Affirmed and Majority Dissenting Opinions filed October 31, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00599-CV

GERALD GODOY, Appellant

V.

WELLS FARGO BANK, N.A., Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2015-36417

D I S S E N T I N G O P I N I O N

More than seven decades ago in *Simpson v. McDonald*, the Supreme Court of Texas announced that an agreement made in advance to completely waive the statute of limitations is void as against Texas public policy.[1] For many years, intermediate courts of appeals, including this one, have followed this binding precedent.[2] In response to appellee Wells Fargo Bank, N.A.'s summary-judgment

[1] *See Simpson v. McDonald*, 179 S.W.2d 239, 242–43 (Tex. 1944).

[2] *See Segal v. Emmes Capital, L.L.C.,* 155 S.W.3d 267, 281 (Tex. App.—Houston [1st Dist.]

motion, appellant Gerald Godoy, citing this line of cases, asserted that the guaranty agreement is void as against public policy to the extent the parties agreed to a complete waiver of the statute of limitations. On appeal from the trial court's summary judgment in favor of the bank, Godoy again argues that the waiver of the statute of limitations in the guaranty agreement is void as against public policy under this line of cases.

The majority concludes that the language in the guaranty agreement suffices to completely waive the statute of limitations in Property Code section 51.003(a) and that this waiver does not violate public policy.[3] The Supreme Court of Texas has not abrogated its *Simpson* precedent or stated that an agreement made in advance to completely waive the statute of limitations does not violate Texas public policy. The Texas Legislature has not enacted a statute commanding Texas courts to enforce such agreements nor has the Texas Legislature otherwise superseded the *Simpson* precedent. Though the majority relies on the supreme court's opinion in *Moayedi v. Interstate 35/Chisam Road, L.P.*[4] and this court's opinion in *Grace Interest, LLC v. Wallis State Bank*,[5] neither of these cases support the notion that the *Simpson* precedent is no longer binding.[6] This court lacks the

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2004, pet. dismissed); *Duncan v. Lisenby*, 912 S.W.2d 857, 858–59 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Am. Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 177 (Tex. App.—Houston [14th Dist.] 1989, no writ); *Squyyres v. Christian*, 253 S.W.2d 470, 472 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.); *see also Lett v. Crown Cork & Seal Co.*, No. 3:14-CV-860-B, 2015 WL 505426, at *3, n. 2 (N.D. Tex. Feb. 5, 2015) (concluding that under Texas law a general agreement in advance to waive the statute of limitations completely is void as against public policy).

[3] *See ante* at 3–7, 10, n.1.

[4] *See Moayedi v. Interstate 35/Chisam Road, L.P.*, 438 S.W.3d 1, 1–8 (Tex. 2014).

[5] *See Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 126–27 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

[6] *See Moayedi*, 438 S.W.3d at 1–8; *Grace Interest, LLC*, 431 S.W.3d at 126–27.

power to abrogate high-court precedent.[7] We are duty-bound to follow *Simpson.*

The majority also concludes that Godoy waived his void-as-against-public-policy defense by failing to plead it.[8] Under binding precedent, Godoy did not have to plead this defense.[9] Even if he did have to plead it, Wells Fargo waived the complaint when the parties tried the issue by consent.[10]

This court should apply the *Simpson* precedent and reverse the trial court's summary judgment enforcing a waiver of the statute of limitations that violates public policy. Because the court fails to do so, I respectfully dissent.

The *Moayedi* court did not abrogate the *Simpson* precedent.

In the guaranty agreement, Godoy waived "any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law . . . (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations . . . ." The majority concludes that Godoy completely waived[11] the statute of limitations in Property Code section 51.003(a) under subsection (A) of this provision.[12] The majority

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[7] *See Lubbock Cty., Texas v. Trammel's Lubbock Bail Bonds,* 80 S.W.3d 580, 585 (Tex. 2002); *Auz v. Cisneros*, 477 S.W.3d 355, 360 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[8] *See ante* at 7–11.

[9] *See Phillips v. Phillips*, 820 S.W.2d 785, 789–90 (Tex. 1991).

[10] *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam); *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); *Danford Maint. Serv., Inc. v. Dow Chemical Co*., No. 14-12-00507-CV, 2013 WL 6388381, at *9 (Tex. App.—Houston [14th Dist.] Nov. 21, 2013, pet. denied) (mem. op.).

