**CASE NO. 14-07-00082-CV**

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**IN THE FOURTEENTH COURT OF APPEALS**
**HOUSTON, TEXAS**

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**CLASSIC CONTRACTORS OF HOUSTON LTD., CLASSIC GP, LLC, AND WESTERN SURETY COMPANY,**
*Appellants*,

*v.*

**TRIPLE B SERVICES, LLP,**
*Appellee*.

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**On Appeal from the 281st Judicial District Court of Harris County, Texas**
**Cause No. 2004-20457**

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# BRIEF OF APPELLEE TRIPLE B SERVICES, LLP

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**ORAL ARGUMENT REQUESTED**

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**Trial Judge:**

The Honorable David J. Bernal, 281st Judicial District Court of Harris County, Texas.

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**TO THE HONORABLE COURT OF APPEALS:**

Appellee Triple B Services, LLP ("Triple B") submits this brief in response to the briefs previously filed by Appellants William G. West, Chapter 7 Trustee of Classic Contractors of Houston, Ltd. and Classic GP, LLC ("Classic") and by Appellant Western Surety Company ("Western Surety"), as follows:

## STATEMENT OF THE CASE

Both Classic's and Western Surety's statements of the case are generally correct.

## RECORD CITATIONS

Triple B's references to the clerk's record will be designated as "CR" followed by the page number. The reporter's record contains seven volumes. Thus, a citation to "2

RR 120" refers to volume 2, page 120 of the reporter's record. "P. Ex." will refer to Plaintiff's Exhibits and "D. Ex." will refer to Defendant's Exhibits.

## ISSUES PRESENTED

Reply Point To Classic's Issue 1:

There is sizable evidence that Classic committed a prior breach of the contract between Classic and Triple B. The trial court correctly found that Classic is liable to Triple B for breach of contract.

Reply Point to Classic's Issue 2:

There is substantial evidence, most notably Classic's prior breach, that excuses Triple B from tendering timely performance under the contract. Accordingly, the trial court correctly determined that Triple B was excused from complying with the contract.

Reply Point to Classic's Issue 3:

There is overwhelming evidence that Classic waived all of the terms of its contract with Triple B. The trial court correctly concluded that Classic waived contractual provisions.

Reply Point to Classic's Issue 4:

The trial court correctly applied Chapter 53 of the Texas Property Code in rendering judgment against Classic for an amount exceeding the face amount of the bond.

Reply Point to Western Surety's Issue 1:

The trial court carefully followed Chapter 53 and correctly entered judgment against Western Surety for an amount exceeding the face amount of the bond.

Reply Point to Western Surety's Issue 2:

The trial court correctly entered Findings of Fact and Conclusions of Law that impose liability on Western Surety exceeding the face amount of the bond.

## STATEMENT OF FACTS

Classic previously owned sixty acres of land in the Kingwood region of Harris County (3 RR 88) ("the property"). Classic intended to develop this land as the North Kingwood Forest subdivision, which would include about two hundred and fifty homes (*Id.*; 2 RR 34). The City of Houston ("the City") annexed the property in 2000 (3 RR 88).

The property lies within a tax increment reinvestment zone ("TIRZ") that the City created (*Id.* at 88-89). Under the public improvement development agreement between Classic and TIRZ No. 10 (D. Ex. 22), Classic was tasked with constructing various public improvements (*Id.*; 3 RR 88-90). The public improvements would eventually belong to the City (D. Ex. 22). The City, in turn, would reimburse Classic for all funds Classic spent in creating the public improvements (*Id.*).

Two key components of the property's infrastructure are water, sanitary sewer and drainage facilities ("WS&D facilities") and a lift station (2 RR 34). A lift station hauls sewage to a higher elevation so that gravity will cause the effluent to flow to a water treatment plant (2 RR 251-52). A lift station essentially has three components: a wet well, pumps and controls that monitor the level of fluid, and landscaping and fencing (2 RR 253-55).

Classic hired Carter & Burgess, Inc. ("C&B") to design the drawings and plans for the WS&D facilities and lift station (2 RR 34, 36). C&B served as Classic's engineer, representative, and agent (2 RR 42-43). C&B designed the plans for the construction of the WS&D facilities and lift station based on input from geotechnical engineers (2 RR

36). By August 2002, Classic and C&B believed that the plans for the lift station were "ready for construction" (2 RR 47).

After a bidding process, Classic awarded Triple B the contract for the construction of the WS&D facilities and lift station ("the contract") (2 RR 41; P. Ex. 5). C&B prepared the contract (2 RR 42). On August 5, 2002, Classic and Triple B executed the contract (P. Ex. 5 at pp. 1-5).[1] The contract encompasses two projects: construction of the WS&D facilities and construction of the lift station (*Id.*). The contract specified separate times for the completion of each project (*Id.*). The contract Triple B and Classic signed incorporates General Conditions (P. Exs. 5, 7).[2]

Article 3 of the Contract states that the WS&D facilities

> will be substantially completed within **90** calendar days after the date when the Contract Times commence to run as provided in Paragraph 2.3 of the General Conditions, and completed and ready for final payment in accordance with Paragraph 14.13 of the General Conditions within **105** calendar days after the date when the Contract Times commence to run.

(P. Ex. 5 at p.1). Similarly, Article 3 of the contract provides that the lift station

> will be substantially completed within **120** calendar days after the date when the Contract Times commence to run as provided in Paragraph 2.3 of the General Conditions, and completed and ready for final payment in accordance with Paragraph 14.13 of the General Conditions within **135** calendar days when the Contract Times commence to run.

(*Id.*). Paragraph 2.3 of the General Conditions provides that "[t]he Contract Times will commence to run on the thirtieth day after the Effective Date of the Agreement, or, if a

[1] On page 1 of the contract, Lake Houston TIRZ No. 10 is listed as the owner (*Id.*). Classic, however, signed the contract as both the owner and the developer of the property (*Id.*; P. Ex. 6 at p. 19).
[2] Classic acknowledges this point in its brief. *See* Classic's Brief at 16.

Notice to Proceed is given, on the day indicated in the Notice to Proceed . . . ." (P. Ex. 7 at p. 15). Because Classic and Triple B agreed that "time is of the essence," (P. Ex. 5 at p. 1), the contract provides for liquidated damages totaling one thousand, one hundred dollars per day (*Id*.). The computation of time under the contract is conditioned on approval of and permitting for the plans (2 RR 172-73).

Paragraph 3.32 of the General Conditions concerns errors and discrepancies contained in the contract documents (P. Ex. 7 at p. 16). That section provides as follows:

> If, during the performance of the Work, CONTRACTOR discovers *any conflict, error, ambiguity or discrepancy within the Contract Documents* or between the Contract Documents and any provision of any such Law or Regulation applicable to the performance of the Work or of any such standard, specification, manual or code or of any inspection of any Supplied referred to in paragraph 6.5, CONTRACTOR shall report it to ENGINEER in writing at once, and *CONTRACTOR shall not proceed with the Work affected thereby* (except in an emergency as authorized by paragraph 6.23) until an amendment or supplement to the Contract Documents has been issued by one of the methods indicated in paragraph 3.5 or 3.6 . . . .

(*Id*. at p. 16) (emphasis added). The "contract documents" include the specifications and drawings for the work (*Id*. at p. 13). If the contract documents contain errors, the contractor cannot proceed with the work and need not request an extension of time (2 RR 90-92, 227-28).

C&B issued a Notice to Proceed to Triple B on August 5, 2002 (2 RR 47-48; P. Ex. 11). On that day, C&B informed Triple B that the contract time would begin to run one day later (P. Ex. 11). Triple B had to take the plans and obtain a permit from the City

(P. Ex. 7; 2 RR 59).[3] Shortly after C&B issued a Notice to Proceed, Triple B tried to pull a permit for the lift station; however, the City would not issue a permit because the property was not deeded to the City of Houston (2 RR 60). Under the contract, Classic bore the responsibility to prepare the easement to give the City the rights to inspect the lift station (*Id.*).

After C&B issued the Notice to Proceed, the City asked Classic to revise the plans for the lift station (2 RR 64-65). The reason for this requested revision was that there was uncertainty regarding the type of lift station that Classic desired (2 RR 64-65, 69). In short, the City found the plans inadequate for the construction of the lift station (2 RR 66).[4]

Due to the lack of a permit and the lack of approved plans for the lift station, Triple B could not work on the lift station for several months (2 RR 135, 140-41; P. Ex. 26). Triple B's work on the lift station was also delayed due to a lack of electricity and telephone services after Triple B was eventually able to commence work (P. Ex. 43). As C&B noted, "[t]hese delays were out of the contractor's control" (*Id.*; *see also* P. Ex. 34).

Notwithstanding the lack of approved plans and the requisite permits (2 RR 102), Triple B sunk the wet well only for the lift station at C&B's request and with C&B's authorization in November 2002 (2 RR 103-04). Triple B moved ahead with the wet well

[3] Although Triple B had to obtain permits under section 6.13 of the general conditions, Triple B had no role in designing the plans (2 RR 230-31). Triple B's sole task was obtaining the permit based on valid plans (2 RR 231).

