

**Supreme Court of Texas**  
**March 20, 2015**

***Stribling v. Millican DPC Partners, LP***

No. 14-0500

Case Summary written by Sara Thornton, Staff Member.

Per Curium.

The Millicans and the McGregors are adjacent landowners who dispute a 34.28-acre tract of land in a heavily wooded area between their two properties. The Millicans assert title to the tract, but a long-standing fence places the land on the McGregor's side. The McGregors assert that the Millicans do not have record title, and in the alternative, claim adverse possession. The court only decides whether or not the Millicans have record title of the disputed tract of land.

Two deeds exist in the Millicans' chain of title. The 1945 deed includes a metes-and-bounds description that includes the contested 34.28 acres. The 1973 deed—which adds nine parcels to compose one, larger tract—includes a general description of the total tract of land described in the 1945 deed, but the metes-and-bounds description does not include the 34.28-acre tract. Another inconsistency exists in the 1973 deed; the nine parcels of land total 1,145.95 acres, but the 1973 deed states that the land consists of 1,167.203 acres.

Issue: When a general description of the land in the deed conflicts with the metes-and-bounds description, which description controls?

The metes-and-bounds description controls because it indicates more accurately the intent of the parties. When conflict exists in a written instrument, the more specific provisions will control over the general descriptions. A general description may be used to interpret the meaning of the deed, however, when the specific description is “defective or doubtful,” when the deed language clearly expresses intent to convey additional land described by the general description, or when the general and specific descriptions may be harmonized. Here, the metes-and-bounds description is not defective or doubtful, and the language cannot be harmonized. Allowing the general description in this circumstance to control would inject uncertainty into this long-settled rule. This conclusion is more consistent with precedent and more closely reflects the true intent of the parties in the 1973 deed.

***Southwestern Bell Telephone v. Emmett***

No. 13-0584

Case Summary written by Austin Smith, Staff Member.

JOHNSON, J., delivered the opinion of the Court.

The Harris County Flood Control District adopted the Brays Bayou Flood Damage Reduction Plans in order to widen and deepened the Brays Bayou Channel and thereby reduce flooding around the Bayou. Widening the entire channel required demolishing and reconstructing bridges, which requires the utilities on the bridges to be relocated. Texas Water Code § 49.223 requires that relocation of utility facilities be done at the sole expense of the District when the District's exercise of power "makes necessary" such relocation.

Project Bray calls for demolition and reconstruction of bridges controlled by the City of Houston, so the District and the City entered into the Brays Bayou Flood Damage Reduction Plan Interlocal Agreement, detailing the responsibilities of each entity. Section 8 of the Interlocal Agreement directs the City, after receiving notice from the District, to issue relocation notices to third parties such as public utility companies, instructing that they relocate their facilities from a bridge right-of-way at the third parties' own expense.

Southwestern Bell Telephone, doing business as AT&T Texas (AT&T), a public utility company with telecommunication facilities attached on the Forest Hill Street Bridge, which Project Brays designated to be demolished, sought a declaratory judgment that the Harris County Flood Control District must bear the costs of relocating AT&T's facilities pursuant to Texas Water Code § 49.223

The trial court determined that the district was not responsible for relocation costs and granted the County Commissioner's plea to the jurisdiction and summary judgment to the District and City. The Houston Court of Appeals affirmed reasoning that the relocation costs sought by AT&T were not clearly within the statute's purview because the District was not shown to have made the relocation necessary, due in large part to (1) the City's involvement in the Project and (2) the testimony of Project Brays's Manager that the bridge had not been demolished yet and it could be left intact, resulting in the channel remaining narrow at the bridge crossing.

On Appeal to the Supreme Court of Texas, AT&T contended that the court of appeals misconstrued § 49.223 by failing to give effect to the plain meaning and purpose of the statute and (2) that the District "made necessary" the relocation of its facilities within the meaning of § 49.223. In support of the trial court's decision the District argues that § 49.223 is inapplicable because (1) "it was the City—not the District—that 'made necessary the relocation'; and (2) it was the City—not the District—that exercised the power to direct AT&T to move its wires." Therefore, the District

argued that any exercise of power by the District was insufficient to authorize and make necessary the relocation of facilities, absent the City's acquiescence.

