Opinion issued August 16, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00482-CV

BROOKS BRAZDA, Appellant

V.

SURETEC INSURANCE COMPANY, Appellee

On Appeal from the Probate Court No. 3
Harris County, Texas
Trial Court Case No. 413,348-402

MEMORANDUM OPINION

Having obtained an award of statutory penalties against the administrator of his father's estate, Brooks Brazda sued the administrator's surety, SureTec Insurance Company, to recover the penalty. SureTec moved for traditional summary judgment on his claim, arguing, among other things, that permitting

recovery against it without notice of the proceeding against the administrator would violate its due process rights and that its bond did not cover the type of penalty assessed against the administrator. The trial court granted SureTec summary judgment without specifying the basis for its ruling, and Brazda appealed. In six issues, Brazda challenges all grounds for summary judgment raised in SureTec's motion.

We affirm.

Background

Brooks Brazda's father died. The probate court designated Keith Morris the dependent administrator[1] of the estate. SureTec issued a surety bond to "Keith Morris, Principal" on the condition that Morris "shall well and truly, faithfully perform all the duties required of him under said appointment" as dependent administrator.

Along the way, the probate court ordered Morris to make a partial distribution from the estate to Brazda and his brother. Almost six months later, Brazda sent a demand letter for the funds. Next, Brazda requested the probate court to compel Morris to either distribute the funds or show good cause for failing to do

[1] *See Administrator*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A person appointed by the court to manage the assets and liabilities of an intestate decedent."); *see also Eastland v. Eastland*, 273 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (explaining that dependent administrators are more closely supervised by the probate court and require court permission for more activities).

so. In connection with the show-cause application, Brazda sought a statutory penalty under Section 360.301 of the Estates Code, alleging that Morris negligently failed to timely distribute funds as ordered. Section 360.301 refers to the statutory penalty as "damages." TEX. EST. CODE § 360.301(d). The court scheduled a show-cause hearing.

Morris did not appear. One day later, Morris filed a response to Brazda's application, arguing that the delay was because Brazda and his brother did not timely sign necessary documents. Morris's response was not verified.

A week later, the probate court found that "Keith Morris, individually, is personally liable to Applicant for damages as directed by Texas Estates Code § 360.301(d)." Morris moved for reconsideration. At a hearing, the court stated it would alter its sanction order, but it failed to do so before losing plenary power.[2] Meanwhile, Morris released the funds Brazda and his brother were due.

With a final order holding Morris liable for statutory penalties, Brazda sued Morris's surety, SureTec, to recover on Morris's bond and for attorney's fees. SureTec moved for traditional summary judgment, and the trial court granted a

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[2] In a 2019 opinion, this Court ruled that the sanction order was a final, appealable order and that subsequent efforts by the probate court to revise its order were null, given that the probate court had lost plenary power before any revisions were made. *See Est. of Brazda*, 582 S.W.3d 717, 728–29 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

take-nothing judgment against Brazda without specifying the basis for its ruling. After the court denied Brazda's motion for new trial, Brazda appealed.

Summary Judgment for Surety

The probate court granted SureTec's traditional summary-judgment motion.

A. Standard of review

We review the trial court's traditional summary judgment de novo. *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009). The standard of review for a traditional summary judgment is well established: (1) the movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to summary judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in the nonmovant's favor. *See, e.g.*, *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *Richards v. Transocean*, 333 S.W.3d 326, 331 n.5 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

Our review involves interpretation of the surety bond. To that end, we apply ordinary principles of contract interpretation. *See, e.g.*, *N. & W. Ins. Co. v. Sentinel Inv. Grp., LLC*, 419 S.W.3d 534, 538 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

Likewise, our review of the relevant Estates Code provisions involves ordinary statutory interpretation. *See Est. of Padilla v. Charter Oaks Fire Ins. Co.*, 843 S.W.2d 196, 198 (Tex. App.—Dallas 1992, writ denied). Because it is the Legislature's prerogative to enact statutes, our primary goal is to carry out the Legislature's intent. *See Rodriguez v. Doe*, 614 S.W.3d 380, 383 (Tex. App.—Houston [14th Dist.] 2020, no pet.). We interpret statutes based on the plain language chosen by the Legislature, unless the surrounding context reflects the Legislature intended a different meaning, or the application of the plain language would yield absurd or nonsensical results that the Legislature could not have intended. *Id.* When the statutory text is clear, the text alone resolves the Legislature's intent. *Brazos Elec. Power Coop. v. Tex. Comm'n on Envt'l Quality*, 576 S.W.3d 374, 384 (Tex. 2019).

