles' only financial responsibility would be their deductible and depreciation, that the "work to be completed and monies due will be the agreed scope of price agreed upon with the adjuster and insurance company[,]" and that the Bourelles "authorize [Wolfe's] to negotiate [with the

Bourelles' insurer] if necessary" on behalf of the Bourelles towards "a quick and fair settlement" with their insurer. *Id*. at **5–6. When the Bourelles failed to pay for the work, Wolfe's sued them for $40,000, asserting claims for breach of contract, quantum meruit, unjust enrichment, and a declaratory judgment on mechanic's liens it filed on the Bourelle's property. *Id*.

The Bourelles counterclaimed and moved for summary judgment seeking to void Wolfe's contract as illegal, therefore voiding Wolfe's contract claims. *Id*. The Bourelles alleged that through its contract, Wolfe's acted as and held itself out as a public insurance adjuster[27] in violation of Texas Insurance Code § 4102.051. *Id*. at **1, 3. Later, the Bourelles filed another summary judgment seeking to remove the lien. *Id*. The court granted the Bourelles' motions for summary judgment, and after dismissing Bourelles' claims against Wolfe's (without prejudice), the court entered a final judgment. *Id*.

The court of appeals affirmed, holding that Wolfe's construction contract was properly voidable by the Bourelles. *Id*. at *7. The primary issue on appeal was Texas Insurance Code Chapter 4102. Section 4102.051(a) prohibits a person from acting or holding themselves out "as a public insurance adjuster in this state … unless the person holds a license" to do so. *Id*. at *4. The Insurance Code also provides that an insurer may void a contract entered into with any person who violates § 4102.051 (by acting or holding themselves out as a public adjuster without a license). Tex. Ins. Code § 4102.207. The Code defines a public adjuster as anyone who "acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property" or advertises, solicits business, or holds themselves out as a public adjuster. Tex. Ins. Code. § 4102.001(3).

The court held that the contract was voidable, as it permitted Wolfe's "to work on the Bourelles' behalf to secure 'a quick and fair settlement.'" *Wolfe's*, 2023 WL 4770069, at *6. Wolfe's argued that since it had not actually acted to negotiate the Bourelles' claims with their insurer, the contract was not voidable. *Id*. The court rejected the argument because Chapter 4102 also prohibits a company from "holding itself out as a public adjuster ― not just taking action as a public insurance adjuster." *Id*. (citing *Lon Smith & Assocs., Inc. v. Key*, 527 S.W.3d 604, 617 (Tex. App.―Fort Worth 2017, pet. denied) and Tex. Ins. Code § 4102.207(a), (b)).

L. Intentional infliction of emotional distress and trespass

In *Bill Wyly Dev. Inc. v. Smith*, --S.W.3d--, No. 14-22-00433-CV, 2023 WL 8041480 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.), the court of appeals reversed a trial court judgment against a contractor for intentional infliction of emotional distress and trespass.

The Smiths were looking to buy a lot to build a home on Tiki Island in 2013. *Id*. at *1. They met Mr. Wyly, whose construction company Wyly Development, had built several homes in the area. *Id*. Mr. Wyly and the Smiths met several times to discuss constructing the Smiths' home. *Id*. The Smiths ultimately chose to go with another home builder, and Mr. Wyly confronted the Smiths about their decision by yelling and pointing at them in a parking lot. *Id*. at *2. The Smiths alleged that their sleep was affected, they were anxious, and abandoned their homebuilding plans

[27] Although the case does not discuss it, the holding implies that Wolfe's was not licensed as a public adjuster.

because of this incident. *Id*. For the next three years, the Smiths' lot was vacant, but allegedly Wyly Development several times directed subcontractors to dump trash onto the Smiths' vacant lot. *Id*. The Smiths paid $11,500 to have trash and debris removed from the lot and to level it for construction. *Id*.

Wyly Development sued the Smiths for breach of contract and fraud, alleging there was a contract for Wyly Development to construct the Smiths' house. *Id*. The Smiths countersued, and added Wyly, individually, as a third-party defendant. *Id*. The Smiths alleged trespass and intentional infliction of emotional distress. *Id*. The Smiths' trespass and intentional infliction of emotional distress claims proceeded to jury trial and the jury awarded the Smiths $11,500 for the trespass, $20,000 for past mental anguish, and $1,000 for future mental anguish. *Id*.[28] Before the jury award, Wyly and Wyly Development moved for directed verdict on the intentional infliction of emotional distress claim claiming that there was no legally sufficient evidence that Wyly's conduct was sufficiently "extreme and outrageous." *Id*. The motion was denied. *Id*. After the jury award, Wyly and Wyly Development moved to disregard the jury's award for the intentional infliction of emotional distress claim and a motion for new trial, through the trial court denied both motions. *Id.*

On appeal, the court of appeals reviewed two issues: (1) whether the trial court should have granted Wyly/Wyly Development's motion for directed verdict, and (2) whether the trial court erred in denying Wyly/Wyly Development's motion for new trial because there was insufficient evidence to support the jury's award for the trespass damages. *Id*. at **3, 8. For the emotional distress claim, the court recited the elements: "(1) Wyly acted intentionally or recklessly; (2) his conduct was extreme and outrageous; (3) his actions caused the Smiths emotional distress; and (4) the emotional distress was severe." *Id*. at *3. The court concluded that Wyly's alleged conduct was not sufficiently severe or of such a duration to support an intentional infliction of emotional distress claim, or the anguish damages associated with it. *Id*. at *7.

For the Smiths' trespass claim, the court reviewed the jury charge definition of "trespass" and the damages elements. *Id*. at *8. But based on the testimony at trial—from Mr. Smith that Wyly told him that he directed subcontractors to dump trash on the Smiths' property—the jury is "entitled to believe" Mr. Smith's testimony. *Id*. at *9. The Court concluded that they "cannot say that the jury's award of $11,500 for trespass damages is so weak or so contrary to the overwhelming weight of all the evidence as to make the award unjust or excessive." *Id*. at *10. Accordingly, the court affirmed the trespass claim. *Id*.

M. Immunity under Texas Civil Practice & Remedies Code § 97.002

In *Austin Materials, LLC v. Rosado for Troche*, No. 03-22-00201-CV, 2023 WL 3666107 (Tex. App.—Austin May 26, 2023, pet. denied) (mem. op.), the court of appeals affirmed the trial court's denial of road contractor's motion for summary judgment asserting immunity under Texas CPRC Chapter 97.

[28] Wyly Development's breach of contract claim had previously been tried to the bench, resulting in a take-nothing judgment against Wyly Development. *Id*.

This dispute arose from a multi-vehicle accident resulting in the death of one driver and the incapacitation of another. *Id*. at *1. The accident occurred in a construction zone controlled by contractor Austin Materials, an asphalt paving company under contract with TxDOT. *Id*. The injured plaintiff sued Austin Materials alleging that it failed to place an electronic sign warning motorists of a lane closure in the correct location, and that this failure caused the plaintiff's injuries. *Id*. The placement of the sign was allegedly required by the contractor's contract with TxDOT. *Id*. The contract required Austin Materials to perform the work in accordance with the provisions of referenced specifications and included a traffic control plan. *Id*. The traffic control plan required placement of a portable, changeable message sign displaying appropriate information such as "merge left," the recommended advisory speed, or information about delays. *Id*. The traffic control plan stated that the message sign should be placed 3,600 feet from the beginning of the construction zone. *Id*. Plaintiff alleged that Austin Materials instead placed the message sign 1.1 miles away from that location. *Id*.

Austin Materials moved for summary judgment on traditional and no-evidence grounds. *Id*. In its traditional motion, Austin Materials argued that it was entitled to immunity under Tex. Civ. Prac. & Rem. Code § 97.002 because it complied with the traffic control plan. *Id*. Section 97.002 provides immunity for road contractors from negligence suits if "the contractor is in compliance with contract documents material to the condition or defect" that allegedly caused injury. *Id*. Because an assertion of § 97.002 immunity is an affirmative defense each element must be "conclusively established" to support summary judgment. *Id*. at *5.

To establish compliance with the traffic control plan, Austin Materials relied on the testimony of the TxDOT area engineer who stated that "to the best of [his] knowledge," even though the "message board [was] missing," it was unclear if "it was being relocated or if [Austin Materials was] in the process of taking down or putting up the traffic control devices" in the area and that complied with the contract. *Id*. at **5–6. Austin Materials also relied on the testimony of a TxDOT inspector who stated Austin Materials complied with the traffic control plan, and its own construction manager's testimony that Austin Materials had never received a notice of default from TxDOT on that project. *Id*. at *5.

The plaintiff disputed that Austin Materials complied with the contract's traffic control plan, arguing that the TxDOT area engineer acknowledged that the message board was "missing" from the location required by the traffic control plan and gave possible excuses for its absence. *Id*. at *6. The plaintiff pointed to conflicting testimony from the TxDOT inspector's deposition in which he acknowledged that the message board was in the wrong location and constituted a violation of the contract. *Id*. Finally, the plaintiff relied on testimony from Austin Material's crew foreman stating that the message board was missing based on the requirements of the traffic control plan. *Id*.

The court of appeals concluded that reasonable people could disagree regarding whether Austin Materials complied with the portions of the traffic control plan material to the plaintiff's alleged injuries and thus the trial court did not err when it denied summary judgment on § 97.002. *Id*. The court of appeals also concluded that it lacked jurisdiction to review the part of the trial court's order denying no-evidence summary judgment on the issue of causation because the court's

interlocutory jurisdiction was limited to the scope permitted in the statute and thus limited its review to Austin Materials' immunity ground for summary judgment. *Id*. at ** 2 n.2, 4.

The plaintiff also moved for partial summary judgment in the trial court, arguing that Austin Materials owed her a duty to comply with the traffic control plan for the lane closure at issue, including the proper placement of the electronic message board as required by the plan, which the trial court granted. *Id*. at *2. The plaintiff then filed a partial motion to dismiss Austin Materials' appeal to the extent it challenged the trial court's order granting her motion for partial summary judgment on duty, arguing that the court of appeals lacked jurisdiction over that order. *Id*. In response, Austin Materials tried to invoke the appellate court's jurisdiction over the trial court's grant of partial summary judgment, arguing that appellate jurisdiction under Texas CPRC § 51.014(a)(15) extends to reviewing otherwise-unappealable interlocutory orders to the extent those rulings bears upon the validity of the appealable order. *Id*. Austin Materials argued that the trial court's ruling on duty affected the validity of its ruling on immunity because whether a contractor owed the plaintiff a duty contributes to determining its entitlement to immunity. *Id*.

The court of appeals disagreed and granted the plaintiff's motion to dismiss, explaining that Austin Materials' entitlement to immunity does not turn on the existence of duty. *Id*. at *3. Section 97.002 makes a contractor immune based on its compliance with the "contract documents" material to the condition or defect that allegedly caused the plaintiff's injury. *Id*. The court of appeals concluded that the validity of the trial court's order denying Austin Materials' motion for summary judgment based on § 97.002 was not affected by its ruling that Austin Materials owed the plaintiff a duty. *Id*. at *3.

Similarly, in *Third Coast Services, LLC v. Castaneda*, 679 S.W.3d 254 (Tex. App.—Houston [14th Dist.] 2023, pet. filed), the court of appeals held that a contractor failed to establish its entitlement to immunity under Chapter 97.

The dispute involved the estate of a man killed in a fatal motor vehicle accident suing several parties. *Id.* at 256. After amending the petition several times, the only remaining parties were the construction company serving as the general contractor to build the highway and its subcontractor. *Id.* The contractor and subcontractor filed motions for summary judgment arguing they were immune from suit under section 97.002 of the Texas CPRC, which the trial court denied. *Id.* The court of appeals held both the contractor and the subcontractor failed to meet each requirement of their affirmative defense and therefore affirmed the trial court's holding. *Id.* On interlocutory appeal, the contractor and subcontractor argued the trial court erred in denying their motions for summary judgment. *Id.* at 258. The contractor also argued the trial court erred in overruling its objections to the amended declaration of the plaintiff's expert witness. *Id.*

First, the court of appeals determined that for § 97.002 to apply, the suit must be against a contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation. *Id.* at 259. The plaintiffs maintained that the contractor's contract was with Montgomery County and the project was divided into two distinct parts: the "County Project" and the "TxDOT Project." *Id.* The plaintiffs argued the contractor and subcontractor only worked on the County Project, which was where the accident occurred. *Id.* at 260. In response, the defendants relied on *Mahoney*, where the appellate court held that § 97.002 did not "require the firm to have

privity with TxDOT." *Id.* (citing *Mahoney v. Webber, LLC* 608 S.W.3d 444, 447–48 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.)). The court of appeals distinguished *Mahoney*, as the contract documents at issue on appeal explicitly stated that the maintenance agreement was governed by § 373.006 of the Transportation Code, instead of § 228.011, which governed the contract in *Mahoney* (and provided that TxDOT must participate in the project). *Third Coast*, 679 S.W.3d at 260. And the court declined to follow the *Mahoney* court's interpretation of § 97.002 as "requiring only that the firm perform work under a contract that makes the firm responsible for constructing or repairing a highway, road, or street for TxDOT." *Id.* at 261. The court determined this interpretation "rewrites" the statute and expands for whom the contractor must perform work for the statute to apply. *Id.* The defendants also relied on *ISI Contracting, Inc.*, in which the appellate court found the contractors were working for TxDOT because the plaintiff pleaded they were and "some of the statute's applicability requirements hinge on what the plaintiff has pled." *Id*. (quoting *ISI Contracting, Inc. v. Markham* 647 S.W.3d 489, 498–500 (Tex. App.—San Antonio 2022, pet. denied)). The court distinguished *ISI* from this case as the plaintiffs at issue never alleged the contractor or subcontractor were TxDOT contractors. *Third Coast*, 679 S.W.3d at 261–262.

Instead, the court relied on *A.S. Horner, Inc. v. Navarrette*, 656 S.W.3d 717, 721 (Tex. App.—El Paso Nov. 18, 2022, no pet.), holding that because the restrictive clause in § 97.002 limits the essential meaning of "contractor," the legislature intended for the statutory protections to extend "only to contractors hired by TxDOT to perform highway, road, or street construction and repairs." *Third Coast*, 679 S.W.3d at 262. The court held that because the contractor and subcontractor provided no evidence that conclusively established that they were hired by TxDOT for injury-causing work, they were not entitled to immunity per § 97.002. *Id.* Therefore, the court overruled the contractor and subcontractor's issue and affirmed the trial court's denial of their summary judgments. *Id.* at 263.

N. Implied warranties

In *Wu v. Lumber Liquidators, Inc.*, No. 14-20-00765-CV, 2023 WL 2714687 (Tex. App.—Houston [14th Dist.] Mar. 30, 2023, no pet.) (mem. op.), the court of appeals held that language in an invoice was insufficient as a matter of law to disclaim the implied warranty of merchantability but was sufficient to disclaim the implied warranty of fitness for a particular purpose.

The court of appeals determined that no disclaimer of the implied warranty of merchantability existed, as the invoice for wood flooring materials provided to a homeowner did not fit the requirements of mentioning "merchantability" and being conspicuous. *Id.* at *12. The court of appeals also held that a disclaimer of the implied warranty of fitness for a particular purpose did exist because the disclaimer was conspicuous (the language was in all capital letters) and disclaimed "ALL OTHER WARRANTIES . . . EXCEPT TO THE EXTENT THAT SUCH WARRANTIES CANNOT BE VALIDLY DISCLAIMED UNDER APPLICABLE LAW." *Id.* The implied warranty of fitness for a particular purpose, unlike the implied warranty of merchantability, does not require any specific mention of the implied warranty that is being disclaimed. *Id*. at *11. Thus, the general waiver of other warranties was valid to waive the implied warranty of fitness for a particular purpose. *Id.* at *12. The court of appeals thus determined that the homeowner had waived the implied warranty of fitness for a particular purpose but not the implied warranty of merchantability.

The homeowner further argued that because they never signed the invoice containing the waivers, the waivers were not binding. *Id.* at *11. The court of appeals disagreed: "all that is required is that the disclaimer be disclosed to the buyer before the contract of sale has been completed, unless the buyer agrees later to modify the contract." *Id.* at *12 (citing *Dewayne Rogers Logging, Inc. v. Propac Indus., Ltd.*, 299 S.W.3d 374, 390 (Tex. App.—Tyler 2009, pet. denied); *Womco, Inc. v. Navistar Int'l Corp.*, 84 S.W.3d 272, 279 (Tex. App.—Tyler 2002, no pet.)). The invoice that contained the two waivers at issue was presented to the homeowner before the purchase of the flooring material and was thus enforceable. *Wu*, 2023 WL 2714687, at *12. The court of appeals determined that there was a fact question about any other waivers that were contained in the broader agreement for home improvement services (not the invoice for flooring materials) as there was no evidence that the homeowner received that home improvement agreement before purchasing the services. *Id.* at **11–12.

O. Insurance

The Insurance Law Update is handled separately in the programming by Doug Skelley, and you should review his materials for important cases affecting insurance.

P. Jury Matters

In *United Rentals North America, Inc. v. Evans*, 668 S.W.3d 627 (Tex. 2023) (discussed above), the Texas Supreme Court also clarified the applicable standard for making a *Batson*[29] challenge for racially motivated peremptory strikes.

During jury selection, United Rentals and the plaintiffs both contended that the other had made impermissible race-based peremptory challenges. *United Rentals*, 668 S.W.3d at 634, 637. In argument supporting the plaintiffs' challenges[30] to United Rentals' peremptory strikes, their counsel stated: "We know from our focus groups that the African-American female is the most favorable juror for this case for whatever reason." *Id*. at 637. The plaintiffs also used five of their six peremptory strikes to remove "four white males and one Hispanic male" from the jury. *Id*. The trial court sustained the plaintiffs' challenge to two of United Rentals' strikes of black females but denied United Rentals' challenge to the plaintiffs' peremptory strikes. *Id*. The court of appeals affirmed, albeit with several justices dissenting in writing from denial of en banc review. *Id*.

The Texas Supreme Court held that a new trial was required due to the racially-motivated statements of counsel. *Id*. at 631–32. Citing its decision in *Powers*, the Court held that if counsel "admitted on the record that race 'figured into' the decision to strike" a prospective juror, courts

[29] *Batson v. Kentucky*, 476 U.S. 79 (1986) is the seminal case deciding that race-based peremptory challenges violated the equal protection clause of the Fourteenth Amendment in criminal cases. In *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991), the Texas Supreme Court applied the prohibition against racially-motivated peremptory challenges to state civil cases.

[30] United Rentals attempted to use five of its nine peremptory strikes to remove black females. *Id*. at 634.

need not engage in an ordinary, three-step *Batson*[31] analysis. *United Rentals*, 668 S.W.3d at 635–36 (citing *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991)). Under the three-step analysis: (1) the party opposing the strike establishes a prima facie case of racial discrimination; (2) shifting the burden to the party who exercised the strike to proffer a race-neutral explanation; (3) so the court can determine whether the party challenging the strike has proven intentional racial discrimination. *United Rentals*, 668 S.W.3d at 635.The Court clarified that *Powers* remains the law, though limited its holding to those "rare circumstances in which an admission of racial preference in jury selection appears explicitly in the record." *Id*. at 636. The Court also reiterated that when there is no explicit mention of race on the record, an ordinary three-step analysis should proceed, and that courts should not "impute impermissible racial motive based on inferences from a race-neutral record[.]" *Id*. at 637. The Court finally qualified its holding, requiring also that the peremptory strikes be "consistent with the announced preference[.]" *Id*. at 637. As the plaintiffs had struck "four white males and one Hispanic male" the Court found that the strikes reflected the racial preference stated by counsel and ordered a new trial. *Id*. at 637–38.

Q. Limitations and Repose

1. Limitations and accrual

In *Hassell Constr. Co. Inc. v. Springwoods Realty Co.*, No. 01-17-00822-CV, 2023 WL 2377488 (Tex. App.—Houston [1st Dist.] March 7, 2023, pet. filed) (mem. op.), the court analyzed the accrual date for a breach of contract claim under the continuing contract doctrine.

The case was wildly complicated by the existence of several lawsuits filed over half a decade. A public improvement district, along with developer Springwoods, hired Hassell Construction to build a roadway project. *Id*. at *1. Their contract appears to have been based on an EJCDC form and listed the "Owner" as the district. *Id*. at **1, 8. Under incorporated special conditions to the contract, Springwoods was also "considered an 'Owner' for certain purposes under the Contract." *Id*. at *1. The contract contained extensive general conditions setting forth the parties' agreed payment and dispute resolution procedures. *Id*. at *8. Under them, Hassell was to submit payment applications to WPM (an engineer working for the district and Springwoods). *Id*. The contract had typical EJCDC dispute resolution procedures, requiring the parties to submit "Claims" to WPM as a condition precedent to the rights of any party. *Id*. The contract stipulated that WPM's decision would become final within 30 days after a contractually stipulated mediation unless the parties pursue dispute resolution (including litigation). *Id*. During construction, Hassell claimed that revisions to the construction plans increased its costs, and submitted a claim that was unsuccessfully mediated on July 2, 2012. *Id*. at *2.

[31] Although under *Batson* the three-step analysis focuses on whether jurors are struck "solely on account of" race, the Texas Supreme Court "characterized the ultimate goal of the three-step inquiry as whether race 'explains' the strike 'better than any other reason.'" *United Rentals*, 668 S.W.3d at 636 (citing *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 526 (Tex. 2008)). The Supreme Court of the United States has since focused its three-step inquiry on determining whether a strike was "motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, 588 U.S.---, 139 S. Ct. 2228, 2245 (2019).

Hassell then sued the district and the developer three times. First, Hassell filed suit against the district and Springwoods on July 26, 2012, within thirty days after mediation. *Id*. at *2. The district and Springwoods filed third-party petitions against WPM. *Id*. Several of Hassell's purported partners or joint venturers, RHC and RHB, filed pleas in intervention in the first suit on September 15, 2014, but Hassell moved to strike those pleas in intervention based in part on the two-year delay in bringing the plea, RHC and RHB's alleged lack of a justiciable interest in the lawsuit, and because the "intervention multiplied the issues excessively" by adding partnership interests to a construction payment dispute. *Id*. at **2–3. The trial court struck RHC and RHB's plea in intervention, and neither appealed that decision. *Id*. at *3. In February 2015, RHC and RHB filed a suggestion of bankruptcy on behalf of Hassell, seeking to stay the first lawsuit. *Id*. The trial court abated the case pursuant to the bankruptcy, but the stay was lifted in April 2016 when RHC moved to dismiss the bankruptcy petition. *Id*. After the trial court reinstated the case (including setting a hearing on motions for summary judgment for October 7, 2016), RHC and RHB filed a second plea in intervention. *Id*. In response, Hassell non-suited its claims against the district and Springwoods; based on the non-suit, the district and Springwoods moved to strike RHC and RHB's second plea in intervention. *Id*. at *4. The trial court granted that motion to strike,[32] which RHC and RHB unsuccessfully appealed. *Id*. In the meantime, Hassell and RHC/RHB filed two separate lawsuits concerning the project. *Id*. at *5.

Hassell filed its second suit on December 9, 2016. *Id*. In that lawsuit, the district and Springwoods again filed third-party petitions against WPM. *Id*. The district and Springwoods then moved for summary judgment on Hassell's claims based on the statute of limitations, and after the trial court granted summary judgment against almost all Hassell's claims on September 5, 2017 (based on limitations), the district and Springwoods non-suited their claims against WPM. *Id*. Hassell then settled with the district and Springwoods on June 24, 2018. *Id*. But the settlement agreement did not purport to resolve RHC or RHB's direct claims, if any. *Id*.

On December 12, 2016, RHC, RHB, and Hassell "derivatively by and through its shareholder" filed suit against the district, Springwoods, and WPM. *Id*. at *6. Collectively, RHC, RHB, and Hassell (as a derivative plaintiff)[33] asserted claims for breach of contract, fraud, fraud by nondisclosure, fraudulent inducement, conspiracy, and quantum meruit. *Id*. Springwoods moved for summary judgment on all these claims based on limitations, and on the quantum meruit claim, arguing that it was barred by the existence of the contract between Hassell and the district. *Id*. RHC and RHB tried to abate the summary judgment proceeding pending their appeal in the first lawsuit, but the trial court denied that motion on April 20, 2017. *Id*. The district joined the summary judgment, and then WPM also filed its own summary judgment, incorporating the district and Springwoods' arguments, and on the additional ground that RHC, RHB, and Hassell had no contract with WPM. *Id*. The district, Springwoods, and WPM argued that because the parties had

[32] In a separate decision, the court of appeals affirmed the trial court's granting the motion to strike the plea in intervention, which became final on April 23, 2021, when the Texas Supreme Court denied RHC and RHB's petition for review. *Id*.

[33] The reason Hassell, through its shareholder, filed a separate suit, is apparently because of the ongoing partnership dispute between Hassell, RHC, RHB, and others, which contributed to the case's complicated procedural history.

mediated the case unsuccessfully by July 2, 2012, any breach of contract claim accrued no later than that date, and the third lawsuit was therefore untimely as it was filed more than four years later (December 12, 2016). *Id*. at *17. The trial court granted Springwoods, the district, and WPM's' motions for summary judgment. *Id. at* *6. WPM also moved for summary judgment on RHC, RHB, and Hassell's contract claims, because they had no contract with WPM. *Id*. at *16. Because RHC, RHB, and Hassell failed to challenge that ground on appeal, the court of appeals affirmed summary judgment on their contract claims on that basis.

On appeal, RHC, RHB, and Hassell argued that their breach of contract cause of action had not accrued on July 2, 2012, under the continuing contract doctrine. *Id*. at *16. While a breach of contract typically accrues when the contract is breached, Texas law "recognizes an exception to this rule in situations involving a continuing contract." *Id*. A continuing contract is one in which payment is divided into separate parts, or where the work is ongoing and indivisible, with payments being made on installments. *Id*. The accrual for a continuing contract is typically the earlier of (1) completion of the work; (2) termination of the contract; or (3) anticipatory repudiation of the contract, accepted by the other party. *Id*.

The court of appeals held that the continuing contract doctrine did not apply based on the terms of the agreement. *Id*. at *18. The court credited Texas's strong public policy favoring freedom of contract and pointed out that the agreement itself provided "a comprehensive mechanism for the parties to resolve their payment disputes." *Id*. Relying on the dispute resolution provisions, the court held that under the contract, the parties were to submit disputes to WPM, and then to mediation, before pursuing suit. *Id*. As Hassell had done just that—mediated and then within 30 days filed the first lawsuit—any breach of contract claims accrued on July 2, 2016 (date of the unsuccessful mediation). *Id*. at **17–18.

The court also rejected the argument that because the contract did not contain the words "accrual" or "causes of action" or "limitations," it could not have been intended to alter the common law rules for accrual. *Id*. at *18. Instead, the court relied on the general common-law rule that a cause of action accrues "when facts come into existence that authorize a party to seek a judicial remedy[,]" and noted that the contract had precise terms about the conditions under which a party could seek a judicial remedy. *Id*. (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)).

The court also affirmed the fraud, fraud by nondisclosure, fraudulent inducement, and conspiracy summary judgments on similar but not identical grounds. *Hassell*, 2023 WL 2377488, at **19–20. The court relied on the same July 2, 2012 accrual date as RHC, RHB, and Hassell knew of any allegedly fraudulent or misleading conduct by that date. *Id*. at *19. Although RHC, RHB, and Hassell claimed misrepresentations "after the Project began," because the alleged misrepresentations were sufficiently like the claims Hassell had asserted in its 2012 lawsuit on July 26, 2012, the court held that those claims accrued no later than that date, which was also four years before RHC, RHB, and Hassell filed the third lawsuit. *Id*. at *23.

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Practice Note: The case has two major effects. First, enforceability of contractual accrual clauses has had mixed results in Texas. Texas CPRC § 16.070 voids any provision that "purports

to limit the time in which to bring suit on the stipulation, contract, or agreement, to a period shorter than two years." Outside the construction context, courts have refused to enforce clauses that require a party to bring suit within two years of some event if the cause of action accrues less than two years from the contractual deadline. *See, e.g.*, *Spicewood Summit Offices Condos. Ass'n, Inc. v. Am. First Lloyd's Ins.,* 287 S.W.3d 461, 465 (Tex. App.—Austin 2009, pet. denied) (stating that "a contractual period for filing suit cannot end until at least two years after the cause of action accrues" and that such clauses "cannot establish a trigger for that period that occurs prior to the accrual of the cause of action" if the deadline is two years from the event). *Hassell* is an important decision because it treats a typical construction contract's dispute resolution procedure as the agreed triggering event for limitations to run, functionally making it an *accrual* clause that may not fall within § 16.070.

Second, the case presents a critical counterpoint to the continuing contract doctrine. Appellate courts have traditionally recognized construction contracts as continuing contracts for statute of limitations purposes. See, e.g., *Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 381 (Tex. App.—Fort Worth 1994, writ denied) ("Typically, construction is performed under a continuing contract."); see also Amy Emerson, *The Night is Dark and Full of Terrors: The Horrifying Dangers of Texas Construction Law*, presented at the 31st Annual State Bar of Texas Construction Law Conference (2018). Not every court has strictly applied the deferred accrual, even for continuing contracts. See, e.g., *Capstone Healthcare Equip. Servs., Inc. v. Quality Home Health Care, Inc.*, 295 S.W.3d 696, 700 (Tex. App.—Dallas 2009, pet. denied) ("However, if the terms of a continuing contract call for fixed, periodic performance during the course of the agreement, a cause of action for the breach of the agreement may arise at the end of each period, before the contract is completed."). But *Hassell* presents another way to bypass the continuing contract doctrine, by treating a party's right to sue under a contract as the date of accrual, even if the contract might otherwise be characterized as continuing. As the plaintiffs pointed out, they "worked on the Project until as late as December 28, 2012," which would have been within four years of their third lawsuit (December 12, 2016). *Hassell*, 2023 WL 2377488, at *23. But the court refused to extend limitations since Hassell could sue under the contract earlier—in fact did sue earlier—within 30 days of the parties' failed mediation. *Id*. at *2.

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In *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 670 S.W.3d 622 (Tex. 2023), the Texas Supreme Court held that the statute of limitations was not equitably tolled during the pendency of an unsuccessful appeal of a dismissal under Chapter 150 of the Texas CPRC.

