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SUPREME COURT OF TEXAS
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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 IN REPLY FOR PETITIONER

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To the Honorable Supreme Court of Texas:

The response brief on the merits of Plaintiffs Mark and Birgit Self fails to refute TxDOT's argument that its sovereign immunity from suit is not waived under the Texas Tort Claims Act (TTCA), Tex. Civ. Prac. & Rem. Code §§ 101.001–.109, for three reasons. *First*, Plaintiffs have failed to show that the workers who removed the trees at issue were TxDOT employees under section 101.001(2)[1] and that TxDOT is liable under section 101.021(1) for those workers' operation or use of motor-driven vehicles and equipment to remove the trees. The evidence conclusively establishes that those workers were not in the paid service of TxDOT, but rather were, at most, in the paid service of the subcontractor, Lyellco, Inc., and the general contractor, T.F.R. Enterprises, Inc. (TFR), that hired Lyellco. As a result, Plaintiffs have failed to show that TxDOT's immunity from suit is waived under the TTCA.

Second, even assuming for the sake of argument that Plaintiffs could show that Lyellco's workers were in the paid service of TxDOT, they still would not be employees of TxDOT because of the exclusions in section 101.001(2) to the in-the-paid-service requirement. The exclusions apply because Lyellco's workers were independent contractors and TxDOT did not have the right to control the details of their operation or use of machinery to remove the trees. Plaintiffs argue that TxDOT had sufficient control because (1) the general contract with TFR gives TxDOT the responsibility to designate which trees to remove and (2) TxDOT's instruction to

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[1] Unless otherwise noted, all statutory references are to the Texas Civil Practice and Remedies Code.

remove the trees from the right-of-way easement "between the fences" is evidence that TxDOT controlled the details of the Lyellco workers' performance of their job. But that evidence does not demonstrate the only control that matters for purposes of the immunity waiver: control over the details of operating or using machinery to remove the trees. Instead, the evidence establishes that TxDOT exercised only a minimal degree of control over the result to be accomplished, which exists in any working relationship with a contractor and is insufficient under section 101.001(2).

Third, Plaintiffs' contention that TxDOT waived its argument about the in-the-paid-service requirement by raising it for the first time on appeal in its motions for rehearing and reconsideration en banc also fails. The in-the-paid-service requirement goes to the issue of whether TxDOT's sovereign immunity from suit is waived under the TTCA. Because the law is well-established that sovereign immunity implicates subject-matter jurisdiction and that arguments asserting a lack of subject-matter jurisdiction can be raised for the first time on appeal, TxDOT did not waive that argument by raising it in rehearing and reconsideration motions on appeal. In addition, because TxDOT raised the immunity-waiver issue in the lower courts, it was free to raise any new argument regarding that issue in its rehearing and reconsideration motions.

Argument

I. TxDOT Is Not Liable for Removing the Trees at Issue.

A. The workers who removed the trees were Lyellco, not TxDOT, employees.

As explained in TxDOT's opening brief on the merits (at 15–35), whether TxDOT's immunity from suit is waived under the TTCA turns on whether the workers who removed the trees were TxDOT employees. In this case, the TTCA waives immunity only if a governmental employee would be personally liable to Plaintiffs for operating or using a motor-driven vehicle or equipment to cause property damage. Tex. Civ. Prac. & Rem. Code §§ 101.025(a) (waiving immunity from suit to the extent of liability under chapter 101), 101.021(1) (creating governmental liability resulting from the operation or use of motor-driven vehicles or equipment by a government employee to the extent private persons would be liable).

The TTCA defines "Employee" to mean:

> [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). As TxDOT's opening brief on the merits explains (at 20–24), this definition creates a threshold test and a two-step process to determine if the allegedly liable person is a governmental employee.

Under that test, "a person" must be "in the paid service of a governmental unit." *Id.*; *Harris County v. Dillard*, 883 S.W.2d 166, 167–68 (Tex. 1994); *Marino v. Lenoir*, 526 S.W.3d 403, 405–08 (Tex. 2017); *Murk v. Scheele*, 120 S.W.3d 865, 867

(Tex. 2003) (per curiam). The two-step process involves first determining that the person is in the paid service of the governmental unit, and, if the answer is yes, then determining whether the exclusions in section 101.001(2) apply. Tex. Civ. Prac. & Rem. Code § 101.001(2); *e.g.*, *Marino*, 526 S.W.3d at 405–08; *Murk*, 120 S.W.3d at 867. If the answer to the threshold test, however, is no, then the inquiry stops there, and the exclusions are not considered. *E.g.*, *Univ. of Tex. Health Sci. Ctr. at Hous. v. Rios*, 542 S.W.3d 530, 534 (Tex. 2017); *Dillard*, 883 S.W.2d at 167–68.