Issue: (1) whether the District's exercise of power will make necessary the relocation of AT&T's facilities if and when the Bridge is demolished, and (2) whether the Commissioners' conduct constitutes ultra vires actions that falls within the exception to governmental immunity.

The Court first addressed the definition of "made necessary" in the text of § 49.223(a) of the Texas Water Code. In the absence of a statutory definition, the Court ascribed to the text its plain meaning. Black's Law Dictionary defines "make" as "to cause (something to exist)." Referring to the same sources, the Court determined the plain meaning of "necessary" to be something that is essential or needed for some purpose. The Court then determined whether the District's exercise of its power caused the need for AT&T's facilities to be relocated. The Court held that the District exercised its power to contract with the City of Houston when it entered into the Interlocal agreement and through the exercise of such power, gained contractual authority to require the City to send notice to relocate AT&T facilities.

The Court then determined that absent the District's flood control plan, the bridge would not have been scheduled to be demolished and AT&T would not need to relocate its facilities. The District caused the relocation of the facilities to become necessary by adopting Project Brays and contracting with the City to effectuate it. Therefore, the District made necessary the relocation of AT&T's facilities within the meaning of §49.223. The availability of an alternative plan that was never adopted is irrelevant to whether the actual plan adopted by the District "makes necessary" relocation. Thus, because the District exercised one of its powers and made relocation of AT&T's facilities necessary, the relocation costs come within the provisions of § 49.223. The Court held the trial court erred by granting summary judgment in favor of the City.

As to the second issue, the Court agreed with AT&T's assertion that the Commissioners acted ultra vires by their clear and extended refusal to accept responsibility for repayment of AT&T's relocation costs and by directing the City to send the relocation notice. The Court held that such clear repudiation of the District's statutory obligation is in violation of their duty and that declaratory relief is not barred by immunity even though it would compel prospective payment. The Commissioners' actions demonstrated their intent not to comply with the statute. AT&T's only viable option for enforcement of § 49.223 at that point was to bring suit seeking declaratory relief as to the District's obligations under the statute.

The Court then addressed whether the Commissioners' anticipatory refusal to comply with the statute qualifies as a ministerial act or was undertaken without legal authority, placing the conduct within the ultra

vires exception to governmental immunity. The use of the word “shall” within the text of § 49.223 evidences the mandatory nature of the duty imposed on the District, and the statute provides under what circumstances the District is to bear the expense. The statute also contains no indication that the District is to conduct any discretion in exercising its payment obligation. Thus, if the District’s exercise of power made necessary the utilities relocation, the statute requires the District to bear the relocation costs. The Court held that because § 49.223 imposes a purely ministerial duty upon the District, the Commissioners had no discretion in determining whether the District would pay relocation costs and they failed to perform the ministerial task of authorizing payment. The Commissioners conduct in requesting the City to issue notices of relocation constituted ultra vires acts in contravention of their ministerial duty and the trial court did have jurisdiction over AT&T’s claims against the Commissioners. Thus, the trial court erred by granting the Commissioners’ plea to the jurisdiction. The Court held further that AT&T is entitled to declaratory relief that payment of its relocation expenses by the District is required by § 49.223 and the District’s immunity does not shield it from such relief. The Court reversed the court of appeals’ judgment to the extent it affirms the trial court’s judgment denying AT&T’s motion for summary judgment, grants summary judgment in favor of the City, and grants the Commissioners’ pleas to the jurisdiction and remanded the case to the trial court. The Court affirmed Michael Marcotte’s— Director of the Department of Public Works and Engineering for the City—no-evidence motion for summary judgment because Marcotte did not fail to perform a ministerial task or act without authority of law.

***G.T. Leach Builders LLC, v. Sapphire V.P., L.P.***

No. 13-0497

Case Summary written by Nicholas Pilcher, Staff Member.

Justice Boyd delivered the opinion of the Court.

