No. 22-0585

In the Supreme Court of Texas

TEXAS DEPARTMENT OF TRANSPORTATION,
Petitioner/Cross-Respondent,

v.

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

On Petitions for Review
from the Second Court of Appeals, Fort Worth

BRIEF FOR PETITIONER

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Statement of the Case

Nature of the Case:	This suit for damages was brought by Mark and Birgit Self (Plaintiffs) against the Texas Department of Transportation (TxDOT), prime contractor T.F.R. Enterprises, Inc. (TFR), and subcontractor Lyellco, Inc., for removing trees allegedly on Plaintiffs' land during a highway-maintenance project in Montague County. CR.182–83. Plaintiffs allege two causes of action against TxDOT: negligence and inverse condemnation. CR.184, 185. Regarding the negligence action, Plaintiffs allege that TxDOT's sovereign immunity from suit is waived under the Texas Tort Claims Act. CR.184–85. TxDOT filed a plea to the jurisdiction that attached evidence, CR.34–175, and argued that the trial court lacked subject-matter jurisdiction over Plaintiffs' negligence cause of action because no facts affirmatively demonstrate a waiver of TxDOT's immunity from suit under the Act, CR.38–40. Regarding Plaintiffs' inverse-condemnation cause of action, TxDOT argued that Plaintiffs failed to allege facts establishing a viable takings claim under the Texas Constitution. CR.41–45.
Trial Court:	97th Judicial District Court, Montague County The Honorable Jack A. McGaughey
Disposition in the Trial Court:	The court denied TxDOT's plea to the jurisdiction. CR.468.
Parties in the Court of Appeals:	TxDOT was appellant. Plaintiffs were appellees.
Disposition in the Court of Appeals:	The court of appeals affirmed in part and reversed in part the trial court's order denying TxDOT's plea as to Plaintiffs' negligence claim but reversed as to Plaintiffs' inverse-condemnation claim. *TxDOT v. Self*, No. 02-21-00240-CV, 2022 WL 1259094 (Tex. App.—Fort Worth Apr. 28, 2022, pet. pending) (mem. op. on reh'g) (per Bassel, J., joined by Wallach and Walker, JJ.). TxDOT's motions for rehearing and reconsideration en banc were denied. *Id.* at *1.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a).

Issues Presented

Under the Texas Tort Claims Act, a governmental unit's immunity from suit is waived when its employee is liable for property damage arising from the operation or use of a motor-driven vehicle or equipment. An employee is a person who is in the paid service of the governmental unit and is not an independent contractor, an agent or representative of an independent contractor, or someone who performs a task the details of which the governmental unit has no legal right to control. TxDOT contracted with TFR to remove trees and clear brush in the rights of way along state highways, and TFR subcontracted with Lyellco to perform tree removal. Plaintiffs allege that Lyellco mistakenly removed several trees that were on Plaintiffs' land. The issues presented are:

1. Does the evidence conclusively establish that Lyellco's workers who allegedly removed Plaintiffs' trees were not in the paid service of TxDOT and thus not its employees, such that TxDOT's immunity from suit is not waived?

2. Did the court of appeals err in refusing to address TxDOT's argument that the workers who allegedly removed Plaintiffs' trees were not employees of TxDOT because, according to the court, the argument was untimely, having been raised for the first time in TxDOT's motions for rehearing and reconsideration en banc?

3. If the Court finds that the evidence raises a fact issue regarding whether Lyellco's workers were in the paid service of TxDOT, is TxDOT's immunity from suit nevertheless still remain because TxDOT had no legal right to control the details of the Lyellco workers' performance of the task of tree removal?

To the Honorable Supreme Court of Texas:

TxDOT hired prime contractor TFR to perform highway maintenance that included removing trees in a right-of-way easement along a farm-to-market road in Montague County. After falling behind schedule, TFR subcontracted Lyellco to perform large tree removal. Lyellco's crew allegedly removed several trees on Plaintiffs' property by mistake, and Plaintiffs sued TxDOT for negligence and inverse condemnation and the contractors for trespass and negligence. TxDOT filed a plea to the jurisdiction asserting, in relevant part, that its immunity from suit for Plaintiffs' negligence cause of action is not waived under the Texas Tort Claims Act (TTCA or the Act), Tex. Civ. Prac. & Rem. Code §§ 101.001–.109, because the contractors and Lyellco's workers who removed Plaintiffs' trees were not TxDOT's "Employee[s]," as that word is defined in the Act and required by the Act's immunity waiver. The trial court denied TxDOT's plea, and the court of appeals affirmed in part the trial court's order, finding that the evidence raised a fact issue as to whether TxDOT had the right to control and actually controlled the details of the workers' performance of the tree-removal task. Based on that finding, the court concluded that Lyellco's workers were not independent contractors, but rather could be considered TxDOT employees, and thus, TxDOT may be liable for the workers' negligence, if any, and TxDOT's immunity from suit is waived under the Act. In so holding, the court of appeals made several errors of law that are important to the jurisprudence of the State.

First, the court erred because the evidence conclusively establishes that Lyellco's workers were not "in the paid service" of TxDOT, as required by the

definition in section 101.001(2) of the Act. Relatedly, the court erred by refusing to even address TxDOT's argument about the workers' employment status, holding instead that the argument was waived because TxDOT raised it only in its motions for rehearing and reconsideration en banc. Both missteps are mistakes of law that are important to the jurisprudence of the State and require correction.

The text of the TTCA requires that to waive a governmental unit's immunity from suit, the governmental unit must be liable under section 101.021. Specifically, the negligence of a governmental unit's *employee*—as that word is defined in section 101.001(2) of the Act—must proximately cause some harm. Here, the alleged employees must have negligently operated or used a motor-driven vehicle or motor-driven equipment to cause property damage. The record evidence in this case conclusively establishes that Lyellco's workers were not in the paid service of TxDOT, but rather were on Lyellco's payroll, and thus were not TxDOT employees.

But instead of applying the Act's definition (a statutory prerequisite to suit) to the undisputed facts, the court skipped over the paid-service requirement and held that the exclusions to that requirement in section 101.001(2) applied to TxDOT and that there was a fact question as to whether TxDOT had the legal right to control the details of the contractors' work and actually did so. The court's analysis directly conflicts with the proper mode of analysis set forth in the text of section 101.001(2). The paid-service requirement must first be satisfied, and if it is, only then does the exclusion involving control over the work come into play. The court's failure to properly apply the text of section 101.001(2) as written is an error of law that is important to the jurisprudence of the State and requires correction.

The court erroneously refused to even address TxDOT's argument about the paid-employee status of Lyellco's workers because, the court said, TxDOT raised the argument only in a motion for rehearing, and therefore, the argument came too late. But because the workers' employment status is relevant to the waiver of immunity in the TTCA and because the immunity waiver implicates the trial court's subject-matter jurisdiction over Plaintiffs' negligence cause of action, it was fundamental error that was not waivable on appeal. This precept of law is foundational to the jurisprudence of the State, and the court of appeals' flouting of this rule requires correction.

Finally, if this Court finds a fact issue as to the paid-employee status of Lyellco's workers, it should nevertheless hold that the evidence conclusively established that the contractors and Lyellco's workers were independent contractors over whom TxDOT did not have a legal right to control the performance of the details of their task to remove trees using motor-driven vehicles and equipment. The control exclusion in section 101.001(2) is a recurring issue, and its proper interpretation and application is manifestly important to the jurisprudence of the State. Accordingly, the Court should grant TxDOT's petition, reverse the court of appeals' judgment in part regarding Plaintiffs' negligence cause of action against TxDOT, and dismiss their suit with prejudice.

Statement of Facts

The court of appeals correctly stated the nature of the case. *See supra* p. ix.

I. Factual Background

A. The right-of-way easement next to Plaintiffs' land

Sometime in 1956, Farm-to-Market (FM) Road 677 was constructed in Montague County. CR.10, 49. It has a 100-foot right-of-way easement (50 feet from the centerline of the roadway in both directions). CR.158. When the road was constructed, the landowner of the property that is the subject of this lawsuit granted the easement for FM 677 next to his land. CR.10, 51; *see also* CR.232–37, 300, 306. The edge of the landowner's property adjacent to FM 677's right of way is demarcated by a fence. *See* CR.10, 232–33.

In 2017, Plaintiffs bought this property. CR.10, 240–43. At that time, "the fence line was completely overgrown with trees and brush," so Plaintiffs "hired a land clearing and fence building firm to clear out the fence line and construct a new fence." CR.10. Plaintiffs instructed the "fence contractor" to "set the fence two to three feet on [Plaintiffs'] side of the ROW easement so that the trees and fence could be maintained." CR.10.

B. The contract for highway maintenance in Montague County

In 2020, TxDOT began a highway-maintenance project for various roadways in Montague, Clay, and Cooke Counties. CR.49–50. The project included the FM 677 right of way adjacent to Plaintiffs' land. CR.49. TFR contracted with TxDOT to work on the project. CR.47–154. The contract is composed of numerous documents, including but not limited to the parties' agreement, the project plans, specifications, and general notes (collectively the Contract). CR.47–154, 75, 266–76.

