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Appeal Perfection – Interventions: Intervenor's motion for new trial was effective to extend time to perfect appeal from thirty to ninety days after the judgment even though the lienholder-intervenor's petition was stricken before the final judgment.

In *Eichner v. Dominguez*, a lienholder intervened in a wrongful foreclosure suit claiming a lien superior to the one being foreclosed. After the lienholder plaintiff settled with the defendant, the trial court struck the intervening lienholder's petition. Twenty-eight days after the judgment, the intervening lienholder-moved for a new trial. On the thirty-fifth day following judgment, the lienholder-intervenor filed its notice of appeal. The notice of appeal was untimely if the new trial motion was not effective to extend the time allowed under Texas Rule of Appellate Procedure from thirty to ninety days after the date the judgment was signed. 26.1(a). The court of appeals ruled the lienholder-intervenor's new trial motion was not effective to extend the time to perfect appeal because he was not a "party to the judgment" rendered by the trial court and dismissed the appeal as untimely.

In a unanimous *per curiam* opinion, the court held that rule 26.1 did not support distinguishing the intervenor from the plaintiff with respect to whether the intervenor was a party to the judgment. Under Texas Rule of Civil Procedure 329b, the timely filing of a new-trial motion "by any party" was deemed sufficient to extend the trial court's plenary jurisdiction. If so, then the intervening lienholder was a party to the *judgment* even though the intervention was stricken. Unless there was a severance, the judgment was the instrument that made the disposition of the case final as to the intervening lienholder.

The opinion carefully distinguished cases where the intervention petition was filed *after* the final judgment was signed. Under those circumstances, the intervenor was *not* a party to the judgment. But when the intervention was filed *before* the final judgment was signed, the intervenor *was* a party to that judgment. Accordingly, intervening lienholder's new trial motion was effective to extend the time to perfect appeal notwithstanding the trial court's pre-judgment decision to strike the intervention petition.

Real Estate – Agreed Conveyance Correction: Property Code §5.029 does not require subsequent grantees to be parties to agreed instruments correcting material conveyance mistakes if the parties to the original conveyance join in the correcting instrument.

Limitations – Inapplicable to Agreed Conveyance Corrections: Agreed correction is not a judicial action, so the four-year residual limitations applicable to reformation suits does not restrict when the agreed deed correction must occur.

Property Code § 5.029 authorizes agreed corrections of *material* errors in recorded conveyances. Under the statute, the correction must be executed by
the parties to the original conveyance "or, if applicable, a party's heirs, successors or assigns." The correction retroactively supersedes the original in all respects. *Broadway National Bank v. Yates Energy Corp. et al*., questioned when the approval of heirs, successors or assigns was "applicable" – that is, necessary. Justice Devine for a 5:4 majority held such persons' approval was necessary only when an original party is unavailable, even if the grantee had already transferred an interest acquired under the original, later corrected, conveyance.

In 2005, the bank, acting as a trustee, executed grant a beneficiary a fee simple interest under mineral deed. The bank maintained the beneficiary was only intended to receive a life estate and filed a corrected deed the following year. Only the bank was a signatory on both the erroneous and purported correction deeds. The beneficiary later executed a deed granting an interest conveyed only under the original, but purportedly erroneous, deed. Thereafter, the trustee executed an amended corrected deed to which all of the trustee beneficiaries were signatories. The issue was whether the amended corrected deed was valid without the joinder of the subsequent grantees in the correcting deed. In the words of the statute, was their joinder in addition to the original parties "applicable" so the correction was effective?

Under Property Code sections 5.027–.031, a correction substitute[s] for the original and is: (1) effective on the original's effective date; (2) *prima facie* evidence of the facts stated in the correction, subject to rebuttal; and (3) notice to a subsequent buyer of the facts stated in the correction. Tex. Prop. Code § 5.030(a)–(b). The correction must be executed by "each party to the … original … conveyance … or, *if applicable*, a party's heirs, successors, or assigns." Tex. Prop. Code § 5.029. (Emphasis added).

