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

RESPONSE BRIEF FOR PETITIONER/CROSS-RESPONDENT

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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), T.F.R. Enterprises, Inc. (TFR), and 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.

Issues Presented

A governmental unit of the State is immune from suit unless a statute or constitutional provision expressly waives that immunity. The Texas Tort Claims Act and article I, section 17 of the Texas Constitution establish limited waivers of immunity for certain claims. Plaintiffs contend that these provisions waive TxDOT's immunity from suit for allegedly removing trees from their land as part of a highway-maintenance project. The questions presented are:

1. Did the court of appeals correctly hold that TxDOT's immunity from suit regarding Plaintiffs' negligence cause of action is not waived under the Tort Claims Act unless employees of TxDOT negligently operated or used a motor-driven vehicle or motor-driven equipment to proximately cause property damage?
2. Did the court of appeals correctly hold that Plaintiffs' inverse-condemnation cause of action does not state a viable takings claim under the Texas Constitution because Plaintiffs cannot establish that TxDOT intentionally took Plaintiffs' trees for public use?

To the Honorable Supreme Court of Texas:

Plaintiffs contend that the court of appeals erred in two ways: (1) by determining that, to waive sovereign immunity under the Texas Tort Claims Act (TTCA), section 101.021(1)[1] requires facts demonstrating that a TxDOT employee operated or used a motor-driven vehicle or equipment to cause Plaintiffs' alleged property damage, and (2) by dismissing Plaintiffs' inverse-condemnation cause of action for failing to establish a viable takings claim under article I, section 17 of the Texas Constitution. Plaintiffs are wrong on both scores.

Regarding section 101.021(1), the court of appeals' determination follows the interpretation of the operation-or-use requirement that this Court announced in *LeLeaux v. Hamshire–Fannett ISD*. The court of appeals correctly applied that interpretation to the undisputed facts in this case, holding that a TxDOT employee had to operate or use the machinery to remove the trees at issue to fall within the waiver.

Regarding Plaintiffs' inverse-condemnation cause of action, the court of appeals correctly determined that Plaintiffs' claim was not viable because the evidence conclusively establishes that TxDOT did not have the requisite intent to take or damage Plaintiffs' property.

Accordingly, the Court should deny Plaintiffs' cross-petition for review. Alternatively, the Court should affirm the court of appeals' judgment in these respects.

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

Statement of Facts

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

I. Factual Background

Farm-to-Market (FM) Road 677 runs through Montague County. CR.10, 49. When the road was constructed, the owner of the property that is the subject of this lawsuit granted the State an easement for FM 677 next to his land. CR.10, 51, 158; *see also* CR.232–37, 300, 306. For years, a fence marked the line between the property and the right of way. *See* CR.10, 232–33.

In 2017, Plaintiffs bought the property. CR.10, 240–43. At that time, Plaintiffs hired a fence contractor to tear down the old fence and build a new one. CR.10. Today, the fence no longer sits on the property line, but rather is two to three feet inside Plaintiffs' land. CR.10.

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 perform "tree removal and trimming" in the rights of way along state highways. CR.50. TFR in turn subcontracted with Lyellco to "remove large trees" in the rights of way. CR.292; *see also* CR.173, 296, 440–45.

Lyellco removed several 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. Plaintiffs allege that some of those trees were not in the right of way, but rather were on their property. *See, e.g.*, CR.326.

II. Procedural History

Plaintiffs sued TxDOT, TFR, and Lyellco for damages arising from the alleged removal of trees from their land. CR.181 (¶¶ 4–6), 182–83 (¶¶ 9–15). Plaintiffs asserted causes of action for trespass, negligence, and gross negligence against TFR and Lyellco. CR.183–84 (¶¶ 16–19). They asserted causes of action against TxDOT for negligence and inverse condemnation. CR.184–85 (¶¶ 20–29).

