

ORAL ARGUMENT – 10/18/00
00-0141
SPRADLIN V. JIM WALTER HOMES, INC.

WILLIAMSON: The issue before the court is whether the requirements of art. 16, §50(a)(5)(A)-(D) of the Texas constitution, apply to the constructions of new improvements on homestead property?

On Jan. 26, 1998, the petitioner met in a restaurant with representatives of Jim Walter Homes regarding the construction of a new home on his homestead property. At that meeting, he filled out an application for an extension of credit, which was approved...

GONZALES: Can I ask you a question about the old section 50? Did it allow for liens on existing and new improvements?

WILLIAMSON: It did not distinguish between new improvements or repair or renovations to existing improvements at all.

GONZALES: Did it allow a lien?

WILLIAMSON: Yes. But it did not distinguish between the two.

GONZALES: Then why do you think the legislature felt it necessary to distinguish it in this new amendment?

WILLIAMSON: I do not think that the legislature did distinguish between new improvements and existing improvements.

PHILLIPS: Why are the words “if in writing” in the new language?

WILLIAMSON: That raises a good question. I do not know why they did that. One would also might ask, well why are the words “owner” and “owner’s spouse” contained in three of the four sections. And I believe it’s in §5(c), owner spouse is omitted altogether.

ABBOTT: To what extent does the _____ protections provided in the property code cover the protections there included in the constitution?

WILLIAMSON: Well the property code does require the spousal consent. However, the petitioner would argue that the legislature could amend this statute at will as it did in 1840. The first homestead laws were enacted in 1839. In 1849, for some unexplained reason, they annulled that statute.

ABBOTT: To what extent do protections in the property code differ from the protections in the new constitution, as you contend the new constitution applies to new improvements?

WILLIAMSON: I contend that the requirements of spousal execution is still a requirement, that it is contained in 5(a)(d) of subsection 50(a).

PHILLIPS: Do you agree with several of the amici that there are two different kinds of liens in Texas: constitutional and statutory?

WILLIAMSON: I do agree.

PHILLIPS: You also agree that the industry has now for several years since this new provision was passed, the constitution treated these liens differently - treated the protections that you are urging as begin statutory only?

WILLIAMSON: Yes.

PHILLIPS: The industry's practices as far as the paper they give, the information they give out is consistent with what the TC and the CA did here in terms of saying these protections are statutory as far as liens on new construction?

WILLIAMSON: Correct. As I stated earlier though, the constitution has never differentiated between new improvements to a homestead and repair or renovations to existing improvements. They are all contained under §50(a)(5)(A)-(D).

ABBOTT: Is there any evidence in the record indicating why Mr. Spradlin wants out from under this lien?

WILLIAMSON: Mr. Spradlin after reading the constitutional amendment, although Mr. Spradlin acknowledges his debt with Jim Walter Homes and he also has made his payment, he is familiar with the terms or became familiar very early with the terms of the constitutional amendment and did not believe that Jim Walter Homes, Inc. had complied with those new enacted requirements. And as he stated no one likes a lien against their homestead property.

ABBOTT: So he doesn't feel like he got a bad deal or was mistreated or cheated by Jim Walter Homes?

WILLIAMSON: No, not at all. As amended, §50(a)(A)-(D) provides in pertinent part, now that the homestead of a family or the single adult person shall be and is hereby protected from forced sale for the payment of all debts, except for working material used in constructing new improvements thereon and contracted for in writing, or work or material used to repair and renovate the existing improvements thereon if the work and material are contracted for in writing, that's where the

duplication is...

ABBOTT: According to the protections the respondents contend are provided by the property code, what is the distinction between those protections and protections contained in the constitution?

WILLIAMSON: The 1997 amendment removed the spousal consent requirement if the respondent's argument is correct. This has been an age-old requirement since 1845...

ABBOTT: The spousal consent is required in the property code, right?

WILLIAMSON: It is required in the property code. But no longer in the constitution. It's an age-old requirement that's been there since 1845. But for some reason, and I do not believe it was the intent of the Texas voter or the legislature based on the committee reports, senate and both house reports, to remove the requirement of spousal consent.

GONZALES: But isn't that requirement arguably still on? Doesn't that requirement still exist with respect to statutory liens?

WILLIAMSON: Statutory liens, yes.

