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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.

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

RESPONDENTS' RESPONSE BRIEF ON THE MERITS

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Rules and Statutes

I.
STATEMENT OF FACTS

Respondents incorporate by reference as if fully set forth herein the Statement of Facts as stated in Respondents' Brief on the Merits filed in this Court on March 29, 2023.

II.
SUMMARY OF ARGUMENT

TxDOT challenges the holding by the court of appeals that "the trial court did not err by finding that a fact issue existed regarding whether the contractor was not an independent contractor but instead was TxDOT's employee," and its affirmance of the trial court's denial of the plea to the jurisdiction with respect to the "independent-contractor claim."

TxDOT essentially argues that any person who does not receive a state paycheck can never be an "employee" under the Tort Claims Act, without regard to control. But the Act itself confirms that control matters:

> (2) "Employee" means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, *or a person who performs tasks the details of which the governmental unit does not have the legal right to control*.

TEX. CIV. PRAC. & REM. CODE § 101.001(2) (emphasis added). Nevertheless, TxDOT advocates for a holding that would turn entirely on form without examining

substance, by disregarding the governmental unit's right to control—or its actual exercise of control over—the progress, details, and methods of the work in question.

Moreover, the term "paid service" is not defined in the statute, and the plain meaning of that term is much broader than the bright line "paycheck test" for which TxDOT advocates. Further, TxDOT's new argument that indirect or intermediated payments can never qualify as "paid service" was not timely raised and was waived, as the court of appeals correctly determined.

The court of appeals correctly held that fact issues existed about whether those who removed the trees were "employees" of TxDOT, including because TxDOT supplied their funding, and because TxDOT exercised control over the critical detail that led to the Self's injury, *i.e.*, identifying what trees to remove.

III.
ARGUMENT

A. The statutory definition of "employee" does not support a bright line "paycheck test" that ignores actual or constructive control.

The Texas Torts Claim Act provides a waiver of sovereign immunity under section 101.021:

> 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 the scope of his 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(1). TxDOT argues that because the party who physically cut down the trees at issue did not receive a TxDOT paycheck, immunity has not been waived.

While only limited discovery has occurred, it is evident that TxDOT exercised substantial control over (and contracted for the right to control) the work details of the individuals who physically destroyed the trees at issue, and that such control was a proximate cause of the loss. The court of appeals thus correctly held that fact issues exist as to "employee" status.

As summarized in detail in the incorporated Statement of Facts, TxDOT actually exercised and retained the right to exercise control over the progress, details, and methods of the work on the project, and TxDOT's acts and omissions in exercising such control caused the property damage at issue in this case.

The Act defines an "employee" as:

> [A] person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

TEX. CIV. PRAC. & REM. CODE § 101.001(2). The term "in the paid service" is not defined, and nothing in the statute supports the bright-line "paycheck test" for which TxDOT advocates. *See Nat'l Liability & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000) ("[W]e must ascertain the Legislature's intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state.") Indeed, if that was the drafter's intent, there would have been much simpler and clearer ways to express such a test for "employee" status.

Nor do the cases cited by TxDOT support such a bright-line test. For example, the *Dillard* case involved a "volunteer reserve deputy subject to being called into service" who lost control of his car, crossed four lanes of traffic, and hit an oncoming car head-on. *Harris Cnty. v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994). The crash occurred late at night, the deputy was legally intoxicated, and one of the occupants of the other car was killed. *Id.* The deputy was convicted of voluntary manslaughter. *Id.* Because there was no evidence that the volunteer reserve deputy was in the County's—or anyone's—"paid" service in any sense of the word, this Court concluded that he was not an "employee" under the TTCA. *Id.* There was no contention or evidence that any other government employee had proximately caused the injuries.

In *Murk*, there was no dispute that Dr. Murk was "compensated entirely by UT and was thus in its 'paid service.'" *Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex.

2003). And in that case, the defendant Dr. Murk was the one arguing he *was* an employee, which entitled him to summary judgment based on the specific procedural posture of that case, which included a prior final judgment in favor of University of Texas Health Science Center ("UT"). *Id.* It was undisputed that Dr. Murk was in UT's paid service. However, with respect to another physician, Dr. Flangas, the Court went beyond the face of Dr. Flangas's paycheck and examined observed that: "no part of Flangas's compensation was *ultimately paid* by UT, and he therefore cannot be said to have been in UT's 'paid service'." *Id.* (emphasis added).

