Affirmed and Opinion filed December 20, 2018.

[SEAL]

In The

Fourteenth Court of Appeals

NO. 14-17-00764-CV

JAMES K. COLLINS AND TONI SHARRETTS COLLINS, Appellants

V.

D.R. HORTON-TEXAS LTD., Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Court Cause No. 15-04-04236-CV

OPINION

This case concerns the ownership of land in Montgomery County on which appellee D.R. Horton-Texas Ltd. intends to develop a subdivision.[1] Appellants James K. Collins and Toni Sharetts [sic] Collins claimed ownership of some of the land being developed, which was adjacent to their homestead and which they

[1] The case was transferred to this court from the Ninth Court of Appeals by Texas Supreme Court Transfer Order. Because of the transfer, we must decide the case in accordance with the precedent of the Ninth Court of Appeals if our decisions otherwise would have been inconsistent with that court's precedent. *See* Tex. R. App. P. 41.3.

referred to as the Sieberman survey. D.R. Horton sued the Collinses to quiet title, for trespassing on its property and for a declaration concerning the boundaries of the respective properties. The Collinses counterclaimed for adverse possession. A year later, the Collinses added claims for trespass, conversion, and malicious prosecution.[2] D.R. Horton filed a motion for partial summary judgment for a declaration that the Collinses could not claim property rights through the Sieberman survey because (1) the subject property boundary had been judicially determined and (2) the Collinses deed expressly references the judicial determination and, as such, they are estopped to assert rights through the Sieberman survey. The trial court granted the motion.

A few weeks before trial, the Collinses amended their pleadings and added new counterclaims emanating from incidents in 2016. D.R. Horton filed a motion to sever the new claims, which the trial court granted. The Collinses' claims for trespass, conversion, and malicious prosecution were severed, and D.R. Horton's trespass and to quiet title claims and the Collinses' adverse possession claim proceeded to trial. The jury found for D.R. Horton on all claims presented but was not asked to and did not award any damages.

In seven issues, the Collinses challenge (1) the grant of partial summary judgment, (2) that a visiting

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[2] Among the affirmative defenses and new counterclaims in the amended pleading, the Collinses asked the court to declare ownership of the disputed tract in accordance with the Sieberman survey.

judge presided over the trial, (3) the denial of their motion for directed verdict, (4) the denial of their motion for judgment notwithstanding the verdict, (5) the denial of their motion for a continuance, (6) the severance of certain of their counterclaims, and (7) the exclusion of certain evidence. We affirm.

Background

The Collinses assert that their rights to the disputed property derive from a grant of 1/3 of a league of land in 1850 from the State of Texas to Frederick Sieberman, who was among the massacred at Goliad. The Collinses claim to have received a quitclaim deed from the heirs of the Sieberman survey in 2015.

D.R. Horton contends that to the extent the Sieberman survey ever existed, it was extinguished by a 1944 federal court judgment in which the boundaries of two other surveys, the James Hodge and the David Thomas, were determined to meet in the area that would have contained the Sieberman survey. This judgment was affirmed by the Fifth Circuit in *McComb v. McCormack*, 159 F.2d 219 (5th Cir. 1947), and both the judgment and appellate opinion were recorded in the real property records. D.R. Horton additionally maintains that the Collinses are estopped from asserting rights to the disputed property because the deed by which they acquired their homestead property referenced the subdivision plat, which in turn referenced the 1944 judgment recorded in the property records.

The Collinses also assert that even if D.R. Horton is correct that the federal judgment extinguished the Sieberman survey, they adversely possessed the disputed property. As stated, the trial court granted partial summary judgment favoring D.R. Horton on the existence of the Sieberman survey and the Collinses' claim to property rights by way of the survey.[3]

Eleven days before trial, on March 2, 2017, the Collinses moved for a continuance on the grounds that Ms. Collins's [sic] was scheduled for hip replacement surgery on the first day of trial (March 13) and Dr. Collins would not be available for trial because he needed to cover for other doctors in his practice group who had spring break plans. Attached to the motion was a note from Ms. Collins's doctor stating that she needed the surgery and March 13 was the first available date. The trial court denied the motion. On March 13, before trial began, the Collinses moved for reconsideration because Ms. Collins was then at the hospital and Dr. Collins was with her. The trial court again denied the motion. The Collinses were absent for voir dire of the jury panel and for the beginning of testimony, but they were able to attend trial starting with the second day and both were able to testify.

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[3] The trial court "ordered that [the Collinses] take nothing on their claims related in any manner to the [Sieberman survey]." We construe this as granting the declaratory relief requested by D.R. Horton and denying the declaratory relief requested by the Collinses.

Five days before trial, the trial court severed the Collinses' claims for trespass, conversion, and malicious prosecution, which involved allegations that D.R. Horton came onto the Collinses' property and removed a fence and other personal property and that Dr. Collins was unlawfully arrested after he discharged a firearm. The malicious prosecution claim had been added two weeks before trial and also involved allegations against several new cross-defendants, including D.R. Horton employees and Montgomery County Sheriff's Department personnel.

The issues remaining after the grant of partial summary judgment favoring D.R. Horton and the severance of some of the Collinses' counterclaims went to trial with a visiting judge presiding on March 13, 2017. Ultimately, the jury was asked three questions: two regarding whether the Collinses had adversely possessed the disputed property and one regarding whether the Collinses had trespassed on D.R. Horton's property. The jury found that no adverse possession had occurred but the Collinses had trespassed on D.R. Horton's property. The jury was not asked any damages questions.

The trial court denied the Collinses' motions for directed verdict and judgment notwithstanding the verdict. In its final judgment, the trial court ordered that an affidavit of adverse possession that the Collinses had filed in the property records was "invalid and of no force and effect and . . . null, void, canceled and discharged of record." The court further permanently enjoined the Collinses from interfering with

D.R. Horton's use and occupancy of the disputed property.

I. Partial Summary Judgment on Declaratory Relief

In their first issue, the Collinses contend that the trial court erred in granting partial summary judgment and thereby resolving all issues pertaining to the existence of the Sieberman survey in favor of D.R. Horton. We review a grant of summary judgment under a de novo standard of review. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm if any of the independent summary judgment grounds is meritorious. *State v. $90,235*, 390 S.W.3d 289, 292 (Tex. 2013). This, in turn, means that when a summary judgment motion alleges multiple grounds and the order granting summary judgment does not specify the ground on which judgment was rendered, the appellant must challenge and negate all summary judgment grounds on appeal. *See*, *e.g.*, *Davis v. Galagaza*, No. 14–16–00362–CV, 2017 WL 1450582, at *2 (Tex. App.–Houston [14th Dist.] Apr. 18, 2017, no pet.) (mem. op.); *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 653 (Tex. App.–Houston [14th Dist.] 2013, no pet.). If summary judgment may have been rendered, properly or improperly, on a ground not challenged, the judgment must be affirmed.

Britton v. Tex. Dep't of Criminal Justice, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

In its motion, D.R. Horton asserted that (1) the 1944 judgment established the relevant boundaries and (2) the deed by which the Collins acquired their property referenced a subdivision plat that in turn references and recognizes the 1944 judgment and, thus, the Collinses were estopped by deed from asserting the effect of the judgment. D.R. Horton points out that the Collinses failed to address the estoppel ground in their opening brief on appeal.

In their reply brief, the Collinses argue that they did enough in their opening brief by generally challenging the grant of partial summary judgment. This is incorrect. The estoppel ground was independent of the merits of the ground based on the 1944 judgment. *See Galagaza*, 2017 WL 1450582, at *2; *Heritage Gulf Coast*, 416 S.W.3d at 653. Also in their reply brief, the Collinses attempt to challenge the merits of the estoppel ground. However, we generally do not consider issues raised for the first time in a reply brief and decline to do so here. *See*, *e.g.*, *HMT Tank Serv. LLC v. Am. Tank & Vessel, Inc.*, No. 14-17-00846-CV, 565 S.W.3d 799, 812, 2018 WL 6217085, at *8 n.10 (Tex. App.—Houston [14th Dist.] Nov. 29, 2018, no pet. h.); *Zurita v. Lombana*, 322 S.W.3d 463, 477 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Because the partial motion for summary judgment could have been based on an unchallenged ground, we overrule the Collinses' first issue. *See Britton*, 95 S.W.3d at 682.

II. Objection to Visiting Judge

In their second issue, the Collinses contend that the trial court erred in permitting a "disqualified" judge to preside over the trial. Specifically, they assert that they timely objected to the assignment of the visiting judge, and she was therefore disqualified from sitting pursuant to Government Code section 74.053. Tex. Gov't Code § 74.053.