TxDOT filed a plea to the jurisdiction raising sovereign immunity from suit and attaching evidence. CR.34–175. Regarding Plaintiffs' negligence cause of action, TxDOT contended that, because the evidence conclusively establishes that Lyellco's workers, not TxDOT's employees, operated or used motor-driven vehicles and equipment to remove the trees at issue, its immunity was not waived under the TTCA. *See* CR.38–40, 447–51. TxDOT also argued that the trial court had no jurisdiction over Plaintiffs' inverse-condemnation action because Plaintiffs cannot state a viable takings claim under the Texas Constitution. CR.41–45, 451–55. The trial court denied TxDOT's plea. CR.468.

The court of appeals reversed in part and affirmed in part the trial court's order denying TxDOT's plea as to Plaintiffs' negligence cause of action, and it reversed and rendered judgment for TxDOT as to Plaintiffs' inverse-condemnation cause of action. 2022 WL 1259094, at *1, *21. Regarding Plaintiffs' negligence cause of action, the court reversed the trial court's order "denying the aspect of [TxDOT's] plea to the jurisdiction predicated on its assertion that there is not a waiver of immunity [under the TTCA] because [TxDOT] was not operating or using equipment" that was used to remove Plaintiffs' trees. *Id.* at *13. But the court affirmed

the order to the extent that it found that TxDOT's immunity was waived because the evidence raised a fact issue as to whether the workers who removed Plaintiffs' trees can be considered employees of TxDOT. *Id.* at *18. (This aspect of the court of appeals' order is the subject of TxDOT's petition for review and discussed in TxDOT's opening brief and will not be addressed here.)

Regarding Plaintiffs' inverse-condemnation cause of action, the court held that the evidence conclusively establishes that TxDOT did not intend to cut down Plaintiffs' trees, but rather was only negligent in not ascertaining whether those trees were in fact in the right of way. *Id.* at *20–21. Accordingly, the court concluded that "the trial court erred by denying TxDOT's plea to the jurisdiction directed to [Plaintiffs'] inverse-condemnation claim." *Id.* at *21.

Summary of the Argument

I. The text and context of section 101.021(1) indicate that a governmental unit of this State is liable only if *its* employee operates or uses a motor-driven vehicle or equipment to cause personal injury, death, or property damage. That reading of the statute comports with the limited waiver of immunity in the TTCA. This Court's decision in *LeLeaux* confirms this interpretation. The Court's more recent decision in *PHI, Inc. v. Texas Juvenile Justice Department* does not call into question, much less abrogate, *LeLeaux*.

II. Plaintiffs do not allege a viable inverse-condemnation cause of action under the Texas Constitution. The evidence conclusively establishes that TxDOT did not intend to take or damage Plaintiffs' property. There is no evidence that TxDOT was substantially certain that its actions regarding the highway-maintenance project

would result in the trees at issue being taken or destroyed. Plaintiffs' allegation that TxDOT instructed the contractors to clear the right of way between the fences, instead of precisely measuring the boundaries of the right of way, fails to state a valid claim for inverse condemnation. Plaintiffs' claim alleges a negligent, not intentional, act or omission.

Standard of Review

A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a pleaded cause of action, and appellate review of a ruling on a plea is de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If a plea to the jurisdiction challenges the existence of jurisdictional facts, the Court considers relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *Id.* at 227. If the 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 227–28.

Argument

I. The Court of Appeals Correctly Interpreted and Applied Section 101.021(1)'s Operation-or-Use Requirement.

A. Section 101.021(1) waives immunity from suit when an employee of a governmental unit operates or uses a motor-driven vehicle or equipment that proximately causes harm.

The court of appeals determined "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. In short, the court concluded that, to waive immunity under section 101.021, an employee of the governmental unit must operate or use machinery to cause property damage. Its determination was correct.

