NUMBER 13-19-00297-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

TEXAS CENTRAL RAILROAD & INFRASTRUCTURE, INC. AND INTEGRATED TEXAS LOGISTICS, INC., **Appellants,**

v.

JAMES FREDRICK MILES, **Appellee.**

On appeal from the 87th District Court of Leon County, Texas.

MEMORANDUM OPINION

Before Justices Longoria, Hinojosa, and Tijerina
Memorandum Opinion by Justice Longoria

Appellants Texas Central Railroad & Infrastructure, Inc. (TCRI) and Integrated Texas Logistics, Inc. (ITL) appeal from the trial court's granting of appellee James Frederick Miles's motion for summary judgment. By four issues, appellants contend that:

(1-2) the trial court erred in declaring that TCRI and ITL were not "railroad companies" or "interurban electric railways"; (3) the trial court erred in granting Miles's summary judgment motion and denying appellants' motion for partial summary judgment; and (4) if this Court reverses, attorney's fees should also be reversed. We reverse the trial court's judgment, render the judgment the trial court should have rendered, and remand for further proceedings.

I. BACKGROUND[1]

TXHS Railroad, Inc., was formed on December 20, 2012. In 2015, TXHS amended its entity information to change its name to TCRI and amended its purpose to be "to plan, build, maintain and operate an Interurban electric railroad . . . ." In 2017, ITL was formed in part

> To construct, acquire, maintain, or operate lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both freight and passengers, with all powers conferred pursuant to and all limitations imposed by Chapter 131 of the Texas Transportation Code;
>
> To operate and transact business as a railroad company, with all powers conferred pursuant to and all limitations imposed by Chapter 112 of the Texas Transportation Code.

Appellants were formed to create and operate a high-speed electric-powered passenger train connecting Dallas and Houston (the Project).

As part of their efforts to advance the Project, appellants "completed over 2,000 land surveys along the railway routes" that were being analyzed. In November of 2015, TCRI sent Miles a packet which included: (1) a brochure with details about the Project; (2) an outline of the survey process and information for what to expect during the process;

[1] This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

(3) an invitation to open-house meetings; and (4) a survey permission form. Miles took issue with the survey permission form and refused to sign. After refusing to grant permission to TCRI to survey his land, Miles sued TCRI for declaratory relief seeking a judgment that TCRI could not conduct the type of survey requested in the survey permission form. Miles later amended his petition to include requests for declaratory relief that:

> TCRI's [survey permission form] exceeds the scope of survey activities granted by TEX. TRANS. CODE §§ 112.051 and 131.013. [Miles] further seeks a declaration regarding TCRI's claim that it has eminent domain authority solely by virtue of statutory entitlement including, but not limited to, an order declaring that TCRI is not statutorily entitled to enter [Miles's] Property to conduct pre-condemnation surveys, inspections and evaluations.

Miles also sought attorney's fees. TCRI answered and counterclaimed, seeking a declaratory judgment that it is a railroad company and an interurban electric railway as those terms are used in the Texas Transportation Code. TCRI also sought injunctive relief to secure its right to survey Miles's property, arguing that because it is a railroad company and an interurban electric railway, it has the right to conduct surveys and examinations. ITL intervened and sought the same declaratory and injunctive relief against Miles.

The parties filed cross-motions for summary judgment. Miles argued that TCRI and ITL were not railroad companies and were not interurban electric railways. He further sought final summary judgment stating that TCRI did not have the right to exercise eminent domain authority on his property and he sought to recover his attorney's fees. Appellants' summary judgment motion asked the trial court to declare that both appellants qualify as railroad companies and as interurban electric railways. The trial court entered summary judgment in favor of Miles, declaring that neither appellant is a railroad company nor an interurban electric railway. Miles was awarded attorney's fees for costs incurred

through judgment and conditional appellate fees. Appellants' counterclaims were dismissed with prejudice. This appeal followed.

II. SUMMARY JUDGMENT

Appellants' first three issues contend that the trial judge erred in granting summary judgment in favor of Miles.