[4] As the trial court noted, Classic "was forced to significantly revise and modify its Lift Station Plans to gain acceptance by the City" (CR 000479).

portion of the lift station project because C&B wanted to avoid delays on the project as a whole (2 RR 103). Moreover, the City had assured C&B that the new design requirements for the wet well would meet all applicable requirements (2 RR 103-06). This decision carried with it the risk that the City of Houston would fine Triple B for engaging in construction without a valid permit (2 RR 104, 139-40).

Fortunately, due to the City's familiarity regarding the issues surrounding the lift station, the City hinted it would not shut down the job (*Id.*). Nonetheless, Classic paid Triple B for its work (2 RR 137-39). After Triple B sunk the wet well in November 2002, Triple B was unable to perform any additional work on the lift station until March 2003 (3 RR 21-22). From November 2002 until March 2003, Triple B did not do any work on the lift station (2 RR 152; 3 RR 21-22; CR 000480).

The City eventually approved the construction drawings and issued permits (2 RR 163-64). Triple B substantially completed its work on the lift station on November 18, 2003 (P. Exs. 34, 57; 3 RR 23-24).[5] Triple B submitted Pay Estimate No. 10 to C&B in March 2004 (3 RR 23-24). C&B, Classic's engineer and agent, determined that Triple B completed its work on the lift station "within the allocated contract time[]" (*Id.*; 2 RR 155-56, 223). Thus, C&B recommended payment totaling $82,827.71 to Triple B (P. Exs. 56, 57; 2 RR 170-71). The Board for the TIRZ unanimously approved Pay Estimate No. 10 (P. Ex. 39).[6]

[5] Triple B reached substantial completion of the WS&D facilities in November 2002 (3 RR 9).
[6] One of Classic's representatives attended the meeting where the Board of the TIRZ approved Pay Estimate 10 (3 RR 146-47). Classic's representative, however, did not voice any disapproval concerning Triple B's work at that meeting (*Id.*).

Pay Estimate No. 10 went unpaid by Classic (RR 3:154). Then, as now, Classic contended that because Triple B did not timely complete its work on the lift station, Triple B owed Classic liquidated damages totaling approximately $300,000.00 (CR 000257). At no point during Triple B's construction of the lift station did Classic attempt to impose liquidated damages on Triple B (2 RR 176; 3 RR 142, 159).[7] On April 15, 2004, Triple B filed an affidavit claiming a lien in the real property records of Harris County, Texas (P. Ex. 40).

Six days later, Triple B sued Classic Contractors of Houston, Ltd. and Classic GP, LLC for breach of contract, quantum meruit, and foreclosure on its lien (CR 000002-000015). Triple B sought damages totaling $82,827.71, the amount of the unpaid retainage (CR 000003). Triple B also sought costs and reasonable attorney's fees (*Id.*).

On June 4, 2004, Classic filed a release of lien bond that it obtained from Western Surety (P. Ex. 44). Triple B received notice of that bond pursuant to section 53.173 of the Texas Property Code (*Id.*). The face amount of the bond is $124,241.56 (*Id.*). The bond expressly acknowledges that Triple B claimed a lien on property owned by Classic for labor and materials furnished to Classic (*Id.*). The condition language for the bond provides that if Classic pays "any and all judgments which may be rendered against the said property in favor of the aforesaid lienor," Western Surety's objection "shall be void" (*Id.*). No other condition appears.

[7] Moreover, C&B disagreed with Classic's claim that Triple B should pay liquidated damages (P. Exs. 32, 34).

Triple B subsequently filed a First Amended Original Petition and named Western Surety as a defendant (CR 000023-000045). Triple B claimed that Western Surety and Classic are jointly and severally liable to Triple B for $82,827.71 (CR 000027). Triple B also averred that it could recover costs and reasonable attorney's fees from Western Surety and Classic under section 53.156 of the Texas Property Code (*Id.*). Classic subsequently filed a counterclaim against Triple B for liquidated damages under the contract (CR 000048-000051).

Classic and Triple B agreed to—and the trial court ordered—separate trials (CR 000246-000248). The first trial would determine whether Triple B would prevail on its affirmative claims (CR 000246). If the trial court found that Triple B breached the contract, the second trial would focus on Classic's counterclaim and damages (CR 000247).

Following a two-day bench trial, the trial court entered findings of fact and conclusions of law and awarded Triple B $82,827.71 in actual damages against Classic and Western Surety (CR 000487, 000505). The Court also awarded Triple B attorney's fees totaling $98,500 pursuant to Chapter 53 of the Texas Property Code, pre-judgment interest, post-judgment interest, and court costs (CR 000487). The Court found that Classic would take nothing on its counterclaim against Triple B (CR 000506).

On November 2, 2006, the Court entered its final judgment against Classic and Western Surety, jointly and severally (CR 000505-000507). The court denied Classic's and Western Surety's motions for new trial on January 12, 2007 (CR 000572). Two weeks later, Triple B filed a partial satisfaction of judgment from Western Surety for

$126,881.70 (CR 000575-000576). This sum equals the face amount of the bond as well as post-judgment interest totaling $2,640.14 (CR 000575).

## SUMMARY OF THE ARGUMENT

It is undisputed that Classic refused to pay Triple B $82,827.71 for Triple B's work on the lift station for the North Kingwood Forest subdivision. Classic also failed to provide Triple B with approved plans for the construction of the lift station so that Triple B could pull a building permit and know what to build. This material breach of the contract prevented Triple B from working on the lift station. Indeed, under the general conditions to the contract, Triple B had no obligation to work on the lift station if there are not approved plans so as to allow Triple B to pull a permit for the project and know what to actually construct.

Under Texas law, the party who breaches a contract cannot subsequently contend that another party violated that contract's terms. Here, Classic cannot cite provisions in the very contract that it previously breached. Due to Classic's prior breach, Triple B was excused from any obligation to perform under the contract. Moreover, the doctrines of equitable estoppel and quasi-estoppel prevent Classic from seeking liquidated damages from Triple B.

Nonetheless, Triple B completed its work on the project. And in any event, Classic has waived its right to complain about alleged contractual breaches by Triple B. The trial court correctly found that Classic is liable to Triple B for breach of contract and that Classic owes Triple B $82,827.71, as well as costs and reasonable attorney's fees.

This Court should sustain the trial court's findings of fact and conclusions of law in their entirety.

Classic did obtain a bond from Western Surety, who now contends that its liability cannot exceed the face amount of that bond: $124,241.56. This argument, however, is untenable under Chapter 53 of the Texas Property Code. That statute expressly allows contractors such as Triple B to obtain damages, costs, and reasonable attorney's fees exceeding the face amount of the bond. Indeed, the principal and the surety are responsible for such awards as "if their claims [would have] been proved to be valid and enforceable liens on the property." TEX. PROP. CODE ANN. § 53.172(6) (Vernon Supp. 1997).

Thus, the trial court carefully followed and logically applied Chapter 53. Moreover, Western Surety's contention that its liability is not ripe finds no support in the plain language of the bond it issued to Classic.

Western Surety contends that "well-settled" Texas law limits Western Surety's liability to the face amount of the bond. However, many of the cases cited by Western Surety predate Chapter 53, which trumps the common law. The Legislature was well aware of pre-existing cases when it enacted Chapter 53, yet it chose a contrary rule. Consequently, these prior cases have no impact.

The cases cited by Triple B after Chapter 53's enactment all involve markedly different statutory schemes and therefore do not apply. Moreover, Chapter 53 merges into, and trumps, the language of the bond. Accordingly, the trial court correctly found that Western Surety is jointly and severally liable to Triple B for damages, costs, and

reasonable attorney's fees exceeding the face amount of the bond. This Court should affirm the judgment of the trial court.

## ARGUMENT

### Reply Point to Classic's Issue 1:

**There Is Sizable Evidence That Classic Committed A Prior Breach of the Contract Between Classic and Triple B. The Trial Court Correctly Found That Classic Is Liable to Triple B for Breach of Contract.**

**A. The trial court's findings of fact are reviewed for legal sufficiency and for factual sufficiency and its conclusions of law are reviewed *de novo*.**

When a party challenges the legal sufficiency of the evidence, that party must demonstrate that no evidence exists to support an adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). In conducting a no-evidence review, the appellate court must "view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary." *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001). The Court may sustain a no-evidence point only under one of the following situations:

> (1) there is a complete absence of evidence of a vital fact;
> (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact;
> (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or
> (4) the evidence establishes conclusively the opposite of the vital fact.

*Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

The trial court's findings of fact are reviewed for factual sufficiency of the evidence under the same legal standards applied to review jury verdicts. *E.g.*, *Anderson*

*v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). In a bench trial, the trial court is the sole judge of the credibility of the witnesses. *Southwestern Bell Media, Inc. v. Lyles*, 825 S.W.2d 488, 493 (Tex. App.—Houston [1st Dist.] 1992, writ denied). In reviewing a factual sufficiency point, the Court must consider and evaluate all evidence in the record. *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980). The Court may overturn findings of fact only if they are so against the great weight and preponderance of the evidence as to be plainly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

The trial court's conclusions of law are reviewed *de novo*. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The Court should uphold conclusions of law if the judgment can be sustained on any legal theory supported by the evidence. *E.g.*, *Econ. Forms Corp. v. Williams Bros. Constr. Co.*, 754 S.W.2d 451, 458 (Tex. App.—Houston [14th Dist.] 1988, no writ).

**B. There Is More Than Ample Evidence That Classic Committed A Material Breach Of The Contract.**

To prevail on a breach of contract claim, a party must establish the following four elements:

(1) a valid contract existed between the plaintiff and the defendant;
(2) the plaintiff tendered performance or was excused from doing so;
(3) the defendant breached the terms of the contract;
(4) the plaintiff sustained damages as a result of the defendant's breach.

*E.g.*, *Valero Mtkg. & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 351 (Tex .App.—Houston [1st Dist.] 2001, no pet.). "It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is

discharged or excused from further performance." *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)). That exact situation exists here.

C&B issued a Notice to Proceed to Triple B on August 5, 2002 (2 RR 47-48; P. Ex. 11). Triple B's performance under the contract, however, was conditioned on approval of the plans and the requisite permits (2 RR 55-56). Triple B had to take the plans for the lift station and obtain a permit from the City (2 RR 59). When Triple B tried to pull a permit for the lift station, the City refused to issue a permit because the property was not deeded to the City of Houston (2 RR 60). The City also determined that the design for the lift station was inadequate (2 RR 64-65, 69).

Under the contract, Classic bore the responsibility to prepare the easement to give the City the right to inspect the lift station (*Id.*). Based on the lack of permits for the lift station, Triple B could not work on the lift station for several months (2 RR 51, 135, 140-41; P. Ex. 26). Triple B's work on the lift station was also delayed due to a lack of electricity and telephone services at the job site after it was finally able to secure a permit (P. Ex. 43). As C&B noted, "[t]hese delays were out of the contractor's control" (*Id.*).

The testimony of Collin Pier ("Mr. Pier"), the former project manager for C&B, plainly demonstrates that Classic did not meet its obligations (2 RR 58-59, 177). Mr. Pier acknowledged that a contractor like Triple B has to have the City's Public Works Division approve the plans (2 RR 50). After that, the City's Code Enforcement Division must give the contractor permits to begin actual construction (2 RR 50-51). When Triple B attempted to pull a permit for the lift station, the City initially refused to issue a permit

because the property was not deeded to the City of Houston (2 RR 60, 245-46). As Mr. Pier testified, this problem is not Triple B's fault (2 RR 80).

Paragraph 3.32 of the General Conditions governs errors and discrepancies within the contract documents (P. Ex. 7 at p. 16). That section provides as follows:

> If, during the performance of the Work, CONTRACTOR discovers *any conflict, error, ambiguity or discrepancy within the Contract Documents* or between the Contract Documents and any provision of any such Law or Regulation applicable to the performance of the Work or of any such standard, specification, manual or code or of any inspection of any Supplied referred to in paragraph 6.5, CONTRACTOR shall report it to ENGINEER in writing at once, and *CONTRACTOR shall not proceed with the Work affected thereby* (except in an emergency as authorized by paragraph 6.23) until an amendment or supplement to the Contract Documents has been issued by one of the methods indicated in paragraph 3.5 or 3.6 . . . .

(*Id*. at p. 16) (emphasis added). The "contract documents" include the specifications and drawings for the work (*Id*. at p. 13). As Mr. Pier testified, the City did not approve the plans for the lift station for several months (2 RR 108).[8] Once the City eventually approved the plans, Triple B timely completed its work on the lift station (2 RR 141-42).

In the end, C&B found that Triple B timely completed its work on the project notwithstanding Classic's prior breach (2 RR 152-53). For that reason, C&B recommended payment of the remaining retainage (2 RR 153, 158). Indeed, Mr. Pier opined that Triple B performed its duty (2 RR 233). Classic, however, withheld payment (2 RR 170).

[8] It is therefore quite questionable for Classic to claim that "[t]here was no error in the drawings and they were perfectly adequate for the construction of the lift station depicted and intended to be constructed." Classic's Brief at 19. Indeed, as the trial court noted, the design for the wet

Mr. Pier also confirmed that the computation of time under the contract presumes that Triple B can work on the lift station (2 RR 173). Triple B's work is conditioned on the City's approval of the plans and the issuance of permits for the construction of the lift station (*Id.*). None of these things, however, happened on time (*Id.*). And the reason that they did not happen on time is that the plans were inadequate, incomplete, and defective (2 RR 227).

Keith Burke ("Mr. Burke"), managing partner of Triple B, aptly described the role of approved plans during his testimony at trial:

> Q. All right. Was having approved plans an important part of the contract in your mind?
>
> A. The plans are our road map. The road map we rely on to complete the journey out there. And without plans, clearly defining what it is that the owner wants, how am I supposed to know what to build?

(2 RR 242-43). Classic did not meet its contractual obligations because Classic forced Triple B to work with plans that were not approved or that lost prior approval, thereby preventing Triple B from pulling a permit (2 RR 250).

Classic contends that the City's Code Enforcement Department simply changed its mind regarding the validity of the plans for the lift station. *See* Classic's Brief at 20-21. This argument, however, does not accurately reflect the record. After C&B issued the Notice to Proceed, the City asked that Classic revise the plans for the lift station (2 RR 64-65). The reason that the City requested this revision was that there was uncertainty

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well changed from the original plans because the City required a "T-lock lining" as one of several upgrades (CR 000479, 000481-000482).

regarding the type of lift station that Classic desired (2 RR 64-65, 69). In short, the City found the plans inadequate for the construction of the lift station (2 RR 66).

The defect in the plans constitutes a material breach of the contract between Classic and Triple B. Moreover, the resulting inability to secure permits for the lift station because of the inadequate plans contravenes the terms of the contract. Classic's material breach prevented Triple B from working on the lift station. It is consequently dubious for Classic to claim that the problems with the lift station occurred simply because the City "changed its mind." To the contrary, the record shows that the City disapproved of Classic's plans (2 RR 64-65, 69).

Texas courts consistently prevent parties who breach a contract from attempting to enforce the terms of that contract. For example, in *Board of Regents of the University of Texas v. S&G Construction Co.*, 529 S.W.2d 90 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), the Third Court of Appeals held that the owner's inability to provide valid plans and specifications constituted a prior material breach. *Id*. at 96. Indeed, the Court further observed that the owner's conduct "was a breach of the contract resulting in the damage to appellee found by the jury." *Id*.; *see also Bd. of Regents of N. Tex. St. Univ. v. Denton Constr. Co.*, 652 S.W.2d 588, 590 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.); *City of Baytown v. Bayshore Constructors, Inc.*, 615 S.W.2d 792, 793-94 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

This Court previously held, in an analogous case, that "[w]hen an owner breaches a construction contract, it relinquishes its contractual procedural rights concerning change orders and claims for additional costs." *Shintech, Inc. v. Group Constructors, Inc.*, 689

S.W.2d 144, 151 (Tex. App.—Houston [14th Dist.] 1985, no writ) (citations omitted). The record demonstrates that the plans Classic gave Triple B prevented Triple B from constructing the lift station at the time the Notice to Proceed was issued (2 RR 64-65, 69). Classic's failure to provide Triple B with the tools necessary for it to perform its work (the plans) was a material breach of the contract. Classic cannot turn around and accuse Triple B of breaching the very contract that Classic in fact has already breached. The trial court correctly rendered judgment that Classic is liable to Triple B for breach of contract.

## Reply Point to Classic's Issue 2:

**There Is Substantial Evidence, Most Notably Classic's Prior Breach, That Excuses Triple B From Tendering Timely Performance Under the Contract. Accordingly, the Trial Court Correctly Determined that Triple B Was Excused From Complying With the Contract.**

### A. The trial court's findings of fact are reviewed for legal sufficiency and for factual sufficiency and its conclusions of law are reviewed *de novo*.

As previously stated in section A to Issue 1 *supra*, the trial court's findings of fact are reviewed for legal sufficiency and for factual sufficiency and the trial court's conclusions of law are reviewed *de novo*.

### B. There is Substantial Evidence That Classic's Material Breach Excused Triple B From Complying with the Contract.

Classic contends that Triple B is not excused from tendering timely performance. Classic's Brief at 14-19. As previously demonstrated, this argument is unavailing. More generally, however this argument glosses over a crucial section of the contract that Classic and Triple B signed.

