Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-21-00255-CV

IN RE CUSTOM HOME BUILDERS OF CENTRAL TEXAS INC. D/B/A Owner Managed Homes D/B/A Texas Build at Cost, Travis White, and White House Custom Design & Construction of Texas, Inc. D/B/A Forever Custom Homes, Relators

Original Mandamus Proceeding[1]

Opinion by: Irene Rios, Justice
Concurring Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

Delivered and Filed: December 15, 2021

In this original mandamus proceeding, we address whether a construction defect suit primarily seeking monetary compensation based on physical damage or injury to a house is an "[a]ction[] . . . for recovery of damages to real property," and therefore, falls within the ambit of section 15.011 of the Texas Civil Practice and Remedies Code, a mandatory venue statute. *See* TEX. CIV. PRAC. & REM. CODE § 15.011. The trial court concluded section 15.011 does not apply to such suits and denied the relators' motion to transfer venue. Because we conclude that section 15.011 applies and that the trial court erred by refusing to transfer venue, we conditionally grant mandamus relief.

[1] This proceeding arises out of Cause No. 2021-CI-03430 pending in the 57th Judicial District Court, Bexar County, Texas, the Honorable Antonia Arteaga presiding.

BACKGROUND

The relators[2] built a custom house for the real parties in interest. The real parties[3] sued the relators for construction defects. The real parties alleged negligence, misrepresentation claims under the Texas Deceptive Trade Practice Act (DTPA), and breach of contract, as well as violations of Chapter 162 of the Texas Property Code for failing to keep account records and improperly managing a trust fund. The real parties sought to recover actual damages, including "the cost of repair, reduction in market value after repair/completion, engineering and consultant fees, temporary housing expenses, out of pocket/mitigation expenses and loss of use damages." The suit was filed in district court in Bexar County.

Under section 15.011, the relators filed a motion to transfer venue to Guadalupe County. The relators argued that the real parties' suit is "for recovery of damages to real property," venue is mandatory in "the county in which all or a part of the property is located," and the house is located in Guadalupe County. *See id.* The real parties responded that section 15.011 applies only to suits involving title to or possession of land. The trial court heard and denied the relators' motion, and the relators sought mandamus relief in this court.

MANDAMUS REVIEW UNDER CHAPTER 15 OF THE CIVIL PRACTICE AND REMEDIES CODE

Our authority in original writ proceedings is limited to the "restrictions and regulations as may be prescribed by law." TEX. CONST. art. V, § 6. The legislature has provided that a "party may apply for a writ of mandamus with an appellate court to enforce the mandatory venue provisions" in Chapter 15 of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 15.0642; *see* TEX. GOV'T CODE § 22.221(b)(1). Under section 15.0642, the "adequacy of an appellate

[2] The relators are Custom Home Builders of Central Texas, Inc. D/B/A Owner Managed Homes D/B/A Texas Build at Cost; Travis White; and White House Custom Design & Construction of Texas, Inc. D/B/A Forever Custom Homes.

[3] The real parties are Damon Woods and Kimberlye Woods.

remedy is not a requisite of a mandatory venue mandamus." *In re Mo. Pac. R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999) (orig. proceeding). "Thus, the focus of a mandamus proceeding under section 15.0642 is whether the trial court abused its discretion." *Id.* "The trial court has no discretion in determining the legal principles controlling its ruling or in applying the law to the facts. A trial court does not have the discretion to make an erroneous legal conclusion even in an unsettled area of law." *Id.* (footnote omitted). We therefore review whether the trial court "failed to analyze or apply the law correctly when [refusing] to transfer the cases to the defendants' chosen venue." *Id.*

The law governing venue in Texas is set out in Chapter 15's statutory provisions. In construing statutory provisions, our goal is "to carry out the [l]egislature's intent." *Id.* "A statute's unambiguous language is the surest guide to the [l]egislature's intent because the [l]egislature expresses its intent by the words it enacts and declares to be the law." *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018) (quotation marks and citations omitted). "[W]e construe the statute by applying the terms' common, ordinary meaning unless the text supplies a different meaning or the common meaning leads to absurd results." *Id.* at 131. We may consider legislative history "to give context to our construction," but not to contradict the plain meaning of an unambiguous statute. *See Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 844 n.6 (Tex. 2018). Finally, we review issues of statutory construction de novo. *See id.* at 837.