A. Standard of Review

On appeal, we review de novo a trial court's summary judgment ruling. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In our review, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). When, as here, the parties file competing motions for summary judgment and the trial court grants one motion and denies the other, this court should review both parties' summary-judgment evidence and determine all questions presented. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Here, because the trial court implicitly resolved the declaratory judgment issues by ruling on motions for summary judgment, we review the propriety of the trial court's grant of the declaratory judgments under the same standards applicable for review of summary judgments. *See English v. B.G.P. Int'l, Inc.*, 174 S.W.3d 366, 370 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Therefore, we must determine whether the trial court properly granted Miles's declaratory judgment requests and, if not, enter the judgment which should have been entered by the trial court. *See id*.

B. Railroad Companies

By their first issue, appellants argue that the trial court erred in finding that neither TCRI nor ITL are railroad companies as the term is defined in the Texas Transportation Code. *See* TEX. TRANSP. CODE ANN. § 81.002. Section 81.002 defines a railroad company as:

> (1) a railroad incorporated before September 1, 2007, under former Title 112, Revised Statutes; or
>
> (2) any other legal entity operating a railroad, including an entity organized under the Texas Business Corporation Act or the Texas Corporation Law provisions of the Business Organizations Code.

Id. The parties do not dispute that appellants were not incorporated before September 1, 2007; therefore, we must determine if appellants are railroad companies under § 81.002(2). In so doing, we must construe the statutory language. Our objective in statutory construction is to give effect to the Legislature's intent, "which we ascertain from the plain meaning of the words used in the statute" because the best indicator of what the Legislature intended is what it enacted. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016); *see also Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632, 635 (Tex. 2013). Thus, "[w]here text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). We presume lawmakers chose statutory language "with care and that every word or phrase was used with a purpose in mind." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). We read these words and phrases in context and construe them according to the rules of grammar and common usage. TEX. GOV'T CODE ANN. § 311.011; *see also TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("Undefined terms in a statute are typically given their ordinary meaning [unless] a

different or more precise definition is apparent from the term's use in the context of the statute . . . ."). Importantly, we do not consider those words and phrases in isolation; rather, "we consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). Moreover, "[s]tatutory terms should be interpreted consistently in every part of an act." *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Finally, we presume that the Legislature intended the statute to comply with the Texas Constitution. TEX. GOV'T CODE ANN. § 311.021(1); *In re Allcat Serv., L.P.*, 356 S.W.3d 455, 468 (Tex. 2011) (orig. proceeding).

Miles contends that this is an eminent domain proceeding, and as such, he cites to *Tex. Rice Land P's, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (*Texas Rice I*)[2] to argue that the statute must be "strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith." As noted by Miles, strict construction of the statute is necessary only "in instances of doubt as to the scope of the power." *Id*.

> Strict construction is not, however, the exact converse of liberal construction, for it does not require that the words of a statute be given the narrowest meaning of which they are susceptible. The language used by the Legislature may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute, but the operation of the law will then be confined to cases which plainly fall within its terms as well as its spirit and purpose.

[2] In *Tex. Rice Land P's, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192 (Tex. 2012) (*Texas Rice I*) the Texas Supreme Court reversed the court of appeals and remanded the matter to the trial court to determine whether Denbury Green Pipeline-Texas, LLC was a common carrier under the test laid out in the opinion pursuant to the Texas Natural Resources Code. On remand, the trial court granted summary judgment, finding Denbury Green Pipeline-Texas, LLC to be a common carrier. *Id.* Subsequently, Texas Rice Land Partners appealed, the Ninth Court of Appeals in Beaumont reversed and remanded, and the Supreme Court reversed and remanded finding that, as a matter of law, Denbury Green Pipeline-Texas, LLC was a common carrier. *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909, 911 (Tex. 2017) (*Texas Rice II*).

Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958).

