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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

TEXAS DEPARTMENT OF TRANSPORTATION'S RESPONSE TO PETITION FOR REVIEW OF MARK SELF AND BIRGIT SELF

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Mark Self and Birgit Self	Plaintiffs/Appellees/Respondents/ Petitioners
T.F.R. Enterprises, Inc.	Defendant
Lyellco, Inc.	Defendant

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RESPONSE TO STATEMENT OF JURISDICTION

This Court has already resolved the issues of law presented in Mark Self and Birgit Selfs' (Selfs) petition for review. *See LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49 (Tex. 1992); *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997); *City of Dall. v. Jennings*, 142 S.W.3d 310, (Tex. 2004); *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004); and *City of Arlington v. State Farm Lloyds*, 145 S.W.3d 165, 168 (Tex. 2004). Therefore, this Court should deny the Selfs' petition for review. *See* Tex. Gov't Code § 22.001(a); Tex. R. App. P. 56.1(a)(5).

ISSUES PRESENTED

I. The court of appeals properly held that TxDOT retained its sovereign immunity from suit for negligence under section 101.021 of the Texas Tort Claims Act because TxDOT did not directly control the operation or use of the motor-driven equipment used to remove the Selfs' trees.

II. The court of appeals properly held TxDOT has sovereign immunity from the Selfs' inverse condemnation claim.

TO THE HONORABLE SUPREME COURT OF TEXAS:

In this suit against the Texas Department for Transportation (TxDOT) for negligence under the Texas Tort Claims Act (TTCA), the court of appeals held (1) TxDOT's sovereign immunity is not waived under section 101.021 of the TTCA because TxDOT did not have direct control of the motor-driven equipment used to remove the Selfs' trees; and (2) the Selfs did not demonstrate TxDOT's intent—a necessary element of an inverse condemnation claim. *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *13, 21 (Tex. App.—Fort Worth Apr. 28, 2022, pets. filed) (mem. op.). In response to the Selfs' Petition for Review, TxDOT shows the Court the following:

STATEMENT OF FACTS

A. TxDOT's right of way easement and the Selfs' property.

On March 7, 2017, Mark and Birgit Self purchased approximately 172 acres off FM 677 in Montague County. TxDOT owns a right of way easement adjacent to that property. CR.10, 240–44. When the Selfs purchased the property, there was a fence that separated it from TxDOT's right of way. CR.10. The Selfs removed the fence and built a new one. CR.10. However, instead of placing the fence on the right-of-way line, the Selfs placed the fence two to three feet inside that line. CR.155–56, 300. They did not notify TxDOT of the change in the fence line until July 2020, after the alleged date of loss. CR.159.

B. Brush and tree removal project contract.

In January 2020, T.F.R. Enterprises, Inc. (T.F.R.) entered a contract with TxDOT to perform tree and brush removal in Montague, Clay, and Cooke counties for approximately $336,000. CR.147–54. The purpose of the contract was to "dispose of all vegetative matter and any other materials removed from State Right of Way in accordance with applicable environmental laws, rules, regulations and requirements." CR.50. The contractor was required to furnish materials and complete the contract in eighty-five working days. CR.47, 51, 145.

C. Subcontractor.

On July 15, 2020, T.F.R. entered into a contract with a subcontractor, Lyellco, Inc. (Lyellco) so that it could meet its contract deadline to complete the project. CR.278–79, 292, 440–44.

D. Tree removal.

In July 2020, the employees of the subcontractor, Lyellco, removed trees from the Selfs' property with (1) a chainsaw and Bobcat provided by Lyellco and (2) a bucket truck provided by T.F.R. CR.215–16; 292, 296; Self COA Br. 11–12; TxDOT COA Br. 2. Shortly thereafter, the Selfs notified TxDOT that trees on the Selfs' property had been cut. CR.155–56, 215.

E. The Selfs filed suit against TxDOT.

The Selfs sued TxDOT, T.F.R., and Lyellco. CR.4–13; CR.180–87. The claims against TxDOT were for (1) negligence under the TTCA, codified at Texas Civil Practice Remedies Code sections 101.001–.109, and (2) inverse condemnation. CR.184–85.