The Contract was for "tree removal and trimming" in the rights of way along state highways. CR.50. TFR agreed to clear trees and brush, CR.50, "[d]ispose of all vegetative matter and any other materials removed from State Right of Way," CR.50, "[c]omplete at least ½ mile of tree trimming, brush and tree removal per day," CR.51, and finish the project in 85 "working days," CR.145. Trees and brush were to be trimmed and removed "from right of way line to right of way line or other widths and locations shown on the plans." CR.51, 275. TFR was required to remove trees according to the "diameters [of the trees] as shown on the plans, or as directed." CR.275. And TFR agreed to "[p]rovide [the] equipment necessary to complete the work." CR.275. TxDOT's Engineer had "the authority to observe, test, inspect, approve, and accept the work" and "decide[] all questions about the quality and acceptability of materials, work performed, work progress, Contract interpretations, and acceptable Contract fulfillment." CR.126.

Payment for TFR's services in removing trees and stumps and trimming trees and brush was calculated based on unit pricing. CR.276. The Contract provided that this price constituted "full compensation for removal, trimming, disposal, equipment, traffic control, labor, and incidentals." CR.276. The total contract price was $335,907.50, CR.147, 255, 435, subject to TxDOT-approved adjustments for "additional trees to be removed (not on plans)," CR.264. TFR began work on the project in 2020.

C. The subcontract for tree-removal services

By July of that year, TxDOT emailed TFR expressing concern that TFR's "production rate" was such that the project would not be completed by August 2020,

"which [was] the end of TxDOT's Fiscal Year (FY) and when the money for maintenance contract work end[ed] for that FY." CR.278–79. In response, TFR emailed back that it was "changing its work schedule to **all daylight hours and every Saturday**" and "**adding a separate tree removal crew** to the Brush removal maintenance crew." CR.278.

As the email suggested it would, TFR subcontracted with Lyellco for tree-removal services. CR.173 (Resp. to Req. for Disclosure 194.2(e)), 181, 440–45 (Continuing Subcontract). Lyellco was tasked "to remove large trees subject to the TXDOT contract." CR.292 (Ans. to Interrog. No. 2), 296 (invoice for "**Tree Removal**"). The Subcontract provides that TFR will issue Lyellco a "work order . . . for each specific project" and that Lyellco will "perform all of the work necessary and incidentally required to complete the items of work described in the work order issued under this Subcontract in strict accordance with the plans and specifications applicable to each individual project." CR.440. Lyellco also agreed "to perform the work specified and to furnish all necessary labor, materials, equipment, supplies, licenses, work permits and other items therefore" and "to complete the work in strict compliance with the terms of the Contract between the Owner [TxDOT] and the Contractor [TFR]" and "the directions of the Owner or Owner's Representatives." CR.440.

To receive payment, Lyellco was required to "present an invoice every Monday for all Work performed and completed through the previous week" to TFR, and TFR agreed "to pay to the Subcontractor the stated consideration, established in the Work Order, for such work under this Subcontract." CR.442.

D. The incident

From July 20 to July 24, Lyellco removed several large trees from what was believed to be the right-of-way easement on the highway side of the fence line separating Plaintiffs' property from the FM 677 right of way. CR.182 (¶ 11), 296. Lyellco provided three workers and the equipment to remove the trees. CR.296. The workers used a truck, a trailer, a Bobcat,[1] and chainsaws. CR.296. TFR also provided a "bucket truck" for Lyellco to use. CR.292 (Ans. to Interrog. No. 3). No TxDOT personnel were present when the trees were removed. CR.164 (Ans. to Interrog. No. 2).

During that time, neighbors called Mark Self to advise him that workers "were cutting down some of the trees along the fence." CR.11. When Mark arrived at the work site, he observed that "every single tree on the road side of the fence, including those touching the fence[,] had been removed." CR.11. Mark determined at that time that "twenty-eight large trees were removed." CR.11.

Not long thereafter, Mark spoke with "the TxDOT employee/engineer responsible for the project who informed him that the ROW was not surveyed," that TxDOT did not mark the trees that were supposed to be removed, and that "the contractor was simply told to 'clear everything between the fences.'" CR.11. This

[1] Bobcat is a brand of skid loader also known as a skid steer, which is a compact piece of equipment used to excavate, pull, push, and lift materials. It is more maneuverable and lighter than a tractor front loader and can be used in landscaping and construction work. *See* Wikipedia: *Bobcat Company*, https://en.wikipedia.org/wiki/Bobcat_Company (last visited Mar. 14, 2023); Wikipedia: *Skid-steer loader*, https://en.wikipedia.org/wiki/Skid-steer_loader (last visited Mar. 14, 2023).

instruction was consistent with "the standard method of determining the right of way." CR.166 (Ans. to Interrog. No. 6). It was also later confirmed through an email that TxDOT's project manager/inspector for Montague County "direct[ed] the contractor to cut the trees down" that "were on the state highway side of the fence." CR.262, 307. A "discussion" Mark had "on site with the contractor's employees" confirmed the instruction. CR.11.

Mark emailed several TxDOT employees to advise that he had hired a surveyor to conduct "a complete survey of the ROW" and locate "each of the [removed] trees (now stumps) within that survey." CR.329. Mark also stated that "he would be seeking a form of restitution" from TxDOT. CR.318. Mark was directed to submit his claim for processing to TxDOT's Occupational Safety Division (OCC) in Austin. CR.307.

Lyellco invoiced TFR $6,000 (4 days × $1500/day) for its work that involved the trees allegedly on Plaintiffs' property. CR.296.

E. Plaintiffs' claim

Plaintiffs submitted to OCC a written claim requesting "settlement with TxDOT." CR.324–27. Plaintiffs claimed that "TxDOT via a contractor cut down a number of large oak trees . . . whose trunks were entirely on [their] property and not in the ROW." CR.324. Of those, "thirteen trees were taken that were in no part of the ROW, eight trees were taken that were entirely inside the ROW and seven trees were mostly outside of the ROW." CR.326. Mark estimated the cost of replacing twenty trees at $251,000. CR.326.

TxDOT acknowledged receipt of Plaintiffs' claim and advised that it was "looking into the incident" and that it would "be in further contact with [Plaintiffs] when [its] investigation [wa]s complete." CR.250. Subsequently, OCC denied Plaintiffs' claim, stating that TxDOT had not been negligent and that the trees were apparently within the right of way. CR.251. OCC further advised Plaintiffs that TFR was the prime contractor on the project and that they might "wish to contact this company concerning [their] claim." CR.251.

II. Procedural History

A. Trial Court

Plaintiffs sued TxDOT and TFR for damages relating to the alleged removal of thirteen trees from their land adjacent to FM 677. CR.4, 5 (¶¶ 4–5), 6 (¶¶ 8, 10), 8–9 (¶ 26). Plaintiffs asserted three causes of action: a trespass action against TFR, CR.7 (¶¶ 14–15); a "Texas Tort Claims Act" action for negligence against TxDOT, CR.7–8 (¶¶ 16–23); and an inverse-condemnation action against TxDOT, CR.8 (¶¶ 24–25). Plaintiffs "d[id] not seek to recover more than $100,000." CR.9 (¶ 26).

Plaintiffs later amended their petition to add Lyellco as a defendant. CR.180, 181 (¶ 6). In it, Plaintiffs asserted trespass, negligence, and gross negligence causes of action against TFR and Lyellco, CR.183–84 (¶¶ 16–19), and reasserted their causes of action against TxDOT, CR.184–85 (¶¶ 20–29). Plaintiffs amended their ad damnum to "seek to recover [not] more than $100,000 per occurrence/tree." CR.185 (¶ 30).

TxDOT filed a plea to the jurisdiction asserting that it was immune from suit because of sovereign immunity. CR.34. TxDOT attached evidence to the plea, namely, the Contract, emails between Mark and TxDOT, and discovery responses by TxDOT and TFR. CR.34–35. Regarding Plaintiffs' negligence cause of action, TxDOT contended that its immunity from suit was not waived because its employees were not liable under section 101.021(1). *See* CR.38–40.

TxDOT argued that, for liability to attach under section 101.021(1), an employee of TxDOT had to have negligently used or operated a motor-driven vehicle or motor-driven equipment to have proximately caused Plaintiffs' alleged property damage. *See* CR.38–40. And section 101.001(2) of the Act required that the persons who removed the trees had to be in the paid service of TxDOT and could not be independent contractors, agents or employees of an independent contractor, or persons who perform tasks the details of which TxDOT had no legal right to control. *See* CR.38–40, 447–51. TxDOT argued that the record conclusively establishes that Lyellco's workers, and not TxDOT employees, physically operated or used the motor-driven vehicles or equipment to remove the trees and that TxDOT had no legal right to control the details of the tree-removal work performed by the independent contractors' workers. *See* CR.38–40, 447–51. TxDOT also argued that the trial court had no jurisdiction over Plaintiffs' inverse-condemnation action because they failed to allege facts establishing a viable takings claim under article I, section 17 of the Texas Constitution. CR.41–45, 451–55.

After an oral hearing, CR.178; RR.1–34, the trial court denied TxDOT's plea, CR.457, 468. The Department noticed an interlocutory appeal under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code. CR.469–71.