The case is procedurally complicated and should not be confused with a prior appeal to the Texas Supreme Court involving the same parties.[34] El Pistolon hired Levison to provide professional architectural services for a property development in McAllen in the mid-2000s. *Levinson*, 670 S.W.3d at 624. In June 2010, El Pistolon sued Levinson for breach of contract and

[34] For full disclosure, our firm submitted an amicus brief on behalf of several trade organization supporting Levinson's position in its original appeal challenging the sufficiency of a certificate of merit filed by El Pistolon. The Court's prior decision was *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017).

negligence, alleging that the project was negligently designed. *Id*. El Pistolon failed to include a certificate of merit in this original lawsuit but nonsuited its claims after Levinson moved to dismiss under Chapter 150. *Id*. El Pistolon then refiled suit "a few months later" with a certificate of merit. *Id*. Levinson again moved to dismiss, arguing that the newly filed certificate of merit was insufficient under Chapter 150. *Id*. The trial court denied the motion to dismiss, and the appellate held that the affidavit was sufficient for El Pistolon's negligence claims, but not for El Pistolon's breach of contract claims. *Id*. at 625. The Texas Supreme Court held that the certificate of merit was also deficient for the negligence claims. *Id*. at 625. In that appeal, El Pistolon had urged that if the Court held the certificate of merit was insufficient, it was entitled to "remand in the interests of justice" so that it could amend its certificate. *Levinson*, 670 S.W.3d at 625. The Court rejected the argument, remanding solely for the trial court to determine whether dismissal should be with or without prejudice. *Id*.

Before the trial court ruled on the dismissal on remand, El Pistolon filed a new lawsuit in May 2018, alleging the same facts and claims (negligence and breach of contract) as the 2010 lawsuit, but with a new and improved certificate of merit. *Id*. In its petition, El Pistolon asserted that the statute of limitations had "been tolled by the doctrine of equitable tolling and other similar" tolling doctrines. *Id*. El Pistolon reasoned that because it had diligently pursued its earlier suit to appeal, its prior failure to comply with the statute was reasonable. *Id*. Because of the passage of around eight years between the two suits, Levinson moved for traditional summary judgment on the statute of limitations. *Id*. Levinson argued that El Pistolon's claims accrued no later than June 2010 (when it filed suit previously) and that the two- and four-year statutes of limitations (for negligence and breach of contract respectively) had long since run. *Id*. Levinson also argued that equitable tolling could not apply since El Pistolon knew about Chapter 150 when it filed suit in 2010, and that Levinson would be prejudiced by equitable tolling. *Id*.

The trial court granted Levinson's motion and issued a final, take-nothing judgment. *Id*. The appellate court reversed, holding that the "legal impediment rule" (from *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991)) tolled the running of limitations while the 2010 suit was on appeal. *Levinson*, 670 S.W.3d at 626. The court of appeals reasoned that El Pistolon should not have had to file a new lawsuit (to preserve accrual of limitations) on an appeal of a ruling it had prevailed on at the trial court. *Id*. at 625–26.

The Texas Supreme Court reversed. *Id*. at 633. First, the Court held that *Hughes* was limited to its circumstances (legal malpractice cases) and should not be extended beyond that context. *Id*. at 629. Second, the Court rejected the appellate court's reliance on a "broader 'legal impediment rule'" extending beyond *Hughes*. *Id*. El Pistolon argued that another equitable tolling theory applied, invoking *Hand v. Stevens Transport, Inc. Employee Benefit Plan*, 83 S.W.3d 286, 293 (Tex. App.—Dallas 2002, no pet.) where the court had articulated a five-factor weighted test for determining tolling: "(1) lack of actual notice of filing requirements; (2) lack of constructive knowledge of filing requirements; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." But the Court rejected the *Hand* factors, noting that since litigants always have constructive notice of the law, the test cannot apply by its own terms to a failure to follow a statutory requirement. *Levinson*, 670 S.W.3d at 630–31. The Court also reasoned that the prejudice factor could never be met, since "a defendant will always be prejudiced, to some degree, by its inability to rely on the relevant statute of limitations." *Id*. at 631. Finally, reciting case law back to

1907, the Court held that the legal impediment rule is limited to either (1) cases involving an injunction that prevents a claimant from bringing an action; or (2) "cases covered by *Hughes*." *Id*. at 629–30. The Court recognized that some courts of appeals tolled limitations during an automatic stay in bankruptcy proceedings but expressed no opinion on whether that was proper. *Id*. at 630 n.4. Because El Pistolon's theory of tolling did not fall within either category, the Court held that El Pistolon's claims were not equitably tolled by El Pistolon's earlier (unsuccessful) appeal, and affirmed summary judgment on the statute of limitations. *Id*. at 632.

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Practice Note: Equitable tolling post-*Levinson* will be a thin strand for litigants to hang on. In dicta, the Court reiterated its cautionary note that "practitioners [should] avail themselves of tools designed to avoid protracted litigation over whether a suit is time-barred" including tolling agreements and protective suits. *Id. at* 629 (citing *Erikson v. Renda*, 590 S.W.3d 557, 570 (Tex. 2019)). In context, a "protective suit" appears to be the practice of filing a separate lawsuit to preserve a statute of limitations, and then seeking abatement of that lawsuit while the original one is pending. *Id*. at 570 n.78.

In dicta, the Court also noted that equitable tolling is unavailable "if it is 'inconsistent with the text of [a] relevant statute.'" *Levinson*, 670 S.W.3d at 627 (quoting *Young v. United States*, 535 U.S. 43, 49 (2002)). It chastised the court of appeals for engaging in a "cursory analysis" by relegating "to a footnote [the court's] analysis of whether equitable tolling is inconsistent" with Tex. Civ. Prac. & Rem. Code § 150.002. *Levinson*, 670 S.W.3d at 628. In a footnote, the Court pointed to Tex. Civ. Prac. & Rem. Code § 150002(g), which states that it "shall not be construed to extend any applicable period of limitations or repose." *Id*. at 628 n.2. It also hinted at "the import of Section 150.002(c)[,]" which provides a statutory grace period for *not* filing a certificate of merit if limitations is about to expire. *Id*. The Court did not rule based on the statute, but the dicta strongly suggests that the Court will never apply equitable tolling to extend limitations due to a failure to comply with Chapter 150.

The Court's dictum regarding prejudice is also meaningful. In rejecting *Hand*, the Court said that "a defendant will always be prejudiced, to some degree, by its inability to rely on the relevant statute of limitations" since statutes of limitations "'afford[] comfort and repose to the defendant[.]'" *Id*. at 631 (quoting *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 538 (Tex. 2019)). Given the robust role that prejudice plays in litigation, lawyers should take note.

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2. Repose

In *Nikko Condo. Ass'n v. KWA Constr., L.P.*, No. 05-21-00914-CV, 2023 WL 154877 (Tex. App.—Dallas Jan. 11, 2023, no pet.) (mem. op.), the court of appeals held that a condominium association's claims were barred by the ten-year statute of repose at Texas CPRC § 16.009 (construction of improvements).

The dispute arose from the construction of a Dallas condominium building. *Id.* at *1. It involved a condominium association (Nikko Condominium Association), a developer (Bowser/Prescott), two related general contractor entities (KWA), and several subcontractors.

The developer originally contracted for the building's construction in 2007. *Id.* The building's certificate of occupancy was issued on December 16, 2008. *Id.* The building was initially used as an apartment complex for about six years. *Id.* The developer then sold the building's individual units as condominiums. *Id.* The condominium association was formed in June 2015. *Id.* Things became contentious soon after. *Id*.

The condominium association issued a written claim for damages on December 18, 2018, which outlined the condominium building's alleged defects and the estimated cost to repair them. *Id.* On December 4, 2019, the condominium association filed suit against the developer, the general contractor entities, and the subcontractors, and asserted negligence, breach of warranty, and DTPA claims. *Id.* The defendants invoked the ten-year statute of repose at Texas CPRC § 16.009(a). *Id.* The parties filed competing motions for summary judgment on the ten-year statute of repose and the trial court denied Nikko's motion and granted summary judgment in the defendants' favor. *Id.* Nikko appealed the trial court's ruling. *Id.*

Before delving into the merits, the court recited the statute of repose's plain text, including the statute's requirement that claimants suing those who construct or repair an improvement to real property must generally do so "not later than 10 years" after substantial completion. *Id*. at *2 (discussing Tex. Civ. Prac. & Rem. Code§ 16.009(c)). The Project's substantial completion date was a critical issue on appeal. *Nikko*, 2023 WL 154877, at **2–3. The court explained it should "turn first" to the governing contract to determine the Project's substantial completion date. *Id*. at *3. The contract described "substantial completion" as "the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." *Id*. The court explained that the substantial completion date would be established by a certificate of substantial completion. *Id.* Turning to the certificate of substantial completion, the court noted it was signed and listed December 12, 2008, as the date when the owner accepted the work as substantially complete. *Id.* The court determined the certificate of substantial completion unambiguously showed that there was an intent to establish a substantial completion date of no later than December 12, 2008. *Id.* Even so, the Court acknowledged that "to the extent the [P]roject's contract precluded substantial completion until the owner received a certificate of occupancy," the certificate of occupancy was issued December 16, 2008. *Id.* The court ultimately decided that "as a matter of law" substantial completion occurred no later than December 16, 2008 based on the certificate of occupancy. *Id.* at *3, n.5.

Nikko contended there was a fact issue about the substantial completion date because Project-related payments continued into February 2009 and those payments described the Project as being "in its final stage of completion." *Id.* The court disagreed. *Id.* It explained that the record did not show how those payments or the reference to final completion had any bearing on the project's substantial completion date. *Id.* The court similarly rejected the notion that a change order prescribing a different date for substantial competition (December 29, 2008) altered its analysis because the record did not show that the date in the change order controlled over the certificate of substantial completion. *Id.* (Importantly, the change order was dated October 2, 2008, before issuance of the certificate of substantial completion. *Id*. at *1.)

R. One-satisfaction rule

In *AdvanTech Construction Systems, LLC v. Michalson Builders, Inc.*, No. 14-21-00159-CV, 2023 WL 370513 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, no pet.) (mem. op.) (discussed above), the court of appeals also addressed the sufficiency of evidence needed to rebut a claim of double recovery.

After the general contractor was awarded nearly $40,000 in damages for its breach-of-contract claim, the subcontractor challenged the amount based on double recovery. *Id*. at *11. The subcontractor reasoned that the general contractor could not recover damages for the increased costs of hiring a replacement to finish the subcontractor's work, as the general contractor had been paid in full by the owner. *Id*. Deferring to the trial court's findings, the court of appeals held that sufficient evidence rebutted any purported double recovery, based on the general contractor's testimony that it was "shorted … like, $200,000 at the end of the project by the owner." *Id*. Although the opinion does not mention the one-satisfaction rule, Texas courts often treat the prohibition against double recovery as "a corollary to the one satisfaction rule[.]" *Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 76 (Tex. App.—San Antonio 2011, no pet.) (citing *Foley v. Parlier*, 68 S.W.3d 870, 883 (Tex. App.—Fort Worth, 2002, no pet.)).

In *Hizar v. Heflin*, 672 S.W. 3d 774, 783–806 (Tex. App.—Dallas 2023, pet. filed) (discussed above), the court of appeals also held that the one satisfaction rule did not bar a homeowners' claims when their cost-to-complete exceeded the original contract balance with a contractor.

This convoluted case is detailed above. To summarize: the Heflins (or at least one of them) agreed to pay a residential contractor (Hizar) $8,600. *Id. at* 783. The Heflins paid the contractor $4,750 before the contractor walked the job. *Id*. at 783–84. The Heflins then paid another contractor $3,500 to complete the project. *Id*. at 784–85. That is, the Heflins paid, in total, $350 dollars less than the original contract price to complete the work. *Id*. at 796. In any event, the trial court awarded the Heflins $8,250 in "economic damages" under breach of contract, negligence, negligent misrepresentation, DTPA, and breach of implied and express warranty theories. *Id*. at 786. These "economic damages" included recovery for "the amounts paid for the defective work and the… reasonable and necessary cost to repair and complete [Hizar's] defective and incomplete work." *Id*. The $8,250 happened to correspond with the total amount the Heflins paid Hizar and the replacement contractor.

On appeal, Hizar argued that the one satisfaction rule barred the Heflins' recovery since they suffered no compensable harm. *Id*. at 795. Hizar reasoned that since the total payments they made to Hizar and the replacement contractor ($8,250) totaled less than the original contract price ($8,600), the court's award of economic damages gave the Heflins the smooth ceiling they bargained for, and a refund for all the work previously performed. *Id*. The Heflins countered that they were simply seeking the $4,750 they paid to Hizar for out-of-pocket losses on Hizar's work, and the $3,500 was benefit-of-the-bargain damages to repair damaged work. *Id*. Although conceding that a party cannot recover both out-of-pocket and benefit-of-the-bargain damages under the DTPA, the Heflins argued that Hizar's work "was of zero value to them." *Id*. at 796–97. The court of appeals agreed, reasoning that "the value of any goods and services provided by… Hizar factors into the measure of damages." *Id*. at 797. Without much analysis, the court affirmed the award of $8,250 in economic damages and held that the trial court's "judgment does not violate the one satisfaction rule." *Id*.

S. Personal jurisdiction

In *Nusret Dallas LLC v. Steve Regan*, No. 05-21-00739-CV, 2023 WL 4144748 (Tex. App.—Dallas [5th Dist.] Jun. 23, 2023, no pet.) (mem. op.), the court of appeals held that an employee of a general contractor had failed to negate facts establishing personal jurisdiction for his role in overseeing a construction project in Dallas.

In May 2019, Nusret Dallas, a Delaware LLC with offices in Florida, hired BengeTexas to provide construction services for Nusret's new restaurant in Dallas, Texas. *Id*. at *1. Nusret designated its employee, Steve Regan, to oversee all aspects of the construction project. *Id*. His responsibilities included overseeing payments to BengeTexas and ensuring that Nusret's rights and interests were protected during the construction process. *Id*. Regan was physically present in Dallas for a while and established long-term relationships with Texas citizens and companies, including vendors, contractors, landlords, attorneys, and Nusret employees. *Id*.

On January 5, 2021, BengeTexas notified Nusret that the company had paid $182,880.50 to Regan. *Id*. According to BengeTexas, Regan told them that Nusret had agreed to pay him $2,250.00 per week in management fees. *Id*. Regan directed BengeTexas to wire payments in this amount plus expenses to Regan's separate company, Penult Projects Inc., from funds BengeTexas had received from Nusret, and not to report the payments to Nusret. *Id*. Nusret did not authorize these payments. *Id*. BengeTexas sued Nusret for breach of contract, quantum meruit, and violation of the Prompt Payment Act, and to foreclose on mechanic's liens. *Id*. Nusret filed a third-party petition against Regan and Penult Projects, alleging claims for violating the Texas Construction Trust Fund Act, fraud, negligent misrepresentation, and conspiracy. *Id*. at *2.

Regan filed a special appearance with a supporting brief and affidavit. *Id*. The trial court sustained Regan's special appearance, and Nusret filed an accelerated appeal to reverse the decision. *Id*. In reversing the trial court's decision, the court of appeals concluded that Regan failed to provide evidence to dispute that he was physically present in Texas overseeing the construction project and payments related to it. *Id*. As a result, the court concluded that Regan presented no evidence to factually negate Nusret's alleged bases for personal jurisdiction. *Id*. The court further found that Regan had purposefully availed himself of the laws of Texas by conducting activities in the state and that there was a substantial connection between Regan's contacts with Texas and the operative facts of the case. *Id*. at **5–6.

Regan also argued that a forum-selection clause in his employment contract with Nusret precluded personal jurisdiction. *Id*. at *8. The court noted that although a forum-selection clause is relevant to personal jurisdiction, it was not dispositive. *Id*. at *9. The court held that the extensive contacts Regan had in Texas overshadowed any weight given to the forum-selection clause. *Id*.

T. Texas Prompt Payment Act (Texas Property Code Ch. 28)

In *Edifika Invs., LLC v. Chain & Chain Constr., LLC*, No. 04-21-00568-CV, 2023 WL 3487027 (Tex. App.—San Antonio May 17, 2023, no pet.) (mem. op.), the court of appeals held that a general contractor failed to establish its entitlement to prompt payment interest under Texas Property Code Chapter 28.

The owner (Edifika) and general contractor (Chain) entered a written contract for Chain to design and construct an apartment complex on Edifika's property in San Antonio. *Id.* at *1. Edifika sued Chain alleging that Chain defectively performed work and demanded payment outside the terms of the contract. *Id.* Chain counterclaimed for breach of contract, quantum meruit, prompt payment interest under Chapter 28 of the Texas Property Code, and attorney's fees. *Id.* Chain generally alleged that Edifika (1) failed to pay Chain's outstanding contract; (2) failed to pay for change orders Edifika wrongly denied; and (3) physically prevented Chain from accessing the property to perform work. *Id.* Chain moved for summary judgment on its affirmative claims, and the court granted the motion. *Id.* Later, Chain filed a separate motion for summary judgment on the amount of its attorney's fees, which the trial court also granted. *Id.* The trial court then entered a final judgment for Chain. *Id.*

On appeal, the court examined the summary judgment record to determine the evidence supporting each claim. For its prompt payment claim, Chain offered: (1) an affidavit from Chain's corporate representative claiming that Edifika "failed to pay outstanding amounts under both the contract and the change orders"; (2) a spreadsheet attached to Chain's affidavit setting forth when such amounts accrued; and (3) Chain's own responses to its disclosures, which purported to identify the unpaid amounts that were untimely under Chapter 28. *Id.* (alteration in original). *Id.* at **5–6. The trial court struck Edifika's summary judgment evidence, but as the court of appeals noted, "Edifika was not required to respond to Chain's motion or present any controverting evidence unless and until Chain established its entitlement to judgment as a matter of law." *Id. at* *2.

The court of appeals held that Chain failed to adduce sufficient evidence to support its prompt payment act claim. *Id*. at *5. First, the court noted that neither the affidavit from Chain nor its attached spreadsheet specified when Edifika received "a written payment request from [Chain] for those amounts." *Id.* at *5 (citing Tex. Prop. Code Ann. § 28.002(a)). An owner's receipt of such a request is a required prerequisite to liability under Chapter 28, and Chain's failure to establish when—or if—Edifika received such a request would destroy its prompt payment claim. *Edifika*, 2023 WL 3487027, at *5. The only summary judgment evidence offered by Chain that referenced Edifika's receipt of notice was its own disclosures, which "purported to identify the unpaid amounts in question, the 35 day due date for those amounts, and a total Penalty under Chapter 28" as of the date of that document." *Id*. (internal quotations removed). The court rejected this evidence as parties generally may not rely on their own discovery responses as summary judgment evidence. *Id.* As a result, the court reasoned, Chain's own[35] evidence created a fact issue, and summary judgment was improper. *Id.* at *6.

U. Quantum meruit and unjust enrichment

In *Wood Group USA, Inc. v. Targa NGL Pipeline Company, LLC*, No. 01-21-00542-CV, 2023 WL 5280249 (Tex. App.—Houston [1st Dist.] Aug. 17, 2023, pet. filed) (mem. op.)

[35] The court also reversed summary judgment on Chain's breach of contract claim (due to its failure to establish the specific obligations Edifika allegedly breached), quantum meruit (due to the existence of an express contract covering the materials and services in dispute), and attorney's fees (due to Chain's lack of entitlement to summary judgment on the merits of its underlying claims).

(discussed above) the court of appeals also reaffirmed (in dicta) that a quantum meruit claim cannot survive in the face of an express contract.

At the trial court level, the contractor had alleged a contingent quantum meruit claim, seeking costs for change orders through quantum meruit if the court determined that the contractor's work fell outside the scope of the agreement. *Id*. at *7. In a footnote, the court of appeals held that quantum meruit could not fill any gaps resulting from invalidation of any contractually based claims (including those for unapproved change order seeking modification of contract price or time). *Id*. at *16. Consistent with prior precedent, the court stated that the presence of the construction contract "bars [the contractor] from recovering under quantum meruit." *Id*. at *16, n.7. The court relied on its earlier decision in *Hassell* (reported on above) for functionally the same result. See *Hassell*, 2023 WL 2377488, at *26 (affirming summary judgment against assumpsit, quantum meruit, and unjust enrichment claims "based on the existence of an express contract" governing the dispute).[36]

In *Von Illyes v. Rolfing*, No. 07-22-00129-CV, 2023 WL 2666115 (Tex. App.—Amarillo Mar. 28, 2023, no pet.) (mem. op.) (discussed above), the court of appeals held that a contractor could not recover in quantum meruit for work performed within the scope of its contract.

At trial, the contractor asserted a quantum meruit claim for unpaid work performed that the owners had accepted but not complained about. *Id*. at *1. The jury rejected the claim, finding that the contractor failed to complete compensable work. *Id*. On appeal the contractor argued that the jury's determination went against the great weight of the evidence. *Id*. at *6. After analyzing the services for which the contractor sought compensation, the court held that they fell within the parties' contract and were therefore unrecoverable under a quantum meruit claim. *Id*. at *6.

V. Responsible third parties

In *Tenaris Bay City Inc. v. Ellisor*, No. 14-22-00013-CV, 2023 WL 5622855 (Tex. App.—Houston [14th Dist.] Aug. 31, 2023, pet. filed) (mem. op.) (discussed above), the court also affirmed the trial court's order striking Tenaris's designation of the prior owner of the property as a responsible third party.

Tenaris had designated the prior owner of the property as a responsible third party, relying on the testimony of one of the plaintiffs that storm water coming from the sod farm "had always been a problem[.]" *Id*. at **1, 11. The plaintiffs moved to strike the designation based on no evidence of negligence by the prior owner and the trial court granted the motion to strike. *Id*. In its JNOV, Tenaris argued that if there was sufficient evidence that it was liable for the flooding damage, there "must have been sufficient evidence to support a finding of liability" against the original property owner. *Id*. at *2. The court of appeals rejected the argument, noting that there was no evidence about the prior owner's standard of care, duty, or causation for the plaintiffs'

[36] It is not obvious that unjust enrichment is a standalone cause of action, or merely an element of quantum meruit claims. Courts have not consistently addressed the distinction. See W. Kyle Gooch, Austin Moorman, *Quantum Meruit: The Other Cause of Action*, 18 CONSTR. L. J., Summer 2022.

injuries. *Id*. at *11. It held the statement by one of the plaintiffs was "no more than a scintilla of evidence" and therefore the trial court did not abuse its discretion in striking the responsible third party. *Id*.

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Practice Note: In analyzing whether evidence supported the designation of a responsible third party, the court held that the designating defendant had to establish all elements of a valid negligence cause of action by the plaintiffs against the potential responsible third party. *Id*. In effect, requiring the designating defendant to prove all the elements of a cause of action that the plaintiff would have against the responsible third party, such that the responsible third party would otherwise be liable to the plaintiff.[37] The trial court had struck the designation under Texas CPRC § 33.004(l), which permits a party (typically the plaintiff) to strike a designation after adequate discovery, if "there is no evidence that the designated person *is responsible for* any portion of the claimant's *alleged injury or damage*." *Tenaris*, 2023 WL 5622855, at *10 (emphasis added). In affirming, the court of appeals relied on *Gunn v. McCoy*, 489 S.W.3d 75, 95 (Tex. App.—Houston [14th Dist.] 2016), aff'd, 554 S.W.3d 645 (Tex. 2018). But *Gunn* did not involve a responsible third-party designation; it was an appeal of a no-evidence summary judgment against the defendant's affirmative defense of comparative fault of a settling co-defendant under Texas CPRC § 33.003(b). While § 33.003(a) lists settling parties and responsible third parties, § 33.003(b) prohibits submission to the jury evidence of "*conduct* by any person without sufficient evidence to support the submission." (Emphasis added.)

It is not obvious that under Chapter 33, responsible third parties must be *liable* to the plaintiff. Section 33.004 does not mention liability at all, referring instead to "responsible" parties. The statute may get there through the definition of a responsible third party, which in its current version is defined as "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these." Tex. Civ. Prac. & Rem. Code § 33.011(6). A "negligent act or omission" or violating "an applicable legal standard" comes close to capturing most (but not all) of the elements of a negligence claim.

The original responsible third party section mandated that responsible third parties were "or may be *liable* to the plaintiff for all or a part of the damages claimed against the named

[37] Interestingly, the court in *Tenaris* held that the defendant was required to show, among other things, "a reasonably close causal connection between [the plaintiffs'] injures and [the original property owner's] negligence or breach of the standard of care." *Tenaris*, 2023 WL 5622855 at *10. The "reasonably close causal connection" is an element sometimes applied in medical malpractice cases. *See, e.g.*, *Martin v. Durden*, 965 S.W.2d 56, 564 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (stating the causation element for "medical malpractice" claims as "reasonably close causal connection between the alleged breach of the standard of care and the alleged injury"). The traditional elements of common law negligence do not typically include "reasonably close causal connection" element, instead substituting "damages proximately resulting from the breach." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 535 (Tex. 1990).

defendant or defendants." Acts 1995, 74th Leg., ch. 136, Sec. 1, eff. Sept. 1, 199 (emphasis added). But that part of the statute was repealed in 2003. Acts 2003, 78th Leg., ch. 204, Sec. 4.03, 4.04, 4.10(2), eff. Sept. 1, 2003; *see also Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 n.6 (Tex. 2009) (noting that the 2003 amendments "substantially broadened the meaning of the term 'responsible third party' to eliminate [jurisdictional and liability] restrictions"). Relying on those changes, courts have repeatedly held, including this year, that a party's non-liability (for immunity, by way of example) does not foreclose their designation as a responsible third party. For instance, in *In re Gamble*, 676 S.W.3d 760 (Tex. App.—Fort Worth 2023, no pet.) the father of two minor plaintiffs who were injured in a car accident, sued the plaintiffs' step-father who was driving them at the time of their accident. *Id.* at 768. The step-father sought to designate TxDOT and the plaintiffs' mother as responsible third parties. *Id*. at 768–69. The father sought to strike the designations, urging that the mother's (parental) immunity and TxDOT's (governmental) immunity rendered them ineligible as responsible third parties. *Id*. at 769. Specifically, the father argued that because of the immunity, there was no "applicable legal standard" that the mother or TxDOT could have breached to fall under the ambit of Chapter 33. *Id*.; see also Tex. Civ. Prac. & Rem. Code § 33.011(6) (defining responsible third party as one who is alleged to have caused or contributed to causing the plaintiff's harm "by other conduct or activity that violates an applicable legal standard"). The court rejected the argument, relying on a long line of cases[38] upholding designation of parties even if the court has no jurisdiction over them, or they have immunity from liability. *In re Gamble*, 676 S.W.3d at 776. The court noted that an immune party still owes a legal duty, just not one they can be held liable for, and its holding was limited to immunity or jurisdiction, rather than some other obstacle to liability. *Id*. The court still struck the designations in part based on the step-father's failure to timely disclose responsible third parties in accordance with Chapter 33 and the Texas Rules of Civil Procedure. *Id*. at 808; see also Tex. Civ. Prac. & Rem. Code § 33.004(d) (prohibiting the defendant from designating responsible third party if the applicable statute of limitations period ran on the plaintiff's cause of action, provided that the designating defendant failed to meet its obligations to timely disclose the potential designee "under the Texas Rules of Civil Procedure").

Courts do not treat the economic loss rule (which speaks to the defendant's duty) as jurisdictional, at least on appeal. See, e.g., *Hassell*, 2023 WL 2377488, at *13 ("The economic loss rule, however, 'is a consideration in measuring damages,' not a jurisdictional bar.") (quoting *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 868 (Tex. 2007)). And so it remains unclear whether a lack of any duty by the responsible third party to the plaintiff would otherwise foreclose their designation.

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[38] The cited cases are: *Preston v. M1 Support Servs., L.P.*, 628 S.W.3d 300, 317 n.11 (Tex. App.—Fort Worth 2020) (mem. op); *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 58 n.5 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding), *rev'd on other grounds*, 642 S.W.3d 452 (Tex. 2022); *Thurston, Owens, & Newman, L.L.C. v. Davis*, No. 12-19-00384-CV, 2021 WL 9440633, at *12 (Tex. App.—Tyler Mar. 18, 2021, pet. denied) (mem. op.); *N.H. Ins. Co. v. Rodriguez*, 569 S.W.3d 275, 299 (Tex. App.—El Paso 2019, pets. denied); *Fisher v. Halliburton*, 667 F.3d 602, 622 (5th Cir. 2012); *Rubi v. MTD Prods., Inc.*, No. H-15-1831, 2016 WL 7638150, at *6 (S.D. Tex. Dec. 13, 2016) (mem. & recommendation); *Hernandez v. Bumbo (Pty.) Ltd.*, No. 3:12-cv-1213-M, 2014 WL 924238, at *3 (N.D. Tex. Mar. 10, 2014) (mem. op. & order).

In any case, based on *Tenaris* a defendant designating a responsible third party should, as a matter of caution, try to establish not just that the third party "caused or contributed" to the plaintiff's "alleged injury or damage," but also that the responsible third party owed a legal duty to the plaintiff, breached the standard of care, and was a legal (proximate) cause of the plaintiff's injury or damages. In many cases it may be that the facts supporting factual causation also support legal causation, duty, etc. But threadbare allegations of mere factual causation might be insufficient to maintain a responsible third party in a post-*Tenaris* world. Tenaris petitioned for review to the Texas Supreme Court that raises (as an unbriefed issue) the responsible third party designation ruling.

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In *In re United Water Restoration Group of Greater Houston*, No. 09-23-00086-CV, 2023 WL 6156070 (Tex. App.—Beaumont Sept. 21, 2023, no pet. h.) (mem. op.), the court of appeals held that if a party fails to timely object to a timely motion to designate a responsible third party, the trial court has no discretion to deny the motion to designate.