In *Thomas*, the court considered control as well as "paid service," and held: "Because the physicians were not 'in the paid service' of Harris County, *and because Harris County had no right to control the details of the physicians' work*, Harris County's sovereign immunity under the TTCA has not been waived." *Thomas v. Harris Cnty.*, 30 S.W.3d 51, 54 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (emphasis added).

As the court of appeals noted:

> It appears that TxDOT's argument offers an all-or-nothing proposition that even though it retained control over the injury-causing event, if the entity it contracted with to do that work remains an independent contractor for other aspects of its work, that entity can never be an employee. That proposition appears contrary to logic and precedent.

Op. on Reh'g at 42-43 n.7. TxDOT submits the same argument to this Court, and it should again be rejected.

The *Marino* case similarly involved a resident physician who was undisputedly paid by The University of Texas System Medical Foundation (the "Foundation"). *Marino v. Lenoir*, 526 S.W.3d 403, 406 (Tex. 2017). Regarding control, the "evidence show[ed] that the details of Gonski's work were in fact supervised and assigned by [University of Texas Health Science Center at Houston] personnel, as the Handbook specifies, rather than personnel of the Foundation." *Id.* at 410. The only evidence cited for the resident's argument that the Foundation retained control was a single "provision of a lengthy Handbook stating that the Foundation 'reserve[s] the right to change any requirements affecting the terms and conditions of employment' of the resident," but there was no evidence that the Foundation actually exercised any such control with respect to the resident physician, or had any role in proximately causing the injuries at issue. *Id.* This Court thus concluded that the resident physician did not satisfy the definition of "employee." *Id.*

None of these cases support the rigid test proposed by TxDOT. Because it is neither supported by the statutory language nor case law, TxDOT's unduly restrictive reading of "employee" should be rejected.

B. TxDOT waived the argument that the "paycheck test" controls without regard to actual or constructive control.

TxDOT argued lack of control in the trial court and to the court of appeals. *See, e.g.*, Appellant's Br. at 8-12 (citing common law factors creating "test to

determine whether a worker is an employee rather than an independent contractor," and arguing facts do not support employee status); Op. on Reh'g at 41 n.7 ("This argument is a different one from the one that TxDOT raised previously when it argued that both the original contractor and subcontractor were independent contractors of TxDOT because TxDOT did not exercise sufficient control over either for them to be employees. The cases that TxDOT now cites to support the proposition in the motions for rehearing were not in its prior briefs in this court (nor were they presented to the trial court)."). As a result, TxDOT should not be permitted to change positions and argue that control is irrelevant, and that the outcome is controlled entirely by the payor name printed on the individuals' paychecks. *See* TEX. R. APP. P. 33.1.; *Blaschke v. Citizens Med. Ctr.*, 742 S.W.2d 779, 781 (Tex. App.—Corpus Christi 1987, no writ) ("Since Citizens' sovereign immunity claim was not presented to the trial court, it cannot be considered on appeal in support of the summary judgment.")

TxDOT argues that it can raise any sovereign-immunity-related argument at any time. *See* Br. for Petitioner at 36-37 ("It is blackletter law that a jurisdictional question cannot be waived; it may be raised, even for the first time, on appeal; it may be raised by the appellate court sua sponte; and the appellate court has jurisdiction to decide both its own and the trial court's jurisdiction."). But sovereign immunity and subject matter jurisdiction are not synonymous: "The ability of states to waive

sovereign immunity or consent to suit is inconsistent with the characterization of sovereign immunity as a subject matter jurisdiction issue under both federal and Texas case law." *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 105 (Tex. 2012) (J. Lehrmann concurring and dissenting). Fact-intensive issues such as how the funding and payment of the parties involved in this case was structured should be raised at the trial court so that court could evaluate whether the evidence established "paid service."

C. The court of appeals properly found a fact issue with respect to actual and constructive control.

TxDOT now argues that the statute should be interpreted so that "control" only applies to the details of the operation or use of the motor vehicle or equipment. This restrictive reading of the statute is uncalled for and not supported by the plain language of the Act. Nothing in either section 101.021(1) or section 101.001(2) require the governmental entity's control over the employee to be directly related to the operation or use of the motor vehicle, but only that the employee proximately causes "the property damage . . . [that] arises from the operation or use of a motor-driven vehicle or motor-driven equipment." *Cf. 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) ("Aside from the narrow context of governmental agents prosecuting tax delinquency suits, 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."); *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 616 (Tex. 2000) ("The Legislature plainly intended the State to waive sovereign immunity if a governmental unit would, were it a private person, be liable to the claimant according to Texas law.").