B. Court of Appeals

The court of appeals' decision was mixed. 2022 WL 1259094, at *1, *21. The court reversed in part and affirmed in part the trial court's order denying TxDOT's plea as to Plaintiffs' negligence cause of action. *See id.* It reversed and rendered judgment for TxDOT as to Plaintiffs' inverse-condemnation action. *See id.* (The inverse-condemnation claim is the subject of Plaintiffs' cross-petition and will not be addressed in this brief.)

The court of appeals first addressed TxDOT's argument that its immunity from suit is not waived under the Act because the evidence conclusively establishes that no employee of TxDOT operated or used a motor-driven vehicle or motor-driven equipment to allegedly remove Plaintiffs' trees; rather, the evidence conclusively establishes that only the employees of TFR's subcontractor, Lyellco, did so. *See id.* at *6–13. Notwithstanding Plaintiffs' argument to the contrary, CR.219–21, the court held that TxDOT's immunity from suit could not be waived unless TxDOT employees operated or used motor-driven vehicles or equipment to allegedly remove Plaintiffs' trees, 2022 WL 1259094, at *6, *13. Merely alleging that TxDOT was negligent in ways besides operating or using machinery was not sufficient to waive TxDOT's immunity from suit. *See id.* at *13.

The court next analyzed whether there is a fact issue regarding whether the contractors and their workers who performed the tree removal were employees of

TxDOT, and not the employees of an independent contractor, because TxDOT had the legal right to control the details of the contractors' work. *Id.* at *14. According to the court, the evidence raised a fact issue as to whether TxDOT had a legal right to control, both contractual and actual, the alleged removal of trees on Plaintiffs' land. *Id.* at *17–18.

In sum, the court reversed in part the trial court's order denying the Department's plea "to the extent that [the trial court] found a fact issue existed regarding whether TxDOT was exercising such control over the motor-driven equipment used by the contractor to mean that TxDOT was operating or using that equipment." *Id.* at *1. But the court of appeals affirmed in part the trial court's order that identified "a fact issue . . . regarding whether the contractor was not an independent contractor but instead was TxDOT's employee." *Id.*

TxDOT filed motions for rehearing and reconsideration en banc. In them, TxDOT argued that the court's holding that a fact issue exists as to the independent-contractor status of the workers who removed Plaintiffs' trees is erroneous because the evidence conclusively establishes that those workers were not in the paid service of TxDOT, as per the definition of "Employee" in section 101.001(2) of the Act, but instead were in the paid service of Lyellco. *See* Mot. Rehr'g 2; Mot. Recons. En Banc 3. Moreover, the evidence conclusively establishes that TFR and Lyellco are independent contractors, *see* Mot. Rehr'g 2, 12–13; Mot. Recons. En Banc 3, 13, that TxDOT did not have the legal right to control the work of the contractors pursuant to their contracts, *see* Mot. Rehr'g 8; Mot. Recons. En Banc 8–9, and that TxDOT

did not exercise actual control over the contractors' work, *see* Mot. Rehr'g 9–11; Mot. Recons. En Banc 10–12.

The court of appeals rejected TxDOT's arguments. Regarding whether Lyellco's workers were in the paid service of TxDOT, the court stated that the argument was untimely because TxDOT raised it only in its rehearing and reconsideration motions and that the court therefore would "not address TxDOT's eleventh-hour issue." 2022 WL 1259094, at *17 n.7. The court rejected TxDOT's other arguments as well and denied TxDOT's motions for rehearing and reconsideration en banc. *Id.* at *1, *17 n.7.

Summary of the Argument

The undisputed evidence conclusively establishes that Lyellco's workers who allegedly removed Plaintiffs' trees using motor-driven vehicles and equipment were not in the paid service of TxDOT, as required by section 101.001(2). Accordingly, TxDOT cannot be liable under section 101.021(1), and its immunity from suit is not waived.

The court of appeals erroneously refused to address the argument that Lyellco's workers were not in the paid service of TxDOT because of its mistaken conclusion that TxDOT waived the argument by presenting it for the first time in its motions for rehearing and reconsideration en banc. Because the argument goes to the issue of TxDOT's immunity from suit under the TTCA, and because the argument involves fundamental error implicating subject-matter jurisdiction, TxDOT's argument was not subject to waiver. Moreover, because TxDOT unquestionably raised the waiver-

of-immunity issue in the lower courts, it was free to raise a new argument about that issue on appeal, even if it was in a motion for rehearing.

Finally, even if the evidence raises a fact question about whether Lyellco's workers were in the paid service of TxDOT, the evidence conclusively establishes that the exclusions in section 101.001(2) apply to the contractors and the workers in Lyellco's tree-removal crew. The evidence conclusively establishes that TxDOT did not have a legal right to control the details of the contractors' work in allegedly removing Plaintiffs' trees using motor vehicles and mechanized equipment, nor did it actually control those workers.

Standard of Review

A plea to the jurisdiction is reviewed de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the plea challenges whether jurisdictional facts exists, the reviewing court considers relevant evidence submitted by the parties to resolve the jurisdictional issues raised, just as the trial court did. *Id.* at 227. The relevant evidence is reviewed to determine if a fact issue exists. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, the plea cannot be granted, and the fact issue will go to the fact finder. *Id.* at 227–28. But if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the plea should be granted as a matter of law. *Id.* at 228. "[T]his standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.*

ARGUMENT

I. Lyellco's Workers Were Not in the Paid Service of TxDOT as Required by Section 101.001(2)'s Main Clause, so the TTCA Did Not Waive TxDOT's Immunity from Suit.

A. Section 101.001(2)'s definition of "Employee" affects the immunity waiver under section 101.021.

It is undisputed that the persons who physically removed the trees allegedly on Plaintiffs' land worked for the subcontractor Lyellco, which TFR hired in connection with the highway-maintenance project. CR.163–64 (TxDOT Ans. to Interrog. No. 2), 174–75 (TFR Resp. to Req. for Disclosure 194.2(l)), 214 (Pls.' Resp. to TxDOT's PTJ), 278 (email from TFR to TxDOT), 296 (Lyellco Invoice); RR.18:22–19:4 (Plaintiffs' counsel stating that "there's really no dispute that" "Lyellco used its own chainsaws and Bobcat and also used a bucket truck provided by T.F.R." to remove Plaintiffs' trees). It is also undisputed that no TxDOT personnel physically removed the trees allegedly on Plaintiffs' land. CR.163–64, 174–75, 214, 278, 296; RR.18:22–19:4.

Given these undisputed facts, the central issue here is whether it was conclusively established that the Lyellco workers who physically removed the trees using motor-driven vehicles and equipment were employees of Lyellco as opposed to TxDOT. If the workers were employees of Lyellco, and not TxDOT, then TxDOT is not liable and its immunity from suit for Plaintiffs' negligence cause of action is *not* waived under the TTCA. *See* Tex. Civ. Prac. & Rem. Code § 101.025(a) (waiving immunity from suit to the extent of liability under chapter 101), § 101.021 (creating governmental liability for specified acts resulting from negligence, premises

conditions, and use of property to the extent private persons would be liable). To resolve the issue of the immunity waiver, then, employee status is key. The answer to that issue lies in the definition of "Employee" in section 101.001(2) of the Act.

1. Section 101.021(1)(A) requires operation or use of a motor-driven vehicle or equipment by an employee of a governmental unit.

In relevant part, section 101.021 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(1).

In the courts below, TxDOT argued that the person operating or using the machinery must be an employee of TxDOT for it to be liable under section 101.021(1). *See* 2022 WL 1259094, at *7. Plaintiffs, on the other hand, argued that the person operating or using the machinery did not have to be a TxDOT employee for liability to attach. *See id.*; CR.211; RR.21:13–23. The court of appeals agreed with TxDOT, "conclud[ing] that the trial court erred by denying the aspect of the State's plea to the jurisdiction predicated on its assertion that there is not a waiver of immunity because the State was not operating or using equipment as those terms are used in Section 101.021." 2022 WL 1259094, at *13 & n.6. The text and context of section

101.021 show, and caselaw confirms, that the court was correct to agree with TxDOT.

The text of subparts (1) and (B) of section 101.021 each contain the word "employee" and, when read in context, indicate that an employee of a state governmental unit, acting in the scope of employment, must have engaged in negligent acts or omissions for which the employee would be liable under Texas law.

Unlike the subparts (1) and (B), however, the text of subpart (A) does not use the word "employee." If read in isolation—that is, without considering subparts (1) and (B)—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.

But it is a basic rule of statutory construction that the words and phrases of a statutory provision are not to be read in isolation. *Brazos Elec. Power Coop., Inc. v. TCEQ*, 576 S.W.3d 374, 384 (Tex. 2019); *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). When read contextually to give effect to every word, clause, and sentence in the statute, the required operator or user of the motor-driven vehicle or equipment is clear: it is the governmental unit. *See, e.g.*, *In re Off. of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013) (orig. proceeding) (stating that the Court "endeavor[s] to read the statute contextually, giving effect to every word, clause, and sentence"). That is because subpart (A) combines with subparts (1) and (B) to form a single sentence, and when the entire sentence is read, 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 and,

consequently, waive that unit's immunity from suit. *See, e.g.*, *Crosstex Energy Servs., LP v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014) ("We believe the sentence must be read in the context of the entire subsection.").