In "Respondents' Brief on the Merits,"[2] however, Plaintiffs argue that the court of appeals misinterpreted the operation-or-use requirement in section 101.021. *See* Cross-Pet'rs' Br. 17–19, 21–26. According to Plaintiffs, "the statute does *not* require that a government employee [to] be physically or directly operating the machinery at issue." *Id.* at 17. In their view, it makes no difference who operates or uses the machinery that causes harm, so long as a governmental employee committed some negligent act or omission connected "to the machine operation and injury at issue." *Id.* at 19. Plaintiffs are wrong.

Analysis starts with the text of the TTCA. The Act provides that "[s]overeign immunity to suit is waived and abolished to the extent of liability created by this chapter." Tex. Civ. Prac. & Rem. Code § 101.025(a). Regarding liability, the Act provides:

[2] That brief is misnamed. To avoid confusion, this brief will refer to Plaintiffs' opening brief as "Cross-Petitioners' Brief" and cite it as "Cross-Pet'rs' Br."

> 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.

Id. § 101.021(1).

As TxDOT's opening brief for the petitioner explained (at 16–20), the text and context of section 101.021 require that an employee of the governmental unit must operate or use the motor-driven vehicle or equipment for liability to attach and waive the government's immunity. *Id.* §§ 101.021, .025(a); *Miranda*, 133 S.W.3d at 224 (immunity from suit under the TTCA is coextensive with immunity from liability). Read as a whole statute, 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. Br. for Pet'r 18. This interpretation comports with this Court's oft-repeated observation that "[t]he Texas Tort Claims Act provides a limited waiver of sovereign immunity." *Id.* (citing *Miranda*, 133 S.W.3d at 224; *TDCJ v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001); *Dall. Cnty. MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998)). Controlling precedent confirms this interpretation. *Id.* at 19 (citing *LeLeaux v. Hamshire–Fannett ISD*, 835 S.W.2d 49, 51 (Tex. 1992) (stating that "the

more plausible reading [of section 101.021(1)] is that the required operation or use is that of the employee")).

Adhering to *LeLeaux*, the court of appeals agreed with TxDOT. 2022 WL 1259094, at *13 n.6. It explained:

> [Plaintiffs'] argument appears to be predicated on an interpretation of Section 101.021 that the motor-driven equipment can be used or operated by anyone so long as a governmental employee had some role that proximately caused property damage, personal injury, or death. Neither [Plaintiffs'] brief nor their motion for rehearing explain why such a broad reading is reasonable or why the supreme court's differing interpretation is flawed.

Id.

B. *LeLeaux*'s interpretation of the operation-or-use requirement controls.

As the court of appeals recognized, *LeLeaux*'s interpretation of the operation-or-use requirement controls. Plaintiffs argue that the court should not have followed *LeLeaux*, and they attempt to distinguish that case. *See* Cross-Pet'rs' Br. 22–24. But their attempt misses the mark.

First, Plaintiffs (at 23) observe that *LeLeaux*, unlike this case, did not involve the distinction between "*employee*-operators" and "*independent-contractor*-operators." But Plaintiffs miss the relevance of *LeLeaux* to this case. *LeLeaux*'s salience to this case lies in the fact that the Court interpreted the same statutory provision that is at issue here. *LeLeaux* held that, to waive the school district's immunity, its employee, not "*the person who suffers injury[] or some third party*," had to operate or use the school bus to cause injury. 835 S.W.2d at 51 (emphasis added). And the Court concluded: "Because the record establishes that [the plaintiff's] injury did not arise out

of the *school district's or its driver's operation or use of the school bus*, we hold that the school district is immune from liability." *Id.* at 52 (emphasis added).

The bus driver in *LeLeaux* was an employee of the school district. *Id.* at 53. Thus, under the Court's interpretation of the operation-or-use requirement, the school district would have been liable and its immunity would have been waived if the bus driver had operated the school bus to injure the plaintiff—but he didn't.