We accord a statute's terms their common, ordinary meaning unless the Legislature has defined a term, a term has a technical meaning, or a term bears another meaning when read in context. *See id.* We do not interpret statutory words and phrases in isolation. *Worsdale v. City of Killeen*, 578 S.W.3d 57, 69 (Tex. 2019). We consider the statutory framework in which the individual provisions are found. *See id.*; *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

We cannot rewrite a statute in the guise of interpreting it. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 492 (Tex. 2017). We cannot add to or subtract from the statutory language or interpret the meaning of its terms in a way that makes them meaningless or superfluous. *See Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019); *Brazos Elec. Power Coop.*, 576 S.W.3d at 384; *Gunn v. McCoy*, 554 S.W.3d 645, 672 (Tex. 2018). It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose, and each sentence, clause, and word is to be given effect if reasonable and possible. *See Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (citing *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963)). Likewise, every word excluded from a statute must also be presumed to have been excluded for a purpose. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

B. SureTec's due process argument based on lack of notice of Brazda's suit against Morris

SureTec's summary-judgment motion makes a due process argument that the judgment against Morris does not bind it because Brazda failed to give SureTec notice of the show-cause hearing. The parties agree that whether the judgment against Morris is conclusive against SureTec depends on the type of bond SureTec maintained with Morris: a judgment bond would make the judgment against Morris conclusive against SureTec, while a general undertaking bond would not.

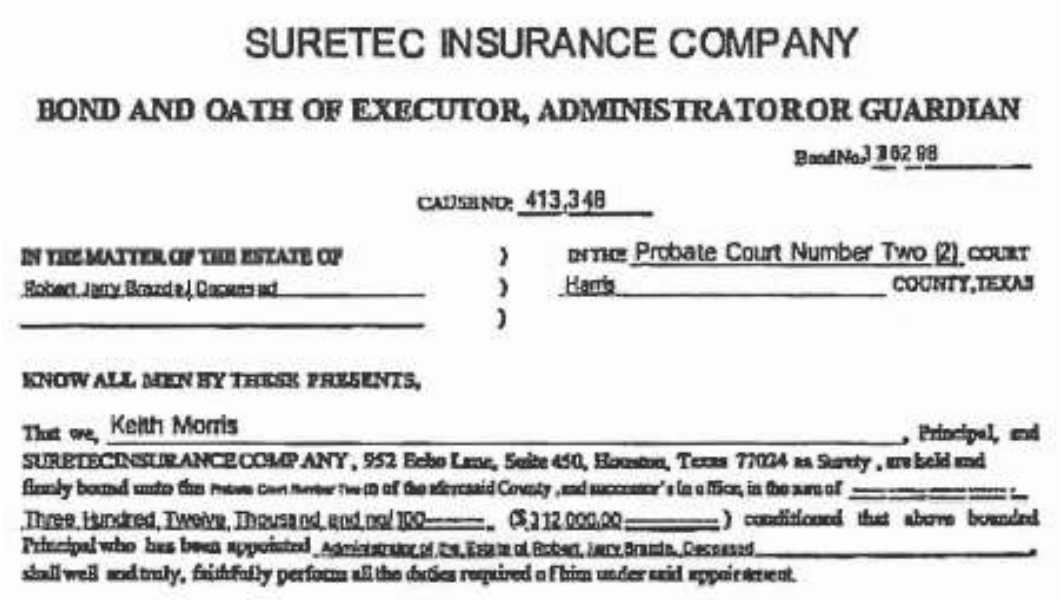
"A judgment bond is one in which the surety agrees to be liable for a judgment based on a specific statutory violation covered by the bond." *S. Ins. Co. v. ADESA Austin*, 239 S.W.3d 423, 427 (Tex. App.—Dallas 2007, no pet.); *Lawyers Sur. Corp. v. Riverbend Bank, N.A.*, 966 S.W.2d 182, 188 (Tex. App.—Fort Worth 1998, no pet.). The bond does not have to include the word *judgment* to be a judgment bond. For example, a surety bond that provided that a surety would be bound to pay if someone "establishes liability" is a judgment bond. *Howze v. Sur. Corp. of Am.*, 584 S.W.2d 263, 265 (Tex. 1979).

