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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/Respondent,

v.

MARK SELF AND BIRGIT SELF,
Respondents/Petitioners.

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

REPLY TO RESPONSE TO PETITION FOR REVIEW OF TEXAS DEPARTMENT OF TRANSPORTATION

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TO THE HONORABLE SUPREME COURT OF TEXAS

The Texas Department of Transportation (TxDOT) submits this reply to the Selfs' response to TxDOT's petition for review:

ARGUMENT AND AUTHORITIES

I. TxDOT retains sovereign immunity under the Texas Tort Claims Act from the Selfs' negligence claim because the subcontractor was not a paid employee of TxDOT.

A. The Selfs do not dispute that the court of appeals had an inherent duty to assess its subject matter jurisdiction.

The court of appeals had an inherent duty to assess whether it had subject matter jurisdiction to determine the Selfs' negligence claim. *City of Hous. v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (per curiam). Thus, the court of appeals erred when it refused to consider TxDOT's argument, raised in motions for rehearing, that sovereign immunity remained intact because the subcontractor's employees did not meet the statutory definition of employee. *See* TxDOT's Pet. for Review at 9–11; *and see* Tex. Civ. Prac. & Rem. Code § 101.021(1) (Texas Tort Claims Act, or TTCA). The Selfs have no response to TxDOT's assertion.

B. TxDOT and the Selfs agree that to invoke the Texas Tort Claims Act's waiver of sovereign immunity, an employee must be in the "paid service" of a governmental entity.

TxDOT and the Selfs agree that in order for TxDOT's sovereign immunity to be waived and for TxDOT to be liable for negligence under section 101.021(1) of

the TTCA, the person who caused the negligence must be an "employee" as defined by section 101.001(2) of TTCA. *See* Selfs' Resp. at 12.

The TTCA defines employee as:

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

Tex. Civ. Prac. & Rem. Code § 101.001 (emphasis added).

The Selfs (1) argue "paid service" is not defined and therefore TxDOT improperly created a "paycheck test" under section 101.001(2); (2) fail to distinguish the cases that establish the "paid service" requirement in 101.001(2); (3) focus on the "right to control" provision in the "employee" definition, and gloss over the "paid service" requirement; and (4) argue TxDOT changed its argument on appeal.

1. The "paid service" requirement under section 101.001(2) must be applied according to its plain and common meaning.

The Selfs argue "paid service" under section 101.001(2) is not defined. But it is unnecessary to resort to rules of construction or extrinsic aids to construe "paid service" under the TTCA's definition of "employee."

The primary objective in construing statutes is to give effect to the Legislature's intent as expressed in the statute's language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009); Tex. Gov't Code § 312.005. If the words of a statute are clear and unambiguous, the courts apply them

according to their plain and common meaning. *Galbraith,* 290 S.W.3d at 867 (citing *City of Rockwall v. Hughes,* 246 S.W.3d 621, 625–26 (Tex. 2008)). When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language. *Id*.

Here, the primary objective of the Court in construing section 101.001(2)'s requirement of "paid service" is to give effect to the Legislature's intent. *See Galbraith,* 290 S.W.3d at 867. And the Legislature's intent in creating a partial waiver of sovereign immunity under the TTCA was for the waiver to be limited and strictly construed in favor of retaining immunity. *See Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012); Tex. Gov't Code § 311.034.

The plain language of section 101.001(2) requires the person who performed the negligent act to be in the paid service of the governmental unit. *See* Tex. Civ. Prac. & Rem. Code § 101.001. The paid service requirement carefully defines the universe of persons who can trigger liability for governmental units through negligent acts. And this plain language reading is consistent with the Legislature's intent to strictly construe the TTCA in a way that favors the retention of immunity. *See* Tex. Civ. Prac. & Rem. Code § 311.034; *Prairie View A & M Univ*., 381 S.W.3d at 513. Additionally, a plain language reading of the statute is supported by both parties' inability to find and cite a case where a courts resorts to rules of construction or extrinsic aids to construe the definition of "paid service."

Further, this Court and the courts of appeals have repeatedly held that "a [governmental unit] is not liable for acts in its behalf of a person who is not a paid employee." *Thomas v. Harris Cnty.*, 30 S.W.3d 51, 53 (Tex. App.—Houston [1st Dist.] 2000, no pet) (citing *Harris Cnty. v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994)). And the Legislature specifically refused to waive governmental units' immunity for acts of independent contractors. *Id*.