That reading only makes sense because section 101.021 is about the liability of a governmental unit, so it would be logical and natural that *its* employees are the necessary operators or users. Indeed, the section's title—"GOVERNMENTAL LIABILITY"—makes plain that the liability about which the statute is concerned is that of the government and not some third party or stranger that is not connected to the government. *See, e.g.*, *Brown v. City of Houston*, No. 22-0256, 2023 WL 1486228, at *4 (Tex. Feb. 3, 2023) (on cert. ques.) (stating that while "the title of a statutory provision cannot override the plain meaning of the underlying text," it "can at least 'inform the inquiry into the Legislature's intent'" (citation omitted)). It would be odd, to put it mildly, if a person who is not connected to the governmental unit could waive the governmental unit's immunity. Read contextually, then, the subparts of section 101.021(1) form a single sentence that conveys the understanding that an employee of a governmental unit must be the operator or user of the motor-driven vehicle or equipment to create liability and waive immunity.

That reading comports with this Court's oft-repeated observation that "[t]he Texas Tort Claims Act provides a limited waiver of sovereign immunity." *Miranda*, 133 S.W.3d at 224; *see also TDCJ v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001); *Dall. Cnty. MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). That is, suits are allowed "to be brought against governmental units only in certain, narrowly defined circumstances." *Miller*, 51 S.W.3d at 587. Plaintiffs' interpretation of section 101.021(1),

however, is not limited. Rather, it is expansive because, in their view, the actions of someone not employed by a governmental unit and over whom the governmental unit has no control can waive the governmental unit's immunity.

TxDOT's view of section 101.021(1) has been confirmed by this Court. *See LeLeaux v. Hamshire-Fannett ISD*, 835 S.W.2d 49, 51 (Tex. 1992). In *LeLeaux*, the Court wrote:

> While the statute does not specify whose operation or use is necessary—the employee's, the person who suffers injury, or some third party—we think the more plausible reading is that the required operation or use is that of the employee. This requirement is consistent with the clear intent of the Act that the waiver of sovereign immunity be limited.

835 S.W.2d at 51. Numerous courts of appeals have followed *LeLeaux*'s interpretation of section 101.021(1). *E.g.*, *Cain v. City of Conroe*, No. 09-19-00246-CV, 2020 WL 6929401, at *5 (Tex. App.—Beaumont Nov. 25, 2020, no pet.) (mem. op.); *Townsend v. City of Alvin*, No. 14-05-00915-CV, 2006 WL 2345922, at *2 (Tex. App.—Houston [14th Dist.] Aug. 15, 2006, no pet.) (mem. op.); *Austin ISD v. Gutierrez*, 54 S.W.3d 860, 863 (Tex. App.—Austin 2001, pet. denied). Not only that, but this Court has extended *LeLeaux*'s analysis to section 101.021(2) as well, holding that section 101.021(2) waives immunity for a use of tangible personal property only when the governmental unit is itself the user, even though this limitation is not expressly stated in section 101.021. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 & n.7 (Tex. 2004) (citing *LeLeaux*, 835 S.W.2d at 51).

For these reasons, the operation or use of the motor-driven vehicle or equipment under section 101.021(1) must be by a person who is an employee of a governmental unit.

2. Whether TxDOT's immunity from suit is waived turns on the main clause in the definition of "Employee" in section 101.001(2).

The central issue in this case is whether Lyellco's workers who operated or used motor-driven vehicles or equipment to allegedly remove Plaintiffs' trees were TxDOT employees for purposes of the waiver of immunity in the TTCA. The answer is *no*.

The analysis begins with the text of section 101.001(2). It provides:

> "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.

The main clause of this definition creates a threshold test of employee status, namely, whether someone is "in the paid service" of the governmental unit.

Thus, the first question that must be answered in this case is whether Lyellco's workers were "in the paid service" of TxDOT. If the record evidence conclusively shows that they were not, then there is no waiver of TxDOT's immunity as to Plaintiffs' negligence cause of action because, as shown above, the operator or user of a motor-driven vehicle or motor-driven equipment who negligently caused some harm must be the employee of a state governmental unit.

But even if the evidence raises a fact question as to whether Lyellco's workers were in the paid service of TxDOT (which it doesn't), the inquiry does not end there. If that were the case, the rest of section 101.001(2)'s text comes into play. The question then becomes whether one of the exclusions in section 101.001(2) applies to maintain TxDOT's immunity from suit. If there is conclusive evidence that at least one of the exclusions is present, then TxDOT's immunity from suit remains intact. But if there is a fact issue whether the exclusions apply, then TxDOT's immunity from suit may still be waived (provided, of course, that all other requirements are met). In short, if the evidence conclusively shows that at least one exclusion is present, the operator or user of the motor-driven vehicles or equipment—for whom there is prima-facie evidence showing that the person was in the paid service of TxDOT—will *not* be considered a TxDOT employee after all, and the waiver of immunity will not apply.

The court of appeals here correctly noted that the definition of "Employee" in section 101.001(2) is "the starting point for the analysis of this issue" and quoted its language. 2022 WL 1259094, at *14. Notwithstanding that recognition, the court misapplied the statutory definition to the undisputed facts in the record. Ignoring the paid-service threshold test, the court stated that "[t]he overarching question in determining whether a person is an employee or an independent contractor turns on who 'has the right to control the progress, details, and methods of operations of the work.'" *Id.* (quoting *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (per curiam)).

Control, however, is not the "overarching question" regarding employee status under section 101.001(2); whether a person is "*in the paid service of a governmental unit*" is the overarching question. Control is not the test; it is an exception to the paid-service requirement and comes into play only if a person is first found to be in the paid service of a governmental unit.

Thus, the court of appeals' analysis immediately faltered because, instead of starting with the definition's main clause establishing the threshold paid-service requirement of "Employee" status, the court considered only the exclusions to that requirement. As discussed in Part II *infra*, the court erroneously refused to address the paid-service requirement because, it said, TxDOT did not timely assert that argument, even though TxDOT's argument goes to the waiver of immunity and hence the trial court's subject-matter jurisdiction. Notwithstanding the nonwaivable and jurisdictional nature of the paid-service requirement and TxDOT's conclusive evidence that Lyellco's workers were not in the paid service of TxDOT, the court overlooked that requirement and went ahead with its analysis of whether TxDOT had the legal right to control Lyellco's workers. The court held there was a fact question about whether TxDOT controlled the details of the contractors' work in allegedly removing Plaintiffs' trees, and thus, TxDOT's immunity from suit was waived, and its plea to the jurisdiction should be denied. *See id.* at *14–17 & n.7. Simply put, the court of appeals erroneously skipped over the threshold paid-service test when applying the definition of "Employee" in section 101.001(2) to the undisputed facts in this case.

By not answering the question of paid service, the court effectively broadened the definition of "Employee" in section 101.001(2) beyond what the statute provides and rewrote the payment requirement out of the statute. The court of appeals' misunderstanding of the statutory definition basically meant that it read section 101.001(2) to say: "'Employee' means a person who is not an independent contractor, not an agent or employee of an independent contractor, and not someone who performs tasks the details of which the governmental unit has no legal right to control." In short, an "Employee" is any person who is not an independent contractor or under the control of a governmental unit.

That cannot be right. The court's rewrite of the definition is contrary to the text of section 101.001(2) and cannot be what the Legislature intended. Control is an exception to the paid-service test, not *the* test itself. The control exclusion in section 101.001(2) makes sense only in relation to the paid-service requirement that it modifies. The Legislature wrote that exclusion to preserve a governmental unit's immunity from suit despite a person being paid by a governmental unit; the Legislature did not write the exclusion to be the test of government-employee status. As written by the Legislature, the independent-contractor and control exclusions in section 101.001(2) serve no function and never need to be addressed, unless a person is first shown to be in the paid service of a governmental unit.

The court of appeals' rewriting of section 101.001(2) is basic error. Courts must not rewrite statutes. *See, e.*g., *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017); *PUC v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920). Accordingly, the court of appeals' treatment

of the definition of "Employee" in section 101.001(2) is an error of law that is important to the jurisprudence of the State and requires correction by this Court to reestablish the legislatively mandated analysis before others follow the court of appeals' misguided approach in future cases.

B. The threshold test for government-employee status is whether a person is in the paid service of a governmental unit by competent authority.

As just mentioned, proper analysis of the waiver-of-immunity issue in this case starts with the TTCA's definition of "Employee" and its threshold requirement of being in the paid service of a governmental unit. Had the court of appeals performed that analysis, its decision would have come out differently.

Starting with the clause "'Employee' means a person . . . who is in the paid service of a governmental unit by competent authority," it is undisputed that Lyellco's workers are the persons who allegedly physically removed Plaintiffs' trees and that TxDOT is a governmental unit under competent authority. The only question then is whether Lyellco's workers were in the paid service of TxDOT.

They were not for two basic reasons. *First*, this Court has held that evidence that an alleged tortfeasor is not in the paid service of a governmental unit is sufficient all by itself to defeat a negligence claim under section 101.021, and in that situation, the issue of control over the details of a person's work does not even enter the discussion. *See Harris County v. Dillard*, 883 S.W.2d 166, 167–68 (Tex. 1994). *Second*, the evidence here conclusively establishes that Lyellco's workers were not in the paid service of TxDOT.

1. This Court's precedents establish that TxDOT had to prove only that Lyellco's employees were not in its paid service to defeat liability and retain immunity.