The same holds true here. As in *LeLeaux*, the evidence in this case conclusively establishes that TxDOT's employees did not operate or use the machinery that allegedly caused harm—Lyellco's employees did. Pet'r's Br. 15–35, 39–50. Thus, like the school district in *LeLeaux*, TxDOT cannot be liable, and its immunity is not waived, because *its* employees did not operate or use the machinery to remove the trees.

Nonetheless, Plaintiffs argue that TxDOT is liable, and its immunity is waived, even though it was not present when Lyellco's workers allegedly removed Plaintiffs' trees and was not the actual user of that machinery. *See, e.g.*, Cross-Pet'rs' Br. 25 (stating that "the Act does not *also* require that the employee be physically operating (or near) the equipment"). In *LeLeaux*, however, because "[t]he driver was not aboard" the bus, not driving the bus, and not loading or unloading passengers from the bus when the plaintiff was injured, he could not have been liable for the plaintiff's injury, and the district's immunity from suit was therefore not waived. 835 S.W.2d at 50–51. The result should be the same here, as Lyellco, not TxDOT, used the machinery to remove the trees; indeed, no TxDOT employee was present when Lyellco removed the trees. CR.163–64, 174–75, 215, 278, 296; RR.18:22–19:4.

Plaintiffs also suggest (at 24) that *LeLeaux* is somehow diminished and should not be followed because it was decided by a 5-4 vote and the dissenting justices disparaged the majority's interpretation of the statute. *See* 835 S.W.2d at 53 (Cook, J., joined by Gammage, J., dissenting); *id.* at 54–56 (Doggett, J., joined by Mauzy, J., dissenting). Of course, just because four justices had a different view of section 101.021 does not mean that the majority opinion is wrong or that it is not good law and controlling authority.

C. *PHI* does not undermine *LeLeaux*.

Plaintiffs also argue that, since *LeLeaux* was handed down, a more recent decision of the Court has called into question *LeLeaux*'s interpretation of the operation-or-use requirement. Cross-Pet'rs' Br. 24–25 (citing *PHI, Inc. v. Tex. Juv. Just. Dep't*, 593 S.W.3d 296 (Tex. 2019)). Plaintiffs are wrong.

In *PHI*, a governmental employee drove and parked a department van on an incline near a PHI-owned helicopter, turned off the ignition, and exited the van without setting the emergency brake. 593 S.W.3d at 300. As the employee walked away, the van began rolling backwards and crashed into PHI's helicopter. *Id.* PHI sued the department, alleging that the department's immunity was waived based on its employee's negligence in not setting the parking brake and maintaining the van. *Id.* The department filed a combined plea to the jurisdiction and motion for summary judgment, which the trial court denied. *Id.* at 301. In a divided opinion, the court of appeals reversed and rendered a take-nothing judgment for the department. *Id.*

On petition for review, the department argued that PHI's negligence claims were barred because its employee was not in the van and actively operating it when

the collision occurred. *Id.* Even though the statute does not explicitly require that the operation or use be "active" or that it be ongoing "at the time of the incident," the department nevertheless contended that these requirements were effectively added to the requirements already found in the statutory text by this Court's statement in *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922 (Tex. 2015) (per curiam)—"'a government employee must have been *actively* operating the vehicle at the time of the incident.'" *PHI*, 593 S.W.3d at 304–05 (quoting *Ryder*, 453 S.W.3d at 927) (emphasis added).

The Court rejected that argument. Although the Court noted that "the Department's error—and that of the court of appeals—[wa]s understandable given *Ryder's* broad statement," the Court nevertheless explained that "no court has the authority, under the guise of interpreting a statute, to engraft extra-statutory requirements not found in a statute's text." *Id.* at 305. Still, the Court acknowledged that

> *Ryder* correctly suggests that whether a government vehicle was in "active" operation "at the time of the incident" is an important consideration in determining whether an alleged injury arises from the operation or use of a vehicle. But a single sentence from that opinion is not itself the rule of decision.

