FILED
22-0585
10/13/2022 4:07 PM
tex-69206655
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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 TO PETITION FOR REVIEW

Nicholas P. Laurent
State Bar No. 24065591
laurent@barronadler.com
Andrew York
State Bar No. 24066318
york@barronadler.com
Blaire A. Knox
State Bar No. 24074542
knox@barronadler.com
BARRON, ADLER, CLOUGH & ODDO, LLP
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 | (512) 478-6022 (fax)

ATTORNEYS FOR RESPONDENTS MARK SELF & BIRGIT SELF

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

Rules and Statutes

I.
STATEMENT OF FACTS

Petitioner's factual recitation omits many of the details regarding control. Critically, the undisputed facts confirm that TxDOT had a legal and contractual right to control—and actually did control—the progress, details, and methods of the work at issue. The Contract[1] called for:

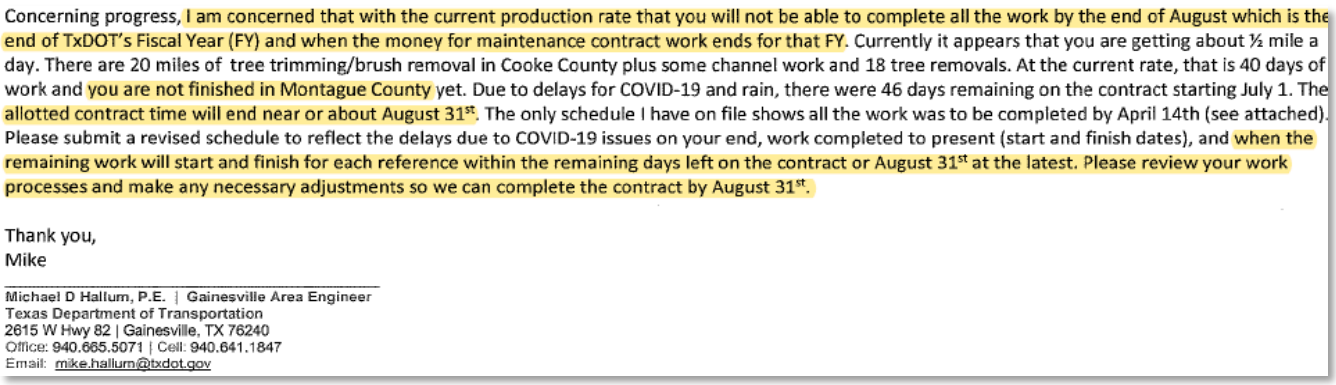
- "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the trunk" [CR 335]
- Quantities for tree removal "shall be *identified* by the engineer prior to work being performed" [CR 337]
- "For trees *marked* for removal, the diameter is determined by . . ." [CR 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]

The contract price for the Contract was approximately $336,000 [CR 431], with possible adjustments up or down depending on the number of trees actually removed by TFR. To that end, the pre-construction conference notes included:

[1] In January 2020, TxDOT and T.F.R. Enterprises, Inc. ("TFR") entered into Contract No. 12194216 for "Tree and Brush Removal in Montague County" (the "Contract").

- "Coordinate the day after work performed to get item quantities established for payment" [CR 264]
- "Mark additional trees to be removed (not on plans) and get quantities to Chris for $ approval" [*Id.*]

However, in July 2020, TxDOT expressed concerns that TFR was not moving quickly enough:



