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SUPREME COURT OF TEXAS
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CAUSE NO. 22-0585

IN THE SUPREME COURT OF TEXAS

TEXAS DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

MARK SELF AND BIRGIT SELF,
Respondents/Cross-Petitioners.

On Petition for Review from the Second Court of Appeals,
Fort Worth, Texas; Cause No. 02-21-00240-CV

REPLY BRIEF OF RESPONDENTS/CROSS-PETITIONERS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

TxDOT selected and destroyed the Selfs' trees in furtherance of a public improvement project. The plain language of the Texas Tort Claims Act, the Texas Constitution, and the United States Constitution provides that the Selfs must be compensated for their loss.

Under the TTCA, a governmental unit in Texas is liable for (1) property damage proximately caused by the wrongful act or omission or the negligence of an employee where (2) the property damage arises from the operation or use of motor-driven vehicle or equipment. TxDOT contends that the employee—and not an independent contractor retained for the purpose of destroying property designated by a government employee—must also be physically operating the vehicle or equipment. But no case cited by TxDOT actually holds that independent contractors can never satisfy the operation-or-use element, especially when the contractor was hired to remove trees designated by the government. Rather, those cases involve different situations such as "use" by members of the public with no connection to the government (*e.g., LeLeaux*), distinctions between "use" and "non-use" or "inactive use" (*e.g., PHI* and *Ryder*), and "use" by unpaid volunteers (*e.g., Dillard*). Thus, on the factual record presented in this case, those cases do not require or justify a deviation from the plain language of the TTCA's waiver of immunity.

Further, Article 1, Section 17, of the Texas Constitution provides: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made" when "the taking, damage, or destruction is for . . . the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by . . . the State, a political subdivision of the State, or the public at large." Similarly, the Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."

The contract between the State of Texas and TFR was for "Tree and Brush Removal" and further described as a "State Highway Routine Maintenance Contract." CR 331, 333. The result of this project—and its stated goal—was the clearing of trees from the Selfs' land for the benefit of the State of Texas and the public at large. The Selfs' trees thus have been taken and destroyed, and the land on which those trees formerly resided has been damaged, and just and adequate compensation is required.

I.
ARGUMENT

A. Section 101.021 should be interpreted as written, and no case holds otherwise on these facts.

The Court's analysis should begin and end with the language of the statute. *See El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 418 (Tex. 2017)

("When the statute's language 'is unambiguous and does not lead to absurd results, our search . . . ends there.'" (citing *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 362 (Tex. 2013))); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999) ("Only truly extraordinary circumstances showing unmistakable legislative intent should divert us from enforcing the statute as written."). Section 101.021 of the Texas Tort Claims Act provides:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> >
> > (B) the employee would be personally liable to the claimant according to Texas law

TEX. CIV. PRAC. & REM. CODE § 101.021 (emphasis added). According to the plain language of the statute, to establish an immunity waiver, the plaintiff must plead (1) property damage proximately caused by the wrongful act or omission or the negligence of an employee where (2) the property damage arises from the operation or use of a motor-driven equipment. There is ample evidence of both elements as discussed at length in the Selfs' prior briefing.

TxDOT argues that a TxDOT "employee" must be the one physically operating the "motor-driven vehicle or motor-driven equipment." In essence, TxDOT contends that the word "employee" should be added to subsection (1)(A) as follows: "the property damage, personal injury, or death arises from the [***employee's***] operation or use of a motor-driven vehicle or motor-driven equipment."

But there is no authority for adding a word to the statute. *See Tex. Mutual Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012) ("[T]his Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact."). Tellingly, the word "employee" is located in subsection (1) and subsection (1)(B), but not in subsection (1)(A). If the Legislature had intended to require that the employee be the one to physically operate or use the motor-driven vehicle/equipment, the Legislature could have included the word "employee" in subsection (1)(A) as well. It did not. *See Laidlaw Waste System (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) ("When the Legislature employs a term in one section of a statute and excludes it in another section, the term should not be implied where excluded." (citing *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980))).