Under section 74.053(b), "[i]f a party to a civil case files a timely objection to the assignment [of a visiting judge], the judge shall not hear the case." An objection under this section must be filed no later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. *Id.* § 74.053(c). The statute requires an immediate objection to an assigned judge to prevent parties from attempting to "sample" the judge before objecting. *In re Canales*, 52 S.W.3d 698, 703 (Tex. 2001) (orig. proceeding).[4]

The Collinses insist that their objection—filed on March 9, 2017, before the visiting judge presided over any proceedings in the case—was timely.[5] However, in a pretrial conference on February 27, 2017, the district

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[4] Under section 74.053(c), a trial court may extend the time to file an objection on written motion by a party who demonstrates good cause. The Collinses did not request and the trial court did not grant an extension in this case.

[5] The Collinses filed their objection on March 9 and presented it to the trial court for a ruling on March 13.

judge informed the parties that a particular visiting judge would be presiding over the trial that was set to begin on March 13. The objection filed on March 9 was therefore not timely because it was filed more than seven days after the Collinses received actual notice of the visiting judge's assignment. *See* Tex. Gov't Code § 74.053(c). Indeed, at the start of trial proceedings on March 13, the visiting judge stated that she could not grant the objection because it was not timely.

As the Collinses point out, the visiting judge apparently signed an order purporting to *grant* the objection on the same day. The signing of this order, however, was clearly a mistake because the visiting judge then presided over the trial and at no point did anyone object to her continuing to preside.[6] In order to preserve a complaint for appellate review, a party must make a timely and sufficiently specific request, objection, or motion in the trial court. Tex. R. App. P. 33.1; *Zewde v. Abadi*, 529 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2017, no pet.). As discussed above, the Collinses' objection to the visiting judge was not timely, and the Collinses made no objection to the judge continuing to sit after she mistakenly signed an order granting the untimely objection. *Cf. In re S.Q.*, No. 04-18-00119-CV, 2018 WL 3129434, at *1 (Tex. App.—San Antonio June 27, 2018, pet. denied) (mem. op.) ("[A] party impliedly withdraws an objection by participating in a hearing or trial without advising the assigned

[6] We further note that the judge subsequently signed the final judgment, which stated that the objection to her sitting was overruled because it was not timely.

judge that an objection has been filed and seeking a ruling." (citing *In re Carnera*, No. 05-16-00055-CV, 2016 WL 323654, at *2 (Tex. App.—Dallas Jan. 27, 2016, orig. proceeding) (mem. op.))). The Collinses have therefore not preserved anything for review, and we overrule their second issue.

III. Motions for Directed Verdict and JNOV

In issues three and four, the Collinses contend respectively that the trial court erred in overruling their motions for directed verdict and judgment notwithstanding the verdict. We review a trial court's decision to grant or deny a motion for a directed verdict and a motion for judgment notwithstanding the verdict under a legal sufficiency standard of review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) (explaining that the test for legal sufficiency is the same for directed verdict, judgment notwithstanding the verdict, and appellate no-evidence review). A party challenging the legal sufficiency of the evidence supporting an adverse jury finding on an issue on which it did not have the burden of proof at trial must demonstrate on appeal that there is no evidence to support the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011).

The problem with the Collinses' arguments under these issues is that they are challenging the proof concerning trespass to try title, a cause of action that D.R. Horton did not plead and was not tried and therefore was not at issue in this case. D.R. Horton pleaded

causes of action to quiet title, for trespassing on its property and for a declaratory judgment concerning the property boundaries.

To prevail in a trespass to try title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004). *See generally* Tex. Prop. Code § 22.001 ("Trespass to Try Title"). The Collinses assert specifically that D.R. Horton failed to prove a regular chain of conveyances back to the sovereign or superior title. They also repeat their arguments that they had title to the Sieberman survey, an issue that was determined by the partial summary judgment and not at trial.

Even after D.R. Horton pointed out in its brief that the Collinses were challenging a cause of action that it did not pursue, the Collinses did not, in their reply brief, explain how the arguments made could apply to any of D.R. Horton's actual causes of action.[7] We

[7] The jury was asked if the Collinses had trespassed on D.R. Horton's property, with trespass being defined as "an entry on the property of another without having consent or authorization of the owner. To constitute trespass, entry upon another's property need not be in person, but may be made by causing or permitting a thing to cross the boundary of the property." D.R. Horton's quiet title claim sought to remove the cloud on D.R. Horton's title created by the affidavit of adverse possession filed by the Collinses. In connection with this claim, the jury was asked if the Collinses had adversely possessed the disputed property.

decline to make the Collinses' argument for them. *See Bhatia v. Woodlands N. Houston Heart Ctr., PLLC*, 396 S.W.3d 658, 666 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

We overrule the Collinses' third and fourth issues.

IV. Motion for Continuance

In their fifth issue, the Collinses contend that the trial court erred in denying their motion for a continuance. The Collinses first requested a continuance five days before trial based on Ms. Collins's scheduled surgery and Dr. Collins's need to cover for other doctors. The Collinses re-urged the motion on the first day of trial. The Collinses were then absent for voir dire of the jury panel and for the beginning of testimony, but they were able to attend trial starting with the second day, and both were able to testify.

We review a trial court's order denying a motion for continuance for a clear abuse of discretion and on a case-by-case basis. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court only abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.* As the Collinses acknowledge, the absence of a party to a proceeding, standing alone, is not sufficient cause to grant a continuance. *See*, *e.g.*, *Pena v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00612-CV, 2012 WL 5974076, at *5 (Tex. App.—Austin Nov. 21, 2012, no pet.) (mem. op.). The absent party must show that it had a

reasonable excuse for not being present and that its absence would result in prejudice. *Id.*

Assuming without deciding that the Collinses asserted reasonable excuses for their absences, we turn to their claims that they were prejudiced by missing the first day of trial. The Collinses specifically argue that they were prejudiced because they were not present during voir dire to determine if the jury selected has any bias against them. They also complain that testimony began without them present to "ascertain any bias" of the witnesses. The Collinses offer no relevant authority or record citations in support of this alleged prejudice. *See* Tex. R. App. P. 38.1(i) (requiring appellant's brief to include relevant citations to authorities and the record). They further offer no explanation how their presence would have revealed any possible bias by either potential jurors or testifying witnesses. The Collinses' counsel was present and actively participated in trial proceedings on the first day. The Collinses do not suggest anything that their counsel would have or could have done differently had they also been present. They present no evidence of prejudice they sustained.

Courts finding prejudice have done so based on evidence of prejudice actually sustained, not on merely speculative or potential prejudice. *See Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 288 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). To hold that the trial court erred under such circumstances would effectively eliminate the requirement that a party demonstrate prejudice in order to obtain

a reversal based on the denial of a continuance. *Cf. Henry v. Tax Appraisal Dist. of Bell Cty.*, No. 04-13-00075-CV, 2013 WL 6672512, at *2 (Tex. App.—Beaumont Dec. 18, 2013, no pet.) (mem. op.) (rejecting general assertion of prejudice based on "fairness and due process" as inadequate).

Because the Collinses fail to demonstrate prejudice resulting from the denial of their motion for a continuance, we overrule their fifth issue.

V. Severance of Counterclaims

In their sixth issue, the Collinses contend that the trial court erred in severing their counterclaims for trespass, conversion, and malicious prosecution five days before trial. The first two claims, trespass and conversion, concerned allegations that D.R. Horton personnel came onto the Collinses' property and removed a fence and other personal property. The malicious prosecution claim was added two weeks before trial and asserted that Dr. Collins was unlawfully arrested after he discharged a firearm. The malicious prosecution claim also involved allegations against several new cross-defendants, including D.R. Horton employees and Montgomery County Sheriff's Department personnel.

"Any claim against a party may be severed and proceeded with separately." Tex. R. Civ. P. 41. Accordingly, trial courts have broad discretion in determining when claims should be severed. *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018). A claim is considered

properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *Id.* In severing cases, courts look to avoid prejudice, do justice, and increase convenience. *In re State*, 355 S.W.3d 611, 613 (Tex. 2011).

The parties primarily dispute the third factor. The Collinses do not dispute that the controversy involved multiple causes of action or that the severed claims could have been brought as separate lawsuits. They argue instead that the trespass, conversion, and malicious prosecution claims involve the same facts and issues as many of the nonsevered claims because "it was Horton's claim to the disputed land that was the catalyst" for these torts.

D.R. Horton filed its lawsuit in April 2015. The Collinses' trespass and conversion claims concern alleged conduct by D.R. Horton occurring in 2016. The Collinses alleged that after D.R. Horton's attorney sent them a letter in June 2016 indicating that D.R. Horton would begin work on one section of the proposed development, D.R. Horton entered the disputed property on July 1 through a different section, where the Collinses had erected a fence and placed "tables, chairs, umbrellas, and hammocks." According to the Collinses, upon entering the disputed property, D.R. Horton destroyed the fence and removed the other personal property items. They claim that the entry itself was a trespass

and the destruction and removal of the personal property constituted conversion.