1. *The majority reasons it unnecessary to consider innocent purchaser rights in §5.029's interpretation because the Legislature explicitly provided for this concern in §5.030.*

The plain language of the statute indicates the correcting instrument is effective when each original party executes it. The issue is the effect of the correcting instrument on *bona fide* purchasers who acquire their interest after the original mistaken conveyance but before the execution of the correction. According to the majority, the Legislature addressed the interests of *bona fide* purchasers in §5.030, not the "if applicable" provision in §5.029. The majority explained that under §5.303(c), the correction is subject to a *bona fide* purchaser's rights acquired after the original and before the correcting instruments were recorded. The statute, the majority reasons, thereby protects an innocent purchaser's rights even if the original parties all agree the original was materially mistaken.

2. *The dissent reasons both grammar and integrity of recorded title requires §5.029 to require the subsequent grantees' consent.*

Under Justice Busby's dissenting opinion, four justices disagreed on the basis of both grammar and policy. From the grammatical standpoint, they dissent because §5.029's "if applicable" qualification of heirs, successors, or assigns would have been unnecessary if the original parties alone could correct their mistake regardless of any intervening conveyance. The dissent reasons "if applicable" necessarily applies refers to the *existence* of a successor-in-interest, not the availability of the original party.[1] This, the dissent urges, is because "assigns have a connection [to the conveyance] when the instrument modifies their property interest."

The dissent bolsters its grammatical reading with the substantive argument that an original party cannot divest an assignee of its property interest by the retroactive application of a "correcting" instrument. Thus, the dissent views the majority's holding as destabilizing the record title system. They believe allowing the successors-in-interest to the original parties to be deprived of their interests with neither notice or consent should not be permitted unless and until the holder of the successive interest discharges the "heavy burden" of showing their interests are adversely affected. The dissent asserts "[a] party should not be burdened to litigate when it has no means of avoiding litigation, especially where the alternative is to place the burden on a party who can …."

3. *The four-year residual limitations applicable to reformation suits does not limit the period during which agreed deed correction must be performed.*

The majority also rejected that the residual four-year limitations period commenced expiration from the date of the original erroneous deed. The majority rejected the attempt to equate correction of a mistaken conveyance with a suit to reform a deed because the agreed correction did not seek any *judicial* action or remedy. It distinguished

[1] Both majority and dissenting opinion contains a useful summary of otherwise not-easy-to-locate cases concerning accepted meanings of "and" and "or" for purposes of statutory interpretation which are equally helpful in contract interpretation.

corrective instruments from the suit in *Cosgrove v. Cade*, 468 S.W.3d 32 (Tex. 2015), to reform a deed *after* the original parties refused to correct it by agreement.

Based on its determination that subsequent grantees were not necessary parties to the correcting deed, the court remanded for consideration by the court of appeals whether these grantees were protected under Property Code §5.030 as *bona fide* purchasers.

Statutory Interpretation – Expunction: *Grammar mandates that article 55.01(a)(2)(A)(ii)(c) allows expunction of particular misdemeanor charges even if all charges resulting from the same arrest are not eligible for expunction.*

Ex parte R.P.G.P. is a case about the interpretation of the statute governing expunction of arrest records. Expunction may not be regular fare for this firm's practice. However, the case is instructive about the differences among justices, all of whom ostensibly share allegiance to "plain meaning" to statutory interpretation. It serves as a reminder that, no matter how attractive the seeming objectivity of simply applying "plain meaning," the meaning intended is apparent only when those words and their definitions are considered in context, not merely as abstractions.

In this case, the plaintiff's arrest resulted in two charges: misdemeanor DWI and misdemeanor marijuana possession. The DWI was dismissed following pretrial intervention. The possession charge was dismissed following deferred adjudication.

Texas Code of Criminal Procedure article 55.01(a)(2)(A)(ii)(c) allows a person arrested to expunge "all records and files relating to *the arrest*" if: (1) the person has been released; (2) "[any] charge … has not resulted in a final conviction" and (3) "is no longer pending"; (4) "there was no court[-]ordered [Chapter 42A] community supervision"; and (5) "provided that," among other conditions, the post-arrest charge was "dismissed or quashed because … the person completed a pretrial intervention program." (Emphasis added). Because the DWI charge was dismissed after pre-trial intervention, the arrestee sought to have it expunged. The possession charge was not eligible for expunction. The issue was whether 55.01(a)(2)(A)(ii)(c) allowed expunction only if *all* charges from an arrest were expungable, or it permitted less than all charges resulting from an arrest to be expunged.

1. The majority relies on a grammatical analysis of the wording adopted by the Legislature to support its conclusion that particular misdemeanor charges may be expunged even if all charges resulting from an arrest are not eligible for expunction.