1. Operating a Railroad

Appellants argue that the trial court erred in declaring that neither TCRI nor ITL were railroads because they are "engaging in railroad operations regulated under Title 5 of the Transportation Code." Miles contends, to the contrary, that because TCRI and ITL "own no trains, have constructed no track or train depots, have expended less than 1% of the total estimated cost of the Project, and cannot even purchase the parcels optioned along the Project's proposed alignment," they are not operating a railroad. The term "railroad" is defined in Title 5 of the Transportation Code as "an enterprise created and operated to carry passengers, freight, or both on a fixed track. The term includes all real estate and interests in real estate, equipment, machinery, materials, structures, buildings, stations, facilities, and other improvements that are necessary to, or for the benefit of, the enterprise." TEX. TRANSP. CODE ANN. § 199.002(a)(1).

The Code Construction Act states clearly that "words in the present tense include the future tense." TEX. GOV'T CODE ANN. § 311.012(a). "Consistent with the legislature's instruction under the Code Construction Act, we should not focus on verb tense in determining legislative intent because words in the present tense include the future tense." *In re Nabors*, 276 S.W.3d 190, 197 n.8 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing Texas Code Construction Act, TEX. GOV'T CODE ANN. § 311.012(a)). "Operating," as used in § 81.002(2), is in the present tense, which forms the basis for Miles's argument that appellants are not currently operating a railroad. *See* TEX. TRANSP. CODE. ANN. § 81.002(2). Miles further argues that if we were to adopt appellants' interpretation, we would be broadly construing the statute "to the point of absurdity and

against the presumption in favor of landowners' fundamental and foundational real property rights." Further, Miles states that such strict construction is only required where there is "doubt as to scope of [eminent-domain] power." *See Texas Rice I*, 363 S.W.3d at 198. Here, Miles does not argue that a railroad company has eminent domain authority to survey his property, as he concedes in his brief, but rather he argues that appellants are not railroad companies at all, and accordingly, they do not have any eminent domain authority. Therefore, we are not interpreting the eminent domain authority, but rather we are interpreting § 81.002(2)'s definition of railroad company. *See* TEX. TRANSP. CODE. ANN. § 81.002(2). However, as previously mentioned, even strict construction of the statute does not require that we give the narrowest possible meaning to the words of the statute, but rather that we "carry out [the legislature's] manifest purpose and intention in enacting the statute." *Pate*, 309 S.W.2d at 831.

Miles contends that "the Legislature chose to use the word 'operating' to codify its intent that an entity must demonstrate that it is presently operating a railroad. . . ." While we agree that when interpreting statutes, our primary objective is to ascertain and give effect to legislative intent, *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999); *see* TEX. GOV'T CODE ANN. § 311.023, we must also assume that the legislature intended that each statute be interpreted in accordance with the Code Construction Act. *See In re Nabors*, 276 S.W.3d at197 n.8. Miles focuses the majority of his argument on the basis that a "fair reading" of the statute would find that an entity must already have trains, tracks, depots, and some physical form to be a railroad company; however Miles's interpretation would have this Court ignore the legislature's instruction

under the Code Construction Act by limiting the word "operating" to solely the present tense. We decline to do so.

Appellants rely on *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017) (*Texas Rice II*), for the contention that that they qualify as an entity with eminent domain power because they will have running trains on the tracks after construction is complete. In *Texas Rice II*, the Texas Supreme Court found Denbury Green Pipeline-Texas, LLC (Denbury) to be a common carrier as it is defined in the Texas National Resources Code because there was a reasonable probability that the pipeline, "at some point after construction" would "serve the public." *See Texas Rice II*, 510 S.W.3d 909, 914. A person is a common carrier if it:

> owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public for hire, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter.

TEX. NAT. RES. CODE ANN. § 11.002(6). *Texas Rice II*, therefore found that a pipeline owner must do more than just state that it is a common carrier by filling out the necessary forms in order to gain eminent domain authority, it must also show that it will meet the requirements as set forth in the code. *Id*. at 915–16 (citing *Texas Rice I*, 363 S.W.3d at 202). *Texas Rice II* did not require that Denbury show that it was currently operating in such a way to serve the public, only that there was a reasonable probability that in the future, it would. *Id*.