[11] In this opinion, the terms "complete waiver" or "completely waive" refer to a waiver under which no statute of limitations applies to the covered claims at all, thus allowing the claimant to sue at any time in the future, as opposed to a partial waiver extending the statute of limitations for a specific and reasonable period of time. *See Am. Alloy Steel, Inc.*, 777 S.W.2d at 177.

[12] *See ante* at 3–7. In concluding that Godoy waived Property Code section 51.003(a) under

states that in *Moayedi*, the Supreme Court of Texas "explicitly held that guaranty agreement language waiving 'any,' 'each,' or 'every' defense 'results in a broad waiver of *all possible defenses* under section 51.003."[13] Based on this reading, the majority concludes that this waiver is not void as against public policy.[14] Because *Moayedi* does not address the void-as-against-public policy issue, this court should apply the *Simpson* precedent and hold that the guaranty agreement is void as against public policy to the extent it contains a waiver of the statute of limitations in Texas Property Code section 51.003.[15]

Moayedi does not govern today's case. In *Moayedi*, a guarantor sought to

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subsection (A) of this provision, the majority fails to follow binding precedent under which this court must examine and consider the entire guaranty agreement in an effort to harmonize and give effect to all its provisions so that none are rendered meaningless. *See Exxon Corp. v. Emerald Oil & Gas Co*., 348 S.W.3d 194, 214–15 (Tex. 2011); *Wolf Hollow I, LP v. El Paso Mktg., LP*, 472 S.W.3d 325, 336–37 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Wolf Hollow I, LP v. El Paso Mktg., LP*, 329 S.W.3d 628, 636 (Tex. App.—Houston [14th Dist.] 2010), *rev'd & remanded on other grounds by*, 383 S.W.3d 138 (Tex. 2012). Under subsection (E), Godoy waives section 51.003(a) only if at the time the Lender sues Godoy, there is outstanding indebtedness of the borrower to the Lender which is not barred by any statute of limitations. If subsection (A) includes a waiver of section 51.003(a), then Godoy would completely waive section 51.003(a) even if there were no outstanding indebtedness of the borrower to the Lender not barred by limitations when the Lender sues Godoy, thus rendering the limitation in subsection (E) meaningless. The specific provision in subsection (E) should govern over the general provision in subsection (A), and this court should conclude that Godoy waived section 51.003(a) only under subsection (E) and only if there were outstanding indebtedness of the borrower to the Lender not barred by limitations when Wells Fargo sued Godoy. *See Exxon Corp.,* 348 S.W.3d at 214–15; *Wolf Hollow I, LP*, 472 S.W.3d at 336–37; *Wolf Hollow I, LP*, 329 S.W.3d at 640–42.

[13] *Ante* at 6 (quoting *Moayedi v. Interstate 35/Chisam Road, L.P*., 438 S.W.3d 1, 8 (Tex. 2014) (emphasis in original).

[14] *See ante* at 3–7, 10, n.1. The majority also concludes that Godoy waived his void-as-against-public-policy argument and that the majority need not address Godoy's argument that the waiver provision is void. *See ante* at 7–11. Yet, the majority also determines that "[t]he guaranty agreement is not illegal on its face because . . . its express waiver of all section 51.003 defenses 'does not violate public policy.'" *Ante* at 10, n.1. The majority also cites *Grace Interest, LLC v. Wallis State Bank* for the proposition that a provision under which a guarantor waives all defenses based upon section 51.003 is not void as against public policy. *See ante* at 7.

[15] *See Moayedi*, 438 S.W.3d at 4–8; *Simpson*, 179 S.W.2d at 242–43.

avoid liability by asking the court to apply an offset under Texas Property Code section 51.003(c); no party raised any issue regarding the statute of limitations.[16] The intermediate appellate court held that the guarantor waived the right to ask for an offset under section 51.003 because the guarantor signed an agreement that contained a general-waiver provision.[17] Before the Supreme Court of Texas, the guarantor argued that (1) he could not have waived his right to offset knowingly and intentionally because the general-waiver provision lacked specificity and (2) the general-waiver provision did not cover the offset provision under section 51.003(c) because that provision is not a defense.[18] The high court concluded that the right of offset was a defense covered by the general-waiver provision and that the provision waived the statutory defense of offset even though it contained general language.[19] The guarantor in *Moayedi* did not argue that the waiver provision was void as against public policy to the extent that it covered the statutory-offset right, and the *Moayedi* court did not address whether the waiver provision was void as against public policy under Texas common-law precedent.[20]

Although no party in *Moayedi* asserted that the provision could not be waived, before addressing whether the general-waiver provision waived the right of offset, the *Moayedi* court addressed whether a guarantor may waive "section 51.003."[21] The high court stated: "Whether [the guarantor] can waive section 51.003 is not disputed by the parties. And although this court has not addressed whether section 51.003 may be waived, other courts have consistently held so. We

[16] *See Moayedi*, 438 S.W.3d at 2–3.