To hold that the employees of subcontractor Lyellco (who undisputedly removed the Selfs' trees with motor-driven equipment and were not paid employees of TxDOT), are paid employees of TxDOT (1) ignores the plain language of section 101.001; (2) ignores controlling precedent; and (3) improperly extends a governmental unit's waiver of sovereign immunity under section 101.021 beyond the limited waiver intended by the Legislature. And this Court has held it would not extend the waiver further than the TTCA provides. *See Dillard*, 883 S.W.2d at 168.

2. The Selfs cannot explain why this Court's "paid employee" requirement defined in *Dillard*, *Murk*, and *Thomas* does not apply to this case.

The Selfs contend that *Dillard*, *Murk v. Scheele*, 120 S.W.3d 865 (Tex. 2003) (per curiam), and *Thomas*, do not establish that the subcontractor who performed the negligent act under section 101.021(1) must be a paid employee of the governmental unit pursuant to section 101.001(2) for TxDOT's sovereign immunity to be waived.

But all three cases recognize that for liability to attach under section 101.021(1), the person who performed the negligent act must be a paid employee of the governmental unit. *See Dillard*, 883 S.W.2d at 167 ("The sole issue in this case is whether a governmental unit is liable for the actions of a person who acts in its behalf but is not a paid employee. We hold that it is not. . . ."); *Murk*, 120 S.W.3d at 867 (No part of [the physician's] compensation was ultimately paid by UT, and he therefore cannot be said to have been in UT's "paid service" [under 101.001(2)]); *Thomas*, 30 S.W.3d at 353 ("Harris County cannot be held liable under the TTCA for the negligence of persons not employed by Harris County.").

In *Murk*, this Court reiterated the importance of the "paid services" requirement to be an "employee" under 101.001(2). *See* 120 S.W.3d at 867. The Scheeles sued UT, Dr. Murk (a neurosurgeon on UT's faculty), and Dr. Flangas (a UT graduate medical student and chief neurosurgery resident). *Id*. UT moved for summary judgment because it was immune from suit and the trial court granted the motion. *Id*. Dr. Murk and Dr. Flangas moved for summary judgment alleging they were "employees" of UT as defined under section 101.001(2) of the TTCA. *Id*. The court of appeals held that neither physician conclusively established employee status. *See id*. at 866. Both physicians filed a petition for review. *Id*. at 865.

The Scheeles conceded Dr. Murk was compensated by UT directly and therefore within UT's "paid service" but argued waiver on other grounds not relevant

to this case. *Id*. *at* 867. This Court found that Dr. Flangas was not an employee under section 101.001(2) and was not in UT's "paid service" because he did not get compensated by UT directly:

> Dr. Flangas was paid by the [Bexar County Health] District. The only monetary benefit UT provided him was medical professional liability insurance coverage, and the District reimbursed UT for the cost of that coverage. Thus, no part of Flangas's compensation was ultimately paid by UT, and he therefore cannot be said to have been in UT's "paid service."

Murk, 120 S.W.3d at 867.

Here, the Selfs have never disputed that the persons who removed the Selfs' trees by operating or using motor-driven equipment were employees of T.F.R.'s subcontractor, Lyellco. *See* Selfs' Appellate Br. 11–12; Selfs' Resp. to TxDOT's Plea to the Jurisdiction, CR.215–16. Like the relationship between UT and Dr. Flangas in *Murk*, TxDOT did not compensate Lyellco's employees directly to remove the Selfs' trees. TxDOT did not issue T.F.R. or Lyellco employees 1099 or W-2 forms. CR.47–154, 440–44. TxDOT did not pay T.F.R. or Lyellco employees for vacation, sick leave, or holidays. *Id.* Nor did TxDOT pay T.F.R. or Lyellco employees' social security or federal income taxes. *Id.* The record demonstrates that T.F.R. and Lyellco employees do not meet the statutory requirement that they be in the paid service of a governmental unit. *See* Tex. Civ. Prac. & Rem. Code § 101.001(2).