TxDOT acknowledges that "the passive phrasing of subpart (A) might seem to suggest that someone other than just an employee of a governmental unit may operate or use a motor-driven vehicle or motor-driven equipment and contribute to a waiver of immunity." Br. for Petitioner at 17. But TxDOT further contends that when the statute is "read contextually," it "naturally conveys that an employee of governmental unit must be the user or operator of the motor-driven vehicle or equipment for liability to attach to the governmental unit" (*id.*), and "[r]ead as a whole statute," the subparts "form a single sentence that conveys the understanding" that the employee must be the operator/user (TxDOT Response Br. at 7).

TxDOT goes on to say that "*LeLeaux*'s interpretation of the operation-or-use requirement controls." *Id.* at 8. But even *LeLeaux* stated explicitly that "**the statute does not specify whose operation or use is necessary**—the employee's, the person who suffers injury, or some third party." *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (emphasis added). In *LeLeaux*, the motor-driven equipment, *i.e.*, the bus, was merely the location where the accident happened, not the cause of the injury. *Id*. at 51–52 (concluding that "phrase, 'arises from', requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment," and holding that the injury did *not* "arise out of the use or operation of the bus"); *see also PHI, Inc. v. Tex. Juvenile Justice Dep't*, 593 S.W.3d 296 (Tex. 2019) ("We held

[in *LeLeaux*] that the injury did not arise out of the operation or use of the bus because the bus 'was nothing more than the place where Monica happened to injure herself' and was 'only the setting for the injury.' (quoting *LeLeaux*, 835 S.W.2d at 51–52)).

The *LeLeaux* decision had nothing to do with distinguishing *employee*-operators from *independent-contractor*-operators, much less an independent contractor hired to destroy property designated by the government. Rather, the Court was considering whether an injured *plaintiff's* "operation" of the vehicle could be sufficient. Nor were those who removed the Selfs' trees some random "third parties"—rather, they were hired by TxDOT specifically to remove trees for the public benefit.

Neither *LeLeaux* nor any other case cited by TxDOT calls for deviation from the plain language of the TTCA—which as confirmed above *does not state* whose operation is necessary—when the proximate cause (*i.e.*, cause in fact plus foreseeability) by an employee element is so firmly established,[1] *and* the physical

[1] *See, e.g.*, CR 307 ("Todd did direct the contractor to cut the trees down"). This is unlike cases cited by TxDOT involving ordinary workplace accidents that were undoubtedly *not* the goal of the project. *See, e.g., City of Houston v. Ranjel*, 407 S.W.3d 880, 884 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("A few hours after arriving in the work area, Turner and Cordero walked onto a part of the guideway where the trains were running and they were struck by a train that was in regular service between terminals."); *Harris Cnty. Flood Control Dist. v. Halstead*, 650 S.W.3d 707, 711 (Tex. App.—Houston [14th Dist.] 2022, no pet.) ("While clearing trees as a subcontractor chainsaw operator in a HCFCD right of way, Lance Halstead was injured when a tree he was cutting fell and struck him."). And in *EPGT*, there was no evidence that the harmful instructions originated with the government. *EPGT Texas Pipeline, L.P. v. Harris Cnty. Flood*

operator/user was not the injured plaintiff, not a third party or passerby, but was instead hired by the government to perform the very task that caused the injury. Under those facts, the government's immunity is waived because (a) the operation/use by TFR/Lyellco satisfies the "arises from the operation or use of a motor-driven vehicle or motor-driven equipment" element of the statute—even assuming no employee "operated or used" the equipment, and/or (b) those facts amount to operation/use *by TxDOT's traditional W2 employees* based on the specific control exercised by those employees.