[17] *See id.* at 3.

[18] *See id*.

[19] *See id.* at 5–8.

[20] *See id.* at 1–8.

[21] *See id.* at 6.

agree."[22]

A careful read of *Moayedi* reveals that the supreme court's conclusion in dicta that a party may waive "section 51.003" does not address whether a party's waiver of the statute of limitations in section 51.003(a) is void as against public policy. [23]

First, the cases with which the *Moayedi* court agreed — *LaSalle Bank National Association v. Sleutel*[24] and *Segal v. Emmes Capital, L.L.C.*[25] — relate only to the offset provision in section 51.003(c) and do not address the statute of limitations in section 51.003(a). In *LaSalle*, the Fifth Circuit addressed whether the Texas Legislature intended to allow parties to waive section 51.003(c)'s right of offset[26] and concluded that because the statute did not contain a provision prohibiting waiver, the Legislature did not insulate the right of offset under section 51.003(c) from waiver.[27] The Fifth Circuit rejected an argument that allowing waiver would frustrate the public-policy goals the Legislature sought to further in enacting section 51.003, concluding that the Legislature did not express any intent to shield the section from waiver for public-policy reasons.[28] In *LaSalle* the parties did not raise, and the court did not decide, whether an agreement waiving the offset right would be void as against public policy under the common law.[29]

Though the *Segal* court did conclude that an agreement waiving the offset

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[22] *Id*. (footnotes omitted).

[23] *See id.* at 1–8.

[24] 289 F.3d 837, 842 (5th Cir. 2002).

[25] 155 S.W.3d at 278.

[26] *See LaSalle*, 289 F.3d. at 839.

[27] *See id.* at 841.

[28] *See id*.

[29] *See id.* at 839–41.

right in 51.003(c) was not void as against public policy, in doing so the court noted that the appellants had cited no cases holding that such a waiver is void as against public policy, and the *Segal* court could not find any such cases.[30] In addition, the *Segal* court noted and approved of the *Simpson* line of cases holding that complete-waiver-of-statute-of-limitations agreements are void as against public policy, but the *Segal* court concluded that the analysis as to whether a waiver of the offset right in section 51.003(c) was void as against public policy was materially different.[31] The *Segal* court embraced the *Simpson* line of cases but reasoned that concluding that a waiver of section 51.003(c) was not void as against public policy did not conflict with the *Simpson* line of cases.[32] The *Segal* court addressed only section 51.003(c) and concluded that a waiver of the right under that provision is not void as against public policy even though a complete waiver of a statute of limitations is void as against public policy.[33] Thus, the *Moayedi* court's agreement with the analysis in *Segal* confirms that the *Moayedi* court's reference to "section 51.003" did not include the statute of limitations in section 51.003(a) and that the *Moayedi* court did not intend to abrogate *Simpson* and its progeny.[34] The supreme court's reasoning in *Moayedi* mirrors the Fifth Circuit's statutory-interpretation analysis in *LaSalle*.[35] The *Moayedi* court did not say whether waiver of any provision within section 51.003 could be void as against public policy.[36] Nor has the supreme court cited *Moayedi* as holding that a waiver of a right under section

[30] *See Segal*, 155 S.W.3d at 278–81.

[31] *See id*. at 280–81.

[32] *See id*.

[33] *See id*. at 278–81.

[34] *See id*.

[35] *Compare Moayedi*, 438 S.W.3d at 6 *with LaSalle*, 289 F.3d at 840–41.

[36] *See Moayedi*, 438 S.W.3d at 4–8.

51.003 is not void as against public policy.