C. The "right to control" provision of section 101.001(2) does not supersede the requirement that the subcontractor must be a paid employee of TxDOT for sovereign immunity to be waived.

Throughout their response, the Selfs focus on TxDOT's right to control the subcontractors. However, nowhere in their response do the Selfs explain or point to legal authority explaining why the "paid service" requirement of section 101.001(2) is not relevant in this Court's analysis and why it should be superseded by the "right to control" provision. "Control" is not the only element a court considers to determine "employee" status under sections 101.001(2) and 101.021.

In fact, the Selfs cite to *Thomas*, 30 S.W.3d at 54, and acknowledge that in addition to the "right to control" requirement, the *Thomas* court also examined the paid service requirement to determine if a physician was an employee of a governmental unit as defined by section 101.001(2). *See* Resp. at 13.

D. The Selfs incorrectly argue TxDOT changed its argument on appeal.

The Selfs suggest that TxDOT should not be allowed to change its position and argue "control is irrelevant," and that the "outcome is controlled entirely by the payor name printed on the paychecks." *See* Resp. at 15. But TxDOT is not arguing that control is no longer relevant.

TxDOT presented argument in the court of appeals on whether T.F.R. and Lyellco were independent contractors under 101.021 and 101.001 pursuant to the *Limestone* factors. *See Limestone Prod. Distrib., Inc. v. McNamara*, 71 S.W.3d 308,

312 (Tex. 2002) (per curiam). TxDOT is not changing its argument before this Court. The *Limestone* factors are relevant in determining a governmental unit's right to control the details of an independent contractors' work. TxDOT's expanded section 101.001(1) argument is that the plain language of the statute requires that the person who moved the Selfs' trees must be in the "paid service" of TxDOT. Further, the issue of whether Lyellco and T.F.R. are employees or independent contractors under the TTCA invokes a jurisdictional issue that can be raised at any time. *See Rhule*, 417 S.W.3d at 442.

II. Restatement (Second) of Torts and common law negligence cases are not applicable to negligence cases under the Texas Tort Claims Act and the Selfs do not disagree.

In its petition for review, TxDOT argued that the court of appeals improperly relied on the duty of care owed by a general contractor for independent contractors in common law negligence cases and section 414 of the Restatement (Second) of Torts to find a fact issue as to whether T.F.R. and Lyellco were independent contractors or employees of TxDOT under section 101.001. *See* TxDOT's Pet. for Review at 12–19. The court of appeals' reliance on common law negligence cases and the Restatement was misplaced because (1) the TTCA defines "employee" to exclude all independent contractors, *see* section 101.001(2); (2) section 5.001 of the Texas Civil Practice and Remedies Code precludes reliance on common law negligence cases and the Restatement when deciding issues arising from claims

brought under the TTCA; and (3) only the Legislature has the authority to expand the governmental unit's waiver of sovereign immunity, *see Prairie View A & M Univ.*, 381 S.W.3d at 512–13.

The Selfs do not dispute, nor do they provide legal authority that conflicts with TxDOT's legal authority that Restatement (Second) of Torts and common law negligence cases are not applicable to negligence cases under the TTCA. *See Thomas*, 30 S.W.3d at 55. This Court should find that the court of appeals misconstrued the definition of "employee" under the TTCA and improperly expanded the TTCA's limited waiver of sovereign immunity.

PRAYER

For the reasons stated in its petition for review and reply, TxDOT respectfully requests this Court grant TxDOT's petition for review, reverse the portion of the court of appeals' decision that affirmed the trial court's order with respect to negligence, reverse the trial court's order denying TxDOT's plea to the jurisdiction, and grant any such relief, general or specific, to which TxDOT may be justly entitled.

Respectfully submitted,

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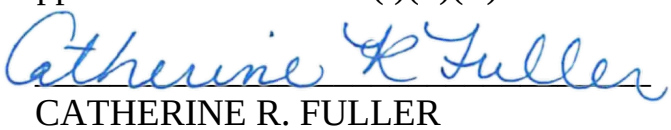

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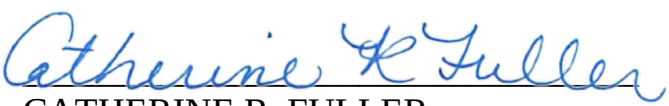

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