In *Dillard*, a Harris County volunteer reserve deputy sheriff was involved in a motor vehicle accident that resulted in the death of a passenger in the other car. 883 S.W.2d at 167. The passenger's statutory beneficiaries sued the county, alleging that it was liable for the deputy's conduct. *Id.* At issue was the county's immunity from suit under section 101.021(1) and the definition of "Employee" under section 101.001(1).[2] *Id.*

The Court made quick work of the issue, writing:

> There is no dispute that [the deputy] was not in the paid service of Harris County at the time of the accident. He was a volunteer reserve deputy subject to being called into service. [The deputy] was therefore not an "employee", within the meaning of the Tort Claims Act, for whose conduct Harris County was liable. TEX. CIV. PRAC. & REM. CODE § 101.001.
>
> . . . .
>
> We hold that plaintiffs' action against Harris County is barred by governmental immunity.

Id. at 167–68 (footnote omitted). The Court did not discuss the exclusions in section 101.001(1), as there was no need to because the paid-service requirement was not met. *See id.*

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[2] When *Dillard* was decided, the definition of "Employee" was in section 101.001(1). Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 101.001, 1985 Tex. Gen. Laws 3242, 3302 (codified at Tex. Civ. Prac. & Rem. Code § 101.001(1)), *as amended by* Act of May 26, 1997, 75th Leg., R.S., ch. 968, § 1, 1997 Tex. Gen. Laws 3007, 3007. In 1997, the definition was moved to and renumbered as subsection (2). *Id.* No substantive change was made to the definition then, and it remains the same today.

Dillard therefore stands for the proposition that all that a governmental unit needs to show to maintain its immunity from suit is that the alleged tortfeasor was not in the paid service of a governmental unit. If it does, the inquiry ends. Whether the governmental unit exercised control over the alleged tortfeasor does not even enter the equation.[3]

Other cases confirm this reading of the statute, too. For example, in *Marino v. Lenoir*, "a resident physician sought dismissal of a malpractice claim on grounds that she was an employee of a governmental unit." 526 S.W.3d 403, 404 (Tex. 2017). The resident filed a motion to dismiss under the election-of-remedies provision of the TTCA, section 101.106(f). *Id.* at 405. She claimed this provision entitled her to dismissal because she was an employee of a governmental unit and met the other elements of the provision. *Id.* This Court disagreed, concluding that the evidence did not demonstrate that the resident was an employee of the governmental unit under section 101.001(2). *Id.* at 405, 410.

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[3] *Accord Hinojosa v. Metro. Transit Auth. of Harris Cnty.*, No. 01-17-00824, 2018 WL 4131890, at *4 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.) (mem. op.) (stating that because a bus driver was not in the paid service of the metropolitan transit authority, the driver was not the authority's "employee" and not reaching the question of whether the authority had the right to control the bus driver); *Ramirez v. County of Live Oak*, No. 13-02-611-CV, 2005 WL 167308, at *3–4 (Tex. App.—Corpus Christi Jan. 27, 2005, no pet.) (mem. op.) (holding that because a volunteer firefighter was not in the paid service of the city's fire department, it was not necessary to reach the issue of whether the fire department controlled the details of the volunteer firefighter's work).

Marino's significance to this case lies not in the conclusion that the Court reached, but rather in how the Court reached it. The Court first observed that "[t]he statutory definition of employee of a governmental unit requires that the defendant 'is in the paid service' of the claimed governmental unit," that the resident offered proof that she was paid by the governmental unit, and that the plaintiff did not dispute this element. *Id.* at 406. The resident, therefore, was an employee of the governmental unit.

Having satisfied the threshold test, the resident confronted the next step required by section 101.001(2)'s text. As to that step, the Court analyzed whether the definition's exclusions applied, specifically, whether the resident was "a person who perform[ed] tasks the details of which the governmental unit d[id] not have the legal right to control." *Id.* at 405–06. "This clause," the Court stated, "preclude[d] [the resident]'s claim to employee status under the evidence presented." *Id.* at 406. The evidence conclusively showed that the details of the resident's tasks were *not*—under the relevant contract and in actual practice—controlled by the governmental unit. *Id.* at 406–08. Thus, because of section 101.001(2)'s exclusion, the resident fell outside the statutory definition even though she was paid by the governmental unit.

The Court also followed this analytical approach in *Murk v. Scheele*, 120 S.W.3d 865 (Tex. 2003) (per curiam). In *Murk*, the plaintiff and his wife brought a medical-malpractice action against a university hospital, a neurosurgeon on faculty at the university, and a graduate medical student. *Id.* at 866. The neurosurgeon and the student sought dismissal as employees of the governmental unit under section 101.106. *Id.* at 867.

As in *Marino*, the Court performed the two-step analysis of employee status under section 101.001(2). As to the student, the evidence proved that no part of the student's compensation was ultimately paid by the governmental unit, and therefore he was not in the governmental unit's paid service and was not an employee of the governmental unit. *Id.* That ended the Court's analysis as to the student.

As to the neurosurgeon, however, plaintiffs conceded that he was compensated entirely by the governmental unit and thus was in its paid service. *Id.* But the Court did not stop there; it examined whether the neurosurgeon was excluded from the statutory definition. Plaintiffs argued that the neurosurgeon's exercise of independent professional judgment was outside the governmental unit's right of control and that therefore the neurosurgeon was not the governmental unit's employee. *Id.* But the Court stated that plaintiffs' argument "swe[pt] far too broadly" because the statutory definition "does not require that a governmental unit control *every* detail of a person's work." *Id.* Ultimately, because plaintiffs conceded that the neurosurgeon was in the paid service of the governmental unit and because the evidence showed that the governmental unit had a right to control enough of the relevant details of the neurosurgeon's practice, the Court held that the neurosurgeon was the governmental unit's employee. *Id.*[4]

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[4] *Accord Fryday v. Michaelski*, 541 S.W.3d 345, 350–51 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (holding that the evidence conclusively established paid-service status of a city building inspector under section 101.001(2) and that the section's exclusions did not apply); *Miers v. Tex. A & M Univ. Sys. Health Sci. Ctr.*, 311 S.W.3d 577, 580–82 (Tex. App.—Waco 2009, no pet.) (holding that a resident oral

For purposes of this case, the takeaway from the foregoing precedent is that, before the exclusions in section 101.001(2) come into play, a court must determine that the alleged tortfeasor was in the paid service of a governmental unit. If the predicate finding of paid service is not made, then a person is not an "Employee" under section 101.001(2), and the exclusions in the statutory definition are irrelevant.

The court of appeals' opinion here is fatally flawed because it did not follow this mode of analysis. Had it done the analysis correctly, it would have determined that Lyellco's workers were not paid by TxDOT and therefore were not employees of TxDOT. *See* Part I.B.2 *infra*. And there was no need to consider the exclusions in section 101.001(2).

2. Lyellco, not TxDOT, paid the tree-removal workers.

The undisputed evidence conclusively establishes that the Lyellco workers who allegedly removed Plaintiffs' trees were not paid by TxDOT and thus were not TxDOT's employees. The analysis begins with the Subcontract. *See* CR.440–45. It is between TFR and Lyellco; TxDOT is not party to the agreement. CR.440. There is no evidence that TxDOT took part in negotiating the Subcontract. Quite the opposite, the Subcontract states that it "does not create, nor does any course of conduct between the Contractor and Subcontractor pursuant to this Subcontract create, any contractual relationship between any parties other than the Contractor and Subcontractor." CR.440.

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surgeon was in the paid service of a university under section 101.001(2) and that the university had the right to control the actions of the surgeon).

TFR subcontracted with Lyellco after TxDOT expressed concern about TFR's "production rate" and finishing the highway-maintenance project on schedule. CR.278–79. As a result, TFR notified TxDOT that it would be increasing production and "**adding a separate tree removal crew**." CR.278. There is no evidence that TxDOT asked TFR to subcontract with another company or add an independent tree-removal crew. TFR did that on its own, hiring Lyellco without any input from TxDOT. Indeed, by the time TFR advised TxDOT of Lyellco's hiring, Lyellco had already executed the Subcontract. *Compare* CR.278, *with* CR.440, *and* CR.445.

Relevant here, the Subcontract has several provisions regarding payment for tree-removal work. To begin, the Subcontract provides that Lyellco would perform "certain work hereinafter specified" and states that "[f]or and in consideration of the Work Order price, the Contractor and Subcontractor agree and contract as set forth below." CR.440. The Subcontract specifies that the "scope of work, scheduled completion time, [and] compensation" is "set forth" "in the work order issued for [each] specific project." CR.440 (all caps omitted). Conspicuously, TFR and Lyellco agreed that "[n]otwithstanding any[thing] . . . to the contrary, the payment provisions of the Contract between the Owner and Contractor are not a part of this Subcontract and specifically are not incorporated by reference." CR.440.

The Subcontract continues: "Subcontractor shall perform all of the work necessary and incidentally required to complete the items of work described in the work order issued under this Subcontract in strict accordance with the plans and specifications applicable to each individual project." CR.440. Lyellco agreed that it would perform the "items" in the work order "for the measurement and payment method,

either unit price, lump sum or another mutually acceptable pay scale as established in the work order, and said price shall constitute the sole consideration for all work performed hereunder." CR.440–41.