Paragraph 3.32 of the General Conditions governs errors and discrepancies within the contract documents (P. Ex. 7 at p. 16). That section provides as follows:

> If, during the performance of the Work, CONTRACTOR discovers *any conflict, error, ambiguity or discrepancy within the Contract Documents* or between the Contract Documents and any provision of any such Law or Regulation applicable to the performance of the Work or of any such standard, specification, manual or code or of any inspection of any Supplied referred to in paragraph 6.5, CONTRACTOR shall report it to ENGINEER in writing at once, and *CONTRACTOR shall not proceed with the Work affected thereby* (except in an emergency as authorized by paragraph 6.23) until an amendment or supplement to the Contract Documents has been issued by one of the methods indicated in paragraph 3.5 or 3.6 . . . .

(*Id*. at p. 16) (emphasis added). The "contract documents" include the plans for the work (*Id*. at p. 13). If the contract documents contain errors, the contractor cannot proceed with the work and need not request an extension of time (2 RR 90-92, 227-28).

The City found that Classic's plans did not pass muster (2 RR 80, 156-57, 177). Triple B, in turn, informed Classic of the permitting problem by contacting Mr. Pier (P. Ex. 25; 2 RR 140-41). Indeed, Matt Seiffert ("Mr. Seiffert"), the former manager of Classic, was copied on that letter (2 RR 141).

Notwithstanding Classic's material breach,[9] Triple B still chose to sink the wet well in October 2002 (3 RR 5-7). Curiously, Classic seeks to punish Triple B for this good deed. But Classic cannot do so under Texas law. *See, e.g., Shintech, Inc. v. Group Constructors, Inc.*, 689 S.W.2d 144, 151 (Tex. App.—Houston [14th Dist.] 1985, no

[9] Classic contends that Triple B admitted it was 92.5 days over the time permitted in the contract when it submitted pay application no. 9. Classic's Brief at 17. As Keith Burke demonstrated during his testimony, however, a computer generates that figure automatically (3 RR 27-28). Triple B did not admit that it is liable to Classic for liquidated damages (*Id*.).

writ) (citations omitted); *City of Baytown v. Bayshore Constructors, Inc.*, 615 S.W.2d 792, 793-94 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

Because there is substantial evidence concerning Classic's breach of the contract, Triple B had no obligation to meet the terms of that contract. *Shintech, Inc.*, 689 S.W.2d at 151; *Bayshore Constructors, Inc.*, 615 S.W.2d at 793-94. The Court should uphold the trial court's findings of fact and conclusions of law on this issue.[10]

## Reply Point to Classic's Issue 3:

### There Is Overwhelming Evidence That Classic Waived All of the terms of its contract with Triple B.

### A. The trial court's findings of fact are reviewed for legal sufficiency and for factual sufficiency and its conclusions of law are reviewed *de novo*.

As previously stated in section A to Issue 1 *supra*, the trial court's findings of fact are reviewed for legal sufficiency and for factual sufficiency and the trial court's conclusions of law are reviewed *de novo*.

### B. The Record Is Plain That Classic Waived Its Right to Insist On Contractual Compliance.

[10] Classic argues that section 16.071 of the Texas Civil Practice and Remedies Code does not apply to the contract between Classic and Triple B because the initial contract price exceeds $500,000.00. Classic's Brief at 24. This argument, however, reads far too much into section 16.071. Section 16.071 "does not apply to a contract relating *to the sale or purchase of a business entity* if a party to the contract pays or receives or is obligated to pay or receive consideration under the contract having an aggregate value of not less than $500,000." TEX. CIV. PRAC. & REM. CODE ANN. § 16.071(f) (Vernon 1991) (emphasis added). The contract between Classic and Triple B concerns the construction of the WS&D facilities and the lift station, not the purchase or acquisition of a business organization (P. Ex. 5 at p. 1). Accordingly, the exception in section 16.071 does not apply.

Because Classic did not meet its contractual responsibilities, Classic cannot enforce the terms of the contract. There is, however, ample evidence that Classic waived any of the rights it now asserts under that contract.

Classic correctly notes that waiver is "an intentional relinquishment of a known right." *Straus v. Kirby Ct. Corp.*, 909 S.W.2d 105, 108 (Tex. App.—Houston [14th Dist.] 1995, writ denied). However, implied waiver exists when a party engages in "intentional conduct *inconsistent with claiming that right.*" *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987) (emphasis added). As the Texas Supreme Court has noted, "for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances." *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (citation omitted). The evidence of waiver is plain on this record.

When the TIRZ board considered Triple B's final payment application, which C&B approved, a representative of Classic was at that meeting (3 RR 146-47). As the TIRZ board proceeded to unanimously approve that pay estimate, Classic's representative said nary a word (3 RR 147). Moreover, when Triple B submitted pay estimate 8, Classic chose not to deny that invoice or assert a claim for liquidated damages (3 RR 142). Indeed, the following testimony demonstrates that Classic wanted Triple B to keep working on the project:

> THE COURT: Did you ever send a letter to anyone at Triple B saying, What's going on? Anything like that?
> THE WITNESS: Oh, absolutely not. They'll walk.

(3 RR 159).

Moreover, Classic approved change orders after its own representative admitted Classic was considering the imposition of liquidated damages against Triple B (3 RR 140, 159-60).[11] Having failed to assert its rights when it had the opportunity to do so, Classic cannot now belatedly complain of alleged contractual breaches by Triple B. The trial court correctly found that Classic waived contractual provisions.

Alternatively, the trial court correctly concluded that Classic is estopped from seeking liquidated damages from Triple B (CR 000487). The doctrine of equitable estoppel states that one who by his or her conduct induces another to act cannot adopt an inconsistent position and consequently injure the other party. *Cf. Hampton v. State Farm Mut. Auto. Ins. Co.*, 778 S.W.2d 476, 479 (Tex. App.—Corpus Christi 1989, no writ). The purpose of this doctrine is twofold: to avoid injustice and to protect those who have been misled. *Robert v. Haltom City*, 543 S.W.2d 75, 80 (Tex. 1976). If the Court finds that this doctrine applies based on a party's words or actions, that party cannot revert back to its prior position. *See Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965). Moreover, equitable estoppel can prevent a party from seeking to enforce the terms of a contract. *Hampton*, 778 S.W.2d at 479. There is ample evidence of equitable estoppel on the record before the Court.

The testimony from Classic's own representatives demonstrates that Classic wanted Triple B to continue working on the project (3 RR 159). Mr. Seiffert testified at trial that Classic chose not to assess liquidated damages (3 RR 141-42). Triple B relied

[11] As Mr. Seiffert acknowledged, change orders become part of the contract once they are approved (3 RR 161).

on Classic's inaction because Triple B proceeded to construct the lift station (P. Exs. 34, 57; 3 RR 23-24). Classic also chose to pay nearly all of the pay estimates that Triple B submitted to C&B (3 RR 140). Having done so, and having received the benefits of Triple B's workmanship, Classic is equitably estopped from belatedly seeking liquidated damages. *Cf. Hampton*, 778 S.W.2d at 479. Alternatively, the doctrine of quasi-estoppel precludes Classic from accepting the benefits of a completed lift station and subsequently seeking an award of liquidated damages. *See Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. App.—Houston [14th Dist.] 1991, no writ).

## Reply Point to Classic's Issue 4:

**The trial court correctly applied Chapter 53 of the Texas Property Code in rendering judgment against Classic for an amount exceeding the face amount of the bond.**

### A. The appropriate standard of review is *de novo*.

Statutory construction is a question of law for the Court to answer. *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Thus, a Court's interpretation of a statute is reviewed *de novo*. *E.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

### B. Chapter 53 mandates the entry of judgment against Classic for an amount exceeding the face amount of the bond

Section 53.156 of the Texas Property Code governs costs and attorney's fees in lawsuits brought under Chapter 53. TEX. PROP. CODE ANN. § 53.156 (Vernon Supp. 2004). That section provides as follows:

> In any proceeding to foreclose a lien or *to enforce a claim against a bond* issued under Subchapter *H, I, or J* or in any proceeding to declare that any

> lien or claim is invalid or unenforceable in whole or in part, *the court may aware costs and reasonable attorney's fees as are equitable and just*.

*Id*. (emphasis added). Subchapter H to Chapter 53 concerns bonds to indemnify against a lien. *Id*. §§ 53.171, 53.172. Section 53.172(6) states that the bond must:

> be conditioned substantially that the principal and sureties will pay to the named obliges or to their assignees the amount that the named obliges would have been entitled to recover if their claims had been proved to be valid and enforceable liens on the property.

*Id*. § 53.172(6). Thus, section 53.156 plainly allows for the imposition of costs and reasonable attorney's fees exceeding the face amount of the bond. *Id*. §§ 53.156, 53.171, 53.172; *cf. Tex. Wood Mill Cabinets, Inc. v. Butter*, 117 S.W.3d 98, 107 (Tex. App.—Tyler 2003, no pet.).[12]

Classic contends that any judgment exceeding the face amount of the bond is "not supportable." Classic's Brief at 28. To support this argument, Classic only relies on *Old Republic Surety Co. v. Cross*, 27 S.W.3d 35 (Tex. App.—San Antonio 2002, pet. denied). *Old Republic Surety Co*., however, does not apply.