B. This court's recent decisions in *PHI* and *Rattray* support the Selfs' text-based interpretation of Section 101.021.

The court of appeals, and other previous opinions, added requirements to the language of the statute, particularly the operation-or-use requirement, such as "active operation" and "direct control." For example, the court of appeals held that operation-or-use at least requires "direct control of that equipment," which in turn requires "both close physical proximity to the equipment while it is in operation and direction so precise that that the State tells the third party in physical control of the equipment which direction and how far to move." *TxDOT v. Self*, No. 02-21-00240-CV, 2022 WL 1259094 at *13 (Tex. App.—Fort Worth Apr. 28, 2022, pet. pending)

Control Dist., 176 S.W.3d 330, 338 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd) ("Moreover, PG & E has not presented any evidence to show that the manual provisions and directions are in fact attributable to HCFCD. The manual on which PG & E relies indicates that TSC Engineering prepared it.").

(mem. op. on reh'g).[2] And in *PHI*, the Texas Juvenile Justice Department argued that the Court's previous decision in *Ryder* required that the "operation or use must also be (1) active and (2) ongoing at the moment of the accident." (citing *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam)). This Court held that while such factors can be considered when evaluating the operation-and-use requirement, they should not be considered legislative requirements:

> The text of section 101.021(1)(A) requires that the injury "arises from the operation or use of a motor-driven vehicle" Tex. Civ. Prac. & Rem. Code § 101.021(1)(A). The statute does not explicitly require that the operation or use be "active" or that it be ongoing "at the time of the incident." Nevertheless, the Department contends that *Ryder* effectively added these two additional requirements to the requirements already found in the statutory text. . . . But no court has the authority, under the guise of interpreting a statute, to engraft extra-statutory requirements not found in a statute's text.
>
> The court of appeals did not err in considering whether there was "active operation at the time of the incident" when applying section 101.021(1)(A). Such an inquiry contributed to the outcome in *Ryder* and remains an important inquiry, even in this case. . . .
>
> The Department's error—and that of the court of appeals—lies not in treating the disputed sentence from *Ryder* as an important part of the analysis but in treating it like statutory text. In context, *Ryder*'s emphasis on active operation of the vehicle served primarily to distinguish that case from our earlier decision in *LeLeaux*, where the bus was not only empty but was nothing more than the physical place where the accident occurred. ***The sentence was not intended to replace the statute or add elements to it, nor could it have done so. The statute itself—and only the statute—provides the governing rules of decision***.

[2] Hereinafter, "Op. on Reh'g."

> In context, *Ryder*'s emphasis on active operation of the vehicle served primarily to distinguish that case from our earlier decision in *LeLeaux*, where the bus was not only empty but was nothing more than where the accident occurred. The sentence was not intended to replace the statute or add elements to it, nor could it have done so. . . . ***By rigidly requiring "active" operation "at the time if the incident" as if those were elements of the statute—even in a case where application of those elements yields a result that conflicts with a common-sense reading of the statutory text—the court of appeals held PHI's claims to a stricter standard than the one provided by the Legislature.*** Although this error was understandable given the wording of *Ryder*, it was error nonetheless.

Id. at 305–06 (emphasis added). Likewise, TxDOT attempts to read one sentence from *LeLeaux* as part of the statute when it simply is not. The Act does not *also* require that the government employee be physically operating (or near) the equipment.

Just two months ago, this Court again considered the operation-or-use requirement in Section 101.021(1)(A) in *Rattray v. City of Brownsville*, No. 20-0975, 2023 WL 2438952 (Tex. Mar. 10, 2023). In *Rattray*, a City employee closed a (motorized) sluice gate during a severe rainstorm which led to flooding in a nearby neighborhood. *Id.* at *1. The City argued that the landowners were more accurately alleging that the City failed to open the sluice gates to release the flood water, which was an allegation of "nonuse" of motor equipment not covered by the statutory waiver. *Id.* at *7. As in *PHI*, this Court considered the facts and circumstances wholistically, and rejected an overwrought statutory interpretation. Although acknowledging the limited nature of statutory waivers, this Court reasoned:

> At the same time, however, we aim not to be unduly restrictive or to engage in sophistry in our understanding of "operation or use." They are, after all, "nothing if not common, everyday words" that "should be given their everyday meaning." *PHI*, 593 S.W.3d at 303. We have therefore decline to read the words of § 101.021 as "terms of art intelligible only to experts in the case law," *id.*, or as language burdened by "nit-picking technicalities" that do not "accompany other causes of action," Antonin Scalia & Bryan A. Garner, *Reading Law, The Interpretation of Legal Texts* 285 (2012).