In addition, the *Moayedi* court stated that it had not yet addressed whether section 15.003 could be waived.[37] But, in *Simpson v. McDonald* — decided seven decades earlier — the high court held that agreements in advance to waive a statute of limitations altogether — which would include the statute of limitations in section 15.003(a) — are void as against Texas public policy.[38] Because the high court already had held that a waiver of the statute of limitations is void as against public policy, the *Moayedi* court's statement that it had not yet addressed whether section 15.003 could be waived confirms that the *Moayedi* court did not intend to address whether an agreement to completely waive the statute of limitations under section 15.003(a) is void as against public policy.[39]

Furthermore, the *Moayedi* court's statements are not necessary to the court's holding, and the court did not speak after considering whether an agreement to completely waive the statute of limitations under section 15.003(a) is void as against public policy.[40] The *Moayedi* court did not deliberately abrogate the *Simpson* precedent as to section 15.003(a) or deliberately determine that an agreement to completely waive section 15.003(a) is not void.[41] Thus, as to the issue before this court today, these statements by the *Moayedi* court are nonbinding obiter dicta and not binding judicial dicta.[42]

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[37] *See Moayedi*, 438 S.W.3d at 6.

[38] *See Simpson*, S.W.2d at 243.

[39] *See Moayedi*, 438 S.W.3d at 6.

[40] *See id*. at 4–8.

[41] *See id*.

[42] *See State v. PR Investments*, 180 S.W.3d 654, 667 n. 13 (Tex. App.—Houston [14th Dist.] 2005) (en banc), *aff'd,* 251 S.W.3d 472 (Tex. 2008); *Edwards v. Kaye*, 9 S.W.3d 310, 314 (Tex. App–Houston [14th Dist.] 1999, pet. denied).

A higher court's holdings and judicial dicta remain binding precedent on lower courts until the higher court sees fit to reconsider them, even if later cases have raised doubts about their continuing vitality.[43] Generally, the Supreme Court of Texas adheres to its precedents for reasons of efficiency, fairness, and legitimacy.[44] If the high court did not follow its own decisions, no issue ever could be considered resolved.[45] The doctrine of stare decisis is a sound policy, and before abrogating a prior precedent, the high court gives due consideration to the settled expectations of litigants who justifiably have relied on the principles articulated in in that precedent.[46] Litigants have been relying on the *Simpson* precedent for more than seventy years, and this court should not conclude that the *Moayedi* court abrogated *Simpson* absent compelling evidence in the text of the *Moayedi* opinion that the high court intended to step away from this longstanding precedent.[47] Nothing on the face of the *Moayedi* opinion suggests the supreme court was undertaking to abrogate its established precedent or make a sweeping change in Texas jurisprudence.[48]

The *Simpson* precedent reflects the majority position nationwide.[49] The Appellate Court of Connecticut has explained that the majority view fosters "the public policy of allowing people, after the lapse of a reasonable time, to plan their affairs with a degree of certainty," "promotes repose by giving stability and

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[43] *See Bosse v. Oklahoma*, —U.S.—,—, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016).

[44] *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995).

[45] *Id*.

[46] *Id*.

[47] *See id.; see also Quill Corp. v. North Dakota*, 504 U.S. 298, 321, 112 S.Ct. 1904, 1916, 119 L.Ed.2d 91 (1992) (J. Scalia, concurring) ("[R]eliance on a square, unabandoned holding of the Supreme Court is *always* justifiable reliance. . . .").

[48] *See Moayedi*, 438 S.W.3d at 4–8.

[49] *See Haggerty v. Williams*, 855 A.2d 264, 268 (Conn. Ct. App. 2004).

security to human affairs" and avoids the difficulty older lawsuits bring in "proof and record keeping."[50] These salutary benefits also undergird Texas public policy. The Connecticut court concluded that a statute-of-limitations defense expresses a societal interest of giving repose to human affairs and involves a combination of private and public interests.[51] A complete waiver of a statute of limitations adversely affects third-party rights that depend on the resolution of the claims that may be brought at any time in perpetuity if no statute of limitations applies.[52]

The *Moayedi* court did not abrogate the *Simpson* precedent. Instead of yielding to the tug of the obiter dicta in *Moayedi*, this court should anchor its holding on the supreme court's decades-old precedent in *Simpson.*

Grace Interest **does not abrogate or conflict with** ***Simpson.***

The majority relies upon this court's opinion in *Grace Interest, LLC v. Wallis State Bank* as support for its conclusion that "[t]he guaranty agreement is not illegal on its face because . . . its express waiver of all section 51.003 defenses 'does not violate public policy.'"[53] The majority also cites *Grace Interest* for the proposition that a provision under which a guarantor waives all defenses based upon section 51.003 is not void as against public policy.[54] The *Grace Interest* court cited *Segal*,[55] *LaSalle*,[56] and the court-of-appeals opinion in *Moayedi*[57] and

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[50] *See id.* at 268.

