

No. 10-0053

IN THE SUPREME COURT OF TEXAS

PAUL E. NUNU,

Petitioner

vs.

***HARRIS COUNTY APPRAISAL DISTRICT,
HARRIS COUNTY APPRAISAL REVIEW BOARD,***

Respondents

PETITION FOR REVIEW

**On Petition for Review from the Fourteenth Court of Appeals
at Houston, Texas (Cause No. 14-08-00528CV)**

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

So the members of the court can determine disqualification and recusal, Petitioner certifies the following is a complete list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel in accordance with Tex. R. App. 53.2(a).

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a) Did the Court of Appeals violate those constitutional rights by declaring as a matter of law that business use of the homestead is “ incompatible ” with residential use , justifying partial revocation of the residential homestead tax exemption under Texas Tax Code §11.13(k)?	
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STATEMENT OF THE CASE

Nature of the Case: This is an ad valorem tax dispute involving the partial revocation of Petitioner's homestead tax exemption based upon Petitioner's partial business use of the residence homestead.

Trial Court Information: No. 2005-42467; 151st Judicial District Court, Harris County, Texas. The Honorable Caroline Baker presiding.

Trial Court's Disposition: After trial to the Court on agreed facts, the Court rendered judgment reinstating 100% of Petitioner's homestead tax exemption.

Parties in the Court of Appeals: Defendant/Appellant:
HARRIS COUNTY APPRAISAL DISTRICT
HARRIS COUNTY APPRAISAL REVIEW BOARD

Plaintiff/Appellee:
PAUL E. NUNU

Court of Appeals Information: 14th Court of Appeals, Houston, Texas. Memorandum Opinion written by the Hon. Charles W. Seymore. Panel consisting of Justices Charles W. Seymore, Jeff Brown and Kent C. Sullivan.

Court of Appeals Disposition: Reversed Trial Court and Rendered judgment that Petitioner was not entitled to 100% homestead tax exemption because business use incompatible with residential use.

Motion for Rehearing En Banc overruled December 10, 2009.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction under Texas Government Code Section 22.001(a)(3) because the case involves the construction or validity of a statute, namely Texas Tax Code §11.13(k)¹ in light of Texas Constitution Art. 16 Sec 51, which is necessary to a determination of this case. Further, the Court of Appeals committed an error of law interpreting the statute that directly conflicts with Texas Constitution Art. 16 Sec 51, and Texas Property Code §41.002(a) and this error is of such importance to the jurisprudence of Texas that it merits correction by this Court.

1

§ 11.13. RESIDENCE HOMESTEAD.

(a) A family or single adult is entitled to an exemption from taxation for the county purposes authorized in Article VIII, Section 1-a, of the Texas Constitution of \$3,000 of the assessed value of his residence homestead.

(j)(1) "Residence homestead" means a structure (including a mobile home) or a separately secured and occupied portion of a structure (together with the land, not to exceed 20 acres, and improvements used in the residential occupancy of the structure, if the structure and the land and improvements have identical ownership) that:

(A) is owned by one or more individuals, either directly or through a beneficial interest in a qualifying trust;

(B) is designed or adapted for human residence;

(C) is used as a residence; and

(D) is occupied as his principal residence by an owner or, for property owned through a beneficial interest in a qualifying trust, by a trustor of the trust who qualifies for the exemption.

(k) A qualified residential structure does not lose its character as a residence homestead if a portion of the structure is rented to another or is used primarily for other purposes that are incompatible with the owner's residential use of the structure. However, the amount of any residence homestead exemption does not apply to the value of that portion of the structure that is used primarily for purposes that are incompatible with the owner's residential use.

ISSUE PRESENTED

If Tex. Const. Art. 16 Sec 51 ² and Tex. Prop. Code § 41.002(a) ³ expressly grant a homestead claimant the right to a business and residential use of the homestead, and Texas Constitution Art. 8 Sec. 1-b. expressly grants the right to a homestead tax exemption:

- a) Did the Court of Appeals violate those constitutional rights by declaring as a matter of law that ***business*** use of the homestead is “***incompatible***” with ***residential use***, justifying partial revocation of the residential homestead tax exemption under Texas Tax Code §11.13(k)?