O'NEILL: We would have to go beyond the plain meaning on your position?

WILLIAMSON: Correct. The respondent argues *The City of Corsicana v. Willman* case. In that case, the court failed to follow the doctrine of last antecedent. In fact in that case, the court referring to the doctrine of last antecedent, which was invoked in that case, the court stated that under that Canon of statutory construction a qualifying phrase must be confined to the words and phrases immediately preceding it to which it may be applied without impairing the meaning of the sentence. But the rule is neither controlling nor inflexible. It may be rebutted by the circumstances...

O'NEILL: What circumstances would you use rebutting _____?

WILLIAMSON: The fact that the legislature and the voters of the State of Texas did not intend to remove the age-old requirement of spousal execution for new improvements.

GONZALES: What evidence is there of that intent?

WILLIAMSON: Well there is no evidence in any of the committee or senate reports...

GONZALES: So don't we look at the plain language then?

WILLIAMSON: The intent of the amendment to §50 was to add a home equity lending. There

was never an intent by looking at the legislative history, or the ballot even to remove the existing age-old requirements. It was to just add new consumer protections for home equity lending.

GONZALES: If we side with your client, do you concede that the first phrase “if contracted for in writing” is superfluous and there was a mistake made in drafting, is that your position?

WILLIAMSON: Yes. The word ‘owner spouse’ for some reason, the drafters left it out of one of the sections. But it’s contained in all of the other three sections.

HANKINSON: Was this a new construction project?

WILLIAMSON: Yes, it was.

HANKINSON: So this is not a home equity loan then?

WILLIAMSON: No, it is not.

HANKINSON: Why does this provision have anything to do with this case then anyway? Why aren’t we dealing with a purchase money mortgage and all the requirements associated with that? I may be missing something. But I don’t understand why we’re talking about home equity lending provisions in new improvements verses existing improvements if what we’re dealing with is new construction. I’ve missed something along the way. Would you clarify that for me?

WILLIAMSON: If you look at the committee reports and the history behind the amendment to §50, the purpose of the amendment was to add more types of liens that could be placed against the homestead, the home equity lending.

HANKINSON: I know, but we don’t have home equity lending here.

WILLIAMSON: No, we do not. But when the legislature amended §50, by adding (5)(6), subparagraphs (a)-(q), for some reason they also amended §50 and added (5)(a)-(d).

HANKINSON: I understand. But that again deals with improvements to existing property.

WILLIAMSON: No, §50(a) also reads for new improvements...

HANKINSON: I understand, but improvements - again, I’m trying to understand the language of the industry. Improvement would mean to me that there is already something there and you are improving it. Like adding a room is an improvement to the property. The room wasn’t there beforehand. As opposed to the second, repair or renovating existing improvements. The room is already there and you are going to fix it. Why isn’t all of that different than building a house from the foundation up when there was no house there to begin with? Why does this have anything to do

with Mr. Spradlin's situation in the first place?

WILLIAMSON: I'm not sure I really understand your question. However, what it has to do with the new improvement is, that §50(a) states: work and material used in constructing new improvements thereon.

HANKINSON: Your view is that the language "new improvements thereon" also involves new construction projects that are from the foundation up...

WILLIAMSON: Yes.

HANKINSON: ...and may be financed by a purchase money mortgage so that even though this is a home equity provision and that's why the legislature did this...isn't this all dealing with home equity loans?

WILLIAMSON: No.

HANKINSON: It's not?

WILLIAMSON: Section 50 prior to the amendment stated the exact same language contained in 50(a)(5)(A).

GONZALES: Except it didn't distinguish it between existing improvements and new improvements, isn't that right?

WILLIAMSON: Right.

GONZALES: So now the legislature has distinguished it. And I guess my question is, perhaps they distinguished it because they decided or wanted to afford different protections depending on the type of improvements they were?

WILLIAMSON: That might be true, but why did they delete the age-old requirement that - for instance under (5)(A) it states: the work and material are contracted for in writing with the consent of both spouses in the case of a family homestead given in the same manner as is required in making a sale and conveyance of the homestead. This is the identical language that has been contained in art. 16, §50 of the constitution for a very, very, very long time. Why would the voters or the legislature want to remove this section (A) from new improvements as it did before. Before it did not distinguish between new improvements and existing improvements. What would be the intent...