In their malicious prosecution claim, the Collinses allege that Dr. Collins was unlawfully arrested after an incident at the property during which he fired a shotgun into the ground.[8] The Collinses assert that D.R. Horton employees provided false and incomplete information to the prosecutor after the incident, which led to criminal charges being filed. The charges were subsequently dismissed by the prosecutor. Under this claim, the Collinses added four additional defendants, two employees of D.R. Horton and two employees of the sheriff's office.[9]

We begin our analysis by noting that all three added claims allege transgressions occurring during the pendency of the lawsuit. *See generally In re Liu*, 290 S.W.3d 515, 523-24 (Tex. App.—Texarkana 2009, orig. proceeding) (explaining that trial court could have reasonably concluded that close temporal proximity of alleged torts and possibility that damages were caused by several tortfeasors in combination suggested claims should be tried together). The claims remaining after the severance included the Collinses' adverse possession and trespass to try title causes of action as well as

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[8] The Collinses state that he did this to alert a D.R. Horton backhoe operator to his presence.

[9] The Collinses asserted that D.R. Horton employed several off-duty sheriff's deputies to accompany its employees to the property. It is unclear from the Collinses' pleadings whether the sheriff's employees added as defendants were purportedly working for D.R. Horton at the time of the incident.

D.R. Horton's causes of action for trespass, to quiet title, and for a declaration concerning the property boundaries. Although, as the Collinses argue, the new claims may have had their roots in the property dispute that was part and parcel of the remaining claims, the severed claims concerned different events, different witnesses, some different issues, and, as to the malicious prosecution claim, different defendants than did the remaining claims. Consequently, consideration of the new and remaining claims together may well have caused confusion in the proceedings, particularly for the jury. *Cf. In re Ben E. Keith Co.*, 198 S.W.3d 844, 854 (Tex. App.—Fort Worth 2006, orig. proceeding) (holding trial court erred in refusing to sever claims due in part to likely jury confusion resulting if the claims were tried together). Under these circumstances, we cannot say that the trial court abused its discretion in severing the claims. *See Morello*, 547 S.W.3d at 889. Accordingly, we overrule the Collinses' sixth issue.

VI. Exclusion of Evidence

Lastly, in their seventh issue, the Collinses contend that the trial court erred "when it prevented [the Collinses] from admitting certified complete official government maps into evidence." In support, the Collinses first assert that the trial court granted a portion of D.R. Horton's motion in limine in which it asked the court to exclude certain government records that

referenced the Sieberman survey.[10] A trial court's grant or denial of a motion in limine, however, does not preserve error concerning the admission or exclusion of evidence. *Ferguson v. Plaza Health Servs. at Edgemere*, No. 05-12-01399-CV, 2014 WL 3401116, at *2 (Tex. App.—Dallas July 10, 2014, pet. denied) (mem. op.); *see also Westview Drive Invs., LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 600 (Tex. App.—Houston [14th Dist.] 2017, pet denied) ("By such an order, the trial court neither admits nor excludes evidence, but merely requires a party to obtain the trial court's permission, at the bench or otherwise outside of the jury's presence, before asking potentially prejudicial questions or introducing potentially prejudicial evidence.").

To preserve error for the exclusion of evidence after a motion in limine has been granted, a party must, during trial: (1) approach the bench and ask for a ruling, (2) formally offer the evidence, and (3) obtain a ruling on the offer. *Ferguson*, 2014 WL 3401116, at *2. If, at that time, the court rules the evidence inadmissible, the party must further preserve the evidence through an offer of proof. *Id.* The fact that the trial court may have granted a particular portion of D.R. Horton's motion in limine therefore did not preserve the exclusion of the evidence for our review.

The Collinses additionally provide two citations to the reporter's record regarding the alleged exclusion of

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[10] The Collinses do not cite to where in the record the trial court granted a motion in limine pertaining to the documents in question.

this evidence. The first citation is to a discussion occurring before trial began, wherein the Collinses' counsel expressly agreed that certain exhibits pertaining to the Sieberman survey were intended only as an offer of proof and were not being offered into evidence for trial purposes—the issue of the Sieberman survey having been disposed of by the partial summary judgment.

At the second citation, D.R. Horton's counsel objected apparently because he thought that Dr. Collins was about to testify that a particular line on an admitted exhibit referenced the Sieberman survey. Far from arguing that Dr. Collins should be permitted to so testify, the Collinses' lawyer apologized to the court and reminded Dr. Collins not to testify about the Sieberman survey.[11] The exhibit itself was admitted.

The Collinses do not cite to any other place in the record for [sic] where they offered the allegedly excluded documents into evidence and obtained an adverse ruling. Accordingly, they have not preserved this issue for our review. *See id.*; *see also Indus. III, Inc. v. Burns*, No. 14-13-00386-CV, 2014 WL 4202495, at *12 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied) (mem. op.) ("To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence or a summary of the evidence and secure an adverse ruling from the court."). We overrule the seventh issue.

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[11] Counsel stated: "I have instructed Dr. Collins not to bring this up, and I'll ask him once again, please don't say that. So I apologize to that extent."

We affirm the trial court's judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Wise, and Jewell.

December 20, 2018

[SEAL]

JUDGMENT

The Fourteenth Court of Appeals

JAMES K. COLLINS AND
TONI SHARRETTS COLLINS, Appellants

NO. 14-17-00764-CV V.

D.R. HORTON-TEXAS LTD, Appellee

This cause, an appeal from the judgment in favor of appellee, DR. Horton-Texas LTD, signed June 9, 2017, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellants, James K. Collins and Toni Sharretts Collins, jointly and severally, to pay all costs incurred in this appeal.

We further order this decision certified below for observance.

[SEAL]

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Justices
TRACY CHRISTOPHER
KEN WISE
KEVIN JEWELL
FRANCES BOURLIOT
JERRY ZIMMERER
CHARLES A. SPAIN
MEAGAN HASSAN
MARGARET "MEG" POISSANT

Chief Justice
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Thursday, March 28, 2019

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RE: Court of Appeals Number: 14-17-00764-CV
Trial Court Case Number: 15-04-04236-CV

Style: James K. Collins and Toni Sharretts Collins
v.
D.R. Horton-Texas LTD

Please be advised that on this date the Court **DENIED APPELLANT'S** motion for rehearing in the above cause.

Panel Consists of Justice Wise and Jewell

Sincerely,

/s/ Christopher A. Prine, Clerk

cc: Richard Travis Piper (DELIVERED VIA E-MAIL)
Ben A. Baring, Jr. (DELIVERED VIA E-MAIL)

Cause No. 15-04-04236-CV

D.R. HORTON – TEXAS, LTD	§	IN THE DISTRICT COURT OF
V.	§	
JAMES K. COLLINS, M.D. and TONI SHARRETTS COLLINS	§	MONTGOMERY COUNTY, TEXAS
	§	284TH JUDICIAL DISTRICT

FINAL JUDGMENT

(Filed Jun. 9, 2017)

On March 13, 2017, this cause came on to be heard and D.R. HORTON - TEXAS, LTD. ("Horton"), the plaintiff, appeared in person and by attorney and announced ready for trial. The defendants, JAMES K. COLLINS, M.D. and TONI SHARRETTS COLLINS ("Defendants") appeared in person and by attorney and filed a motion for reconsideration of their motion for continuance. The motion for reconsideration was denied and Defendants announced ready for trial.

Previously, on March 9, 2017, the Court granted Horton's motion for severance of certain of Defendants' counterclaims and claims against other parties, the Court severing the Defendants' claims for spoliation of evidence, trespass, conversion, and malicious prosecution, and ordered that such claims be re-docketed under Cause Number 17-03-03620-CV in the 284th Judicial District Court, Montgomery County, Texas in a case styled James K. Collins, MD. and Toni Sharretts Collins v. D.R. Horton-Texas, Ltd, D. R. Horton, Inc.,

Charles Matthew Carr, Angelica Galczynski, David Randy Schweyher, and Sgt. J P. Gonzalez. In addition, Defendants filed an objection to the assignment of the Hon. Carolyn Marks Johnson as a visiting judge to hear this case, but such objection was overruled as it was not made timely.

A jury having been demanded, a jury consisting of twelve qualified jurors was duly empaneled and the case proceeded to trial. At the conclusion of the evidence, all questions of fact were submitted to the jury by the Court's charge. After deliberation, the jury returned its verdict by answering the questions of fact in the charge. The Court's charge and the answers of the Jury to the questions therein and the Jury's verdict are attached as Exhibit "A" hereto and incorporated herein.

