COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

A.S. HORNER, INC.,	§	No. 08-18-00044-CV
Appellant,	§	Appeal from the
v.	§	384th District Court
RAFAEL NAVARRETTE,	§	of El Paso County, Texas
Appellee.	§	(TC# 2015DCV3144)

OPINION

Appellee Rafael Navarrette has filed a motion for rehearing of our opinion and judgment dated March 19, 2021. We deny Navarrette's motion for rehearing, withdraw our opinion and judgment of said date, and substitute the following opinion in its place.

As a permissive appeal, Appellant A.S. Horner, Inc. (Horner) appeals the trial court's denial of its motion for summary judgment seeking a take nothing judgment on all claims asserted against it by Appellee Rafael Navarrette.[1] Horner contends it conclusively established it performed its highway construction work for the Texas Department of Transportation (TxDOT) in compliance with contract documents. It thus contends it is protected from liability for personal injury damages based on the statutory protection afforded by TEX. CIV. PRAC. & REM. CODE ANN.

[1] *See* TEX. R. APP. P. 28.3; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

§ 97.002. We reverse the trial court's judgment and render a take-nothing judgment in favor of Horner.

BACKGROUND

Originally, Rafael Navarrette sued Horner, TxDOT, and the County of El Paso for injuries he sustained while working as a firefighter-paramedic.[2] At the time of the incident that is a basis of the suit, Navarrette was on duty responding to a multi-vehicle crash that occurred in the middle of the night on a Loop 375 overpass. Navarrette's suit alleged that, "[w]hile between the barricades, on a defectively designed and installed cement catwalk without restraining railings he fell 20 to 30 feet through [a] 3 1/2 or 4 feet opening." Horner constructed the overpass from which Navarrette fell. Navarrette asserted claims against Horner pursuant to premises liability based on a dangerous condition on the road or property, and alternatively, based on theories of negligence.

Horner generally denied the allegations and asserted several affirmative defenses including a defense that Navarrette's claims against it were barred by TEX. CIV. PRAC. & REM. CODE ANN. § 97.002. As discussed in further detail below, section 97.002 provides that if, at the time of a personal injury, property damage, or death, a contractor, who constructs or repairs a highway, road, or street for TxDOT, is in compliance with contract documents—material to the condition or defect that was the proximate cause of the personal injury, property damage, or death—such contractor is not liable to a claimant for those injuries arising from the performance of the construction or repair. *See id.* § 97.002.

After a period of discovery, Horner moved for summary judgment on all claims against it based on the protection afforded by section 97.002. *See id.* § 97.002. In support of its motion,

[2] In a separate proceeding, the trial court dismissed Navarrette's claims against the County of El Paso and TxDOT while his suit against Horner remained pending. After obtaining discovery, Navarrette filed a bill of review seeking to reinstate claims against TxDOT only. The court denied TxDOT's motion to dismiss the bill of review filed against it. That denial is the subject of a separate appeal decided this same day in Cause Number 08-18-00017-CV, styled *State of Texas and Texas Department of Transportation v. Rafael Navarrette*.

Horner provided evidence that it performed its work as a contractor to which section 97.002 applied along with proof that it performed its construction work in compliance with TxDOT's plans. Horner completed its work on the overpass some seven weeks prior to the incident. Horner relied on deposition testimony from Ricardo Romero, the TxDOT area engineer charged with ensuring work was performed in compliance with contract documents, who confirmed the overpass and ramp were constructed as designed or otherwise planned.

Navarrette did not dispute Horner's status as a TxDOT contractor, nor its assertion that its construction complied with TxDOT's contract documents. Rather, he argued section 97.002 was inapplicable to this case because his injuries did not "arise from the performance of the construction or repair[,]" since Horner's work was not ongoing but, rather, had been completed prior to the incident. Said differently, Navarrette asserted the statute only protects contractors from claims for injuries sustained *during* the construction process, but not for injuries sustained after construction is completed.

The trial court signed an order denying Horner's motion for summary judgment. Horner then filed a motion for entry of an amended order to permit it to pursue an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). The court signed an amended order denying Horner's motion for summary judgment, stating as the ground for that denial that TEX. CIV. PRAC. & REM. CODE ANN. § 97.002 does not apply because construction was completed prior to the injury. The trial court found the statutory requisites for an interlocutory appeal were present and, thus, granted Horner permission to file an interlocutory appeal. This Court followed suit in permitting this interlocutory appeal. *See* TEX. R. APP. P. 28.3.