While it is undisputed that appellants have not yet physically laid tracks or began to carry passengers or freight onboard a train, appellants have taken many of the necessary steps in order to be able to create and operate a railroad in the future. Title 5

regulates: (1) design, planning, and preliminary studies, *see* TEX. TRANSP. CODE. ANN. §§ 91.004(a)(1), 91.036, 91.054; (2) surveying, *see id*. § 112.051(a); (3) construction, *see id*. §§ 91.004(a)(1), 112.002(7), 112.057; (4) acquisition, *see id*. §§ 91.002(1), 131.032(a); (5) financing, *see id*. § 91.004(a)(4); (6) maintenance, *see id*.; and (7) purchasing, holding, and using property necessary to accomplish company objectives. *See id*. §§ 91.103(1), 112.002(6). Although Miles contends that appellants have only spent approximately 1% of their overall budget, appellants produced summary judgment evidence showing that they have coordinated with regulatory agencies concerning the Project, begun design, construction, and management operations, conducted land surveys, and entered into purchase agreements.

Accordingly, considering the legislature's instruction to view present tense as including future tense in the statute and the actions taken by appellants to begin to operate a railroad, we conclude that TCRI and ITL are railroad companies pursuant to § 81.002(2). *See id.* § 81.002(2).

We sustain appellants' first issue.

C. Interurban Electric Railway Companies

In their second issue, appellants argue that they are interurban electric railway companies as defined in the Transportation Code. *See id*. § 131.011 ("In this subchapter, 'interurban electric railway company' means a corporation chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state.").

> A corporation chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in

> this state for the transportation of freight, passengers, or both freight and passengers may:
>
> (1) exercise the power of eminent domain with all the rights and powers granted by law to a railroad company; and
>
> (2) enter, condemn, and appropriate land, right-of-way, easements, or other property of any person or corporation to acquire:
>
> (A) right-of-way on which to construct and operate lines of railway for the acquiring corporation; or
>
> (B) sites for depots or power plants.

Id. § 131.012. Miles responds that neither TCRI nor ITL qualify as interurban electric railways simply because they checked a box on a form. He also argues that the Legislature could not have "intended the eminent domain powers it conferred upon electric trolley cars over a century ago to apply to TCRI and ITL's 200 mile-per-hour bullet trains today."

Section 131.011 requires a corporation to be chartered for a specific purpose: "to conduct and operate an electric railway between two municipalities in this state." *Id*. § 131.011. TCRI, in its January 21, 2015 amended filing with the Secretary of State, identifies that TCRI's purpose is "to plan, build, maintain and operate an interurban electric railroad . . . ." The certificate was effective on the date of filing. ITL filed its certificate of formation with the Secretary of State on September 26, 2017, identifying its purpose, in part, "to construct, acquire, maintain, or operate lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both freight and passengers . . . ." The certificate was effective on the date of filing. Miles contends that the mere act of filling out these documents does not grant the right of eminent domain to appellants. His argument is based on *Texas Rice I*, "[p]rivate property

cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more." *Texas Rice I*, 363 S.W.3d at 199. However, in *Texas I*, the "core constitutional concern" was "the pipeline's *public vs. private use*." *Id.* at 200 (emphasis in original). There, the Supreme Court analyzed whether the intended use of the pipeline was for public or private service to decide whether Denbury had been granted the power of eminent domain. *Id*. "To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder's exclusive use." *Id*. Accordingly, the Supreme Court created a test to determine the common-carrier status by determining the intended use of the pipeline. *Id*.