"The Subcontract Amount [was] listed on the individual Work Order for a given project" and constituted "the total amount to which Subcontractor [was] entitled," subject to any change order. CR.442. The record shows that Lyellco's compensation for the tree-removal work in question was calculated by multiplying a base-rate of $1,500 times the number of days worked. CR.296. Lyellco in turn agreed to "make timely payment for all labor . . . relating in any way to Subcontractor's work." CR.442.

To receive payment, Lyellco was required to "present an invoice every Monday for all Work performed and completed through the previous week." CR.442. TFR agreed "to pay to the Subcontractor the stated consideration, established in the Work Order, for such work under this Subcontract." CR.442.

Furthermore, the Subcontract provided that TFR, not TxDOT, could withhold payments otherwise due if (1) the work was defective, (2) debris was not cleared from the assigned work area, (3) the Owner or other government official determined that the work was ineligible for payment, (4) Lyellco's failed to pay its subcontractors, if any, and applicable taxes, fees, and fringe benefits, (5) there was reasonable doubt that the work could be completed for the balance of the Subcontract amount then unpaid, or (6) there was any other breach of the Subcontract. CR.442–43. And if those deficiencies were not remedied, TFR could rectify them at Lyellco's expense. CR.443.

During the week of July 20–24, Lyellco performed tree-removal services on the highway-maintenance project. CR.296. TFR identified Lyellco as the third party responsible for allegedly removing Plaintiffs' trees. CR.172 (Resp. to Req. for Disclosure 194.2(b)) (describing Lyellco as the "*Subcontractor hired by TFR to perform certain tree removal services.*"), 292 (Ans. to Interrog. No. 2) (answering that TFR retained Lyellco to remove large trees on the project); *see also* CR.215 (Pls.' Resp. to TxDOT's Plea to the Jurisd.) ("Lyellco personnel removed the twenty-two trees at issue from the Property"). Lyellco employed a three-man work crew to do the work. CR.296.

Consistent with the Subcontract's payment provisions, Lyellco submitted "**INVOICE** # 1116" to TFR on July 31, 2020. CR.296. The amount due was $6,000 ($1,500/day × 4 days). There is no claim or argument, let alone any evidence, that anyone other than TFR paid this invoice. *See* CR.210–26 (Pls' Resp. to Plea to the Jurisd.); CR.458–62 (Lyellco's 2d Amend. Ans.); CR.463–67 (TFR's 3d Amend. Ans.). And there is no claim or argument, let alone any evidence, that anyone other than Lyellco paid its workers' wages. *See* CR.210–26 (Pls' Resp. to Plea to the Jurisd.); CR.458–62 (Lyellco's 2d Amend. Ans.); CR.463–67 (TFR's 3d Amend. Ans.).

These facts conclusively establish that Lyellco's workers who allegedly removed Plaintiffs' trees were not in the paid service of TxDOT and thus were not TxDOT's employees. As per the Subcontract, their labor was paid by Lyellco, and Lyellco's tree-removal services were invoiced directly to and paid by TFR. TxDOT neither hired nor paid the Lyellco workers. Indeed, as the evidence shows, TFR hired and

contracted to pay Lyellco for services it rendered in connection with a work order issued by TFR. TxDOT was not party to the Subcontract. And the Subcontract expressly provides that the payment provisions of the Contract between TxDOT and TFR were neither applicable nor incorporated by reference into the Subcontract.

There is no evidence that raises a fact issue as to the employee status of the Lyellco workers:

- There is no evidence that Lyellco's workers received a paycheck from TxDOT. *Cf., e.g.*, *Hinojosa*, 2018 WL 4131890, at *3–4 (holding that a bus driver was not in a transit authority's paid service because there was no evidence showing that the bus driver received her paychecks from the authority); *Kamel v. Sotelo*, No. 01-07-00366-CV, 2009 WL 793742, at *5 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet.) (mem. op.) ("Sotelo testified that she received her paychecks from the University of Texas and there is no evidence that Sotelo received payment from any other source.").
- There is no evidence that TxDOT paid Lyellco's workers based on timesheets they submitted to TxDOT for their labor. *Cf., e.g.*, *Fryday*, 541 S.W.3d at 350 (holding that a building inspector's declaration that the city paid him for his services based on timesheets he submitted proved that he was "in the paid service of a governmental unit"); *City of Dallas v. Salyer*, No. 05-12-00701-CV, 2013 WL 3355027, at *3 (Tex. App.—Dallas July 1, 2013, no pet.) (mem. op.) (holding that undisputed evidence established

that a temporary worker was paid by the city through a staffing company based on the hours the worker reported to the city).

- There is no evidence that TxDOT paid Lyellco's workers a salary. *Cf., e.g.*, *Poland v. Willerson*, No. 01-07-00198-CV, 2008 WL 660334, at *6 (Tex. App.—Houston [1st Dist.] Mar. 13, 2008, pet. denied) (mem. op.) (a physician's affidavit established that he was a salaried employee of a state-owned hospital); *DFPS v. Atwood*, 176 S.W.3d 522, 529 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (foster parents were not paid employees of the State, but rather were only reimbursed for expenditures made on behalf of the child).
- There is no evidence that either Lyellco or TFR billed TxDOT for reimbursement of the Lyellco workers' wages. *Cf., e.g.*, *Risk Mgmt. Strategies, Inc. v. Tex. Workforce Comm'n*, 464 S.W.3d 864, 868 (Tex. App.—Austin 2015, pet. dism'd) (caregivers to disabled individuals who were the beneficiaries of banks serving as trustees of special-needs trusts were employees of the individual bank trusts rather than the management company that provided the caregivers to the trustees because, even though the wages were paid and payroll processing was done by the management company, each trust, by contract, reimbursed the management company for the caregivers' services); *Miers*, 311 S.W.3d at 580 (a resident oral surgeon's salary was paid by the university because it reimbursed the medical center where the resident worked in full for that salary).

Rather, the evidence shows that:

- TxDOT only agreed to pay TFR a predetermined price of $355,907.50 for TFR's performance of tree and brush clearing from highway rights of way under the Contract. CR.147, 255, 435. There is no evidence that TxDOT paid anything more than the Contract price or paid an amount to anyone else for tree removal.
- TxDOT did not agree to pay the wages, salaries, or benefits of TFR's employees or Lyellco's employees. *See* CR.47–154, 440–44.
- TxDOT did not agree to submit W-2 or 1099 forms for employees of TFR or Lyellco. *See* CR.47–154, 440–44.
- TxDOT did not agree to pay TFR's or Lyellco's employees for vacation, sick leave, or holidays. *See* CR.47–154, 440–44.
- TxDOT did not agree to withhold or pay the employer portion of social security or federal income taxes for TFR's or Lyellco's employees. *See* CR.47–154, 440–44.

On top of all that, the Subcontract expressly disavows that TxDOT has any payment obligations to Lyellco's workers for any labor they provided under a work order issued by TFR to Lyellco. CR.440. And Lyellco indisputably invoiced TFR, not TxDOT, for allegedly removing Plaintiffs' trees. CR.296.

II. The Court of Appeals Mistakenly Held That TxDOT Waived Its Jurisdictional Argument Regarding the Employee Status of the Lyellco Workers.

A. TxDOT's employee-status argument implicates subject-matter jurisdiction and thus is not waivable on appeal.

The court of appeals refused to address TxDOT's argument that, because Lyellco's workers who operated or used machinery to allegedly remove Plaintiffs' trees were not in the paid service of TxDOT and thus not its employees, its sovereign immunity from suit is not waived. 2022 WL 1259094, at *17 n.7. The Court refused to consider that argument because, the court said, TxDOT allegedly raised the argument too late by asserting it for the first time in its motions for rehearing and reconsideration en banc. *Id.* The court said, "We will not address TxDOT's eleventh-hour issue." *Id.*

But even if, as the court of appeals suggested, employee status was a "new argument" by TxDOT, the court still should have addressed it because the argument asserts fundamental error regarding subject-matter jurisdiction. *See, e.g.*, *Dall. Metrocare Servs. v. Juarez*, 420 S.W.3d 39, 41 (Tex. 2013) (per curiam) (stating that "an appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all"); *McCauley v. Consol. Underwriters*, 304 S.W.2d 265, 266 (Tex. 1957) (per curiam) (concluding that fundamental error exists when "the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter"). 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. *See, e.g.*, *Rattray v. City of Brownsville*, No. 20-0975, 2023 WL 2438952, at *6 (Tex. Mar. 10, 2023); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993). *But cf. Engelman Irrig. Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 752 (Tex. 2017) (holding that a final judgment against a governmental entity was not subject to collateral attack on the ground that the entity enjoyed sovereign immunity from suit).