CONSTRUING SECTION 15.011

The parties dispute the proper construction of section 15.011 of the Texas Civil Practice and Remedies Code. Section 15.011 provides as follows:

> Sec. 15.011 LAND. Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located.

TEX. CIV. PRAC. & REM. CODE § 15.011. The parties' arguments more specifically focus on the proper construction of the phrase "damages to real property." *Id.* The relators argue "damages to real property" means monetary compensation for physical injury or damage to any type of real property. The real parties argue that "damages to real property" refers to suits involving disputes about title to or possession of land, specifically.

The Ordinary Meaning of "Damages to Real Property"

"Damages" means "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Real property" means "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Real property*, BLACK'S LAW DICTIONARY (11th ed. 2019). "To" is "used as a function word to indicate the application of an adjective or a noun." *To*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/to. Thus, the common and ordinary meaning of the phrase "damages to real property" is money claimed as compensation for loss or injury to land or anything attached to land. Because Chapter 15 of the Civil Practice and Remedies Code and Code Construction Act do not supply a different meaning, and the ordinary and common meanings of the terms in section 15.011 are not absurd in the context of determining mandatory venue, we must construe the statute in accordance with the common, ordinary meaning of the unambiguous terms the legislature used. *See Tex. Health Presbyterian Hosp.*, 569 S.W.3d at 131.

Decisions Under Section 15.011's Predecessor Statutes

Analyzing the parties' arguments and authorities requires discussing the statutes that preceded the current version of section 15.011. An early predecessor statute, enacted in 1846, provided, "In cases where the recovery of land or damages thereto is the object of the suit . . . suit must be instituted where the land or a part thereof is situated." *Finch's Heirs v. Edmonson*, 9 Tex.

504, 509-10 (1853). In 1886, this provision stated that "suits for the recovery of land, or damages thereto, suits to remove incumbrances upon the title to land, suits to quiet title to land and suits to prevent or stay waste on lands must be brought in the county in which the land, or a part thereof, may lie." *In re Stroud Oil Props., Inc.*, 110 S.W.3d 18, 24 n.4 (Tex. App.—Waco 2002, orig. proceeding); *see also Stiba v. Bowers*, 756 S.W.2d 835, 839 (Tex. App.—Corpus Christi-Edinburg 1988, no writ) (identifying a Revised Civil Statute provision containing a substantively similar version).

In 1983, the legislature amended the mandatory venue provision for suits involving land to provide as follows:

> Lands. Actions for recovery of real property or an estate or interest in real property, or for partition of real property, or to remove encumbrances from the title to real property, or to quiet title to real property shall be brought in the county in which the property or a part of the property is located.

Scarth v. First Bank & Tr. Co., 711 S.W.2d 140, 141 (Tex. App.—Amarillo 1986, no writ). In the 1983 predecessor statute, the legislature substituted the term "real property" for "land," and removed the phrase "or damages thereto." *See id.* In 1985, the legislature recodified this provision as section 15.011 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.011. In 1995, the legislature amended section 15.011 to add "for recovery of damages to real property":

> LAND. Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, *for recovery of damages to real property,* or to quiet title to real property shall be brought in the county in which all or a part of the property is located.

See id. (emphasis added). Thus, the provision at issue in this proceeding—"damages to real property"—resembles the language in the early predecessor statutes which was removed in 1983, but was added back to section 15.011 in 1995.