2

Section 51 - AMOUNT OF HOMESTEAD; USES

The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, **that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant, whether a single adult person, or the head of a family**; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired; provided further that a release or refinance of an existing lien against a homestead as to a part of the homestead does not create an additional burden on the part of the homestead property that is unreleased or subject to the refinance, and a new lien is not invalid only for that reason.

3

Texas Property Code § 41.002. DEFINITION OF HOMESTEAD.

(a) If **used** for the purposes of an urban home or as ***both an urban home and a place to exercise a calling or business***, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.

(d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Paul E. Nunu, (“Petitioner”) petitions to reverse the Court of Appeals ’s opinion of August 27, 2009, and to affirm the District Court’s judgment.

I. This case is important to the jurisprudence of Texas

This Court should grant review in this case of first impression because this case presents an important, recurring issue of property tax law and the Court of Appeals’ interpretation of this statute directly conflicts with the homestead rights granted by the Texas Constitution. This case has far reaching implications and sets precedent that will directly and adversely affect many if not all Mom and Pop small business owners throughout this state.

The constitutional right of Texas homeowners to use their home for business purposes is expressly granted by Texas Constitution Art. 16 Sec. 51. The right to a homestead tax exemption is expressly granted by Texas Constitution Art. 8 Sec. 1-b. However, the Court of Appeals declaration that a homeowner’s business use of a portion of the residence is as a matter of law “*incompatible with the owner’s residential use*”, justifying revocation of the homestead tax exemption, violates those constitutional rights. No other Texas court has so held.

The Court of Appeals decision incorrectly used “*harmoniously*” as the legal standard for finding incompatible use.⁴ No other Texas court has used this standard. If *harmoniously* becomes the legal standard for *incompatibility*, then the

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“Incompatible” refers to an incapability of existing together without discord or disharmony. “Incompatible” may also refer to a situation involving mutually inconsistent demands. In the context of physical space, therefore, incompatible would refer to uses that could not occur ***harmoniously in the same space, uses such as intimate family conversations and client conferences or loud children’s play and legal study.*** Court of Appeals opinion at p. 6.

decision will create confusion in all types of litigation. Subjective opinions about what is or is not harmonious are not admissible as evidence under *Daubert* and its progeny,⁵ but the Court of Appeals' subjective opinions about what is or is not harmonious now sets the legal standard in ad valorem tax cases. If the Legislature had intended *harmonious* to be the legal standard for *incompatible*, it would have clearly said so, and it didn't.

This Court should declare that the correct legal standard for "*incompatible*" use should be "*mutually exclusive*". This interpretation not only honors the plain language of the statute, but furthers the constitutional and legislative intent. It is also consistent with the common law "*incompatibility doctrine*" adopted en banc in *State vs Hill* 887 S.W.2d 921 (Tex. Crim. App 1994).

The Court of Appeals decision is bad precedent for many reasons. If uncorrected the opinion will have a chilling effect on many home based enterprises. The "*harmonious*" legal standard will empower and embolden appraisal districts all over the state to revoke homestead exemptions for homeowners having any type of home office. This means that an assumed name filing or professional licensing combined with a computer in the study or extra bedroom would justify partial revocation of the homestead exemption. This was not the legislative intent.

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If the expert brings only his credentials and a subjective opinion, his testimony is fundamentally unsupported and therefore of no assistance to the jury. *Cooper Tire & Rubber Co. v. Mendez* 204 S.W.3d 797 , 801 (Tex. 2006) . Without more than credentials and a subjective opinion, an expert's testimony that "it is so" is not admissible. *Viterbo v. Dow Chemical Co.* 826 F.2d 420, 424 (5th Cir.1987).) When the expert brings to court little more than his credentials and a subjective opinion, this is not evidence that would support a judgment.... If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no. *Coastal Transp. Co. v. Crown Central Petrol. Corp.* 136 S.W.3d 227, 232 (Tex.2004).