Here, to the contrary, the statute grants eminent domain to those corporations "chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both freight and passengers." TEX. TRANSP. CODE. ANN. § 131.012. TCRI and ITL's intent is to transport freight, passengers, or both freight and passengers, and Miles does not challenge this intent. Miles argues that because no hearing took place and no investigation was conducted, the registration is merely clerical, but he does not present this Court with any argument about what would have been found, had an investigation been done. TCRI and ITL's intent is compliant with the statute and Miles presented no argument to the contrary. Therefore, appellants meet the requirements under the Transportation Code. *See id*. §§ 131.011–12.

Miles argues that even if TCRI had acquired eminent domain authority when chartered, the authority expired as a matter of law in 2013 because TCRI failed to comply with Texas Government Code § 2206, which states:

> (a) This section does not apply to an entity that was created or that acquired the power of eminent domain on or after December 31, 2012.
>
> (b) Not later than December 31, 2012, an entity, including a private entity, authorized by the state by a general or special law to exercise the power of eminent domain shall submit to the comptroller a letter stating that the entity is authorized by the state to exercise the power of eminent domain and identifying each provision of law that grants the entity that authority. The entity must send the letter by certified mail, return receipt requested.
>
> (c) The authority of an entity to exercise the power of eminent domain expires on September 1, 2013, unless the entity submits a letter in accordance with Subsection (b).

TEX. GOV'T CODE ANN. § 2206.101. Miles argues that TCRI never filed a letter claiming to be an interurban electric railway or identifying the Transportation Code provisions relating to interurban electric railways as a source of its purported eminent-domain authority on or before December 31, 2012.

TCRI responds that as of December 31, 2012, it was not chartered as an interurban electric railway, but solely as a railroad company, and that is where it first acquired eminent domain authority. It was not until TCRI amended it's filing in 2015 that it stated its purpose as an interurban electric railway. TCRI, therefore, argues that it was not required to send a letter under § 2206 of the Texas Government Code because it had not yet acquired the right of eminent domain authority as an interurban electric railway. We agree. TCRI could not have been expected to file a letter with the comptroller purporting to have eminent domain powers that it had not yet acquired. Miles's contention that TCRI

argues that it has had eminent domain powers since December 2012 and therefore, TCRI has considered itself an interurban electric railway since that date, is misplaced. TCRI has been chartered as a railroad company since December 2012, which is where any eminent domain authority as of that date was acquired.

Miles also argues that the Legislature could not have intended interurban electric railway statutes to govern "modern bullet trains." The Texas Transportation Code defines a high-speed rail as a "passenger rail service that is reasonably expected to reach speeds of at least 110 miles per hour." TEX. TRANSP. CODE ANN. § 112.201. Here, it is undisputed that the intended rail will exceed 110 miles per hour, and because of this fact, Miles argues that the interurban electric railway statute was not meant to cover TCRI and ITL's intended railway. Specifically, Miles directs this Court's attention to the now repealed Texas High–Speed Rail Act (HSRA) to support his contention that the Legislature never intended for the interurban electric railway statute to encompass high-speed trains. *See* Texas High–Speed Rail Act, TEX. REV. CIV. STAT. ANN. art. 6674v.2, § 2(b) (Repealed by Acts 1995, 74th Leg., ch. 165, § 24(a), eff. Sept. 1, 1995). In 1989, the Legislature established the Texas High–Speed Authority "to award a franchise to the private sector to construct, operate, and maintain a high-speed rail facility, if the authority determines that the award of a franchise is for the public convenience and necessity." *Id*.

Appellants argue that § 131.011 of the Transportation Code does not preclude high-speed rails, and simply because the HSRA was enacted and repealed, does not mean that there is no place for high-speed rails. Miles's contention that the Legislature would not have enacted the HSRA if it intended for § 131.011 to cover high-speed rails is not supported by any case law. Indeed, while Miles discusses the HSRA and the intent

behind it, the HSRA has been repealed and is no longer effective. *See id*. While the HSRA did, at the time it was effective, cover public-private partnership in the creation of high-speed rails, it no longer exists, and we must address the current statute as it pertains to this case. Accordingly, we must determine whether appellants are interurban electric railways under § 131.011 of the Transportation Code, and as previously stated, we find that they are. *See* TEX. TRANSP. CODE. ANN. § 131.011. To the extent that Miles contends that this statute does not extend to high-speed rails, but rather was intended for "localized, electronic trolley-car companies of a century ago," we find nothing in the statute to confirm this assertion. Section 131.011 has not been repealed, nor amended, to exclude high-speed rails or to be limited to specific technology. *See id*. Therefore, we conclude that TCRI and ITL are interurban electric railway companies.