TxDOT cites *Halstead* for the proposition that the "type of control necessary to establish employee status for waiver-of-immunity purposes is control over the details of the operation or use of the motor-driven equipment or tangible personal property." *Harris Cnty. Flood Control Dist. v. Halstead*, 650 S.W.3d 707, 717 (Tex. App.—Houston [14th Dist.] 2022, no pet.). But that case involved an ordinary workplace injury—" Halstead [a chainsaw operator] was injured when a tree he was cutting fell and struck him". *Id.* at 711. Thus, the details that mattered in that case related to how the chainsaw was operated. The instant case is different—the critical detail was designating which trees to remove. The techniques used to operate the chainsaws and other equipment are not the source or cause of the injuries in this case, and thus focusing only "control" of the "details" of those techniques makes no sense.

The Contract itself called for substantial exercise of control by TxDOT, including as to identifying, marking, and designating the trees to be removed:

- "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the trunk" [CR 335]

- Quantities for tree removal "shall be *identified* by the engineer prior to work being performed" [CR 337]

- "For trees *marked* for removal, the diameter is determined by . . ." [CR 338]

- At formal pre-construction conference: (a) "discussed perform work within *designated work spaces only*," (b) "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the trunk," (c) "trimming/brush removal . . . from *right-of-way line to right-of-way line*" [CR 256–57]

- "Perform tree and brush removal and trimming from *right of way line to right of way line* or other widths and locations shown on the *plans*. . . . Remove trees of various diameters as shown on the *plans*, or as directed." [CR 275; 359]

Moreover, there is no dispute that one or more TxDOT employees—including Todd Russell—directed TFR and/or Lyellco to disregard the written contract documents and clear "fence to fence." CR 229 (Self Declaration: "After learning of the tree destruction, I contacted TxDOT, as set forth in more detail in Exhibit 4. I was informed by TxDOT personnel that the right-of-way was not surveyed, and the contractors were simply instructed to 'clear everything between the fences.'").

This admission against interest by TxDOT is confirmed by contemporaneous TxDOT emails, showing that Mr. Russell provided the instructions for which trees should be removed:

From: Glenn Allbritton
Sent: Thursday, July 23, 2020 2:57 PM
To: Michael Beaver
Cc: Larry Gulley
Subject: FW: FM 677 ROW Stump Removal

Mike – Just to let you know, Shane contacted me earlier today about a property owner upset about trees cut down near his property. Todd did direct the contractor to cut the trees down, but they were on the state highway side of the fence. Since this complaint, they did determine that it is a 100' ROW out there and after measuring with a wheel one of the trees is maybe 6" on his property and all others are within that 50' ROW from centerline. Of course, we are not exactly perfect when measuring from the centerline with a wheel. It appears that the property owner might get a survey. Regardless, I directed Shane to give him the OCC claim address to send his concern into. I'm not 100% sure that's the right place to go with this issue, but I think it's a good start on the claim process should his survey prove that those trees are in fact on his property.

Glenn

CR 307.

This "fence-to-fence" instruction is further confirmed by TxDOT's discovery responses:

Request for Interrogatories No. 6:
Please identify any efforts TxDOT or T.F.R. took to ensure it was only clearing or maintaining trees or vegetation within the FM677 public right-of-way and not on private property.

OBJECTION(S):

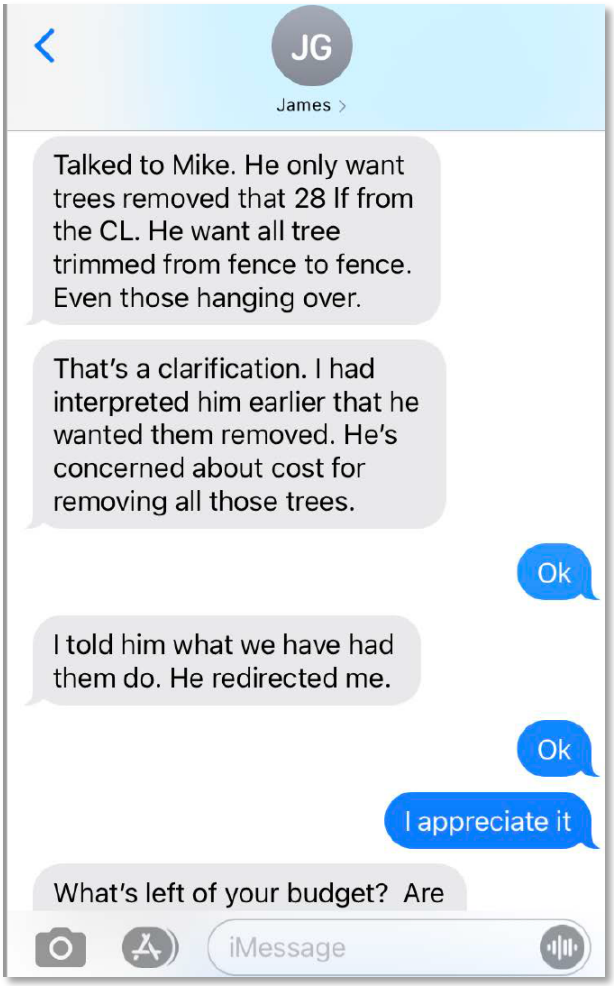
Overly Broad
TXDOT objects on the basis that the request is overly broad, vague and ambiguous and is beyond the scope of discovery allowed by the Texas Rules of Civil Procedure. Plaintiffs' interrogatory amounts to nothing more than a fishing expedition which is prohibited under Texas law. Further, TxDOT objects to this discovery request because the discovery can be obtained from some other source that is more convenient, less burdensome, or less expensive. Tex. R. Civ. P. 192.4(a).