Id. Thus, the Court held that, although the department's employee was not in the van and actively operating it when the impact occurred, the evidence still raised a fact issue as to whether the accident arose from the employee's operation of the van, which "include[d] making sure it does not roll away after it is parked." *Id.* at 304, 306.

The Court in *PHI* distinguished the fact pattern there from the one in *LeLeaux*. *See id.* at 302. The Court noted that, in *PHI*, "[t]he van itself rolled away and collided with the helicopter, and PHI allege[d] this happened because of the driver's negligent failure to make sure the van did not immediately roll away after he exited it." *Id*. at 304. But unlike in *PHI*, "the bus *driver* in *LeLeaux* had nothing to do with the accident." *Id*. Plaintiffs' case here is more like the fact pattern in *LeLeaux* than it is like the fact pattern in *PHI*.

Furthermore, in *PHI*, the government's argument was that "*Ryder* effectively added . . . two additional requirements to the requirements already found in the statutory text." *Id.* at 305. But that was not the argument in *LeLeaux*, nor is it the argument here. TxDOT argued (CR.450–51; Appellant's Br. 13–15), and the court of appeals found (2022 WL 1259094, at *6–8), that the meaning of section 101.021(1) is determined not by adding words to the section, but rather by interpreting the statutory text as it already exists, just as the Court in *LeLeaux* said. 835 S.W.2d at 51. That Court stated that "the more plausible reading is that the required operation or use is that of the employee" and that "[t]his requirement is consistent with the clear intent of the Act that the waiver of sovereign immunity be limited." *Id*.

Finally, Plaintiffs cite *Sem v. State*, 821 S.W.2d 411 (Tex. App.—Fort Worth 1991, no writ), as additional support for their view of the operation-or-use requirement in section 101.021(1). Cross-Pet'rs' Br. 25. But *Sem* was decided before *LeLeaux* was handed down, so it has no relevance here.

D. Plaintiffs' additional arguments fail.

Plaintiffs also contend (at 26) that despite "**TxDOT's slippery slope concerns**," their interpretation of the statute "does not create blanket government liability for *all* vehicle/equipment accidents on government jobs." But TxDOT is not arguing that. Rather, TxDOT argues that Plaintiffs' interpretation of the operation-or-use requirement is wrong because of the statutory language and precedent of this Court, not because of some policy concern that Plaintiffs misattribute to it.

Plaintiffs argue (at 27–29) that TxDOT's plea to the jurisdiction should be denied because there is a fact issue about whether a TxDOT employee proximately caused the alleged removal of Plaintiffs' trees and "who exactly was operating the equipment."

Regarding Plaintiffs' proximate-causation argument, they argue (at 27) that because "TxDOT did not mark the trees to be removed with an 'X' as required by the contract documents and its internal procedures," "performed no surveys," and "failed to create a written plan identifying the trees to be removed," their trees were removed and TxDOT's immunity from suit is waived under section 101.021(1). But that is not the material question; rather, it is whether TxDOT's employees operated or used machinery to allegedly remove Plaintiffs' trees. *See, e.g.*, *Harris Cnty. Flood Control Dist. v. Halstead*, 650 S.W.3d 707, 718 (Tex. App.—Houston [14th Dist.] 2022, no pet.) (holding that a district's immunity was not waived because governmental employees did not use the chainsaw that injured the plaintiff); *City of Houston v. Ranjel*, 407 S.W.3d 880, 892 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (Busby, J.) (holding that "[b]ecause the jurisdictional evidence establishe[d] that a

Houston employee did not operate or use the APM train that struck Turner and Cordero, . . . Houston's immunity [w]as not . . . waived"); *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 a district's immunity was not waived because an independent contractor, rather than a governmental employee, operated the vehicle that damaged the utility company's pipeline).