The case arose after homeowners hired a water restoration company (United) to perform water extraction and drying services after a water leak in a pipe installed in their attic flooded their home. *Id.* at *1. The pipe was installed by another contractor, who had also built the home (A&F). *Id*. The owners later sued United, alleging improper remediation resulted in toxic mold exposure that injured the owners and their family. *Id.* Later, United filed a motion for leave to designate A&F as a responsible third party. *Id.* Because of a calendaring error, the owners failed to object to the motion within fifteen days as required under Texas CPRC § 33.004(f), but instead filed a motion for leave to file untimely objections to United's motion. *Id*. The homeowners also objected to the designation itself as invalid because the statute of limitations on their tort claims against A&F ran years earlier when the owners received test results showing the presence of toxic mold. *Id.* United, the owners argued, had known about A&F for years but did not identify them as potential responsible third parties in their initial disclosures. *Id.* The trial court ruled the fifteen-day deadline in § 33.004(f) of the Texas CPRC barred any objection by the homeowners that United had failed to plead sufficient facts about A&F's responsibility. *Id.* at *2. The trial court ruled that § 33.004(f) did not apply to the owner's objection to United's late designation under § 33.004(d) (failure to disclose a potential responsible third party). *Id.* As a result, the trial court denied United's motion to designate because it was not filed before limitations ran on the owner's claims against A&F. *Id.* United countered, arguing that it had not learned about A&F until the owner had produced documents in discovery, after which it served supplemental disclosures listing A&F as a potential responsible third party. *Id.* After a new judge was assigned to the case, United filed a mandamus petition to compel the new judge to declare void all orders by the recused judge. *Id.*

At issue for the court of appeals was the proper construction of § 33.004 of the Texas CPRC. *Id.* at *3. United argued that under the plain language of Section 33.004(f) the trial court must grant a responsible-third-party designation if no other party files an objection within 15 days of the date on which the motion to designate is filed. *Id.* The homeowners repeated their argument that subsection (f) did not apply to the other subsections of § 33.004, including § 33.004(d). *Id.* The court of appeals held that § 33.004(f) "provides the procedure through which the defendant's non-compliance with subsection (d) is brought to the attention of the trial court." *Id*. Accordingly,

the trial court was required to grant a motion for leave to designate the named person as a responsible third party unless another party filed a timely objection within fifteen days. *Id.* Thus, the court conditionally granted mandamus, finding the trial court abused its discretion when it failed to properly apply Section 33.004, holding that the trial court should vacate its order to deny United's motion to designate A&F. *Id.*

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Practice Note: Mandamus is an extraordinary remedy, but designation of responsible-third party practice is one area where the courts have consistently authorized mandamus relief. The holding in *United* is a critical reminder that the fifteen-day deadline at § 33.004(f) will apply to a defense under § 33.004(d) (failure to disclose).

The case presents an interesting statutory conundrum that was not addressed in the opinion. Assuming a party does timely file an *objection* to a motion for leave to designate a responsible third-party, "the court shall grant" the designation *unless* the objecting party establishes: (1) the designating party did not plead sufficient facts about the alleged responsibility of the person to satisfy the requirements of the Texas Rules of Civil Procedure; *and* (2) after being granted leave to replead, the defendant fails to plead sufficient facts to meet the requirements of the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code Ann. § 33.004(g). If subsection (f) "provides the procedure through which the defendant's non-compliance with subsection (d) is brought to the attention to the trial court[,]" *United Water*, 2023 WL 6156070, at *3, subsection (g) provides the remedy. But subsection (g) obligates the court to grant the designation if it is well-pleaded; it does not authorize the court to deny the motion based on subsection (d) at all. Put differently, if a plaintiff objects timely based on subsection (d), it could still be the case that the defendant's designation "satisfy[ies] the pleading requirements of the Texas Rules of Civil Procedure," since subsection (d) is not in the Texas Rules of Civil Procedure (though it does reference timely disclosure under those Rules). As the basis for objecting under subsection (d) is not incorporated into subsection (g), it is unclear what role subsection (d) might play in a court's discretion to deny the designation, even with a timely objection. Moreover, subsection (d) is not implicated in the other basis for objecting to a responsible third-party designation under subsection (l) (failure of the designating party to adduce evidence of the responsible third party's responsibility after an adequate time for discovery). Like subsection (g), subsection (l) says nothing about a failure to disclose, and the court's discretion is strictly limited. Tex. Civ. Prac. & Rem. Code § 33.004(l) (mandating that court "shall grant the motion to strike unless the defendant produces sufficient evidence to raise a genuine issue of fact" about the responsible third-party's responsibility).

Moreover, the court's reading of subsection (d) is not intuitive. Subsection (d) is the only part of the statute that seemingly places a categorical prohibition on what "[a] defendant may not" do. Subsections (g), (f), and (l) all speak to what *the court* "shall" do. Because of this incongruity, if there is any part of § 33.004 that stands independent of the others, subsection (d) is a good candidate. But, for now, plaintiffs should ensure they file timely objections or risk mandamus, at least in the Beaumont Court of Appeals.

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W. Rule of Civil Procedure 91a Motions to Dismiss

In *In re Jordan Foster Constr., LLC*, No. 08-22-00201-CV, 2023 WL 2366610 (Tex. App.—El Paso Mar. 6, 2023, no pet.) (mem. op.), the court of appeals held that it could not consider evidence submitted by a Rule 91a movant seeking dismissal.

A project's owner sued its architect, alleging that the architect had performed its construction administration services negligently. *Id.* at *1. The owner asserted claims for breach of contract, negligence, negligent misrepresentation, fraud by non-disclosure, breach of warranties, and under the DTPA. *Id.* at *2. The architect filed a thirty-party petition naming the contractor as a third-party defendant. *Id.* In its third-party petition, the architect blamed the contractor for the construction defects, and asserted claims for (1) common-law indemnity, (2) statutory contribution under Chapters 32 and 33 of the Texas CPRC, and (3) breach of an express warranty. *Id.* at *4. The contractor moved to dismiss under Rule 91a of the Texas Rules of Civil Procedure arguing that all the architect's third-party claims were baseless. *Id.* As part of its motion, the contractor attached clippings of its contract with the owner and a certificate of substantial completion. *Id*. at *4. The trial court denied the entire motion. *Id*. at *2.

On a mandamus appeal, the contractor asserted that the trial court abused its discretion by denying the motion. *Id.* at *6. First, the contractor urged the court to consider extrinsic evidence that the contractor had attached to its motion to dismiss. *Id*. at *4. The court of appeals declined the invitation, holding that the court's review under Rule 91a was limited solely to "the pleadings of the cause of action." *Id*. (quoting Tex. R. Civ. P. 91a.6). As the contract and the certificate of substantial completion were not attached to either the owner's petition against the architect, or the architect's third-party petition against the contractor, they could not support the contractor's Rule 91a arguments. *Jordan Foster*, 2023 WL 2366610, at *4.

However, the court of appeals agreed with the contractor that the trial court should have dismissed the architect's claims for common-law indemnity and contribution under Chapter 32 of the Texas CPRC. *Id.* at *4. The court also concluded that the trial court did not clearly abuse its discretion in denying the motion to dismiss regarding the architect's claims for contribution under Chapter 33 of the Texas CPRC and breach of express warranty. *Id.* at *5.

For the express warranty claim, the contractor argued that it had no basis in law because the architect and contractor had no contract. *Id*. at *6. That said, the architect's third-party petition alleged that the contractor had breached a warranty in the project's specifications made "to the Owner and Architect" about the quality of construction. *Id*. The court noted that whether the project manual or specifications "ultimately governs the relationship between the parties is irrelevant at this stage of the litigation" because under Rule 91a, the court "must take the allegations" in the relevant pleadings as true. *Id*.

The contractor also argued that the statute of limitations had run as a matter of law, relying on a letter attached to the architect's third-party petition in which the owner complained to the contractor that it had been having HVAC issues for over 16 months. *Id*. Although the court agreed that the architect's breach of warranty claim was governed by a four-year statute of limitations, the court held (for Rule 91a purposes) that the letter did not establish the accrual date of limitations. *Id*.

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Practice Note: Rule 91a expressly prohibits the consideration of any evidence (besides attorney's fees), as review is limited "solely on the pleading of the cause of action, together with any pleading exhibits[.]" Tex. R. Civ. P. 91a.6. The contractor creatively did try to rely on evidence attached to the architect's pleadings to establish a statute of limitations defense. But the grounds for dismissal are also narrow. A party is only entitled to dismissal if the claims have "no basis in law or fact." Tex. R. Civ. P. 91a.1. The court was unwilling to declare, as a matter of law at an early stage in litigation, the legal effect on accrual of a notice letter from the owner complaining of the contractor's work.

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X. Sanctions

In *Hizar v. Heflin*, 672 S.W. 3d 774 (Tex. App.—Dallas 2023, pet. filed) (discussed above), the court of appeals upheld a death penalty sanction against a residential contractor in a defect and payment dispute.

The facts here are discussed in more detail elsewhere. For purposes of the sanctions discussion: the Heflins hired Hizar to remove popcorn ceiling from their home. *Id*. at 783. Hizar eventually walked the job, filed a lien, and the Heflins sued Hizar. *Id*. at 785. The Heflins filed their first motion to compel on April 27, 2021, alleging that Hizar's objections to their discovery requests (RFPs and interrogatories) were unfounded, and Hizar's responses (to the Heflins RFPs, interrogatories, and RFDs) were inadequate. *Id*. After full briefing, the trial court held a hearing (with no transcript) and signed an order to compel on July 6, 2021. *Id*. The trial court ordered that by June 25, 2021,[39] Hizar should diligently search for all documents responsive to the Helfins' requests, serve adequate and truthful answers, and produce responsive documents. *Id*. The court also ordered Hizar to identify and produce its insurance policies. *Id*. at 786. On July 9, 2021, the Heflins filed a supplemental motion to compel seeking a hearing to ensure Hizar's compliance. *Id*. They contended that Hizar had responded to the discovery *requests* on June 24, 2021, but had produced no documents, except for some "limited additional documents" later on July 6 and 8. *Id*. The trial court held another hearing (with no transcript), on July 9, 2021, and issued an order the same day. *Id*. In it, the court ordered Hizar to produce responsive documents to the remaining requests by July 12, but warned that if Hizar did not produce by that deadline, their "pleadings will be struck." *Id*.

Here we go again, the Heflins filed another motion to enforce the courts' order on July 14, 2021, contending that Hizar failed to produce documents per the court's prior order. *Id*. at 786–87. The trial court heard the motion on July 22, including live testimony and other evidence from the Heflins on their claims. *Id*. at 787. On July 29, the trial court entered a final judgment finding that Hizar had not complied with the court's prior requests, striking Hizar's pleading, granting default judgment against Hizar, and awarding the Heflins damages and attorney's fees. *Id*. The court's judgment recited that it had considered lesser sanctions per the Texas Rules of Civil Procedure. *Id*.

[39] The reason the deadline to comply (June 25) predates the order (July 6), is because the hearing on the motion to compel occurred on June 11. *Id*. Although there was no transcript from the June 11 hearing, ostensibly the court was ordering Hizar to comply by June 25, but did not enter its formal order until July 6. *Id*.

On appeal, Hizar argued that the trial court abused its discretion in issuing death penalty sanctions. *Id*. The court of appeals engaged in a typical death penalty sanction analysis and addressed each element in turn. *Id*. at 789–95. As for the relationship of the sanctions to the sanctionable conduct, the court of appeals held that the record reflected that Hizar had not complied with the trial court's orders. *Id*. at 789. The Heflins had testified at their last hearing about Hizar's heavier redactions than permitted by the trial court's orders, failure to produce complete records, and failure to issue amended responses per the trial court's order. *Id*. Accordingly the court of appeals held that the sanction was directly related to the sanctionable conduct. *Id*. at 790.

On the excessiveness of the sanction, the court of appeals concluded that the punishment fit the crime. *Id*. Although Hizar argued that it lacked sufficient notice of a death penalty threat, the court of appeals noted that Hizar had been specifically warned of death penalties in one of the trial court's orders. *Id*. Hizar also argued that the discovery requests were limited to only some of the Heflins' claims (alter ego against Hizar's company) and so the trial court should have only struck pleadings defensive against that theory. *Id*. The court of appeals rejected the argument, holding instead that the lower court was not required to test the waters with Hizar with a lesser sanction. *Id*. at 790–91. In sum, "[m]ultipile violations of the discovery rules and court orders for discovery may be a factor authorizing impositions of sanctions such as striking pleadings and the entry of a default judgment" regardless of the offending party's justifications and excuses. *Id*. at 791.

As to the consideration of lesser sanctions, Hizar argued that the trial court failed to do so. *Id*. But as the court of appeals noted, the trial court *did* impose lesser sanctions initially, and only imposed more severe penalties after Hizar's failure to comply with prior orders. *Id*. And the court pointed out that Hizar was warned that if it continued to fail to comply, its pleadings would be struck. *Id. at* 792. The court of appeals joined the First, Third, Fourth, Tenth, Thirteenth, and Fourteenth courts in holding that an unequivocal warning satisfies the requirement of considering a lesser sanction. *Id*.

Finally, on the presumption that Hizar's claims lacked merit, the court of appeals noted that repeated violations of discovery rules are a consideration even if the offending party offers justification. *Id*. at 794–95. The court concluded that "two chances to comply" was sufficient evidence to support the trial court's death penalty sanction. *Id*. at 795. Accordingly, the court of appeals held that the record did not demonstrate a clear abuse of discretion and affirmed. *Id*.

In *Sheridan v. Haydon*, No. 03-22-00173-CV, 2023 WL 5488792 (Tex. App.—Austin Aug. 25, 2023, no pet.) (mem. op.), the court of appeals addressed sanctions under Texas Rule of Civil Procedure 193.6(a) for a general contractor's and its officers/directors' failure to produce evidence and required disclosures through discovery and held that the trial court properly excluded the unproduced evidence.

The dispute arose from prior litigation involving allegations of nonpayment for construction services and materials. *Id.* at *1. A subcontractor (Haydon) originally sued a general contractor (Sheridan) and at least one of the general contractor's officers or directors (Anthony Sheridan) for breach of two contracts relating to the construction of a residential home. *Id.* The home was for two other officers or directors (Robert Sheridan and Linda Sheridan) of the general contractor. *Id.* The subcontractor claimed it was not paid for labor performed and materials

provided during the home's construction. *Id.* The parties ultimately resolved the dispute by executing a settlement agreement and promissory note—which provided the subcontractor would be paid $13,500.00 plus accrued interest in exchange for nonsuiting its claims. *Id.* One of the general contractor's officers or directors (Robert Sheridan) personally guaranteed the general contractor's settlement obligation. *Id.*

The subcontractor later filed a new lawsuit against the general contractor and Anthony Sheridan, Robert Sheridan, and Linda Sheridan because it was not paid the previously agreed upon settlement funds despite nonsuiting its claims. *Id.* The subcontractor asserted several causes of action against the general contractor and the officers/directors, including breach of contract, fraud, and civil conspiracy. *Id.* The general contractor and its officers/directors responded by arguing that the subcontractor's new claims were barred by res judicata and that two of its officers/directors (Anothony Sheridan and Linda Sheridan) could not be held personally liable under Tex. Bus. Orgs. Code § 21.223 (the Texas corporate veil piercing statute). *Id*. The subcontractor served written discovery requests that went unanswered—which included requests for admissions that were deemed admitted. *Id.* The general contractor and its officers/directors also failed to produce documents that were required to be exchanged under the trial court's scheduling order. *Id.* at *2.

The parties filed competing motions for summary judgment. *Id.* at *1. The subcontractor also filed a motion for sanctions based on the defendants' failures to respond to discovery. *Id.* The motion for sanctions specifically asked the trial court to prohibit the defendants from introducing any summary judgment evidence that (1) was contrary to the deemed admissions and (2) could have been produced in response to the subcontractor's discovery requests. *Id.* The trial court entered an order granting the subcontractor's motion for summary judgment and stated that the trial court had prohibited the defendants from presenting any evidence due to their failure to respond to discovery and comply with the trial court's scheduling order. *Id.* at *2. The trial court's order awarded the subcontractor damages, including the amount of the unpaid settlement funds plus interest, additional damages totaling $123,082.16 jointly and severally from the non-guarantor directors (Anthony Sheridan and Linda Sheridan), plus interest, court costs, and attorneys' fees. *Id.*

On appeal, the defendants argued that, by excluding all their evidence, the trial court effectively issued death-penalty sanctions that were unjust under the circumstances. *Id.* The court of appeals disagreed. *Id.* It determined that the evidence was subject to automatic exclusion under Texas Rule of Civil Procedure 193.6(a)—which prohibits the introduction of evidence that was not timely produced through discovery and required disclosures—and noted that the defendants failed to point to any record evidence that demonstrated the evidence was produced or that an exception to that mandatory sanction applied. *Id.*

Y. Suit on Sworn Account

In *Hale v. Rising S Company, LLC*, No. 05-21-01103-CV, 2023 WL 3714751 (Tex. App.—Dallas May 30, 2023, pet. denied) (mem. op.), the court of appeals reiterated that a plaintiff must strictly comply with the procedures for establishing a suit on sworn account to prevail on that theory, and that a defendant does not have to file a verified denial if the plaintiff's suit on sworn account is procedurally defective.

This partially pro se appeal involved complicated procedural issues, most of which we sidestep here. A landowner (Hale) hired Rising S to construct a survivalist bunker. *Id*. at *1. Their agreement was for $45,000, though it contemplated "additional charges… for certain site conditions" including unanticipated excavation of rocks, tree removal, or anything else complicating the installation of the bunker. *Id*. Rising S contended that unforeseen conditions resulted in an additional $9,300 in charges that Hale refused to pay. *Id*. Rising S sued Hale asserting several claims, including suit on sworn account. *Id*. The trial court granted a directed verdict on Rising S's suit on sworn account, because Hale had not filed a verified denial of the account under Tex. R. Civ. Proc. 185. *Id*. at *2.

The court of appeals reversed because Rising S's petition, verification, and account did "not 'strictly comply' with the requirements of rule 185 as required." *Id*. at * 5 (citing *Rudberg v. N.B.P.*, No. 05-13-00535-CV, 2014 WL 3016910, at *5 (Tex. App.—Dallas July 2, 2014, no pet.) (mem. op.)). The court held that Rising S's "record of account consisted of a lone invoice" with "no details as to how any of the charges were derived." *Hale*, 2023 WL 3714751, at *5. The court also noted that Rising S's affidavit did not swear that its claims were "just and true" and Rising S failed to otherwise establish the justness or trueness of the claims. *Id*. Because Rising S failed to meet its initial burden, Hale was not required to file a sworn denial of the claim. *Id*.

Z. Summary Judgment

In *Valley Forge, Inc. v. CK Construction, Inc.*, 677 S.W.3d 127 (Tex. App.—El Paso 2023, no pet.), the court of appeals held the trial court erred in granting summary judgment on a breach-of-contract claim based on disputes over the scope of the agreement.

The case arose from a contract under which a contractor agreed to renovate and remodel a building for an owner. *Id.* at 129. The owner made several payments to the contractor while the work was ongoing as required by the contract. *Id.* at 129–30. The owner attempted to make a final payment, but the contractor refused the payment, arguing it was inadequate to satisfy the owner's contractual obligations. *Id.* at 129. The contractor claimed it sent a demand letter to the owner, seeking the $69,606.15 still allegedly due on the contract, and then filed a mechanic's and materialman's lien on the property in the amount it contended was owed. *Id.* at 129–31. In its suit, the contractor sought damages in the amount of $69,606.15 for the alleged breach, a judicial order of foreclosure on the lien, a judicial sale of its interests in the subject property, and an award of attorney fees. *Id*. at 130. The contractor moved for summary judgment, which the trial court granted. *Id*. at 131. The owner appealed, contending it presented sufficient evidence to raise a factual dispute about whether it breached the parties' contract, among other things. *Id.* at 132–33.

In support of its motion for summary judgment, the contractor argued that the original contract called for a lump-sum payment of $429,577.62, a "10% additional combined profit and overhead on additive change orders," and a "[f]ive percent retainage" that was to be withheld on the project. *Id.* at 132–33. The owner, however, submitted an affidavit in which it disputed all three of those contract terms. *Id.* at 133. The contractor countered that the owner's affidavit, made by its president, did not expressly deny the contractor's contention that it was owed $69,166.15 under the contract. *Id.* Instead, the contractor argued, the affidavit focused on the argument that the owner never received an invoice for that amount and therefore had not breached contract. *Id.* The contractor argued this made its own affidavit—stating the amount due under the contract—

uncontroverted and thus sufficient to sustain the contractor's motion for summary judgment on its breach of contract claim. *Id.* Viewing the owner's affidavit in the light most favorable to the owner, the court of appeals held that the owner's affidavit created two fact-issues against summary judgment. *Id.* at 133–34. The court held the owner's affidavit was some evidence that the owner attempted to fulfill its promise to pay the contractor in line with the contract by tendering a check in the amount it believed was due, but because the contractor improperly refused, the owner would be relieved of its liability for its alleged non-performance. *Id.* at 134. The court found the affidavit raised a factual question on the issue of the proper amount of damages as well, assuming breach occurred. *Id*. Although a non-breaching party is generally entitled to all actual damages necessary to put him in the same economic position in which he would have been had the contract not been breached, the court found the parties' disagreement as to the terms of the contract was a sufficient dispute over the amount of damages that would put the contractor in the same position it would have been had no breached occurred. *Id.* at 134–35.

The court also reversed summary judgment on the contractor's foreclosure action and claim for attorney fees. *Id*. at 135–36. It noted that to foreclose on its lien, the contractor had to establish "a 'valid' debt" owed. *Id*. at 135. As the debt was not properly established on summary judgment, there was no basis for the trial court to grant summary judgment on the lien claim, or any attorney's fees. *Id*. at 135–36.

Similarly, in *Roland Landscape Creations LLC v. Cobb*, No. 09-20-00258-CV, 2023 WL 2028441 (Tex. App.—Beaumont Feb. 16, 2023, no pet.) (mem. op.), the court of appeals held that a contractor had adduced sufficient evidence to resist summary judgment from an owner on a cost-to-complete claim after the contractor abandoned the project.

The case arose out of a payment dispute involving lot owners and a landscaping company. *Id*. at *1. The company agreed to design and then execute a landscaping plan on a lot owned by a husband and wife. The owners alleged that, before work was complete and after it requested more money to "keep the project moving," the landscaping company abandoned the job. *Id.* The owners sued the landscaping company asserting claims for breach of contract, money had and received, breach of fiduciary duties, violation of Chapter 134 of the Texas CPRC (Texas Theft Liability Act), and misrepresentation. *Id*. The owners filed summary judgment, including just one sworn declaration to support their liability claims, in which one of the owner's alleged that: (1) she had paid the company the requested $9,800 money to continue working; (2) based on an estimate from another contractor, it would cost $25,837 to finish landscaping their lot; and (3) the owners had paid the landscaping company $54,810 toward completing the work. *Id.*; *id.* at *3. The trial court granted the motion for summary judgment and the landscaping company appealed. *Id.* at *2.

On appeal, the landscaping company argued the owners' evidence was not conclusive and the declaration wasn't credible for three reasons: (1) the owners failed to include the contractor's estimate that the owner relied on to state it would cost $25,837 to finish the work; (2) the summary judgment evidence did not conclusively prove that the landscaping company agreed to perform the work that the owner swore the company failed to complete; and (3) the summary judgment evidence did not conclusively prove the landscaping company was paid $54,810 for its work. *Id.* at *3.

Because the court found that opinion testimony cannot alone establish any material fact as a matter of law, it held that the owner's declaration was insufficient to conclusively prove what it would cost the owners to complete the project. *Id.* at *4. The owners did not say from whom they obtained the estimate that it would cost $25,837 to finish landscaping the lot, whether they obtained more than one estimate, or whether the contractor or contractors contacted were in the landscaping business. *Id.* Nor was there any summary judgment evidence showing the owners were qualified to express an opinion about what the reasonable and necessary costs to complete the project might have been. *Id.* Further, there was no evidence from anyone qualified to testify about what it might cost to complete the work, nor any evidence to show the difference, if any, between the value of the work the landscaping company agreed to perform under the agreements and the value of the work it completed before it quit the project. *Id.* Thus, the court held that the evidence did not establish the amount of the owners' actual damages on their claims for either breach of contract or for fraud. *Id.*

The court also held that the evidence did not conclusively establish that the owners paid the landscaping company $54,810, even though that's what declaration said. *Id.* Although the checks made payable to the landscaping company included in the summary judgment evidence totaled $45,810, one of them was for $9,000 "payable to Big Chuck's." *Id*. Neither the declaration nor any other summary judgment evidence explained what this other check was for or whether Big Chuck's was working as a subcontractor for the landscaping company. *Id.* Because the wife was a party to the case, and thus an interested witness, the court held her testimony was neither clear, positive, direct, or otherwise credible and free from contradictions and inconsistencies—and therefore her declaration failed to support the $25,837 the trial court awarded the owners as actual damages. *Id.*

Finally, the court held the evidence did not support the trial court's findings under the Theft Liability Act. *Id.* Because under the Act a "failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed," the court held that the landscape company's alleged failure to complete the work after promising the owners more money was needed to "keep the project moving" was, without more, insufficient to establish that the company had committed theft under the Act. *Id*. at *5.

In *CMS Consultants, LLC v. EPM Disaster Recovery Team, LLC*, No 13-22-00101-CV, 2023 WL 5487941 (Tex. App.—Houston [14th Dist.] Aug. 24, 2023 no pet. h.) (mem. op.), the court of appeals affirmed summary judgment, determining that the trial court did not abuse its discretion in refusing to consider the late filed summary judgment response absent good cause for doing so.

In August 2021, EPM moved for summary judgment on its prompt-pay and breach-of-contract claims. *Id.* at *1. Four days later, Hurricane Ida struck Louisiana, where CMS (the nonmovant) was located. *Id.* CMS filed an untimely response motion, two days after its deadline had passed, without first filing a motion for continuance or a motion for leave to file a late response. *Id.* At the hearing on EPM's summary judgment motion, counsel for CMS argued that the court should consider the untimely response because he had trouble communicating with his client and obtaining summary judgment evidence due to the hurricane. *Id.* at *2. CMS failed to produce affidavits or other evidence of these difficulties at the hearing, and the trial court granted EPM's

motion for summary judgment. *Id.* A week later, CMS filed a motion for new trial and reconsideration, including affidavits detailing the effect of Hurricane Ida on CMS's ability to respond to EPM's motion for summary judgment. *Id.* EPM non-suited its remaining claims and moved for entry of a final judgment. *Id.* The trial court rendered a final judgment denying all relief. *Id.*

On appeal, CMS argued that the trial court should have considered its late-filed response because there was good cause for the delay. *Id.* The court of appeals determined the trial court could disregard CMS's counsel's unsworn statements (at the summary judgment hearing) contending that his client had to travel to obtain updated information, and that such travel was impossible due to the state of emergency in the wake of Hurricane Ida. *Id.* Thus, the court of appeals determined that the trial court did not abuse its discretion in refusing to consider the late filed summary judgment response without evidence of good cause. *Id.*

CMS also argued that the trial court should have granted it motion for new trial and reconsideration after summary judgment was granted because the motion included affidavits evidencing good cause. *Id.* at *3. The court of appeals, however, decided that the *Craddock* elements did not apply because CMS failed to timely respond, had notice of the hearing, and had an opportunity to employ other means available in the TRCP. *Id*. Here, CMS was aware of the need to file a timely response to EPM's motion, so no equitable considerations were appropriate. *Id.* Because CMS had notice and an opportunity to avail itself of the TRCP, the court of appeals upheld the trial court's ruling on this issue. *Id.* at *4.

In *APCO Construction Group, LLC and Mohammad Habib v. Galvatec, Inc*., No. 14-22-00049-CV, 2023 WL 4732843 (Tex. App.—Houston [14th Dist.] July 25, 2023, no pet.) (mem. op.), the court of appeals held that a contractor's verified summary judgment response was not competent summary-judgment evidence under Tex. R. Civ. P. 166a(f).

The dispute involved claims and counterclaims between a supplier (Galvatec) against a contractor (APCO Construction) and one of its officers (Mohammad Habib). *Id*. at *1. The contractor ordered materials from the supplier and agreed to pay upon delivery. *Id*. When the materials were delivered, the contractor paid the supplier with checks, which later bounced. *Id*. The supplier sued the contractor for breach of contract, quantum meruit, and suit on sworn account. *Id*. The supplier also alleged that Mohammad Habib, as the signer of the contractor's checks, was personally liable for the contractor's debts because the debts were incurred when the contractor's corporate rights were forfeited for failure to pay its state franchise tax. *Id*. The contractor defendants responded with counterclaims of negligent misrepresentation, breach of contract, and breach of DTPA. *Id*.

The supplier filed a combined traditional and no-evidence motion for summary judgment on its sworn-account claim and on the contractor's counterclaims. *Id*. The contractor defendants responded to the supplier's motion, but they attached no declarations or affidavits to their response. *Id*. Instead, the contractor defendants tried to refute the suppliers' agency argument with support from the following verification: "My name is Mohammad Habib… I declare under penalty of perjury that paragraph 30 of this document is true and correct." *Id*. The trial court granted summary judgment for the supplier and signed a final judgment. *Id*.

On appeal, the contractor defendants challenged the trial court's summary judgment ruling because they raised a fact issue about agency. *Id*. at *2. In doing so, the contractor defendants once again relied on their verified response to the supplier's summary judgment motion. *Id*. The court of appeals affirmed the trial court's ruling, holding that pleadings are not competent evidence, even if sworn or verified. *Id*. The court of appeals also noted that the verified summary judgment response did not comply with Tex. R. Civ. P. 166a(f) because it did not demonstrate that the contractor defendants' response was made on personal knowledge or that the affiant was competent to testify. *Id*.

In *One Time Construction Texas v. Snow*, No. 02-23-00033-CV, 2023 WL 5767365 (Tex. App.-Fort Worth Sept. 7, 2023, no pet.) (mem. op.), the court of appeals rejected a litany of a general contractor's evidentiary and procedural claims stemming from the trial court's grant of summary judgment for opposing homeowners.

In 2020, homeowners Clint and Jana Snow hired One Time Construction Texas as the general contractor to construct their new residence. *Id*. at *1. One Time was solely owned and operated by Shay Fretwell. *Id*. The project went poorly almost immediately. *Id*. The Snows had paid One Time $116,990, of which $50,000 was for framing and $7,500 was for the roof. *Id*. The Snows subsequently received lien notices from the project's framing and roofing subcontractors due to non-payment. *Id*. The Snows also noticed that fundamental parts of the project were either not completed or defective. *Id*. at *2. The Snows alerted One Time and Fretwell of the issues. *Id*. Despite Fretwell's assurances that the issues would be remedied, One Time abandoned the project within a month. *Id*. As a result, the Snows hired a replacement contractor to finish their home at additional cost. *Id*.

The Snows filed suit against One Time and Fretwell, individually, for breach of contract, breach of express and implied warranties, money had and received, negligence, violation of the Texas Construction Trust Fund Act (TCTA), and violation of the DTPA. *Id*. One Time and Fretwell answered but never served their required initial disclosures. *Id*. at *3. The Snows moved for summary judgment on all claims. *Id*. One Time and Fretwell filed a response with summary judgment evidence as well as special exceptions to the Snows' motion. *Id*. The trial court sustained the Snows' evidentiary objections and excluded all of One Time's summary judgment evidence because it had failed to serve initial disclosures and did not produce this evidence in response to relevant requests for production. *Id*. The trial court subsequently granted the Snows' motion for summary judgment on all claims. *Id*. One Time filed a motion for new trial, which the trial court denied without hearing. *Id*.