Section 101.001(2)'s exclusions cover three categories of people: independent contractors, agents or employees of independent contractors, and workers who perform tasks the details of which the governmental unit does not exercise control. Embedded in all three exclusions is the basic question of whether the government controls the relevant details of the work that the contractor performs. Such control is not just "a formal right to control" the details of the task but also includes "'actual' control." *Marino*, 526 S.W.3d at 409. Thus, control can be established through evidence of a written contract assigning the right to control or, absent a contract, evidence of actual control over the relevant details of the assigned task. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).

Employee status is critical because a governmental unit's liability, and thus the TTCA's waiver of immunity, is predicated on the act, omission, or negligence of *its* employee. *See* Tex. Civ. Prac. & Rem. Code §§ 101.021, .025(a). Together, section 101.021(1) and 101.001(2) require a person in the paid service of the governmental unit, and not an independent contractor, to operate or use motorized vehicles or equipment to cause certain specified forms of harm. *See, e.g.*, *LeLeaux v.*

Hamshire-Fannett ISD, 835 S.W.2d 49, 51 (Tex. 1992) ("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."); *City of Houston v. Ranjel*, 407 S.W.3d 880, 890 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (Busby, J.) ("The type of control necessary to establish employee status for waiver-of-immunity purposes is control over the details of the operation or use of the motor-driven equipment."); *EPGT 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.) (holding that the details of a contractor's work regarding the operation of a motor-driven vehicle is the only type of activity for which a governmental unit waives its immunity in tort).

As TxDOT's opening brief on the merits explained, the evidence conclusively establishes that the workers who removed the trees were employees of Lyellco, not TxDOT. Br. for Pet'r 15, 29–35; *see also* CR.163–64, 174–75, 214, 278, 296, 440–45; RR.18:22–19:4.

The subcontract between TFR and Lyellco establishes that. CR.440–45. In relevant part, it states:

- "**THIS CONTINUING SUBCONTRACT** (hereafter 'Subcontract') is" "between TFR . . . , herein called **CONTRACTOR**, and Lyellco . . . , called **SUBCONTRACTOR**, for the performance by Subcontractor of certain work hereinafter specified," and "[f]or and in consideration of the Work Order price, the Contractor and Subcontractor agree and contract." CR.440.
- "This Subcontract establishes, as a minimum, the terms and conditions that are applicable to all projects with the exception of SCOPE OF

WORK, SCHEDULED COMPLETION TIME, COMPENSATION and any other special conditions that will be set forth for any individual project in the work order issued for that specific project." CR.440.

- "This Subcontract 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.

- "A work order will be issued to the Subcontractor for each specific project . . . to establish specific project requirements," which "include" such things as the Subcontractor's "compensation." CR.440.

- "Subcontractor shall perform said items 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.

- "Subcontractor shall make timely payment for all labor . . . relating in any way to Subcontractor's work." CR.442.

- "Subcontractor shall comply with federal, state and local tax laws, Social Security acts, Unemployment Compensation acts and Workers' Compensation acts, insofar as applicable to the performance of the Work." CR.442.

- "[T]he Subcontract Amount is listed on the individual Work Order for a given project. This Subcontract Amount shall be the total amount to which Subcontractor is entitled, except as may be amended by Change Order or other provisions as set forth herein." CR.442.

- "Subcontractor shall present an invoice every Monday for all Work performed and completed through the previous week." CR.442.

- "The Contractor agrees to pay to the Subcontractor the stated consideration, established in the Work Order, for such work under this Subcontract." CR.442.

- "Subcontractor agrees . . . to pay all taxes and contributions imposed or required by any law relating to the employees of Subcontractor and to the performance of said work and completion of this Subcontract." CR.444.

The subcontract also contains this limitation: "[T]he payment provisions of the Contract between the Owner [i.e., TxDOT] and Contractor are *not* a part of this Subcontract and specifically are *not* incorporated by reference." CR.440 (emphases added).