[51] *See id.*

[52] *See id.*

[53] *Ante* at 10, n.1.

[54] *See ante* at 7.

[55] *See Segal,* 155 S.W.3d at 279–81.

[56] *See LaSalle*, 289 F.3d 837, 842 (5th Cir. 2002).

[57] *See Moayedi v. Interstate 35/Chisam Road, L.P.*, 377 S.W.3d 791, 801 (Tex. App.—Dallas 2012), *aff'd*, 438 S.W.3d 1 (Tex. 2014).

held that a waiver of the offset provision in section 51.003(c) did not violate public policy.[58] No party asserted a statute-of-limitations defense in the *Grace Interest* case.[59] Because the statements the majority cites from *Grace Interest* were not necessary to the court's holding, they are nonbinding obiter dicta.[60] Breath spent repeating an obiter dictum does not infuse it with life.[61]

The majority presents a bouquet of obiter dicta from section 51.003(c) cases and not a single holding from a statute-of-limitations case or one interpreting section 51.003(a). The majority's repetition of obiter dicta indicating that a waiver of section 51.003(a) does not violate public policy neither gives precedential force to the obiter dicta nor removes our obligation to follow the binding precedent in *Simpson*.[62]

Even if the *Grace Interest* court's statements were holdings, the *Grace Interest* court did not purport to construe, apply, or distinguish *Simpson*, so this panel would be bound to follow *Simpson* rather than *Grace Interest.*[63] As an intermediate court, our role is to apply supreme-court precedent, not to abrogate or modify it.[64]

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[58] *See Grace Interest, LLC*, 431 S.W.3d at 126–27.

[59] *See id*. at 118–20, 128.

[60] *See Edwards,* 9 S.W.3d at 314.

[61] *See Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300, 115 S. Ct. 2144, 2149, 132 L.Ed.2d 226 (1995).

[62] *See id*.; *Air Routing Intern. Corp. v. Britannia Airways, Ltd*., 150 S.W.3d 682, 692–93 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

[63] *See Glassman v. Goodfriend*, 347 S.W.3d 772, 781 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc) (explaining that a panel of this court is not bound by a prior holding of another panel of this court if the prior holding conflicts with a decision from a higher court that is on point).

[64] *See Lubbock Cnty., Texas*, 80 S.W.3d at 585; *Auz*, 477 S.W.3d at 360.

Godoy did not have to plead his void-as-against-public-policy defense.

In addition to concluding that the waiver of section 51.003(a) in the guaranty agreement does not violate public policy, the majority concludes that Godoy waived his void-as-against-public-policy defense by failing to plead it.[65] In its summary-judgment motion Wells Fargo asserted that Godoy agreed in advance to waive the statute of limitations that Godoy asserted against Wells Fargo's claim. In his response, Godoy argued that the guaranty agreement is void as against public policy to the extent it contains an agreement — made in advance — to generally waive the statute of limitations (the "Public Policy Argument"). Though Godoy raised this issue in his summary-judgment response, he did not plead it in his answer. The majority concludes that Texas procedure required Godoy to affirmatively plead the Public Policy Argument in his answer.[66]

A defendant's assertion that part of an agreement is void because it violates public policy ordinarily would be a matter constituting an avoidance or affirmative defense that the defendant would have to plead in the answer.[67] But, a defendant need not plead that part of an agreement is void as against public policy if the defense is apparent on the face of the petition and established as a matter of law (the "Facial Exception").[68] The Public Policy Argument falls within the Facial Exception.

As a matter of law in Texas, an agreement made in advance to completely waive the statute of limitations is void as against Texas public policy.[69] In its live

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[65] *See ante* at 7–11.

[66] *See id*.

[67] *See* Tex. R. Civ. P. 94; *Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991).

[68] *See Phillips*, 820 S.W.2d at 789.

[69] *See Simpson*, 179 S.W.2d at 242–43.

petition, Wells Fargo expressly asserted that Godoy waived any statute-of-limitations defense he may have had to the enforcement of the guaranty agreement, as set forth in the guaranty agreement itself, which Wells Fargo attached to and made a part of its petition. Under the guaranty agreement's unambiguous language, as reflected on the face of the petition — in subsection (E) of the agreement — Godoy agreed in advance to completely waive the statute of limitations.[70] Because the void-as-against-public-policy defense appears on the face of the petition and is established as a matter of law, Godoy satisfied the Facial Exception under the Supreme Court of Texas's precedent in *Phillips v. Phillips.*[71] So, Godoy did not have to plead this defense in his answer.