One Time appealed arguing that the trial court erred by (1) granting summary judgment upon insufficient evidence, (2) sustaining the Snows' objection to summary judgment evidence, (3) overruling One Time's motion for new trial, and (4) denying One Time's special exceptions. *Id*. at *1. The appeals court affirmed the trial court on all issues. *Id*.

The court of appeals held that the trial court did not abuse its discretion by sustaining the Snows' objections to One Time's evidence. *Id*. at *4. One Time argued that (1) the Snows' objections were untimely, (2) the Snows had not presented evidence to support One Time's non-

disclosure of information, and (3) the Snows did not suffer unfair prejudice or surprise by the evidence. *Id*. at **5–6. The court rejected (1) and held that the Snows' objections were filed two-days before the submission deadline and that Rule 166a sets no deadline for parties to object to summary judgment evidence. *Id*. And the court held that One Time's argument lacked merit because it had filed objections to the Snows' summary judgment evidence on the submission deadline. *Id*. "Under these circumstances, [One Time] [is] in no position to question the fairness of the trial court's procedure for addressing the parties' evidentiary objections." *Id*. In addition, One Time cited no authority suggesting that the Snows were required to present evidence of nondisclosure to support their evidentiary objections. *Id*. at *6. Thus, the Snows were not required to file all documents produced by One Time to verify One Time's lack of disclosure. *Id*.

The court also held that One Time's prejudice argument lacked merit. *Id*. Under Rule 193.6(a) "[a] party who failed to make … a discovery response, including a required disclosure, in a timely manner may not introduce in evidence the material or information that was not timely disclosed." *Id*. There is an exception to this rule if the party seeking to introduce evidence establishes a lack of unfair surprise or prejudice. *Id*. However, One Time failed to make this argument despite ample opportunity before the summary judgment hearing. *Id*. at *7. One Time also argued on appeal that there was no unfair prejudice because the Snows had an opportunity to depose Fretwell. *Id*. The right to depose a witness does not, in and of itself, demonstrate a lack of unfair prejudice or unfair surprise. *Id.*

One Time argued that the trial court abused its discretion by denying its motion for new trial without a hearing. *Id*. However, a trial court only has to conduct a hearing "when a motion [for new trial] presents a question of fact upon which evidence must be heard," the motion "alleges facts, which if true, would entitle the movant to a new trial," and the movant properly requests a hearing. *Id*. Motions for new trial on these grounds must be verified or include an affidavit. *Id*. The court found no abuse of discretion because One Time did not (1) verify its motion, (2) include an affidavit, or (3) request a hearing. *Id*. at *8.

Next, the appeals court found that One Time failed to preserve error on its argument related to special exceptions to Homeowners' motion for summary judgment. *Id*. Failure to obtain a timely hearing and ruling on special exceptions does not preserve the argument for appeal and One Time failed to do so at the trial court level. *Id*. Even so, the court held that One Time's argument failed on the merits because the homeowners' motion set forth specific and detailed grounds for its motion for summary judgment. *Id*. at *9.

AA. Texas Citizens Participation Act (Anti-SLAPP)

In *Hale v. Rising S Company, LLC*, No. 05-21-01103-CV, 2023 WL 3714751 (Tex. App.—Dallas May 30, 2023, pet. denied) (mem. op.) (discussed above) the court of appeals also held that the law-of-the-case doctrine did not bar a court from addressing the merits of a Texas Citizens Participation Act (TCPA) motion to dismiss a later, timely filed appeal after final judgment.

In its payment dispute with Hale, Rising S also asserted business disparagement and tortious interference claims, alleging that Hale published false information about Rising S online. *Id*. at *1. Hale moved to dismiss under the TCPA. See, e.g., Tex. Civ. Prac. & Rem. Code § 27.003

(authorizing dismissal of certain claims based on a party's exercise of the right of free speech, right to petition, or right of association). After a hearing, the trial court denied the TCPA motion by operation of law. *Hale*, 2023 WL 3714751, at **1–2. Hale filed an untimely interlocutory appeal, which the court of appeals dismissed for want of jurisdiction. *Id*. at *3. In the later, non-interlocutory appeal (after a final judgment) Hale challenged the trial court's denial of her TCPA motion to dismiss. *Id*. Rising S argued that the prior interlocutory appeal dismissal of that claim constituted the "law of the case" barring any further appeal. *Id*.

The court of appeals rejected Rising S's argument, holding that the law of the case did not bar a timely post-judgment appeal after a prior untimely interlocutory appeal. *Id*. Under the law-of-the-case doctrine, an appellate court's ruling on a question of law is conclusive for all future appeals unless clearly erroneous. *Id*. But it does not apply if subsequent appeals present different issues. *Id*. As the court pointed out, the only issue on the first appeal was the timeliness of Hale's interlocutory appeal, not the merits of that appeal. *Id*. Thus, the court held that the law-of-the-case doctrine would not prevent Hale from reasserting the trial court's error in denying her motion to dismiss, on the subsequent appeal. *Id*.

The court of appeals ultimately did reject Hale's appeal of the TCPA denial on mootness grounds. *Id*. at *4. At trial, Rising S had nonsuited its business disparagement and tortious interference claims. *Id*. at *3. After the trial court's plenary power to vacate or reform the final judgment passed, there was no longer any claim for Hale to seek dismissal of through the TCPA. *Id*. at **3–4.

In *Avid Square Constr., LLC v. Valcon Consulting, LLC*, No. 02-22-00297-CV, 2023 WL 3113950, at *2 (Tex. App.—Fort Worth Apr. 27, 2023, no pet.) (mem. op.), the court of appeals held that a general contractor's criticisms that resulted in a lawsuit against two construction consultants were protected speech under the Texas Citizens Participation Act.

The defendants, Valcon and Courty, were hired as construction consultants for a student housing project. *Id*. After the original contractor was terminated, Avid Square Construction was brought on to complete the work. *Id*. At some point, Valcon filed a lien against the property for nonpayment. *Id*. Avid Square and the owner eventually sued Valcon and Courty for breach of contract and breach of fiduciary duty, alleging that the defendants performed or supervised defective construction work, missed critical delivery dates without cause, and abandoned the project. *Id.* The consultants counterclaimed for breach of contract, defamation, and business disparagement, arguing that the statements asserted in Avid Square's petition were defamatory. *Id*. at *2. Avid Square moved to dismiss the business disparagement and defamation claims in accordance with § 27.003(a) of the Texas CPRC (TCPA), arguing that the claims were brought in response to Avid Square's right to petition under Texas Citizens Participation Act and were therefore protected. *Id*. The trial court denied Avid Square's TCPA motion, and an interlocutory appeal followed. *Id*.

The court of appeals evaluated the motion under the TCPA's three-part burden-shifting analysis: (1) Avid Square had to prove that a "legal action" had been brought against it in response to an exercise of free speech protected by the Act; (2) upon Avid Square's invocation of the Act, the defendants could prevent the court from dismissing the claims if they provided clear and specific evidence of a prima facie case for each essential element of the claims at issue; and (3) if

defendants met this burden, Avid Square would have to establish an affirmative defense or other grounds on which it was entitled to judgment as a matter of law to prevent dismissal. *Id*.

In response to Avid Square's motion, the defendants alleged for the first time that the statements in Avid Square's petition were repeated to a plumbing contractor. *Id*. at *4. The court rejected this argument as an after-the-fact assertion unsupported by the defendants' pleadings. *Id*. at *5. The court also rejected the defendants' argument that the commercial speech exemption to the TCPA applied because defendants failed to show that the plumbing contractor was a potential customer of Avid Square or that the statements concerned services that Avid Square offers. *Id*. at *6. The court held these statements, if made, were akin to a warning regarding the quality of the defendants' services rather than an attempt by Avid Square to obtain new business. *Id*.

After determining that Avid Square showed a "legal action" had been brought in response to its protected speech, the court examined whether the defendants established a prima facie case for each essential element of their claims. *Id*. at **7–8. Because the defendants did not establish when, where, or to whom the alleged statements were published outside the context of the lawsuit, they failed to show clear and specific evidence that the statements were made to a third party. *Id*. at *9. As a result, the defendants failed to make a prima facie showing of an essential element of their business disparagement and defamation claims. *Id*. at *9. The court of appeals reversed the trial court's ruling and granted Avid Square's motion to dismiss. *Id*. at *10.

BB. Texas Deceptive Trade Practices Act

In *One Time Construction Texas, LLC v. Snow*, No. 02-23-00033-CV, 2023 WL 5767365 (Tex. App.—Fort Worth Sept. 7, 2023, no pet.) (mem. op.) (discussed above) the court of appeals also held that homeowners had presented sufficient evidence to support the trial court's award of treble economic damages under the Deceptive Trade Practices Act (DTPA), against both a general contractor and its owner in his individual capacity.

A consumer may maintain an action under the DTPA when a "breach of express or implied warranty" or "any unconscionable action or course of action by any person" constitutes "a producing cause of economic damages or damages for mental anguish." *Id*. at *12 (citing Tex. Bus. & Com. Code Ann. § 17.50(a)(2), (3)). Further a trial court may award treble economic damages under if it "finds that the conduct of the defendant was committed knowingly[.]" *Snow*, 2023 WL 5767365, at *12 (citing Tex. Bus. & Com. Code Ann. § 17.50(b)(1)). Here, the general contractor (One Time) and its owner (Fretwell) argued that summary judgment evidence failed to show that (1) One Time breached express or implied warranties, (2) One Time committed "unconscionable" acts, (3) One Time "knowingly" committed the acts giving rise to these violations, or (4) Fretwell was liable in his individual capacity. *Snow*, 2023 WL 5767365, at *12.

First, "a plaintiff can recover on a claim for breach of express warranty for services if (1) the defendant sold services to the plaintiff; (2) the defendant made a representation to the plaintiff about the characteristics of the services by affirmation of facts, by promise, or by description; (3) the representation became part of the basis of the bargain; (4) the defendant breached the warranty; (5) the plaintiff notified the defendant of the beach; and (6) the plaintiff suffered injury." *Id*. (citing *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 886 (Tex. App.—Dallas 2007, no pet.)). Here, the homeowners alleged that One Time had breached an express warranty

that the work would be performed per their architect's plans. *Snow*, 2023 WL 5767365, at *12. It was uncontested that One Time sold services to the homeowners. As to the second and third element, the court held that the contract between the parties expressly stated that "[the homeowners] desire[] [One Time] to build [a] new custom home… pursuant to the plans and specifications by [architect][.]" *Id*. The architect's plans and specifications were included in the contract documents. *Id*. As to the fourth and fifth elements, One Time admitted in its deposition that certain aspects of the construction did not comply with the plans. *Id*. at*13. Additionally, the homeowners' replacement contractor provided a declaration enumerating the many defects of One Time's work. *Id*. As to the sixth element, the homeowners provided evidence of their damages through declaration testimony. *Id*. This declaration laid out the homeowners' damages for (1) payments they made to One Time, (2) payments they made directly to subcontractors to prevent the filings of liens, (3) payments they made to a replacement contractor to correct work, (4) additional payments they made for their construction loan, and (5) damages for alternative living arrangements and storage. *Id*.

The trial court also found that One Time had violated the DTPA by breaching the implied warranty of good and workmanlike construction. *Id*. A plaintiff can recover on a claim for breach of implied warranty of good and workmanlike manner if (1) the defendant built residential property; (2) the plaintiff purchased the property; (3) the construction was not performed in a good and workmanlike manner; and (4) the plaintiff suffered injury. *Id*. From the evidence discussed above the court found that there was sufficient evidence to support the trial court's finding that One Time breached the implied warranty of good and workmanlike construction. *Id*. at *14. The court noted that the homeowners' replacement contractor—and expert witness—submitted a declaration that "there were numerous defects . . . which fell below the acceptable standard of care and industry standard." *Id*. at *13.

The trial court also found that One Time violated the DTPA by committing an "unconscionable act." *Id*. at *14. The DTPA defines unconscionable act as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id*. (citing Tex. Bus. & Com. Code § 17.45(5)). The court held that the record contained sufficient evidence of One Time's unconscionable acts, specifically:

- Failing to pay subcontractors amounts specifically earmarked for them;
- The homeowners being required to pay subcontractors directly to release liens for amounts they had already paid to One Time;
- One Time's false representation that progress would be made then abandoning the project; and
- One Time filing a mechanic's lien affidavit for non-existent change work after abandoning the project.
-

Snow, 2023 WL 5767365, at *14.

The court also held that evidence was sufficient to show that One Time had also acted "knowingly" entitling the homeowners to treble damages appropriate. *Id*. at *15. The DTPA defines "knowingly" as

> actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer' claim or in an action brought under [section 17.50(a)(2)], actual awareness of the act, practice, condition, defect, or failure constituting the beach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

Id. (citing Tex. Bus. & Com. Code Ann. § 17.45(9)). The evidence showed that One Time and Fretwell knowingly breached express and implied warranties. *Snow*, 2023 WL 5767365, at *16. Fretwell admitted in his deposition that (1) work was deficient, (2) the homeowners sent correspondence notifying him of many defects, (3) Fretwell responded to the correspondence with a promised remedy, and (4) abandoned the project shortly after. *Id*.

Evidence also supported the trial court's conclusion that Fretwell had knowingly engaged in unconscionable conduct. *Id*. The court credited (1) Fretwell's representation that defective work would be remedied, (2) Fretwell's subsequent inaction and abandonment, and (3) Fretwell's placement of a lien on the property for work Fretwell admitted was defective or not delivered. *Id*. Accordingly, the court upheld the trial court's finding of liability against Fretwell, individually. *Id*. Having already determined that Fretwell had knowingly committed an unconscionable act, the sole issue the court had to determine was if individuals can be held personally liable under the DTPA. *Id*. The DTPA allows claims against "any person" and broadly defines "person" as "an individual, partnership, corporation, association, or other group, however organized." *Id*. (citing Tex. bus. & Com. Code Ann. § 17.45(3)). Thus, the DTPA, by its plain language, permitted Fretwell to be held personally liable for violating the statute. *Snow*, 2023 WL 5767365, at *16.

CC. Texas Construction Trust Funds Act (Texas Property Code Ch. 162)

In *One Time Construction Texas, LLC v. Snow*, No. 02-23-00033-CV, 2023 WL 5767365 (Tex. App.-Fort Worth Sept. 7, 2023, no pet.) (mem. op.) (discussed above) the court also found that the trial court did not err in awarding homeowners damages for violating the Texas Construction Trust Fund Act (TCTFA) against their general contractor and its owner.

The Snows brought a claim against One Time Construction and its owner (Fretwell) for violating Texas Property Code § 162.006. *Id*. at *10. That section requires a general contractor "who enters into a written contract with a property owner to construct improvements to a ***residential homestead*** for an amount exceeding $5,000" to deposit any trust funds into a "construction account." *Id*. (citing Tex. Prop. Code § 162.006(a)). In response, One Time argued that the trial court erred when it granted summary judgment awarding damages to the Snows under the TCTFA because they had failed to demonstrate the project was their "residential homestead." *Snow*, 2023 WL 5767365, at *10.

The court first examined the definition of a "residential homestead." *Id*. at *11. Because there is no authority on the definition of residential homestead under the TCTFA, the court turned to the definition of "homestead" for purposes of the exemption from creditors' claims under the Texas Constitution and Chapter 41 of the Texas Property Code. *Id*. Under those definitions a landowner seeking to claim a homestead has the burden to establish "(1) overt acts of homestead

usage and (2) the intention to claim the property as a homestead." *Id*. (citing *Zorilla v. Apyco Const. II, LLC*, 469 S.W.3d 143,159 (Tex. 2015)).

The court found that the Snows' summary judgment evidence showed both their "present intent" to use the property as their homestead and an "overt act" manifesting that intent. *Snow*, 2023 WL 5767365, at *11. The Snows' summary judgment evidence included a declaration stating that (1) they had hired One Time "to build [their] new home," and (2) the Snows needed to find an alternative living situation due to One Time's failure to build their new home within the promised schedule. *Id*. This and other evidence—discussed above—demonstrated "both (1) that at the time [the Snows and One Time's] Contract … was executed, the [Snows] had a clear intent to use the property as a homestead at a reasonable and definite time in the future . . . and (2) that the [Snows] had engaged in overt acts manifesting that intent." *Id*.

One Time and Fretwell also argued that Fretwell could not be personally liable for violating the TCTFA. *Id*. at *17. But under the TCTFA, construction payments are trust funds, and contractors and their officers, directors, and agents are trustees of these funds. *Id*. (citing Tex. Prop. Code Ann. §§ 162.001(a), 162.002)). Thus, Fretwell was a trustee of the funds the Snows paid to One Time. *Snow*, 2023 WL 5767365, at *17.

Finally, the court held that the Snows had presented sufficient evidence that Fretwell, as One Time's sole owner, had misapplied trust funds received on the project, including:

- At least $9,262.08 in framing trust funds left unaccounted for;
- Another $7,500 in trust funds earmarked for the roof, which General Contractor neither completed nor paid to its roofing subcontractor; and
- Another $7,000 earmarked for an HVAC unit, which was never delivered to the project.

Id. Thus, the Snows' evidence was sufficient to support a finding that One Time and Fretwell misapplied approximately $24,000 in trust funds. *Id*.

DD. Texas Water Code § 11.086

In *Tenaris Bay City Inc. v. Ellisor*, No. 14-22-00013-CV, 2023 WL 5622855 (Tex. App.—Houston [14th Dist.] Aug. 31, 2023, pet. filed) (mem. op.) (discussed above), the court also held that flood waters from Hurricane Harvey were "surface water" under Tex. Water Code § 11.086.

Section 11.086 prohibits any person from diverting or impounding the natural flow of "surface waters in this state[.]" Tex. Water Code § 11.086. The statute defines surface water as "simply water or natural precipitation diffused over the surface of the ground until it either evaporates, is absorbed by the land, or reaches a bed or channel in which it is accustomed to flow." *Id*. at § 11.086(a). Surface water is "never found in a natural watercourse." *Id*. Surface waters contrast with "floodwaters" that "generally speaking, have overflowed a river, stream or natural water course and have formed a continuous body with the water flowing in the ordinary channel." *Tenaris*, 2023 WL 5622855 (quoting *Texas Woman's Univ. v. Methodist Hosp.*, 221 S.W.3d 267, 278 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

The jury had found Tenaris liable for diverting surface waters under § 11.086. *Tenaris*, 2023 WL 5622855, at *2. Tenaris argued on appeal that although rainwater from Hurricane Harvey that landed on Tenaris's property began as surface water, "it necessarily must have passed through a natural watercourse before reaching [the plaintiffs'] properties, and thus the surface water was converted to floodwater." *Id*. at *8. Since floodwaters are under the exclusive ownership and control of the State of Texas, private parties typically have no legal duty to prevent floodwaters. *Id*. at *7.

The court of appeals rejected Tenaris's argument, holding that under Tex. Water Code § 11.086, the proper inquiry is "the identity of the water at the time it was diverted—not the identity of the water when it flooded the plaintiff's property." *Id*. at *8. Because the evidence conclusively established that the water that Tenaris allegedly diverted was surface water at the point of diversion, the court held that legally and factually sufficient evidence supported the jury's finding that Tenaris violated § 11.086. *Id*. The court also rejected Tenaris's argument that the trial court erred by not submitting an accurate definition of surface water to the jury, deferring to the trial court's discretion to avoid "surplus instructions," and because the court of appeals found that the definition was unnecessary considering the undisputed evidence that the rainfall was surface water at the point of diversion by Tenaris. *Id*. at *10.

EE. Third-party claims

In *In re Jordan Foster Constr., LLC*, No. 08-22-00201-CV, 2023 WL 2366610 (Tex. App.—El Paso Mar. 6, 2023, no pet.) (mem. op.) (discussed above), the court of appeals held that an architect had not pleaded sufficient facts to establish claims for common-law indemnity or contribution under Chapter 32 of the Texas CPRC but could maintain a Chapter 33 contribution claim.

As a reminder, the architect was sued by the owner for negligence and DTPA violations, among others. *Id*. at *1. In turn, the architect asserted a third-party claim against the project's contractor for common-law indemnity and contribution under Chapters 32 and 33 of the Texas CPRC. *Id*. at **1–2.

Texas only recognizes common-law indemnity in "products liability actions to protect an innocent retailer in the chain of distribution" or "in negligence actions to protect a defendant whose liability is purely vicarious in nature." *Id.* at *4 (citing *Affordable Power, L.P. v. Buckeye Ventures, Inc.*, 347 S.W.3d 825, 833 (Tex. App.—Dallas 2011, no pet.)). The architect argued that it had pled sufficient facts to establish a "vicarious liability relationship" between it and the contractor, because it alleged the owner was attempting to hold it "responsible for construction issues" caused by the contractor's acts or omissions. *Jordan Foster*, 2023 WL 2366610, at *4. In response, the court of appeals pointed to the essential element of vicarious liability—the alleged principal's right to control. *Id.* at *4 (citing *Peter v. Stern*, No. 05-20-00021-CV, 2020 WL 4783192, at *4 (Tex. App.—Dallas Aug. 18, 2020, pet. denied)). The court of appeals held that the architect did not plead any facts showing it had a right to control the contractor's actions or that it acted as a surety in any way. *Jordan Foster*, 2023 WL 2366610, at *4. Thus, referencing the project's specifications included in the architect's third-party petition, which demonstrated the architect had no control over the contractor, the court held the trial court abused its discretion in part by denying the contractor's Rule 91a motion to dismiss the claim. *Id.* at **4–5.

Regarding the Chapter 32 contribution claim, the court also held that the architect's claims should have been dismissed. *Id*. at *5. As Chapter 32 only provides a right of contribution to a codefendant "against whom a judgment is rendered[,]" the architect could not maintain that claim as it had not alleged any judgment rendered against it. *Id*. Yet the court upheld the architect's Chapter 33 contribution claim. *Id*. The contractor argued that because the owner only sought "economic losses," the dispute was contract-based and therefore not subject to Chapter 33 (which is limited to tort and DTPA claims). The court dodged the economic loss rule issue, noting instead that since the owner had sued the architect for DTPA violations, the architect could maintain a DTPA claim under Chapter 33. *Id*.

III. ARBITRATION

A. Construing and Enforcing Arbitration Agreements

1. Arbitration and dominant jurisdiction

In *Longhorn Canyon Partners, L.P. v. BFS Tex. Sales, LLC*, No. 07-23-00178-CV, 2023 WL 5354783 (Tex. App.—Amarillo Aug. 21, 2023, no pet. h.) (mem. op.), the court held that a lawsuit by a general contractor against its subcontractor for indemnity should be stayed pending the outcome of an arbitration between the project's owner and the general contractor.

Longhorn, a general contractor, prematurely sued several subcontractors seeking indemnity after a condominium association initiated arbitration proceedings against Longhorn for defective construction. *Id*. at *1. Longhorn withheld service of citation on the subs and instead sought to join them in an arbitration between Longhorn and the Association. *Id*. Rather than wait to be served, one of Longhorn's subs, BFS Texas Sales, filed an answer, contesting Longhorn's request to stay the proceeding pending arbitration, and moved for a no-evidence summary judgment. *Id*. BFS was not a party to the arbitration agreement between Longhorn and the Association. *Id.* The trial court denied Longhorn's motion to stay and granted BFS's motion for summary judgment. *Id*. The arbitrators subsequently released BFS from the arbitration. *Id*.

On appeal, Longhorn argued that the trial court should have stayed the proceeding whether or not BFS was a party due to the similarity of issues involved in both proceedings. *Id*. Longhorn argued that if it were ultimately determined that Longhorn performed defective work (through its subcontractors), Longhorn's subcontractors would be liable for their portion of the defective work. *Id*. Because issues material to the arbitration regarding defective construction work were also material to the lawsuit, the court of appeals held that the trial court abused its discretion in denying Longhorn's motion to stay. *Id*. Otherwise, the trial court proceedings could have undermined Longhorn's right to have the issues resolved in accordance with its arbitration agreement with the owner's association. *Id*. Furthermore, the arbitrator's decision could have affected issues that were material to the trial, like the subcontractor's responsibility for defects. *Id*. The trial court therefore failed to adhere to Texas Supreme Court precedent holding that arbitration should be given priority over parallel litigation to the extent that arbitration is likely to resolve issues material to the lawsuit. *Id*. at **1–2 (citing *In re Merrill Lynch & Co*., 315. S.W.3d 888, 891 (Tex. 2010)).

2. Whether issues are for arbitrators, or courts, to decide (arbitrability)

In *TotalEngergies E&P USA, Inc. v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694 (Tex. 2023), the Texas Supreme Court held that incorporating a AAA rule that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim[,]" "clearly and unmistakably" delegated arbitrability issues to the arbitrator.

The (non-construction) case is procedurally complicated and involved several agreements. MP Gulf (MP) and TotalEnergies (Total) respectively owned two-thirds and one-third interest in oil-and-gas leases in the Gulf of Mexico. *Id*. at 697–98. MP and Total entered a "Chinook Operating Agreement" (COA) governing their relationship as co-owners of those interests. *Id*. at 698. The parties entered a "System Operating Agreement" (SOA) to jointly process, store, and transport production from leases associated with their ownership interests. *Id*. The SOA governed that operation, although "subject to the requirements" of a different, "Cost Sharing Agreement" (CSA). *Id*. The SOA required MP to advance costs to operate the leases and then collect those "as provided in the" CSA, or if the CSA did not allocate those costs, require each party to "pay those Costs in proportion to its Equity Interest" in the leased systems. *Id*.

About a decade later, MP pursued reentering a well that had been previously shut-in, but Total elected not to participate, invoking rights under the COA. *Id*. Even so, MP demanded $41 million from Total as its "Equity Interest" portion of the costs to operate the shut-in well. *Id*. Total responded that it was not required to pay any "Equity Interest" as the CSA specifically allocated disputed costs on a per unit basis, rather than to the entire leased systems. *Id*. After negotiations broke down (and after mediation), Total filed suit in Harris County district court seeking a declaration to construe the CSA in its favor. *Id*. at 698–99. Although Total sought declarations concerning the CSA, it did not seek any declaration concerning the COA as the COA had an arbitration agreement requiring arbitration before the International Institute for Conflict Prevention and Resolution. *Id*. at 699. The same day it filed suit, Total also initiated arbitration with the IICPR to determine its rights under the COA. *Id*.

Soon after, MP initiated an arbitration with the AAA, claiming that Total breached the SOA by failing to remit the $41 million, and sought a declaration as to the CSA (which was incorporated into the SOA) and how it allocates expenses between the parties. *Id*. The SOA stated that

> [i]f any dispute or controversy arises between the Parties out of this Agreement, the alleged breach thereof, or any tort in connection therewith, or out of the refusal to perform the whole or any part thereof… [the dispute] shall be submitted to arbitration…in accordance with the rules of the AAA and the provisions of this Article[.]"

Id. That article stipulated that the "procedures of the arbitration proceedings shall be in accordance with the Commercial Rules of the AAA, as may be modified by the panel of arbitrators." *Id*. Relying on this last provision, MP contended that questions about the *scope* of arbitration (arbitrability) must be resolved by the AAA. *Id*. at 700. Rule 7(a) of the AAA Commercial Rules states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any

objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id*. Thus, per MP, Total had agreed (through the SOA) to delegate to the AAA the power to decide whether their disputes must be resolved through arbitration. *Id*. Total responded that the SOA's reference to the AAA rules did not create that delegation. *Id*. The trial court agreed with Total, stayed the AAA arbitration, and denied MP's motion to compel arbitration. *Id*. at 701. The court of appeals reversed and rendered judgment compelling AAA arbitration. *Id*.

In a long, 6-1 opinion (Justices Huddle and Young did not participate in the decision), accompanied by a concurrence (Justice Bland) and a lengthy dissent (Justice Busby), the Texas Supreme Court agreed with the court of appeals and held that Total had agreed to submit the dispute to AAA arbitration, and delegate authority to the AAA arbitrators to arbitrability and the scope of arbitration. *Id*. at 694–721 (opinion); 721–25 (concurrence); 725–35 (dissent). The opinion involved a lengthy analysis of nationwide state and federal law about the effect of incorporation of arbitration rules delegating arbitrability to the arbitrator. *Id*. at 702–12. As discussed by the Court, arbitrability concerns three questions: (1) the merits of a case; (2) whether the merits must be resolved through arbitration instead of courts; and (3) who (court or arbitrator) decides question (2). *Id*. at 701–02. Arbitrability concerns question (3). *Id*. at 702. The Texas Supreme Court had previously held that it will enforce the delegation of arbitrability *to the arbitrator*, provided there is a "clear and unmistakable" agreement to delegate that decision. *Id*. at 701–02 (citing *Robinson v. Home Owners Mgmt. Enterprises, Inc.*, 590 S.W.3d 518, 525, 532 (Tex. 2019)).

The majority concluded "that, as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' dispute must be resolved through arbitration." *TotalEnergies*, 667 S.W.3d at 708. The Court credited that the SOA "expressly states that arbitration must be conducted '*in accordance with* the rules of the AAA.' And that the 'procedure of the arbitration proceedings shall be *in accordance with* the Commercial Rules of the [AAA]." *Id*. at 709. The Court also found that rule 7(a) was mandatory, because it states that the arbitrators "shall have the power to rule on his or her own jurisdiction" including any questions concerning arbitrability. *Id*. According to the Court, the rule's use of the definite article "the" before "power" indicated *exclusive* power, limiting the delegation exclusively to the arbitrator. *Id*.

Total argued that even if it had agreed to delegate arbitrability of *some* disputes, the arbitration agreement itself was of limited scope and did not apply to "any and all possible controversies," only those that "arise… out of" the SOA. *Id*. at 712. Total argued that "arising out of" is narrower than terms often used like "concerning" or "related" or "connected to" an agreement. *Id*. Thus, Total argued that the courts must make an initial decision about the arbitrability of the dispute because the arbitration clause's scope excluded a broader universe of disputes that might not be arbitrable. *Id*. The Court partially dodged that question, agreeing that while parties "*can* contractually limit their delegation of arbitrability issues to only certain claims and controversies" the SOA did not do so. *Id*. The Court rejected Total's argument that courts must determine arbitrability before rule 7(a) governs, because doing so would result in that delegation "essentially [having] no effect at all." *Id*. at 714. Conceptually, if the parties incorporate rule 7(a), but it only applies after a court has determined that arbitrability belongs to the arbitrator, the rule

does nothing. If a court has to make a threshold finding that a dispute is arbitrable, before deferring to the arbitrator's power to make that determination, it is not the arbitrator's determination. *Id*. ("[H]olding that rule 7(a) only applies if a court first determines that the claim is subject to the arbitration agreement would render the rule essentially meaningless.").