In July 2008, after the wake of Hurricane Dolly, Sapphire V.P., L.P (Sapphire) incurred heavy damages to a condominium project it has developing on South Padre Island, Texas. Thereafter, Sapphire filed sued against several of its insurance brokers on the project, who in turn designated G.T. Leach Builders, L.L.C. (G.T. Leach), two of G.T. Leach’s subcontractors, and an engineering contractor as responsible third parties. After limited participation in pre-trial matters, G.T. Leach moved to compel arbitration and stay the proceedings, alleging its general contract with Sapphire gave it the right to do so. The other “responsible parties” filed similar motions, alleging that the contract between Sapphire and G.T. Leach likewise entitled them to compel arbitration. The trial court denied all such motions, and the court of appeals affirmed. Hearing the case on interlocutory

appeal, the Supreme Court of Texas first considered whether G.T. Leach could compel arbitration with Sapphire.

Holding that (1) an arbitration agreement existed, (2) Sapphire had breached the agreement, and (3) G.T. Leach did not waive its right to compel arbitration by either express or implied waiver, the Court concluded that G.T. Leach in “the totality of the circumstances . . . [did not] invoke[ ] the judicial process to the extent required to demonstrate a waiver of its right to arbitration . . . .” *G.T. Leach Builders, LLC, v. Sapphire V.P., L.P.*, 2015 WL 1288373, at \*13 (Tex. Mar. 20, 2015). The court then held that any dispute between the litigants over a procedural deadline pertaining to the arbitration agreement “does not determine the present existence, enforceability, or scope of the agreement to arbitrate the parties’ disputes, but instead imposes a procedural limit on the parties’ rights under that agreement,” and that consistent with prior precedent, “absent express contractual agreement to the contrary, issues of this nature must be resolved by arbitrators rather than courts.” *G.T. Leach Builders*, 2015 WL 1288373, at \*22. However, the court did couch this holding by noting that such “disputes over a contractual deadline in an arbitration agreement” will always present issues solely for arbitrators to decide. *G.T. Leach Builders*, 2015 WL 1288373, at \*23.

As to the claims by the other “responsible parties,” the court held: (1) They had not established the existence of an arbitration agreement which they were parties to; (2) While G.T. Leach and Sapphire may have brought the other parties in to arbitration proceedings pursuant to the general contract, the other parties were not entitled to the same rights due to their status as non-parties to the general contract; (3) that the general contract between G.T. Leach and Sapphire specifically provided that it was only applicable to “the Contractor” and “the Owner” to the exclusion of all others; and (4) that even if Sapphire may be equitably estoppel from denying the existence of subcontracts with the other parties, such putative agreements were entirely void of enforceable arbitration provisions. Accordingly, the Court reversed as to the issue of G.T. Leach’s ability to compel arbitration with Sapphire, but affirmed the appellate court’s decision as to the other litigants.

### ***Kallinen v. City of Houston***

NO. 14-0015

Case Summary written by Kevin Smith, Staff Member.

Per Curiam.

Randall Kallinen filed a Texas Public Information Act (PIA) request from the City of Houston to secure a study related to traffic light cameras that the City had commissioned. After producing a large number of documents, the City withheld others. The City proceeded to request an

opinion from the Attorney General, based on the statutory guidelines, to determine whether the withheld documents required disclosure under the PIA. Before the forty-five day deadline to issue an opinion, Kallinen sued for a writ of mandamus to compel the disclosure of the withheld documents. The Attorney General then closed the file, interpreting the PIA to not require a ruling on a case in litigation. The City filed a plea to jurisdiction, however the district court overruled the plea and granted summary judgment in favor of Kallinen. The court of appeals reversed, holding that the trial court did not have jurisdiction, because the requestor of information under the PIA must exhaust all administrative remedies and that a suit can only arise once the Attorney General issues an opinion.

Issue: Did the appellate court err by interpreting the PIA to require a requestor to exhaust all administrative remedies, resulting in a denial of subject matter jurisdiction to trial courts until the Attorney General rules on opinions related to governmental body exceptions to the PIA?

The Supreme Court of Texas applied the doctrine of statutory interpretation that requires courts to “give effect to all the words of a statute and not treat any statutory language as surplusage if possible.” *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987). Breaking down TEX. GOVT CODE § 552.321(a), the court held that the statute’s requirement that a requestor may file a writ of mandamus when the state refused to supply “public information” does not first require the Attorney General to deem the information public. The appellate court’s interpretation essentially nullified a provision of the statute. Additionally, the statute does not guarantee the remedies that the court of appeals required. A requestor has the choice to await the Attorney General’s decision, but the governmental body is entitled to insist on its position to a final ruling and the requestor does not have to wait to file a suit for mandamus. A court may abate proceedings to await the Attorney General’s ruling, but this does not defer the court’s jurisdiction should the requestor choose to file suit. Without hearing oral argument, the supreme court reversed and remanded to the trial court.