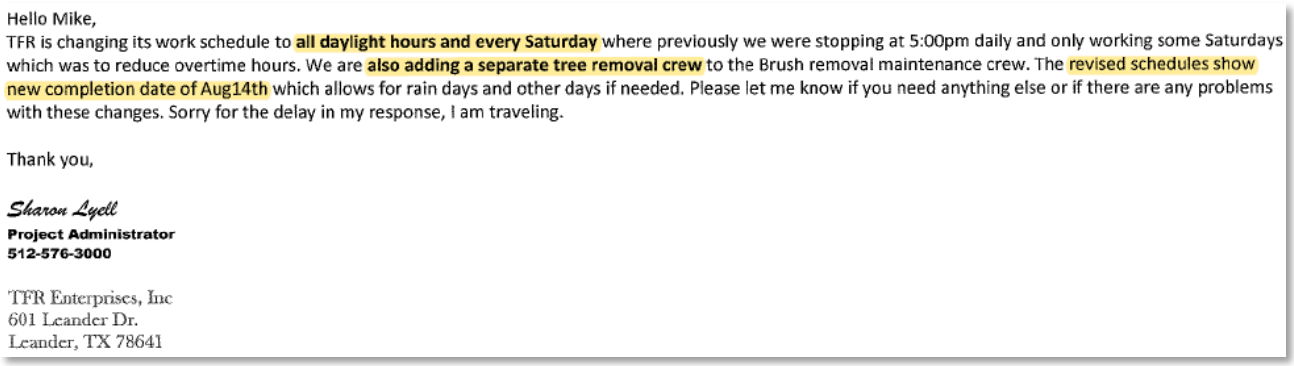
Concerning progress, I am concerned that with the current production rate that you will not be able to complete all the work by the end of August which is the end of TxDOT's Fiscal Year (FY) and when the money for maintenance contract work ends for that FY. Currently it appears that you are getting about ½ mile a day. There are 20 miles of tree trimming/brush removal in Cooke County plus some channel work and 18 tree removals. At the current rate, that is 40 days of work and you are not finished in Montague County yet. Due to delays for COVID-19 and rain, there were 46 days remaining on the contract starting July 1. The allotted contract time will end near or about August 31st. The only schedule I have on file shows all the work was to be completed by April 14th (see attached). Please submit a revised schedule to reflect the delays due to COVID-19 issues on your end, work completed to present (start and finish dates), and when the remaining work will start and finish for each reference within the remaining days left on the contract or August 31st at the latest. Please review your work processes and make any necessary adjustments so we can complete the contract by August 31st.

Thank you,
Mike

Michael D Hallum, P.E. | Gainesville Area Engineer
Texas Department of Transportation
2615 W Hwy 82 | Gainesville, TX 76240
Office: 940.665.5071 | Cell: 940.641.1847
Email: mike.hallum@txdot.gov

CR 279.

In response, in an email dated July 16, TFR agreed to start working essentially around the clock, and added a new crew with apparently minimal (if any) experience with this type of project:



Hello Mike,
TFR is changing its work schedule to **all daylight hours and every Saturday** where previously we were stopping at 5:00pm daily and only working some Saturdays which was to reduce overtime hours. We are **also adding a separate tree removal crew** to the Brush removal maintenance crew. The revised schedules show new completion date of Aug14th which allows for rain days and other days if needed. Please let me know if you need anything else or if there are any problems with these changes. Sorry for the delay in my response, I am traveling.

Thank you,

Sharon Lyell
Project Administrator
512-576-3000

TFR Enterprises, Inc
601 Leander Dr.
Leander, TX 78641

CR 279.

This effort to fast-track the project to beat an artificial budgetary deadline led to TFR executing a subcontract with Lyellco Inc. ("Lyellco") in July 2020. CR 440–45. According to public Secretary of State records, the president and registered agent of Lyellco is Sharon Lyell, who signed the email above as TFR's project administrator. Thus, this was not an arms-length relationship.

Days later, on July 23, Lyellco personnel removed the twenty-two trees at issue from the Property.[2]

TFR has confirmed in discovery that the tree damage "arose from" the use of chainsaws and a Bobcat provided by Lyellco, and a "bucket truck" provided by TFR:

INTERROGATORY NO. 3: Please identify the equipment used to remove trees on Plaintiffs' Property, on any properties that immediately adjoin Plaintiffs' Property, and on any FM677 public right-of-way adjacent to Plaintiffs' Property. In answering this interrogatory, please state if any such equipment is motor-driven.