DISCUSSION

The sole issue on appeal is whether TEX. CIV. PRAC. & REM. CODE ANN. § 97.002 applies to active construction only or whether it additionally shields qualified contractors from liability

for injuries or damages sustained after construction is completed.

Standard of Review

Summary judgments are reviewed de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for traditional summary judgment bears the burden of establishing there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann*, 289 S.W.3d at 848. "[A] defendant who conclusively negates at least one essential element of a cause of action or conclusively establishes all the elements of an affirmative defense is entitled to summary judgment." *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015).

Issues of statutory construction are also reviewed de novo. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018).

Applicable Law

The Supreme Court of Texas has cautioned that courts must construe statutes "as written" and must "refrain from rewriting text that lawmakers chose." *Creative Oil & Gas*, 591 S.W.3d at 133 (quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009)). "This means enforcing 'the plain meaning of the text unless a different meaning is supplied by statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result.'" *Id.* (quoting *Beeman v. Livingston*, 468 S.W.3d 534, 538 (Tex. 2015)). And, while a reviewing court must consider the specific statutory language at issue, it must do so in the context of the statute as a whole, not as an isolated provision. *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 183 (Tex. 2019); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Finally, courts are not to consider "legislative history or other extrinsic aides

to interpret an unambiguous statute because the statute's plain language most reliably reveals the legislature's intent." *Texas Health Presbyterian Hosp. v. D.A.*, 569 S.W.3d 126, 135-36 (Tex. 2018). Here, neither party contends that section 97.002 is ambiguous, and we agree. We therefore decline Horner's invitation to examine the statute's legislative history and focus instead on its plain language. *See id.*

Whether section 97.002 applies in the context of completed construction appears to be a question of first impression. Each of the cases we have found applying this statute concerns an injury sustained while road construction or repair was ongoing. *See, e.g.*, *Brown v. RK Hall Constr., Ltd.*, 500 S.W.3d 509, 510 (Tex. App.—Texarkana 2016, pet. denied) (collision with construction equipment in construction zone); *Bennett Truck Transp., LLC v. Williams Bros. Constr.*, 256 S.W.3d 730, 731 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (accident caused by traffic lanes narrowed by ongoing construction). None of these cases, however, address whether the statute's applicability is limited to such circumstances. We are guided, then, only by principles of statutory construction, as recited above.

Analysis

Beginning with its plain terms, section 97.002 reads as follows:

> A contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.

TEX. CIV. PRAC. & REM. CODE ANN. § 97.002.

Notably, section 97.002 has three distinct parts: (1) an introduction describing who qualifies for the statute's protection, (2) a middle portion describing the specific protection the statute affords, and (3) an ending setting forth the condition that must be met for such protection

to apply. We address each part in turn before interpreting the whole provision in context. *See KMS Retail Rowlett*, 593 S.W.3d at 183.

A. Who qualifies for this statutory protection?

The first portion of section 97.002 sets forth to whom the statute provides liability protection when prerequisites are met: "A contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation . . . ." *Id.* § 97.002. Navarrette asserts the term "constructs," modifies the phrase, "arising from the performance of the construction or repair," which appears in the middle portion of the text. But we disagree with that assertion. Rather, in context, the opening phrase, "[a] contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation," is a restrictive clause modifying the immediately preceding noun, "contractor."

The first word in the restrictive clause—"who"—is a relative pronoun. BRYAN GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 10.9, at 178-79 (3d ed. 2013). Relative pronouns require an antecedent—that is, a preceding noun—to which they refer. *Id*. Generally, the proper antecedent for a relative pronoun is the noun that (1) precedes the pronoun most closely; and (2) agrees in number, gender, and person with that pronoun. *Id.* at § 10.10, 179. Here, the word "contractor" is the noun immediately preceding the relative pronoun "who," and both words agree in number (singular), gender (neutral), and person (third). Thus, "who," along with the remainder of the clause, relates to "contractor" in this statute. A restrictive clause is one that "limits the essential meaning of the sentence element it modifies or identifies." WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000) (Glossary: restrictive term, element, clause); *see also* BRYAN GARNER, GARNER'S MODERN AMERICAN USAGE (3d ed. 2009) (Glossary: Clause, Relative). The restrictive clause here limits the essential meaning of "contractor" because, in its absence, the statute would apply to any contractor regardless of the nature of the work such