As TxDOT explained in its opening brief, the evidence conclusively establishes that Lyellco's, not TxDOT's, employees used the vehicles and equipment to remove the trees. Pet'r's Br. 7–8, 15, 29–35, 41, 46–50. Plaintiffs' allegation that TxDOT was negligent in other ways that do not involve *its* operation or use of motor-driven vehicles or equipment does not state a claim creating liability under section 101.021(1) and thus waiving immunity.

Regarding Plaintiffs' contention that the identity of the person who operated or used the machinery that removed the trees is unknown, that fact is irrelevant. What is relevant is that the person or people who operated the machinery that removed the trees undisputedly worked for Lyellco, not TxDOT. CR.163–64, 174–75, 213–14, 278, 296; RR.18:22–19:4.

Plaintiffs also argue (at 28) that, "even assuming for argument that the Act requires an 'employee' to be physically operating the equipment," a fact issue exists as to "whether or not those individuals and entities [who removed the trees] were 'employees' [of TxDOT] as defined by the Tort Claims Act." Not true. As discussed in TxDOT's opening brief, *see* Pet'r's Br. 15–35, 39–50, because Lyellco's

workers were not in the paid service of TxDOT, as required by section 101.001(2), they were not TxDOT's employees for purposes of section 101.021(1).

In addition, Plaintiffs argue that "[d]enying TxDOT's plea to the jurisdiction is . . . consistent with [the] common law [of negligence]." Cross-Pet'rs' Br. 29 (citing *Rosenthal v. Grocers Supply Co.*, 981 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, no pet.)). But consistency with the common law of negligence is not the test. Rather, section 101.021(1) is the test. And only cases that interpret and apply that text, instead of the common law of negligence, are relevant. That is why Plaintiffs' reliance on *Rosenthal* is misplaced. As explained in TxDOT's opening brief (at 42–46), *Rosenthal* did not concern whether governmental immunity was waived under section 101.021(1) or whether an independent contractor was a governmental employee under section 101.001(2). *See* 981 S.W.2d at 222.

Finally, Plaintiffs argue (at 29) that it is "common sense" that TxDOT's plea to the jurisdiction should be denied and that "[w]hen the State hires someone to destroy something, it should be held responsible when it designates the wrong target, whether or not such designation is made while physically standing in close proximity." But Plaintiffs' public-policy argument is not the metric by which a waiver of sovereign immunity is judged—rather, as just mentioned, it is judged by the standard described in statutory text and court precedents interpreting that text. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) ("We have consistently deferred to the Legislature to waive sovereign immunity from suit, because this allows the Legislature to protect its policymaking function."); *Brown v. City of Houston*, 660 S.W.3d 749, 752 (Tex. 2023) ("As with every question of

statutory construction, our duty is to accurately articulate the meaning of the enacted text. . . . Our precedents assist in this inquiry. Our decisions are not themselves the statutes that they interpret, but they can provide authoritative and binding constructions of those statutes.").

II. The Court of Appeals Correctly Found That Plaintiffs' Inverse-Condemnation Cause of Action Is Not Viable.

Plaintiffs asserted an inverse-condemnation cause of action against TxDOT under article I, section 17 of the Texas Constitution. CR.185 (¶¶ 28–29). They alleged that TxDOT intentionally took or damaged their property without providing adequate compensation. *Id.* TxDOT's plea to the jurisdiction argued that any damage was unintentional and not for a public use, and its immunity from suit is therefore not waived. CR.42–45. The trial court denied TxDOT's plea. CR.468. But the court of appeals reversed the trial court's order and rendered judgment dismissing Plaintiffs' inverse-condemnation claim. 2022 WL 1259094, at *19–21.

Article I, section 17 of the Texas Constitution provides in part that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made." "When the government takes private property without first paying for it, the owner may recover damages for inverse condemnation," *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004), and sovereign immunity "does not shield the State from an action for compensation under the takings clause," *Gen. Servs. Comm'n v. Little–Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).