When a surety enters into a judgment bond, no notice of the hearing or trial to determine the principal's liability is required for the judgment against the principal to be conclusive as to the surety's liability. *See id.* The surety is bound regardless of notice or default, absent proof of collusion or fraud. *Id.* at 265–66; *Old Republic Sur. Co. v. Bonham State Bank*, 172 S.W.3d 210, 214 (Tex. App.—Texarkana 2005, no pet.). "The idea that it is unnecessary to provide notice to a surety who furnished a particular judgment bond is based on the notion that any notice would be redundant because the surety agreed to be liable for specifically enumerated acts of the principal." *Hartford Cas. Ins. Co. v. State*, 159 S.W.3d 212, 219 (Tex. App.—Austin 2005, pet. denied). "A surety who furnishes this type of bond can and should adjust the premiums based on the principal's potential liability for those specific acts." *Id.*

The only other type of bond is a general undertaking bond. A surety's general undertaking bond does not contract to bind the surety to a particular judgment; it promises to be generally liable for the undertakings of the principal. *See Bonham State Bank*, 172 S.W.3d at 214; *Old Republic Sur. Co. v. Reyes*, No. 05-01-01881-CV, 2002 WL 1772976, at *2 (Tex. App.—Dallas Aug. 2, 2002, pet. denied) (mem. op., not designated for publication); *Browne v. French*, 22 S.W. 581, 583 (Tex. Civ. App. 1893, no writ).

A judgment against a principal that is a party to a general undertaking bond does not bind the surety without notice. *See Howze*, 585 S.W.2d at 265; *Bonham State Bank*, 172 S.W.3d at 214. Instead, it "creates a prima facie liability against the surety who was not made a party or given an opportunity to defend the underlying suit, and the surety will be permitted to assert any valid defense which the principal could have asserted." *Bonham State Bank*, 172 S.W.3d at 214 (citing *Howze*, 584 S.W.2d at 265).

SureTec's bond with Morris does not mention any future judgment or the establishment of liability. It merely conditions the bond on the principal's performance of all duties as administrator of the referenced estate:



SURETEC INSURANCE COMPANY

BOND AND OATH OF EXECUTOR, ADMINISTRATOR OR GUARDIAN

Bond No. 362 98

CAUSE NO. 413,348

IN THE MATTER OF THE ESTATE OF
Robert Jerry Brandt, Deceased

IN THE Probate Court Number Two (2) COURT
Harris COUNTY, TEXAS

KNOW ALL MEN BY THESE PRESENTS,

That we, Keith Morris, Principal, and SURETEC INSURANCE COMPANY, 952 Echo Lane, Suite 450, Houston, Texas 77024 as Surety, are held and firmly bound unto the Probate Court Number Two (2) of the aforesaid County, and successor's in office, in the sum of Three Hundred, Twelve, Thousand, and no/100 ($312,000.00) conditioned that above bounded Principal who has been appointed Administrator of the Estate of Robert Jerry Brandt, Deceased shall well and truly, faithfully perform all the duties required of Him under said appointment.

The bond is conditioned on Morris "well and truly, faithfully perform[ing] all the duties required of him" as administrator.