contractor engaged in or for whom the contractor performed. But the restrictive clause here evidences the Legislature's intent for it to apply only to contractors hired by TxDOT to perform highway, road, or street construction and repairs. TEX. CIV. PRAC. & REM. CODE ANN. § 97.002.

Navarrette also contends that his interpretation of section 97.002 is mandated by the tense of the verb "constructs." He argues that because "constructs" is stated in the present-active tense, the Legislature intended the phrase to limit the statute's application to construction that is presently ongoing, or not otherwise completed. However, we determine the plain language and structure of that phrase does not support this argument.

When construing statutory language, we may consider the use and interpretation of similar language in other statutes. *See Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). The Texas Legislature routinely uses present-tense verbs in restrictive clauses to explain to whom the relevant statute applies; this is grammatically proper because restrictive clauses are not the action of the sentence, they are being used as modifiers to nouns within the statutes. For example, section 74A.002 of the Texas Civil Practice and Remedies Code provides:

> Unless the health care provider acts with malice or gross negligence, a health care provider *who provides patient information to a health information exchange* is not liable for any damages, penalties, or other relief related to the obtainment, use, or disclosure of that information in violation of federal or state privacy laws by a health information exchange, another health care provider, or any other person.

TEX. CIV. PRAC. & REM. CODE ANN. § 74A.002(a) (emphasis added). Similarly, section 150.004 of the Texas Civil Practice and Remedies Code states that "[a] certified municipal inspector *who provides the services* to which this section applies is not liable for civil damages, including personal injury, wrongful death, property damage, or other loss related to the inspector's act, error, or omission in the performance of the services," except when said provision is not applicable. TEX. CIV. PRAC. & REM. CODE ANN. § 150.004(b) (emphasis added). Similar to these statutes, we do not believe the use of the present tense within the restrictive clause of the statute at issue here—

section 97.002—limits the exclusion of liability only to the time period during which the work is performed. Instead, we note from these examples that the Legislature commonly uses the present tense in restrictive clauses when such clauses are descriptive, yet the clause does not function as the action of the sentence.

Secondly, Navarrette urges that Horner's reading of section 97.002 would impermissibly require that we add language to the statute so that it reads, "[a] contractor who constructs or repairs [or has completed construction or repair of] a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance [or completion] of the construction . . . ."[3] While we agree this additional wording would support the interpretation Horner advances, we do not agree such language is the only means of supporting Horner's view.

Simply put, the word "constructs" is not the action of the sentence. Rather, it is part of a restrictive clause that modifies the noun before it. As a result, we conclude the Legislature's use of a present-tense verb in the restrictive clause has no temporal bearing and does not necessarily limit the application of section 97.002 to injuries only occurring during ongoing construction or repairs.

B. The protection afforded by § 97.002

After establishing to whom the statute provides protection, the middle portion of the provision explains the protection afforded to those who are qualifying contractors as follows: "[a contractor] is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 97.002.

[3] The argument can be made that Navarrette's interpretation of section 97.002 as only applying to active construction requires altering the language of the statute to read "a contractor who ~~constructs~~ [is constructing] a highway for the Texas Department of Transportation is not liable to a claimant for personal injury arising from [and during] the performance of the construction."

We first note this case involves a personal injury, not property damage or death. For clarity and succinctness, then, we simplify our discussion from this point forward by omitting these non-relevant terms.

To be afforded protection by the statute, Navarrette contends the phrase "arising from the performance of the construction," necessarily means the contractor's performance must be contemporaneous with the claimant's personal injury. We disagree. Instead, we conclude that this is neither a logical—nor grammatically-correct—reading of the statute. The phrase "arising from" simply acknowledges there must ordinarily be a causal nexus between the contractor's conduct in performing a TxDOT project—whether ongoing or completed—and the injury claimed. *See Delaney v. Univ. of Houston*, 835 S.W.2d 56, 59 (Tex. 1992) (discussing "arising out of" and "arises from" as requiring a nexus). Without this clause, for example, a contractor in compliance with a TxDOT contract anywhere in the state might assert a section 97.002 defense against a claim for personal injury it caused under circumstances unrelated to its TxDOT project. Stated differently, a contractor's mere following of contract terms does not shield it from potential liability arising out of events completely unrelated to the work at issue.