O'NEILL: Didn't Sen. Barrientos say why during the debates that he wanted to protect the homeowner from siding salesmen and things like that?

WILLIAMSON: I think that's a comment he made to the press.

O'NEILL: Wouldn't that support your opponent's explanation for the reason?

WILLIAMSON: It would support, but this is only one senator. But I believe that maybe that was his intent. But I do not think if you will refer to the senate research center report and also the house reports and committee notes, there was never anything stated about removing or there being an attempt to remove the age-old requirement that existed. No attempt whatsoever.

ENOCH: Ms. Williamson, you may be correct that there was no intent to do so. But if the court concludes based on this language that's exactly what they did, then what authority is there for us to just kind of fix the problem? Let's assume that the citizens really didn't know what they were voting for. And in fact what they voted for was to distinguish between improvements and repairs and for new improvements no longer requiring both spouses to sign. Gee gosh whiz, it's a mistake. What authority is there for us to sit there and say we need to add a comma or delete a comma or add a phrase or delete a phrase, just kind of fix it?

WILLIAMSON: Well throughout the history of our homestead exemptions, the Texas courts have consistently pursued a liberal interpretation of §50. The purpose is for the fostering of the family in it and protecting home ownership. Like I stated earlier, these policies and reasons for protecting the homestead are very important and as important today as they ever were. And with the mandate...

ENOCH: Let's assume I go with you and say, You know, in Texas it's just a constitutional right for spouses to sign-off on - to not allow their other spouse to put a lien on their property. But unfortunately, this is the constitution. So is there anything else out there that would allow us to change the constitution based on some sort of principle or authority?

WILLIAMSON: History and in the intent of the legislature and the intent of the voters of the State of Texas.

OWEN: You keep saying the voters in the State of Texas. They see this entire amendment on the ballot don't they?

WILLIAMSON: No, they didn't see it on the ballot.

OWEN: I suspect that the truncated version did not even talk about this.

WILLIAMSON: Oh no, not whatsoever. There was never anything in the house committee notes or reports or the senate research center report about this either - about deleting. You cannot find anything in the legislative, or I could not find anything that stated that the legislature intended to remove the age-old requirement from the 1840's of spousal consent from the constitution.

ABBOTT: If we're to find in your favor, we would have to go beyond the plain reading of the statute and look to the policy considerations behind what you think the statute means?

WILLIAMSON: Yes, sir.

* * * * *

RESPONDENT

GONZALES: Ms. Sanders, what policy reasons might there be for the legislature to treat new improvements differently from renovations to existing improvements in terms of protections afforded to the consumer? What would be the basis for disparate treatment?

SANDERS: I think perhaps this goes back to Justice Hankinson's question regarding what's the difference between purchase money mortgage and a loan to construct a new home on a piece of property. Your point is well taken Justice Hankinson. I think that when we're dealing with someone who just owns a piece of property and they go out and contract to put a home on it, it really is more like a purchase money mortgage rather than an improvement to an existing residence.

Let's say that I buy a piece of property for \$5,000, and I go out and contract to have a home erected on that piece of property for \$50,000. The lender in that case is going to be adding \$50,000 worth of value to an asset that is only worth \$5,000. And so is adding \$50,000 worth of value secured only by \$5,000? In that situation, who has the chips on the table? I think it's the lender rather than the consumer.

O'NEILL: **Couldn't hear Judge O'Neill's question very good.**

SANDERS: Again, it goes back to the difference between purchase money mortgage and the traditional home improvement, which traditionally has been the only type of home equity loan that was allowed in Texas until this constitutional amendment. There has never been a spousal consent requirement for purchase money mortgage. Only for improvements. And before the amendment to the constitution improvements were all lumped together. There was no distinction made between residential construction and repair or renovation to existing improvements.

GONZALES: This is not a purchase money mortgage?

SANDERS: It is not technically a purchase money mortgage. And to answer Justice Hankinson's question, I think the distinction is, that the improvement is to the real property. So a new improvement would be erecting a residence. I guess the most typical example that we have in this case. Whereas, the traditional home improvement you do have an existing residence. But as Justice Hankinson pointed out, I think that the nature of the type of interest is more like a purchase money mortgage than with the traditional home improvement.

HANKINSON: Could a new improvement though be a room on an existing house under the language of the constitution?