We sustain appellants' second issue.

III. APPELLANTS' MOTION FOR SUMMARY JUDGMENT

Appellants argue in their third issue that the trial court should have granted their motion for partial summary judgment and denied Miles's motion for summary judgment. Miles contends that even if we were to determine that TCRI and ITL were railroad companies and/or interurban, we should not grant appellants' motion for summary judgment because they violated the Texas Property Code and the Texas Rules of Civil Procedure.

A. Landowner Bill of Rights

Miles argues that TCRI and ITL violated Texas Property Code § 21.0112 by "failing to timely provide [him] a copy of the landowner's bill of rights." *See* TEX. PROP. CODE ANN. § 21.0112. Section 21.0112 provides

> (a) Not later than the seventh day before the date a governmental or private entity with eminent domain authority makes a final offer to a property owner to acquire real property, the entity must send by first-class mail or otherwise provide a landowner's bill of rights statement provided by Section 402.031, Government Code, to the last known address of the person in whose name the property is listed on the most recent tax roll of any appropriate taxing unit authorized by law to levy property taxes against the property. In addition to the other requirements of this subsection, an entity with eminent domain authority shall provide a copy of the landowner's bill of rights statement to a landowner before or at the same time as the entity first represents in any manner to the landowner that the entity possesses eminent domain authority.
>
> (b) The statement must be:
>
> (1) printed in an easily readable font and type size; and
>
> (2) if the entity is a governmental entity, made available on the Internet website of the entity if technologically feasible.

Id. Miles argues that TCRI did not provide the landowner's bill of rights to him until September 2016, three months after TCRI sued him and "expressly asserted it was 'vested with the power of eminent domain.'" ITL publicly sued Miles in May 2018, also "claiming it was 'vested with the power of eminent-domain'" and did not provide a landowner's bill of rights until August 2018.

1. TCRI

We first address Miles's contention that TCRI failed to comply with § 21.0112 of the property code. *See* TEX. PROP. CODE ANN. § 21.0112. At the trial court level, in Miles's motion for summary judgment, he did not address TCRI's alleged failure to provide a

landowner's bill of rights. Accordingly, he has not preserved this issue for our review. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) (explaining that summary judgment motions and responses, or answers to those motions, must stand or fall on the grounds expressly presented to the trial court).

2. ITL

ITL argues that this was not an eminent domain proceeding nor a condemnation proceeding and § 21.0112 is irrelevant to the relief sought in the trial court. We disagree. While not specifically a proceeding on eminent domain, ITL did represent that it possessed eminent domain authority, and as such, was required to provide a timely landowner's bill of rights. *See id*. However, we find no statutory provision or authority that requires we deprive ITL of eminent domain authority, nor does Miles provide any such authority. To the contrary, the Texas Supreme Court has held that when a party fails to meet a governing statutory provision, the proper remedy is to abate to correct the violation, rather than to dismiss. *See Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 184 (Tex. 2004); *see also Graves v. Lone Star NGL Pipeline LP*, No. 09-18-00173-CV, 2019 WL 962544, at *4 (Tex. App.—Beaumont Feb. 28, 2019, no pet.) (mem. op.) ("In situations where a party fails to meet a governing statutory provision, courts have remanded the matter to allow the parties to provide evidence meeting their statutory burden."). As such, we find that ITL violated the property code, however, no remand is necessary because the violation has been cured, as Miles has been provided with the required landowner's bill of rights. *See Hubenak*, 141 S.W.3d at 184.