The Court held that Total's argument impermissibly conflated the scope of what could be arbitrated with the scope of the arbitrability delegation and applied the severability rule to enforce the delegation. *Id*. at 714–18. Under the severability rule, courts may generally sever broader contract issues from the provisions requiring them to arbitrate, enforcing the latter even if there is some alleged defense against or defect in the former. *Id*. at 717.[40] The Court extended the severability rule, holding that "the arbitration provision" itself was "in turn severable from the provision within it that delegates arbitrability issues to the arbitrators[.]" *Id*. at 717. Turning to the agreement, the Court found that the delegation provision incorporating the AAA rules did not limit the scope of the delegation at all. *Id*. at 718. As a standalone provision, it "clearly and unmistakably delegate[d] arbitrability issues to the arbitrator" thus requiring the Court to "enforce that provision as written and allow the arbitrator to decide the scope of the arbitration provision." *Id*. As a result, "the fact that the parties' arbitration agreement may cover only some disputes while carving out others" had no effect on the delegation provision, which required the arbitrator to decide the scope of arbitration (just as they would decide the merits of the contract claims in an ordinary arbitration dispute as well). *Id*.

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Practice Note: It remains to be seen how much the ruling will affect the construction industry directly. Rule 7(a) of the Commercial Rules of the AAA is very similar, but not identical, to Rule 9(a) of the Construction Industry Arbitration Rules and Mediation Procedures. Rule 7(c) of the Commercial Rules in effect at the time of *TotalEnergies*:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement **or to the arbitrability of any claim or counterclaim**.

[40] This is why if a party challenges the validity of an entire contract in which an arbitration clause is present, but do not specifically challenge the arbitration provision itself, the arbitrator must decide the challenge to the broader contract. *Id*. at 701. It is only "when a party challenges the validity or scope of an arbitration agreement *contained within a broader contract*" that courts "resolve that challenge to determine whether the parties agreed to arbitrate their controversies regarding the contract." *Id*. This is counter-intuitive, because if the contract fails for some reason (lack of consideration, invalid under the statute of frauds, illegality, and so on), the arbitration provision would fall with it. But if agreements to arbitrate were defeated by some allegation that the contract was unenforceable (including first material breach), there would scarcely ever be any arbitration.

TotalEnergies, 667 S.W.3d at 700 (citing AAA Commercial Rule 7(a)) (emphasis added).[41] Rule 9(a) of the Construction Industry Arbitration Rules is similar but not identical, omitting the highlighted portion above:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

Rule 9(c) does specifically reference arbitrability, albeit in the context of *challenging* the arbitrator's jurisdiction:

> A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

That may be enough to "clearly and unmistakably" delegate arbitrability to the arbitrator under the AAA Construction Industry Arbitration Rules, but a court committed to distinguishing *TotalEnergies* may find the differences between the Commercial and Construction rules persuasive.

Then again, the difference may not matter. In *TotalEnergies*, the Supreme Court of Texas cited favorably numerous decisions finding clear and unmistakable delegation, even though the applicable clause or rule itself did not specifically state "arbitrability."[42]

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[41] The AAA Commercial Rules currently make it even clearer that arbitrability is for the arbitrators, as "the AAA recently amended rule 7(a) to add language at the end adding "without any need to refer such matters first to a court." *TotalEnergies*, 667 S.W.3d at 702 n.9. However, since that recent amendment did not apply to the delegation provision at issue, the Court did not rely on the amendment in reaching its holding. *Id*.

[42] *See, e.g.*, *Societe Generale de Surveillance, S.A. v. Raytheon Eur. Mgmt. & Sys. Co.*, 643 F.2d 863, 869 (1st Cir. 1981) (interpreting Rule of Conciliation and Arbitration of the International Chamber of Commerce rule that delegated "jurisdiction" to "the arbitrator himself"); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (same); *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1031 (9th Cir. 2022) (enforcing delegation clause that stated arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, [or] enforceability… of the agreement to arbitrate"); *Attix v. Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1298 (11th Cir. 2022) ("By incorporating this AAA rule about the arbitrator's 'power to rule on his or her own jurisdiction' into their agreement, Attix and Carrington clearly and unmistakably agreed to arbitrate threshold arbitrability disputes."); *Commc'ns Workers of Am. v. AT&T Inc.*, 6 F.4th 1344, 1347 (D.C. Cir. 2021) (enforcing as delegation provision AAA's Labor Arbitration arbitrability rule, which is identical to Construction Industry Rule 7(a)); *ROHM Semiconductor USA, LLC v. MaxPower Semiconductor, Inc.*, 17 F.4th 1377, 1383–84 (Fed. Cir. 2021) (enforcing as delegation provision incorporation of California Code of Civil Procedure § 1276.161, stating that "arbitral tribunal may rule on its own jurisdiction"); *Goldgroup Res., Inc. v.*

At least one of the federal cases cited favorably in *TotalEnergies* involved the Construction Industry Arbitration Rules. In *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014), the 8th Circuit did not discuss the rule at issue, but held that because the contract "incorporated the Construction Industry Arbitration Rules of the American Arbitration Association[,]" there was "clear and unmistakable indication the parties intended for the arbitrator to decide the threshold questions of arbitrability." *Id*. at 1099–1100. And in *TotalEnergies*, the Court approved several state supreme court decisions that involved or referenced the AAA's Construction Industry Rules.[43]

Delegation may not pop up in cases involving non-signatories. The Texas Supreme Court had previously held that "incorporation of the AAA rules did not clearly and unmistakably demonstrate an agreement to delegate arbitrability of claims against a *non-signatory*[.]" *TotalEnergies*, 667 S.W.3d at 703 n.10 (citing *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 632 (Tex. 2018)). But in *TotalEnergies*, the Court cryptically noted that "[c]ourts in other jurisdictions have since reached the opposite result in cases involving non-signatories." *TotalEnergies*, 667 S.W.3d at 703 n.10 (citing *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 845 (6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza Franchising LLC*, —— U.S. ——, 141 S. Ct. 1268, 209 L.Ed.2d 8 (2021); *Wiggins v. Warren Averett, LLC*, 307 So. 3d 519, 523 (Ala. 2020)). Because both MP and TotalEnergies were *signatories* to arbitration agreements with delegation provisions, neither asked the Texas Supreme Court to rule on whether delegation extended to non-signatories. *TotalEnergies*, 667 S.W.3d at 703 n.10. But *Blanton* did not involve compelling a non-signatory; rather it involved a non-signatory (Domino's Pizza) seeking to compel a signatory to an arbitration agreement (with a Domino's franchise). *Blanton*, 962 F.3d at 845 n.1. *Wiggins* did involve a signatory compelling a non-signatory to arbitration, but the court held the non-signatory was "undisputedly a third-party beneficiary of the contract" that delegated arbitrability to the arbitrator, and therefore the non-signatory could not "avoid [the contract's] burdens or limitations." *Wiggins*, 307 So.3d at 523.

DynaResource de Mex., S.A. de C.V., 994 F.3d 1181, 1191 (10th Cir. 2021) (enforcing as delegation provision incorporation of AAA-ICDR rule referencing arbitrator's "power to rule on its own jurisdiction, including any objections to the existence, scope, or validity of the agreement"). Notably, the AAA rule at issue in *Attix*, Rule 14(a) of the Consumer Arbitration Rules *did* reference "arbitrability" just like the Commercial Rules, but the court did not include that part in the quoted portion of its opinion. Attix, 35 F.4th at 1297–98. There are others listed in the opinion. *TotalEnergies*, 667 S.W.3d at 704–707, n.11, 12, 13, 14, 15, and 16.

[43] See, e.g., *Airbnb, Inc. v. Doe*, 336 So. 36 698, 702, 706 (Fla. 2022), (approving one of its own intermediate appellate court's decision "that by incorporating the Construction Industry Rules of the AAA" there was "clear and unmistakable evidence of [the parties'] intent to submit the issue of arbitrability to an arbitrator.") (citing *Glasswall, LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248, 251 (Fla. 3d DCA 2016)); *HPD, LLC v. TETRA Techs., Inc.*, 424 S.W.3d 304, 308, 310–11 (Ark. 2012) (holding that incorporation of AAA's Construction Industry Rules, including rule 9(a), manifested "clear and unmistakable intent to arbitrate the questions of arbitrability").

In a more traditional, direct-benefits estoppel case, the signatory is seeking to compel a non-signatory, and the very thing at issue is what the non-signatory did to become bound by the arbitration agreement. There is therefore always, or almost always, a threshold question about the facts, circumstances, conduct, or relief sought by the non-signatory that would otherwise obligate them to arbitrate as a non-signatory. For example, after *TotalEnergies* was decided, the Texas Supreme Court decided *Lennar Homes of Texas Land and Construction, Ltd. v. Whiteley*, 672 S.W.3d 367, 377 (Tex. 2023) (discussed below), where a signatory sought to compel a non-signatory under the theory of direct-benefits estoppel. Thus, the Court had to determine the threshold issue of whether the parties' dispute could be arbitrated, even though the contract at issue did delegate arbitrability to the arbitrators through incorporation of AAA rules. *Id*. at 376 n.6. Reciting *TotalEnergies* and *Jody James*, the Court held that it could not hold that a non-signatory had delegated arbitrability based on a purchase agreement's "incorporation of the AAA rules without first identifying a qualifying legal basis for compelling" the non-signatory "to arbitrate at least one of her claims under" the purchase agreement. *Lennar Homes*, 672 S.W.3d at 376 n.6.

It is hard to imagine a scenario when a court can avoid this threshold, gateway arbitrability issue in a direct-benefits estoppel case, since those cases always involve at least one party who disputes that they ever agreed to arbitrate at all, much less that they agreed to delegate arbitrability to an arbitrator. Even if the Texas Supreme Court ultimately adopts the reasoning in *Blanton* and *Wiggins*, it is hard to see how that would apply to direct-benefits estoppel fact patterns where the party resisting arbitration is a non-signatory. Broadly speaking, courts must *always*, as a practical matter, "decide 'gateway matters'," since whether an arbitration clause or a delegation provision exists, first finds its way to courts through motions to compel arbitration. *Id*. at 376 (quoting *In re Weekly Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005)). Put differently, and adopting the Court's analysis from *TotalEnergies*, *somebody* has to decide (1) the merits; (2) if the merits will be decided in arbitration; and (3) if an arbitrator decides question (2). But it's turtles all the way down since *somebody* must also decide (4) if an arbitrator decides question (3). No matter how deep this arbitrability pit runs, at the bottom sits a court, deciding something.

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B. Judicial Review of Arbitration Awards

1. Modification of award

In *Ramirez v. JJ & EG, LLC*, No. 14-22-00715-CV, 2023 WL 6561230 (Tex. App.—Houston [14th Dist.] Oct. 10, 2023, pet. filed) (mem. op.), the court of appeals held that the trial court's failure to include an arbitrator's findings did not require modification of its order confirming the award.

The suit arose from a dispute between a general contractor and an owner over the construction of a body shop. *Id.* at *1. The owner questioned the general contractor's progress on the project and confronted the general contractor, who subsequently refused to return to the construction site. *Id.* The agreement between the parties was terminated, and the parties later agreed to arbitrate their claims per their agreement. *Id.* The trial court signed an order compelling arbitration, and the arbitrator rendered a final arbitration award in favor of the owner. *Id.* The trial court then entered final judgment confirming the award for the owner. *Id.* Later, the general

contractor moved to modify, correct, or reform the final judgment, arguing the judgment did not track the language of the arbitration award. *Id.* The trial court did not rule on this motion (which was denied by law), and the general contractor appealed. *Id.*

The court of appeals reviewed on an abuse of discretion basis, finding that the trial court did not act arbitrarily or without reference to guiding legal principles in its denial of the general contractor's motion. *Id.* The general contractor provided no authority supporting his contention that the trial court abused its discretion by failing to track the language of the award. *Id.* at *2. The court pointed to Texas CPRC § 171.092, which only requires a trial court to enter a judgment or decree conforming to the order that confirms an arbitration award. *Ramirez,* 2023 WL 6561230, at *1. The court found no requirement that the trial court's judgment must include the arbitrator's findings. *Id.*

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Practice Note: The opinion does not elaborate on what, precisely, the general contractor thought should have been included in the final judgment. Although the general contractor "emphasized" that "findings in the arbitration award favorable to him… were excluded from the final judgment," it is unclear if the findings have anything to do with the award itself. *Id*. at *1. In any event, since even arbitrators "are not required to state the reason for their award or to make any findings of fact" it seems straight-forward that a trial court would not have to include optional findings in any judgment. *Brown v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 901 n.32 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

2. Ruling on confirmation or vacatur of award

In *Spears Constr. Mgmt., LLC v. Physical Therapy Dynamics, PLLC*, No. 02-22-00337-CV, 2023 WL 1859452 (Tex. App.—Fort Worth Feb. 9, 2023, pet. denied) (mem. op.), the court of appeals held that the trial court erred in granting the owner's motion to vacate an arbitration award because the general contractor failed to put forth a sufficient record to vacate the award after it had failed to request a transcript of the final arbitration hearing.

In *Spears*, the general contractor filed suit (which it later voluntarily submitted to arbitration), alleging the owner of a construction project had breached the parties' contract, violated the Texas Prompt Payment Act and the Texas Construction Trust Fund Act. *Id*. at *1. The contractor also sought enforcement of a lien placed on the property. *Id*. The case proceeded to an arbitration hearing and the arbitrator entered a final award in favor of the general contractor. *Id*. at *2. The general contractor moved in state court to confirm the arbitration award. *Id*. In response, the owner moved to vacate or correct the arbitration award arguing that the award was obtained by fraud or other undue means, the arbitrator both refused to hear material evidence and denied the owner an opportunity to present material evidence, and that the arbitrator refused to postpone the final hearing after a showing of sufficient cause. *Id*.

The trial court vacated the arbitration award and ordered that the matter be reheard. *Id*. at *3. The general contractor appealed. *Id*. The court of appeals reversed, holding that because there was no record of the arbitration proceeding, none of the vacatur grounds alleged by the owner were

supported by evidence and that the court must presume the evidence was adequate to support the arbitrator's award and confirm the arbitration award. *Id*. at *9.

C. Non-signatory Arbitration

There have been major developments in this area of law at the Supreme Court of Texas. We address those first, below, then turn to the intermediate opinions.

In *Lennar Homes of Texas Land and Construction, LTD. v. Whiteley*, 672 S.W.3d 367 (Tex. 2023) the Texas Supreme Court held that a subsequent purchaser of a home was required to arbitrate claims against a homebuilder alleging negligence and implied warranty claims arising out of construction defects, based on the theory of direct-benefits estoppel.

While Lennar Homes was building a house in Galveston, a homebuyer entered into a purchase agreement to acquire the dirt and the fully constructed home. *Id*. at 372. This original purchase agreement addressed title conveyance, recording of the deed, and additional documents required or incorporated in it. *Id*. The purchase agreement also entitled Lennar to notice and approval of transfers of the purchaser's rights under it. *Id*. at 372. One of the incorporated documents in the purchase agreement was a "Limited Warranty" booklet disavowing any implied or other warranties (including workmanship and habitability) and substituting three express warranties. *Id*. at 372–73. The booklet provided (from the date of closing): (1) a one-year workmanship warranty subject to the standards and limitations in it; (2) a two-year systems protection warranty; and (3) a ten-year structural warranty. *Id*. at 373. The booklet had an "Indoor Environmental Quality Disclosure" addressing the likelihood of mold growth in the home, and mandated arbitration for all disputes. *Id*. at 372–73. The original purchase agreement also required binding arbitration of disputes, broadly defined to include "all controversies, disputes or claims… arising under, or related to" or "arising by virtue of any representations, promises or warranties alleged to have been made by [Lennar]" and "relating to the personal injury or property damage" or the purchaser "or other occupants of the Property, or in the community in which the Property is located." *Id*. at 372–73. The purchase agreement recited that the purchaser "had executed the agreement on behalf of his children and other occupants of the home with the intent that all such parties would likewise be bound." *Id*. Finally, the arbitration provision in the purchase agreement required disputes covered by the Limited Warranty be resolved per its dispute resolution provisions (i.e., arbitration). *Id*. at 372.

At closing, Lennar recorded a Special Warranty deed conveying the property to the purchaser, and providing that the conveyance was subject to "[a]ny and all restrictions, encumbrances, easements, covenants, conditions … and reservations" for the property, and specifically incorporated an arbitration exhibit that was also recorded. *Id*. at 373. The exhibit recited that it "shall run with the land and be binding upon the successors and assigns of" the original purchaser. *Id*.

Just over a year after closing, the original purchaser sold the property to Kara Whiteley, conveying the title through a General Warranty Deed that was recorded. *Id*. After Whiteley moved in, she discovered mold in the home and, after exhausting RCLA procedures, sued Lennar alleging that the HVAC system was defective and contributed to mold by creating excessive moisture levels

in the home. *Id*. at 374. She asserted non-contract claims for negligent construction and breach of the implied warranties of habitability and good workmanship, premised on Lennar's alleged failure to adhere to the standard of care, and that the mold made the home uninhabitable. *Id*. at 373–74. Lennar moved to stay the lawsuit pending arbitration mandated under the original purchase agreement and the Limited Warranty booklet. *Id*. at 374. Whiteley opposed as she did not sign any of the agreements, and Lennar responded arguing she was bound under the theories of direct-benefits estoppel or assumption of the arbitration agreement. *Id*. The trial court granted the stay, and the parties went to arbitration. *Id*.

The arbitrator denied Whiteley's claims and awarded attorney's fees and costs to Lennar from Whiteley and two of Lennar's subcontractors who was joined to the arbitration. *Id.* at 374.[44] Lennar took the award to the trial court seeking confirmation of the award and judgment consistent with it. *Id*. at 374–75. Whiteley moved to vacate, re-urging her argument that she had never agreed to arbitrate, and separately arguing that even if the purchase agreement bound her to arbitrate, her claims fell outside their scope. *Id*. at 375. The trial court denied Lennar's motion to enter the award, but granted Whiteley's motion to vacate, and Lennar appealed. *Id*. The court of appeals affirmed the trial court's ruling, finding that the arbitration exhibit did not run with the land, Whiteley had never assumed Lennar's original special warranty deed, Whiteley was not a third-party beneficiary of the Limited Warranty booklet, and direct-benefits estoppel did not apply to Whiteley's implied warranty of good workmanship and habitability claims. *Id*.

The Texas Supreme Court reversed, holding that Whiteley was required to arbitrate her claims under the theory of direct-benefits estoppel. *Id*. at 379. As recited by the Court, the theory of direct-benefits estoppel requires a non-signatory to an arbitration agreement arbitrate if their claims are "based on a contract" that mandates arbitration, as long as the claimant "seeks, through the claim, to derive a direct benefit from the contract[.]" *Id.* (quoting In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739, 741 (Tex. 2005)). The "direct benefit" is critical, as it is not enough that the claimant's "claim may relate to a contract" mandating arbitration, as the "relationship does not, in itself, bind the non-signatory to the arbitration provision." *In re Kellogg*, 166 S.W.3d at 741.[45] Reminding that "the boundaries of direct-benefits estoppel are not always clear," the Court noted that non-signatories must arbitrate if their claims "arise from a contract" containing an arbitration clause, "but not if liability arises from general obligations imposed by law." *Lennar Homes*, 672 S.W.3d at 377 (citing *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 761 (Tex. 2006)). If "liability… must be determined by reference" to the contract, the non-signatory must arbitrate. *Lennar Homes*, 672 S.W.3d at 377 (citing *Jody James Farms, JV v. Altman Grp.*, 547 S.W.3d 624, 637 (Tex. 2018)). And where the arbitration agreement broadly requires arbitration for tort and contract claims, the existence of any *one* claim falling under the arbitration agreement requires

[44] Lennar had also asserted counterclaims against Whiteley in the arbitration, asserting she breached her obligations under the original purchase agreement and the Limited Warranty. *Id*.

[45] As discussed in the Practice Note and cases below, there is "another way in which a non-signatory may be estopped" from resisting arbitration, if they seek "substantial benefits from the contract itself[.]" *Lennar Homes*, 672 S.W.3d at 376 n.7 (quoting *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529, 533 (Tex. 2023)).

that all must be arbitrated. *Lennar Homes*, 672 S.W.3d at 377. (citing *Taylor Morrison of Tex. v. Skufca*, 660 S.W.3d 525, 527–28 (Tex. 2023)).

Whiteley argued that she could not be compelled to arbitrate because her claims derived from common law obligations (rather than contractual ones), and that her purchase of the home was *not* done through the original purchase agreement (containing the arbitration agreement).[46] *Id*. at 377. The Court rejected both arguments. *Id*. First, the Court clarified that although implied warranties are "imposed by operation of law" they still are implied *through* a contract and are therefore "*automatically assigned* to the subsequent purchaser." *Id*. at 377–78 (quoting *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983)). The Court found no need to address Whiteley's "negligent construction claim" because it was indistinguishable from her breach of implied warranty of good workmanship. *Lennar Homes*, 672 S.W.3d at 378 n.11 (citing *Ewing Constr. Co. v. Amerisure Ins.,* 420 S.W.3d 30, 37 (Tex. 2014)). The Court therefore held that the contract under which any warranties derived was the original purchase agreement containing the Limited Warranty booklet (and arbitration provisions). *Lennar Homes*, 672 S.W.3d. at 377.

Second, the Court examined the relationship between the original purchase agreement and the two implied warranties Whiteley asserted. *Id*. at 378–79. For the implied warranty of good workmanship, the Court noted that it could be superseded and disclaimed by express warranties that address performance. *Id*. at 378. The Court also held that a downstream recipient of an implied warranty could not "obtain a greater warranty than that given to the original purchaser." *Id*. (quoting *Man Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 140 (Tex. 2014)). Thus, the Court reasoned, any attack on whether Lennar built in accordance with the Limited Warranty (which disclaimed implied warranties), could be determined only in reference to the original purchase agreement containing the warranties. *Lennar Homes*, 672 S.W.3d at 378–79. Put differently, although a defendant's liability under an implied warranty may arise out of general law, the Court reasoned that Lennar's "*nonliability* [arose] from the terms of the express warranties" in its one-, two, and ten-year warranties. *Id*. at 379.

Turning to the implied warranty of habitability, the Court noted that it could not be disclaimed, except "to the extent that defects are adequately disclosed." *Id*. (quoting *Centex Homes v. Buecher*, 95 S.W.3d 266, 274 (Tex. 2002)). Relying on the "Indoor Environmental Quality Disclosure" and other disclosures about the home in the Limited Warranty booklet, the Court held that it could not determine the force of Whiteley's implied warranty of habitability claim without reference to those documents. *Lennar Homes*, 672 S.W.3d at 379. As a result, neither of Whiteley's implied warranty claims stood independently of the original purchase agreement and the Limited Warranty booklet. *Id*.

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[46] It is unclear from the opinion, but presumably Whiteley's argument was that she acquired title through a General Warranty Deed from the original purchaser, as opposed to a deed transferring the Special Warranty Deed that Lennar gave to the original purchaser. *Lennar Homes*, 67 S.W.3d at 373.

Practice Note: There is much to unpack from this important decision. Prior law had made clear that direct-benefits estoppel compelled non-signatories to arbitrate if the defendant's "alleged liability arises from the contract or must be determined by reference to it[.]" *Jody James Farms*, 547 S.W.3d at 637. The novelty of *Lennar Homes* is that it expanded this analysis even to the defendant's alleged *nonliability* for claims. *Id*. at 379. Thus, if a defendant asserts that it has some defense through its express warranties—even made to a subsequent seller with whom the builder has no contract—those defenses mandate arbitration as well.

Interestingly, at arbitration Lennar had defended against Whiteley's claims (negligence and implied warranties) as "barred by the economic loss rule." *Id*. at 374. The opinion does not deal with whether this defense prevailed at arbitration. In the direct-benefits estoppel context, the Court has made clear that a non-signatory "cannot both have his contract and defeat it too." *In re Weekly Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005). Had Whiteley asserted breach of contract claims, she would have had no hope of avoiding arbitration. But if the economic loss rule would have also barred her negligence claims, Whiteley walked into arbitration with both hands tied behind her back. To avoid that conundrum, subsequent purchasers trying to avoid upstream arbitration provisions (however unlikely that result seems after this year's decisions from the Court) should probably plead alternative contract claims as well, although doing so will weaken entitlement to litigate rather than arbitrate all claims. Or add contract claims at arbitration, although that may also affect the party's ability to vacate the award later. Lennar argued that Whiteley, by participating in arbitration (after being compelled to do so), waived any objection to arbitration. *Lennar Homes*, 672 S.W.3d at 375. Although the Court stated that it would "address" that issue "in turn[,]" it later declined to do so because it held that Whiteley must arbitrate. *Id*. at 376, 379–80.

As discussed above, direct-benefits estoppel hinges on the non-signatory asserting a claim (1) based on contract (2) that seeks to derive a *direct* benefit from the contract. Even though Whiteley did not assert any contract claims, the Court still held that she must arbitrate under *direct*-benefits estoppel because Lennar's nonliability could be determined only in reference to the original purchase agreement and the Limited Waiver booklet. But in footnote 7 of its opinion, the Court "recognized *another way* in which a non-signatory may be estopped": when "by conduct" the non-signatory "'seeks and obtains substantial benefits from the contract itself,' such as when plaintiffs' 'occupancy of the home indicates that they accepted the benefits of [the underlying] purchase agreement for the home' signed by another family member.'" *Id*. at 376 n.7 (emphasis added) (quoting *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529, 533 (Tex. 2023)). In that case (reported on elsewhere in this paper), the Court was still applying direct-benefits estoppel, and concluded that a purchaser's non-signatory spouse "clearly" received "direct benefits from the purchase of the home" by occupying it. *Id*. at 534. The Court's use of "another way" suggests that a party can compel a non-signatory to arbitrate either by demonstrating the traditional direct-benefits estoppel elements (claim based on contract, seeks a direct benefit from the contract), or by proving that the non-signatory substantially benefitted from the contract itself. While the distinction between these two may appear thin, arguably the salient feature of the former is that it requires reference to the plaintiff's claims and the defendant's defense to liability, while the latter focuses on conduct outside the context of litigation. The *Ha* case is discussed in more detail below.

The Court ducked another issue. In the arbitration, Lennar had sued Whiteley claiming she "breached her contractual obligations under the PSA and Limited Warranty." *Lennar Homes*, 672

S.W.3d at 374. As discussed, if the plaintiff asserts several claims, but at least one of them is governed by a broad arbitration clause, all claims must be arbitrated. *Id*. at 377 n.8 ("[W]e have recognized that a single arbitrable claim on a contract is sufficient to require the claimant to arbitrate any other claims that fall within the scope of the contract's arbitration provision[.]"). But the Court declined to address "whether a non-signatory claimant may likewise be required to arbitrate any related counterclaims asserted against it in the course of compelled arbitration proceedings" because Whiteley had "not articulated any distinct grounds for refusing to confirm" the arbitration award on Lennar's claims. *Id*. The issue remains undecided under Texas law.

Another interesting part of the Court's analysis is it referenced the original purchase agreement's "general disclaimer of the warranty of habitability[.]" *Id*. at 379. Ordinarily, you cannot substitute an express warranty for an implied warranty of habitability. *See, e.g.*, *Centex Homes*, 95 S.W.3d at 275 ("While the parties are free to define for themselves the quality of workmanship, there is generally no substitute for habitability."). Although the Court agreed "with Whiteley that Lennar's reliance on such a general disclaimer would be unlikely to succeed on the merits," it noted that under the FAA (which governed the arbitration), there was no "wholly groundless" exception for compelling claims to arbitration. *Lennar Homes*, 672 S.W.3d at 379 n. 12 (quoting *Henry Schein Inc. v. Archer & White Sales, Inc.*, --U.S.--, 139 S. Ct. 524, 528 (2019)). Put differently, it might have been the case that Lennar did not properly limit its liability for the implied warranty of habitability through that disclaimer, but the Court was deferring the issue to the arbitrator. The result might have been different if the "general disclaimer" was the *only* basis for evaluating Lennar's nonliability under the contract, but there were others (including the mold disclaimer). And so the insufficiency of the general disclaimer would not have been decisive of the larger arbitrability issue as to whether Whiteley had to arbitrate, or not.

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In *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 672 S.W.3d 422 (Tex. 2023), the Court held (per curiam), largely relying on *Lennar Homes*, compelled a subsequent purchaser to arbitrate negligence and implied warranty claims against the original homebuilder under the theory of direct-benefits estoppel.

In 2013, Taylor Morrison entered a purchase agreement with two individuals to build and deed them a home in League City. *Id*. at 423. The purchase agreement contained a broad arbitration clause requiring arbitration of any "and all claims" whether sounding in contract, tort, statute, etc., and included a one-year "Limited Warranty" specifying "Quality Standards" governing the construction of the home. *Id*. at 422–23. The Limited Warranty, in turn, excluded coverage for consequential damages, damages from water, or damages from the presence of mold,[47] and excluded defects that were "not reported in writing to [Taylor Morrison] within the Limited Warranty Term." *Id*. at 423. The Limited Warranty also disclaimed all implied warranties—including habitability and "quality of construction." *Id*.

[47] The purchase agreement had a separate provision disclaiming responsibility for mold "except as provided in the written limited warranty". *Id*. at 424.

In 2016, the original homebuyers sold the house to four individuals, who in turn sold the property to the Kohlmeyers. *Id*. at 424. After moving in, the Kohlmeyers sued Taylor Morrison alleging that the house had construction and design defects causing high moisture and substantial mold growth. *Id*. The Kohlmeyers alleged that Taylor Morrison breached the implied warranties of habitability and good workmanship, and for negligent construction. *Id*. The Kohlmeyers also sued under the DTPA, though it is unclear from the opinion if the DTPA claims were standalone laundry-list claims, warranty claims, or both. *Id*. Taylor Morrison moved to compel arbitration under theories of direct-benefits estoppel and "implied assumption." *Id*. at 425. The trial court eventually denied the motion to compel, and Taylor Morrison appealed. *Id*. Probably because *Lennar Homes* had not yet issued, the court of appeals affirmed the trial court's denial of Taylor Morrison's motion to compel. *Id*.