The Court, based on the jury's findings or after hearing the evidence and arguments of counsel~~,~~ [CMJ] is of the opinion that the plaintiff is entitled to the following judgment:

IT IS ORDERED that Affidavit of Adverse Possession filed of record by Defendants in the Official Public Records of Montgomery County, Texas under Document Number 2015018297 is invalid and of no force and effect and the same is hereby declared to be null, void, canceled and discharged of record.

IT IS FURTHER ORDERED that the title to the real property described in Exhibit "B" attached hereto is quieted in D.R. HORTON - TEXAS, LTD.

IT IS FURTHER ORDERED ~~It is further ORDERED,~~ [CMJ] ADJUDGED, and DECREED that JAMES K. COLLINS, M.D. and TONI SHARRETTS COLLINS, and each of them, and those acting in concert with them, are hereby permanently enjoined from interfering in any way with Plaintiffs use and occupancy of the property described in Exhibit B.

The interlocutory summary judgment signed on November 8, 2016, that Defendants take nothing on their claims relating in any manner to the Frederick Sieberman Survey, Abstract No. 497, Montgomery County, Texas, is incorporated herein by reference and is hereby made final.

All costs of court expended or incurred in this cause are taxed against Defendants. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All relief not expressly granted is denied.

SIGNED on June 9, 2017.

/s/ Carolyn Marks Johnson
CAROLYN MARKS JOHNSON
Judge Presiding, Sitting on
as 284th District Court of
Montgomery County, Texas
[assigned]

Cause No. 15-04-04236-CV

D.R. HORTON - TEXAS, LTD	§	IN THE DISTRICT COURT OF
V.	§	
JAMES K. COLLINS, M.D. and TONI SHARRETTS COLLINS	§	MONTGOMERY COUNTY, TEXAS
	§	284TH JUDICIAL DISTRICT

CHARGE OF THE COURT

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not

show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the

meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise.

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

7. Do not decide who you think should win before you answer the questions and then just answer

the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. Unless otherwise instructed, the answers to the questions must be based on the decision of at least ten of the twelve jurors. The same ten jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

Definitions and Instructions

The "Subject Tract" means a tract of land in Montgomery County, Texas described as:

> BEGINNING AT THE SOUTHEAST CORNER OF THE LAKE CREEK FOREST SECTION ONE, A SUBDIVISION IN MONTGOMERY COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN CABINET C, SHEET 31-B OF THE MAP RECORDS OF MONTGOMERY COUNTY, TEXAS, THENCE NORTH 89 DEGREES, 18 MINUTES, 44 SECONDS EAST, A DISTANCE OF 1092.8 FEET TO A 5/8TH IRON ROD AT THE NORTHEAST CORNER OF LOT 2, IN BLOCK 1, OF THE RED OAK RANCH, SECTION ONE (1), A SUBDIVISION IN THE DAVID THOMAS SURVEY, A-550, MONTGOMERY COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN CABINET I, SHEET 200 OF THE MAP RECORDS OF MONTGOMERY COUNTY, TEXAS; THENCE NORTH 3 DEGREES, 10 MINUTES AND 41 SECONDS WEST, A DISTANCE OF 100 FEET; THENCE SOUTH 89 DEGREES, 18 MINUTES, 44 SECONDS WEST, A DISTANCE OF 1085 FEET TO A POINT ON THE EASTERN BORDER OF THE LAKE CREEK FOREST, SECTION ONE, A SUBDIVISION IN MONTGOMERY COUNTY, TEXAS, ACCORDING TO THE MAP OF PLAT THEREOF RECORDED IN CABINET C, SHEET 31-B OF THE MAP RECORDS OF MONTGOMERY COUNTY, TEXAS; AND

THENCE SOUTH ALONG THE EASTERN BORDER OF THE LAKE CREEK FOREST, SECTION ONE, A SUBDIVISION IN MONTGOMERY COUNTY, TEXAS, ACCORDING TO THE MAP OF PLAT THEREOF RECORDED IN CABINET C, SHEET 31-B OF THE MAP RECORDS OF MONTGOMERY COUNTY, TEXAS, A DISTANCE OF 100 FEET TO THE POINT OF BEGINNING, BEING A TOTAL OF 2.4985 ACRES, MORE OR LESS.

QUESTION 1

Did James K. Collins, M.D. and Toni Sharretts Collins hold the Subject Tract in peaceable and adverse possession under title or color of title for a period of three years prior to April 27, 2015?

"Adverse possession" means:

a) an actual and visible appropriation of real property;

b) commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person.

"Peaceable possession" means possession of real property that is continuous and is not interrupted by an adverse suit to recover the property.

"Color of title" means a consecutive chain of transfers to the person in possession that is not regular because of a muniment that is not properly recorded or is

only in writing or because of a similar defect that does not lack intrinsic fairness or honesty.

"claim of right" means an intention to claim the real property as one's own to the exclusion of all others.

A claim of right is "hostile" only if either

a) it provides notice, either actual or by implication, of a hostile claim of right to the true owner; or

b) the acts performed on the real property, and the use made of the real property, were of such a nature and character that would reasonably notify the true owner of the real property that a hostile claim is being asserted to the property.

Answer "Yes" or "No."

Answer: NO

QUESTION 2

Did James K. Collins, M.D. hold the Subject Tract in peaceable and adverse possession for a period of ten years prior to April 27, 2015?

"Peaceable possession" means possession of real property that is continuous and is not interrupted by an adverse suit to recover the property.

"Adverse possession" means:

a) an actual and visible appropriation of real property;

b) commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person.

"Claim of right" means an intention to claim the real property as one's own to the exclusion of all others.

A claim of right is "hostile" only if either

a) it provides notice, either actual or by implication, of a hostile claim of right to the true owner; or

b) the acts performed on the real property, and the use made of the real property, were of such a nature and character that would reasonably notify the true owner of the real property that a hostile claim is being asserted to the property.

For this question, to establish peaceable and adverse possession, a claimant must also have cultivated, used, or enjoyed the property.

Answer "Yes" or "No."

Answer: NO

If you answered "No" to Question 1 and "No" to Question 2, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Did James K. Collins, M.D. or Toni Sharretts Collins trespass on D.R. Horton-Texas, Ltd.'s property?

"Trespass" means an entry on the property of another without having consent or authorization of the owner. To constitute trespass, entry upon another's property need not be in person, but may be made by causing or permitting a thing to cross the boundary of the property.

Answer "Yes" or "No" for those named below:

James K. Collins, M.D. Yes

Toni Sharretts Collins Yes

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you Understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. Unless otherwise instructed, you may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

If eleven jurors agree on every answer, those eleven jurors sign the verdict.

If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

Do you understand these instructions? If you do not, please tell me now.

/s/ Carolyn Marks Johnson
JUDGE PRESIDING
[assigned]

Verdict Certificate

Check one:

____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____	_____
Signature of Presiding Juror	Printed Name of Presiding Juror

____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

__X__ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.	/s/ John W. Robinson	John W. Robinson
2.	/s/ Valeria R. Ahlers	Valeria R. Ahlers
3.	/s/ Anne T. LeBlanc	Anne T. LeBlanc
4.	/s/ Renea Rolan	Renea Rolan
5.	/s/ Freddie Garza	Freddie Garza
6.	/s/ Randy Calhoun	Randy Calhoun
7.	/s/ Bruce Herndon	Bruce Herndon

8. /s/	Tracy Brainerd	Tracy Brainerd
9. /s/	Susan A. Huff	Susan A. Huff
10. /s/	Richard Zoinfeld	Richard Zoinfeld
11.		