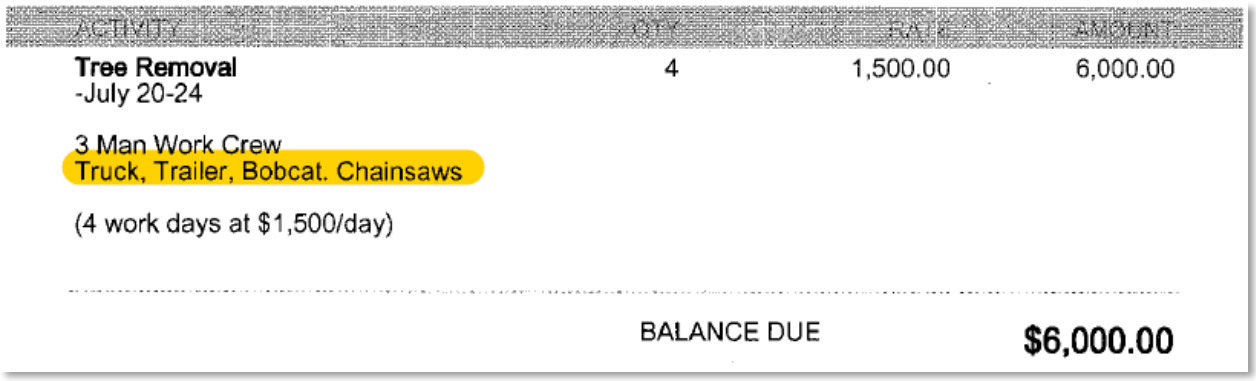
ANSWER:

Lyellco used its own chainsaws and Bobcat, and also used a bucket truck provided by TFR. Also, see bates labeled documents: DEF_TFR_000264-274, which are incorporated by reference.

CR 292.

Lyellco's work records confirm the same:

[2] At least 30 trees were removed in total. Of those, at least 22 were located either entirely or partially within the Property's boundaries (and outside of the public right-of-way). CR 228; 232–38.



ACTIVITY	QTY	RATE	AMOUNT
Tree Removal -July 20-24 3 Man Work Crew Truck, Trailer, Bobcat. Chainsaws (4 work days at $1,500/day)	4	1,500.00	6,000.00
	BALANCE DUE		**$6,000.00**

CR 296.

Finally, there is ample evidence that one or more TxDOT employees—including Todd Russell—directed TFR and/or Lyellco to 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):

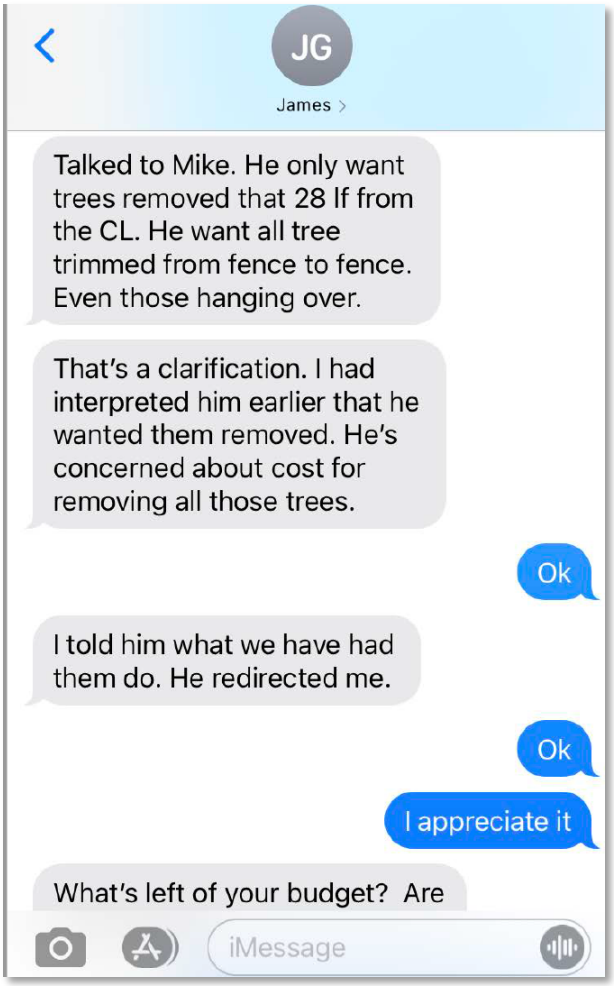
Overly Broad
TXDOT objects on the basis that the request is overly broad, vague and ambiguous and is beyond the scope of discovery allowed by the Texas Rules of Civil Procedure. Plaintiffs' interrogatory amounts to nothing more than a fishing expedition which is prohibited under Texas law. Further, TxDOT 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[3] 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.