In an abbreviated opinion, the Texas Supreme Court reversed, largely reciting its holding in *Lennar Homes*. *Id*. at 425–26. The Court reasoned that the purchase agreement had been automatically assigned to the subsequent purchasers, and it "contained disclosures that could affect the implied warranty of habitability and performance standards that could affect the implied warranty of good workmanship." *Id*. at 426. Finally, the Court held that because the arbitration "provision broadly covers any claims or disputes related to the agreement or the property, including any disputes over the property's design or construction defects[,]" the Kohlmeyers claims relating to those defects fell within the scope of the arbitration provision. *Id*.

Based on *Lennar*, the Austin Court of Appeals reached a similar result. In *Meritage Homes of Tex., LLC v. Pouye*, No. 03-21-00281-CV, 2023 WL 4139033 (Tex. App.—Austin June 23, 2023, no pet.) (mem. op.), the court of appeals held that direct-benefits estoppel required a subsequent purchaser to arbitrate negligence and DTPA claims.

The dispute arose from the construction and sale of a residential home. *Id.* at *1. The homebuilder (Meritage Homes) constructed the home and sold it to the original homeowners under a purchase agreement. *Id.* at *2. The purchase agreement contained arbitration and limited warranty provisions. *Id.* The arbitration provision required Meritage and the original homeowners to arbitrate "any controversy or claim or matters in question" including, but not limited to (a) any matter arising out of or relating to the design or construction of the home; (b) violations of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA); (c) claims for defective design or construction of the home; (d) any alleged breached of express or implied warranties; and (e) and any other cause of action relating to or arising out of the construction or sale of the home by Meritage. *Id.* The purchase agreement's limited warranty also stated that the limited warranty was the sole warranty provided by Meritage and that all other express or implied warranties, including warranties of merchantability, fitness for a particular purpose, good and workmanlike construction, and habitability (except for latent undisclosed conditions), were disclaimed and excluded. *Id.*

The plaintiffs (Pouye and Toure) subsequently bought the home from the original homeowners. *Id.* at *1. After moving into the home, they sued Meritage for negligence, gross negligence, and DTPA violations alleging inadequate and improper installation of the home's exterior stucco system. *Id.* at *2. Through their DTPA claims, the plaintiffs contended that Meritage breached the implied warranties of habitability and good and workmanlike construction.

Id. Meritage filed a plea in abatement and moved to compel arbitration. *Id.* Meritage argued that the plaintiffs, as non-signatories, were required to arbitrate their claims under the purchase agreement that Meritage entered with the home's original owners. *Id.* The trial court disagreed and denied Meritage's plea and motion. *Id.*

The sole issue on appeal was whether the plaintiffs, as non-signatory subsequent purchasers of the home, were required to arbitrate their claims against Meritage under a direct-benefits estoppel theory. *Id.* at *3. The court of appeals noted that direct-benefits estoppel applies when non-signatories seek the benefits of a contract, thus estopping them from simultaneously attempting to avoid the contract's burdens, including the obligation to arbitrate a dispute. *Id.* It explained that determining whether non-signatories are seeking the benefit of a contract requires courts to look to the substance of the non-signatories' claims (rather than artfully pleaded claims). *Id.* It clarified that if the non-signatories' claims depend upon the existence of the contract containing the arbitration clause—unlike claims that arise from general obligations imposed by law—they must be arbitrated. *Id.*

The court of appeals largely deferred to *Lennar Homes* (discussed above)—which addressed the application of direct benefits estoppel to compel a non-signatory subsequent purchaser of a home to arbitrate claims against a homebuilder—and was issued after the trial court had denied the homebuilder's efforts to compel arbitration. *Id*. at **3–4. The court noted that in *Lennar Homes* that direct-benefits estoppel required a non-signatory subsequent purchaser to arbitrate negligence and breach of implied warranty claims against a homebuilder because liability for those claims could not be decided without referencing the original purchase agreement and warranties in it. *Id.*

Similarly, in *Lennar Homes of Texas Land and Construction Ltd. v. Cockerham,* No. 09-21-00354, 2023 WL 7852058 (Tex. App.—Beaumont Nov. 6, 2023) (mem. op.), the court of appeals held that subsequent purchasers of a home could be compelled to arbitrate construction defect claims under the original sales contract, largely in reliance on *Lennar Homes*.

Cockerham arose out of a purchase and sale agreement between a predecessor-in-interest to Lennar Homes (the builder) and buyers Ray and Kimberly Wideman. *Id.* at *1. The contract contained an arbitration agreement requiring the arbitration of "any dispute (whether contract, warranty, tort, statutory or otherwise)." *Id.* The contract also included an "Limited Warranty" that contained an arbitration clause and excluded all implied warranties. *Id.* at **1–2.

The Widemans sold their home to the Cockerhams, who subsequently brought claims against the builder alleging that construction defects had "caused significant mold growth in Plaintiffs' home." *Id.* at *2. The Cockerhams brought claims for DTPA violations, breach of the implied warranties of habitability and workmanship, and negligence. *Id.* Lennar answered and moved to compel arbitration, arguing the Cockerhams were bound to the original contract's arbitration provisions under the doctrine of direct benefits estoppel. *Id.* at **2–3. The trial court denied the motion, and Lennar brought an interlocutory appeal. *Id.* at *3.

The primary issue on appeal was whether the Cockerhams' claims arose under the original sales contract such that they could be compelled to arbitrate under the doctrine of direct benefits

estoppel. *Id.* The court determined that they did. *Id.* at *6. In doing so, the court compared the operative facts to those of *Lennar Homes* and found them nearly identical. *Id.* at *5. First, the plaintiffs in *Lennar Homes* sued the builder of their home for construction defects that allegedly caused mold growth. *Id.* Second, the plaintiffs in *Lennar Homes* were subsequent purchasers of the home, and not parties to the original contract. *Id.* Third, the *Lennar Homes* plaintiffs sued the builder for negligent construction and breach of implied warranties of habitability and good workmanship. *Id*. Finally, the arbitration clause at issue in *Lennar Homes*, like this case, was "very broad." *Id.* The court therefore found it appropriate to deliver the same result. *Id*. It held that the implied warranties that created the Cockerhams' claims were "as much part of the writing as the express terms of the contract." *Id.* As a result, the court held the Cockerhams' implied warranty claims sought relief under the original sales contract. *Id.* at *6. The Cockerhams were therefore bound under direct benefits estoppel to arbitrate those claims, and the court reversed and remanded with instructions to enter an order compelling arbitration.

In *Taylor Morrison of Texas, Inc. v. Ha*, 660 S.W.3d 529, 531 (Tex. 2023) the Texas Supreme Court (per curiam) held that a non-signatory spouse and children who accepted substantial benefits from a home purchase contract by living in the home were bound by an arbitration clause within that contract.

Tony and Michelle Ha and their three minor children sued their home seller, Taylor Morrison, in district court for construction defects in their home. *Id*. Although only Mr. Ha signed the purchase agreement, Taylor Morrison sought to compel Mrs. Ha and the children to arbitrate based on a provision in the agreement broadly requiring arbitration of all disputes arising out of the purchase agreement, the property, or the sale. *Id*. at 531–32.

Mrs. Ha and the children contended they were not bound by the arbitration clause because their claims—negligence, negligent construction, and violation of the RCLA—were not based on the contract. *Id*. Only Mr. Ha asserted breach of implied warranty, fraud in a real-estate transaction, breach of contract, and quantum meruit claims. *Id*. at 532.

The primary issue on appeal was whether direct-benefits estoppel required Mrs. Ha and the children to arbitrate their claims even though they did not sign the purchase agreement. *Id.* "Under "direct-benefits estoppel," a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate." *Id*. at 533 (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005)). A non-signatory can seek the benefits of the contract either by (1) suing based on the contract or (2) conduct that "deliberately seeks and obtains substantial benefits from the contract itself." *Ha*, 660 S.W.3d at 533 (quoting *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005)).

The Supreme Court of Texas concluded that although Mrs. Ha and the children arguably did not sue on the contract, they could be compelled to arbitrate because they accepted the benefits of the purchase agreement by occupying the home. *Id*. at 533. This result was consistent with the unique nature of marital and parent-child relationships. *Ha*, 660 S.W.3d at 533–34. As a spouse, Mrs. Ha benefitted from the vested rights she received in homestead property. *Id*. at 534. And as parents, the Has had the right to equitably bind their children to an arbitration agreement by seeking

the benefit of moving their child into a home just as they had the right to sign an arbitration agreement on behalf of their children. *Id*.

The same day, in *Taylor Morrison of Texas, Inc. v. Skufca as Next Friend of KSX and KSXX*, 660 S.W.3d 525, 526, 29 (Tex. 2023), the Texas Supreme Court (per curiam) also held that non-signatory children who sued on a home purchase contract subjected themselves to the contract's arbitration provision.

Jack and Erin Skufca and their two minor children sued their home seller, Taylor Morrison, in district court for construction defects in their home. *Id*. at 526–27. Taylor Morrison moved to abate and compel arbitration based on a provision in the purchase contract requiring arbitration of all disputes arising out of the purchase agreement, the property, or the sale. *Id*. at 527.

The children contended they were not bound by the arbitration clause because they did not sign the contract. *Id*. But unlike *Ha*, the Skufca's petition did not differentiate between the parents and the children when asserting each cause of action. Compare *Skufca*, 660 S.W.3d at 527–28 with *Ha*, 660 S.W.3d at 531–32. The appeal involved only a narrow question of pleading: whether the children joined the breach-of-contract claim in the petition and thus could be compelled to arbitrate because they sought the direct benefits of the purchase contract by suing on that contract. *Skufca*, 660 S.W.3d at 527.

The caption of the petition listed four individuals—the two parents and two children—as the plaintiffs. *Id*. at 528. All causes of action asserted failed to distinguish between the parents and children, stating "Plaintiffs" had a valid contract, fully performed, and had suffered a breach. *Id*. By contrast, the damages section specified certain family members had suffered various damages. *Id*. Based on "the petition's own terms" that did not differentiate between the parents' and childrens' causes of action, the Court held that the children fully joined the breach-of-contract claim and were thus subject to arbitration based under direct-benefits estoppel. *Id*. at 529.

After dispensing with the pleading question before it, the Court noted that a pleading amendment could not cure the children's obligation to arbitrate. *Id*. As in *Ha*, the Skufca children had accepted the benefits of the purchase contract by living in the home, which served as an additional basis for compelling arbitration based on direct benefits estoppel. *Id*.

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Practice Note: Although *Skufca* involved direct-benefits estoppel caused by pleading relief through a contract, it would not have mattered anyway given the Court's treatment of the "substantial benefits" sub-species of direct-benefits estoppel adopted in *Ha*. The bigger issue is how *Lennar* and *Kohlmeyer* interact with *Skufca* and *Ha*. From the former two cases, subsequent purchasers can be required to arbitrate claims in the original construction contract (that the plaintiffs were non-signatories to) if they sue for negligent construction and breach of implied warranties, including the implied warranty of habitability. But *Ha* also involved a non-signatory, in that case the spouse of a signatory, and her children. Assuming the subsequent purchasers in *Lennar* or *Kohlmeyer* could articulate a theory of liability that did not implicate the original homebuilder's liability (or nonliability) under the contract, could the homebuilder still compel arbitration on a "substantial benefits" theory? If the "substantial benefits" that the children or

spouse obtained was *living in the house*, it remains to be seen how future occupants (including subsequent purchasers) would avoid arbitration.

Other big questions remain. How far does the "substantial benefits" theory go? And is it limited to the arbitration context? Do *guests* of a subsequent purchaser also obtain "substantial benefits" by staying in the house over the weekend? What if they stay for a month? What if they are renters? And if the plaintiffs in *Lennar*, *Kohlmeyer*, *Ha*, and *Skufca* cannot avoid "the arbitration clause" because a person "cannot both have his contract and defeat it too[,]" will the same become true of other contractual provisions, like limitations of liability, disclaimers, and so on? *Jody James Farms*, 547 S.W.3d at 637 (quoting *In re Weekly Homes, L.P.*, 180 S.W.3d at 135)). As Texas law ventures towards the primacy of contract law, we may be approaching the final frontier.

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In *Texas First Rentals, LLC v. Montage Development Co., LLC*, No. 04-22-00429-CV, 2023 WL 5270534 (Tex. App.—San Antonio Aug. 16, 2023, no pet.) (mem. op.), the court of appeals examined the evidentiary requirements for compelling a non-signatory to arbitration.

The case concerned agreements to rent construction equipment. *Id*. at *1. Derick Murway, the owner or president of Montage Development, submitted a credit application to Texas First Rentals (TFR). *Id*. The credit application did not include any arbitration provision but did reference a "Terms and Conditions" purportedly governing "TFR's Rental Contract." *Id*. Although the record discussed on appeal is turgid, TFR rented equipment to Montage through at least five "Rental Agreements," all of which postdated the credit application. *Id*. at *2. The Rental Agreements consisted of various invoices, billings, "Rental Outs," "Pickup Tickets," and in some cases terms and conditions associated with them. *Id*. at *2. According to the court, the "Rental Outs" appeared to be a "form" used "when TFR releases equipment to a customer" while the "Pickup Tickets" was used when Montage returned the equipment. *Id*. Complicating matters, some of the Rental Outs listed a date that was "after the date the equipment is listed as being delivered to Montage." *Id*.

After Montage purportedly failed to pay for rental equipment, TFR sued Montage and Murway for breach of contract, trust fund violations, and suit on sworn account. *Id*. at *1. Montage and Murway moved to transfer venue, and TFR moved to compel arbitration and to stay the proceedings. *Id*. TFR based its motion to compel on the credit application, and the purported terms and conditions incorporated into the Rental Agreements, supported by an affidavit from TFR's financial services manager. *Id*. at *2.

The primary issue on appeal was the evidentiary state of the five Rental Agreements. The documents were inconsistent, at best. *Id*. at *7. None of them included documents signed by Murway. *Id*. at *10. There were only two "Rental Agreements" that were signed by Montage, and of these two, only one of them included an additional terms and conditions page referencing arbitration. *Id*. at **7–8. The court held Montage could be compelled only to arbitrate disputes concerning the Rental Agreement that Montage signed, incorporating the additional terms and conditions. *Id*. at *8.

The court also rejected TFR's incorporation by reference argument related to the credit application. *Id*. at *5. The court acknowledged that incorporation by reference is a valid basis for compelling arbitration but noted that TFR did not provide a copy of the "Rental Contract" (referenced in the credit application) that would support an incorporation by reference theory. *Id*. And the court refused to credit TFR's affidavit because it (1) failed to assert that the Rental Agreements were true and correct copies of the Rental Contract; and (2) did not assert that the additional terms and conditions remained the same between 2019 (when the credit application was signed) and 2021 (when the Rental Agreements purportedly took place). *Id*. at *6.

Because the evidence failed to support the incorporation by reference theory, the court held Murway could not be compelled to arbitrate at all, as he had not signed any of the Rental Agreements. *Id*. at **8–9. TFR offered two additional theories to compel a non-signatory (Murway) to arbitration: agency and intertwined-claims theory. *Id*. at **8–10.[48] First the court rejected TFR's agency theory, pointing out that agency is typically used by a *non-signatory* agent to compel a signatory to arbitration. *Texas First Rentals*, 2023 WL 5270534, at *9. But here, it was TFR (signatory) attempting to compel a purported agent but non-signatory (Murway) to arbitration. *Id*. The court dispensed with the intertwined-claims theory on the same basis, noting that other jurisdictions only applied it when *non-signatories* were attempting to compel signatories to arbitration. *Id*. at *10.

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Practice Note: There are bases for a signatory to compel a non-signatory to arbitration, but it appears that agency and intertwined claims are not generally effective to do so. While the Texas Supreme Court has "acknowledged" the intertwined-claims theory—and at least one court of appeals predicted that the Texas Supreme Court would adopt it—to date the Texas Supreme Court has yet to expressly approve the theory. *Jody James Farms*, 547 S.W.3d at 624. As discussed elsewhere in the paper, there are other theories a signatory may use to compel a non-signatory to arbitrate.

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In *Trans-Vac Sys., LLC v. Hudson Ins. Co.*, No. 08-22-00232-CV, 2023 WL 4146295 (Tex. App.—El Paso June 23, 2023, no pet.) (mem. op.), the court of appeals affirmed the trial court's denial of a motion to compel arbitration, holding that the arbitration agreement incorporated by reference into a performance bond did not bind surety to arbitrate disputes arising solely under the performance bond.

[48] The "intertwined-claims theory" is a sub-species of equitable estoppel, sometimes called "alternative-estoppel". *Id*. at *9. It allows a non-signatory to compel arbitration when (1) the non-signatory has a close relationship with a signatory to a contract that calls for arbitration; and (2) the claims are "intimately founded in and intertwined with the underlying contract obligations." *Id*. at *9 (citing *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 639 (Tex. 2018)).

Trans-Vac hired MGB (as a subcontractor) on a US Army Corps of Engineers project. *Id*. at *1. The subcontract contained an arbitration agreement and required MGB to furnish performance and payment bonds to Trans-Vac's satisfaction. *Id*. Later, MGB executed a "subcontract performance bond" agreement[49] with Hudson as the surety. *Id.* MGB then allegedly defaulted on its contractual obligations. *Id.* at *2. When the surety learned of the default, it sent a letter demanding that Trans-Vac not pay MGP further without the surety's consent. *Id.*

Almost two years later, Trans-Vac sent a letter to the surety requesting payment of its excess costs of $458,966, incurred due to the cost to complete the remaining work after MGB's alleged default. *Id.* The surety responded, contending that by failing to timely provide notice of the default, Trans-Vac had prejudiced the surety from exercising its right to mitigate damages, therefore voiding the bond. *Id.* Years later, Trans-Vac filed a demand for arbitration against the surety, seeking damages. *Id.* The surety then petitioned in the trial court seeking declaratory relief that Trans-Vac's claims were time-barred and that the surety was not bound by the arbitration agreement. *Id.*

The court of appeals began its analysis by restating the six theories that Texas courts recognize may bind non-signatories to arbitration agreements: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary." *Id.* at *5 (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 730 (Tex. 2005)). Trans-Vac relied on the incorporation by reference theory. *Trans-Vac*, 2023 WL 4146295, at *4. On interlocutory appeal, Trans-Vac argued that because the subcontract was incorporated by reference into the performance bond "without restriction or limitation," the parties intended for all the provisions—including the arbitration clause—to apply to the performance bond and against the surety. *Id.* at *6. According to the court, however, Trans-Vac did not give the surety the opportunity to remedy MGB's default, and instead remedied the default itself and sought payment from the surety after. *Id.* at *7.

The court held that the surety could not be said to "stand in [MGB's] shoes for the purpose of litigating this particular dispute." *Id.* Further, the court held that, given arbitration is a matter of consent, the subcontract's incorporation by reference into the performance bond did not automatically give rise to an inference that the surety consented to arbitrate disputes relating solely to the surety's compliance with the performance bond terms. *Id.* The court also examined the arbitration agreement itself to determine whether the parties intended the particular dispute to be subject to arbitration. *Id.* First, the court examined whether the agreement contained general or specific language suggesting whether it applied to "any claims arising from or relating to the contract" or language demonstrating an intent to only bind the signatories to the agreement. *Id.* at *8. The court restated the principle that, when an arbitration agreement specifies the parties to whom it applies, in this case Trans-Vac and MGB, it does not bind a surety to arbitrate any disputes relating to the contract if the dispute between the surety and Trans-Vac (as obligee) does not involve performance issues under the contract but only involves issues relating to the surety's obligations under the performance bond. *Id.* at *9. The court found that the arbitration agreement

[49] Ostensibly Trans-Vac was the obligee on the bond, though the court did not expressly state that to be the case. But the court did discuss generally the tripartite relationship between principal, surety, and the obligee later in the opinion. *Id*. at *7.

language was specific to Trans-Vac and MGB. So it held the contract did not reflect the parties' intent to require the surety to arbitrate its disputes with Trans-Vac if they arose solely under the performance bond. *Id.* at *12. Finally, the court examined the language of the performance bond itself. *Id.* The bond mentioned "suits" under the bond—language that ordinarily indicates "proceedings in court." *Id.* The court held this, and other language, confirmed that the intent behind the performance bond was to resolve disputes arising under it in court rather than through arbitration. *Id.* Accordingly, the court affirmed the trial court's order denying the motion to compel arbitration. *Id.*

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Practice Note: The surety had argued that because the subcontract contained standard language disclaiming the creation of any relationship between anyone besides the parties, it "plainly" could not "impose any contractual duty (to arbitrate) running from [the surety] to Trans-Vac." *Id*. at *11 n.14. The court rejected the argument, acknowledging that parties clearly could have contemplated the surety being bound by terms in the subcontract given the entire purpose of a performance bond is to create a tripartite relationship. *Id*.

If parties desire to cause the surety to arbitrate disputes over breach of the performance bond, the court identified a way for them to do so. The subcontract did not exclude the surety, but by its terms applied only to Trans-Vac and MGB. *Id*. at *11 n.13. The court noted that "had" the parties "wished to require [the surety] to participate in arbitration, they could have expressly included the surety" as a defined party required to participate in arbitration. *Id*. The subcontract could have defined MGB under its terms to include MGB "or its surety." Even if MGB had not yet procured a performance bond at the time it contracted, the incorporation by the surety of a subcontract contemplating arbitration *by the surety* probably would have tipped the result the other direction.

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In *StrucSure Home Warranty, LLC v. 2RH Bros. Properties, LLC*, No. 05-22-01214-CV, 2023 WL 4557622 (Tex. App.—Dallas July 17, 2023, no pet.) (mem. op.), the court affirmed the denial of a motion to compel a non-signatory to arbitrate claims relating to a limited home warranty.

2RH Brothers Properties entered into a construction completion agreement with Homestead Concepts to take over the construction of a home that was ninety percent complete. *Id*. at *1. 2RH then listed the home for sale. *Id*. The home was purchased by Danica and Michael Sessna (homeowners). *Id*. The sales agreement listed Homestead as the builder. *Id*. As part of the purchase, 2RH promised to provide a limited home warranty covering construction defects. *Id.* 2RH purchased the limited home warranty through StrucSure Warranty. *Id.*

Shortly after closing, the homeowners experienced many problems and submitted a notice of claim to StrucSure under the limited home warranty. *Id*. StrucSure refused to honor the warranty because Homestead was not the *original* builder of the home despite being listed as such in the limited home warranty. *Id*. The homeowners sued 2RH, and 2RH filed a third-party petition

against StrucSure for breach of contract and fraud for failing to honor the warranty. *Id*. at *2. StrucSure filed a plea in abatement and motion to compel arbitration against 2RH, arguing that 2RH's breach of contract and fraud claims were subject to the arbitration provision because 2RH sought and obtained benefits under the limited home warranty despite being a non-signatory to the Limited Warranty. *Id*. at *3. The trial court denied the motion to compel arbitration, and the court of appeals affirmed. *Id*. at *1.

Although non-signatories may be bound to an arbitration clause under the equitable doctrine of direct-benefits estoppel if the non-signatory seeks to benefit from a contract with an arbitration agreement, the court held 2RH was not seeking to enforce the terms of the limited home warranty. *Id*. at *4. Instead, the court concluded that 2RH's breach claim involved an alleged breach to *provide* the limited home warranty, not a breach of any term in the Limited Warranty itself. *Id*. Similarly, 2RH's fraud claim was not based on any of the exclusions or limitations that might apply to the limited home warranty; instead, the issue was whether the limited home warranty existed and to what extent 2RH may be entitled to damages for paying for a limited home warranty that did not cover what 2RH allegedly bargained for on the homeowner's behalf. *Id*. And since 2RH was only seeking breach of contract damages from StrucSure for the *purchase price* of the warranty ($3,412.50) rather than remedial damages under the warranty, the court held that 2RH was not trying to enforce StrucSure's obligations under the Limited Warranty itself. *Id*. at *4. Regarding 2RH's nondisclosure claim, the court held that "2RH's fraud claim is not based on any of the exclusions or limitations that might apply to the Limited Warranty" but instead was based on "whether the Limited Warranty exists[.]" *Id*. at *5. The court did not look to the existence of the Limited Warranty itself to determine StrucSure's liability, instead holding that because fraud arises from a failure to disclose information, "StrucSure's potential liability did not depend on the Limited Warranty's existence." *Id*.

StrucSure also sought to compel arbitration based on an agency theory, arguing that 2RH was Homestead's agent in procuring the Limited Warranty, and thus could be compelled to arbitrate through it. *Id*. at *6. The court of appeals disagreed, stating that although agency is one theory by which arbitration by non-signatories may be required, the record evidence did not support a finding of agency. *Id*. The construction completion agreement was signed by Elton Johnson on behalf of Homestead as contractor and by Raul Ruiz on behalf of 2RH as owner. *Id*. The warranty deed transferring ownership of the property did not reference StrucSure, Homestead, or the limited home warranty. *Id*. The limited home warranty application was not signed by Homestead and only listed Homestead as builder on the application. *Id*. Because nothing in the record indicated that 2RH acted on behalf of Homestead, the dispute did not fall within the scope of the limited home warranty's arbitration provision.

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Practice Note: Although the *Lennar Homes* opinion came out before *StrucSure*, there is no discussion of the former in the latter, probably because briefing in *StrucSure* closed several months before *Lennar* published. *StrucSure* is difficult to square with *Lennar Homes*, though. *StrucSure* was focused exclusively on whether "potential liability" depended on the agreement with an arbitration clause in it. *StrucSure*, 2023 WL 4557622, at *5. But *Lennar* expanded the scope to include the defendant's *nonliability* under the agreement with an arbitration clause.

Lennar Homes, 672 S.W.3d at 379 ("In other words, although liability arises in part from the general law, *nonliability* arises from the terms of the express warranties described" in the warranty). As *StrucSure* argued that 2RH's fraud claims were "based upon referencing the exclusions and limitations in the Limited Warranty[,]" arguably those claims related to StrucSure's *nonliability* to 2RH's claims. *StrucSure*, 2023 WL 4557622, at *5. It is an interesting issue that will have to remain for another day, as there was no motion for rehearing or appeal filed.

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In *Louisiana-Pacific Corp. v. Newport Classic Homes, L.P.*, No. 05-21-00330-CV, 2023 WL 3000579 (Tex. App.—Dallas Apr. 19, 2023, no pet.) (mem. op.) the court of appeals compelled a purchaser of flooring materials to arbitrate with the materials' manufacturer and distributor under the theory of direct-benefits estoppel.

Louisiana-Pacific Corp. addresses the applicability of an arbitration clause in a product warranty, where the chain from manufacturer to ultimate purchaser was complicated by the presence of middlemen; an intervening distributor and retailer—and the distributor was the sole party in privity of contract with the product manufacturer. *Id.* The product purchaser brought suit (in state court) against the manufacturer along with the distributor and retailer following a dispute among the parties over the quality and replacement of the product under the manufacturer's warranty. *Id.* at *2. The manufacturer moved to remove the case to federal court, although the case was remanded due to lack of subject-matter jurisdiction. *Id.* Later, the distributor and manufacturer sought to compel arbitration of the purchaser's claims, citing the arbitration clause in the manufacturer's written warranty for the flooring product at issue. *Id.* The trial court granted the distributor's and manufacturer's motions to compel arbitration, but subsequently reversed course after granting the purchaser's motion to reconsider the trial court's order compelling arbitration of its claims. *Id.* at *3.

The court of appeals held arbitration of the purchaser's claims was required under the doctrine of direct-benefits estoppel since the purchaser, as a non-signatory to the arbitration clause in the product warranty (which the court concluded was valid and enforceable), sought to derive direct-benefits from the warranty. *Id.* at **4–5. Incidentally, the court of appeals also concluded that the distributor and manufacturer of the product had not waived their right to compel arbitration by "substantially invok[ing]" the judicial process notwithstanding the fact the distributor and manufacturer had waited over a year after purchaser filed suit to move to compel arbitration, sought removal of the matter to federal court, moved to dismiss in federal court, and engaged in other litigation conduct the court considered to be "purely defensive action." *Id.* at **7–8.

D. Potpourri

In *Taylor Morrison of Texas, Inc. v. Glass*, No. 14-21-00398-CV, 2023 WL 2585821 (Tex. App.—Houston [14th Dist.] Mar. 21, 2023, no pet.) (mem. op.), the court of appeals held that a trial court had no discretion to modify arbitration procedures outlined in the applicable purchase agreement.

The court of appeals determined that the trial court had abused its discretion by trying to modify the terms of the arbitration agreement. *Id.* at *6. The court of appeals emphasized that the FAA, under which the parties expressly agreed to arbitrate, imposes limitations on judicial interference in arbitration procedures, and modifying the agreed-upon method of selecting the arbitrator exceeds these limitations. *Id.* at *3. Indeed, the primary purpose of the FAA is to require enforcement of arbitration agreements according to their terms. *Id.* at *6. In this case, the terms of the arbitration agreement explicitly required that arbitration be conducted through JAMS, with the only exception being that if "JAMS is for any reason unwilling or unable to serve as the arbitration service[.]" *Id.* There was no evidence that JAMS was unwilling or able to serve. *Id*. So the trial court's order modifying the agreement to not proceed under JAMS was an abuse of discretion as it failed to uphold the method of arbitrator selection outlined in the arbitration agreement. *Id.* Thus, the appellate court reversed the trial court's order and instructed the parties to proceed with arbitration before JAMS. *Id.*

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Practice Note: In a concurrence, Justice Spain raised an interesting jurisdictional issue. *Glass* was taken up on interlocutory appeal under Texas CPRC § 51.016. That statute limits an interlocutory appeal to "the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16." The majority concluded that it had jurisdiction through 9 U.S.C. § 16(a)(1)(B). *Glass*, 2023 WL 2585821, at *4. But as Justice Spain noted, the Second, Fifth, Eighth, and Ninth Circuits have concluded that jurisdiction under 9 U.S.C. § 16(a)(1)(B) is only available for an order *denying* arbitration entirely. *Glass*, 2023 WL 2585821, at *6 n.1 (Spain, J., concurring). Justice Spain would have held, instead, that the proper appellate mechanism was mandamus, rather than § 51.016. *Id*. This is a nice opportunity to remind: when in doubt, file an interlocutory appeal *and* a writ of mandamus. If one of them is dismissed, the other may survive. At the very least, on appeal ask the intermediate court to *treat* your interlocutory appeal as a writ of mandamus if it finds it has no interlocutory jurisdiction. In *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011), the party seeking an interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.016 failed to file a writ of mandamus but did ask the court of appeals to treat its interlocutory appeal as a writ of mandamus. The Texas Supreme Court ultimately held that it would "not unnecessarily waste the parties' time and further judicial resources by requiring [the party] to file a separate document with the title 'petition for writ of mandamus' listed on the cover where the party has expressly requested mandamus treatment of its appeal in an uncertain legal environment" *because* the party "specifically requested mandamus relief in the court of appeals and preserved that issue in this Court[.]" *Id*. at 453–54. The next case addresses a related issue.