To overcome sovereign immunity, an inverse-condemnation cause of action must be predicated upon a viable allegation of taking. *Carlson v. City of Houston*, 451 S.W.3d 828, 830 (Tex. 2014) (citing *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012)). "In the absence of a properly pled takings claim, the state retains immunity," *Hearts Bluff*, 381 S.W.3d at 476, and "a court must sustain a properly raised plea to the jurisdiction," *Carlson*, 451 S.W.3d at 830.

The elements of an inverse-condemnation action are (1) a governmental unit of the State intentionally performed certain acts (2) that resulted in a taking of property (3) for public use. *E.g.*, *Sw. Bell Tel., L.P. v. Harris Cnty. Toll Rd.*, 282 S.W.3d 59, 62 (Tex. 2009); *Little–Tex*, 39 S.W.3d at 598. Because a governmental unit is generally entitled to immunity for a negligence action, it cannot be subject to an action for a taking or destruction of property under the Texas Constitution unless it engaged in intentional behavior. *Gragg*, 151 S.W.3d at 554–55. "[T]akings liability may arise even when the government did not particularly desire the property to be damaged" "if the government knows that specific damage is substantially certain to result from its conduct," and the damage "is necessarily an incident to, or necessarily a consequential result of, the act of the governmental entity." *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004) (quotation marks and citations omitted).

The court of appeals decided that Plaintiffs failed to establish a viable inverse-condemnation cause of action against TxDOT. 2022 WL 1259094, at *21. The court found that Plaintiffs' action failed because they did not establish that TxDOT intentionally took or damaged Plaintiffs' trees. *See id.* The court of appeals was right.

Plaintiffs (at 30) argue that "TxDOT's actions and omissions made it substantially certain that the trees in question[] would be destroyed in furtherance of a public project, and TxDOT failed to follow its own procedures for marking trees and confirming that all trees removed were in the right of way." Although Plaintiffs give a nod to the *Jennings* substantial-certainty standard, their argument is not actually that TxDOT intentionally had their trees removed. Instead, it is that TxDOT was *negligent* for not marking the trees to be removed from the right of way and making sure they were not on Plaintiffs' land. First, TxDOT does *not* concede that it was negligent. And second, Plaintiffs tellingly do not, and cannot, argue that TxDOT knew that it was substantially certain that its alleged inaction would result in removing the trees, because TxDOT did not know that Plaintiffs had moved their fence and that Lyellco's workers removed the trees at issue. Indeed, TxDOT did not know that Lyellco had removed the trees at issue until Plaintiffs brought it to TxDOT's attention. CR.229.

TxDOT, moreover, did not deliberately order the removal of trees from Plaintiffs' land. TxDOT instead instructed the contractors to clear the right of way only between the fences in keeping with its "standard method of determining the right of way." CR.229, 286. TxDOT believed that this instruction would ensure that the trees and brush "were on the state highway side of the fence." CR.307. And, when it ordered the right of way to be cleared, it did not know that Plaintiffs had the fence moved onto their property. CR.35, 300, 312, 321. *Cf. State v. Gafford*, No. 04-03-00168-CV, 2003 WL 22011302, at *3 (Tex. App.—San Antonio Aug. 27, 2003, no pet.) (mem. op.) ("The evidence reflects that the State did not intend, authorize, or

even know that it was removing trees from [appellee's] property until it was so informed."). This conclusively proves that TxDOT did not intend for the trees to be removed and that it did not know that the instruction to clear the right of way between the fences was substantially certain to damage Plaintiffs' property. *See Jennings*, 142 S.W.3d at 314.