In *Old Republic Surety Co*., the Fourth Court of Appeals evaluated an estate administrator's bond, not a bond indemnifying against a prior lien. *Id*. at 36. Moreover, in *Old Republic Surety Co*., there was no applicable statute allowing for an award of costs and reasonable attorney's fees in addition to damages. *Id*. at 38.

[12] The decision to award or to refuse to award costs and reasonable attorney's fees is committed to the discretion of the trial court. *World Help v. Leisure Lifestyles, Inc*., 977 S.W.2d 662, 685 (Tex. App.—Fort Worth 1998, pet. denied).

Here, however, Chapter 53 allows the trial court to award costs and reasonable attorney's fees in addition to actual damages. *See* TEX. PROP. CODE ANN. § 53.156. Because the Fourth Court of Appeals had no occasion to consider this statute in *Old Republic Surety Co.*, that case is immaterial. The trial court's entry of judgment against Classic for an amount exceeding the face amount of the bond is valid under Chapter 53.

## Reply Point to Western Surety's Issue 1

**The trial court carefully followed Chapter 53 and correctly entered judgment against Western Surety for an amount exceeding the face amount of the bond.**

### A. The appropriate standard of review is *de novo*.

Statutory construction is a question of law for the Court to answer. *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Consequently, a Court's interpretation of a statute is reviewed *de novo*. *E.g.*, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

### B. The trial court correctly interpreted Chapter 53 in entering judgment against Western Surety.

#### 1. Texas Courts Consistently Interpret Applicable Statutes In Accordance With Their Plain Meaning.

In interpreting a statute, Texas courts must determine and honor the intent of the Legislature. TEX. GOV'T CODE ANN. § 312.005 (Vernon 1998). In discerning legislative intent, courts begin with "the plain and common meaning of the statute's words." *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003) (quotations omitted). If the statutory language is unambiguous, the Court must interpret and apply the statute in accordance with its plain meaning. *See, e,g., Fitzgerald v. Advanced Spine Fixation Sys.*,

*Inc.*, 996 S.W.2d 864, 865 (Tex. 1999).[13] The Court must presume that the Legislature intends an entire statute to be effective. *See* TEX. GOV'T CODE ANN. §§ 311.021(2), (3).

Texas courts develop the common law; the Texas Legislature develops the statutes. Statutes can modify and abrogate common-law rights. *E.g.*, *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356 (Tex. 1990). Indeed, statutes can override the common law on particular topics. *Cf., e.g.*, *Ryan v. Travelers Ins. Co.*, 715 S.W.2d 172, 175 (Tex. App.—Houston [1st Dist.] 1986), writ ref'd n.r.e.).

Texas courts presume that when the Legislature enacts statutes, the Legislature is aware of prior court decisions. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 596 (Tex. 2001); *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963). Where, as here, a statute alters or abrogates the common law, the Court must assume the Legislature knew of—yet chose to disregard—prior cases. *Tex. Comm. Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002).

**2. Chapter 53 Applies to This Lawsuit.**

Section 53.021 of the Texas Property Code provides that a person has a statutory mechanic's lien if:

> (1) the person labors, specifically fabricates material, or furnishes labor or materials for construction or repair in this state of:
>
> (A) a house, building, or improvement;
> (B) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or
> (C) a railroad; and

[13] The only exception to this rule is if a literal interpretation of the statute would produce an absurd result. *Cf. Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996).

> (2) the person labors, specifically fabricates the material, or furnishes the labor or materials under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor.

TEX. PROP. CODE ANN. § 53.021(a)(1)-(2) (Vernon Supp. 2003). An "improvement" includes:

> (A) abutting sidewalks and streets and utilities in or on those sidewalks and streets;
> (B) clearing, grubbing, draining or fencing of land;
> (C) wells, cisterns, tanks, reservoirs or artificial lakes or pools made for supplying or storing water;
> (D) pumps, siphons, and windmills or other machinery or apparatuses used for raising water for stock, domestic use, or irrigation; and
> (E) planting orchard trees, grubbing out orchards and replacing trees, and pruning of orchard trees.

*Id*. § 53.001(2)(A)-(E). A statutory mechanic's lien covers "the house, building, fixtures, or improvements, the land reclaimed from overflow, or the railroad and all of its properties, and to each lot of land necessarily connected or reclaimed." *Id*. § 53.022(a); *Houston Elec. Distrib. Co. v. MBB Enters*., 703 S.W.2d 206, 207 (Tex. App.—Houston [14th Dist.] 1985, no writ).

Triple B contracted with Classic to construct the WS&D facilities and the lift station (2 RR 41-42). Triple B contracted for and provided work for the construction of an improvement (*Id*.). Thus, Triple B has a statutory mechanic's lien that extends to all 60.47 acres comprising the North Kingwood Forest subdivision project (P. Ex. 40).

Section 53.171 of the Texas Property Code states that "[i]f a lien, other than a lien granted by the owner in a written contract, is fixed or attempted to be fixed by a recorded instrument under this chapter, any person may file a bond to indemnify against the lien."

TEX. PROP. CODE ANN. § 53.171(a). A person attempting to "bond around" a lien must file that bond "with the county clerk of the county in which the property subject to the lien is located." *Id*. § 53.171(b). The bond must:

> be in an amount that is double the amount of the liens referred to in the bond unless the total amount claimed in the liens exceeds $40,000, in which case the bond must be in an amount that is the greater of 1 1/2 times the amount of the liens or the sum of $40,000 and the amount of the liens . . . .

*Id*. § 53.172(3).

Section 53.156 of the Texas Property Code governs costs and attorney's fees in lawsuits brought pursuant to Chapter 53. *Id.* § 53.156. That section provides as follows:

> In any proceeding to foreclose a lien or to enforce a claim against a bond issued under Subchapter *H, I, or J* or in any proceeding to declare that any lien or claim is invalid or unenforceable in whole or in part, *the court may aware costs and reasonable attorney's fees as are equitable and just*.

*Id*. (emphasis added). Section 53.172(6) states that the bond must:

> be conditioned substantially that the principal and sureties will pay to the named obliges or to their assignees the amount that the named obligees would have been entitled to recover if their claims had been proved to be valid and enforceable liens on the property.

*Id*. § 53.172(6). Subchapter H to Chapter 53 concerns bonds to indemnify against liens. *Id*. §§ 53.171, 53.172. Thus, section 53.156 allows for an award of costs and reasonable attorney's fees in addition to actual damages. *Id*. §§ 53.156, 53.171, 53.172; *cf. Tex. Wood Mill Cabinets, Inc. v. Butter*, 117 S.W.3d 98, 107 (Tex. App.—Tyler 2003, no pet.). There is no reference to the term "penal sum" in sections 53.171 through 53.175 of the Texas Property Code. *See* TEX. PROP. CODE ANN. §§ 53.171-53.175.

### 3. The Plain Language of Chapter 53 Allows Triple B To Recover Damages, Costs, and Reasonable Attorney's Fees Exceeding The Face Amount of the Bond.

Western Surety's principal argument on appeal is that its liability cannot exceed $124,241.56, the face amount of the bond. This argument, however, finds no support in the plain language of Chapter 53. Indeed, Western Surety invites the Court to ignore the logical application of Chapter 53 to this case.

Western Surety concedes that "[s]ection 53.156 provides for the recovery of attorney's fees . . . ." Western Surety's Brief at 15. Yet Western Surety attempts to evade the plain language of Chapter 53 by advancing the following argument:

> [T]he legislature in requiring a bond to be in the amount of 1 ½ times the amount of the lien, *intended for the additional amount to be the extent of the surety's liability* for any such fees or costs under the bond. If not, the legislature would have simply provided that a surety would be liable for *all* attorney's fees and there would be no requirement for the additional one-half of the lien amount.

*Id*. (emphasis added). This assertion rests solely on mere speculation unsupported by the text of Chapter 53. This argument also contravenes logical rules of statutory construction.

The Legislature's goal in crafting Chapter 53 "cannot be known except *as revealed in its text*." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 868 (Tex. 1999) (emphasis added). The text of sections 53.156 and 53.172 contains no ambiguity; thus, the intent of the Legislature is plain. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.172(3). Indeed, Chapter 53 quite plainly allows for the following recovery against a surety who "bonds around" a statutory mechanic's lien:

> (1) an amount that is the greater of 1 1/2 times the amount of the liens or the sum of $40,000 and the amount of the liens; and
> (2) costs and reasonable attorney's fees as are equitable and just.

*Id*.

Contrary to Western Surety's contention, the Legislature did provide for the recovery of costs and reasonable attorney's fees against a surety by enacting section 53.156. *See id*. § 53.156.[14] There is no language in Chapter 53 showing that a surety's liability cannot exceed the face amount of the bond. *Id*. §§ 53.156, 53.172(3).[15] Indeed, section 53.172(6) states that the award must be paid by the principal and surety as if the sums were incurred to prove a valid, enforceable lien. *Id*. § 53.172(6).