Consistent with the subcontract, Lyellco billed TFR, not TxDOT, for the removal of the trees by its workers. CR.296 (invoice stating "BILL TO[:] TFR"). There is no evidence that Lyellco billed TxDOT for removing the trees, that TxDOT paid Lyellco for removing the trees, that TxDOT directed funds to TFR to be earmarked for the payment of Lyellco's workers, or that TxDOT had any involvement in TFR's hiring of Lyellco and input on drafting the subcontract.

In short, this evidence establishes that the workers who removed the trees were in the paid service of Lyellco; that Lyellco, not TxDOT, was required to pay those workers for their labor; that Lyellco, not TxDOT, was responsible to pay social-security taxes, unemployment, and worker's compensation, required by state and federal law; that Lyellco invoiced TFR, not TxDOT, for the work; that TFR, not TxDOT, was contractually obligated to pay Lyellco for the tree-removal work performed by its employees; and that the subcontract expressly provides that it creates a contractual relationship between only TFR and Lyellco. Plaintiffs' response brief on the merits cites no evidence to contradict those facts or to raise a fact issue about the employee status of the Lyellco workers. Accordingly, because it is conclusively

established that the tree-removal workers were Lyellco, not TxDOT, employees, TxDOT is not liable under section 101.021(1), and its immunity from suit is not waived.

B. Plaintiffs' counterarguments lack merit.

Plaintiffs do not argue that TxDOT misreads the plain text of section 101.001(2) or that the facts show anything other than what TxDOT just described. Instead, they launch different attacks, all to no avail.

1. To begin, Plaintiffs seem to suggest that, even if a person is not in the paid service of a governmental unit, he or she can still be considered an "Employee" under section 101.001(2) so long as the governmental unit exercises control over the details of the person's performance of a task. *See* Resp'ts' Resp. BOM 4. In other words, Plaintiffs contend that employee status can be established by demonstrating that a person is *either* (1) in the paid service of *or* (2) controlled by a governmental unit.

They misread the statutory text. The main clause of section 101.001(2) states that, for a person to be an "Employee" of a governmental unit, the person must be "in the paid service of a governmental unit." But even if a person is "in the paid service of a governmental unit," he or she is not necessarily a governmental employee because the main clause is modified by the phrase "but does not include." This phrase introduces the statutory exclusions regarding independent contractors and governmental control. Plaintiffs' argument ignores the "but does not include" phrase introducing the exclusions. In doing so, Plaintiffs treat the third exclusion

regarding governmental control like it is not an exclusion at all, but rather like it is an alternative basis for establishing employee status.

The statutory text, however, can be read only one way—a person is an "Employee" under section 101.001(2) only if he or she is in the paid service of a governmental unit *and* none of the exclusions applies. If a person is not found to be in the paid service of the government, that person cannot be a governmental employee—full stop. In that event, section 101.001(2)'s exclusions have no role to play in that scenario. *See Maldonado v. City of Pearsall*, 977 F. Supp. 2d 646, 651–52 (W.D. Tex. 2013) ("[I]f a defendant fails to satisfy the 'paid employment' prong, a court need not address whether the governmental unit had the right to control the details of his assigned tasks." (quoting *Adkins v. Furey*, 2 S.W.3d 346, 348 (Tex. App.—San Antonio 1999, no pet.)).

Plaintiffs therefore overstate (at 4) that "the Act itself confirms that control matters." That statement is true but only so far as it goes. Control matters *but only if* a person is first found to be in the paid service of the government. Control does *not* matter if the person is not in the paid service of the government.

To support their argument, Plaintiffs cite (at 8) *Thomas v. Harris County*, 30 S.W.3d 51 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In *Thomas*, though, the court of appeals found that "[t]he physicians practicing in the Harris County Detention Center were not employees of Harris County. They were employees of [the University of Texas Health Science Center]." *Id.* at 54. With that finding, the physicians could not be Harris County's employees under section 101.001(2), and the court did not need to go any further than that to rule in the county's favor. But the court

continued by also analyzing whether Harris County controlled the physicians and finding that it did not. Ultimately, the court concluded: "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." *Id.* (emphasis added). The court in *Thomas* made the same mistake that Plaintiffs make here; it failed to treat control as an exclusion to the in-the-paid-service test. The error was harmless because the court reached the right result. In any case, *Thomas* does not take precedence over the statute's text and this Court's decisions.