SANDERS: Well of course that's going to be something the court may be faced with down the road if it does decide to distinguish between the two. I think that were I to propose a construction between new improvements verses repair or renovation to existing improvements, it would be that to read the new improvement provision very restrictively. And I say that because we're dealing with a homestead and a homestead presumes to preclude that there is going to be a residence. And if for a new improvement I would think that it would have to be for the initial residence, the place of dwelling that actually creates the homestead interest. Whereas, an improvement or a home improvement, repair or renovation to an existing improvement would be anything that is added after that.

HANKINSON: I don't understand though. If a new improvement is putting a house on a piece of property that you already own, you can't have a homestead can you until the house is built?

SANDERS: Not necessarily. Of course, occupancy is evidence of a homestead interest. But where there is an actual occupancy, the law says that it takes intent to use the property as a homestead plus some ____ act of preparation. So let's say you lay a foundation or a slab, and in this case it's not on the record but my understanding is that Mr. Spradlin had built a road to access his property, so some indicia that there is an intention to use the property as a homestead and it can be a homestead even...

OWEN: But in a real homestead if the husband for example contracted to build a new barn, that would be a new improvement to the homestead?

SANDERS: My suggestion is that under this constitutional provision, the barn would not be a new improvement. It would be a repair or renovation to an existing improvement because the home, the dwelling place is what makes it a homestead or the intent to build a place of dwelling is a homestead. And the barn is just an out building. Now if it were all built at the same time, let's say that the initial contract to build the residence included the erection of a house and a barn, I would say that would all be in one lien to secure new residential construction.

ENOCH: Now I'm a little bit confused. As I was reading this, if I had a home and I added a room to it, I'd count it as an improvement. If I had a home and I gutted the kitchen and put a new kitchen, I would call that a renovation. I'm having a little bit of difficult on why...

SANDERS: Well I think that we're using improvements differently. Under the constitutional amendment there is new improvements, and then there is repair or renovation to existing improvements.

HANKINSON: An existing improvement could be the house that's already on the property

as opposed to a house that was improved and then the improvement is repaired?

SANDERS: Right.

HANKINSON: So you're calling from the ground up, the house itself is an improvement?

SANDERS: That's correct.

HANKINSON: So if we do anything to that house, like put in a new kitchen or adding a room or whatever, that's the second half of the constitutional provision?

SANDERS: Right.

HANKINSON: But the actual putting the house in in the first place on the property you already own is the new improvement. And once you've done that, you are done with the new improvement phase and anything else that happens after that you would consider to be a repair or renovation to an existing improvement?

SANDERS: That would be my proposal simply because we are dealing with a homestead here.

HANKINSON: Does that then take you back to the question that Justice Gonzales originally asked you about why the distinction and why you don't need the whole laundry list for new improvements?

SANDERS: Yes. Again, it has to do with the fact that it's more like a purchase money mortgage and you're dealing with the initial residence being built. And the real risk is to the lender in that situation. There's not as much of a need for the consumer protections.

BAKER: If that's the case, why do they have in part 1, the express statement of a purchase money mortgage, or part thereof?

SANDERS: I think there still is a distinction between a purchase money mortgage and a contract to build new residential construction. If you look at the vehicle that was used to secure the lien in this case, it was a mechanics and material __ lien.

BAKER: Which is customary with people who are builders of houses?

SANDERS: Right. A purchase money mortgage you wouldn't have that. So there is still _____ a distinction. My point is simply that the nature of the loan is more like purchase money than it is a home improvement that you would add to and there is less risk that a consumer would be taking advantage of in new residential construction situations than in a situation where you're adding

an improvement to an existing structure.

BAKER: Who says that? It seems we have quite a few cases where builders are sued for improper construction or failure to comply to the contract. I don't see a material difference on whether you are a siding person or a new builder. If you don't do it right, you still breach the contract.

SANDERS: I agree that there is still going to be breaches of contract and there is no way to cover every conceivable possibility that might come up. But my point is, that there is a basic distinction based on the risk that the lender is taking as opposed to the consumer. So there is a distinction between contracts for new residential construction and contracts for repair or renovation to existing improvements.

BAKER: And would you explain that again in your view why there is a distinction between the risk?

SANDERS: Because in a new residential construction situation, the lender is putting out the majority of the risk, the majority of the value added to the property. You've got a relatively lower value asset, the actual real estate and then the asset that's going to be added is going to be worth significantly more than the real property that is securing it.