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In *Builders FirstSource, Inc. v. White*, No. 05-22-00724-CV, 2023 WL 2674083 (Tex. App.—Dallas Mar. 29, 2023, no pet.) (mem. op.), the court dismissed on jurisdictional grounds a contractor's appeal of a deferred ruling on a motion to compel arbitration for want of jurisdiction.

White (an injured worker) sued Builders for damages arising out of a work injury. *Id*. at *1. The trial court denied the motion to compel but granted White's motion for a jury trial on

arbitrability, setting a date for that trial. *Id*. Builders filed an interlocutory appeal under Texas CPRC § 51.016 (relying on 9 U.S.C. § 16). *Id*. The court of appeals held that because the trial court's order deferred on the arbitrability of injured worker's tort claims, the court did not have appellate jurisdiction to entertain Builders' interlocutory appeal until the trial court made a final ruling on the matter. *Id.* at *2. Because the trial court's order made clear (i) arbitrability would be revisited and (ii) no final ruling on arbitrability was expressed, the court held (largely relying on federal case law) that 9 U.S.C. § 16 would not authorize an appeal "when a trial court's order simply defers ruling on a motion to compel arbitration." *Id.* at **1–2.

E. Waiver of right to arbitration

In *Momentum Project Controls, LLC v. Booflies to Beefras LLC*, No. 14-22-00712-CV, 2023 WL 4196584 (Tex. App.—Houston [14th Dist.] June 27, 2023, pet. denied) (mem. op.) (discussed above), the court analyzed whether an arbitration movant impliedly waived its right to arbitrate by substantially invoking the judicial process.

Booflies (owner) hired Momentum (general contractor) to build a daycare facility under a standard AIA contract. *Id*. at **1–2. Momentum sued Booflies in 2018 to recover payment for construction costs. *Id*. Separately, several of Momentum's subcontractors (including Young Lee Plumbing) also filed suit against Momentum and Booflies, and the subcontractors' suits were consolidated into Momentum's original suit. *Id*. at *4. Young Lee moved for partial summary judgment and obtained judgment for $57,958 before trial. *Id*. Four years after Momentum had originally filed suit, and two weeks before trial in the consolidated suit, Momentum moved to compel arbitration against Booflies, Young Lee Plumbing, and several other subcontractors. *Id*. at *2. Young Lee and Booflies both opposed the motion, arguing Momentum had impliedly waived its right to arbitrate by substantially invoking the judicial process to their detriment. *Id*. The trial court agreed with Young Lee and Booflies and denied Momentum's motion to compel. *Id*. at *3.

The court of appeals affirmed in part and reversed in part. *Id*. at *9. As for Young Lee, the court affirmed, holding that Momentum had waived arbitration by substantially invoking the judicial process based on the *Leach* factors and the totality of the circumstances. *Id*. at **4–6. The *Leach* factors are: (1) how long the party moving to compel arbitration waited to do so; (2) who initiated the litigation; (3) whether the movant sought judgment on the merits; (4) the reasons for the movant's delays; (5) whether and when the movant knew of the arbitration agreement during the period of delay; (6) how much discovery the movant conducted before moving to compel arbitration, and whether that discovery related to the merits; (7) whether the movant asserted affirmative claims for relief in court; (8) the extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction); (9) the amount of time and expense the parties have committed to the litigation; and (10) when the case was to be tried. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 512 (Tex. 2015). The court's focus was on Young Lee's successful summary judgment, discovery, and timing. *Momentum*, 2023 WL 4196584, at *5. The court pointed out that Momentum had resisted Young Lee's discovery and had resisted discovery motions by claiming that discovery was complete prior to its motion to compel arbitration. *Id*. at *5. The court also credited the fact that Momentum waited until *after* Young Lee secured partial summary judgment, to file its motion to compel, and only two weeks before trial ("on the eve of trial"). *Id*. at **5–6.

The court also held that Young Lee had proven that it was prejudiced by Momentum's litigation conduct. *Id*. at *5. Momentum argued that Young Lee was required to submit detailed evidence of the litigation costs it incurred at the trial court level. *Id*. at *6. The court disagreed, holding that "even without specific evidence" a party can prove prejudice on the record. *Id*. In any event, Young Lee submitted evidence of the money it expended for court costs, attending mediation, and securing the partial summary judgment that an arbitration proceeding might threaten. *Id*.

Regarding Momentum's claims against Booflies, the court of appeals reversed and compelled Booflies to arbitrate. *Id*. at **6–8. First, the court announced that it could not consider the evidence of Momentum's invocation of the judicial process *against Young Lee* in considering whether Momentum had substantially invoked the judicial process against Booflies. *Id*. at *7. The court noted that Momentum had engaged in "minimal" discovery against Booflies through one request for disclosure. *Id*. Although admonishing "that Momentum could have been more prompt in seeking arbitration," the court also held that "Booflies was similarly inactive." *Id*.

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Practice Note: Implied waiver by substantial invocation of the judicial process is always a fact-intensive exercise. Pursuing or waiting until after losing summary judgment is a common means by which parties impliedly waive a right to arbitrate, and so the decision is not surprising with respect to Young Lee Plumbing. But Booflies was unsuccessful in resisting arbitration even though Momentum waited four years into litigation, and weeks before trial, to arbitrate. Had Booflies engaged in more conduct in litigation—forcing Momentum to reciprocate—the result may have come out differently.

The court's analysis focused on prejudice on the parties resisting arbitration as well, consistent with Texas law. *See Perry Homes v. Cull*, 258 S.W.3d 580, 594–95 (Tex. 2008) (reiterating that "waiver of arbitration requires a showing of prejudice"). But the court pointed out in a footnote that the Supreme Court of the United States rejected the prejudice requirement in *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1712–14 (2022), at least under the FAA. Although the arbitration agreements were governed by the FAA, the court declined to follow *Morgan*, deferring to the Texas Supreme Court as to whether *Morgan* changes the requirement "as a matter of procedure" in Texas. *Momentum*, 2023 WL 4196584, at *5 n.5. Several other courts of appeals have similarly ducked the *Morgan* issue, and it will likely be up to the Supreme Court of Texas to decide what effect, if any, *Morgan* has on Texas's waiver of arbitration law.

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In *Pearland Urban Air, LLC v. Rockwood Alliances, Inc.*, No. 14-22-00499-CV, 2023 WL 4359992 (Tex. App.—Houston [14th Dist.] July 6, 2023, no pet.) (mem. op.) the court of appeals held that the party resisting arbitration had failed to show that the movant impliedly waived its right to arbitration by substantially invoking the judicial process.

An owner (Urban Air) hired a general contractor (Rockwood) to construct a trampoline and adventure facility. *Id*. at *1. The parties' contract contained a broad arbitration clause that appears to be based on a modified A201-2017 General Conditions, stipulating that the FAA governed. *Id*. The general contractor sued the owner for breach of contract, claiming the owner failed to pay for improvements. *Id*. at *2. One month before trial, the owner's lawyer withdrew. *Id*. On the day of trial, the owner moved to compel arbitration, for the first time invoking the arbitration clause. *Id*. The general contractor resisted, arguing that the owner had impliedly waived its right to arbitrate by substantially invoking the litigation process. *Id*. The trial court denied the owner's motion to compel. *Id*.

On appeal, the owner sought dismissal of the appeal based on the general contractor's erroneous reference to the statute authorizing interlocutory appeal under the TAA (Tex. Civ. Prac. & Rem. Code § 171.098) rather than under the FAA. *Id*. at *3. Interlocutory appeals are authorized under the FAA through Tex. Civ. Prac. & Rem. Code § 51.016. *Id*. The court held that the erroneous reference did not deprive it of subject matter jurisdiction, as the general contractor had filed its notice of appeal "in a bona fide attempt to invoke the appellate court's jurisdiction." *Id*.

The court of appeals then reversed the trial court, largely on evidentiary grounds. *Id*. at **3–5. The court reiterated that once a party proves the existence of a valid, enforceable arbitration agreement, a "heavy burden" shifts to the party resisting arbitration to prove a defense, including implied waiver through substantially invoking the litigation process. *Id*. at **4–5. The general contractor failed to put on any evidence substantiating its arguments that the parties engaged in extensive discovery, or of other time and expense expended by the general contractor through the litigation initiated by the owner. *Id*. at *4. The court summarily rejected the general contractor's argument that litigating for a year, or participating in mediation, were sufficient to waive the owner's right to arbitrate. *Id*. at **4–5.

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Practice Note: Texas law favors arbitration and it is not enough to argue that a party seeking arbitration has substantially invoked the litigation process. A resisting party must put on evidence, which should be in the form of litigation conduct, and include arguments about prejudice. As in *Momentum*, the court declined to address whether the Supreme Court of the United State's *Morgan* decision vitiated the prejudice requirement, although on slightly different grounds. As the court had determined that the owner had not substantially invoked the litigation process, there was no reason for it to address the second prong, prejudice. *Id*. at *5 n.3. Because a party resisting arbitration must establish both prongs, it is critical that the party put on evidence substantiating both, until the Texas Supreme Court addresses the effect of *Morgan* on Texas courts.

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In *Longhorn Canyon Partners, L.P. v. BFS Tex. Sales, LLC*, No. 07-23-00178-CV, 2023 WL 5354783 (Tex. App.—Amarillo Aug. 21, 2023, no pet. h.) (mem. op.) (discussed above), the court held that a contractor did not waive its right to arbitrate against its subcontractor by filing suit.

Longhorn, the general contractor, filed suit against its subcontractors in response to a construction defect claim by the project's owner. *Id*. at *1. This was premature, as Longhorn and the owner had a valid arbitration agreement. *Id*. As a result, Longhorn opted against serving citation against the subs and instead moved to stay the litigation pending arbitration. *Id*. Longhorn then sought to join the subs in the arbitration proceeding. *Id*. Rather than wait to be served, one of Longhorn's subs, BFS Texas Sales (BFS), filed an answer, contested Longhorn's motion to stay, and moved for no-evidence summary judgment. *Id*. The trial court denied Longhorn's motion to stay and granted BFS's motion for summary judgment. *Id*. The arbitrators subsequently released BFS from the arbitration. *Id*. In reversing the trial court's decision, the court of appeals reminded that a party does not waive arbitration merely by filing suit. *Id*. at *2. The court held that the suit against BFS should be stayed pending the outcome of arbitration. *Id*.

In *Carpenter v. Brackish Dev., LP*, No. 05-22-00802-CV, 2022 WL 22236153 (Tex. App.—Dallas Aug. 15, 2022, no pet. h.) (mem. op.),[50] the court of appeals held that a landscape contractor had not waived its right to arbitrate by substantially invoking the judicial process.

Following a payment dispute, a homeowner sued its landscape contractor for alleged DTPA violations, fraud, and breach of the parties' agreement, which contained an arbitration clause. *Id.* at *1. After unsuccessfully attempting to serve the landscape contractor's registered agent at the address on file with the Texas Secretary of State, the homeowner served the Texas Secretary of State, who forwarded the citation to the registered agent only for the citation to come back bearing the notation "Return to Sender." *Id.* The homeowner then moved for default judgment against the landscape contractor, which the trial court granted as to liability while setting a later hearing to establish damages. *Id.* Before the trial court ruled on damages, the landscape contractor answered and moved for reconsideration of default judgment as to liability, asserting the citation had never been received by its registered agent, though the trial court denied the motion. *Id.* Approximately a month later, the landscape contractor moved to compel arbitration and abate the proceedings pending arbitration and, subject to its motion to compel, the landscape contractor also moved to set aside the default judgment as to liability. *Id.* The homeowner opposed the contractor's motion to compel, claiming the contractor had waived its right to arbitrate under the parties' agreement by "substantially invoking the judicial process." *Id.* The trial court issued an order denying the contractor's motion to set aside the default judgment, while granting the contractor's motion to compel arbitration. *Id.* The homeowner appealed the trial court's decision compelling arbitration. *Id.*

The court of appeals affirmed, holding that the contractor had not waived its right to arbitrate by substantially invoking the judicial process under the established totality of the circumstances test. *Id.* at **2–3. After noting that a defaulting defendant does not "automatically" waive its right to arbitrate, the court held that the contractor had not acted "inconsistently with its

[50] Although the Westlaw cite to the case recites that the opinion was filed August 15, 2022, a separate, nearly identical opinion was issued on December 8, 2023. There is no August 15, 2022 opinion called *Carpenter v. Brackish* on the Fifth Court of Appeals' website. The Westlaw cite appears to simply have inaccurate information about the date of the opinion. Regardless, that does not affect summarization of the holding. Because the opinion came out so recently, note there is no petition history available.

right to arbitrate." *Id.* at *3. The court further held that while the contractor had engaged in "litigation conduct" prior to moving to compel arbitration—seeking to set aside the default judgment—the conduct was too limited to meet the "high bar" necessary to establish substantial invocation of the judicial process. *Id.* at **2, 4. The court also found that the five-month gap between the contractor's answer and its moving to compel arbitration was not sizeable enough to establish waiver of the right to arbitrate. *Id.*

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Practice Note: The court declined to address whether the homeowner could establish it was prejudiced, as it had no need to reach that element having concluded that the contractor did not substantially invoke the judicial process. *Id*. at *3. Due to the "high bar" to proving that a party substantially invoked the judicial process, it may be a while until we get clear direction from the Texas Supreme Court as to whether the prejudice requirement survives in Texas after *Morgan*.

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In *Rivera v. Alan Utz & Assocs., Inc.*, No. 12-23-00009-CV, 2023 WL 6157304 (Tex. App.—Tyler Sept. 20, 2023, no pet. h.) (mem. op.), the court of appeals held that a plumbing subcontractor properly invoked its right to arbitrate in response to a motion for summary judgment and did not impliedly waive its right to arbitrate by substantially invoking the judicial process.

AUA as general contractor hired Silvio's Plumbing Silvio as a subcontractor on a project in Austin. *Id*. at *1. AUA alleged that Silvio failed to perform under the contract and sued for breach of contract in Justice Court. *Id*. After Silvio failed to answer, the Justice Court entered a default judgment, which Silvia appealed to County Court at Law. *Id*. Silvia subsequently answered through counsel, alleging in part that the subcontract contained an arbitration clause and requesting arbitration. *Id*. But Silvio did not move to compel arbitration. *Id*. AUA later moved for summary judgment on its breach of contract claim; Silvia filed a response focusing not on the merits, but on the arbitration clause. *Id*. Silvio also requested, through its response, that "the trial court deny the summary judgment and order the parties to arbitration." *Id*. The trial court concluded that Silvio had not properly invoked its right to arbitrate, or had waived its right to arbitrate, and granted summary judgment for AUA. *Id*.

The court of appeals reversed and remanded, holding that the trial court erred by granting summary judgment rather than denying it and sending the parties to arbitration. *Id*. at *5. The court agreed with AUA that Silvio "could have been clear and more diligent in seeking arbitration" but credited Silvio with "specifically" requesting an order sending the parties to arbitration in its summary judgment response. *Id*. at *2.

Turning to AUA's argument that Silvio substantially invoked the judicial process, the court engaged in an ordinary totality-of-the-circumstances analysis and concluded that Silvio's conduct did not rise to the "high hurdle" of waiver. *Id*. at **4–5. The court began its analysis by noting that it was not Silvia who elected "to resolve the dispute in court" as AUA had initiated the action in Justice Court. *Id*. at *4. It pointed out that Silvio had filed no counterclaim or issued any discovery. *Id*. Although "Silvio could have been more prompt in seeking arbitration," the delay from the

initiation of suit and Silvio's request for arbitration was only seven months, a significantly shorter time than other cases holding that a party had not substantially invoked the judicial process. *Id*.

The court also held that AUA failed to prove unfair prejudice. *Id*. The only evidence of prejudice raised by AUA was the delay, but the court reiterated that "mere delay" is not enough. *Id*. at *5.

IV. LIEN CLAIMS

In *AdvanTech Construction Systems, LLC v. Michalson Builders, Inc.*, No. 14-21-00159-CV, 2023 WL 370513 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, no pet.) (mem. op.) (discussed above), the court of appeals addressed several issues relating to constitutional and statutory liens under Texas Property Code Chapter 53, including jurisdictional requirements, entitlement to attorney's fees under § 53.156, and personal liability against the individual who filed the lien.

After a dispute arose between a general contractor and its subcontractor, the subcontractor (through its employee/agent) filed two liens. *Id*. at *1. First, the employee filed a mechanic's lien that included incorrect information, and which the trial court later found was done fraudulently. *Id*. at **1, 10. The trial court ruled that the subcontractor released that lien before trial, but later filed a constitutional lien that also contained false information. *Id*. Although the subcontractor sought a constitutional lien under a sham contractor theory, it presented no evidence at trial to support that theory. *Id*. The general contractor then sued the subcontractor and its employee, personally, for filing fraudulent liens, and secured a judgment against both, along with a finding that the liens were fraudulent. *Id*. at **2–3. The general contractor also successfully sought attorney's fees under § 53.156. *Id*. at **2–3.

The subcontractor and its employee defended against the judgment on the lien on several grounds, all rejected by the court of appeals. First, the subcontractor and its employee argued that because the original lien had been released, the constitutional lien settled before trial, and the general contractor had not brought a claim to remove the constitutional lien, the general contractor could not recover under § 53.156. *Id*. at *5. The court of appeals disagreed, crediting the general contractor's success at trial in securing a judgment finding that the liens were fraudulent. *Id*. The court reasoned that a judgment and finding that the liens were fraudulent was judgment as to "the validity and enforceability of the liens" under § 53.156. *Id*.

Second, the subcontractor challenged the trial court's jurisdiction over "lien removal claims." *Id*. at *3. The case was tried to the bench in one of the Harris County civil courts at law. *Id*. at *3. Although the Harris County civil court was a statutory county court, it also had additional jurisdiction to hear suits "for the enforcement of a lien on real property." *Id*. at *3; Tex. Gov't Code Ann. § 25.1032(d)(3) (additional jurisdiction that is particular to Harris County civil courts at law). The subcontractor argued that "enforcement of a lien on real property" did not extend to a suit to remove a lien. *AdvanTech*, 2023 WL 370513, at *4. Without deciding that question, the court of appeals held it did not matter, as Harris County civil courts at law have concurrent jurisdiction with district courts so long as the matter in controversy exceeds $500 but not $250,000. *Id*. Because the amounts in dispute were within that range, the county court at law had jurisdiction

over the suit under its concurrent jurisdiction with district courts and did not need separate jurisdiction under § 25.1032(d)3) of the Texas Government Code. *Id*.

Third, the subcontractor argued that the lien removal claims were mooted by the release of the first lien and settlement[51] of the second. *Id*. The court rejected that argument as the general contractor had sought attorney's fees for the fraudulent lien filings, and its affirmative claim could not be mooted by the subcontractor's removal of the liens. *Id*.

Fourth, the subcontractor argued that the general contractor could not recover attorney's fees under § 53.156 to remove the subcontractor's constitutional lien, reasoning that § 53.156 only authorized attorney's fees for statutory liens. *Id*. The court of appeals rejected that argument, noting that § 53.156 authorizes attorney's fees in any proceeding declaring "*any* lien or claim is invalid or unenforceable[.]" *Id*.

Finally, the subcontractor's employee argued that it could not be personally liable for attorney's fees on an agency theory, reasoning that the employee filed them on behalf of the subcontractor. *Id*. at *6. The appellate court disagreed, following the general rule that an agent is liable for its own tortious conduct. *Id*. Although the employee invoked statutory protections for members or managers of businesses (under Tex. Bus. Orgs. Code §§ 21.223(a)(2), 101.114, and 101.251), the employee failed to submit evidence that it was an owner, assignee, affiliate, subscriber, member or governing person of the subcontractor, including any company agreement establishing same. *Id*.

In *Wolfe's Carpet, Tile & Remodeling, LLC v. Bourelle*, --S.W.3d--, No. 14-22-00579, 2023 WL 4770069 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (reported on above), the court also held that a voidable, illegal contract vitiated the contractor's lien rights on a homestead.

As discussed above, the court of appeals held that Wolfe's contract with the homestead owners was voidable under the Insurance Code. *Id*. at *7. The homeowners had moved to remove Wolfe's lien because "no contract was executed or filed[.]" *Id*. (citing Tex. Prop. Code Ann. § 53.160(b)(6)(A)). The court held that a "valid contract is required to fix a construction lien on a homestead" and that since the contract was voidable by the homeowners, the trial court committed no error in removing the lien. *Wolfe's*, 2023 WL 4770069, at *7.

In *Pioneer Emerald Pointe, LLC v. Texmenian Contractors, LLC*, No. 05-22-00493-CV, 2023 WL 3963991 (Tex. App.—Dallas Jun. 13, 2023, no pet.) (mem. op.), the court of appeals held that (1) a contractor had "substantially complied" with the requirements for perfecting its lien under Chapter 53 of the Texas Property Code.

Pioneer examined the lien rights of a contractor that performed certain "make ready" work at an apartment complex (the Project) to prepare units for new tenants. *Id.* at *1. After the Project

[51] The subcontractor also settled its second lien with the project's owner. *Id*. at *5. The subcontractor argued, creatively, that the general contractor acted as the owner's agent, and was thus bound by the settlement agreement. *Id*. But the court of appeals rejected the argument as the subcontractor had put forth no evidence to support that agency theory. *Id*.

owner withheld portions of invoices issued by the contractor for the work, the contractor recorded a mechanic's lien against the Project for the full amount invoiced—which incorrectly identified the Project owner and did not include an averment or indicia of the affiant's personal knowledge. *Id.* The contractor subsequently recorded an amended mechanic's lien affidavit which correctly identified the Project owner. *Id.* The owner filed suit against the contractor to have the mechanic's lien declared invalid. *Id.* The contractor sought to foreclose on its lien against the Project. The trial court ruled in favor of the contractor, awarding damages and attorneys' fees. *Id.*

Construing the requirements of Chapter 53 liberally, the court of appeals concluded that notwithstanding contractor's incorrect identification of the owner in its initial mechanic's lien affidavit (which the contractor obtained from public appraisal district records), the contractor had "substantially complied with the Chapter 53 requirements since this 'misnomer' concerning the owner's identity was merely a 'technical defect' that could be excused since overlooking it would [not] read a provision out of the statute or prejudice another party." *Id.* at **8–9. The court also held an affidavit claimant "does not necessarily have to state that it is made on the personal knowledge of the affiant to substantially comply with [Chapter] 53." *Id.* at *8 ("Even though the [contractor's] affidavit did not explicitly state that [the contractor's owner] had personal knowledge of the matters described therein, we conclude that it substantially complied with section 53.054.").

In *Gutierrez, CDS, LLC v. Rodriguez*, No. 07-23-00260-CV, 2023 WL 8008364 (Tex. App.—Amarillo Nov. 17, 2023, no pet. h.) (mem. op.), the court of appeals held that a lien claimant's purported failure to include information about the work completed or the basis of the claimed lien did not render the lien fraudulent.

Gutierrez filed a "Texas Mechanic's Lien" claiming $105,182 against Rodriguez's property in Slaton, Texas. *Id*. at *1. Rodriguez countered with a verified motion that the lien was fraudulent under Tex. Gov't Code § 51.903. *Id*. Rodriguez argued that the lien was invalid because it failed to provide information about the work completed or explain the basis for the claimed amount. *Id*. at *2. The trial court agreed with Rodriguez, and issued findings of fact that (1) the lien was not provided for by state, federal, or constitutional provisions, (2) was not created by express or implied consent, (3) was not an equitable, constructive, or other lien imposed by court of competent or legal jurisdiction, and (4) was not asserted against real property or an interest in real or personal property. *Id*. at **1–2.

The court of appeals began its analysis by noting that a Texas Property Code Chapter 53 mechanic's lien is provided for by Texas law and cannot be presumed to be fraudulent. *Id*. at *2. Thus, a trial court may only determine whether a challenged instrument is fraudulent under section 51.901(c)(2). *Id*. This limits the trial court's review to whether a particular *instrument* is fraudulent on its face and disallows any ruling on the validity of the underlying lien itself or the claims between the parties. *Id*. Because Rodriguez argued that the lien was invalid under Tex. Prop. Code §§ 53.051–.055, it asked the trial court to look outside the scope of § 51.903 to examine the validity of the underlying lien. *Id*. The court of appeals held that it was error for the trial court to do so under § 51.903. *Id*. "Section 51.903 of the Texas Government Code is part of a statutory scheme to quickly identify and remove liens and encumbrances that are patently without basis in recognized law." *Id*. at *1.

Rodriguez also argued that the instrument could still be construed as fraudulent because the plaintiff failed to show that it was "created by implied or express consent or agreement" of the parties and therefore may be presumed fraudulent under § 51.901(c)(2). *Id*. The court rejected this argument, noting that Texas courts have held that a document is fraudulent under § 51.901(c)(2) if the document is not one of three types of legitimate lien claims: (1) an instrument provided for by state or federal law or constitution, (2) one created by express or implied consent or agreement of the obligor, debtor, or owner of real or personal property, or (3) imposed by court as an equitable, constructive, or other lien. *Id*. at *2. Because Gutierrez established that the document issued was provided for by Texas law (specifically Chapter 53), Rodriguez's argument failed and the instrument could not be considered presumptively fraudulent under § 51.901(c)(2). *Id*. at *3.

In *Wildcat Concrete & Construction, LLC v. Vanderlei*, No. 07-23-00078-CV, 2023 WL 8817556 (Tex. App.—Amarillo December 20, 2023, no pet. h.) (mem. op.) (discussed above), the court of appeals also upheld the trial court's invalidation of the contractor's lien because it was not perfected.

At trial, the contractor's president testified that the contractor "walked off the job sometime in January 2019. *Id*. at *4. As it was a commercial project, the contractor was required to file their lien affidavit by the fifteenth day of the four month after abandonment. *Id*. (citing Tex. Prop. Code Ann. § 53.052(a)(1)). The contractor filed their lien affidavit on August 15, 2019. *Wildcat*, 2023 WL 8817556, at *4. The court held that the contractor's testimony about abandonment of the job was sufficient evidence to affirm the trial court's holding that the lien was not timely filed. *Id*.

In *Charter Drywall Houston, Inc. v. Matthews Investments Southwest, Inc. XX*, No. 14-22-00484-CV, 2023 WL 3476909 (Tex. App.—Houston [14th Dist.] May 16, 2023, no pet.), the court of appeals affirmed on evidentiary grounds the trial court's finding that a contractor had filed fraudulent liens under Texas CPRC § 12.002.

A residential real estate developer hired Brunson Homes as contractor to build two residential homes, Units 503A and 503B. *Id*. at *1. Brunson in turn received bids from Charter Drywall in "late 2017" to install the drywall for the homes, though Brunson rejected the bids. *Id*. Despite the rejection, Charter delivered and installed drywall without an agreement on price, and billed Brunson $8,746 for each unit. *Id*. After Brunson did not pay, Charter filed a mechanic's lien against both units stating that the work was "furnished… pursuant to a written contract dated February 9, 2017" and claiming that Brunson was a sham contractor due to its "unity of interest" with the developer. *Id*.

The developer successfully sold both units and the title company did not discover Charter's lien on unit 503B. *Id*. at *2. But when the developer tried to sell unit 503A, the developer's title company required that the developer place $13,500 in escrow so that the title company could pay $10,827.82 to cause Charter to release its lien on that unit. *Id*. The developer then sued Charter for filing fraudulent lien affidavits under Texas CPRC § 12.002. *Id*. at **2–3. Charter counterclaimed, seeking foreclosure of its lien on unit 503B. *Id*. at *2. At a bench trial, the developer called several witnesses who testified that Charter performed the work with no written contract, that Brunson had told Charter repeatedly that Brunson rejected the price, and that there was no agreement on

price at the time Charter performed its work. *Id*. at *4. One of the witnesses also testified that Charter "usually went in and stocked… homes before they were ready so they were guaranteed to get the contracts and if they didn't get the contracts [then] they filed liens on the properties and they have done that on numerous occasions." *Id*. The witnesses also testified that Charter's work was defective, and that Brunson had spent $2,000 to fix the work. *Id*. at *5. The evidence also showed that Brunson tried to pay Charter $8,000 per unit, but that Charter rejected the check because it stated, "paid in full." *Id*. The developers never received notice that the liens had been filed, and that the developer and Brunson had no common ownership interest to establish a sham contractor relationship. *Id*. Charter testified that the basis for his assertion that Brunson and the developer had a common interest was his assumption that "a builder and a[n] owner have a common interest." *Id*. For his part, he blamed the reference to a non-existent February 9, 2017 contract on a "typo." *Id*. After trial, the court found that Charter's liens were fraudulently filed on both units and declared Charter's lien on 503B invalid. *Id*. at *2. The court ordered Charter to pay the developer $20,000 in statutory damages. *Id*.

On appeal, Charter challenged the trial court's findings on legal sufficiency grounds. *Id*. The court noted that since Charter's lien was filed under Chapter 53 of the Texas Property Code, the developer had to prove that Charter acted with intent to defraud. *Id*. at *3 (citing Tex. Civ. Prac. & Rem. Code § 12.002(c)). Because § 12.002(c) does not define "defraud," the court relied on its common meaning (conduct involving bad faith, dishonest, lack of integrity, etc.). *Charter*, 2023 WL 3476909, at *3. Charter argued that there was no evidence of any intent by him to defraud. *Id*. at *5. However, largely grounded on deference to the trial court's evaluation of the witnesses, the court disagreed. *Id*. at *6. The court credited the false statements in Charter's liens, and the testimony about Charter's alleged scheme to stock homes to secure contracts and file liens when he did not get the work. *Id*. Accordingly, the court affirmed based on legally sufficient evidence to prove intent to defraud under Texas CPRC § 12.002. *Id*.

In *Hizar v. Heflin*, 672 S.W. 3d 774, 783–806 (Tex. App.—Dallas 2023, pet. filed) (discussed above), the court of appeals also held that the trial court lacked jurisdiction to remove a residential contractor's lien.