The Court of appeals precedent to allow this when the Legislature has not clearly intended this result is the equivalent of a judicially imposed tax increase. Only this Court can remedy this error.

FACTS

The Court of Appeals correctly stated the nature of the case and that the case was tried upon agreed facts. However, the Court omitted some facts which are relied upon by Petitioner, and restated herein:

The agreed facts of the parties establish that *“Nunu acquired the subject property in 1982 and has owned it since” . . . “Nunu has used the property as both an urban home and as a place to exercise a calling or business, that is as his law office. The portion of the structure used as an office was open and accessible to the remainder of the structure during all relevant time periods.” . . . “During all times relevant to this lawsuit, Nunu and his family occupied the property as their principal and only residence” . . . “The study is used entirely for Nunu’s office containing desks, computers, copier and file cabinets. **While used primarily for conducting Nunu’s law practice, his daughters and wife also use this area for personal and/or family matters including homework and school activities.**” ⁶*

TRIAL COURT FINDINGS

The District Court made the following findings:

⁶ Court of Appeals opinion at p. 2-3

The Court finds that Plaintiff owns and occupies, as his principal residence, the real property that is the subject of this cause and described as follows:

The District Court correctly found that Petitioner is entitled to a one hundred percent (100%) homestead exemption because he has owned and occupied the entire structure as his sole and principal residence, with his wife and children, at all times during the tax years in question, notwithstanding the fact that he uses a portion of the structure as his office. The District Court did not find any incompatible use.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals is unconstitutional, erroneously decided, and must be corrected for a number of public policy considerations.

First, the Court of Appeals's opinion failed to construe the constitutional rights granted in Texas Constitution Art. 16 Sec 51 and Art. 8 Sec. 1-b when it declared "*We conclude, as did HCAD and the Review Board, that twelve percent of the property is "used primarily for purposes that are incompatible with [Nunu's] residential use."*"⁷ Nor did the Court of Appeals construe the term "***incompatible***" in the context of the statutory predicate used in the statute "***is rented to another***". Petitioner suggests that the language "***is rented to another***" follows the language of Tex. Const. Art. 16 Sec 51 but was wholly omitted by the Court of Appeals.

Thirdly, under the principles of statutory construction, business use of the homestead is not *incompatible* with residential use as a matter of law because the

⁷ Court of Appeals opinion at p. 1

Texas Constitution Art. 16 Sec 51 and homestead statute Tex. Prop. Code §41.002(a) expressly make compatible a business and residential use of the family homestead.

The Court of Appeals’s finding of incompatible use is based upon purely subjective opinion and the personal preferences of the Court, not the record or agreed facts of the case:

*“In the present case, Nunu agreed he “sometimes” held conferences or depositions in the dining room and “sometimes” interviewed clients in the sitting room. **In the United States, the home is generally associated with the freedom to engage in private conduct in which one would not engage before strangers or business acquaintances. It is reasonable to conclude that, when Nunu was using the dining room and sitting room to accommodate business acquaintances or strangers to the family, such use was incompatible with residential use.” . . .***⁸

ARGUMENT AND AUTHORITIES

This case presents a question of first impression for the interpretation of the provisions of Texas Tax Code §11.13(k) and turns on this Court’s construction of “*incompatible*”. The Legislatures’ failure to define “*incompatible*” as used in Texas Tax Code §11.13(k) renders the statute vague and ambiguous because it is subject to more than one interpretation.

⁸ Court of Appeals opinion at p. 6-7

Tax Code §11.13(k) provides: “A *qualified residential structure does not lose its character as a residence homestead if a portion of the structure **is rented to another or is used primarily for other purposes that are incompatible with the owner’s residential use** of the structure. However, the amount of any residence homestead exemption does not apply to the value of that portion of the structure that is used **primarily for purposes that are incompatible with the owner’s residential use.**”*

The Court of Appeals stated that “*“Incompatible” refers to an incapability of existing together without discord or disharmony. “Incompatible” may also refer to a situation involving mutually inconsistent demands. In the context of physical space, therefore, incompatible would refer to uses that could not occur **harmoniously** in the same space, uses such as intimate family conversations and client conferences or loud children’s play and legal study.*”⁹