BAKER: It's true when you finish up that type of a scenario, the one who furnished the labor and materials gets a lien on the \$50,000 home they added, plus the \$5,000 land. And so they end up with more security than they enhanced the value of the land ostensibly.

SANDERS: That's true. But compare that to a situation where someone comes in to make a \$5,000 improvement to a \$50,000 home, then...

BAKER: Alright. Is there a first lien on it?

SANDERS: Well there may be.

BAKER: What if there's not a first lien in that scenario? Wouldn't your improver get a lien on the whole deal?

SANDERS: He gets a lien on the whole deal.

BAKER: So where is the risk there? I add \$5,000 room that I get a lien on a \$50,000 house to secure \$5,000.

SANDERS: The risk is on the consumer. And that's where the need - I think that that's what the legislature intended when it added these protections. They wanted to add protections o the

consumer.

BAKER: So they are not the same then are they?

SANDERS: I just see a basic distinction between the two. When you are only adding \$5,000 worth of value, but you get a lien on the entire \$55,000 resulting asset.

GONZALES: Your scheme only works if we accept your definition of what constitutes a new improvement. For example, if you have \$100,000 home and you build a \$10,000 garage or some other building separate from that, if we view that as a new improvement and not as a renovation, which is what I understand your argument should be a renovation, then the risk would be on the consumer in that instance would it not?

SANDERS: That's true.

GONZALES: So it all depends on whether or not we agree with your description of what constitutes an improvement?

SANDERS: Exactly. This is just a suggestion. It's brand new. The legislature didn't give us any real clue as to how far it wanted to go with the definition of new improvements in this constitutional amendment.

ABBOTT: There's another way your scheme works, and that is by applying what the petitioner concedes is a strict interpretation of the language in the constitution. However, I have a question about the language in the constitution, the strict interpretation of the structure of it I want to ask you about it. And that is, under the phrase under subpart (5), that ends with a colon, followed by (a), (b), (c) and (d). The way I typically read something that ends with a colon followed by (a), (b), (c) and (d) is, I would apply those 4 following subparts to everything in the phrase that precedes it. And it seems like the entire phrase that precedes it is the entire two lines of subpart (5), not just the part about existing improvements.

SANDERS: A couple of things on that. First of all, the two constitutional principles that were discussed in the CA's opinion, and I think applies here, the doctrine of the last antecedent, in which case these 4 procedural protections only apply to the phrase immediately preceding them. Not to the more remote phrase in improvements. The only qualifying phrase to new improvements is that they be contracted for in writing.

The second constitutional construction Canon that the CA relied on is that the court is to strike on interpretation that renders every phrase meaningful. And because of the repetition of the contract to foreign writing both after new improvements and then in the first procedural protection, I think that any other construction other than the one that we are contending, would render that first phrase superfluous. It would have no meaning. There is no purpose for it to

be there.

This will probably spawn a lot of litigation. By the same token, the fact that we're buying a lot of litigation can't override the plain meaning of this constitutional provision.

HANKINSON: Couldn't it have the exact opposite result though, because wouldn't it throw most everything over into the second category, so that you would have a bright line that unless you were starting from the ground up that only the ground up would be new improvements. Bare land, building something would be new improvements and it would throw everything else over the bright line onto the other side and increase the number of consumers who would be protected?

SANDERS: That's precisely the reason that I was proposing this more restrictive definition of new improvements, because that would give a bright line. Whether the court would adopt that in the context of this particular...

HANKINSON: It would adopt a bright line. So we wouldn't have litigation. And second it would draw the bright line at a point in time that maximize the protection of the consumers.

SANDERS: That's exactly right.

GONZALES: Is that the question in this case?

SANDERS: The question in this case is really just do those procedural protections apply to new residential construction, because we clearly have, I think every one agrees, that what we have here is new residential construction. It is a new improvement under anyone's definition.

What would be the more fuzzy stuff would be like to say for instance the barn, or a swimming pool, or something like that. The reason we propose this more restrictive definition is because it is easier to apply and would give the lenders more certainty.

The bottom line in this case is that up and until the very last minute, there was never any separation between new improvements and repair or renovation to existing improvements. That separation was the result of a last minute amendment by Sen. Patterson, and that was the first time that there was ever any division between the two kinds of improvements. Before that they had all been lumped together.