Texas courts must interpret "statutes in a manner that effectuates the Legislature's intent," not "second-guess the policy choices that inform [those] statutes." *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003). The Legislature expressed its intention in the text of Chapter 53. Accordingly, the Court should apply Chapter 53 in accordance with its plain meaning. *Id*.

**4. The Cases On Which Western Surety Relies Are Inapplicable.**

Western Surety relies on "[c]ase law, old and new" to support its assertion that its liability cannot exceed the face amount of the bond. Western Surety's Brief at 10. The

[14] One must also note that an obligee under a statutory bond may "utilize the civil practice and remedies code to recover attorney's fees in a suit against the surety." *Gramercy Ins. Company/Arcadia Fin. Ltd. v. Arcadia Fin. Ltd./Gramercy Ins. Co.*, 96 S.W.3d 320, 327 (Tex. App.—Austin 2001, pet. denied).

[15] The expression "penal sum" appears in Western Surety's brief more than thirty times. That phrase, however, does not appear once in the "bond around" statute. *See* TEX. PROP. CODE ANN. §§ 53.171-53.175. The only reference to the term "penal sum" is in section 53.202 of the Texas Property Code, which applies to bonds to pay liens or claims. *Id*. § 53.202(1) ("the bond must: (1) be in a penal sum . . . .").

"old" cases, however, do not apply because they pre-date Chapter 53's enactment. *Cf. Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 596 (Tex. 2001). The "new" cases also offer no assistance because these cases involve entirely different statutes.

**a. The Court Should Disregard Cases Issued Before The Enactment of Chapter 53.**

Western Surety cites the following five cases issued before Chapter 53's enactment:

> (1) *Bill Curphy v. Elliott*, 207 F.2d 103 (5th Cir. 1953) (performance bond);[16]
> (2) *Ferguson v. Ferguson*, 69 S.W.2d 592 (Tex. Civ. App.—Eastland 1934, no writ) (supersedeas bond);
> (3) *First National Bank of Brownfield v. Massachusetts Bonding & Insurance Co.*, 69 S.W.2d 151 (Tex. Civ. App.—Amarillo 1934, writ ref'd n.r.e.) (public warehouseman's bond);
> (4) *Chesley v. Reinhardt*, 300 S.W. 973 (Tex. Civ. App.—El Paso 1927, no writ) (bond issued in favor of insurance companies); and
> (5) *Locke v. Beal*, 257 S.W. 302 (Tex. Civ. App.—Galveston 1923, no writ) (bond issued under the forcible entry and detainer statute).

Western Surety's Brief at 10-15.

Each of these cases stands for the common law proposition that "the penalty fixed in the bond is the limit of the liability of the sureties." *Locke*, 257 S.W. at 302.[17] All of these cases were decided before the Texas Legislature enacted (and amended) Chapter 53. The Court must presume that the Texas Legislature was aware of these prior cases, yet chose to disregard them in enacting Chapter 53. *Tex. Comm. Bank, N.A. v. Grizzle*,

[16] A federal court's interpretation of Texas law is not binding. *Cf., e.g., Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004, pet. filed).

96 S.W.3d 240, 250 (Tex. 2002); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 596 (Tex. 2001); *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963). Accordingly, each of these pre-Chapter 53 cases is irrelevant. *Grizzle*, 96 S.W.3d at 250.[18]

**b. The Court Should Also Disregard Cases Issued After The Enactment of Chapter 53 That Involved Markedly Different Statutes.**

Western Surety also cites the following five cases:

> (1) *Abercia v. Kingvision Pay-Per-View, Ltd.*, 217 S.W.3d 688 (Tex. App.—El Paso 2007, pet. filed);
> (2) *Colonial America Casualty & Surety Co. v. Scherer*, 214 S.W.3d 725 (Tex. App.—San Antonio 2007, no pet.);
> (3) *Certified/LVI Environmental Services, Inc. v. PI Construction Corporation*, Civil Action No. SA-01-CA-1036 FB (NN), 2003 U.S. Dist. LEXIS 18057 (W.D. Tex. Sept. 18, 2003);
> (4) *Old Republic Surety Co. v. Cross*, 27 S.W.3d 35 (Tex. App.—San Antonio 2000, pet. denied); and
> (5) *Fort Bend County, Tex. v. Hartford Fire Ins. Co.*, No. 14-96-00316-CV, 1997 Tex. App. LEXIS 5024 (Tex. App.—Houston [14th Dist.] Sept. 18, 1997, pet. denied) (not designated for publication).

Western Surety's Brief at 11-14. None of these cases, however, involves a bond to indemnify against a statutory mechanic's lien.[19] Consequently, each of these cases is distinguishable.

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[17] *See also Elliott*, 207 F.2d at 108; *Ferguson*, 69 S.W.2d at 595; *First Nat'l Bank of Brownfield*, 69 S.W.2d at 152-53; *Chesley*, 300 S.W. at 974.

[18] One must also note that none of the bonds in those cases was an indemnity bond issued to protect against a statutory mechanic's lien. *See Elliott*, 207 F.2d at 108; *Ferguson*, 69 S.W.2d at 595; *First Nat'l Bank of Brownfield*, 69 S.W.2d at 152-53; *Chesley*, 300 S.W. at 974; *Locke*, 257 S.W. at 302.

[19] *See Certified/LVI Envtl. Servs., Inc.*, Civil Action No. SA-01-CA-1036 FB (NN), 2003 U.S. Dist. LEXIS 18057, at *14; *Abercia*, 217 S.W.3d at 704-05; *Scherer*, 214 S.W.3d at 727-28; *Old Republic Sur. Co.*, 27 S.W.3d at 36; *Fort Bend County, Tex.*, No. 14-96-00316-CV, 1997 Tex. App. LEXIS 5024, at *16-*17.

*Abercia* involved a sheriff's bond issued under section 86.002 of the Texas Local Government Code. 217 S.W.3d at 704-05. Under that section, "a person who is elected to the office of constable must execute a bond with two or more good and sufficient sureties . . . ." TEX. LOC. GOV'T CODE ANN. § 86.002(a) (Vernon Supp. 2005). The amount of the bond, however, is "not less than $500 or more than $1,500." *Id.* Because *Abercia* involved the issuance of a bond under a distinctly different statute, *Abercia* is inapplicable.

*Scherer* is no more relevant that *Abercia*. The former case involves the question of whether "the surety on a bond securing the original administrator of an estate is liable for attorney's fees incurred by a successor administrator in a suit against the original administrator for neglect and mismanagement of the estate." *Scherer*, 214 S.W.3d at 727-28. *Scherer* involved the extent of liability for a surety who serves as an estate administrator. *Id.* at 727-28, 733. Consequently, *Scherer* is inapposite.

*Certified/LVI Environmental Services, Inc.* concerns bonds issued in connection with the Miller Act, which is "a federal statute enacted to protect subcontractors and suppliers who provide goods and services for construction contracts on federal property." Civil Action No. SA-01-CA-1036 FB (NN), 2003 U.S. Dist. LEXIS 18057, at *14 (footnotes omitted). The United States District Court for the Western District of Texas issued *Certified/LVI Environmental Services, Inc.* *Id.* at *1. Thus, the interpretation of Texas law in that case does not bind this Court. *Cf., e.g., Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004, pet. filed).

Regardless, the district court's focus in *Certified/LVI Environmental Services, Inc.* was quite limited. Action No. SA-01-CA-1036 FB (NN), 2003 U.S. Dist. LEXIS 18057, at *25. Apart from an examination of the Miller Act, the Court in *Certified/LVI Environmental Services, Inc.* focused its attention on bond documents for the sureties, which "were standardized forms for *performance and payment bonds*." *Id.* (emphasis added) (footnote omitted). This lawsuit, however, involves a bond issued to protect against a statutory mechanic's lien. The relevance of *Certified/LVI Environmental Services, Inc.* is consequently minimal.[20]

Western Surety's reliance on *Old Republic Surety Co.* is also unavailing. That case involved an estate administrator's bond, not a bond indemnifying against a prior lien. 27 S.W.3d at 36. The Court examined whether a separate basis for an award of attorney's fees existed. *Id.* at 37. In *Old Republic Surety Co.*, however, there was no applicable statute that allowed for an award of attorneys' fees. *Id.* at 38. Here, Chapter 53 allows the trial court to award costs and reasonable attorney's fees in addition to actual damages. *See* TEX. PROP. CODE ANN. § 53.156. Because the Fourth Court of Appeals did not consider Chapter 53 in *Old Republic Surety Co.*, that case is immaterial.

Finally, Western Surety relies on *Ford Bend County, Texas v. Hartford Fire Insurance Co.*, No. 14-96-00316-CV, 1997 Tex. App. LEXIS 5024 (Tex. App.—Houston [14th Dist.] Sept. 18, 1997, pet. denied), an unpublished decision from this Court. *Hartford Fire Insurance Co.* involved bonds issued under section 232.004 of the Texas

[20] One must also note that the Miller Act does not generally allow for the recovery of attorney's fees. *Cf id.* at *16-*17.