Id. at *8.

The Court concluded that the landowners' allegations were sufficient to satisfy the operation-or-use requirement:

> What matters here is that, as all parties agree, the North Laredo Gate is used to control waterflow in the resaca, the City closed the gate, and it was the use of the gate (the attempt to control waterflow) that immediately preceded and allegedly caused the flooding of the homeowners' neighborhood. These events, as alleged, fit comfortably within the scope of the statutory waiver and our precedent interpreting that waiver. . . . [A]ll the operative facts were part of the same larger narrative without any logical disconnect that could justify the City's theory.

Id. at *9.

Similarly, in this case, TxDOT directed TFR/Lyellco to remove certain trees located on the Selfs' property, and TFR/Lyellco removed those trees with motor-driven equipment, damaging the Self's real property. Like the van driver in *PHI* or the stormwater manager in *Rattray*, TxDOT employees took actions that directly led to injury arising from the operation of motor-driven equipment/vehicles. While TxDOT may think that this application goes "too far," it fits under the language of

the statutory waiver in Section 101.021. *See PHI*, 593 S.W.3d at 305 ("The statute itself—and only the statute—provides the governing rule of decision."). It should be up to the legislature, not the courts, to add the word "employee" to the operation-or-use requirement of the TTCA.

C. The nominal designation of TFR/Lyellco as "independent contractors" does not negate the waiver of immunity.

The authority cited by TxDOT does not dictate that persons or entities nominally designated (by the government) as "independent contractors" can never satisfy the TTCA definition of "employee" even when traditional government employees retain control over critical details of a public project, such as designating items to be destroyed. Rather, "Texas courts have applied the traditional 'right to control' factors to determine whether a worker is an employee or an independent contractor in the context of the TTCA." *Olivares v. Brown & Gay Eng'g, Inc.*, 401 S.W.3d 363, 376 (Tex. App.—Houston [14th Dist.] 2013), *aff'd*, 461 S.W.3d 117 (Tex. 2015).

In *Olivares*, the Fort Bend County Toll Road Authority ("FBCTRA") contracted with Brown & Gay Engineering (for design) and Mike Stone Enterprises ("MSE") (for operation). *Id.* at 367. In analyzing the paid service element, the court noted: "Appellants do not dispute that FBCTRA paid both MSE and Brown & Gay for work performed under their respective contracts." *Id.* at 376 n.14. But after analyzing the relevant control factors, the court ultimately held that Brown & Gay

and MSE were independent contractors (and not employees) under the TTCA. *Id.* at 373-74. But there was no evidence in that case—as there is here—that the government instructed Brown & Gay or MSE to perform the specific acts that caused the injury, or that the injuries at issue were the foreseeable result of instructions given by traditional government employees.

As set forth in detail in the Selfs' Response Brief, fact issues (at a minimum) remain as to whether those physically operating the equipment on the Selfs' property were "in the paid service of a governmental unit by competent authority" and as to whether the government retained sufficient control of the critical details of the work such that those on site when the tree removal occurred satisfy the TTCA's definition of "employee." Indeed, there is no question that TxDOT paid for the project by "competent authority."

D. The Selfs' pleadings and the record evidence establish (at least) fact issues with respect to the inverse-condemnation claim.