B. Texas Rule of Civil Procedure 166a(a)

Lastly, Miles argues that ITL's motion for summary judgment was filed in violation of Texas Rule of Civil Procedure 166a(a) because it was filed before Miles had the opportunity to answer the suit filed by ITL.

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

TEX. R. CIV. P. 166a(a). Miles did not object to the timeliness of ITL's motion for summary judgment at the trial court level, and therefore, has not preserved this objection for our review. *See McConnell*, 858 S.W.2d at 341 (providing that issues which the non-movant contends preclude the granting of a summary judgment must be expressly presented to the trial court by written answer or other written response to the motion and not by mere reference to summary judgment evidence); *see also* TEX. R. CIV. P. 166a(c) (stating that issues not expressly presented to the trial court in writing shall not be considered on appeal as grounds for reversal); *Casso v. Brand*, 776 S.W.2d 551, 553 (Tex. 1989) (stating that all theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court).

Nonetheless, we note that ITL filed its first motion for partial summary judgment on May 7, 2018, before Miles answered ITL's petition in intervention and application for injunctive relief on July 2, 2018. However, subsequently, ITL filed an amended motion for partial summary judgment on July 18, 2018. The live pleading on behalf of ITL at the time of the trial court's hearing on the parties' motions for summary judgment was filed subsequent to Miles's answer. Accordingly, Miles filed an answer to ITL's suit before ITL's

amended motion for partial summary judgment was considered and ruled on by the trial court.

C. Summary

Having found that appellants are both railroad companies and interurban electric railways, we conclude that the trial court erred by granting Miles's motion for summary judgment and denying appellants' motion for partial summary judgment.

Appellants' third issue is sustained.

IV. ATTORNEY'S FEES

By their fourth and final issue, appellants argue that the attorney's fees awarded by the trial court to Miles must be reversed. A trial court "may award costs and reasonable attorney's fees as are equitable and just" in a declaratory judgment proceeding. *See* TEX. CIV. PRAC. & REM. CODE § 37.009. The grant or denial of attorney's fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing of abuse of discretion. *Hartsell v. Town of Talty*, 130 S.W.3d 325, 329 (Tex. App.—Dallas 2004, pet. denied). A trial court may, in its discretion, award attorney's fees to the non-prevailing party in a declaratory judgment action. *Collin Cty v. City of McKinney*, 553 S.W.3d 79, 87 (Tex. App.—Dallas 2018, no pet.). Because we reverse the trial court's judgment and there is no evidence to indicate whether the trial court's award of fees would be equitable and just in light of our opinion in this case, we reverse the portions of the judgment awarding and denying requested attorney's fees and remand the issue of attorney's fees to the trial court for its reconsideration in light of this opinion. *See id*.

Appellants' fourth issue is sustained to this extent.

V. CONCLUSION

We acknowledge Miles's well-founded policy concerns regarding the wielding of eminent domain powers by private entities.[3] However, it is not the Court's role "to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent." *McIntyre v. Ramirez,* 109 S.W.3d 741, 748 (Tex. 2003). Our inquiry is necessarily constrained by the language of the pertinent statutes, which is determinative of the legislature's intent. *See Summers*, 282 S.W.3d at 437.

We reverse the trial court's judgment denying appellants' declaratory judgment requests that TCRI and ITL are railroad companies and interurban electric railways and we render judgment granting appellants' partial summary judgment. We further reverse the trial court's judgment granting Miles's motion for summary judgment and render judgment denying same. We remand the issue of attorney's fees and court costs to the trial court for its reconsideration in light of this opinion and to resolve the TCRI and ITL's remaining claims for injunctive relief.

NORA L. LONGORIA
Justice

Delivered and filed the
7th day of May, 2020.

[3] One of Miles's concerns is the use of eminent domain powers for projects which might never be realized. In that regard, we note that the property code allows a person to repurchase property acquired through eminent domain where the public use for which the property was acquired is not timely realized. *See* TEX. PROP. CODE ANN. § 21.101.