Generally, a surety's liability is determined by the language of the bond. *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992). But where a statute mandates a bond, the statute is made part of the bond contract and is controlling. *See Davis v. First Indem. of Am. Ins. Co.*, 56 S.W.3d 106, 111 (Tex. App.—Amarillo 2001, no pet.); *see also Geters*, 834 S.W.2d at 50; *Globe Indem. Co. v. Barnes*, 288 S.W. 121, 122 (Tex. Comm'n App. 1926, judgmt adopted) ("It is well settled that, where a bond is executed with the intention upon the part of all parties to comply with the requirements of a statute, the terms of such statute will become a part of such obligation, by incorporation as it were, even though the bond itself otherwise be silent as to the statutory obligation."); *cf. Dallas Postal Credit Union v. Southtrust Bank Nat'l Ass'n*, No. 05-00-00137-CV, 2001 WL 804467, at *3

(Tex. App.—Dallas July 18, 2001, no pet.) (mem. op., not designated for publication) (in case involving statutory dealer bond where bond and statute both provide for surety to be liable for judgments, concluding that bond was judgment bond).

The statute here, Section 360.301, omits any reference to a surety being liable for a statutory penalty imposed on an administrator for failing to perform the duties required. *See* TEX. EST. CODE § 360.301; *see also Dallas Postal Credit Union*, 2001 WL 804467, at *3.

We conclude that SureTec's bond with Morris is a general undertaking bond, not a judgment bond. The bond does not mention the establishment of liability or judgments. Nor does the statute that makes an administrator liable for failing to deliver estate property mention surety liability on a bond. Because this is a general undertaking bond, due process requires that SureTec not be bound by the judgment against the principal without notice. *Howze*, 584 S.W.2d at 265; *Bonham State Bank*, 172 S.W.3d at 214. In a suit by Brazda to collect on the bond, SureTec may present any defenses available at the time of judgment against Morris. *See Howze*, 584 S.W.2d at 265; *Bonham State Bank*, 172 S.W.3d at 214.

Having the ability to assert a defense to liability does not entitle the surety to a traditional summary judgment on the singular argument that the surety did not receive notice. *See Browne*, 22 S.W. at 852 (stating that, when surety is sought to

be made liable on general undertaking bond, he is "permitted to interpose any valid defense that would defeat the plaintiff's case existing at the time the judgment was obtained" against principal). An actual defense is required. And that defense must be established to warrant a traditional summary judgment in the surety's favor. *See Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999).

Here, SureTec argued that the lack of due process defeated Brazda's claim as a matter of law. But it does not; it only alters the evidentiary weight given to the judgment against Morris. *See Bonham State Bank*, 172 S.W.3d at 214 & n.2; *Paulk*, 15 S.W.2d at 104. Because SureTec did not receive due process, the judgment against Morris is reduced from conclusive evidence of SureTec's liability to prima facie evidence. *See Bonham State Bank*, 172 S.W.3d at 214 & n.2; *Paulk*, 15 S.W.2d at 104. It remains evidence. *Paulk*, 15 S.W.2d at 104. SureTec is not entitled to traditional summary judgment on this argument without also supplying a defense to liability. *See id.* SureTec still must establish that it is entitled to judgment as a matter of law. *See id.*

C. SureTec's defenses to liability

SureTec argues multiple defenses to liability. Because it is dispositive, we begin with whether Section 360.301 authorizes recovery of a statutory penalty against a surety on an administrator's bond.

SureTec contends that the statutory provision that permits the probate court to impose a penalty on an administrator for neglect in delivering property does not mention liability of a surety while other statutory provisions explicitly state that a surety also may be held liable on its bond. For example, for nonpayment of claims from estate funds, Section 355.113 permits the probate court to impose a penalty on an administrator and specifically permits the court to render judgment against the surety in favor of the claimholder for that penalty. TEX. EST. CODE § 355.113.

Likewise, a probate court may hold an administrator liable for neglecting to promptly deliver a deed. *Id.* § 356.559(a). The statute explicitly provides that the surety may be held liable on its bond for the administrator's failure. *Id.*

Finally, both the administrator and its surety may be liable for damages caused by the administrator's failure to give notice for presentment of claims. *Id.* § 308.056 (explicitly providing for surety liability on its bond).