TxDOT filed a plea to the jurisdiction asserting sovereign immunity. CR.34–175, 446–56. The trial court denied TxDOT's plea. CR.468. TxDOT appealed. CR.469–71.

F. The court of appeals' opinion.

The court of appeals agreed with TxDOT that the trial court erred by denying TxDOT's plea to the jurisdiction on (1) the negligence claim, which alleged that TxDOT operated or used motor-driven equipment, and (2) the inverse condemnation claim. *Self*, 2022 WL 1259094, at *21.

The court of appeals otherwise affirmed the trial court's order with respect to negligence, holding there was a fact issue as to whether TxDOT's contractor T.F.R. or T.F.R.'s subcontractor Lyellco was a TxDOT employee or independent contractor. *Id.* That holding precluded the trial court from granting TxDOT's plea to the jurisdiction. *Id.*

SUMMARY OF ARGUMENT

The Selfs challenge the court of appeals' holdings that TxDOT's sovereign immunity is not waived on the Selfs' claims for negligence under the TTCA or on their inverse condemnation claim because (1) TxDOT did not operate or control the motor-driven equipment that removed the Selfs' trees; and (2) TxDOT did not intend to inversely condemn the Selfs' property.

The Selfs ignore the court of appeals' analysis of twenty years' worth of case law on the issues before this Court, provide no legal authority to support their position, and ask this Court to enlarge a waiver of governmental units' sovereign immunity under the TTCA.

The court of appeals analyzed the legal authority on the issues before this Court, followed the statutes and precedent on the issues by this Court and courts of appeals, and properly held TxDOT's sovereign immunity is not waived for the Selfs' claims of negligence under section 101.021 and inverse condemnation.

ARGUMENT

I. The court of appeals properly held that TxDOT retained its sovereign immunity from suit for negligence under section 101.021 of the Texas Tort Claims Act because TxDOT did not directly control the operation or use of the motor-driven equipment used to remove the Selfs' trees.

A. Twenty years of Texas precedent establishes that the Selfs cannot plead a valid waiver of TxDOT's sovereign immunity under the Texas Tort Claims Act.

The Selfs rely on section 101.021 Texas Civil Practice and Remedies Code to argue a waiver of TxDOT's sovereign immunity. Section 101.021 states that a governmental unit's immunity from suit and liability is waived if:

> (1) [The] property damage . . . [was] proximately caused by the wrongful act or omission or negligence of an employee acting within his scope of employment if:
>
> > (A) the property damage . . . arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> >
> > (B) the employee would be personally liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code § 101.021.

The term "employee" is defined "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(2).

The court of appeals analyzed twenty years of precedent and seventeen cases that address the question of what control by a TxDOT employee is required over motor-driven equipment to trigger section 101.021's waiver of sovereign immunity. *See Self*, 2022 WL 1259094, at *7–13.

The court of appeals started its analysis with the *LeLeaux* opinion, which held that the required operation or use of the motor-driven equipment under 101.021 must be that of the employee to trigger a waiver of governmental immunity. *See Self*, 2022 WL 1259094, at *8–9. The court examined 3 cases, which it referred to as the "strict reading of *LeLeaux*." *Id*. at 11–13. These cases follow *LeLeaux*'s strict holding that a governmental employee must be immediately directing control of the motor-driven equipment when there is a governmental unit and third party or independent contractor relationship. *See id*. at *12–13.[1]

The court also considered three cases which it calls the "more lenient line" of cases. *See id*. at *8–11. These cases found "the State can exercise such control over

[1] *See Tarkington Indep. Sch. Dist. v. Aiken*, 67 S.W.3d 319 (Tex. App.—Beaumont 2002, no pet.); *McLennan Cnty. v. Veazey*, 314 S.W.3d 456 (Tex. App.—Waco 2010, pet. denied); *Tavira v. Tex. Dep't of Crim. Just.*, No. 07-14-00046-CV, 2016 WL 736062 (Tex. App.—Amarillo Feb. 24, 2016, pet. denied) (mem. op.). This line of cases applies the principle that operation or use of motor-driven equipment under section 101.021 requires immediate, direct control by the governmental employee. *See Self*, 2022 WL 1259094, at *12–13.

motor-driven equipment that, even though a non-State-employed third party is at the equipment's controls, the State is operating or using the equipment." *See id*. at *8.[2]

Under the "lenient line" of cases, the court of appeals found that the Selfs could not plead a valid waiver of TxDOT's sovereign immunity under section 101.021 because no TxDOT employee was in direct control of the motor-driven equipment that caused the Selfs' damages. *Id*. at *13. The court held the Selfs did not establish TxDOT's control through proximity to the equipment while it was in operation or through such precise direction of the subcontractor's movements that it amounts to TxDOT's physical control of the equipment. *Id*.