II.
SUMMARY OF ARGUMENT

This Response focuses on the issues raised by the Petition for Review filed by TxDOT on August 24, 2022.[4] TxDOT's Petition 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."

---

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

[4] Respondents' Petition for Review filed contemporaneously with this Response will address Respondents' arguments in support of affirming the trial court's order denying the plea to the jurisdiction.

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*.

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.

III.
ARGUMENT

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 above, 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 "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." *Id.* § 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. 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 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. *Id.*

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.

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." *Id.* at 44 n.8. TxDOT can potentially avoid liability in many situations by structuring its contracts and actual working relationships 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.

Here, 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.

Finally, TxDOT argued lack of control 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). 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 paychecks.

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,

BARRON ADLER CLOUGH & ODDO, L.L.P.
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 – Telephone
(512) 478-6022 – Facsimile

By: */s/ Andrew F. York*
Nicholas P. Laurent (SBN 24065591)
laurent@barronadler.com
Andrew F. York (SBN 24066318)
york@barronadler.com
Blaire A. Knox (SBN 24074542)
knox@barronadler.com

ATTORNEY FOR RESPONDENTS,
MARK SELF & BIRGIT SELF

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this Brief contains 1,966 words, and is in compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(B). Further, I certify that on October 13, 2022, I transmitted a copy of the foregoing to the following counsel by electronic mail:

Catherine Fuller
Assistant Attorney General
Transportation Division
P.O. Box 12548
Austin, Texas 78711-2548
O: (512) 936-1116
F: (512) 936-0888
catherine.fuller@oag.texas.gov
Counsel for Petitioner

Jennifer D. Aufricht
Sean R. Hicks
THOMPSON COE
700 N. Pearl Street, 25th Floor
Dallas, Texas 75201-8209
jaufricht@thompsoncoe.com
shicks@thompsoncoe.com
Counsel for T.F.R. Enterprises

Catherine L. Kyle
Scott G. Marcinkus
CHAMBERLAIN MCHANEY, PLLC
901 S. MoPac Expressway
Bldg. I, Suite 500
Austin, Texas 78746
ckyle@chmc-law.com
smarcinkus@chmc-law.com
Counsel for Lyellco, Inc.

/s/ Andrew F. York
Andrew F. York

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Amanda Glasscock on behalf of Nicholas Laurent
Bar No. 24065591
aglasscock@barronadler.com
Envelope ID: 69206655
Status as of 10/13/2022 4:23 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Catherine L. Kyle	11778600	ckyle@chmc-law.com	10/13/2022 4:07:08 PM	SENT
Sean Hicks	24072479	shicks@thompsoncoe.com	10/13/2022 4:07:08 PM	SENT
Andrew York	24066318	york@barronadler.com	10/13/2022 4:07:08 PM	SENT
Blaire Knox	24074542	knox@barronadler.com	10/13/2022 4:07:08 PM	SENT
Nicholas Laurent	24065591	laurent@barronadler.com	10/13/2022 4:07:08 PM	SENT
Scott Marcinkus	24099703	smarcinkus@chmc-law.com	10/13/2022 4:07:08 PM	SENT
Jennifer Dechamplain Aufricht	1429050	jaufricht@thompsoncoe.com	10/13/2022 4:07:08 PM	SENT
Amanda Glasscock		aglasscock@barronadler.com	10/13/2022 4:07:08 PM	SENT
Catherine Fuller		Catherine.Fuller@oag.texas.gov	10/13/2022 4:07:08 PM	SENT