No Evidence of Incompatible Use

The Court of Appeals went to great lengths to hypothesize incompatible circumstances when it reversed the District Court after trial on agreed facts.¹⁰ (See

⁹ Court of Appeals opinion at p. 6

¹⁰

Rule 263 requires that the parties agree on all ultimate facts essential for the determination of the lawsuit, leaving to the court only the function of deciding questions of law. The parties agree on all ultimate facts essential for the determination of the lawsuit. They agree that the facts in the agreed statement of facts are all the facts of the case, and they agree that those are the facts on which this case must be decided. See *Cummins & Walker Oil Co. v. Smith*, 814 S.W.2d 884, 886 (Tex. App.—San Antonio 1991, no writ). No other facts are relevant to the disposition of this lawsuit.

FN 4 & 8). However, there is absolutely no evidence in this record of incompatible use such as renting to another, or partitioning of the office. As a matter of agreed fact the office and residential use have co-existed harmoniously for Petitioner and his family for over 28 years. ¹¹

Constitutional Right to Homestead Exemption

The right to a homestead tax exemption is expressly granted by Texas Constitution Art. 8 Sec. 1-b and codified in Texas Tax Code §11.13. Nothing contained in Art. 8 Sec. 1-b prohibits business use of the residence homestead or suggests incompatible uses justifying revocation of the exemption.

Separately Secured and Occupied

While the Texas Constitution does not define "*Residence homestead*" the Texas Tax Code §11.13(j)(1) does. The "*Residence homestead*" is defined as "***a structure. . . or a separately secured and occupied portion of a structure together with the land, not to exceed 20 acres, and improvements used in the residential occupancy of the structure. . .***". Reading this statute as a whole suggests that the Legislature intended that the test for the *Residence homestead* exemption is that it be "***a structure or a separately secured and occupied portion***

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An appellate court, in reviewing a case tried upon an agreed statement of facts, is not permitted to draw any inference or find any fact not embraced in the agreement unless as a matter of law such further inference or fact is necessarily compelled by the agreed upon evidentiary facts. *Lawler v. Lomas & Nettleton Mortgage Investors*, 691 S.W.2d 593, 595 (Tex. 1985).

of a structure” owned and used as a principal residence. The operative factual analysis being a determination of what portion of the structure is separately secured and occupied as a residence.

Under the agreed facts *The portion of the structure used as an office was open and accessible to the remainder of the structure during all relevant time periods.*”. No portion of the office was separately partitioned or secured, or rented to another. In other words, the entire structure is occupied as Petitioner’s principal and only residence. Because Petitioner’s entire structure (not just 88%) is secured and occupied as his principal residence Petitioner should be entitled to a 100% exemption unless a preponderance of the credible evidence clearly establishes that a portion of the structure is used **primarily for purposes that are incompatible with the owner’s residential use**. Respondent HCAD has offered no evidence and wholly failed to meet its burden of proof to establish that the activities carried on are incompatible with the owners residential use.

CONSTITUTIONAL RIGHT TO BUSINESS USE OF THE HOMESTEAD

The Court of Appeals’s decision failed to construe §11.13(k) in light of the substantive constitutional rights granted in Texas Constitution Art. 16 Sec 51: **“provided that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business,”** . . . when it declared *“We conclude, as did*

*HCAD and the Review Board, that twelve percent of the property is “used primarily for purposes that are incompatible with [Nunu’s] residential use.”*¹²

Constitutional Compatibility

The Court of Appeals erred when it declared that Petitioner’s business use is incompatible with his residential use because combined business and residential use is a constitutional right expressly granted under Texas Constitution Art. 16 Sec 51 and codified in the homestead statute Texas Property Code §41.002(a). Texas Constitution Art. 16 Sec 51 provides: *provided that the homestead . . . shall be used . . . as both an urban home and a place to exercise a calling or business.* The constitutional right to compatible business use of the homestead could not be more clear.