Local Government Code. *Id*. at *16-*17. This Court noted that the bond determined by the County Engineer and the Commissioners Court limited the paving liability company's liability. *Id*. at *17. Accordingly, the judgment of the trial court in favor of the surety was affirmed. *Id*. at *19. Because *Hartford Fire Insurance Co*. involved a bond issued under a dissimilar statute, it does not apply here.

None of the cases cited by Western Surety involve a statute that provides a basis for awarding costs and reasonable attorney's fees in addition to actual damages. Section 53.156 of the Texas Property Code allows for an award of costs and reasonable attorney's fees in a lawsuit against a surety who "bonds around" a lien. *See* TEX. PROP. CODE ANN. § 53.156. This statute does not limit the surety's liability to the face amount of the bond. *Id*. This Court cannot attribute this language to an inadvertent choice by the Legislature. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc*., 996 S.W.2d 864, 868 (Tex. 1999).

There are other statutes that provide for a bond and specifically limit the surety's liability. For example, section 86.002 of the Texas Local Government Code provides that the commissioner's court sets the bond for a duly elected constable "in an amount of not less than $500 *or more than* $1,500." TEX. LOC. GOV'T CODE ANN. § 86.002(a) (Vernon Supp. 2005) (emphasis added). Similarly, section 503.033 of the Texas Transportation Code provides as follows:

> (e) the liability imposed on a surety *is limited to*:
>
> (1) the amount:
>
> (A) of the valid bank drafts, including checks, drawn by the applicant to buy motor vehicles; or

> (B) paid to the applicant for a motor vehicle for which the applicant did not deliver good title; and
>
> (2) attorney's fees that are incurred in the recovery of the judgment and that are reasonable in relation to the work performed.
>
> (f) The liability of a surety *may not exceed the face value of the surety bond*. . . . .

TEX. TRANSP. CODE ANN. § 503.033(e)-(f) (Vernon Supp. 1997) (emphasis added).

In both the Local Government Code and the Transportation Code, statutory restrictions exist concerning the extent of the surety's liability. *Id.*; *see also* TEX. LOC. GOV'T CODE ANN. § 86.002(a). There is no such restriction in Chapter 53. And in the absence of any such restriction, this Court cannot create one at Western Surety's request. Instead, the Court should apply the plain language of Chapter 53. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 868 (Tex. 1999).

**5. Chapter 53 Trumps The Common Law.**

Western Surety contends that "the issue at hand is not an issue that arises under Chapter 53, but rather, under general suretyship law." Western Surety's Brief at 16 n.51. But Western Surety agrees that the bond it issued is governed by Chapter 53. The enactment of Chapter 53 meant that the Legislature "dramatically engrafted upon" the common law. *Bartley v. Guillot*, 990 S.W.2d 481, 485 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). And as this Court has held, "[w]here the common law is revised by statute, the statute controls." *Id.*; *see also Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 596 (Tex. 2000); *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 330 (Tex. 1978).

The common law applies only when it does not conflict with a statute. *Signal Oil & Gas Co.*, 572 S.W.2d at 330. There is an unmistakable conflict between the common law rule cited by Western Surety and Chapter 53. *Compare Locke v. Beal*, 257 S.W. 302, 302 (Tex. Civ. App.—Galveston 1923, no writ), *with* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. This Court must resolve that conflict in favor of Chapter 53 and apply it "according to its plain language." *Del Indus., Inc.*, 35 S.W.3d at 596.

**6. Chapter 53 Trumps the Bond That Western Surety Issued to Classic.**

Even assuming, *arguendo*, that the issue before the Court solely arises under common law, Western Surety's arguments are unpersuasive. In *Howze v. Surety Corporation of America*, 584 S.W.2d 263 (Tex. 1979), the Texas Supreme Court noted that courts construe a bond "as a whole and the intent of the Legislature in requiring it." *Id*. at 266. If a party issues a bond pursuant to a statute, the statute "is made part of the bond and is controlling regardless of the bond's language." *Id*. (citing *Globe Indem. Co. v. Barnes*, 288 S.W.2d 121 (Tex. Comm'n App. 1926, judgm't adopted)). Intermediate courts in Texas have consistently applied the rule that the Texas Supreme Court established in *Howze*.[21]

The notice for the bond states that it is issued "in accordance with Section 53.173 Texas Property Code" (P. Ex. 44). Moreover, the bond notes that Triple B had a lien "for

[21] *See Sheldon Pollack Corp. v. Pioneer Concrete of Tex., Inc.*, 765 S.W.2d 843, 846 (Tex. App.—Dallas 1989, writ denied) ("[T]he terms of such statute will become a part of such obligation, by incorporation, *even though the bond itself is otherwise silent as to the statutory obligations.*" (emphasis added) (citation omitted)); *see also Gramercy Ins. Company/Arcadia Fin., Ltd. v. Arcadia Fin. Ltd./Gramercy Ins. Co.*, 96 S.W.3d 320, 324 (Tex. App.—Austin 2001,

and on account of *labor and/or materials* furnished to said **Classic Contractors of Houston, Ltd** . . . ." (*Id.*) (emphasis added). It bends reason for Western Surety to suggest that it was unaware that Triple B's lien arose under Chapter 53.

Because Western Surety intended to "bond around" Triple B's statutory lien,[22] Chapter 53 controls. *Howze*, 584 S.W.2d at 266; *Pioneer Concrete of Tex., Inc.*, 765 S.W.2d at 846. Western Surety's contention that "[t]he Bond itself describes the undertaking of Western"[23] is therefore inaccurate. *Howze*, 584 S.W.2d at 266; *Pioneer Concrete of Tex., Inc.*, 765 S.W.2d at 846.

Western Surety also avers that "in order for WSC to have any liability under the Bond to begin with, Triple B has to first obtain a judgment against Classic based on the condition of the bond, and Classic not pay the judgment." Western Surety's Brief at 9 (footnote omitted). Western Surety attempts to include additional language into the bond that is noticeably absent.

The condition language of the bond is as follows:

> **NOW, THEREFORE,** the condition of this obligation is such that, if the above bounden, **Classic Contractors of Houston, Ltd.** shall well and truly pay any and all judgments which may be rendered against the said property in favor of the aforesaid lienor, his successors or assigns, in any action or proceeding to enforce said lien, then this obligation shall be void, otherwise to remain in full force and effect.

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pet. denied) ("A statute mandating a bond . . . is made a part of the bond and *is controlling*." (emphasis added) (quotation and citations omitted)).

[22] *See* Western Surety's Brief at 9 n.48 (noting that the bond "was filed for the express purpose of 'bonding around' the lien on the property that Triple B sought to foreclose").

[23] Western Surety's Brief at 9.

(P. Ex. 44). This paragraph simply notes that if Classic pays all judgments rendered against the subject property in favor of Triple B, then Western Surety's obligation no longer exists (*Id*.). In that regard, the condition language subtly follows Chapter 53. *See* TEX. PROP. CODE ANN. § 53.172(6). This language does not indicate when Western Surety can, or should, pay off judgments (P. Ex. 44). This paragraph quite simply cannot support the exceedingly liberal interpretation that Western Surety attempts to give it.

**7. The Interpretation of Chapter 53 Proposed By Western Surety Would Lead To An Absurd Result.**

"Courts should not read a statute to create . . . an absurd result." *Barshop v. Medina County Underground Water Conservation Dist*., 925 S.W.2d 618, 629 (Tex. 1996). Adopting Western Surety's interpretation of Chapter 53 would lead to an especially odd result in this case. Western Surety asks the Court to limit the amount of costs and reasonable attorney's fees Triple B could recover to the difference between the face value of the bond and actual damages. *See* Western Surety's Brief at 3. Section 53.156, however, contains no such limitation. TEX. PROP. CODE ANN. § 53.156. Rather, section 53.156 allows for an award of costs and reasonable attorney's fees "as are *equitable and just*." *Id.* (emphasis added).

There is no indication in the text or structure of section 53.156 that the Legislature intended to allow sureties who "bond around" a lien to limit their liability to the face amount of the bond. Adopting Western Surety's interpretation of section 53.156 would be imprudent because the amount of costs and reasonable attorney's fees can often exceed the difference between the face value of the bond and actual damages. For that

reason, alone, the Court should refuse to adopt Western Surety's interpretation of Chapter 53.

A simple hypothetical illustrates the problem with Western Surety's interpretation of Chapter 53. If a contractor has a statutory mechanic's lien for $5,000.00, the surety could issue a bond with a face amount of $15,000.00. *See* TEX. PROP. CODE ANN. § 53.172(3). It is not unreasonable to think that the contractor would spend more than $10,000.00 in costs and attorney's fees in prosecuting its case against the surety. Under those circumstances, it would be entirely fair to allow the contractor to recover costs and reasonable attorney's fees. Section 53.156 implements this policy by allowing for an award of costs and reasonable attorney's fees "as are equitable and just." *Id.* § 53.156.