Therefore, the court of appeals did not find it necessary to consider TxDOT's argument that the government employee must physically operate the motor-driven equipment pursuant to this Court's opinion in *LeLeaux*.

[2] *See Sepulveda v. Cnty. of El Paso*, 170 S.W.3d 605, 609 (Tex. App.—El Paso 2005, pet. denied); *City of El Campo v. Rubio*, 980 S.W.2d 943 (Tex. App.—Corpus Christi–Edinburg 1998, pet. dism'd w.o.j.); *Cnty. of Galveston v. Morgan*, 882 S.W.2d 485 (Tex. App.—Houston [14th Dist.] 1994, writ denied). These cases turned on whether the drivers in each case complied with, or were in the act of complying with, directions by a governmental employee who was present when the accident occurred.

B. The court of appeals' ruling properly construed section 101.021 in favor of TxDOT's limited waiver of sovereign immunity.

1. Any ambiguities in section 101.021 must be construed in favor of retaining sovereign immunity.

Sovereign immunity protects the State from lawsuits for money damages. Tex. Gov't Code § 311.034; *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374 (Tex. 2006). Immunity from suit may only be waived by legislative consent or constitutional amendment. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). "Legislative consent to sue the State must be expressed in 'clear and unambiguous language.'" *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001) (citing *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994)). "In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute *shall not* be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." Tex. Gov't Code § 311.034 (emphasis added).

"[A] statute that waives the State's immunity must do so beyond doubt." *Taylor*, 106 S.W.3d at 697. Any ambiguities in a statute will be resolved in favor of retaining immunity. *Id*. "We have repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity." *PHI, Inc. v. Tex. Juv. Just. Dep't*, 593 S.W.3d 296, 303 (Tex. 2019 (citing *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012)).

2. This Court has held that for governmental immunity to be waived, a government employee must have been operating the motor-driven equipment that caused the property damage.

In *LeLeaux*, this Court endorsed the line of cases requiring immediate, direct control of the motor-driven equipment by a government employee being necessary to trigger the waiver under section 101.021:

> This waiver of immunity [under Tex. Civ. Prac & Rem. Code § 101.021] is a limited one. A school district is not liable for a personal injury proximately caused by a negligent employee unless the injury "arises from the operation or use of a motor-driven vehicle or motor-driven equipment." The phrase, "arises from", requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment. While the statute does not specify whose operation or use is necessary—the employees, the person who suffers injury, or some third party—*we think the more plausible reading is that the required operation or use is that of the employee. This requirement is consistent with the clear intent of the Act that the waiver of sovereign immunity be limited.*

LeLeaux, 835 S.W.2d at 51 (emphasis added) (citation omitted).

Here, the parties agree that TxDOT employees were not present when the Selfs' trees were removed. CR.164. Mr. Self repeatedly blamed TxDOT's "contractors" for the tree removal. CR.10–13, 310–11. By T.F.R.'s own admission and the evidence produced, Lyellco operated the motor-driven equipment (chain saw, bucket truck, bobcat, trailer) to remove the Selfs' trees. CR.216–17.

A TxDOT employee did not operate the motor-driven equipment that removed the Selfs' trees. Therefore, TxDOT's sovereign immunity remains intact

under the TTCA, which is consistent with the clear intent of the act. *See LeLeaux*, 835 S.W.2d at 51.

3. The Selfs cite no legal authority that supports a waiver of TxDOT's immunity under section 101.021.

None of the cases cited by the Selfs support their position that sovereign immunity is waived under 101.021 when a governmental employee is not physically operating or in close proximity to and directing the independent contractor's use of motor-driven equipment that causes damage.

a. The Selfs' reliance on *PHI, Inc. v. Texas Juvenile Justice Department* is misplaced.