The Heflins hired Hizar to remove popcorn on their residential ceiling. *Id*. at 783–84. After the Heflins refused to pay a demand from Hizar, Hizar filed a lien on their property for $7,400. *Id*. at 785. During litigation, the trial court removed the lien and awarded the Heflins $3,389.84 in attorney's fees for the removal. *Id*.

On appeal, the Heflins conceded that the trial court did not have jurisdiction to remove the lien and requested that part of the trial court's order be vacated. *Id*. at 805. The trial court was a statutory county court. *Id*. Those courts' jurisdiction is governed by Texas Government Code Chapter 25. *Id*. Through Texas Government Code § 26.043, the Legislature removed some civil matters from statutory common courts' jurisdiction, including "a suit for the enforcement of a lien on land[.]" Tex. Gov't Code § 26.043(2). Relying on one of its earlier decisions, the court of appeals held that the trial court had no jurisdiction to issue an order invalidating the lien. *Hizar*, 672 S.W.3d at 806. Accordingly, the court of appeals reversed that part of the trial court's order, including its award of attorney's fees ($3,389.84), and dismissed the claim due to lack of jurisdiction. *Id*.

In *Arredondo's Mech. Serv., LLC v. Ortega Med. Bldg., LLC*, No. 14-22-00067-CV, 2023 WL 5622808 (Tex. App.—Houston [14th Dist.] Aug. 31, 2023, no pet. h.) (mem. op.), the court of appeals held that a subcontractor had not perfected its lien because it sent notices to the wrong general contractor entity.

AMS filed suit against Trojan *Global* Construction and Ortega, claiming to have performed work on Ortega's project per a subcontract between Trojan Global and AMS. *Id*. at *1. AMS sought to foreclose on its mechanic's lien and have it declared valid. *Id*. Ortega counterclaimed to remove the lien, alleging that AMS did not perfect its lien rights because AMS sent its fund-trapping letter to and filed suit against Trojan Global, even though the general contractor was a different entity, Trojan *Group* Contractor (Trojan Group). *Id*. The trial court granted Ortega's motion for summary removal of AMS's lien and awarded attorney's fees to Ortega. *Id*. at *2. The trial court then severed the claims between AMS and Ortega and issued a take-nothing final judgment in Ortega's favor. *Id*.

On appeal, the court first evaluated blackletter law on statutory subcontractor liens: "a subcontractor's lien rights 'are totally dependent on compliance with the statutes authorizing the lien.'" *Id*. at *3. And a subcontractor "must give the original contractor written notice of the unpaid balance not later than the fifteenth day of the second month following each month in which all or part of the claimant's material was delivered" and must also provide notice to the owner. *Id*. The court noted that the record included progress payment applications from AMS to Trojan Group as well as conditional waivers on progress payments addressed to Trojan Group, not Trojan *Global*. *Id*. at *4. The court concluded that this evidence, coupled with the Texas Secretary of State information for Trojan Global and checks to AMS issued by Trojan Group "conclusively proves that the general contractor for the project was Trojan Group" and AMS did not perfect its lien claim. *Id*.

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Practice Note: An odd set of facts and an odd result. Earlier in its decision, the court of appeals noted that "substantial compliance with" Chapter 53 is ordinarily sufficient to perfect a lien. *Id*. at *3. Although the owner argued that AMS had not substantially complied, AMS appears to have resisted summary judgment primarily because there was some fact issue as to which of the two Trojans had requested work, even though there was simply no evidence that Trojan Global had anything to do with the project; all AMS's evidence showed it was performing work for and being paid by Trojan *Group*. *Id*. at *4. And so there was simply no evidence on which "reasonable people" could conclude that Trojan Global (rather than Trojan Group) was the original contractor. *Id*.

You would have expected a discussion of the relationship between Trojan Group and Trojan Global in a wrongly named notice recipient case. But the owner also submitted evidence that Trojan Global had forfeited its existence more than a year before AMS worked on the project. *Id*. Weirdly, the court's opinion has a heading C.1 ("Identity of Original Contractor") but no heading C.2. *Id*. Maybe there had been a discussion of misnomer, alter ego, or some other theory in an earlier draft of the opinion. Or maybe it is just a typo. Anyway, send your lien notices to the right entity, or else.

It also appears that the court simply misunderstood Chapter 53. AMS allegedly contracted with Trojan Group. *Id*. at *3. The court of appeals treated this as a "debt incurred by a subcontractor[.]" *Id*. But AMS would have no need to send a fund-trapping letter to Trojan Group, as Trojan Group knew it had not paid AMS. The second month notice to the general contractor (under the prior version of Chapter 53) is ordinarily only required for a derivative, sub-subcontractors (seeking a debt incurred by a subcontractor). The "debt" was not incurred by AMS, it was incurred by Trojan Group. It is hard to judge the court too harshly for this misreading, since the mechanic's lien statute is confusing.

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V. CONSTRUCTION LABOR

A. Liability of general contractor/subcontractor

In *Metropolitan Transit Authority of Harris County, Texas v. Trans-Global Solutions, Inc.*, No. 01-22-00434-CV, 2023 WL 3742349 (Tex. App.—Houston [1st Dist.] June 1, 2023, no pet.) (mem. op.), the court of appeals held that a general contractor was not liable for negligence, gross negligence, and negligence per se stemming from subcontractor's collision with a metro train.

On August 31, 2016, a dump truck driven by a trucking subcontractor (Morfin Trucking) attempted a U-turn in downtown Houston which resulted in a collision with a Metropolitan Transit Authority of Harris County, Texas (Metro) train. *Id*. at *1. Metro filed suit against the project's general contractor (TGS), who had subcontracted with Morfin to provide trucks to haul off clay dirt from the project to a designated landfill. *Id*. Metro sued TGS for negligence, negligence per se, and gross negligence and claimed that "as the general contractor at the project site, TGS had a duty to make sure all of its employees and subcontractors performed their duties in a safe and prudent manner." *Id*.

At the trial court, Metro asserted a litany of reasons that TGS was negligent, including TGS's failure to (1) properly assess a dangerous condition at the intersection where the accident occurred, (2) instruct Morfin truck drivers not to violate traffic control laws at or near the project site, (3) have an off duty peace officer directing traffic at the project site, (4) have a traffic control plan and obtain a traffic control permit for the project, (5) have a designated haul route for the Morfin drivers to follow, (6) confine traffic to designated haul routes, and (7) properly assess the area near the project site for traffic and safety concerns. *Id*. at *2. Metro also alleged that TGS was vicariously liable for Morfin's negligent acts because TGS had the right to control Morfin. *Id*.

The trial court granted TGS's no-evidence motion for summary judgment finding that Metro had put forth no evidence that (1) TGS controlled the means, methods, or details of Morfin's work; (2) TGS had violated a specific statute; or (3) TGS had actual, subjective awareness of any risk involving Morfin's trucks making illegal U-turns. *Id*. at **3–4.

From the outset the court of appeals noted that "[a] general contractor typically does not owe any duty to ensure than an independent contractor performs its work in a safe manner." *Id*. at

*5 (citing *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155, n.1 (Tex. 1999)). But it noted that a duty may arise through a contractual right to control or an actual right to control. *Id*. In determining whether a contract grants a general contractor the right to control that will subject a general contractor to liability, the contract must give the general contractor at least the right to control "the means, methods, or details of the independent contractor's work such that the contractors is not entirely free to do the work in [its] own way." *Metropolitan* 2023 WL 3742349, at *6 (quoting *AEP Tex. Cent. Co. v. Arrendondo*, 612 S.W.3d 289, 295 (Tex. 2020)).

The court of appeals upheld the trial court's ruling as to negligence and gross negligence and found that TGS did not have the right to control Morfin and thus had no legal duty to Metro. *Metropolitan* 2023 WL 3742349, at *8. Neither the prime contract nor TGS's subcontract with Morfin imposed any duty on TGS to control the manner that Morfin's drivers drove when they were not at the project site. *Id*. at **7–8. Instead, TGS's subcontract with Morfin required Morfin's drivers to "comply with TXDOT regulations, Harris County and [municipal] traffic regulations" and declared that Morfin was "responsible for any damage and repairs caused by trucks to public roads, street, and bridges." *Id*. at *7.

The court of appeals similarly upheld the trial court's ruling as to Metro's negligence per se claim and found that "Metro did not allege or present any evidence that TGS's acts or omissions relating to the collision between [Morfin's] truck and the Metro train violate any penal statute . . . [and] it has not identified any ordinance that TGS violated." *Id*. at *8.

In *Nelson v. H & E Equipment Services, Inc.*, No. 14-21-00704-CV, 2023 WL 4503544 (Tex. App.—Houston [14th Dist.] July 13, 2023, no pet.) (mem. op.), the court of appeals held that a lessor of construction equipment was not liable for personal injuries caused by alleged safety failures and misuse of its equipment.

H&E leased a front loader to a contractor (TMG) on a highway construction project. *Id*. at *1. The equipment lease stipulated that TMG was familiar with the equipment, had received and understood the operating instruction, warnings, and caution signs applicable to the equipment, and would limit operation of the equipment to qualified operators employed by TMG. *Id*. The lease also stated that if TMG discovered that any safety device or label was missing, it would notify H&E. *Id*. A TMG employee backed the front loader into a traffic lane, causing an accident that killed the vehicle's driver, and severely injured several passengers. *Id*. These injured plaintiffs sued H&E, TMG, and TMG's employee who operated the front loader, alleging wrongful death and survival claims, along with negligence, gross negligence, respondeat superior, negligence per se, and negligent entrustment. *Id*.

H&E filed a no-evidence motion for summary judgment on all the plaintiffs' negligence claims. *Id*. at *2. The plaintiffs responded, asserting that H&E's equipment lacked a "Slow Moving Vehicle" (SMV) emblem per Chapter 544 of the Texas Transportation Code and the Texas Manual on Uniform Traffic Control Devices (MUTCD), had inadequate warnings that were not compliant with the loader's safety manual, and that H&E had failed to adequately ensure that only trained or licensed personnel operated the equipment. *Id*. The plaintiffs also submitted evidence that the requirements of the MUTCD, the operation and maintenance manual for the front loader (including safety warnings required for the machine), and that TMG's employee was not authorized to drive

the front loader because of a prior DWI conviction. *Id*. at **2–3. The trial court granted H&E's no-evidence motion for summary judgment. *Id*. at *3.

The plaintiffs appealed, arguing that they raised fact issues on their negligence, negligence per se, negligent entrustment, and gross negligence claims. *Id*. at **4, 9. The court of appeals affirmed in a lengthy opinion. *Id*. at *9. The court dispensed with the negligence claim on duty grounds, holding that under the rental agreement, TMG was required to notify H&E if any safety devices or warnings were lacking. *Id*. at *5. The court held that "owners of equipment or vehicles 'have no duty to ensure that an independent contractor performs its work in a safe manner.'" *Id*. at *6 (citing *Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007)). The court also found that the rental agreement itself did not create a tort duty, as the plaintiffs failed to show that H&E exercised contractual control over the equipment, as the equipment lease placed that responsibility on TMG. *Nelson*, 2023 WL 4503544, at *6.

The plaintiffs' negligence per se claims were based on the alleged lack of an SMV emblem, and the alleged noncompliance with the MUTCD. *Id*. at **7–8. For the SMV emblem, the court noted that the Transportation Code requires that it be located on the back of the loader, but held the plaintiffs had not included in their summary judgment evidence any pictures[52] of the back of the loader to prove its absence. *Id*. at *7. As for the alleged MUTCD failure, the court held that by its own terms the MUTCD "do not create mandatory duties, in the legal sense[.]" *Id*. at *8.

Finally, the court affirmed summary judgment against the plaintiffs' negligent entrustment and gross negligence claims. *Id*. at *9. The plaintiff adduced no evidence that H&E knew, or should have known, that TMG's employee operated the equipment, or about his alleged lack of a license, incompetence, or recklessness. *Id*. And without any duty on any of the underlying negligence claims, the plaintiffs could not maintain their gross negligence claim. *Id*.

In *Battles v. Anthony Inman Constr., Inc.*, 667 S.W.3d 477 (Tex. App.—Amarillo 2023, no pet.), the court of appeals held that a general contractor had no duty of reasonable care to an independent contractor's employee regarding a dangerous condition on the job site.

This case arose out of a negligence claim by an independent contractor's employee seeking damages for injuries he suffered after falling off a scissor lift that tipped over an uneven surface. *Id*. at 480. The contractor hired around thirty subcontractors for a gymnasium construction project, one of whom was the plaintiff's employer. *Id*. at 479–80. A concrete base at the construction site formed two concentric rectangles in which the inner rectangle was two inches lower than the outer rectangle, forming a small ledge. *Id*. at 481. The plaintiff used a scissor lift to reach the height necessary to install sheetrock along the gymnasium walls. *Id*. While the plaintiff knew that a boom lift was safer to use on uneven surfaces, there was no boom lift on site and the plaintiff was instructed by his employer (the subcontractor) to use the scissor lift. *Id*. While the plaintiff was

[52] Interestingly, although H&E also included photographs of the front loader in its reply in support of its motion for summary judgment, the court disregarded that evidence because the plaintiffs had not "pointed the trial court to [that] evidence" as required by a comment to Tex. R. Civ. P. 166a(i). *Id*. at *8 n.3.

elevated, the lift tipped over and the plaintiff fell to the ground, sustaining several severe injuries. *Id*.

The plaintiff sued the general contractor for negligence. *Id*. The general contractor argued that it maintained no control over the plaintiff's work and owed no duty to warn of an open and obvious job-site condition. *Id*. The trial court rendered a take-nothing summary judgment against the plaintiff. *Id*. On appeal, the plaintiff argued that the trial court erred in denying his negligence claim because the general contractor had a legal duty to the plaintiff because the plaintiff was an employee of one of the project's subcontractors. *Id*. at 480–81. Analyzing the claim under a general negligence theory, court of appeals disagreed, holding that a general contractor owes no duty of reasonable care to an independent contractor's employee where the general contractor has no actual or contractual control over the manner in which the subcontractor performs his work. *Id*. Because the general contractor did not control the way the plaintiff performed the work that resulted in his injuries, the contractor did not owe the plaintiff a duty of care. *Id*.

The plaintiff also argued that the general contractor failed to warn or make safe the unreasonably dangerous condition created by the uneven surface. *Id*. at 482. Analyzing the claim under a premises liability theory, the court held that the general contractor's duty to warn or make safe only existed for dangerous conditions that are concealed. *Id*. Because the plaintiff was warned about the ledge and drove equipment over the ledge on other occasions, the general contractor did not owe the plaintiff a duty to warn of the condition. *Id*. at 483.

The plaintiff finally argued that the "necessary use" exception imposed a duty on the general contractor to make the premises safe despite the plaintiff's awareness of the dangerous condition where (1) it was necessary for the plaintiff to use the dangerous premises and (2) the premises owner should have anticipated that the plaintiff would be unable to avoid the unreasonably dangerous condition. *Id*. The court noted that the exception did not apply where the plaintiff is an independent contractor who is expected to rely on his expertise while performing the work. *Id*. And the court held that it was unnecessary to determine whether the plaintiff was entitled to assert the exception because there was no genuine issue of material fact about necessary use. *Id*. The subcontract required the subcontractor to use its own equipment for the work and stated that the subcontractor was solely responsible for the safety of its employees. *Id*. The court also found no evidence suggesting that the subcontractor and its employees would not be able to avoid the unreasonable risk of danger created by the ledge. *Id*.

In *Garcia v. Tex. All Around Drywall Inc*., No. 07-23-0057-CV, 2023 WL 7178025 (Tex. App.—Amarillo Oct. 31, 2023, no pet. h.), the court of appeals held that a drywall subcontractor was not liable for a sub-subcontractor's employee's injuries.

Texas All Around Drywall (TAAD), a residential drywall subcontractor, hired a sub-subcontractor to install sheetrock for several residential projects. *Id*. at *1. The plaintiff, one of the sub-subcontractor's employees, was injured when a sheet of drywall fell from the second floor of a residential construction site after someone had rested the material on temporary railing that gave way. *Id*. The plaintiff argued that TAAD was responsible for his injuries, as TAAD had failed to warn the plaintiff regarding the dangerous conditions that led his injury. *Id.* The trial court granted

TAAD's motion for summary judgment on all the plaintiff's claims, finding that TAAD did not owe the plaintiff a duty to warn of a dangerous condition. *Id*.

On appeal, the plaintiff argued the trial court erred in finding that TAAD owed no duty to the plaintiff. *Id*. The court relied on the sub-subcontract, which delegated the scope of sheet rock installation to the sub-subcontractor (rather than TAAD). *Id*. at *2. Further, TAAD's upstream contract with the general contractor included an addendum requiring all drywall to be stacked in a manner that resisted falling. *Id*. The plaintiff argued this upstream contractual duty was sufficient to impose a duty of control on TAAD. *Id*. The court disagreed, holding that under a negligent activity theory, the plaintiff could not establish duty. *Id*. The court noted that a duty does not arise when a contractor simply directs that the work be done in a safe manner. *Id*. While a duty can arise when an independent contractor is directed to comply with safety guidelines, the only duty imposed is to ensure that the safety procedures do not reasonably increase, rather than decrease, the probability or severity of the injury. *Id*. Because there was no evidence of a directive by TAAD that drywall be leaned against a railing, the plaintiff failed to establish any duty for TAAD. *Id*.

The plaintiff also argued that a duty was imposed on TAAD because the upstream contract required TAAD to have an OSHA-approved person supervising safety on the premises, creating sufficient control over safety to impose a duty on TAAD. *Id*. at *3. The court rejected this argument, noting that even if this were sufficient to establish a duty, the plaintiff failed to show that the presence of an OSHA-approved person would have prevented the accident from occurring and therefore failed to establish probable cause. *Id*. As TAAD had filed a no-evidence motion for summary judgment as well, the plaintiff's failure to adduce evidence defeated its claim. *Id*. In any event, the court also held that the plaintiff's premises liability claims also failed to establish any duty, as the person controlling the premises is liable to employees of an independent contractor only for claims arising from a *preexisting* defect rather than from the contractor's work. *Id*. The record showed that another of the sub-subcontractor's employees placed the sheetrock against the railing. *Id*. Thus, the plaintiff failed to prove the existence of a *preexisting* defect to establish that TAAD created an unsafe condition under ap remises liability theory. *Id*. Accordingly, the court affirmed the trial court's summary judgment for TAAD. *Id*. at *4.

In *JMI Contractors, LLC v. Medellin,* No. 04-22-00072-CV, 2023 WL 4217036 (Tex. App.—San Antonio, June 28, 2023, no pet.) (mem. op.), the court of appeals affirmed, on evidentiary grounds, a jury verdict for the plaintiff (Medellin), who was injured while working as an independent contractor on a roofing job for the general contractor (JMI).

On the day of his injury, Medellin was working for Hernandez's Metal Roof, a contractor performing roofing work on a multifamily project in San Antonio. *Id.* at *1. JMI was the general contractor for the project. *Id.* Medellin was asked to apply a rubberized roofing membrane to one of the buildings on the project. *Id.* As he and another laborer unrolled the membrane, Medellin fell off the roof and suffered injuries. *Id.* At the time of his injury, a JMI-employed safety advisor was on site. *Id.* Medellin sued JMI and multiple individuals present on the project site, including JMI's safety advisor. *Id.* Following trial, the jury returned a verdict in Medellin's favor in the amount of $3,337,779.34 against JMI on both premises-liability and negligent-activity claims. *Id.* at *2. The jury further found JMI's safety advisor liable for gross negligence and assessed $1 million in exemplary damages. *Id*.

After filing a motion for judgment notwithstanding the verdict (which was denied), JMI appealed. *Id.* To begin, the court of appeals analyzed the claims of negligent activity and premises liability and determined they were distinct claims that it was required to consider separately. *Id*. For the premise liability claim, the court considered that, in some cases, an owner can insulate itself from a premises liability cases if it provides an adequate warning of the danger. *Id.* at *3. One exception to this principle is the "necessary-use" exception, which applies when it is necessary for the invitee to use the premises and "the landowner should have anticipated tat the invitee is unable to take measures to avoid that risk." *Id.* (quoting *SandRidge Energy, Inc. v. Barfield,* 465 S.W.3d 560, 568 (Tex. 2022)). The trial court instructed the jury on this exception. *JMI*, 2023 WL 4217036, at *3.

JMI contended the instruction was error, noting that the Texas Supreme Court "expressed doubt that the necessary-use exception applies to independent contractors." *Id.* (citing *SandRidge,* 465 S.W.3d at 568)). The court of appeals rejected this contention, finding that, despite the Texas Supreme Court's expression of doubt in *SandRidge*, it still "analyzed the facts to determine whether the necessary-use exception applied when an employee of a subcontractor was injured." *JMI*, 2023 WL 4217036, at *3. As a result, the court overruled JMI's appellate issue, declining to hold that Medellin, as an independent contractor, was not entitled to the necessary-use exception instruction. *Id.*

Next, the court turned to Medellin's negligent-activity claim. As the court acknowledged, a defendant generally owes no duty to an independent contractor to ensure the contractor safely performs its work. *Id.* The court also acknowledged an exception however, when the employer retains "some control over the manner in which the contractor performs the work that causes the damage." *Id.* at *4 (quoting *JLB Builders, LLC v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021)). JMI argued no reasonable jury could have found the exception applied to Medellin. *JMI*, 2023 WL 4217036, at *5. The court, however, determined the evidence "include[d] at least a scintilla of evidence" supporting a finding that JMI "exercised actual control over the fall-prevention measures utilized by Medellin," including by employing its own watchman as a fall prevention measure. *Id.* *6. As a result, the court overruled JMI's issue about the negligent activity claim. *Id.*

Despite overruling JMI on these two issues, the court ultimately reversed and remanded due to the trial court's error in excluding evidence related to Medellin's use of alcohol and marijuana on the day of his injury. *Id.* at **7–9. Without the trial court's error on that issue, the findings related to premises liability and negligent-activity against JMI would have been undisturbed.

In *Barrett Horton v. MMM Ventures LLC*, No. 05-22-00005-CV, 2023 WL 4486211 (Tex. App.—Dallas July 12, 2023, pet. filed) (mem. op.), the court of appeals affirmed summary judgment for a general contractor against a downstream construction laborer on a personal injury claim.

On June 11, 2018, Barrett Horton sustained injuries while working on a construction project known as the Entrada Project. *Id.* at *1. Crescent Estates Custom Homes served as general contractor for the project and engaged Henry Steel Construction as subcontractor to perform steel

erection work on the Entrada Project, and Henry Steel Construction hired the plaintiff, Horton, as an independent contractor. *Id*.

Horton was engaged in unloading a steel load weighing 6,000 pounds, which was being lowered into a basement using a forklift driven by an employee of Henry Steel. *Id.* During the unloading process, the steel slipped from the forklift's forks and fell about three feet, crashing onto wooden pallets in the basement. *Id.* While attempting to guide the steel during its descent, Horton was pinned under a portion of the load, sustaining injuries to his leg and foot, and severely crushing his right arm. *Id.* No employees from Crescent were present at the site when this accident occurred. *Id.*

Following his injury, Horton filed suit against Henry Steel and Crescent alleging claims for negligence, repondeat superior, negligent undertaking, and negligence per se. *Id.* Crescent responded with a motion for summary judgment, supported by deposition testimony from various parties, including Horton. *Id.* Horton countered with similar testimonies and a declaration from his safety expert, blaming Henry Steel's forklift operator for the accident. *Id.* The trial court granted Crescent's motion and dismissed Horton's claims against Crescent with prejudice. After the court granted Crescent's motion to sever the claims against it, Horton appealed. *Id.*

The court of appeals engaged in a typical discussion of liability for an independent contractor relationship, and a general contractor's duties to a subcontractor's employee. *Id.* at *2. The court found that, in general, one who employs an independent contractor has no duty to ensure the contractor safely performs his work unless "the employer retains some control over the manner in which the contractor performs the work that causes the damage." *Id.* at *2 (citing *AEP Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 295 (Tex. 2020)). Horton argued that Crescent had contractual control based on Crescent's contractual right to determine who could use the forklift. *Barrett*, 2023 WL 4486211, at *3. The court rejected the argument, noting that the mere right to select who operated the forklift was insufficient to establish control. *Id*. The court also rejected Horton's argument that Crescent had actual control over the forklift, as the undisputed testimony was that no one from Crescent was around the forklift at the time of the accident. *Id*. at *4. Given the lack of contractual or actual control, the court also affirmed summary judgment against Horton on his negligent undertaking and negligence per se claims due to a lack of any duty owed by Crescent. *Id*. at **5–6.

B. Liability of property owner

In *Marcell Rodriguez Segovia v. Houston Metals, LLC*, No. 14-22-00130-CV, 2023 WL 4732887 (Tex. App.—Houston [14th Dist.] July 25, 2023, no pet.) (mem. op.), the court of appeals held that a property owner's allegedly negligent actions did not proximately cause the injuries suffered by a truck driver while on the owner's property.

A truck driver hired to haul scrap metal from a property owner's facility sued the property owner for injuries sustained in a slip-and-fall on the owner's premises. *Id*. at *1. The driver asserted negligence and gross negligence claims because the property owner overloaded his truck, which prompted the driver to climb on top of his vehicle to secure his load, where he slipped on a piece of scrap metal. *Id*. The property owner filed a traditional and no-evidence motion for summary

judgment seeking dismissal of the driver's claims. *Id*. In its no-evidence motion, the property owner argued that the driver failed to produce evidence on any element of a negligent-activity claim. *Id*. In its traditional motion, the property owner asserted that the evidence demonstrated that the driver could not establish duty or proximate cause. *Id*. The trial court granted the property owner's summary-judgment motion and rendered a final judgment against the driver. *Id*.

On appeal, the driver argued that fact issues existed which should have defeated summary judgment. *Id*. at *2. The driver pointed to summary-judgment evidence establishing that the property owner overloaded his truck before his injury and had a pattern of doing so. *Id*. The court of appeals considered whether the evidence showed that the owner's alleged overloading proximately caused the driver's injury. *Id*. at *3. The court noted that the driver drove from the loading site to another location on the premises, where he climbed on top of his truck to secure the load and consequently suffered injuries. *Id*. at *4. Therefore, the court reasoned that he was not injured in the loading of the truck or by any ongoing activity contemporaneous to the loading of the truck. *Id*. As a result, the court of appeals held that no proximate cause connected the driver's injury with the property owner's alleged overloading. *Id*.

On appeal, the driver also alleged premises-liability claims, but the court disposed of the claim on procedural grounds. *Id*. at **2–3. As the driver had failed to "allege that [the driver] was injured by any defect or dangerous condition on" the owner's premises (because the dangerous condition was on the driver's truck), the court held that the driver had failed to plead a premises-liability claim and summary judgment was proper on same. *Id*. at *3.

In *Sanchez v. Cott Beverages, Inc.*, No. 04-22-00417-CV, 2023 WL 5270731 (Tex. App.—San Antonio, Aug. 16, 2023, no pet.) (mem. op.), the court of appeals held that an owner was not liable to an injured laborer under Chapter 95 of the Texas CPRC.

A property owner (Cott) solicited a bid from a roofing contractor (Cloud) to perform roofing repair work. *Id*. at *1. During the investigation and bid process, Cott issued a "Roof Access Permit" to Cloud's inspector identifying various hazards at the facility. *Id*. at **1–2. Cott ultimately accepted Cloud's bid, and the parties executed a contract granting Cloud "access to the perimeter of the building for the staging and execution of the roofing process" and placing supervisory and responsibility solely on Cloud. *Id*. at *2. Cloud, in turn, subcontracted with EMC, who was Sanchez's employee. *Id*. at *2. Cott staged drums of silicone membrane for the repair of the facility and would deliver the drums on request to roof workers. *Id*. Cott later issued a second roof access permit to Cloud's inspector, as well as roof "workers" with several additional "Precautions Taken" notations or checks made in it. *Id*. Sanchez was working on the roof when he fell through an unbarricaded skylight, sustaining injuries. *Id*. at *3. Sanchez then sued Cott and Cloud for negligence. *Id*. at *1. Cloud cross-claimed against Cott, and Cott moved for traditional and no-evidence summary judgment against both Sanchez and Cloud's claims. *Id*. The trial court granted Cott's summary judgment motion and severed Sanchez's negligence claim against Cott to render the judgment final as between Cott and Sanchez. *Id*. at *3.

On appeal, Sanchez conceded that Chapter 95 of the Texas CPRC applied to his claim. *Id*. Chapter 95 insulates an owner from liability for injuries suffered by independent contractors (or their employees) unless they establish that (1) the owner exercises or retains control over the work;

and (2) that the owner had actual knowledge of the danger or condition resulting in the injury. *Id*. at *3. Once Chapter 95 applies, the burden shifts to the plaintiff to prove the two conditions. *Id*. Sanchez first argued that Cott exercised contractual control through its contract with Cloud, and through the Roof Access Permit. *Id*. at *4. Cott responded, pointing out that the roof access permits could not *increase* the probability or severity of any injury suffered by Sanchez. *Id*. The court agreed with Cott, noting that Sanchez had adduced no evidence that Cott played any role in the "precautions taken" notations in the second permit. *Id*. at *5.[53] The court also held that the only role Cott played in the second roof access permit was printing it, and the mere printing of the permit had no nexus to any injuries suffered by Sanchez. *Sanchez*, 2023 WL 5270731, at *5.

Sanchez also alleged actual control, pointing to Cott's staging of the drums, and testimony evidencing that *Cloud* "was under the impression that Cott retained a supervisory right to control the work" relating to safety. *Id*. at **5–6. The court dispensed with the first argument, pointing out that no evidence demonstrated that Cott's staging of the drums contributed to Sanchez's injury. *Id*. at *6. And the court held that Cloud's employee's impressions about Cott's supervisory control—because "[i]t was their building"—at best "merely reflect[ed] Cott's general supervisory right to control the roofing repair project, which does not trigger liability." *Id*. at *6. See also Tex. Civ. Prac. & Rem. Code § 95.003(1) (stating that to "establish control" plaintiff must show more than the owner's "right to order the work to start or stop or to inspect progress or receive reports"). According to the court, the fact that Cott owned the building was no evidence that Cott exercised actual control over the way Sanchez performed his work. *Sanchez*, 2023 WL 5270731, at *6.

[53] The court applied the "equal inference rule" as well. *Id*. Where the evidence "gives rise to any number of inferences, none more probable than another" that evidence is not legally sufficient to support the party with the burden of proof. *United Rentals N.A., Inc. v. Evans*, 668 S.W.3d 627, 642 (Tex. 2023).