The majority says that this dissent "invokes *Phillips v. Phillips* for the propositions that no affirmative pleading was necessary because (1) Wells Fargo pleaded an agreement that is illegal on its face and thereby anticipated Godoy's challenge to the guaranty agreement's waiver provision; and (2) courts will not enforce a plainly illegal contract even if the parties do not object."[72] Rather than invoke this high-court precedent for these two propositions, this dissent invokes *Phillips v. Phillips* for the Facial Exception — the rule that a defendant need not plead that part of an agreement is void as against public policy if the defense is apparent on the face of the petition and established as a matter of law.[73] The presence of the two noted propositions in the *Phillips* opinion does not limit the application of that case to situations in which the entire agreement is illegal.[74] The *Phillips* court cited these two principles as rationales that support the *Phillips*

[70] *See id*. This point is also addressed in footnote 12 of this opinion.

[71] *See Phillips*, 820 S.W.2d at 789–90.

[72] *Ante* at 8.

[73] *See Phillips*, 820 S.W.2d at 789.

[74] *See id*. at 789–90.

court's conclusion that the defendant in that case did not need to plead that a liquidated-damages provision was a penalty because that defense was apparent on the face of the petition and established as a matter of law.[75]

In *Phillips*, the defendant asserted that a liquidated-damages provision in a partnership agreement was an unenforceable penalty; the defendant did not assert that the entire agreement was void, unenforceable, illegal, or against public policy.[76] The *Phillips* court concluded that under a line of high-court authority, there was an exception to Texas Rule of Civil Procedure 94 under which a defendant need not plead the affirmative defense of illegality if the illegal nature of the document is apparent from the plaintiff's pleadings.[77] The *Phillips* court extended this exception by holding that a defendant need not plead that a liquidated-damages provision is a penalty if this defense is apparent from the face of the plaintiff's petition and is established as a matter of law.[78] The *Phillips* court reasoned that a defendant need not plead penalty under such circumstances, just as a defendant need not plead illegality under such circumstances, because enforcement of a penalty violates public policy just as enforcement of an illegal contract violates public policy.[79] Thus, under *Phillips*, a defendant need not plead that part of an agreement is void as against public policy if the defense is apparent on the face of the petition and established as a matter of law.[80]

The majority also indicates that the Facial Exception applies only if the

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[75] *See id.* at 789 (stating "[t]wo principles support this exception to the general rule that affirmative defenses are waived if not pleaded.")

[76] *See id*. at 787–89.

[77] *See id*. at 789.

[78] *See id*.

[79] *See id*. at 789–90.

[80] *See id*.

defense would void the entire agreement.[81] The majority suggests that, because the guaranty agreement contains a savings clause, Godoy's defense, even if meritorious, would not void the entire guaranty agreement, and therefore the Facial Exception does not apply.[82] But, the affirmative defense in *Phillips* was that only one provision of the partnership agreement violated public policy and was an unenforceable penalty.[83] The defense in *Phillips* did not void the entire partnership agreement; rather, the plaintiff in *Phillips* recovered a judgment against the defendant based on her actual damages resulting from the defendant's breach of the partnership agreement, even though the agreement's liquidated-damages provision was an unenforceable penalty that violated public policy.[84]

The majority also indicates that even if the waiver of the statute of limitations in the guaranty agreement violated public policy, the void-as-against-public-policy defense does not appear on the face of the petition because, according to the majority, the guaranty agreement would not be void in whole or in part based on its savings clause.[85] Under this clause, if the waiver of the statute of limitations in the guaranty agreement "is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy." By the guaranty agreement's unambiguous language, Godoy agreed in advance to a complete waiver of the statute of limitations in section 51.003(a), and he also agreed that, if a court were to determine that this waiver is void as against public policy, then the waiver would not be given effect. So, Godoy agreed to the waiver and also agreed that the

[81] *See ante* at 9–10.

[82] *See id*.

[83] *See Phillips*, 820 S.W.2d at 788–90.

[84] *See id.* at 787–90.

[85] *See ante* at 10, n.1.

waiver would cease to be effective once a court determined that the waiver violated public policy. Yet, the waiver of limitations violated public policy from the moment Godoy signed the guaranty agreement.[86] Thus, when Wells Fargo filed its live pleading and attached the guaranty agreement, the waiver violated public policy and the savings clause had not been triggered. Indeed, even today, the savings clause has yet to be triggered because the trial court and this court have rejected the Public Policy Argument.