Section 101.001(2) has been summarized as "requir[ing] both 'control *and* paid employment to invoke the [TTCA]'s waiver of immunity.'" *Olivares v. Brown & Gay Eng'g, Inc.,* 401 S.W.3d 363, 368 (Tex. App.—Houston [14th Dist.] 2013), *aff'd*, 461 S.W.3d 117 (Tex. 2015) (quoting *Adkins*, 2 S.W.3d at 348); *El Paso County v. Solorzano*, 351 S.W.3d 577, 581 (Tex. App.—El Paso 2011, no pet.); *Kamel v. Sotelo*, No. 01-07-00366-CV, 2009 WL 793742, at *3 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet.) (mem. op.). And that is true, because if there is paid employment by a governmental unit, then there also needs to be governmental control for the exclusions not to apply. Contrary to those cases, however, *Thomas* misapplies section 101.001(2) by suggesting that a person is a governmental employee if the government has the right to control the person, even if he or she is *not* in the paid service of the government.

2. Throughout their response brief (at 5–7, 9–10, 17), Plaintiffs argue that TxDOT advances a "'bright line paycheck test.'" But TxDOT does not argue that

a person's receipt of a "paycheck" from a governmental unit is the *only* way to establish the in-the-paid-service requirement. Indeed, TxDOT's opening brief (at 33–35) identified several ways a claimant can meet the requirement, only one of which is evidence of a government paycheck. Instead, TxDOT argues that the text of section 101.001(2) provides the test, which is the in-the-paid-service requirement.

Likewise, Plaintiffs wrongly accuse TxDOT (at 17) of attempting "to escape liability by arranging for persons who don't receive TxDOT paychecks [like the Lyellco workers] to operate the vehicles and equipment." That accusation is unfounded. TxDOT did not "arrange" to hire Lyellco—TFR did. CR.278, 440–45. TFR hired Lyellco to remove large trees because TFR had fallen behind schedule, not because TxDOT told TFR to hire Lyellco to remove the trees. CR.278. Indeed, TxDOT did not even know that TFR had hired Lyellco until after Lyellco had signed the subcontract with TFR. CR.278, 445.

3. Plaintiffs suggest (at 5) that evidence of "indirect or intermediated payments" may satisfy the in-the-paid-service requirement. What exactly such payments might be and how they might work, Plaintiffs do not say. And they cite no authority to support their suggestion.

Similarly, Plaintiffs suggest that a person may be a statutory employee if his or her compensation is "*ultimately paid*" by a governmental unit. Resp'ts' Resp. BOM 8 (quoting *Murk*, 120 S.W.3d at 867 (emphasis added by Plaintiffs)). And Plaintiffs contend (at 17) that "[t]here is no dispute that the workers on site were being paid, and that TxDOT was the ultimate source of those payments." But Plaintiffs just assume that the dollars TxDOT paid TFR went directly from TFR to Lyellco and that

Lyellco used those dollars to pay its workers' wages. In other words, Plaintiffs assume, without any evidence, that TFR was a mere conduit between TxDOT and Lyellco's workers through which TxDOT paid their wages.

The record belies Plaintiffs' assumption. TxDOT contracted to pay TFR, not Lyellco or its employees. CR.145. In the general contract with TxDOT, TFR represented to TxDOT that it was "fully equipped, competent and capable of performing" the contract and that it agreed to perform, "at its own proper cost and expense, all the work necessary for the highway improvement." CR.145.

For that consideration, TxDOT "agree[d] and [bound] itself" to pay TFR. CR.145. And TxDOT agreed to pay for only those "items of work and respective unit prices . . . contained in the original proposal and . . . [the] contract." CR.145. TFR and TxDOT, moreover, mutually agreed "that th[eir] contract [wa]s the full and complete contract for the performance of the work called for and described [t]herein." CR.149. Thus, TxDOT agreed to pay TFR, not Lyellco, in connection with the highway-maintenance project.

Because TxDOT contracted with TFR, not Lyellco or its employees, for work on the project, Plaintiffs are making a leap in logic that does not support the conclusion that Lyellco's workers were in the paid service of TxDOT. If the workers who removed the trees were in the paid service of anyone—besides, that is, their employer Lyellco, which in fact paid their wages—it was TFR, not TxDOT.