METES AND BOUNDS DESCRIPTION
TRACT 1
750.7 ACRES
IN THE JAMES HODGE SURVEY,
ABSTRACT NO. 19
MONTGOMERY COUNTY, TEXAS

DESCRIPTION OF A 750.7 ACRE TRACT OF LAND SITUATED IN THE JAMES HODGE SURVEY. ABSTRACT NO. 19. MONTGOMERY COUNTY, TEXAS, BEING THAT CERTAIN TRACT OF LAND CALLED 750.354 ACRES AS DESCRIBED IN DEED TO MADELEY INTERESTS LTD. III RECORDED UNDER MONTGOMERY COUNTY CLERK'S FILE (M.C.C.F.) No. 2002-015834 AND No. 2002-015835 OF THE OFFICIAL PUBLIC RECORDS OF REAL PROPERTY; MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS, (BEARINGS BASED ON THE TEXAS STATE PLANE COORDINATE SYSTEM OF 1983, CENTRAL ZONE, AS DETERMINED BY GPS MEASUREMENTS):

BEGINNING at a 5/8-inch capped iron rod stamped "EHRA 713-784-4500" set marking the southwesterly corner of the called 750.354 acre

tract, being in the northerly line of the Block 1 of Red Oak Ranch Section One, as per plat recorded in Cabinet I, Sheet 200 of the Montgomery County Map Records (M.C.M.R.), from which a 1/4-inch iron rod found marking the southeast corner of Lake Creek Forest Section One, as per plat recorded in Cabinet C, Sheet 31A of the M.C.M.R., bears North 03°50' West, 0.29 feet;

(1) THENCE, North 03°50'49" West, along the east line of said Lake Creek Forest Section One for a distance of 1,484.44 feet to a 5/8-inch iron rod found for corner;

(2) THENCE, North 03°40'21" West, continuing along the east line of said Lake Creek Forest Section One for a distance of 1,469.00 feet to a point for corner from which a bent 5/8-inch iron rod was found South 01°30' East, 0.40 feet;

(3) THENCE, North 03°42'28" West, continuing along the east line of said Lake Creek Forest Section One for a distance of 1,320.61 feet to a point for corner from which a 1/2-inch capped iron rod stamped "Jeff Moon RPLS 4639" was found South 87°14' West, 0.15 feet;

(4) THENCE, North 03°53'51" West, continuing along the east line of said Lake Creek Forest Section One, passing at 1,801.32 feet a 5/8-inch capped iron rod stamped "EHRA 713-784-4500" set for reference and continuing for a total distance of 1901.32 feet to a point for corner set in the centerline of the bed of Lake Creek;

THENCE, along the meanders of the centerline of Lake Creek the following seventy one (71) courses and distances:

(5) THENCE, North 61°32'51" East for a distance of 228.05 feet to a point for corner;

(6) THENCE, North 54°58'17" East for a distance of 92.46 feet to a point for corner;

(7) THENCE, North 51°58'09" East for a distance of 259.16 feet to a point for corner;

(8) THENCE, North 45°58'35" East for a distance of 159.83 feet to a point for corner;

(9) THENCE, North 22°01'45" East for a distance of 192.41 feet to a point for corner;

(10) THENCE North 27°13'37" East for a distance of 76.84 feet to a point for corner;

(11) THENCE, North 54°56'45" East for a distance of 95.43 feet to a point for corner;

(12) THENCE, North 67°30'56" East for a distance of 184.27 feet to a point for corner;

(13) THENCE, North 76°56'09" East for a distance of 133.56 feet to a point for corner;

(14) THENCE, North 61°26'41" East for a distance of 177.31 feet to a point for corner;

(15) THENCE, North 50°22'55" East for a distance of 560.07 feet to a point for corner;

(16) THENCE, North 37°46'34" East for a distance of 133.00 feet to a point for corner;

(17) THENCE, North 17°21'11" East for a distance of 139.15 feet to a point for corner;

(18) THENCE, North 00°11'57" East for a distance of 274.14 feet to a point for corner;

(19) THENCE, North 18°11'55" East for a distance of 116.51 feet to a point for corner;

(20) THENCE, North 39°54'45" East for a distance of 121.72 feet to a point for corner;

(21) THENCE, North 48°18'12" East for a distance of 291.99 feet to a point for corner;

(22) THENCE, North 37°14'21" East for a distance of 92.22 feet to a point for corner;

(23) THENCE, North 52°07'40" East for a distance of 103.25 feet to a point for corner;

(24) THENCE, North 55°52'04" East for a distance or 193.01 feet to a point for corner;

(25) THENCE, North 72°11'52" East for a distance of 110.77 feet to a point for corner;

(26) THENCE, South 83°08'03" East for a distance of 92.11 feet to a point for corner;

(27) THENCE, South 65°53'48" East for a distance of 84.92 feet to a point for corner;

(28) THENCE, South 07°21'08" East for a distance of 107.07 feet to a point for corner;

(29) THENCE, South 21°25'57" West for a distance of 121.20 feet to a point for corner;

(30) THENCE, South 33°41'30" West for a distance of 76.93 feet to a point for corner;

(31) THENCE, South 42°09'05" West for a distance of 131.48 feet to a point for corner;

(32) THENCE, South 45°03'47" West for a distance of 122.62 feet to a point for corner;

(33) THENCE, South 00°26'36" East for a distance of 102.07 feet to a point for corner;

(34) THENCE, South 42°26'12" East for a distance of 73.01 feet to a point for corner;

(35) THENCE, North 76°53'20" East for a distance of 70.93 feet to a point for corner;

(36) THENCE, North 61°57'33" East for a distance of 100.10 feet to a point for corner;

(37) THENCE, North 86°49'59" East for a distance of 57.05 feet to a point for corner;

(38) THENCE, North 68°06'00" East for a distance of 111.11 feet to a point for corner;

(39) THENCE, North 82°41'26" East for a distance of 271.58 feet to a point for corner;

(40) THENCE, South 88°01'13" East for a distance of 114.27 feet to a point for corner;

(41) THENCE, South 89°46'09" East for a distance of 178.21 feet to a point for corner;

(42) THENCE, North 80°49'21" East for a distance of 72.20 feet to a point for corner;

(43) THENCE, North 53°06'35" East for a distance of 162.69 feet to a point for corner;

(44) THENCE, North 19°32'42" East for a distance of 160.09 feet to a point for corner;

(45) THENCE, North 08°47'46" East for a distance of 217.65 feet to a point for corner;

(46) THENCE, North 15°27'20" East for a distance of 137.74 feet to a point for corner;

(47) THENCE, North 26°41'07" West for a distance of 117.15 feet to a point for corner;

(48) THENCE, North 75°30'38" West for a distance of 63.48 feet to a point for corner;

(49) THENCE, South 77°51'34" West for a distance of 111.84 feet to a point for corner;

(50) THENCE, South 67°14'55" West for a distance of 126.55 feet to a point for corner;

(51) THENCE, North 84°16'56" West for a distance of 92.33 feet to a point for corner;

(52) THENCE, North 54°36'56" West for a distance of 76.80 feet to a point for corner;

(53) THENCE, North 03°40'47" East for a distance of 69.88 feet to a point for corner;

(54) THENCE, North 33°55'57" East for a distance of 73.92 feet to a point for corner;

(55) THENCE, North 24°18'23" East for a distance of 83.75 feet to a point for corner;

(56) THENCE, North 34°13'45" East for a distance of 249.15 feet to a point for corner;

(57) THENCE, North 15°29'51" East for a distance of 133.40 feet to a point for corner;

(58) THENCE, North 11°47'44" West for a distance of 56.19 feet to a point for corner;

(59) THENCE, North 29°33'33" West for a distance of 146.29 feet to a point for corner;

(60) THENCE, North 03°43'48" East for a distance of 94.06 feet to a point for corner;

(61) THENCE, North 29°17'22" East for a distance of 162.93 feet to a point for corner;

(62) THENCE, North 53°15'42" East for a distance of 177.88 feet to a point for corner;

(63) THENCE, North 69°38'07" East for a distance of 195.39 feet to a point for corner;

(64) THENCE, North 61°42'03" East for a distance of 101.33 feet to a point for corner;

(65) THENCE, North 36°58'24" East for a distance of 91.65 feet to a point for corner;

(66) THENCE, North 11°57'27" East for a distance of 58.01 feet to a point for corner;

(67) THENCE, North 24°42'40" West for a distance of 51.98 feet to a point for corner;

(68) THENCE, North 56°16'37" West for a distance of 44.55 feet to a point for corner;

(69) THENCE, North 26°28'19" West for a distance of 40.47 feet to a point for corner;

(70) THENCE, North 12°06'49" East for a distance of 64.65 feet to a point for corner;

(71) THENCE, North 12°35'21" East for a distance of 126.74 feet to a point for corner;

(72) THENCE, North 51°10'24" East for a distance of 62.70 feet to a point for corner;

(73) THENCE, North 66°13'52" East for a distance of 130.17 feet to a point for corner;

(74) THENCE, North 87°14'06" East for a distance of 36.35 feet to a point for corner;

(75) THENCE, South 77°13'16" East for a distance of 50.39 feet to a point for corner in the line of the called 750.354 acre tract and the westerly line of a called 72.168 acre tract of land described in M.C.C.F., No. 2002-015839 and a called 31.770 acre tract of land described in M.C.C.F. No. 2010074246;

(76) THENCE, South 03°44'24" East, along the east line of the called 750.354 acre tract and the westerly line of the called 31.770 acre tract, Passing at 300.0 feet a 5/8-inch iron rod set for reference, passing at 1,794.90 feet a 5/8-inch iron rod found 1.7 feet west of line, passing at 3,896.04 feet a 1/2-inch capped iron rod stamped "C&C" found 0.6 feet east of line marking the westerly common corner of a called 30.0825 acre tract of land described in M.C.C.F. No. 2010024246 and a called 5.716 acre tract of land described in M.C.C.F. No. 2007-064306, passing at 4,294.96 feet a 1/2-inch iron rod found 1.4 feet east of line marking the northwesterly common corner of a called 3.105 acre tract of land described in M.C.C.F. No. 2007-004078, passing at 5,134.99 feet a 1/2-inch iron rod found 0.9 feet west of line marking the westerly common corner of a called 7.9490 acre tract of land described in M.C.C.F. No. 2005-047884 and a called 10.188 acre tract of land described in

