# OIL & GAS

# ENVIRONMENTAL LAW


SMU SCHOOL OF LAW

Adjunct Professor Joseph R. Dancy
Email: JDancy@smu.edu

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# Introduction: Rule of Capture and Oil & Gas Pollution

On January 10, 1901, a tremendous roar was heard in the little sawmill town of Beaumont, Texas. With the roar came a 150-foot plume of oil that could be seen for miles. The event took place in the Spindletop oil field and changed the course of history. This was the birthplace of the modern oil industry.

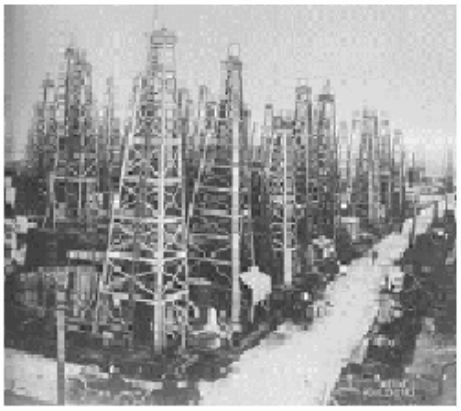
Prior to the discovery of the Spindletop Field many thought that the oil industry was too small to produce enough fuel for the automobile manufacturing sector. Most vehicles at the turn of the century were therefore powered by electricity or steam, and the internal combustion engine was not dominant.

Spindletop Field, Texas
Birthplace of the Modern
Oil Industry

1901

On the discovery of the Spindletop well production in Texas immediately doubled – and the internal combustion and automobile sectors began their long economic ascent.

Note in the pictures the density of the drilling pattern. This resulted in an incredible waste of reservoir energy, and oil was produced as fast as possible since if it was not produced the next rig could acquire ownership by producing that oil under the “Rule of Capture.”



1903

Oil was stored in tanks, pits, barrels, or any container available while any water or salt water produced was dumped into pits or into local streams. The waste, and accompanying pollution, were quite incredible by modern standards.

1905

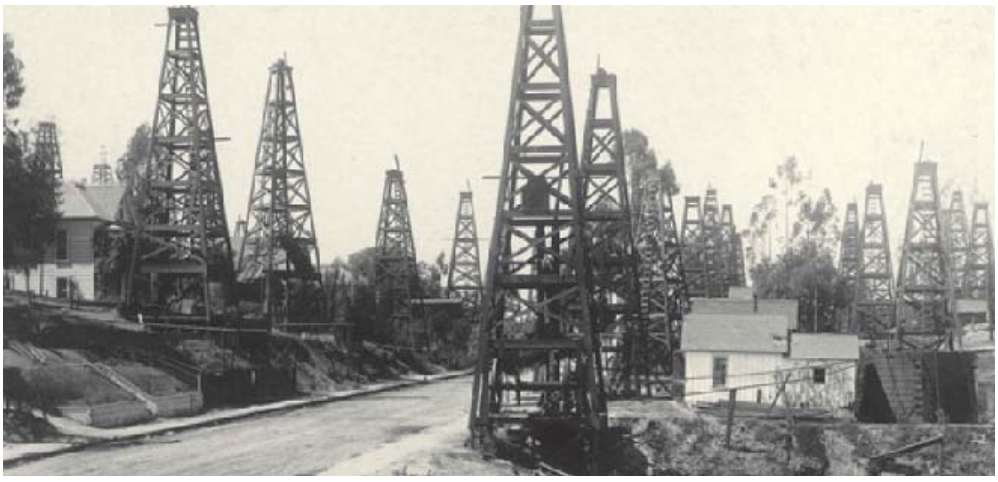
By 1902, there were nearly 300 wells on Spindletop hill, and 600 individual oil companies. But rampant over-drilling began to turn the boom to bust in two years. Over the next 30 years, the U.S. witnessed a string of historic oil strikes in West Texas, Tulsa and the great East Texas field that transformed the Southwest.