Arguments like those that TxDOT made to the trial court and the court of appeals concerning its sovereign immunity from suit implicate subject-matter jurisdiction. *See, e.g.*, *Miranda*, 133 S.W.3d at 226. As discussed in Part I.A.2 *supra*, section 101.001(2)'s definition of "Employee" bears on the issue of whether TxDOT's immunity from suit is waived and implicates the trial court's subject-matter jurisdiction. Establishing that a government employee proximately caused injury, death, or property damage by operating or using machinery is a statutory prerequisite for TxDOT's respondeat superior liability to attach under section 101.021(1) and thus waive sovereign immunity from suit. *See* Tex. Gov't Code § 311.034 ("Statutory prerequisites to a suit . . . are jurisdictional requirements in all suits against a governmental entity."). The court of appeals, therefore, could not simply refuse to address whether Lyellco's workers were in the paid service of TxDOT because the court believed TxDOT had not raised the argument in a timely manner. *See* 2022 WL 1259094, at *17 n.7. Whether or not TxDOT raised the employee-status argument for the first time in its motions for rehearing and en banc reconsideration, the court was nonetheless required to confront that argument because it implicated the

jurisdictional issue about the waiver of sovereign immunity and the alleged fundamental error committed by the trial court.

The court of appeals' stiff-arming of TxDOT's jurisdictional argument on employee status conflicts with numerous cases of this Court holding that a court of appeals must consider jurisdictional arguments and may even do so sua sponte. *E.g.*, *Rattray*, 2023 WL 2438952, at *6; *Engelman Irrig. Dist.*, 514 S.W.3d at 751 & n.41; *Manbeck v. Austin ISD*, 381 S.W.3d 528, 530 (Tex. 2012) (per curiam); *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94 (Tex. 2012); *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991) (per curiam). Because the court of appeals' refusal to address TxDOT's jurisdictional argument is out of step with well-settled law, this Court should reverse the court of appeals' judgment and bring the court back into line.

B. TxDOT may raise new arguments on appeal regarding an issue that was raised in the trial court.

Furthermore, the court of appeals refused to address TxDOT's employee-status argument because the court considered it to be a "new argument" that was waived. *See* 2022 WL 1259094, at *17 n.7. The waiver principle on which the court relies, however, is not applicable to *arguments*, but rather to *issues*.

The general rule is that appellate courts do not consider issues that were not raised in the courts below, but parties are free to construct new arguments in support of issues properly before an appellate court. *See, e.g.*, *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014). Applying that rule here, TxDOT indisputably raised the issue of the immunity waiver under section 101.021(1) and the companion issue of whether the contractors were employees of TxDOT under section

101.001(2). TxDOT, therefore, was free to make a slightly different argument (or, for that matter, an entirely new argument) in a motion for rehearing, so long as it concerned issues that had already been raised.

One argument that TxDOT made to support its plea to the jurisdiction in the trial court and on appeal was that TxDOT's lack of control over the details of the tasks performed by the contractors' workers meant that the contractors were independent contractors and not employees of TxDOT under section 101.001(2). Another argument that TxDOT made in its rehearing motions was that the Lyellco workers were not in the paid service of TxDOT and thus were not its employees under section 101.001(2). Both arguments go to the immunity-waiver issue of section 101.021(1).

The court of appeals never questioned (nor could it have) that the immunity-waiver issue was properly before it. Thus, the court should have addressed TxDOT's "new argument" about Lyellco's workers not being paid employees of TxDOT under section 101.001(2).

III. Lyellco and Its Workers Are Excluded from the Definition of "Employee" in Section 101.001(2), so the TTCA Does Not Waive TxDOT's Immunity from Suit.

Because the evidence conclusively establishes that Lyellco's workers are not paid employees of TxDOT, the Court need not consider the exclusions to the definition of "Employee" in section 101.001(2). But even if there were a fact issue regarding whether Lyellco's workers were in the paid service of TxDOT, the evidence

nonetheless conclusively establishes that the definition's exclusions apply to Lyellco and its workers, and therefore, TxDOT's immunity from suit remains intact.

A. A governmental unit's right to control the details of a person's task involving the operation or use of a motor-driven vehicle or motor-driven equipment is the test.

A person in the paid service of a governmental unit is excluded from section 101.001(2)'s definition of "Employee" if that person is "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." The common thread in these exclusions is the governmental unit's right to control (or more precisely its lack of a right to control) the details of a person's work.

As discussed in Part I.A.2 *supra*, the court of appeals stated that the "overarching question in determining whether a person is an employee or an independent contractor turns on who has the right to control the progress, details, and methods of operations of the work." 2022 WL 1259094, at *14 (cleaned up). Applying this test, the court stated:

> Because there is evidence that TxDOT controlled the details of the contractor's work in determining the area from which trees were to be removed—both in its contract and through instructions given by TxDOT employees—we conclude that the trial court did not err by denying TxDOT's plea to the jurisdiction on this ground. TxDOT's direction over which trees the contractor was to clear created a fact question regarding whether the contractor was an independent contractor or TxDOT's employee.

Id. But the court's conclusion is wrong because it did not consider the control that is relevant to a waiver of immunity under section 101.021(1)—namely, control over the operation or use of a motor-driven vehicle or motor-driven equipment.

The requirement of a legal right to control the details of a person's performance of a task as stated in section 101.001(2) does not stand alone; rather, it is subsumed into the larger question in section 101.021(1) that asks whether a governmental unit is liable, under a respondeat superior theory of liability, for property damage, personal injury, or death caused by the negligence of its employee in operating or using a motor-driven vehicle or motor-driven equipment. Thus, "[t]he 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*." *City of Houston v. Ranjel*, 407 S.W.3d 880, 890 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (Busby, J.) (emphasis added).

Operating or using motor-driven vehicles or equipment is "the *only* type of activity for which [the governmental unit] waives its immunity in tort" under section 101.021(1). *EGBT Tex. Pipeline, L.P. v. Harris Cnty. Flood Control Dist.*, 176 S.W.3d 330, 337 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd) (Bland, J.) (emphasis added). Accordingly, even if the evidence shows that a governmental unit participated in making the plans and specifications for a project and inspected the completed project for compliance with the plans, such evidence does not create a fact issue that the governmental unit had a right to control, or did control, the details of the contractor's work *with respect to the operation of a motor-driven vehicle or motor-driven equipment*. *Id.* at 337–38.

Applying the proper control test to the undisputed evidence in this record requires examining whether TxDOT controlled the details of the Lyellco workers' performance of the task involving the operation or use of motor-driven vehicles or equipment to allegedly remove Plaintiffs' trees. But the court of appeals here did not do that.

B. The court of appeals did not apply the proper right-to-control test.

The court of appeals' analysis did not determine whether, in accordance with the text of sections 101.001(2) and 101.021(1), TxDOT had a right to control the details of the work of Lyellco's employees with respect to their operation or use of machinery to allegedly remove Plaintiffs' trees, but rather went beyond the text of the TTCA to decide the control question. To answer the control question, the court turned to general negligence cases that did not involve the TTCA. *See* 2022 WL 1259094, at *15–16 (citing *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860 (Tex. 2021); *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985); *Cmtys. Helping Cmtys., Inc. v. City of Lancaster*, No. 3:06-CV-1436-P, 2007 WL 9711683 (N.D. Tex. July 18, 2007); *Schievink v. Wendylou Ranch, Inc.*, 227 S.W.3d 862, 867 (Tex. App.—Eastland 2007, pet. denied); *Rosenthal v. Grocers Supply Co.*, 981 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, no pet.)).

Specifically, the cases on which the court relied did not involve the TTCA's immunity waiver or its definition of "Employee." Moreover, unlike here, those cases did not involve whether an employer-employee relationship existed. Rather, they concerned whether an owner/general contractor owed a duty to exercise its

retained supervisory control over an independent contractor to ensure that harm did not befall the subcontractor's employees or others.

- The issue in *JLB Builders* was whether the general contractor on a construction project owed a duty of care to a concrete subcontractor's employee who was injured on the job. 622 S.W.3d at 863. The Court held that the plaintiff failed to raise a fact issue on whether the general contractor exercised actual control over the subcontractor with respect to the injury-causing work. *Id.* at 869. The Court also held that the parties' contract did not provide a basis for imposing a duty of care on the general contractor to ensure the safe performance of the subcontractor's work. *Id.* at 870.
- The issue in *Redinger* was whether a general contractor owed a duty to a subcontractor's employee, and if so, whether there was evidence that the duty was breached. 689 S.W.2d at 417. The Court stated that the general rule is that an owner or occupier of land does not owe a duty to ensure that an independent contractor performs its work safely. *Id.* at 418. But "when the general contractor exercises some control over a subcontractor's work," the general contractor may be liable if it does not exercise reasonable care in supervising the subcontractor's work. *Id.*
- The issue in *Communities Helping Communities* was again whether the general contractor (the City of Lancaster) had a duty of control over a subcontractor (a demolition company) and could thus be responsible for the subcontractor's action in addition to its own. 2007 WL 9711683, at *5.

The court found that, despite the usual rule that a general contractor's right to order the work to stop or start does not impose the duty to exercise reasonable care to ensure an independent contractor performs its work in a safe manner, the city—even if it only retained the right to order or stop a demolition—may have a duty of control over the demolition company that would make the city liable for an improper demolition at the hands of the demolition company. *Id.*

- The issue in *Rosenthal* was whether "a company that hires an independent contractor to clear land ha[s] a duty to correctly identify the land." 981 S.W.2d at 222. The landowner admitted that it directed the independent contractor to clear the wrong property but contended that it did not control how the subcontractor cleared the land. *Id.* The court held that controlling this "one vital 'detail'" created a fact issue on liability that would defeat summary judgment as to the owner's responsibility for the contractor's acts and as to the owner's responsibility for its own error. *Id.* To reach this conclusion, the court applied the rule from *Redinger*. *Id.*
- The issue in *Schievink* was whether landowner A breached a duty as to adjoining landowner B by failing to instruct a fencing company as to the property line before the contractor bulldozed some trees on landowner B's property, even though the fencing company was an independent contractor. 227 S.W.3d at 864. As per *Redinger*, the court held that assuming that landowner A had a duty to ascertain the correct boundary line and to instruct the fencing company in that respect and that landowner A

> retained control over the location on which the fencing company was to build the fence, landowner A had a duty to use reasonable care in exercising that control. *Id.* at 867.