In the present case, the real parties argue that the phrase "damages to real property," added by the 1995 amendments to section 15.011, must be given the same meaning as "damages thereto" in the 1846 version of the statute. For reasons set out in greater detail below, we reject this argument. The real parties point to *Miller v. Rusk*, in which the Texas Supreme Court construed the 1846 version as follows: "The 'recovery of land' manifestly has reference to the possession; and 'damages thereto,' as manifestly has reference to an injury to the possession, or to the freehold or estate." 17 Tex. 170, 171 (1856). The supreme court held a suit for breach of a contract of sale and seeking specific performance did not fall under the 1846 predecessor statute. *Id.*

Later, the supreme court held that the phrase "damages thereto" in the relevant predecessor statute did not apply because the primary purpose of the suit was an injunction or specific performance. *Brown v. Gulf Television Co.*, 306 S.W.2d 706, 709 (Tex. 1957); *Smith v. Hall*, 219 S.W.2d 441, 444 (Tex. 1949). Furthermore, the supreme court held that "damages thereto" did "not include damages for loss of profits to a business located on real property, or losses occasioned by a decrease in market value of land used for business purposes when there [was] no invasion of the land itself or a right appurtenant thereto." *Brown*, 306 S.W.2d at 709.

To further support their argument that section 15.011 does not apply to their suit, the real parties cite several cases from this court. In *Ashby v. Delhi Gas Pipe Line Corp.*, we held that the predecessor statute did not apply to a suit for breach of a contract for sale of mineral rights because the principal purpose of the suit was to secure specific performance and damages for a contractual breach. 500 S.W.2d 686, 690 (Tex. Civ. App.—San Antonio 1973, writ dism'd). In *Roach v. Chevron U.S.A., Inc.*, we held that the predecessor statute did not apply when "[n]o question concerning any interest in or title to the land was material to a disposition of these cases." 574 S.W.2d 200, 204 (Tex. Civ. App.—San Antonio 1978, no writ). The real parties cite other cases from our court applying the supreme court's decisions under predecessor statutes. *See, e.g.*,

Canales v. Estate of Canales, 683 S.W.2d 77, 81 (Tex. App.—San Antonio 1984, no writ) (holding the predecessor statute did not apply when the principal purpose of the action was not to recover title, despite how the claims were pled); *Umbaugh v. Miers*, 256 S.W.2d 660, 661 (Tex. Civ. App.—San Antonio 1953, no writ) (holding the predecessor statute did not apply when "the action seemingly is one for breach of contract").

We hold that none of the cases cited by the real parties are dispositive. First, the predecessor statutes pertained only to land. In 1983, the legislature amended the applicable statute deleting the word "land" and substituting the term "real property" throughout the provision, except in the provision's title. Although "land" is a type of real property, "real property" includes more than land. *See real property*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Real property" also includes "anything growing on, attached to, or erected on [land], excluding anything that may be severed without injury to the land." *Id.* Thus, the language in the current version of section 15.011 is more expansive than the language in the predecessor statutes. Second, the above-cited cases did not clearly exclude physical damage to real property from the scope of the mandatory venue provision and, instead, focused on whether the primary purpose of the suit was for injunctive relief or to obtain specific performance regarding a contractual right, rather than damages.

On the other hand, the relators direct us to cases showing that suits alleging physical injury or damage to real property, without a dispute over title or possession, fell within the mandatory venue provisions under the applicable predecessor statutes. In *Smith v. Reid*, homeowners hired a structural engineer to design the foundation of their house. 658 S.W.2d 800, 801 (Tex. App.—Dallas 1983, no writ). After the homeowners moved in, they began experiencing problems with the house and sued the engineer. *Id.* The majority held the suit for breach of an implied warranty sounded in tort, not in contract, so venue was mandatory in the county where the house was located. *Id.* at 801–02. The concurrence in *Smith* would have held that venue was mandatory in the county

where the house was located because the gravamen of the homeowner's complaint was damages to the house. *See id.* at 802 (Stewart, J., concurring).