M.C.C.F. No. 2005-047802, passing at 6,193.39 feet a 1/2-inch iron rod found 1.0 feet east of line marking the westerly common corner of a called 4.467 acre tract of land described in M.C.C.F. No. 2007-015113 and a called 5.585 acre tract of land described in M.C.C.F. No. 9131267, passing at 6,543.21 feet a 1/2-inch capped iron rod stamped "Laughin" found marking the westerly common corner of a called 5.585 acre tract of land described in M.C.C.F. No. 9131267 and a called 5.942 acre tract of land described in M.C.C.F. No. 2001-049736 from which a 1/2-inch iron rod was found east, 2.8 feet, and continuing for a total distance of 7,630.37 feet to a 1/4-inch iron rod found marking the westerly common corner of a called 7.232 acre tract of land described in M.C.C.F. No. 2001-049736 and a called 5.00 acre tract of land described in M.C.C.F. No. 8543874;

(77) THENCE, South 03°51'13" East, along the westerly line of said 5.00 acre tract of land for a distance of 626.02 feet to a point for corner in the northwesterly right-of-way line of Old Conroe-Magnolia Road (based on a width of 60-feet as occupied) from which a 1/2-inch capped iron rod stamped "Jeff Moon RPLS 4639" was found North 47°22" East, 0.25 feet;

(78) THENCE, South 44°51'15" West, along the northwesterly right-of-way line of Old Conroe-Magnolia Road for a distance of 1,973.37 feet to a 1/2-inch capped iron rod stamped "Jeff Moon RPLS 4639" found for corner;

(79) THENCE, South 45°14'26" West, continuing along the northwesterly right-of-way line of Old Conroe-Magnolia Road for a distance of 1,055.36 feet to a point for corner in the northerly line of a called 5.66 acres described in M.C.C.F. No. 2006-100222 from which a 5/8-inch iron rod was found South 86°07' East, 0.28 feet;

(80) THENCE, South 86°49'19" East, along the northerly line of said 5.66 acre tract, passing at a distance of 1,076.10 feet a 5/8-inch iron rod found marking the northerly common of a called 5.01 acre tract of land described in M.C.C.F. No. 5843267 and the northeasterly corner of the aforementioned Block 1 of Red Oak Ranch Section One, and continuing along the northerly line of said Block 1 of Red Oak Ranch Section One for a total distance of 2,168.57 feet to the POINT OF BEGINNING and containing 750.7 acres of land. This description accompanies a Land Title Survey prepared by Edminster, Hinshaw, Russ and Associates, Inc. dated November 19, 2012.

EDMINSTER, HINSHAW, RUSS & ASSOCIATES, INC d/b/a EHRA

/s/ Robert L. Boelsche [SEAL]
Robert L. Boelsche, R.P.L.S.
Texas Registration No. 4446
10555 Westoffice Drive
Houston, Texas 77042
713-784-4500

Date: 11/19/2017
Job No. 171-079-00
File No. [Illegible]

METES AND BOUNDS DESCRIPTION
TRACT 2
42.02 ACRES
IN THE JAMES HODGE SURVEY,
ABSTRACT NO. 19
MONTGOMERY COUNTY, TEXAS

DESCRIPTION OF A 42.02 ACRE TRACT OF LAND SITUATED IN THE JAMES HODGE SURVEY, ABSTRACT NO. 19, MONTGOMERY COUNTY, TEXAS, BEING OUT OF THAT CERTAIN TRACT OF LAND CALLED 48.939 ACRES AS DESCRIBED IN DEED TO MADELEY INTERESTS LTD. III RECORDED UNDER MONTGOMERY COUNTY CLERK'S FILE (M.C.C.F.) No. 2002-015834 AND No. 2002-15835 OF THE OFFICIAL PUBLIC RECORDS OF REAL PROPERTY; SAID 42.02 ACRE TRACT BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS, (BEARINGS BASED ON THE TEXAS STATE PLANE COORDINATE SYSTEM OF 1983, CENTRAL ZONE, AS DETERMINED BY GPS MEASUREMENTS):

BEGINNING at a 5/8-inch capped iron rod stamped "EHRA 713-784-4500" set marking the southwesterly corner of a called 7.9838 acre tract described in M.C.C.F. No. 2008-034303 and being in the northerly line of the Block 2 of Red Oak Ranch Section One, as per plat recorded in

Cabinet I, Sheet 200 of the Montgomery County Map Records (M.C.M.R.):

(1) THENCE, South 86°02'11" West, along the northerly line of said Block 2 of Red Oak Ranch Section One for a distance of 599.11 feet to a fence post found for corner;

(2) THENCE, South 85°00'17" West, continuing along the northerly line of said Red Oak Ranch Section One, passing at 440.25 feet 5/8-inch iron rod found marking the northwesterly corner of said Block 2 and the northeasterly corner of a called 8.04 acre tract described to M.C.C.F. No. 9844236, and continuing along the northerly line of said 8.04 acre tract for a total distance of 582.25 feet to a fence post found for corner;

(3) THENCE, South 89°19'14" West, along the northerly line of said 8.04 acre tract for a distance of 46.24 feet to a 5/8-inch capped iron rod stamped "EHRA 713-784-4500" set for corner in the southwesterly line of a 50-foot wide easement granted to Sinclair Pipe Line Company in Volume 431-Page 424, Volume 431-Page 428, Volume 431-Page 434, Volume 434-Page 458 and Volume 434-Page 452 of the Montgomery County Deed Records;

(4) THENCE, North 25°50'15" West, along the southwesterly line of said Sinclair easement for a distance of 407.11 feet to a 5/8-inch capped iron rod stamped "EHRA 713-784-4500" set marking an angle point;

(5) THENCE, North 27°01'15" West, continuing along the southwesterly line of said Sinclair easement, a distance of 281.17 feet to a 5/8-inch capped iron rod stamped "EHRA 713-784-4500" set for corner in the southeasterly right-of-way line of Old Conroe-Magnolia Road (based on a width of 60-feet as occupied);

(6) THENCE, North 45°14'26" East, along the southeasterly right-of-way line the of Old Conroe-Magnolia Road for a distance of 62.40 feet to a 1/2-inch capped iron rod stamped "Jeff Moon RPLS 4639" found for corner;

(7) THENCE, North 44°51'15" East, continuing along the southeasterly right-of-way line of Old Conroe-Magnolia Road for a distance of 1,920.88 feet to a point for corner in the westerly line of a called 60-foot wide roadway easement described in Volume 676, Page 842 of the Montgomery County Deed Records from which a 1/2-inch iron rod was found North 43°09' East, 0.45 feet;

(8) THENCE, South 03°51'13" East, along the westerly line of said 60-foot wide roadway easement, a distance of 1,934.27 feet to the POINT OF BEGINNING and containing 42.02 acres of land. This description accompanies a Land Title Survey prepared by Edminster, Hinshaw, Russ and Associates. Inc. dated November 19, 2012 and revised December 05, 2012.

CAUSE NO. 15-04-04236

D. R. HORTON – TEXAS, LTD.	§	IN THE DISTRICT COURT OF
PLAINTIFF	§	MONTGOMERY COUNTY, TEXAS
VS.	§	
JAMES K. COLLINS, M.D. AND TONI SHARRETS,	§	284TH JUDICIAL DISTRICT
DEFENDANTS	§	

ORDER GRANTING D. R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court has considered the motion for partial summary judgment filed by D. R. Horton on the Sieberman Survey Issue, and having considered said motion, and Defendants' response, and being of the opinion that said motion is with merit and should be granted, it is therefore

ORDERED that Plaintiff, D.R. Horton–Texas, Ltd.'s motion for partial summary judgment be, and the same is hereby, GRANTED.

It is further ORDERED that Defendants take nothing on their claims related in any manner to the Frederick Sieberman Survey A-497, Montgomery County, Texas.

Signed: 11/8/2016 11:23 AM

SIGNED this 8 day of November, 2016.

/s/ Cara Wood
Judge Presiding

Approved and Entry Requested:

DE LANGE, HUDSPETH, MCCONNELL
& TIBBETS, L.L.P.