Under the guaranty agreement's plain text, the presence of the savings clause does not preclude the void-as-against-public-policy defense from appearing on the face of the petition or from being established as a matter of law. From the outset, the complete waiver of the statute of limitations has violated public policy and made part of the guaranty agreement (subsection (E)) void, notwithstanding Godoy's agreement that the waiver would be ineffective if a court were to find that it violated public policy.

Instead of applying the high-court precedent in *Phillips* and recognizing that today's case falls within the Facial Exception, the majority relies upon this court's opinion in *950 Corbindale, L.P.* as support for the notion that Godoy was required to affirmatively plead the Public Policy Argument in his answer.[87] In that case, this court held that a party waived its argument — that the arbitration agreements were unconscionable because they caused a waiver of rights and remedies — by failing to assert the argument in the trial court.[88] Unlike today's case, *950 Corbindale, L.P.* did not involve a void-as-against-public-policy defense, and the

[86] *See Simpson*, 179 S.W.2d at 242–43.

[87] *See 950 Corbindale, L.P. v. Kotts Capital Holdings Ltd. P'ship*, 316 S.W.3d 191, 196 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

[88] *See id*. at 194, 196.

statements the majority cites are non-binding obiter dicta.[89] The *950 Corbindale* precedent is not on point and does not mandate the conclusion that Godoy had to plead the Public Policy Argument in his answer.[90] Even if *950 Corbindale* were on point and contrary to *Phillips*, the *950 Corbindale* court does not purport to construe, apply, or distinguish *Phillips*, so this court would be bound to follow *Phillips* and apply the Facial Exception rather than *950 Corbindale.*[91]

Because Godoy did not have to plead the Public Policy Argument, he did not waive this defense by failing to plead it.[92]

Wells Fargo tried the void-as-against-public-policy defense by consent.

Even if the Public Policy Argument did not fall within the Facial Exception and the pleading rules required Godoy to plead the Public Policy Argument in his answer, his failure to do so would waive the defense only if, before the trial court rendered judgment, Wells Fargo objected to Godoy's assertion of this defense in the absence of any pleading to support it.[93] Wells Fargo did not voice this objection in the trial court. So, Wells Fargo tried the defense by consent. Godoy

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[89] *See id*. at 196 (stating "[a]n allegation that a provision in a contract is void, unenforceable, or unconscionable is a matter in the nature of avoidance and must be affirmatively pleaded" and "[i]f a party fails to plead the affirmative defense, it is waived"); *Edwards,* 9 S.W.3d at 314.

[90] *See id*. at 194, 196.

[91] *See Glassman*, 347 S.W.3d at 781 (explaining that a panel of this court is not bound by a prior holding of another panel of this court if the prior holding conflicts with a decision from a higher court that is on point).

[92] *See Phillips*, 820 S.W.2d at 789–90.

[93] *See* Tex. R. Civ. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, *answer* or *other response* shall not be considered on appeal as grounds for reversal.") (emphasis added); *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam); *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); *Danford Maint. Serv., Inc. v. Dow Chemical Co*., No. 14-12-00507-CV, 2013 WL 6388381, at *9 (Tex. App.—Houston [14th Dist.] Nov. 21, 2013, pet. denied) (mem. op.).

did not waive this defense.[94]

The majority concludes that Wells Fargo did not try the void-as-against-public-policy defense by consent because Wells Fargo raised Godoy's failure to plead this defense in its response to Godoy's motion for new trial.[95] But, in the motion-for-new-trial response Wells Fargo did not object to Godoy's assertion of this defense during the summary-judgment proceedings on the basis that Godoy had no pleading to support the defense. Instead, Wells Fargo asserted that Godoy was not entitled to a new trial based on this defense because Godoy waived the defense by not pleading it in his answer and by not asserting it in his summary-judgment response.[96] Therefore, Wells Fargo's motion-for-new-trial response did not contain an objection that Godoy was relying on a summary-judgment argument without a pleading required to support that argument.[97]

In addition, even if Wells Fargo had complained in its motion-for-new-trial response that Godoy was asserting this defense in the summary-judgment proceedings without any pleading to support the defense, this complaint would have been untimely and incompetent to avoid trial by consent, given that Wells Fargo filed this response after the trial court granted summary judgment, rejected

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[94] *See Via Net*, 211 S.W.3d at 313; *Roark*, 813 S.W.2d at 495; *Danford Maint. Serv., Inc.*, 2013 WL 6388381, at *9.