In *Wagner v. Kroger Co.*, the Fourteenth Court of Appeals considered whether the relevant predecessor statute applied to claims against contractors who built a warehouse and the roof of the warehouse collapsed. 663 S.W.2d 43, 44 (Tex. App.—Houston [14th Dist.] 1983, writ dism'd). The court noted that the record revealed that the plaintiff "proved that it owned both the warehouse and the land on which it was located in Harris County. There was proof of damage to the building due to a collapsed roof." *Id.* at 45. There was no dispute over title or possession noted in the decision, but the court held, "Damages to buildings on land are considered as damages to the land." *Id.*; *see also Perma Seal of Tex., Inc. v. Lovelace*, 518 S.W.2d 447, 447–48 (Tex. Civ. App.—Waco 1975, no writ) (holding predecessor statute applied to suit for "damages for breach of contract concerning repairs to the roof of Plaintiff's home located in Grayson County, Texas" because the "cause of action [was] for damages to land").[4] We conclude that, to the extent decisions under the predecessor statutes inform our construction of the current version of section 15.011, they support our plain-language construction that "actions . . . for damages to real property" may include construction defect suits seeking to recover monetary compensation for physical damage to land and real property improvements thereon.

Decisions Under the Current Version of Section 15.011

The parties direct us to conflicting authorities concerning the proper construction of the current version of section 15.011. The relators cite *San Jacinto River Auth. v. Guajardo*, in which the First Court of Appeals held that section 15.011 applied to "a cause of action for inverse

[4] The relators cite numerous other cases applying the predecessor statutes to suits involving claims for damages based on physical damage or injury to real property, including improvements such as houses. *See, e.g.*, *Calvert v. Welch*, 369 S.W.2d 840, 841 (Tex. Civ. App.—Texarkana 1963, no writ).

condemnation and unconstitutional taking, alleging that the River Authority was liable for damages to real property caused when it released water from the Lake Conroe Dam." No. 01-20-00662-CV, 2021 WL 1878377, at *1 (Tex. App.—Houston [1st Dist.] May 11, 2021, no pet.) (mem. op.). The court explained, "Because this suit involves injury to land, this mandatory venue provision applies." *Id.* at *3.

By contrast, the real parties primarily rely on *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227 (Tex. App.—Austin 2002, review granted, judgment vacated and remanded by agreement). In *Allison*, the plaintiff sued an insurance company for failing to pay for damages to a residence involving "water damage to a hardwood floor [that] evolved to include mold contamination of the entire house and outbuildings." *Id.* at 233. The Third Court held that section 15.011 did not apply, stating: "the suit does not involve recovering real property or quieting title or seeking damages for such loss." *Id.* at 244. The court based its holding on its contentions that before the 1995 amendments to section 15.011, the statute applied only when the suit involved recovering real property or quieting title or seeking damages for such loss, and nothing about the amendments suggested the legislature intended to expand the scope of the venue statute. *Id.* at 243–44.

The Thirteenth Court of Appeals has followed, and extended, the holding of *Allison* to non-insurance cases. *In re Graybar Elec. Co., Inc.*, Nos. 13-08-00073-CV, 13-08-00294-CV, 13-0800333-CV, 13-08-00341-CV, 2008 WL 3970865, at *16 (Tex. App.—Corpus Christi-Edinburg Aug. 26, 2008, orig. proceeding) (mem. op.). The court noted that the plaintiffs sued the defendant "for breach of contract and negligence in carrying out its duties in the construction of the Laredo Holiday Inn. [Plaintiff] has not cited to any authority expanding the scope of section 15.011 beyond questions relating to the recovery of real property or affecting title to 'land.'" *Id.* at *17. Citing *Allison*, the court reasoned that because the plaintiffs' claims did "not involve recovering real property or quieting title or seeking damages for such loss, section 15.011 does not apply." *Id.*; *see*

also In re Ashley, No. 13-09-00022-CV, 2009 WL 332312, at *3 (Tex. App.—Corpus Christi-Edinburg Feb. 10, 2009, no pet.) (mem. op.) (holding section 15.011 did not apply to construction defects in medical building in San Antonio).