“In a sense, Spindletop foreshadowed the future of the oil industry. The uncontrolled gushers created the first oil field environmental disasters. Spindletop raged with a fire for a solid week in September, 1902 when one of the wells ignited from a cigar carelessly discarded by a driller. The well was gushing high above the derrick top when the flames reached it. There was no chance to close it in because valves had not been installed. It was brought under control by a combination of steam and sand.

In recent times, oil field pollution has become a major problem in the oil patch of Texas, Louisiana and Oklahoma. Property owners became rich from the oil beneath their land, but over the years, many have filed lawsuits against oil producers for contamination of groundwater” Source: NPR Website

## ‘**Rule of Capture’ & Environmental Damange**

Oil and gas production is subject to a unique legal principle developed under common law. First, unlike many countries in the U.S. individuals can own the minerals and the right to extract them (many other countries reserve mineral ownership to the state). But ownership of oil or gas in the U.S does not vest until the production is ‘captured’. So the incentive is to produce as much oil as possible as fast as possible – or ownership was lost. Environmental and safety issues often were ignored in the wild rush to drill and produce. At right, a picture from Los Angeles illustrates the wild drilling and production races occurred even in residential areas – to the detriment of the environment.



# Chapter 1: Frequently Encountered Environmental Problems

Several decades of major environmental legislation and regulation of air, water, and solid wastes has produced an extremely complex matrix of regulations and obligations which have been imposed on the oil and gas industry.

Environmental compliance now represents a significant cost of doing business, both in terms of cost of compliance, and in terms of the possible penalties and fines which could be incurred as a result of non-compliance.

A detailed understanding of the applicability and impact of environmental regulation on oil and gas operations and facilities is necessary for informed corporate planning, acquisition and divestiture analysis, and decision making.

On the federal level oil and gas facilities and pipelines are regulated under the Clean Water Act ("CWA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), the Resource Conservation and Recovery Act ("RCRA"), the Safe Drinking Water Act ("SDWA"), the Clean Air Act ("CAA"), the Toxic Substance Control Act ("TSCA"), as well as numerous other statutes. Many states have statutes that supplement the federal statutory provisions. Common law liability issues also frequently arise.

## Common Environmental Problems

Pollution of fresh water is generally one of the main issues alleged in common law lawsuits involving oil and gas operations. There are several major potential sources of fresh water pollution: (1) damage from produced water or produced water disposal or injection, (2) damage from pits or underground storage tanks, (3) damage from leaking pipelines, and (4) damage from unplugged or improperly plugged wells.

## NATURE OF OIL AND GAS RELATED WASTES

The following are excerpts from rule making or regulatory publications discussing the nature of oil and gas related wastes:

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ENVIRONMENTAL PROTECTION AGENCY
[FRL-3403-9]
53 FR 25447
July 6, 1988
Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes
ACTION: Regulatory determination.

SUMMARY: Section 3001(b)(2)(B) of the Resource Conservation and Recovery Act (RCRA) requires the Administrator to determine whether to promulgate regulations under RCRA Subtitle C for wastes from the exploration, development, and production of crude oil, natural gas, and geothermal energy. . . . .

### 2. [Oil & Gas] Waste Quantities and Characterization

In the Report to Congress, EPA estimated that 361 million barrels of drilling waste were generated in 1985 from about 70,000 crude oil and natural gas wells, *and that over 800,000 active production sites generated 20.9 billion barrels (including produced water injected for enhanced oil recovery (EOR)) of produced water during that year*. Associated waste, such as workover fluids and tank bottoms, are produced at the rate of 11 million barrels per year.

For geothermal energy wastes, EPA estimated that approximately 111,000 barrels of geothermal energy-related drilling wastes were generated in 1985, along with 56 billion gallons of liquid wastes (geothermal fluid and condensed steam) from both binary and flash process plants, and 8 billion gallons of liquid waste from direct use of geothermal energy.