The procedural protections actually were proposed in an amendment the day before Sen. Patterson's amendment. And that was proposed by Sen. Barrientos. In his proposal, the procedural protections, there was no separating out (a), (b), (c) or (d). It just added at the end of subsection (5), such a contract shall not be executed until 12 days after an owner of the homestead initiates a loan application and any such contract may be rescinded by any owner of the homestead within 3 days after its execution, etc., etc. And then it has the provision for the place that the

contract is to be executed. The day after Sen. Barrientos proposed that amendment, Sen. Patterson proposed the amendment that actually made it into the enrolled version of the bill that separated new improvements from repair or renovation to existing improvements, and subdivided (a), (b), (c) and (d) the procedural protections that we contend only apply to repair or renovation to existing improvements.

I think we can all agree that this is probably not the most artfully drafted constitutional provision. But by the same token, I think the language is certainly plain enough in looking to the history and the way this amendment proceeded through the legislature, it's clear that there was a purpose of the a legislature separating between new improvements verses repair or renovation to existing improvements. And I would urge the court to adopt the construction that we have put before the court today.

HECHT: But it's less clear that they wanted to remove the spousal consent requirement from new improvements.

SANDERS: I would agree with that. But of course, it still is a requirement under the property code, because the property code does not distinguish between new improvements and repair or renovation to existing improvements.

HECHT: So you think that would apply to constitutional liens as well as statutory liens?

SANDERS: This distinction between constitutional liens and statutory liens to me is sort of more of a theoretical sort of distinction. Because in Texas the law is very clear that in order to perfect a lien against a homestead, the lender has to comply with both the constitution and the statutory requirements. So the lender is not getting anything if he says, Well the constitution does require me to get the spouse's signature on a contract for new residential construction. It doesn't him no good because he still has to comply with the statutory requirements. So in essence, nothing has changed in this case before the constitutional amendment and after the constitutional amendment. The requirements that Jim Walker Homes had to comply with in both instances are exactly the same. The only thing this constitutional amendment did was to add additional consumer protections and that applies only to what we traditionally refer to as home improvements.

ABBOTT: Are you saying that under the property code, the protections that are included in the property code with regard to statutory liens are identical to the protections set out in (5)(A)-(D)?

SANDERS: No.

ABBOTT: There's not the 12-day cooling off period?

SANDERS: Right. Correct. That's a new constitutional requirement that only applies

under our interpretation of traditional home improvements.

* * * * *

REBUTTAL

WILLIAMSON: I would like to refer to the commentary following the old section 50, prior to the 1998 amendment. This commentary states that the convention that drew up the constitution of 1845 determined to safeguard the homestead by putting it beyond the reach of legislators, and as well as creditors by incorporating an exemption into the constitution. That was the purpose of putting...

OWEN: But logically a husband and a wife decide to buy a house, and the husband can go contract and buy the house. And even though it's going to be homestead, and the purchase money lien is valid, it could be foreclosed on even though the wife didn't sign the purchase money contract. That's correct right?

WILLIAMSON: Well the case law states that if you want to abandon a homestead, for instance, a husband...

OWEN: If you don't pay your mortgage.

WILLIAMSON: Well if he tried to abandon the property as his homestead.

OWEN: But my question is if they didn't pay their mortgage on the homestead, the lender could foreclose on that lien even though the wife didn't sign any of the lien documents?

WILLIAMSON: Correct.

OWEN: So what's the difference from the legislature's standpoint if you have unimproved land that you as a couple want to build a home on, the husband could go out and buy it and establish a valid lien if it had a house on it, in letting the husband go out and buy the land and contract to build a new house on it under the new constitutional amendment. The legislature could have made that call?

WILLIAMSON: There wouldn't be a valid lien without the spousal consent.

OWEN: But the legislature could have said there is really no distinction between buying an existing home and letting the husband do that without the wife's joinder, and buying an unimproved lot and contracting to put a house on it without the wife's joinder. The legislature could have said we see no distinction.

WILLIAMSON: Yes, I guess they could have said that. What I am trying to get across is the fact that the spousal consent has been so important under Texas law, that it was added to the

constitution. And then for some reason if you go with the respondent's argument it has just disappeared.