The provision here, Section 360.301, only speaks to administrator liability, not surety liability. *Id.* § 360.301. It penalizes an administrator who neglects to deliver a portion of an estate when ordered to do so and the person entitled to it has demanded it. *Id.* A corollary provision allows a similar penalty at the end of the administration, if the administrator fails to deliver property of the estate "on the final settlement of an estate." *Id.* § 362.052. Neither of these two provisions

includes language to suggest that a surety may be held liable on the administrator's bond for the administrator's neglect. *Compare id.*, *with id.* § 355.113.

SureTec argues that ordinary principles of statutory construction require that a surety not be liable for a penalty under Section 360.301, which omits surety liability, given that other statutory provisions expressly provide for surety liability for an administrator's neglect. According to SureTec, the inclusion of terms to hold the surety liable in some sections but not in others reflects that the Legislature did not intend surety liability where it was not expressly included. SureTec asserts the statutory construction principle of *inclusion unius est exclusion alterius*[3] dictates this outcome.

Brazda responds with two arguments. First, he points to an older Texas Supreme Court case that discussed an earlier but substantially similar version of this same statute and argues that a surety would be liable on an administrator's bond for a statutory penalty imposed for failure to deliver a portion of an estate as ordered, under that authority. *See Stewart v. Morrison*, 17 S.W. 15 (Tex. 1891). There, two heirs successfully sued to collect a penalty when an administrator neglected to deliver estate property they were entitled to. *Id.* at 16. The surety appealed, arguing that the suit was premature. In deciding that it was not, the Court stated, in dicta, that the "duty of the administrator is plain. He must pay the heirs as

[3] This Latin phrase means "the inclusion of one thing suggests the exclusion of all others."

directed by the judgment, and, if he refuses to do so on demand, he violates his trust, and becomes liable on his bond." *Id.* The opinion reiterated that an administrator's failure to deliver a portion of the estate ordered to be delivered is remedied through a "suit upon his bond." *Id.*

The *Stewart* Court cited two statutory provisions. It cited both the statute allowing a statutory penalty for failing to deliver estate property—which is the statute at issue here—and the statute allowing a penalty for failure to pay a creditor. *Id.*[4] The first statute was silent on the issue of surety liability, while the second one expressly provided for it. *Id.* Thus, one of the statutory provisions the Court referenced explicitly allowed surety liability. Because *Stewart* linked surety liability to a statutory provision that expressly authorized it—which the provision at issue here does not—and because the statements quoted above were dicta unnecessary to the Court's holding that the heirs' suit was not premature, we are not bound by these statements.

We have found two other opinions that also discuss a surety being liable on its bond in the context of a legatee[5] or the legatee's assignee suing because the principal failed to distribute as ordered, both of which rely on *Stewart*. *See Ford v.*

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[4] *Stewart* cited article 2127, which is now Section 360.301 of the Estates Code, and article 2049, which is now Section 355.113 of the Estates Code.

[5] "Legatee includes a person who is entitled to a legacy under a will." TEX. EST. CODE § 22.021 (internal quotation marks in statutory definition omitted).

Wheat, 36 S.W.2d 712, 713 (Tex. Comm'n App. 1931, holding approved); *Cobb v. Speers*, 49 S.W. 666, 667 (Tex. Civ. App 1899, no writ). In one, the Texas Supreme Court adopted a holding of the Commission of Appeals that the statute of limitations had not run on a claim by an assignee of a legatee against an administrator and his bondsman for failing to distribute to residuary owners. *Ford*, 36 S.W.2d at 713. The opinion does not cite the provision at issue here to specify it was the source of the suit, and, as discussed, *Stewart* cited a provision that is not at issue here and that expressly provides for surety liability. *See id.* In another, an intermediate appellate court held that judgment for a legatee against an executor that was granted before the court ordered a distribution to the legatee was unauthorized and, in reaching that holding, cited *Stewart* for the idea that the legatee could sue on the bond once the executor failed to distribute as he had been ordered to do. *Cobb*, 49 S.W. at 667. We are not bound by that opinion.

We are not persuaded that *Stewart* or the two cases that follow it dictate the result of this appeal. The statements in *Stewart* were dicta and failed to distinguish the provision at issue from the one that expressly provided for surety liability. *Ford* is also distinguishable. And *Cobb* is not binding authority. Setting these opinions aside, we will engage in a traditional statutory construction analysis to determine whether the surety is liable for a Section 360.301 statutory penalty.