The court of appeals held that proof was lacking as to whether "TxDOT intended to cut down those of the Selfs' trees beyond the right-of-way or was substantially certain that any trees on their private property would be cut down," and that the Selfs failed to show TxDOT was "aware that its action [would] necessarily cause physical damage to certain private property, and yet determine[d] that the benefit to the public outweigh[ed] the harm caused to that property." Op. on Reh'g at 50, *20.

"Inverse condemnation is 'a cause of action against a governmental defendant to recover the value of property that has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *Hearts Bluff Game Ranch Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012) (quoting *United States v. Clark*, 445 U.S. 253, 257 (1980)). The elements of an inverse-condemnation claim are "(1) a governmental entity intentionally performed certain acts (2) that resulted in a taking or damaging of property (3) for public use." *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 828 (Tex. App.—Dallas 2008, no pet.).

Regarding intent, in *Jennings*, the parties agreed that "only an intentional act can give rise to such a taking." *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004). The Jenningses asserted that "it is only the act causing the damage that must be intentional," while the City contended that the "relevant question is whether the government intended to damage the property." *Id.* This Court rejected both standards, and instead concluded:

> Nor do we believe, however, that the City must necessarily *intend* to cause the damage; if the government knows that specific damage is *substantially certain to result* from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged. Our earlier jurisprudence has left open the possibility that liability may be predicated on damage that is necessarily an incident to, or necessarily a consequential result of, the act of the governmental entity.

Id. (citations and quotation marks omitted, emphasis added).

Here, the evidence is clear (and certainly creates a fact issue) that TxDOT instructed and thus "intended" that the trees at issue be removed. Thus, the line of cases cited by TxDOT regarding "mere accidental results" does not apply. *See, e.g.*, TxDOT Response Br. at 19 (citing *Jennings*, 142 S.W.3d at 313−14 ("When damage is merely the accidental result of the government's act, there is no public benefit and the property cannot be said to be 'taken or damaged for public use.'") (quoting *Tex. Highway Dep't v. Weber*, 147 219 S.W.2d 70, 71 (Tex. 1949)). Nor did TxDOT's actions create the "mere possibility of damage," and therefore, that line of cases cited by TxDOT also does not control. *See, e.g.*, TxDOT Response Br. at 19 (citing *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009) ("The governmental entity's awareness of the mere possibility of damage is no evidence of intent."); *City of Keller v. Wilson*, 168 S.W.3d 802, 829 (Tex. 2005) ("The critical question in this case was the City's state of mind—the Wilsons had to prove the City knew (not should have known) that flooding was substantially certain.")).

The evidence also shows (or at least creates a fact issue) that the reason for such removal was to clear the right of way for the benefit of the State and the public at large. It is further undisputed that property was damaged. What is less clear is what TxDOT and its personnel knew with respect to whether any of the trees designated for removal were on private property, but that uncertainty is insufficient

to negate the fact issue as to TxDOT's intent, especially when TxDOT disregarded its own written procedures for confirming the limits of the right-of-way—which reflected TxDOT's view that the "benefit to the public" outweighed the cost of following those procedures.

Regarding public use, the court of appeals stated that: "The State and the public would surely have preferred that the Selfs' trees had remained standing because the act of removing trees from outside the right-of-way accomplished nothing of benefit for the public; indeed, that act's only result was the creation of the Selfs' claim against the fisc." Op. on Reh'g at 50-51, *19. But that logic is flawed—the purpose of the tree removal project was to create unobstructed space around the highway, and removing the Selfs' trees furthered that purpose.

Accordingly, the elements of the Selfs' inverse condemnation claim have been established, or at a minimum, fact issues preclude dismissal of that claim.

II.
PRAYER

FOR THESE REASONS, Respondents and Cross-Petitioners, Mark and Birgit Self, respectfully request that this Court grant their petition for review, affirm the trial court's order, reverse contrary portions of the decision of the court of appeals, and grant such other and further relief to which Respondents are justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this Brief contains 4,103 words, and is in compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(B). Further, I certify that on May 12, 2023, I transmitted a copy of the foregoing to the following counsel by electronic mail:

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