Navarrette's interpretation would require that we determine the term "performance" has a present temporal effect. But the ordinary, common meaning of the term "performance" has no such limitation and may, in certain contexts, refer to past, future, or present performance. *See Liberty Surplus Ins. Corp. v. Exxon Mobil Corp.*, 483 S.W.3d 96, 104 n.5 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *see* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 920 (11th ed. 2014) (defining "performance" as "the execution of an action" or "something accomplished"). Consequently, as appearing in section 97.002, we conclude the term "performance" encompasses both ongoing and completed construction.

If the Legislature had intended this portion of the statute to impose a temporal limitation to the immunity it provides, it could have easily done so. For example, the immunity would have clearly been limited to active construction zones if this portion of the statute read, "arising *while performing* the construction or repair . . . ." As Horner points out, the Legislature commonly does just that. *See, e.g.*, TEX. GOV'T CODE ANN. § 659.061 ("[A] state agency may . . . spend appropriated funds to pay for . . . expenses of an employee . . . who is injured or killed *while engaged in the performance* of a necessary governmental function assigned to the employee . . . ." (emphasis added)).

Similarly, the Legislature could have limited section 97.002 immunity to completed construction projects only by using the language "arising from *completed* construction or repair." But here, the Legislature chose language that had no inherent temporal limitation, and we determine that this choice demonstrates the Legislature's intent that the immunity provided encompasses ongoing and completed construction projects.

Navarrette further argues that, if this portion of the statute contains no temporal limitation, the words "performance of" are superfluous and have no meaning; Navarrette argues that the same purpose would have been accomplished if the statute simply read, "arising from the construction or repair." We disagree. There could be injuries arising from the performance of the construction or repair, which are not necessarily related to the contractor's road construction or repair.

Based on its plain text, the statute applies only to those claims arising from the performance of the construction or repair where it is additionally shown that, at the time of the injury, the contractor was in compliance with contract documents material to the condition or defect that proximately caused the personal injury. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 97.002. As with most claims, a nexus is ordinarily required between the performance of the construction or repair and the injury claimed. Here, Navarrette claims his injury occurred because of an allegedly

dangerous condition or defect—that is, the condition or defect of "a 3½ or 4 feet opening" appearing between the ramp and the overpass, the condition or defect of a lack of rails to prevent falls, the condition or defect of the failure to adequately warn that falls could occur, or any combination of such. For section 97.002 to apply such as to limit a contractor's liability, however, the contractor must otherwise establish it remained in compliance with TxDOT's contractual terms at the time the injury occurred.

Giving the plain language of the statute its ordinary meaning, and considering the text as a whole, we conclude the phrase "arising from the performance of the construction" does not limit section 97.002's application only to those cases in which an injury is sustained during ongoing highway construction or repairs.

C. The condition under which § 97.002 applies

The remainder of the text provides the crucial condition under which the statute applies, and in doing so, further reveals the Legislature's intent. The contractor is only shielded from liability "if, at the time of the personal injury . . . the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury . . . ." *Id.* § 97.002.

The words "at the time of the injury" are the only words in section 97.002 that indicate any temporal link between two events, however the two events that must be linked temporally are not—as Navarrette argues—active construction and the injury. The two events that must be linked temporally in order for the statute to provide a shield from liability are the injury and the contractor's status as being in compliance with contract documents relevant to the condition or defect a plaintiff alleges as a cause of the claimed injury. Stated differently, this clause in its entirety states the condition under which the statute applies—that the contractor is in compliance with the contract—and assigns a point in time when the contractor's compliance is evaluated: the

time of the injury. As Horner points out, simply because it had completed active construction does not mean Horner was no longer in compliance with the contract, or that its compliance with the contract cannot be determined at some later date. Such might be the case if a plaintiff was injured due to a crumbling road and it came to light that the contractor breached the construction contract by using inadequate materials or failing to include sufficient support for a road.