[95] *See ante* at 11.

[96] In its response to the motion for new trial, Wells Fargo asserted: "Godoy has not pleaded that the contractual waiver at issue was unenforceable or void as against public policy. See Godoy's Original Answer, on file with this Honorable Court. Nor did Godoy raise this issue in his summary-judgment response. Thus, Godoy has waived this defense." In fact, Godoy did raise the Public Policy Argument in his summary-judgment response.

[97] *See Roark*, 813 S.W.2d at 495 (holding that party tried unpleaded summary-judgment argument by consent by failing to complain that the opposing party was asserting the argument in the absence of a required pleading).

Godoy's Public Policy Argument, and rendered a final judgment.[98]

The majority also relies upon *950 Corbindale, L.P.* as support for its conclusion that by failing to plead the Public Policy Argument, Godoy waived the defense even without an objection from Wells Fargo.[99] In *950 Corbindale, L.P.*, this court held that a party waived its argument that the arbitration agreements caused a waiver of rights and remedies and thus were unconscionable when the party failed to raise this argument at any point in the trial court.[100] In today's case, Godoy raised the defense in response to Wells Fargo's summary-judgment motion. Unlike today's case, *950 Corbindale, L.P.* did not involve a void-as-against-public-policy defense. The statements in *950 Corbindale, L.P.* on which the majority relies are not necessary to the court's holding, so they are nonbinding obiter dicta.[101] And, the obiter dicta from *950 Corbindale, L.P.* are not on point.[102] Nor do they compel the conclusion that Godoy would waive the Public Policy Argument by failing to plead it in his answer, even with no objection by Wells Fargo.[103]

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[98] *See Roark*, 813 S.W.2d at 495 (holding that party tried unpleaded summary-judgment argument by consent by failing to complain that the opposing party was asserting the argument in the absence of a required pleading before rendition of judgment); *Boggs v. Bottomless Pit Cooking Team*, 25 S.W.3d 818, 826 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that party tried unpleaded summary-judgment argument by consent by failing to complain that the opposing party was asserting the argument in the absence of a required pleading before rendition of judgment).

[99] *See ante* at 8; *950 Corbindale, L.P.*, 316 S.W.3d at 196.

[100] *See 950 Corbindale, L.P.*, 316 S.W.3d at 196.

[101] *See Edwards*, 9 S.W.3d at 314.

[102] *See 950 Corbindale, L.P.* at 196.

[103] *See id*. at 194, 196. The majority also cites obiter dicta from a footnote in *Harvey v. Kindred*. *See* 525 S.W.3d 281, 285, n.11 (Tex. App.—Houston [14th Dist.] 2017, no pet.). These statements were not necessary to the court's holding because the court already determined that the appellant had raised the argument in her summary-judgment response. *See id*. In addition, the *Harvey* case did not involve trial by consent or the void-as-against-public-policy defense.

This court should reverse, not affirm.

The majority errs in concluding that the provision in the guaranty agreement completely waiving the statute of limitations in section 51.003(a) does not violate public policy. Established precedent from the Supreme Court of Texas says that it does. Godoy did not have to plead the Public Policy Argument in his answer because the Facial Exception relieved him of complying with that requirement. Even if a pleading were required, Wells Fargo tried the issue by consent because Wells Fargo did not object before rendition of judgment that Godoy was asserting this defense in the absence of any pleading to support it. Godoy did not waive this defense, and he preserved error in the trial court by raising the defense in his summary-judgment response.

In the course of explaining its rejection of the Public Policy Argument, the majority creates a lack of uniformity in this court's decisions.[104] Instead of rejecting the Public Policy Argument, this court should sustain Godoy's sole appellate issue, reverse the trial court's judgment, and remand for further proceedings.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Brown. (Boyce, J., majority).

See id. at 282–85.

[104] *Compare ante* at 3–7, 10, n.1, *with Duncan*, 912 S.W.2d at 858–59; *Am. Alloy Steel, Inc.*, 777 S.W.2d at 177. *Compare ante* at 10, n.1, *with Auz v. Cisneros*, 477 S.W.3d at 360. *Compare ante* at 7–11, *with Danford Maint. Serv., Inc.*, 2013 WL 6388381, at *9. *Compare ante* at 6–7, *with Wolf Hollow I, LP*, 472 S.W.3d at 336–37; *Wolf Hollow I, LP*, 329 S.W.3d at 636. *Compare ante* at 11, *with Boggs*, 25 S.W.3d at 826.