BY: /s/ Ben A. Baring, Jr.
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Facsimile: 713.871.2020

ATTORNEYS FOR PLAINTIFFS

FILE COPY

RE: Case No. 19-0397 DATE: 7/26/2019

COA #: 14-17-00764-CV TC#: 15-04-04236-CV

STYLE: COLLINS v. D.R. HORTON-TEXAS LTD.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MS. TONI L. SHARRETTS
LAW OFFICE OF TONI L. SHARRETTS
COLLINS
11054 NORTH HIDDEN OAKS
CONROE, TX 77387
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 19-0397 DATE: 12/13/2019

COA #: 14-17-00764-CV TC#: 15-04-04236-CV

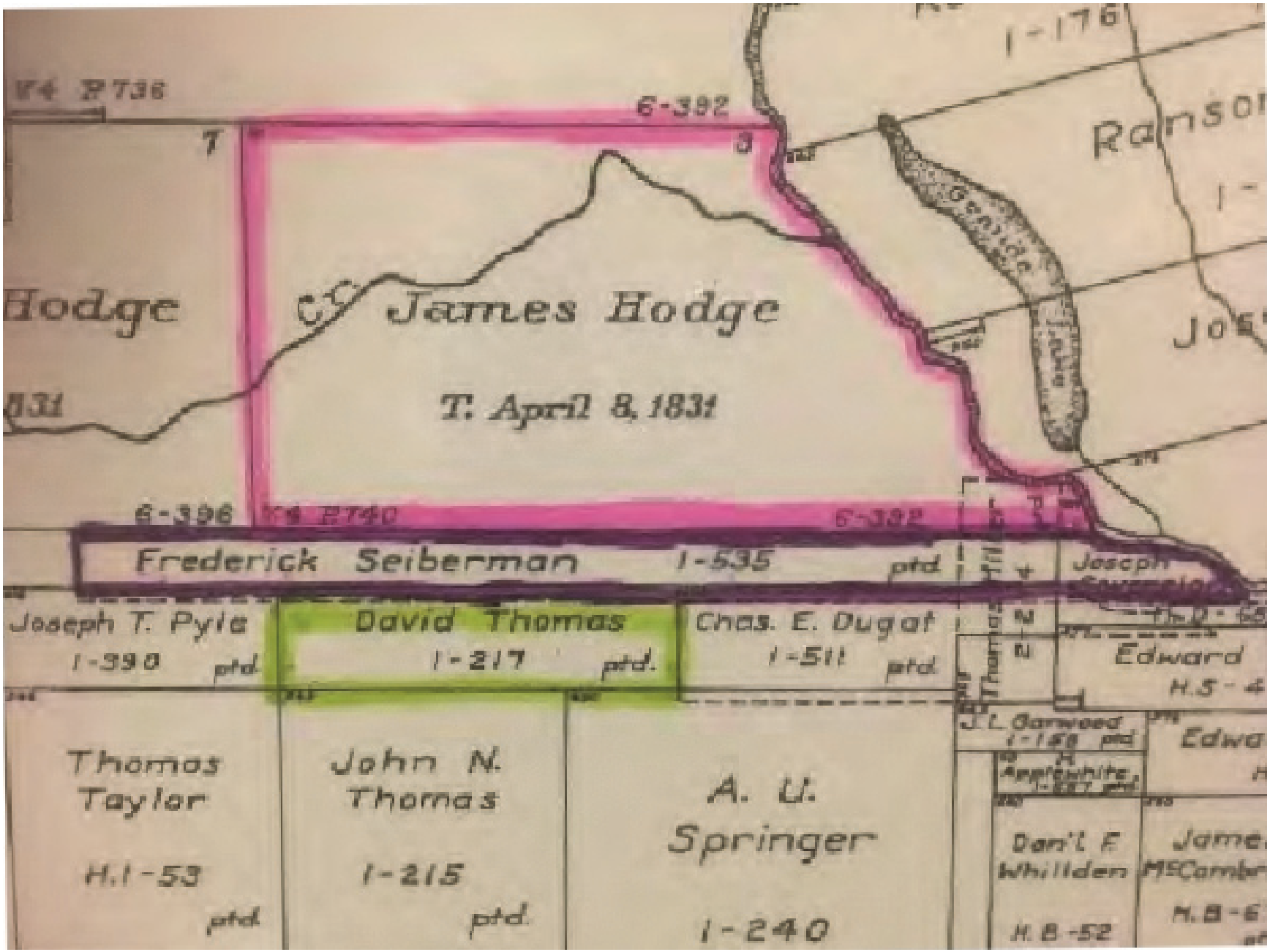
STYLE: COLLINS v. D.R. HORTON-TEXAS LTD.

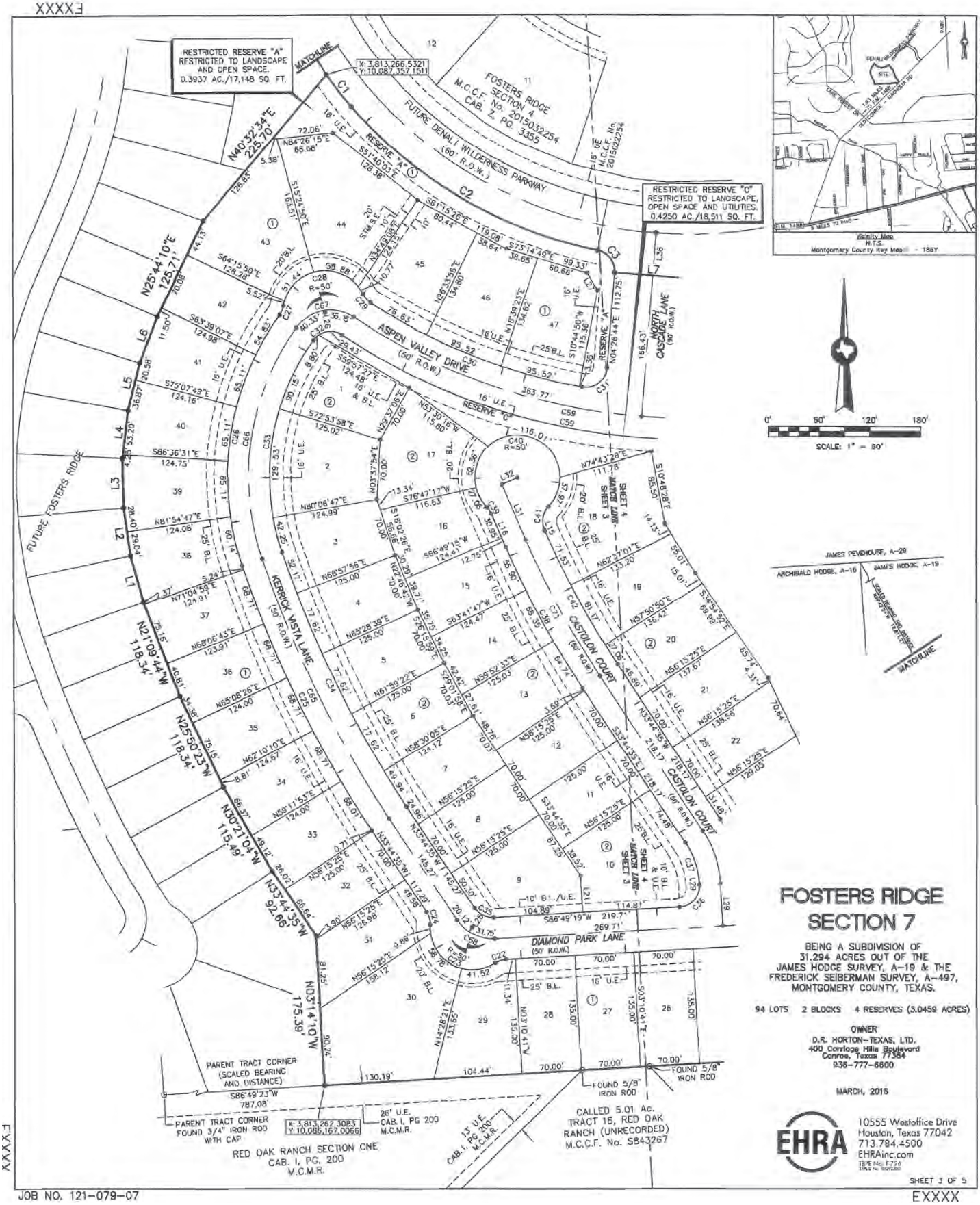
Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MS. TONI L. SHARRETTS
LAW OFFICE OF TONI L. SHARRETTS
COLLINS
11054 NORTH HIDDEN OAKS
CONROE, TX 77384 [sic]
* DELIVERED VIA E-MAIL *