### ***Nabors Well Service, Ltd. v. Loera***

No. 13-0126

Case Summary written by Nirav Patel, Staff Member.

Per Curiam.

In this negligence suit, a Nabors Well Service tractor-trailer collided with a vehicle driven by Morayma Loera when Loera attempted to pass the tractor-trailer while it was attempting to make a left turn. The trial court admitted evidence that Loera and his two parents, both passengers in the vehicle, were not wearing their seat belts. The jury found that Loera was 40% responsible for the accident, while Nabors Well Service and its driver were

60% responsible. The jury also determined that Loeras' failure to wear seat belts was a proximate cause of their injuries. Despite the jury's award of approximately \$450,000 to the Loeras, the trial court entered a take-nothing judgment, likely because the jury found the Loeras proximately caused their own injuries. The Loeras appealed, arguing that the trial court impermissibly admitted evidence of seatbelt nonuse.

The court of appeals remanded the case for a new trial, applying the Supreme Court of Texas's 1974 precedent in *Carnation v. Wong*, which held that "persons whose negligence did not contribute to an automobile accident should not have the damages awarded to them reduced or mitigated because of their failure to wear available seat belts." 516 S.W.2d 116, 117 (Tex. 1974). While Nabors Well Service's petition for review in this case was pending, the Texas Supreme Court overruled *Carnation* and stated that evidence of seat belt use and nonuse is admissible for apportioning responsibility in civil cases. *Nabors Well Service, Ltd. v. Romero*, \_\_\_ S.W.3d \_\_\_ (Tex. 2015). The Court's decision was driven primarily by the Texas Legislature's decision to repeal a statutory ban on the admissibility of seat-belt evidence. In light of the *Romero* decision, the Court remanded the case to the court of appeals for reconsideration.

### ***University of Texas at Arlington v. Williams***

No. 13-0338

Case Summary written by Regan Pearson, Staff Member

Justice Devine delivered the opinion of the Supreme Court, which Chief Justice Hecht, Justice Green, and Justice Lehrmann joined.

Mr. and Mrs. Williams sued the University of Texas at Arlington (UTA) after Mrs. Williams fell and sustained injuries while at a stadium owned by the university. Mr. and Mrs. Williams were watching their daughter's soccer game when a gate Mrs. Williams was leaning against unexpectedly opened and caused her to fall to the ground five feet below. The couple brought suit for negligence and UTA argued that the recreational use statute under section 75.003(g) of the Texas Civil Practice and Remedies Code barred liability. Mr. and Mrs. Williams argued that the recreational use statute did not apply because Mrs. Williams was not engaged in a recreational activity, as defined under the statute, at the time of the incident. The trial court denied UTA's motion to dismiss the suit and the court of appeals affirmed.

The Supreme Court of Texas granted UTA's motion to determine whether watching a soccer game constituted a recreational activity under the recreational use statute's "catchall" provision. The catchall provision provides that an activity can constitute a recreational activity if it is "any other activity associated with enjoying nature or the outdoors."

The Court held that watching a soccer game does not fall into the recreational use statute's catchall provision because the activity is not centered around the outdoors and nature and because the activity is unlike the other activities specifically mentioned in the statute to amount to a recreational activity.

The Court reasoned that the principle of *ejusdem generis* maintains that a general provision included with more specific provisions should be read in context with the specific provisions. As a result, the Court concluded that the definition of "recreation" under the statute is more specific than the term's ordinary use and that the catchall provision in the recreational use statute does not include an activity simply because it occurs outside. Nature describes "part of the physical world that is removed from human habitation." The Court noted that being a spectator at a soccer game does not remove oneself from human habitation—it embraces it. Additionally, the focus on competitive sports is the activity itself, not where the activity takes place.

Justice Guzman filed a concurring opinion, which Justice Willett joined.