Under Western Surety's constricted interpretation of Chapter 53, however, the surety could always limit the amount of costs and attorney's fees it would pay to the difference between actual damages and the face amount of the bond. There is no compelling policy that should cause the Court to venture beyond the text of Chapter 53. If anything, the interpretation advanced by Western Surety, if adopted, would deprive contractors of the ability to recover damages, costs, and reasonable attorney's fees. Western Surety's interpretation of Chapter 53 would produce results that are neither equitable nor just. Consequently, concerns of public policy weigh against Western Surety's interpretation of Chapter 53.

Throughout its brief, Western Surety hints that the trial court disregarded "well-established law." But Western Surety points to no case or statute that contravenes Chapter 53. Moreover, the cases Western Surety cites yield to Chapter 53.

In the end, Western Surety is left with little more than speculation regarding what it believes the Legislature intended in enacting section 53.156. The Court, however, need not undertake such an endeavor. Instead of contemplating what the Legislature could have accomplished, the Court should interpret what the Legislature did accomplish in enacting section 53.156: allowing recovery of costs and reasonable attorney's fees in addition to actual damages.[24] The Court should affirm the judgment of the trial court.

## Reply Point to Western Surety's Issue 2:

**The trial court correctly entered Findings of Fact and Conclusions of Law that impose liability on Western Surety exceeding the face amount of the bond.**

### A. The trial court's findings of fact are reviewed for legal sufficiency and factual sufficiency and its conclusions of law are reviewed *de novo*.

As previously stated in section A to Issue 1 *supra*, the trial court's findings of fact are reviewed for legal sufficiency and for factual sufficiency and the trial court's conclusions of law are reviewed *de novo*.

### B. The trial court correctly made the challenged findings of fact in favor of Triple B.

Western Surety contends that the Court erred in making Finding of Fact No. 108, which is as follows:

> 108—Western Surety Company is liable to Triple B for any and all amounts that Classic is liable to Triple B under the statutory and constitutional liens.

[24] *Cf. Collins v. Ison-Newsome*, 73 S.W.3d 178, 191 (Tex. 2001) (Hecht, J., joined by Owen, J., dissenting) ("Rather than speculate over what purposes the Legislature could have had in writing the statute as it did, *we ought to follow the words it chose as precisely as we can*." (emphasis added)).

(CR 000484). As previously demonstrated, however, Western Surety is plainly liable to Triple B for damages, costs, and reasonable attorney's fees exceeding the face amount of the bond. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. Moreover, the language of the bond incorporates Chapter 53 (P. Ex. 44). Accordingly, the Court should reject this contention.

Western Surety avers that the Court erred in making Finding of Fact No. 109, which is as follows:

> 109—Classic and Western Surety Company have each failed to pay any part of the $82,827.71 to which Triple B is entitled under the lien or constitutional lien.

(CR 000484). Western Surety's suggestion to the contrary, there is nothing in the language of the bond that indicates its liability matures only after Classic pays a judgment (P. Ex. 44). Nor is this argument tenable under Chapter 53, which does not contain any limiting language. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. This argument is unavailing.

Western Surety contends that Finding of Fact No. 115 is erroneous. That finding is as follows:

> 115—All conditions precedent to Triple B's claims and suit have occurred or been performed or satisfied, if not excused.

(CR 000484).

The bond that Western Surety issued to Classic expressly acknowledges Chapter 53 (P. Ex. 44) and therefore allows Triple B to seek full recovery from Western Surety.

*See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. This argument is also unpersuasive.

Western Surety contends the trial court erred in making Finding of Fact Nos. 119, 120, 121, and 122, which are as follows:

> 119—Triple B has incurred attorneys' fees in connection with the prosecution of its claim against Classic and Western Surety Company and in connection with Classic's counterclaim against Triple B;
>
> 120—Attorneys' fees incurred in prosecuting Triple B's claim against Classic and Western Surety Company are inextricably intertwined with those incurred in defending Classic's counterclaim against Triple B;
>
> 121—Triple B incurred reasonable attorney fees in the amount of $98,500.00 in prosecuting its claims against Classic and Western Surety Company and in defending Classic's counterclaim through trial;
>
> 122—Triple B will incur additional attorneys' fees of $20,000.00 in the event of an appeal to the court of appeals, $10,000.00 in the event of a petition to the Texas Supreme Court that is not granted and $10,000.00 more if the petition is granted but unsuccessful.

(CR 000484-000485). The only proffered basis for overturning these four findings of fact is that "suit against Western was premature until such time that a final non-appealable judgment is rendered against Classic and not thereafter paid by Classic." Western Surety's Brief at 19. As previously demonstrated, this argument finds no support in the bond that Western Surety issued to Classic (P. Ex. 44).

For reasons previously demonstrated, Western Surety is plainly liable to Triple B under Chapter 53. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. Consequently, the Court should reject Western Surety's assertion.

Western Surety also assails Finding of Fact Nos. 123 and 124, which are as follows:

> 123—Triple B has proven by a preponderance of the evidence and prevails on all its causes of actions, defenses and affirmative defenses against Classic, Classic GP, LLC, and Western Surety Company;
>
> 124—Classic, Classic GP, LLC and Western Surety Company failed to prove by a preponderance of the evidence any of its causes of action, defenses and affirmative defenses against Triple B.

(CR 000485). Western Surety again contends that its liability "does not arise until a final judgment is rendered against Classic which is not paid by Classic." Western Surety's Brief at 20. There is nothing in the language of the bond to support this assertion (P. Ex. 44). The bond that Classic issued under Chapter 53 allows Triple B to obtain the precise relief that it did. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. Thus, the Court should uphold these challenged findings.

### C. The trial court correctly entered the challenged conclusions of law in favor of Triple B.

Western Surety attacks Conclusion of Law No. 4, which provides as follows:

> 4—Western Surety Company is obligated to pay Triple B $82,827.71, plus attorneys fees under the Bond.

(CR 000485). Western Surety insists that its liability does not arise "until a judgment is rendered against Classic and not thereafter paid by Classic." Western Surety's Brief at 21. For reasons previously stated, Chapter 53 does not support Western Surety's assertion. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. Accordingly, the Court should uphold Conclusion of Law No. 4.

Western Surety also challenges Conclusion of Law No. 29. That conclusion is as follows:

> 29—Classic is ordered to pay Triple B reasonable attorney fees in the amount of $98,500.00 in connection with Triple B's claims against Classic and Western Surety Company and in defending Classic's counterclaim through trial.

(CR 000487). As previously illustrated, however, Triple B can recover damages, costs and reasonable attorney's fees exceeding the face amount of the bond. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. Moreover, Western Surety's liability matured before trial because it issued a bond under Chapter 53 (P. Ex. 44). The Court should summarily dismiss this argument.

Western Surety also attacks Conclusion of Law No. 30, which states as follows:

> 30—Triple B is entitled to recover attorney fees from Classic and Western Surety Company under Chapter 53 of the Texas Property Code.

(CR 000487). Western Surety's challenge is a reiteration of its previous position that its liability to Triple B is limited to the "penal sum" of the Bond. Western Surety's Brief at 22. For several reasons, this argument lacks merit. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. The Court should uphold Conclusion of Law No. 30.

Western Surety criticizes Conclusion of Law No. 38, which states the following:

> 38—Classic and Western Surety Company are jointly and severally liable to Triple B under the Bond in the amount of $82,827.11, plus reasonable attorneys' fees and interest.

(CR 000488). Western Surety reiterates its prior contention that its liability is conditioned on Classic not paying a judgment and Western Surety's liability cannot exceed the face sum of the bond. Western Surety's Brief at 22. The statute that governs

Western Surety's bond, however, disallows both arguments. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. This Court should as well by upholding Conclusion of Law No. 38.

Finally, Western Surety believes the trial court erred in making Conclusion of Law No. 39, which states as follows:

> 39—Triple B is entitled to prejudgment interest to the maximum amount allowed by law.

(CR 000488). The Court should reject any assertion by Western Surety that is liability is limited to the face sum of the bond. Considering the plain language of Chapter 53, this contention is plainly erroneous. *See* TEX. PROP. CODE ANN. §§ 53.156, 53.171, 53.172. The Court should uphold Conclusion of Law No. 39.

Western Surety globally asserts that the trial court erred in making and findings of fact or conclusions of law that do not expressly limit Triple B's recovery against Western to the "penal sum" of the bond. Western Surety's Brief at 22-23. For reasons previously demonstrated, however, Chapter 53 fully supports each of the trial court's findings of fact and conclusions of law on this particular issue. Accordingly, the Court should sustain the trial court's findings of fact and conclusions of law on this topic.

## PRAYER

For these reasons Appellee Triple B Services, LLP respectfully prays that the trial court's judgment be in all things affirmed, with costs taxed against Appellants.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

As required by Texas Rules of Appellate Procedure 6.3 and 9.5(b), (d), (e), I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded by certified mail, return receipt requested on this the_____day of February, 2008, to the following:

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