That arrangement comported with the general rule regarding the payment of subcontractors. Absent an express contractual provision to the contrary, a contractor is ultimately responsible for payment of its subcontractors, *Interstate Contracting*

Corp. v. City of Dallas, 135 S.W.3d 605, 618 (Tex. 2004), even if the work is done under the direction of and in accordance with the plans furnished by the owner, *City of Corpus Christi v. Acme Mech. Contractors, Inc.*, 736 S.W.2d 894, 898 (Tex. App.—Corpus Christi 1987, writ denied). The subcontractor must look to the prime contractor for payment because, without an express contract, there is no privity between the subcontractor, employed by the prime contractor, and the owner. *Interstate Contracting*, 135 S.W.3d at 618; *Woodard v. Sw. States, Inc.*, 384 S.W.2d 674, 675 (Tex. 1964).

Moreover, Plaintiffs' contention that Lyellco's workers were in the paid service of TxDOT is at odds with the TFR-Lyellco subcontract. That document specifically provides that "the payment provisions of the Contract between the [TxDOT] and [TFR] *are not a part of this Subcontract and specifically are not incorporated by reference.*" CR.440 (emphasis added). In other words, the payment obligations TxDOT had with respect to TFR did not extend to Lyellco and its workers. It follows that, if TxDOT had no payment obligation to Lyellco and its workers, those workers would not be in the paid service of TxDOT. And just because TxDOT agreed to pay TFR a lump-sum contract price for the highway-maintenance project and TFR in turn subcontracted with Lyellco, it does not follow that Lyellco and its workers (who are not subject to the general contract's payment provisions) are in the paid service of TxDOT.

"[I]n the paid service" cannot include a subcontractor like Lyellco who was hired by TFR and was not in privity with TxDOT, and whose subcontract expressly excluded the payment provisions of the general contract between TFR and TxDOT

from the subcontract. Otherwise, a general contractor could unilaterally render the subcontractor's workers in the paid service of the government and government employees, against the government's wishes. And by extension, the government could, hypothetically, be held liable for the acts, omissions, or negligence of the subcontractor that operates or uses machinery to cause some harm, resulting in a waiver of governmental immunity. But that would expand the waiver of immunity in section 101.021 too far, as it would violate the well-settled rule that the waiver of immunity in the TTCA is a limited one. *E.g.*, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *LeLeaux*, 835 S.W.2d at 51.

In any event, even if Plaintiffs' theory about the ultimate source of the wages paid to Lyellco's workers were correct, those workers would still not be TxDOT employees because the subcontract states that "[t]he Subcontractor is in all respects *an independent contractor*." CR.440 (emphasis added). Accordingly, even if the Lyellco workers can be thought of as being in the paid service of TxDOT, in some attenuated sense, the subcontract conclusively demonstrates that Lyellco and its workers were independent contractors, thereby preventing them from being governmental employees. *See* Tex. Civ. Prac. & Rem. Code § 101.001(2) (excluding an "independent contractor" and an "employee of an independent contractor" from the definition of "[e]mployee").

4. Plaintiffs assert (at 7–9) that *Dillard*, *Marino*, and *Murk* are distinguishable on their facts. But TxDOT cited those cases to support its reading of the text of section 101.001(2). To recap, the cases stand for the proposition, which applies here, that the Court first evaluates whether a person is in the paid service of the

governmental unit sued. If the answer is no, the person is not that unit's employee and the analysis ends. If the answer is yes, the Court takes the next step and evaluates whether one of the statute's exclusions applies, even though the person may be in the unit's paid service. Plaintiffs cannot satisfy the threshold test, and that is all there is to it. The factual distinctions the Plaintiffs advance make no difference.

II. TxDOT Did Not Control the Details of the Lyellco Workers' Tree-Removal Task.

Because the evidence conclusively establishes that Lyellco's workers are not in the paid service of TxDOT, the Court need not consider Plaintiffs' arguments about TxDOT's alleged control over the tree-removal workers. But even if there were a fact issue regarding whether those workers were in the paid service of TxDOT, the evidence conclusively establishes that the lack-of-control and the independent-contractor exclusions apply here, and therefore, TxDOT's immunity from suit remains intact.