A number of opinions have detailed the ordinary business relationship between TxDOT and highway contractors. In Texas, highway contractors such as Horner have no discretion to deviate from the design plans provided in their contract with TxDOT. *See Brown*, 500 S.W.3d at 511 (quoting *APAC-Texas, Inc. v. Beasley*, No. 09-13-00390-CV, 2014 WL 887266, at *2 (Tex. App.—Beaumont Mar. 6, 2014, no pet.) (mem. op.). Highway contractors have no discretion to deviate even when the plans "may be inadequate or flawed to such a degree as to . . . cause harm or damage to some person or some property." *Beasley*, 2014 WL 887266, at *2. Highway contractors are simply hired to execute the design plans provided by TxDOT. *See id.* Given the relationship between TxDOT and its highway contractors, it makes sense that the Legislature chose to shield a contractor from liability for injuries arising from an alleged defect when—and only when—the contractor performed its work pursuant to TxDOT's specifications. But we determine that nothing in this conditional language makes a distinction between the time period of active construction and after construction is completed. It is clear from the language of section 97.002, when read in its entirety, that the Legislature enacted the statute to shield contractors who construct or repair highways for TxDOT from liability in situations where it is affirmatively shown that the contractors complied with TxDOT specifications over which they had no control. In other words, when it is shown that highway construction for TxDOT is completed in compliance with TxDOT's requirements, we find no textual basis to conclude that the Legislature only granted protection to contractors contemporaneously with the period of active construction.

The dissent argues that this interpretation would allow contractors to escape liability forever upon project completion. Yet, we do not construe section 97.002 to provide a complete limit of liability against contractors in all situations, or even those in which injuries occur after the contractor's completion of a roadway. As stated above, the statute contains an important limitation on a highway contractor's defense: it must have performed its construction or repair in compliance with contract documents. We recognize the possibility that a contractor's non-compliance with TxDOT's specifications might only be discovered after the completion of its highway work and even after the project's acceptance by TxDOT. Nothing in this opinion should be interpreted to address whether a plaintiff could raise a genuine issue of material fact on a contractor's compliance after the project was accepted by TxDOT.

Because TxDOT designed this project and required Horner to perform its work pursuant to contract terms, and because Navarrette did not challenge or otherwise dispute that Horner's work complied with those terms, we determine that section 97.002's conditional pre-requisite was met. For these reasons, we disagree with Navarrette's proposed interpretation of the statute's text. Section 97.002 applies alike whether contractors have ongoing projects or have ultimately completed their work, so long as that work complies with the TxDOT contract. Whether a contractor may be held liable for personal injury, property damage, or death arising from the performance of the contractor's construction or repair of a highway, road, or street for TxDOT, does not hinge on whether the work is ongoing or completed. Instead, the liability depends on whether, at the time of the personal injury, property damage, or death, the contractor is in compliance with its contract documents which were material to the condition or defect that was the alleged proximate cause of the personal injury, property damage, or death. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 97.002. Since it is undisputed that (1) Horner qualifies as a contractor who performed work on a roadway for TxDOT, and (2) it was in compliance with TxDOT's contract

documents material to the condition or defect that allegedly caused the personal injury at issue—at the time of such injury—we hold that Horner has conclusively established its no liability defense as a matter of law. *See id.* § 97.002; *see also Brown*, 500 S.W.3d at 511, 513-15 (summary judgment in favor of contractor invoking section 97.002 was appropriate where there was no genuine issue of material fact regarding whether the contractor's work on a TxDOT roadway was in compliance with TxDOT's contract materials relevant to the claimant's injury). Accordingly, we conclude the trial court erred in denying Horner's motion for summary judgment. Horner's sole issue on appeal is sustained.

CONCLUSION

Having sustained Horner's sole issue, we reverse the trial court's order denying Horner's motion for summary judgment and render a take-nothing judgment in favor of Horner.

GINA M. PALAFOX, Justice

November 18, 2022

Before Rodriguez, C.J., Palafox, J., and McClure, C.J. (Senior Judge)
Rodriguez, C.J., dissenting
McClure, C.J. (Senior Judge), sitting by assignment