Statutory Compatibility

Under Tex Gov Code § 311.023(4), whether or not the statute is considered ambiguous on its face, this Court may properly consider §11.13(k) in the context of other Texas laws on the same or similar subjects including the homestead statute, Texas Property Code §41.002(a) which expressly makes compatible a business and residential homestead use.

Texas Property Code §41.002(a) provides that *“if used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family . . . shall consist of . . .”* By this language, *“if used . . . as*

¹² Court of Appeals opinion at p. 1

both an urban home and a place to exercise a calling or business, the homestead of a family” the Property Code specifically authorizes Petitioner’s business use as a compatible family homestead use. When the Constitution and this statute are read together, Petitioner’s business use is expressly authorized and cannot be an incompatible use as a matter of black letter law.

Statutory Construction

The Property Tax Code does not define “*incompatible*” and the word is subject to more than one definition. It may very reasonably be construed to mean an *incompatible* use that interferes with the owners use, i.e. such as renting it out to another. Incompatible could also apply to the acquisition of a new homestead, i.e. a fact that is incompatible with a homestead claim.

Petitioner suggests that the Legislature intended the language “*is rented to another or is used primarily for other purposes that are incompatible with the owner’s residential use*” to follow the language of the Texas Constitution Art. 16 Sec 51: *provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.* Note: The Legislature did not say “is rented to another or used for business purposes”.

The word “*incompatible*” is an adjective modifying “owner” and “*is rented to another*”, reflects more on the owner’s right to present possession, i.e. to use, than it does to the term residential. This language should be applicable to situations such as a homestead that is temporarily rented to another, or contains separately secured

areas of the structure such as a duplex or apartment project and rented to another. In those situations, the property should still qualify as homestead because it is owned and occupied as a principal residence, but the segregated portion of the structure that is under a superior right of present possession by others would not qualify for the owners' homestead tax exemption. This is a common sense reading of the statute as was the holding in *Sifuentes vs Arriola* (2009-TX-0424.510) (Tex. App.-Austin, 2009).

CONCLUSION AND PRAYER

The Court of Appeals decision is contrary to the legislative intent and thwarts the exemption purpose. It is illogical to conclude that the Legislature and Texas Constitution would expressly protect a business use of the residence homestead in the Property Code only to subject it to a declaration that the same business use is incompatible with residential use in the Property Tax Code. This is a mis-reading of the statute by the Court of Appeals and must be corrected.

This Court can take judicial notice of the commonly known fact that many residences in Texas are also home to business ventures, whose co-existence has been time tested and proven very compatible; as well as the fact that in this world of high speed internet access a majority of lawyers, business executives and even Judges have home offices.

If uncorrected, the Court of Appeals decision could be carried to its logical next step, revocation of homestead exemptions for other "business activity". Arguably

frequent entertaining or business meetings at one's residence could be declared non-harmonious and thus incompatible with residential use.

Until now, no Texas court supported the fantasy of the tax assessor that a homeowners business use of a portion of his residence is "*incompatible*" with residential use negating exemption. However, today this fantasy has been given life by the Court of Appeals decision and will be used against small business owners throughout Texas unless and until corrected by this Court.

While this appeal only involves 12% of Petitioner's homestead tax exemption, the ruling threatens the substantive property rights of many taxpayers throughout Texas. The erroneous decision grants license to a whole new intrusion by the government into the homes of every citizen just to determine if any lawful business activities were being conducted and homestead exemptions being "wrongfully" claimed. If uncorrected, this precedent will lead to the creation of a whole new branch of tax collectors to be known as the "exemption police" whose sole purpose will be to check for lawful business activity conducted in residential homesteads. The exemption police will violate the privacy of every law abiding citizen claiming homestead exemption in Texas. If uncorrected, for the reasons stated herein the jurisprudence of Texas will be adversely impacted.

WHEREFORE, PREMISES CONSIDERED Petitioner moves this Honorable Supreme Court to grant the petition and reverse the Court of Appeals's decision of August 27, 2009, and to affirm the District Court's judgment as correct in all respects, and for such other and further relief to which he is entitled.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record by telecopy, U.S. Mail and PDF email on this the 15th day of February, 2010:

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