A. Lyellco was an independent contractor.

To begin, the subcontract states that "[Lyellco] is in all respects an independent contractor." CR.440. Plaintiffs do not mention, let alone refute, this provision. Because the provision undisputedly establishes Lyellco's independent-contractor status on the highway-maintenance project, the first exclusion in section 101.001(2) applies. And Lyellco's workers therefore are not TxDOT's employees, even if it is assumed they were in the paid service of TxDOT.

B. TxDOT did not control the Lyellco workers' operation or use of machinery to remove the trees.

Despite the subcontract's independent-contractor provision, Plaintiffs still argue that TxDOT exercised control over the Lyellco workers. *See* Resp'ts' Resp. BOM 6. But as TxDOT explained in its opening brief on the merits (at 19, 40–41, 49), to the extent that it exercised any control over those workers, such control did not include the details of how Lyellco's workers *operated or used the vehicles and equipment to remove the trees*, which is the only control that matters for purposes of establishing liability under section 101.021(1) and waiving immunity under the TTCA. In response, Plaintiffs argue (at 11) that "[n]othing in either section 101.021(1) or section 101.001(2) require[s] the governmental entity's control over the employee to be directly related to the operation or use of the motor vehicle."

TxDOT's opening brief on the merits anticipated and addressed that argument, so TxDOT will not repeat itself here. *See* Br. of Pet'r 19, 40–41, 49 (citing *LeLeaux*, 835 S.W.2d at 51; *Harris Cnty. Flood Control Dist. v. Halstead*, 650 S.W.3d 707, 718 (Tex. App.—Houston [14th Dist.] 2022, no pet.); *Ranjel*, 407 S.W.3d at 892; *EPGT*, 176 S.W.3d at 337). Still, it should be noted that Plaintiffs do not cite, much less refute, *LeLeaux*, *Ranjel*, and *EPGT*.[2]

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[2] To be fair, Plaintiffs' opening brief on the merits (at 22–24) argued that *LeLeaux* misinterpreted the text of section 101.021(1) and that the facts in *LeLeaux* differ from the facts of this case. TxDOT's earlier briefing countered those arguments, Resp. Br. for Pet'r/Cross-Resp't 7–12; Br. of Pet'r 16–19, and to avoid repetition, will not be discussed here.

Plaintiffs do, however, attempt to distinguish *Halstead*. Resp'ts' Resp. BOM 12. Plaintiffs argue that, in *Halstead*, the operation of the chainsaw "mattered," whereas the operation of "the chainsaws and other equipment" does not matter here, because such machinery was "not the source or cause of the[ir] injuries." *Id.* They claim (at 12) that TxDOT's failure to "designat[e] which trees to remove" is the gravamen of their tort claim.

Even if that were the case, that framing does not help Plaintiffs because control over the details of the workers' operation or use of motor-driven equipment, not the designation of the trees, is the control that matters for establishing TxDOT's liability and the waiver of immunity. *See, e.g.*, *Ranjel*, 407 S.W.3d at 890 ("The type of control necessary to establish employee status for waiver-of-immunity purposes is control over the details of the operation or use of the motor-driven equipment."); *EPGT*, 176 S.W.3d at 337 (holding that the details of a contractor's work regarding the operation of a motor-driven vehicle is the only type of activity for which a governmental unit waives its immunity in tort).

Halstead rejected the same argument that Plaintiffs are making here. There, the court stated:

> [I]dentifying which trees to cut presents 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. . . . Directing a tree-removal worker to the trees that require removal is not control over the means and details of how the worker performs the removal.

Halstead, 650 S.W.3d at 718. The court continued that "[a]t most, Halstead's evidence indicate[d] that [the governmental entity] had control over the end results of

the tree removal," not "how to operate the chainsaw, or the proper cutting methods to complete the work." *Id.* Accordingly, the court concluded that "control over which trees to fell [wa]s [not] sufficient to satisfy the test for showing an employer-employee relationship," *id.* at 719, and for that reason, "the TTCA d[id] not waive immunity . . . because the negligent use of motor-driven equipment must be by the governmental unit's employee" and "Halstead was not [the governmental entity]'s employee as a matter of law when the accident occurred," *id.* at 720.

Halstead is on point with the waiver-of-immunity analysis required here. Like the subcontractors' workers in *Halstead*, *see* 650 S.W.3d at 716, Lyellco's workers were not TxDOT's employees under section 101.001(2). And like the governmental entity in *Halstead*, TxDOT did not have control over the details of Lyellco's workers' operation or use of the chainsaws and other equipment.