Justice Guzman agreed with the majority's conclusion, but more specifically examined the activity Mrs. Williams was undergoing. In her opinion, Mrs. Williams was no longer a spectator at the game and was actually signing release forms so her daughter could leave the game with her. The question was not whether observing a soccer game constituted a recreational activity, but whether signing papers at a stadium did. Because signing papers did not amount to such an activity, Justice Guzman concurred with the result.

Justice Boyd filed a concurring opinion.

Justice Boyd agreed with the majority that the statute narrowed the definition of recreation but differed in that he observed no clear guidance as to what the limits were. Because the statute deprived invitees of their common law right to sue for negligence, it should be interpreted in accordance with its ordinary meaning. As a result, Justice Boyd concluded that the statute did not apply.

Justice Johnson filed an opinion, concurring in part and dissenting in part, which Justice Brown joined.

Justice Johnson concurred with the majority's conclusion regarding the gross negligence claim but dissented in regards to the ordinary negligence claim. Justice Johnson argued that the majority mistakenly concluded that the Legislature intended to give the term "recreation" a more specific meaning than its ordinary use when creating the statute. Williams was not embracing human habitation, only her daughter's participation in outdoor athletics. In the dissent's opinion, the recreational use statute's catchall

provision should apply to the observation of sporting events.

***Klumb v. Houston Municipal Employees Pension System***

No. 13-0515

Case Summary written by Jake Rutherford, Staff Member.

Justice Guzman delivered the opinion of the Court.

This case arises out of the Houston Municipal Employees Pension System (HMEPS) board members denying retirement benefits to, and requiring pension contributions from, employees who were formally employed by the city and are now employed by a third party and perform substantially the same tasks. HMEPS is a creature of a Texas Revised Civil Statute that requires very large cities to provide contributions to pension funds for their employees.

In early 2011, as part of a cost saving initiative, HMEPS transitioned 100 employees from the City's Convention and Entertainment Facilities Department to a third party corporation created by the City to complete substantially the same duties. Several of these employees complained that since they were no longer technically employed by the City, that they should be deemed "retired" and should therefore draw retirement benefits and not have to contribute to the pension plan. The definition of "employee" under the statute that created the HMEPS was very broad, and the HMEPS and its pension board construed it to include employees under the direction of third-party entities still under the control of the City. The enabling statute not only gives the pension board extremely broad authority to define terms in the statute, it also prohibits judicial review of board decisions under the statute—making this mainly a question of subject matter jurisdiction. The trial court ruled that they lacked subject matter jurisdiction to hear the claim and the appellate court confirmed.

Issue: Whether the HMEPS requirement that the City employees contribute to the City of Houston's pension plan violated the enabling statute.

The Court had no trouble affirming the trial and appellate decisions refusing to find subject matter jurisdiction because the pension board is given extremely broad authority to interpret the statute, further defined omitted terms, promulgate rules in order to administer the fund, and "determine all questions of law and fact pertaining to the same."

In order to remedy the lapse in jurisdiction, the employee petitioners further alleged *ultra vires* complaints, as well as Equal Protection and Due Process violations by HMEPS. An *ultra vires* action accrues when a government entity acts "without legal or statutory authority." Here, the Court held that the statutory definition of employee was broad and the definition adopted by the board was not patently inconsistent. This consideration, combined with the broad authority given to the board to interpret terms, means that the board acted under its legitimate statutory authority. Although, the Court was careful not to rule out an *ultra vires* claim

against a pension board in the future.

Next, the Petitioners alleged that their Equal Protection rights were violated because in a past situation that was very similar to the transition HMEPS sought to do in this case, the employees in that instance were allowed to take “retiree” status. Therefore, those employees drew retirement benefits while being paid for performing substantially the same duties that they performed while employed by the City.

The Court refused to find an Equal Protection violation because the HMEPS’s decision to transition the employees to the direction of a private entity without allowing them to gain retiree status was “rationally related to a legitimate government purpose.” More specifically, protecting fund resources and reducing the risk of allowing pension fund members to double dip.

Finally, the Petitioners claimed that they were deprived of their property without due process of law. In holding that the due process claims were facially invalid, the court found that the employees in question did not have a vested property right in their future retirement benefits. It is a generally held rule in Texas that the Legislature retains authority to modify or adjust monthly pension plan payments— this inherently extends to entities acting under statutory authority.