For crude oil and natural gas wastes, EPA sampled liquids and sludges from several locations. Drilling fluids were sampled at drilling operations while produced water and tank bottoms were sampled at production operations. Samples from central treatment and disposal facilities and central pits contained mixtures of all wastes including associated wastes. *The Agency found that organic pollutants at levels of potential concern (levels that exceed 100 times EPA's health-based standards) included the hydrocarbons benzene and phenanthrene. Inorganic constituents at levels of potential concern included lead, arsenic,barium, antimony, fluoride, and uranium*.

Tank bottoms, an associated waste sampled and analyzed by the Agency, contained significant levels of contaminants of concern, with some levels exceeding the reference doses (RfDs) for noncarcinogens or the risk-specific doses (RSDs) for carcinogens (health-based standards) for these contaminants.

Analysis of the constituents of several geothermal energy waste streams indicated that some of the production wastes exhibited the corrosivity characteristic and extraction procedure (EP) toxicity for certain metals. Factors such as management practices, dilution and attenuation of the contaminant, and hydrogeological characteristics, affect the risk to human health and the environment presented by these chemicals.

## 3. Current and Alternative Management Practices

A wide range of management practices are employed for crude oil and natural gas wastes. The technological diversity is the result of widely varying geological, climatological, ecological, topographic, economic, geographic, and age differences among drilling and production sites across the country and partially account for varying State regulatory requirements. There are, however, variations from State to State in the stringency of management practices which are not wholly attributable to the varying physical settings of the operations.

Current practices include the use of reserve pits for drilling wastes; landspreading of reserve pit contents; disposal of produced waters through Class II underground injection wells; disposal of produced water in unlined pits; discharge of produced water to surface waters; roadspreading; use of commercial facilities for treatment and disposal of drilling wastes and produced water; and some practices unique to the Alaska North Slope, such as the use of semipermanent production-related reserve pits, and discharges to the tundra. Less frequently used current practices discussed in the report are closed-cycle drilling mud systems, annular disposal of produced water and drilling fluid, and trenching of reserve pits to dispose of reserve pit fluids.

These practices vary substantially in the protection they provide to the environment. While changes in State regulatory requirements over the years have led generally to the use of more environmentally protective technologies and management practices, there is a need for increased movement to more protective approaches for discharge to ephemeral streams, surface water discharges in estuaries in the Gulf Coast region, road applications of reserve pit contents and discharge to tundra in the Arctic, and annular disposal of produced waters.

For the major waste streams, EPA was unable to identify any new technologies in the research and development stage that offer promise for wide application in the near term. More widespread use of the best existing technologies, however, would provide substantial additional protection for the environment in many areas.

Waste management practices unique to geothermal power generation wastes include closed-cycle ponding, reinjection into the producing zone or a nonproducing zone, and consumptive secondary use. In California, production wastes are tested for hazardousness, using the California tests for hazardousness, before disposal to determine the appropriate disposal method. After direct use of geothermal energy fluid for heating purposes, these fluids can be discharged to

surface waters, injected into the producing zone or a nonproducing zone, and consumed by secondary uses.

## 4. Evidence of Damages

To determine the types and severity of damages caused by crude oil and natural gas wastes, EPA assembled information on a substantial number of damage cases, 62 of which were fully documented and passed EPA's "tests of proof." These cases were based on recent information gathered from the States of Alaska, Arkansas, California, Kansas, Kentucky, Louisiana, Michigan, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia, and Wyoming. These damage cases were extensively reviewed by the States, industry, and third parties.

*On the basis of all available information, the study found that wastes from crude oil and natural gas operations have endangered human health and caused environmental damage when managed in violation of State and Federal requirements. In some instances damage occurred where wastes are managed in accordance with currently applicable State and Federal requirements*.