As mentioned, we may not add terms to statutory language. *See Silguero*, 579 S.W.3d at 59. Every word of a statute is presumed to have been used for a purpose. *See Del Indus.*, 35 S.W.3d at 593. And every word excluded from a statute is presumed to have been excluded for a purpose. *See Cameron*, 618 S.W.2d at 540. We are persuaded that the Legislature's specific provision for surety liability in some contexts but not in Section 360.301 conveys the Legislature's intent not to impose liability on a surety for a Section 360.301 penalty. *See, e.g.*, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (noting courts must enforce statutes as written and refrain from rewriting text that lawmakers chose).

That leads to Brazda's final argument, that the Legislature had no need to invoke surety liability in Section 360.301 because administrators owe duties to heirs but not to creditors. According to Brazda, the distinction between the two types of claimants requires reference to surety liability in provisions dealing with failure to deliver to a creditor to whom the administrator otherwise would have no duty but leaves it unnecessary in Section 360.301 to refer to surety liability because the administrator always owes a duty to heirs to whom a distribution is ordered.

We cannot agree that this distinction overcomes the statutory construction analysis above. Statutory penalties are due when an administrator fails to do as

ordered by the court. It is the administrator's failure of duty to the probate court that triggers the penalty, not the administrator's relationship to the claimant. *See* TEX. EST. CODE § 355.113 (imposing penalty when administrator fails to pay creditor who "the court orders to be paid"); *Est. of Brazda*, 582 S.W.3d 717, 726 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (stating that Section 360.301 "authorizes the filing of a cause of action, after demand, against an administrator guilty of neglecting to deliver estate property that has been ordered to be delivered to a person interested in the estate").

The failure might be in not delivering a portion of an estate to an heir after the court ordered the administrator to do so, as happened here, under Section 360.301. Or it could be in not making a payment to a creditor after the court ordered payment be made, under Section 355.113. Either way, it is the administrator's failure to comply with the court order that invokes the statutory penalties. The type of claimant being denied receipt of estate assets and the existence of a duty to that class of claimant does not support adding new language to a statute that the Legislature chose to omit. We fail to see how Brazda's argument that an administrator has a duty to heirs but not to creditors explains why the Legislature would have made the surety liable for statutory penalties in both contexts but only expressly state so in one.

We note that Section 351.003 allows certain costs and attorney's fees to be assessed against an administrator and his surety when an administrator neglects to perform a required duty. TEX. EST. CODE § 351.003. Section 351.003 applies to a Section 360.301 penalty claim. *See In re Est. of Hawkins*, 187 S.W.3d 182, 184–86 (Tex. App.—Fort Worth 2006, no pet.) (holding that court properly awarded attorney's fees under earlier version of Section 351.003 for violating earlier version of Section 360.301). "These costs are assessed against the administrator and the surety because of the inequities inherent in penalizing the estate for the administrator's negligence." *Lawyers Sur. Corp. v. Larson*, 869 S.W.2d 649, 652 (Tex. App.—Austin 1994, writ denied); *Fillion v. Osborne*, 585 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1979, no writ) ("[T]he purpose of the section is to insure that the estate will not be charged with fees or any costs which are incurred by reason of fault of the personal representative....").

We concede it may be unexpected that a surety would be liable for the costs and attorney's fees incurred to obtain compliance by the administrator yet not be liable for the underlying sanction imposed for the same conduct, but that appears to be the intent of the Legislature. Whether unexpected, it is not an absurd result to cause us to ignore the plain language of the statute. *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) (stating general rule to discern legislative intent from plain meaning of words chosen applies unless enforcing

plain language of statute as written would produce absurd results). We have found no explanation, in the statute or case law, for why this would be. But we conclude that this provision does not alter our analysis above. *See id.* We will not write "and his surety" into Section 360.301 where the Legislature chose to omit it.

Having determined that summary judgment was proper, we overrule Brazda's issues.

Conclusion

We affirm.

Sarah Beth Landau
Justice

Panel consists of Justices Landau, Guerra, and Farris.