Halstead also explains why the evidence that Plaintiffs cites (at 12–16) referencing contract provisions and communications between TxDOT and TFR about the removal of trees does not raise a fact issue about control. Ultimately, TxDOT instructed the contractors only to remove the trees from the right of way between the fence lines. CR.11, 257. As in *Halstead*, such an instruction reflected only "a minimal degree of control that exists in any working relationship [between an owner and a contractor]," rather than "control over the means and details of how the worker perform[ed] the removal." 650 S.W.3d at 718. At most, such an instruction "indicates that [the governmental entity] had control over the end results of the tree removal," not control over the details of how to perform the tree-removal task and is therefore insufficient. *Id.*

C. Plaintiffs' evidentiary and policy arguments fail.

Plaintiffs point to evidence (at 15) of "internal confusion, budget concerns, and casual definition and alteration of work scopes" that "contributed to the problem" of designating the wrong trees for removal. But those things are irrelevant to the only control issue that matters: control over the details of the workers' operation or use of the machinery to remove the trees.

Plaintiffs also argue (at 15–16) that, after their trees were removed, TxDOT ordered the contractors "to confirm the limits of the tree-removal zone" by using a "tape measure or other technique." This subsequent remedial measure, Plaintiffs argue, establishes that TxDOT was negligent in not designating the correct trees for removal. That argument also fails.

For starters, evidence of subsequent remedial measures is not admissible to show negligence or culpability. Tex. R. Evid. 407(a). But even so, such evidence is irrelevant. Again, what matters for purposes of the waiver of immunity in the TTCA is control over the details of the workers' operation of use of the machinery to remove trees. As already discussed, that type of control is lacking here. Evidence of what TxDOT might have done after the trees were removed is no evidence that TxDOT exercised the requisite type of control at the relevant time.

Plaintiffs also state (at 12) that "focusing [on] only 'control' of the 'details' of" "[t]he techniques used to operate the chainsaws and other equipment" "makes no sense." The TTCA may not "make sense" to Plaintiffs, but all that matters is the statutory language, and it requires control over a governmental employee's operation or use of machinery to waive immunity under the TTCA. Tex. Civ. Prac. &

Rem. Code §§ 101.001(2), .021(1); *see, e.g.*, *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007) ("While [immunity from suit] can be waived, we have consistently deferred to the Legislature to do so; indeed, we have said immunity from liability 'depends entirely upon statute.'" (footnotes omitted) (quoting *Dall. Cnty. MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998)); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) ("We have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved."); *TDCJ v. Miller*, 51 S.W.3d 583, 587, 588–89 (Tex. 2001) (stating that the TTCA "does not waive sovereign immunity for all negligence claims against governmental units" and that "the Legislature drew th[e] line in the Tort Claims Act" between a "use" of tangible personal property that waives immunity and "non-use" that does not, even though "the distinction . . . is problematic").

In addition, Plaintiffs argue (at 17) that "[w]hen the State hires someone to destroy something, it should be held responsible when it designates the wrong target." But again, regardless of what Plaintiffs think, the Legislature has decided that, as far as liability and the immunity waiver in the TTCA are concerned, the control that counts is that which a governmental entity exercises over its employees' operation and use of motor-driven vehicles and equipment.

Lastly, Plaintiffs contend (at 17) that TxDOT's interpretation of sections 101.001(2) and 101.021(1) "frustrate[s] the purpose of the Tort Claims Act, and leave[s] those injured by the State without redress." The TTCA's purpose, however, is not to broadly waive sovereign immunity for the redress of all injuries, but

rather to "waive[] the state's immunity for *certain negligent acts* by governmental employees." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 512 (Tex. 2019) (emphasis added). In other words, the Act provides only a "*limited*[] avenue for common-law recovery against the government," *Mission Consol. ISD v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008) (emphasis added), which is "restrictive" and does not "waive governmental immunity in most circumstances," *Bossley*, 968 S.W.2d at 341–42. That makes sense because it allows the government, rather than privately represented individuals, to determine how public money should be spent. *E.g.*, *Univ. of the Incarnate Word v. Redus*, 602 S.W.3d 398, 404 (Tex. 2020); *Nazari v. State*, 561 S.W.3d 495, 508 (Tex. 2018).