Relying on the *PHI* case, the Selfs argue section 101.021 does not require proof that TxDOT employees were either: (1) physically operating, or (2) in close proximity and directing the independent contractor's use of the motor-driven equipment that damaged the Selfs' trees. *See* Selfs' Pet. for Review at 23–25.

In *PHI*, this Court analyzed the words "use" or "operation" under section 101.021 and found the words should be given their everyday meaning. *PHI*, 593 S.W.3d at 301 (citing *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam)). This court found the appellate court wrongly added the word "active" and required "active" operation or use at the time of the incident. But the *PHI* decision does not alter the precedent established in *LeLeaux* because the *LeLeaux* court determined *whose* operation or use of the motor-driven

equipment was necessary to trigger the waiver under section 101.021. 935 S.W.2d at 51. And the *PHI* court did not overturn *LeLeaux*'s holding that *the required operation or use of the motor-driven equipment under section 101.021 is that of the employee*. *See LeLeaux*, 835 S.W.2d at 51. Further, it does not matter that *LeLeaux* was a 5-4 opinion, as the Selfs suggest. *LeLeaux* is still this Court's controlling law on this issue.

b. The *PHI* court reaffirmed the rules applied when interpreting a statute under the Texas Tort Claims Act.

The *PHI* court reiterated the rules on statutory construction:

> As with any statute, in construing the words "operation or use" we must look to the plain meaning of statutory text "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." "If a statute is clear and unambiguous, we apply its words according to their common meaning without resort to rules of construction or extrinsic aids." Also informing this analysis is our recognition, noted above, that waivers of sovereign immunity must be clear and unambiguous. With respect to the Tort Claims Act, we noted in *Ryder* that, "[g]iven the Legislature's preference for a limited immunity waiver, we strictly construe section 101.021's vehicle-use requirement." More generally, "[w]e have repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity."

PHI, 593 S.W.3d at 303 (citations omitted).

Here, the Selfs suggest that the plain language of section 101.021 supports their position that TxDOT need not be physically operating or in close proximity and in direct control of the motor-driven equipment that caused their damages. *See* Selfs' Pet. for Review at 27–28. However, there is clearly ambiguity in section 101.021

because, as cited by the court of appeals, at least seventeen cases involved consulting the rules of construction and extrinsic aids to decide what control by a governmental employee is required over motor-driven equipment to trigger section 101.021's waiver. *See Self*, 2022 WL 1259094, at *7–13. The court of appeals properly construed section 101.021 in favor of retaining TxDOT's immunity.

Therefore, *PHI* does not support the Selfs' argument that TxDOT's general directions of tree removal from fence line to fence line or failure to designate trees to be removed was sufficient operation and control of the motor-driven equipement to meet the requirements of section 101.021 and waive TxDOT's sovereign immunity.

c. The Selfs' reliance on *Rosenthal v. Grocers Supply Co.* is misplaced.

The Selfs rely on the common law negligence case, *Rosenthal v. Grocers Supply Co.*, 981 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, no pet.), to support their argument that TxDOT's sovereign immunity is waived for negligence under the TTCA because TxDOT had a duty to correctly identify the trees to be removed by independent contractors on TxDOT's right of way.

The Selfs' reliance on a common law negligence case is misplaced because that case did not relate to a suit against a governmental unit under a state statute. And courts cannot rely on common law that is inconsistent with the laws of this state.

See Tex. Civ. Prac. & Rem. Code § 5.001; *Thomas v. Harris Cnty.*, 30 S.W.3d 51, 55 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

d. The Selfs advocate for an expansive interpretation of the statute and what constitutes waiver of TxDOT's sovereign immunity.

Only the Legislature has the authority to waive a governmental unit's sovereign immunity. *See* Tex. Gov't Code § 311.034; *Harris Cnty. v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994). Yet, the Selfs argue that section 101.021 should be broadly interpreted to encompass acts that fall short of constituting operation of motor-driven equipment or direct control over that equipment and thereby waive TxDOT's sovereign immunity in this case.