Subject to and without waving the foregoing objection(s) and/or assertion(s) of privilege, TxDOT responds as follows:

Fence-to-fence has been the standard method of determining the right of way. Plans were provided and areas were discussed at the pre-work meeting. Plans of the pre-work meeting are produced with TxDOT's *Response to Request for Production of Documents*. There were also phone communications between T.F.R. and TxDOT inspector.

CR 286.

Moreover, contemporaneous communications between Mike Hallum (TxDOT Area Engineer), James Gibbs (TxDOT Gainesville), and Todd Russell (TxDOT Inspector) confirm that internal confusion, budget concerns, and casual definition and alteration of work scopes contributed to the problem:



CR 299.

The above text chain confirms that *after* the Selfs' trees were removed, TxDOT altered its work scope instructions to limit *removal* of trees to twenty-eight linear feet on either side of the roadway center line, with *trimming* from fence to

fence, which was evidently an update to the instructions that were in place the day the Selfs' trees were removed. Sensibly, the twenty-eight-foot requirement[1] would require the crew to use a tape measure or other technique to confirm the limits of the tree-removal zone, which they had evidently never done on this project. But the change came too late to benefit the Selfs.

Finally, TxDOT has confirmed in interrogatory answers that "no surveys were conducted in association with this project," and "TxDOT is not aware of any communications with Plaintiff prior to clearing or maintaining of trees or vegetation on this project." CR 287–88; 228–30.

Taken as a whole, these facts are sufficient to create a fact issue as to the Tort Claims Act's language with respect to "a person who performs tasks the details of which the governmental unit does not have the legal right to control." Here, TxDOT had the right to—and *did*—control details of the work that proximately caused the losses at issue.

Moreover, "TxDOT is suffering the consequences of how it drafted the contract at issue and, perhaps, the instructions issued by its employees. TxDOT could have protected itself in the contract by limiting the determinations that it took on itself to make." Op. on Reh'g at 44 n.8. TxDOT can potentially avoid liability in many situations by structuring its contracts and actual working relationships

[1] The full right of way width was 60 feet, or 30 feet from the centerline.

accordingly. For example, TxDOT in this case could have confirmed in the contract that TFR/Lyellco were responsible for determining which trees were in the right of way. Instead, TxDOT retained the responsibility for designating and marking trees (but didn't mark them) and directed that the trees at issue be removed. *See* CR 307 excerpted *supra* ("Todd did direct the contractor to cut the trees down"). When the State hires someone to destroy something, it should be held responsible when it designates the wrong target.

There is no dispute that the workers on site were being paid, and that TxDOT was the ultimate source of those payments. And TxDOT has not provided support for a test under which only a person whose paycheck comes directly from the State can be considered an "employee," regardless of control. Allowing TxDOT to escape liability by arranging for persons who don't receive TxDOT paychecks to operate the vehicles and equipment used on TxDOT's myriad projects around the state—all while TxDOT retains control over the project's work details—would completely frustrate the purpose of the Tort Claims Act, and leave those injured by the State without redress.

IV.
PRAYER

FOR THESE REASONS, Respondents, Mark and Birgit Self, respectfully request that this Honorable Court of Appeals deny TxDOT's Petition for Review or affirm the rulings challenged therein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this Brief contains 2,956 words, and is in compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(B). Further, I certify that on April 18, 2023, I transmitted a copy of the foregoing to the following counsel by electronic mail:

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