To summarize, the *Allison* court acknowledged that the plain meaning of the phrase "damages to real property" was itself sufficiently broad to cover suits to recover monetary compensation for injury to property. 98 S.W.3d at 243. However, the court ultimately held that the provision was limited to actions involving disputes over title or possession of land. *Id.* The court considered: (1) the title of the section is "land"; (2) all other actions covered by section 15.011 require a dispute over title or possession; and (3) the parties cited no authority that the 1995 amendments expanded the scope of section 15.011. *Id.* at 243–44.

We are unpersuaded by the *Allison* court's reasoning. First, although the title of section 15.011 is still "Land," "[t]he use or absence of labels may suggest legislative intent, but labels are not dispositive of underlying character." *In re Xerox Corp.*, 555 S.W.3d 518, 529 (Tex. 2018) (orig. proceeding). As we noted previously, the legislature expanded the scope of section 15.011 from the predecessor statutes by changing "land" in the text of the provision to "real property." Second, under the *Allison* court's reasoning, the 1995 amendments would be considered a useless act. If the predecessor statutes (from 1983 to 1985) required all actions to involve a title dispute before the addition of "for damages to real property," then the addition of "for damages to real property" includes no other cases than those already covered by section 15.011's other provisions that expressly apply to disputes over title and possession. *See In re Mo. Pac. R. Co.*, 998 S.W.2d at 216 ("We do not lightly presume that the [l]egislature may have done a useless act."). Third, unlike the *Allison* court, we have been presented with cases in which courts have held the predecessor statutes (using similar language as the current version of section 15.011) apply to cases involving physical injury to real property improvements. Finally, there are no plain-language

definitions of words in "damages to real property" that would require a title dispute. The best indicia of the legislature's intent to expand section 15.011 to cover suits for damages to real property, without a dispute over title or possession, was the inclusion of the language "for recovery of damages to real property."

As the *Allison* court conceded, the plain meaning of "damages to real property" includes damages for physical damage or injury to real property, including a house. Section 15.011 describes several actions that are subject to the mandatory venue provision in the disjunctive. *See* TEX. CIV. PRAC. & REM. CODE § 15.011. The legislature used the word "or" to separate actions "for recovery of damages to real property" from actions "for recovery of real property," "for partition of real property," "to remove encumbrances from the title to real property," and "to quiet title to real property." *Id.* Thus, if the action is "for recovery of damages to real property," then there need not be a dispute over title or possession. Holding otherwise would require us to give no effect to the 1995 amendments to section 15.011. As we noted above, because our plain-language construction is not absurd and no statute provides a more definitive meaning of "damages to real property," we are bound to accept the plain language of section 15.011 as we find it.[5]

APPLYING SECTION 15.011

Having concluded the phrase "[a]ctions . . . for recovery of damages to real property" in section 15.011 does not require a dispute over title or possession, we turn to analyzing whether the real parties' suit constitutes such an action. "A party must allege two 'venue facts,' and establish them by prima facie proof if specifically denied, to show that venue is mandatory under Section

[5] We further note, for context, that the legislative history of the 1995 amendments supports that the legislature intended to broaden the scope of section 15.011 to apply to suits involving damage to property. House Research Organization, Bill Analysis, SB 32, Venue for Civil Actions, May 3, 1995, https://hro.house.texas.gov/pdf/ba74r/sb0032.pdf#navpanes=0 (stating SB 32 would create a new mandatory venue rule requiring suits for "[d]amage to property" to be brought "where the property is located.").

