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**NO. 19-0353**

IN THE SUPREME COURT OF TEXAS

HEATHER KUTYBA,
PETITIONER,

V.

ASHLEE E. WATTS, D.V.M. AND TEXAS A&M UNIVERISTY,
RESPONDENTS.

On Petition for Review from the
Tenth Court of Appeals in Waco, Texas: No. 10-18-00168-CV

# RESPONDENTS' RESPONSE TO PETITION FOR REVIEW

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# RESPONDENT'S RESPONSE TO PETITION FOR REVIEW

## TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

This Court should deny the Petition for Review because the Tenth Court of Appeals correctly interpreted the plain language of the statute. Horses have long been considered property under Texas law, and there is no split in authority among the lower courts on the issue in this case.

## ARGUMENT AND AUTHORITIES

**The Tenth Court of Appeals correctly interpreted the plain language of section 101.021 of the Civil Practice and Remedies Code.**

This is a run-of-the-mill statutory interpretation case involving issues of settled law correctly decided by the Tenth Court of Appeals. In her reading of the statute at issue, Petitioner points to a dictionary definition of "death" and other statutes in other codes for why she should have prevailed. However, the Tenth Court of Appeals correctly applied the plain language of the statute at issue. Therefore, this Court should deny Petitioner's Petition for Review.

### A. Section 101.021(2) of the Civil Practice and Remedies Code does not waive a governmental unit's sovereign immunity for the death of a horse caused by the use of tangible personal property.

As Petitioner correctly notes at the beginning of her brief, the relevant statute at issue in this case is Texas Civil Practice and Remedies Code section 101.021. That statute reads as follows:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and

> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE § 101.021 (West 2011). In other words, a governmental unit's sovereign immunity is waived for (1) property damage, personal injury, or death caused by the negligent operation or use of a motor-driven vehicle or motor-driven equipment, or (2) "personal injury and death" caused by the condition or use of tangible personal or real property, and if the governmental unit would, were it a private person, be liable to the claimant under Texas law. Specifically, this case turns on subsection (2) and the word "death." Petitioner claims that "death" in subsection (2) refers to the death of horses as well as people, while Respondents believe, and the trial court and Tenth Court of Appeals held, that "death" in subsection (2) refers only to the death of human beings.

Statutory interpretation is a question of law that a court reviews de novo. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016). When construing a statute, the primary objective is to ascertain and give effect to the Legislature's intent. TEX. GOV'T CODE § 312.005 (West 2013); *see TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). "To discern that intent, we begin with the statute's words." *TGS-NOPEC*, 340 S.W.3d at 439; *see* TEX. GOV'T CODE § 312.003. "If a statute uses a term with a particular meaning or assigns a particular meaning to a term, [a court] is bound by the statutory usage." *TGS-NOPEC*, 340

S.W.3d at 439. If a statute is ambiguous, a court should adopt the interpretation the statute's plain language supports unless such an interpretation would lead to absurd results. *Id.* A court should consider statutes as a whole rather than as isolated provisions. *Id.* Additionally, courts "presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *Id.*

Here, the word "death"—and the immediate context in which it is placed in subsection (2)—clearly refers to death only of human beings, not of horses or other living creatures as Petitioner argues. As the Tenth Court held below, "in making this argument, [Petitioner] ignores the preceding three words in the statutory provision." *Kutyba v. Watts and Tex. A&M Univ.*, No. 10-18-00168-CV, 2019 WL 1187427, at *3 (Tex. App.—Waco 2018, pet. filed) (mem. op., not designated for publication). The Tenth Court continued: "In other words, the absence of a comma between injury and death indicates that the adjective 'personal' refers to both 'injury' and 'death.' Furthermore, the plain and common meaning of the term 'personal' refers to a human being, not property." *Id.* (citing BLACK'S LAW DICTIONARY 932 (7th ed. 2000)). Thus, the Tenth Court correctly interpreted "death" in subsection (2) by looking at it in the context of the words surrounding it, and by applying the appropriate common, ordinary meaning of the word "death."