Plaintiffs also contend (at 30–31) that "[t]o the extent TxDOT was not aware that the trees in question were privately owned," TxDOT cannot avoid liability because of its "ignorance." But if, as Plaintiffs contend, TxDOT was ignorant that the trees were on Plaintiffs' property, then TxDOT would have no knowledge that ordering their removal would constitute a taking. And if TxDOT had no knowledge that the trees were on Plaintiffs' property, then removing the trees would have been accidental, and TxDOT would not have been substantially certain that specific damage to Plaintiffs' property would result. *See Jennings*, 142 S.W.3d at 313–14 ("When damage is merely the accidental result of the government's act, there is no public benefit and the property cannot be said to be 'taken or damaged for *public use*.'") (quoting *Tex. Highway Dep't v. Weber*, 147 219 S.W.2d 70, 71 (Tex. 1949); *Steele v. City of Houston*, 603 S.W.2d 786, 791–92 (Tex. 1980)).

Relatedly, Plaintiffs' assertion that TxDOT's "ignorance" was "a result of [its] own acts and omissions" seems to suggest that TxDOT *should have known* that the trees were on Plaintiffs' property. But constructive knowledge does not satisfy the substantial-certainty standard. Substantial certainty requires more than a mere possibility, an increased risk, or even more likely than not. *See, e.g.*, *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009) ("The governmental entity's awareness

of the mere possibility of damage is no evidence of intent."); *City of Keller v. Wilson*, 168 S.W.3d 802, 829 (Tex. 2005) ("The critical question in this case was the City's state of mind—the Wilsons had to prove the City *knew* (not should have known) that flooding was substantially certain."); *Sloan Creek II, L.L.C. v. N. Tex. Tollway Auth.*, 472 S.W.3d 906, 930 (Tex. App.—Dallas 2015, pet. denied) (holding that evidence of what TxDOT engineers "should have known" was not enough to show the actual-knowledge component of the intent standard). It is a "heightened intent standard," *City of Arlington v. State Farm Lloyds*, 145 S.W.3d 165, 168 (Tex. 2004) (per curiam), requiring actual knowledge, *Bhakta v. TxDOT*, No. 04-15-00297-CV, 2016 WL 1593163, at *4 (Tex. App.—San Antonio Apr. 20, 2016, no pet.) (mem. op.).

In addition, Plaintiffs assert (at 31) that the "circumstances [of the tree removal] were under TxDOT's control (and not [Plaintiffs']) and should not negate the validity of [their] [inverse-condemnation] claim." But even assuming for the sake of argument that TxDOT controlled the tree removal, it does not follow that TxDOT knew that the trees at issue were on Plaintiffs' land instead of in the right of way.

Furthermore, Plaintiffs argue (at 31) that, even if TxDOT did not intend to remove the trees, "it [still] should be held responsible when it designates the wrong target." But that would make TxDOT liable for inverse condemnation for accidently damaging property, rather than for knowing "that specific damage is substantially certain to result from its conduct." *Jennings*, 142 S.W.3d at 314; *see also City of Keller*, 168 S.W.3d at 830 (liability for inverse condemnation requires an objective indicium of intent showing that the governmental entity knew identifiable harm was occurring or substantially certain to result). And that would be improper.

Finally, Plaintiffs (at 16–17) note that, after the incident, TxDOT "require[d] the crew to use a tape measure or other technique[s] to confirm the limits of the tree-removal zone" and argue that TxDOT should have done this beforehand. At the outset, evidence of subsequent remedial measures is not admissible to show negligence or culpability. Tex. R. Evid. 407(a). But, even if such evidence were admissible, the fact that TxDOT took a subsequent remedial measure only highlights that that TxDOT did not intentionally order the removal of the trees at issue. Plaintiffs' allegation is self-defeating.

Prayer

The Court should deny Plaintiffs' cross-petition for review. Alternatively, the Court should affirm the parts of the court of appeals' judgment that (1) affirm that section 101.021(1) requires an operation or use of a motor-driven vehicle or equipment by an employee of a governmental unit and (2) dismiss Plaintiffs' inverse-condemnation cause of action.

Respectfully submitted.

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