The foregoing cases differ from this case because the level of control needed in those cases to create a common-law negligence duty owed to a subcontractor's employee is far less than what is required in cases like this one where there is a statutory definition of employee and a limited statutory waiver of a governmental unit's immunity from suit.

Moreover, another critical distinction between those cases involving general contractors and this case involving a putative governmental employer is that

> [t]he courts of this State have repeatedly held that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, *without thereby creating such contractor an employee of such company*.

Indus. Indem. Exch. v. Southard, 160 S.W.2d 905, 907 (Tex. 1942) (emphasis added). In other words, the general-contractor rule applies even if the person charged with negligence "does not retain the degree of control which would subject him to liability *as a master*." *Redinger*, 689 S.W.2d at 418 (emphasis added). The upshot is that the degree of control required in this statutory employer/employee case is more stringent than in a general contractor/subcontractor case, such as those on which the court of appeals relied.

The control that is needed to create an employer-employee relationship with respect to the TTCA's immunity waiver is exacting, not lenient. The governmental

unit must control the details of a person's performance of a task involving the operation or use of a motor-driven vehicle or motor-driven equipment. *Ranjel*, 407 S.W.3d at 890; *EGBT Tex. Pipeline*, 176 S.W.3d at 337–38. By contrast, in the foregoing cases, the general contractor needed only to "exercise[] *some control* over a subcontractor's work" to create a supervisory duty to ensure a subcontractor's safety. *See Redinger*, 689 S.W.2d at 418 (emphasis added).

C. TxDOT did not have the legal right to control the details of the Lyellco workers' performance of the task involving the operation or use of motor-driven vehicles and equipment.

The evidence here conclusively establishes that any minimal degree of supervisory control that TxDOT might have had over the highway-maintenance project did not extend to controlling the details of the task assigned to TFR, Lyellco, or Lyellco's workers to operate or use motor-driven vehicles and equipment to remove trees, making them TxDOT's employees for the purpose of the TTCA's immunity waiver. Recall that the statutory definition of "Employee" looks to whether the governmental unit has the "legal right to control" "the details" of "tasks" that the claimed employee "performs." Tex. Civ. Prac. & Rem. Code § 101.001(2). Also recall that "[t]he 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." *Ranjel*, 407 S.W.3d at 890; *accord EGBT Tex. Pipeline*, 176 S.W.3d at 337.

Control generally can be proven in two ways: *first*, by evidence of a contractual agreement that explicitly assigns the owner or general contractor a right to control;

and *second*, in the absence of a contractual agreement, by evidence that the owner or general contractor exercised actual control over the way the independent contractor performed its work. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). In *Marino*, the defendant argued that "'legal' control" in the exclusion to the definition of "Employee" in section 101.001(2) "mean[t] a formal right to control, in contrast to 'actual' control." 526 S.W.3d at 409. The Court found the argument "unpersuasive," describing it as "essentially argu[ing] that 'legal' control means a theoretical right to control as opposed to an actual right to control." *Id.* The Court saw "no reason to adopt such a novel definition." *Id.* Heeding *Marino*, TxDOT will discuss both contractual and actual control.

1. TxDOT did not exercise contractual control.

To begin, TxDOT did not have the legal right to control TFR, Lyellco, or Lyellco's workers in the performance of the details of their task to remove trees under the Contract or Subcontract. Neither the Contract nor Subcontract gives TxDOT control over the details of how persons are to perform tree removal by operating or using machinery. *See* CR.47–144, 440–45. Neither the Contract nor Subcontract contains any provision describing what vehicles or equipment are to be used to remove trees, much less describes TxDOT's control over the details of how such machinery was to be operated. *See* CR.47–154, 440–45.

Indeed, TxDOT's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, CR.266–76, specifically, Item 752 "TREE AND BRUSH REMOVAL"—which was incorporated by reference into the Contract, CR.75—states only "Provide equipment necessary to complete the work," CR.275

(¶ 3). It further states "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." CR.275 (¶ 4). And Item 752 states only that "trees of various diameters" are to be removed "as shown on the plans, or as directed," CR.275 (¶ 4.1), and instructs on how to measure tree diameter, CR.276 (¶ 5.1). The specifications do not direct how the removal is to be done, let alone that TxDOT may direct how machinery is to be used to perform the details of that task. *See* CR.275–76.

The Subcontract shows that Lyellco agreed to perform the work specified in work orders provided by TFR and that Lyellco would furnish all labor and equipment necessary to perform the work. CR.440. Regarding TxDOT, the Subcontract states only that Lyellco will complete the work in strict compliance with the terms of the Contract and to the satisfaction and in compliance with the directions of TxDOT or its representatives. CR.440. In other words, the Contract gives TxDOT control over the end result only, not the means or methods used by the Contractor to achieve that result. And there is no provision that TxDOT may control the details of what machinery Lyellco's workers may use for tree removal or how they must operate such machinery. *See* CR.440–45.

2. TxDOT did not exercise actual control.

Regarding actual control, the court of appeals emphasized that TxDOT controlled the decision as to which trees would be removed in performance of the highway-maintenance contract. 2022 WL 1259094, at *2. The court zeroed in on evidence showing that a TxDOT representative "direct[ed] the contractor to cut the trees down" and that, instead of surveying the right of way to confirm the exact

location of Plaintiffs' property line, TxDOT "simply instructed [the contractor] to 'clear everything between the fences.'" *Id.* at *17.

Even when viewed in the light most favorable to Plaintiffs, this evidence does not raise a fact issue as to whether TxDOT had the legal right to control Lyellco's workers in the performance of the details of their task to remove trees by operating or using machinery. Identifying which trees to cut down represents only a minimal degree of control that exists in any working relationship of this type and is no evidence of a degree of control detailed enough to indicate employee status. *See Harris Cnty. Flood Control Dist. v. Halstead*, 650 S.W.3d 707, 718 (Tex. App.—Houston [14th Dist.] 2022, no pet.) (holding that tree-removal contractor and its subcontractor were independent contractors rather than governmental employees for purposes of the immunity waiver in the TTCA); *cf. also McNamara*, 71 S.W.3d at 312–13 (noting that a company's designation of delivery locations and where pay tickets were to be dropped off related to the ends to be achieved, and not control of the details of work); *Eagle Trucking Co. v. Tex. Bitulithic Co.*, 612 S.W.2d 503, 508 (Tex. 1981) (holding that a construction company was not liable for the negligence of a driver who hauled sand when the company "had no more than the power to direct the place sand was to be loaded and the place it was to be unloaded"). Directing a worker to the trees that require removal is not control over the means and details of how the worker performs the removal, much less control over the details of how such worker is to use machinery to accomplish the task. *See Halstead*, 650 S.W.3d at 718.

TxDOT hired TFR as prime contractor to remove trees as part of the highway-maintenance project, and TFR in turn hired Lyellco as subcontractor to remove the

trees in the FM 677 right of way bordering Plaintiffs' property. *See* CR.47–154, 440. There is no evidence that TxDOT directed, instructed, or controlled either TFR or Lyellco as to how to remove the trees with machinery; how to operate the chainsaws, bucket truck, and Bobcat; or the proper cutting methods to complete the work.

At most, Plaintiffs' evidence merely indicates that TxDOT had control over the end result of the tree-removal project. *Cf., e.g.*, *Tex. A & M Univ. v. Bishop*, 156 S.W.3d 580, 584–85 (Tex. 2005) (holding that evidence of the university's final script approval of a play put on by an outside director and his assistant for the university's drama club demonstrated only a minimal degree of control that exists in any working relationship and was no evidence of a level of control detailed enough to indicate employee status); *McNamara*, 71 S.W.3d at 313 (holding that the summary-judgment evidence established that the general contractor merely controlled the end sought to be accomplished—determining where and when to deliver limestone—whereas its independent contractor controlled the means and details of accomplishing the work); *Olivares v. Brown & Gay Eng'g, Inc.*, 401 S.W.3d 363, 377 (Tex. App.—Houston [14th Dist.] 2013) (holding that a contract providing that an engineering company would perform its services under a county toll road authority's supervision indicated control over the general requirements of the project and its proper completion, rather than the right to control the details of the contractor's engineering work), *aff'd*, 461 S.W.3d 117 (Tex. 2015).

Prayer

The Court should grant TxDOT's petition for review, reverse the part of the court of appeals' judgment that affirms the trial court's order denying TxDOT's plea to the jurisdiction regarding Plaintiffs' negligence cause of action against TxDOT, and render judgment dismissing Plaintiffs' negligence cause of action against TxDOT for a lack of subject-matter jurisdiction.

Respectfully submitted.

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