Here, the waiver is limited to the government employee's liability for the operation or use of machinery that causes injury. Tex. Civ. Prac. & Rem. Code §§ 101.001(2), .021(1), .025(a). Plaintiffs, however, advocate reading the TTCA as creating a broad waiver of immunity to ensure that people are not left without redress. But such an interpretation would contradict the limited waiver of immunity that exists. As this Court has stated, "[a]rguments for applications of the Act that would essentially result in its waiver becoming absolute must therefore be rejected as contrary to the Act's fundamental purpose." *Bossley*, 968 S.W.2d at 342.

III. TxDOT Did Not Waive Its Jurisdictional Argument Regarding the In-the-Paid-Service Requirement.

TxDOT's opening brief on the merits argued (at 36–39) that the court of appeals erroneously refused to address TxDOT's argument that Lyellco's workers were not in the paid service of TxDOT because the court mistakenly concluded that TxDOT

waived the argument by presenting it for the first time in its motions for rehearing and reconsideration en banc. As TxDOT explained, because its in-the-paid-service argument goes to the issue of TxDOT's immunity from suit under the TTCA, and because sovereign immunity implicates subject-matter jurisdiction, TxDOT could raise it in the motions for rehearing and reconsideration, and the argument was not waived. Br. for Pet'r 36–38 (citing numerous decisions of this Court).

In response, Plaintiffs cite just one court of appeals' decision and the Texas Rule of Appellate Procedure on the preservation of appellate complaints. *See* Cross-Resp'ts' Resp. BOM 10 (citing Tex. R. App. P. 33.1; *Blaschke v. Citizens Med. Ctr.*, 742 S.W.2d 779, 781 (Tex. App.—Corpus Christi 1987, no writ) ("Since Citizens' sovereign immunity claim was not presented to the trial court, it cannot be considered on appeal in support of the summary judgment.")). That fails to overcome the substantial line of authority TxDOT cited.

True, a party typically cannot obtain reversal of a trial court's judgment on appeal based on an error that was not raised in the trial court. *See* Tex. R. App. P. 33.1(a), 53.2(f). But there is a settled exception to that rule: Because sovereign immunity implicates subject-matter jurisdiction, and because a lack of subject-matter jurisdiction can be raised at any time in the proceedings, a governmental entity can raise a sovereign-immunity defense for the first time on appeal. *E.g.*, *Rattray v. City of Brownsville*, No. 20-0975, 2023 WL 2438952, at *6 (Tex. Mar. 10, 2023); *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94 (Tex. 2012).

Plaintiffs point out that "sovereign immunity and subject matter jurisdiction are not synonymous." Cross-Resp'ts' Resp. BOM 10–11 (quoting *Rusk*, 392 S.W.3d at

105 (Lehrmann, J., concurring and dissenting)). But that just explains why TxDOT has been careful to say that sovereign immunity *implicates* subject-matter jurisdiction, as opposed to saying sovereign immunity *equates* to subject-matter jurisdiction. As this Court recently explained, while sovereign immunity "does not *equate* to subject-matter jurisdiction," the "implication" of jurisdiction still allows a governmental entity to raise immunity arguments for the first time on appeal. *Rattray*, 2023 WL 2438952, at *6 (citing *Rusk*, 392 S.W.3d at 94–96, and noting the collateral-attack distinction that the Court recognized in *Engelman Irrig. Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 751 (Tex. 2017)). Thus, TxDOT's in-the-paid-service argument, which goes to the issue of waiver of sovereign immunity implicating subject-matter jurisdiction, is not waived because it was raised in a motion for rehearing or reconsideration en banc on appeal.

In addition, as explained in TxDOT's opening brief on the merits, because TxDOT unquestionably raised the waiver-of-immunity issue in the lower courts, it was free to raise a new *argument* about that same *issue* on appeal, even if it was in motions for rehearing and reconsideration en banc. Br. for Pet'r 38–39 (citing *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) (holding that appellate courts do not consider issues that were not raised in the courts below but that parties are free to construct new arguments in support of issues properly before an appellate court)). Plaintiffs offer no response to this point.

Prayer

The Court should grant TxDOT's petition for review, reverse the part of the court of appeals' judgment that affirmed 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 lack of subject-matter jurisdiction.

Respectfully submitted.

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