F SEIBERMAN


Texas General Land Office
Interactive Land Lease Mapping Program
Street
Aerial
Hybrid
Geographic
Topo
Blank
Map Contents
Click the box below to activate a Layer
Energy Resources
Upland & Coastal Leases / Easements
Archives and Records Collections
Renewable Energy
Original Texas Land Survey
Submerged Texas Land Survey
Other Map Layers
MONTGOMERY
F. SIEBERMAN
4-496
D. THOMAS
4-550
County & Abstract Search
Features selected: 1
Clear
Control Number:
Base File Number:
Grantee: F. SIEBERMAN
Block:
Section Number:
Abstract: 497
County Name: MONTGOMERY
Land Type:
Ranch Name:
Original Acres:
2000 ft
Auto Save
GIS WEB Mapping...
Skype
Adversary Exhibits
Untitled - Paint
7:35 PM
5/31/2016


1-176
6-392
Ransom
Hodge
James Hodge
T: April 8, 1831
6-396
6-392
Frederick Seiberman
1-535
ptd.
Joseph T. Pyle
1-390
ptd.
David Thomas
1-217
ptd.
Chas. E. Dugat
1-511
ptd.
Edward
H.5-4
Thomas Taylor
H.1-53
ptd.
John N. Thomas
1-215
ptd.
A. U. Springer
1-240
Don't F Whillden
H.8-52


RESTRICTED RESERVE "A"
RESTRICTED TO LANDSCAPE AND OPEN SPACE.
0.3937 AC./17,148 SQ. FT.
MATCHLINE
X: 3,813,266.5321
Y: 10,087,357.1511
FOSTERS RIDGE SECTION 4
M.C.C.F. No. 2015032254
CAB. Z, PG. 3355
FUTURE DENALI WILDERNESS PARKWAY
(60' R.O.W.)
16' U.E.
M.C.C.F. No. 2015022254
RESERVE "A"
RESTRICTED RESERVE "C"
RESTRICTED TO LANDSCAPE, OPEN SPACE AND UTILITIES.
0.4250 AC./18,511 SQ. FT.
Vicinity Map
N.T.S.
Montgomery County Key Map
ASPEN VALLEY DRIVE
(50' R.O.W.)
NORTH CASCADE LANE
(60' R.O.W.)
FUTURE FOSTERS RIDGE
KERRICK VISTA LANE
(50' R.O.W.)
CASTOLON COURT
(60' R.O.W.)
DIAMOND PARK LANE
(50' R.O.W.)
SHEET 4 - MATCH LINE - SHEET 3
SHEET 4 - MATCH LINE - SHEET 3
JAMES PEVEHOUSE, A-29
ARCHIBALD HODGE, A-18
JAMES HODGE, A-19
SCALE: 1" = 60'
0'
60'
120'
180'
N40°32'34"E
225.70'
N25°44'10"E
125.71'
N21°09'44"W
118.34'
N25°50'23"W
118.34'
N30°21'04"W
115.49'
N33°44'35"W
92.66'
N03°14'10"W
175.39'
S86°49'19"W 219.71'
S86°49'23"W
787.08'
PARENT TRACT CORNER
(SCALED BEARING AND DISTANCE)
PARENT TRACT CORNER
FOUND 3/4" IRON ROD WITH CAP
X: 3,813,262.3083
Y: 10,085,167.0066
26' U.E.
CAB. I, PG. 200
M.C.M.R.
15' U.E.
CAB. I, PG. 200
M.C.M.R.
RED OAK RANCH SECTION ONE
CAB. I, PG. 200
M.C.M.R.
CALLED 5.01 Ac.
TRACT 16, RED OAK RANCH (UNRECORDED)
M.C.C.F. No. S843267
FOUND 5/8" IRON ROD
FOUND 5/8" IRON ROD
FOSTERS RIDGE
SECTION 7
BEING A SUBDIVISION OF
31.294 ACRES OUT OF THE
JAMES HODGE SURVEY, A-19 & THE
FREDERICK SEIBERMAN SURVEY, A-497,
MONTGOMERY COUNTY, TEXAS.
94 LOTS 2 BLOCKS 4 RESERVES (3.0459 ACRES)
OWNER
D.R. HORTON-TEXAS, LTD.
400 Carriage Hills Boulevard
Conroe, Texas 77384
936-777-6600
MARCH, 2018
EHRA
10555 Westoffice Drive
Houston, Texas 77042
713.784.4500
EHRAinc.com
TBPE No: F726
TBPLS No: 10072500
SHEET 3 OF 5
JOB NO. 121-079-07

NO. 14-17-00764-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES K. COLLINS and
TONI SHARRETTS COLLINS,

Appellants

v.

D.R. HORTON-TEXAS, LTD.,

Appellee

ORAL ARGUMENT

June 28, 2018
2:00 p.m.

BEFORE:

The Hon. Martha Hill Jamison
The Hon. Ken Wise
The Hon. Kevin Jewell

APPEARANCES:

Law Office of Toni L. Sharretts Collins
By: Toni L. Sharretts Collins
State Bar No. 24037476
11054 North Hidden Oaks
Conroe, Texas 77483
(281) 827-7749
Appearing on behalf of Appellant

Delange, Hudspeth, McConnell & Tibbets
By: Paul J. McConnell, III
State Bar No. 13447500
1177 West Loop South, Suite 1700
Houston, Texas 77027
(713) 871-2000

* * *

[9] Collins proved the Sieberman exists with its perfected superior title from the Source of Texas title: The General Land Office.

The Texas Supreme Court holds: "Title becomes perfect with a patent issued by the GLO." And that's in *Hamilton v. Avery*, 20 SW 612, 630 (Tex. 1857). The patent is the superior legal title to the land issued by the State of Texas. That's *Patterson v. Peel*, 149 S.W.2d 284, 285 (Tex. App. 9th Dist. 1941).

That case holds: "[A] trespasser, [not unlike the Hodge claimants in Horton), have no standing to assert a patent that was not issued in accordance with the law." Have no standing to assert a patent that was not issued in accordance with the law.

The Texas Supreme Court further holds that: "A patent is conclusive against the state government upon the question as to the issue of the patent. If the state cannot deny its own act, no one else has the right to do so for it." That's *Ney v. Mumme*, 17 S.W. 407, 408 (Tex. 1886).

[10] There is no conflict that exists between the mutually exclusive Sieberman Survey and Hodge Survey.

JUSTICE WISE: What year did you say?

MS. SHARRETTS: 1886. There is no conflict that exists between the mutually exclusive Sieberman Survey and Hodge Survey patents per the General Land Office certified records.

Thus, the Exhibit B that we have before the Court, the patented GLO records, correctly reflect the survey boundaries for the mutually exclusive Sieberman and Hodge surveys.

Hodge only had title evidence, and the source is a 1944 federal judgment. That's all they gave us. No title opinion or anything.

It is void as to the Collins and Sieberman because the necessary parties, the Sieberman owners, were not joined in the 1941 lawsuit. That resulted in the 1944 judgment.

Despite the GLO evidence of existing survey in 1943, and the deed transactions within the Sieberman Survey in 1943, contemporaneous with the lawsuit, the Siebermans were still not joined.

And I'd like to give the Justices an [11] example. All three of you live next to each other on a street. All three lots are –

JUSTICE JAMISON: You're over your time, so why don't you skip the example. But go ahead and

give us your argument and wind up in about another minute.

MS. SHARRETTS: Okay, thank you, Your Honor.

The Texas and the United States Constitutions, as well as the Texas and U.S. Supreme Court, have long held that "parties interested and not joined in this suit will not be bound thereby" and "a judgment entered without notice or service is constitutionally infirm."

Per *Humphrey v. Beaumont Irrigating Co.*, Horton had the burden to prove that the Sieberman owners were joined in the suit, the 1941 suit, and they did not.

That shows that the Sieberman Survey is an existing patent, especially in the superior legal title that's conclusive against the State and all persons.

Horton has produced no title, or even a patent, for the Hodge under which it has its claims of title. It simply gave us a 2012 Lease [12] that it prepared on its own, and a 2012 survey that it prepared, and that was all the title that we had.

So they didn't even try to establish they had title. All throughout the actual -their motion for summary judgment responses, they asserted five times "we are not claiming title. This is not what we're going after. We did not adversely possess. We're not even going there."

They didn't attempt to even show they had title to the Sieberman.

But the Hodge Survey is patented. The Sieberman Survey is patented with the GLO. Therefore, it is gold. A superior title in Texas. And they can't deny that under a summary judgment. They didn't even send a patent. They only had nine pieces of evidence under the summary judgment. It certainly didn't come close to being proof as a matter of law.

JUSTICE JAMISON: Okay, thank you. You'll have time on rebuttal.

MS. SHARRETTS: Okay, thank you.

* * *

CERTIFICATE

I, Randel Raison, certified electronic court transcriber, do hereby certify that I typed the proceeding in the foregoing matter from audio recording, or the transcript was prepared under my direction, and that this is as accurate a transcript of what happened at that time and place as best as is possible, due to conditions of recording and/or duplicating.

/s/ Randel Raison
Randel Raison, CET 340