The 6:3 majority in an opinion by Justice Guzman held article 55.01(a)(2)(A)(ii)(c) authorized the expunction of a qualifying charge even if the arrest resulted in additional charges ineligible for expunction. The majority opinion began by pointing out some subparts of article 55.01 turned on the offense charged whereas others were addressed to all charges resulting from the arrest. Thus, article 55.01 as whole was "neither entirely arrest-based nor offense-based" The opinion only addressed the subpart in article 55.01(a)(2)(A)(ii)(c).

The majority's analysis began by noting subpart (a)(2)'s language allowing expunction if "the charge, if any, has not resulted in a final conviction" and satisfied other requirements indicated the Legislature intended that subpart to apply on a *per offense* basis. The majority bolstered its reading by contrasting the reference in (a)(2)'s current version to "the charge" with its pre-2011 version referring to expunction of "any offense" which the majority reasoned "d[id] not tie [expunction]to a single offense but to all offenses" from an arrest. (Emphasis added). Thus, the later change to "the charge" indicated the Legislature meant the current version of subpart (a)(2) to apply on a per-offense basis.

The majority then applied the distinction between "the offense" and "any offense" to subpart (a)(2)(A)'s disparate treatment of felony and misdemeanor offenses. Subpart (a)(2)(A) contrasts expunction of an indictment "charging the person with … *a* misdemeanor *offense* based on the person's arrest" from one that "charg[es] … *any* felony offense arising out of the same transaction for which the person was *arrested.*" (Emphasis added). From this, the majority concluded that the Legislature intended to permit expunction of a single *misdemeanor* offense charged following an arrest while allowing expunction of felony offenses only if *all felonies* charged on the basis of an arrest were expungable under the statute.

2. *The dissent first places subpart (a)(2)(A)(ii)(c) in the context of the overarching policy that records should be public except to remove those resulting from a wrongful arrest.*

Justice Bland's dissent, however, concluded that subpart (a)(2)(A) only authorized expunction if *all* charges resulting from the arrest met the statutory criteria. The starting point for the dissent's statutory interpretation was the general principle that "[e]xpunction is a statutory privilege" that arises from a wrongful arrest and "an exception" to the general rule "court records ought to be open to the public." The dissent supported this assertion by pointing that paragraph (a) allows expunction for "*all records* … relating to the *arrest*" if certain conditions are satisfied. Although not discussed in the dissent, doing so is consistent with common-law presumption the Legislature is familiar with extant law and the statutory interpretive requirements that favors the public interest over private interest and that the resulting interpretation achieve a fair and reasonable result Tex. Gov. Code §311.021. The dissent points out that the majority's interpretation has several deleterious effects on the public interest including reducing the arrest histories available to law enforcement and reducing the incentives to enter plea bargains.

The dissent rejects the majority's premise that the scope of expunction permitted under article 55.01 varies with the nature of the offense. The dissent explains the condition that must be satisfied to expunge a particular offense may vary under subpart (a)(2)(A), but that the right to expunge charges is limited in the first instance by paragraph (a) to those that are levelled as the result of the *arrest*. The dissent deems the difference between "an" and "any" to be too slight to justify "[t]he Court's insistence on upending that [statutory] scheme based on the use of an indefinite article ignores … context … [to] treat[] differently an arrest that results in multiple criminal charges." In other words, for the dissent, article 55.01 only authorizes the expunction of an *arrest record*, not a subset of particular offenses that may have been charged as a result of that arrest.

Which of these approaches is most likely to fulfill the Legislature's objective? The majority would say that the only way to determine that objective rests on the grammar and particular wording of the statute. However, experience teaches that legislation prepared in the pressure cooker of a limited-duration biennial legislative sessions is seldom a model of grammatical perfection. The dissent would likely say that statutory interpretation has to begin by placing the legislation in the proper legal context. The difficulty with that approach is that the purpose of legislation is often to change the legal *status quo ante*. Therefore, it cannot be assumed that a particular enactment was not intended to change, rather than ensconce, the status quo.

The bottom line, in this writer's opinion, is that the dispute over interpretive doctrine overlooked the important role that learned and reasonable judges are intended to and must fulfill in ascertaining legislative intent. Justices on this State's highest court should candidly acknowledge that function, not hide from it behind allegiances to particular theories of statutory interpretation.