The Selfs contend that the court of appeals' requirement of "'close physical proximity to the equipment'—as part of the more 'lenient' line of cases as characterized by the court of appeals—makes little sense in the digital era, when instructions and directions from people more than 20 feet away are often more consequential than those given on site." *See* Selfs' Pet. for Review at 26.

If this Court were to adopt the Selfs' position, a governmental unit's liability could be waived with a mere email, text message, or phone call in connection with a project in which motor-driven equipment is used. This goes against the Legislature's intent that waivers of sovereign immunity be limited, and section

311.034's requirement that only the Legislature has authority to enlarge a governmental unit's sovereign immunity.

C. The Selfs directly caused their property damage.

The Selfs argue that TxDOT could have prevented the damage to the Selfs' trees by either (1) marking the trees to be removed pursuant to the contract on TxDOT's right of way; or (2) restructuring the contract by limiting the determination it took on itself to make. *See* Selfs' Pet. for Review at 26–27. However, the Selfs fail to acknowledge their own role in the removal of their trees. The Selfs never notified TxDOT that the fence no longer designated the property line between the Selfs' property and TxDOT's right of way. Thus, the Selfs proximately caused their own damages. CR.145, 155–56, 300.

II. The court of appeals properly held TxDOT has sovereign immunity from the Selfs' inverse condemnation claim.

A. The Selfs cannot establish the elements of an inverse condemnation claim.

The Texas Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Tex. Const. art. 1, § 17.

To establish an inverse condemnation claim, a property owner must establish that the government intentionally performed certain acts that resulted in a taking, damaging or destroying of property for public use without the property owner's

consent. *See Tex. Parks & Wildlife Dep't v. Sawyer Tr*, 354 S.W.3d 384, 390–91 (Tex. 2011). Sovereign immunity is retained where a plaintiff fails to plead or establish an inverse condemnation claim. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 489, 491 (Tex. 2012); *Little-Tex*, 39 S.W.3d at 598–99. "Determining whether a taking has occurred is a question of law." *Hearts Bluff*, 381 S.W.3d at 477.

Here, the court of appeals reviewed four of this Court's opinions to analyze the element of "intent" under an inverse condemnation claim. *Self*, 2022 WL 1259094, at *19–20. These cases reiterated the higher standard for the "intent" element and distinguished an intentional act to take property for public purpose at the time the governmental acted versus a governmental unit's mere negligence or nonfeasance. *Gragg*, S.W.3d at 554–55; *Jennings*, 142 S.W.3d at 313–14, *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016) (op. on reh'g); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 921 (Tex. 2009); and *City of Arlington*, 145 S.W.3d at 168. The court of appeals properly found there was no intent that TxDOT intentionally removed the Selfs' trees. *Self*, 2022 WL 1259094, at *19–20.

The Selfs argue 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 taking trees and confirming that all

trees removed were on the right of way. *See* Selfs' Pet. for Review at 30. However, the Selfs do not cite to legal authority to support their argument.

B. TxDOT did not intentionally take actions that led to the Selfs' property damages.

A governmental entity cannot be liable in inverse condemnation for acts that are not intentional. *See Gragg*, 151 S.W.3d at 554. "Mere negligence which eventually contributes to the destruction of property is not a taking." *Likes*, 962 S.W.2d at 505.[3] The Selfs have the burden to establish that TxDOT physically damaged their property with the intent necessary for a constitutional taking. *See Karnes City v. Kendall*, 172 S.W.3d 624, 627 (Tex App.—San Antonio 2005, pet. denied). "[W]hen a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 if it: (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is 'necessarily an incident to, or necessarily a consequential result of' the government's action." *Jennings*, 142 S.W.3d at 314.

[3] This Court found, "[m]uch of our takings jurisprudence focuses on mens rea. We have made clear that a taking cannot be established by proof of mere negligent conduct by the government." *Kerr*, 499 S.W.3d at 799 (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997)). Here, the Selfs allege that TxDOT is not only "negligent" under the TTCA, but also "intentionally" took their property. The Selfs' claims are mutually exclusive.