Petitioner's interpretation of the word "death," on the other hand, relies on an acontextual reading of "death" and other statutes in other codes. Dictionaries, other statutory provisions, and caselaw "are helpful tools but often insufficient." *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 573 (Tex. 2014) (Willett, J., concurring). For example, Petitioner cites a dictionary definition of death that is much broader than the one allowed by the word's context. "[T]he choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures." *Id.* (quoting Frank H. Easterbrook, *Text, History, and Structure in Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994)). Additionally, Petitioner's citation to other statutes to support her interpretation of "death" in subsection (2) is also misplaced. "Evidence of meaning from other statutes is . . . useful, but this can be tricky, as words in statutes may take on unique or varying shades of meaning depending on the context and purpose for which they are used." *Jaster*, 438 S.W.3d at 573 (Willett, J., concurring).

Additionally, Petitioner's claim that "construing the statute to exclude the death of animals would lead to an absurd result" is without merit. The "bar for reworking the words our Legislature passed into law is high, and should be." *Combs v. Healthcare Servs. Corp.*, 401 S.W.3d 623, 631 (Tex. 2013). This Court has repeatedly held that the "absurdity safety valve is reserved for truly exceptional

cases, and mere oddity does not equal absurdity." *Id.* Further, the only absurd result that could come would be to adopt Petitioner's interpretation of death. As Respondents argued below, if "death" in subsection (2) included the death of horses, there is nothing in the statute that would limit "death" to that of any particular living organism. To adopt Petitioner's reading "would be a situation where sovereign immunity would be waived if a state employee, in the course and scope of his employment, negligently killed grass with his shoe." Appellee Br. at 16.

Finally, to the extent there is any ambiguity in whether "death" includes death of horses, the statute should be interpreted to retain Respondents' sovereign immunity. This Court has applied "long-held statutory construction principles that compel strict construction of . . . statutes waiving sovereign and governmental immunity." *See, e.g.*, *City of Houston v. Jackson*, 192 S.W.3d 764, 773 (Tex. 2006). Thus, to read "death" to include horses would be to violate that long-held principle of statutory interpretation in this state.

### B. Horses have long been considered property under Texas law, and there is no split in authority among the lower courts.

As the Tenth Court correctly noted, "under Texas law, horses are considered property, not persons." *Kutyba*, 2019 WL 1187427, at *3. Further, there is no split in authority among the lower courts on the issue before this Court. In fact, last year, the Seventh Court of Appeals, in an analogous case, held that the City of Lubbock's sovereign immunity was not waived for the death of horses because the damage to

the horses had not been "caused by the City's operation or use of a motor-driven vehicle or motor-driven equipment." *Davis v. City of Lubbock*, No. 07-16-00080-CV, 2018 WL 736344, at *5–6 (Tex. App.—Amarillo 2018, no pet.) (mem. op., not designated for publication). In *Davis*, the plaintiff, a horse owner, filed suit against the City of Lubbock for selling bacteria-laden hay that killed two horses and injured a third. *Id.* at *1. In her pleadings, the plaintiff alleged that, because a tractor baled the hay, there was a waiver of sovereign immunity. *Id.* at *5. The court held that sovereign immunity was not waived because the death of the horses was not caused by the operation or use of a motor-driven vehicle or motor-driven equipment, as that is the only way one can sue a governmental unit for horse—i.e., property—damage. *Id.* at *6. The same principle applies in this case. Petitioner has not alleged that the use of a motor-driven vehicle or motor-driven equipment caused damage to her horse. Therefore, as in *Davis*, there is no waiver of sovereign immunity.

The Tenth Court of Appeals correctly decided this case because it applied the plain meaning of the word "death" in subsection (2) in accordance with the context that surrounds that word. The Tenth Court did so against the backdrop of traditional principles of statutory interpretation, as well as Texas caselaw that held that horses are property, particularly in the context of section 101.021. Therefore, this Court should deny the Petition for Review.

## PRAYER

For these reasons, Dr. Watts and Texas A&M University pray that this Court deny Petitioner's Petition for Review.

## Certificate of Compliance

Pursuant to TEX. R. APP. P. 9.4(i)(3), this is to certify that this Response to the Petition for Review complies with the type-volume limitations of TEX. R. APP. P. 9.4(i)(2)(D) which is 4,500 words. This Response contains 1,676 words in a proportionally spaced typeface, exclusive of the exempted portions set forth in TEX. R. APP. P. 9.4(i)(1). This brief has been prepared using Times New Roman 14 point in text and Times New Roman 12 point in footnotes produced by Microsoft Word 2016 software.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel, by electronic transmission to the electronic mail addresses listed below on this, the **23rd day of July, 2019.**

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