15.011: (1) that the nature of the lawsuit fits within those listed in Section 15.011 and (2) that all or part of the property at issue is located in the county of the lawsuit." *In re Harding*, 563 S.W.3d 366, 370–71 (Tex. App.—Texarkana 2018, orig. proceeding). "It is the ultimate nature or purpose of the suit that determines whether a particular case falls under the mandatory venue statute, and not how the cause of action is described by the parties." *Id.* at 371; *see Heckert v. Heckert*, No. 02-19-00298-CV, 2020 WL 2608338, at *2 (Tex. App.—Fort Worth May 21, 2020, no pet.) (stating that courts consider the "true nature" of the dispute when determining if a suit falls within section 15.011's mandatory venue provision); *In re Kerr*, 293 S.W.3d 353, 356 (Tex. App.—Beaumont 2009, orig. proceeding [mand. denied]) (same). "The nature of the plaintiff's claim is governed by the principal right asserted and the relief sought in the plaintiff's petition." *In re Harding*, 563 S.W.3d at 371.

In their motion to transfer venue, the relators objected to the case proceeding in Bexar County and argued venue was mandatory in Guadalupe County under section 15.011. The relators presented evidence showing the house is located in Guadalupe County; the real parties presented no evidence to the contrary. Thus, the sole remaining question is whether the ultimate nature or purpose of the real parties' action is "for recovery of damages to real property," or more specifically, to recover monetary compensation for physical damage or injury to the house. *See* TEX. CIV. PRAC. & REM. CODE § 15.011; *Milner v. Fitch*, 651 S.W.2d 809, 810 (Tex. App.—Houston [1st Dist.] 1983, no writ) (stating that in the absence of evidence to the contrary, a house is presumed to be part of the land on which it is located, and thus real property).

The real parties alleged negligence, DTPA, and breach of contract claims.[6] The real parties primarily sought actual damages, and sought exemplary damages and attorney's fees predicated on actual damages. The damages the real parties seek are "the cost of repair, reduction in market value after repair/completion, engineering and consultant fees, temporary housing expenses, out of pocket/mitigation expenses and loss of use damages." These damages all arise from the relators' alleged defective construction of the real parties' house. Specifically, the real parties alleged that "[t]he plumbing was defectively installed, and significant bellies exist in multiple locations causing sewage backups in these lines to occur"; that "multiple systems in the residence do not comply with code and are not compliant with the plans"; that the relators "negligently failed to supervise the work of their subcontractors"; that the complained-of construction defects "were caused in whole or in part by defective work and materials supplied by [relators'] subcontractors"; and that the negligent work performed by the relators and their subcontractors "resulted in physical injury to . . . the home and property . . . ." The real parties further alleged the relators violated the DTPA and breached express and implied warranties. The vast majority of the real parties' allegations relate to their negligence and DTPA claims; virtually none of the real parties' allegations relate to their breach of contract claims. The alleged physical damage or injury to the house is the injury giving rise to the real parties' claims for damages. The ultimate nature and principal purpose of this suit—for purposes of evaluating the application of the mandatory venue statute—is to recover monetary compensation for physical injury or damage to real property. *See In re Harding*, 563 S.W.3d at 371. In sum, the real parties' suit is a suit to recover monetary compensation for physical

[6] The real parties alleged a separate claim under the Property Code. However, "[i]n a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions of Subchapter B[], the suit shall be brought in the county required by the mandatory venue provision." TEX. CIV. PRAC. & REM. CODE § 15.004.

injury and damage to a house or, in other words, an action "for the recovery of damages to real property." *See* TEX. CIV. PRAC. & REM. CODE § 15.011.

CONCLUSION

We hold that section 15.011 applies to the real parties' suit.[7] Because the trial court ruled otherwise, we conditionally grant mandamus relief and order the trial court to vacate its order denying the relators' motion to transfer venue and to render an order granting the motion. A writ of mandamus will issue only in the unlikely event the trial court fails to comply within fourteen days of the date of this opinion.

Irene Rios, Justice

[7] As to the assertion in the Chief Justice's concurring opinion that "the majority's framework is too expansive," we respectfully disagree. Our opinion simply decides the case before us based on the law and the circumstances presented.