In other words, intent means that the actor desires to cause the consequences of his act or believes that the consequences are substantially certain to result from the act. *Kendall*, 172 S.W.3d at 629. As noted by this Court, *Jennings* "held that a heightened intent standard is indeed necessary to support a[n inverse condemnation] claim." *City of Arlington*, 145 S.W.3d at 168.

The mere existence of an intentional act will not give rise to liability for an intentional taking. *Jennings*, 142 S.W.3d at 313. "To establish intent, therefore, the plaintiff must prove not just that the government should have known the damage would occur, but instead that the government had actual knowledge." *Bhakta v. Tex. Dep't of Transp*., No. 04-15-00297, 2016 WL 1593163, at *4 (Tex. App.—San Antonio Apr. 20, 2016, no pet.) (mem. op.) (citing *Jennings*, 142 S.W.3d at 313–14).

In *Jennings*, this Court specifically rejected the position that only the act causing the harm must be intentional. *See Jennings*, 142 S.W.3d at 313–14. Where an action does not ordinarily result in damage to private property although it may sometimes result in such damage, there is no fact issue created regarding intent. *See id*. at 315 (holding that proof that City's actions sometimes resulted in such damage was insufficient to satisfy intent requirement). "[T]he fact that the government entity should have known the harm would occur is not sufficient to satisfy the intent

element; the government entity must possess actual knowledge." *Bhakta,* 2016 WL 1593163, at *4.

Here, the Selfs failed to plead facts that TxDOT physically damaged their property with the intent necessary for an inverse condemnation claim. Further, the undisputed evidence establishes the trial court had no jurisdiction, as the Selfs failed to come forward with any evidence to raise a fact issue. First, TxDOT admitted it directed T.F.R. to remove trees on TxDOT's right of way, which TxDOT thought was up to the fence line. CR.166. This demonstrates TxDOT thought the independent contractors would remove trees within TxDOT's right of way. However, the Selfs moved the fence line that was on the right of way line "two to three feet on [the Selfs'] side of the right of way easement." CR.10. TxDOT did not know the Selfs moved the fence line. CR.155, 158. Accordingly, the requisite intent to inversely condemn the Selfs' property is absent. The Selfs failed to demonstrate the Court's jurisdiction under the element of "intent."

C. The Selfs' reliance on *City of Dallas v. Zetterlund* is misplaced.

The Selfs erroneously rely on *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 828 (Tex. App.—Dallas 2008, no pet.) to support their argument that there was evidence that damage to the Selfs' property was substantially certain to result from TxDOT and its independent contractors' acts. *See* Selfs' Pet. for Review 29–30.

The facts in *Zetterlund* are distinguishable from the facts here. In *Zetterlund*, government contractors continued using the landowner's property as a staging site for a municipal pipeline construction project on an adjacent tract of land for months, after being informed the staging site belonged to the landowner, and after agreeing to compensate the landowner for the use of the property. *Zetterlund*, 261 S.W.3d at 837.

Here, TxDOT did not know it removed the Selfs' trees until after the trees were removed. CR.155–56, 215. Unlike *Zetterlund*, TxDOT did not continue to remove the Selfs' trees for months after being notified the trees belonged to the Selfs, nor did TxDOT agree to compensate the Selfs for the removal of the trees. The Selfs cannot establish TxDOT had the requisite intent to inversely condemn the Selfs' property. Therefore, the Selfs cannot plead a valid inverse condemnation claim, and TxDOT's sovereign immunity remains intact.

PRAYER

For the reasons stated, TxDOT respectfully requests that this Court deny the Selfs' petition for review, affirm the portions of the court of appeals' decision that reversed the trial court's order with respect to (1) negligence on the element of whose operation or use of the motor-driven equipment are necessary, and (2) inverse condemnation, and grant any such relief, general or specific, to which TxDOT may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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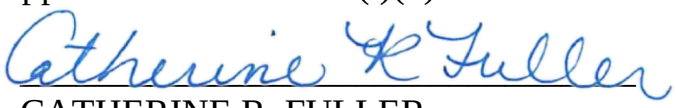

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This is to certify that on November 14, 2022, a true and correct copy of the foregoing *TxDOT's Response to the Selfs' Petition for Review* has been served on the following:

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