The major categories of wastes responsible for damages include reserve pit wastes, fracturing and acidizing fluids, stimulation chemicals, waste crude oil, produced water, and other miscellaneous wastes generated by the exploration, development, and production of crude oil and natural gas. The various categories of damages to, or endangerment of, human health and the environment contained in the Report to Congress include:

-- Damage to agricultural land, crops, ephemeral streams, livestock, and threats to endangered species, fish, and other aquatic life in estuaries and bays from produced water and drilling fluids;

-- Degradation of soil and ground water from runoff and leachate from central treatment and disposal facilities, reserve pits, and unlined disposal pits;

-- Potential contamination of aquatic and bird life in estuaries and bays by metals and polycyclic aromatic hydrocarbons resulting from the discharge of drilling fluids and produced waters;

-- Potential for endangerment of human health from consumption of contaminated fish and shellfish and from ground water contaminated by seepage from storage and disposal pits;

-- Potential damage to tundra on the Alaska North Slope from roadspreading and seepage and discharges from reserve pits;

-- Damage to ground water, agricultural land, and domestic and irrigation water caused by seepage of
native brines from improperly plugged and unplugged abandoned wells; and

-- Ground-water degradation from improper functioning of injection wells.

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**WASTE MINIMIZATION IN THE OIL FIELD**
By the Texas Railroad Commission

*The Texas Railroad Commission recognizes that about 98% by volume of the oil and gas waste produced in Texas consists of produced water. Drilling fluids and associated wastes make up about 1.6% and 0.4%, respectively, of Texas oil and gas wastes.*

Although large volume reductions may not be expected for produced water using today's technologies, some waste minimization technologies - predominately recycling by injection in enhanced recovery projects - do exist for produced water. Produced water can also be treated to reduce contaminate concentrations.

Many possibilities already exist for reducing the volumes and toxicity of drilling fluids and associated wastes. A voluntary waste minimization program offers the best opportunity for an individual company to reduce the pollution potential of oil and gas wastes. . . .

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**Pollution Prevention Opportunities in Oil and Gas Production, Drilling, and Exploration**
Pacific Northwest Pollution Prevention Research Center

Funded by a grant from the Pollution Prevention Office of the Alaska Department of Environmental conservation
. . .
Industry Waste Streams

Produced water. *Produced water, water produced in association with crude oil, is by far the largest waste stream in most oil fields, accounting for up to 95 percent of total wastes*. It is composed of natural underground saline formation brines combined with water injected into the formations from the surface to enhance recovery of the oil in a process called "waterflooding."

In mature fields like those of Alaska's North Slope, the amount of this water produced often exceeds the amount of oil. For the North Slope, that means more than 42 million gallons of produced water is generated daily. However, operations at second-generation oilfields such as the Kuparuk River Field reuse much of their produced water for enhanced oil recovery.

Presently as much as 60 percent of most, Alaska oil fields' produced water is treated to remove solids and traces of oil and then returned to the formation to be reused in water-flooding. The solids are removed during treatment, as their reinjection might plug the subsurface formation. Not all produced water is treated for continued waterflooding; some is only cleaned up sufficiently to reinject it for disposal in highly permeable zones at depths of several thousand feet. It was suggested that other industries may be able to provide improved technologies for handling produced water. . . .

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## ‘PRODUCED’ WATER & ENVIRONMENTAL DANGERS

Damage to fresh water aquifers or to surface lands from produced water disposal, injection, or secondary recovery projects account for a large portion of current oil and gas environmental litigation.

Studies have indicated that produced water in the mid-continent area has a total dissolved solids ("TDS") content of approximately 50,000 parts per million (ppm) on average. As a comparison of water quality, the average TDS level of produced water (50,000 ppm) exceeds the solids content of seawater (approx. 34,500 ppm). The high TDS concentration of most produced waters can result in a relatively small amount of produced water contaminating a large fresh water aquifer or surface reservoir.

While varying widely the elements found in produced water from oil and gas operations, as compared to seawater, can be summarized as follows:

CONCENTRATIONS IN PARTS PER MILLION ("ppm")

| CONTAMINANT | SEAWATER | DRINKING WATER | PRODUCED WATER |
|---|---|---|---|
| Sodium | 10,600 | - | 12,000 to 150,000 |
| Potassium | 400 | - | 0 to 4,000 |
| Calcium | 400 | - | 1,000 to 120,000 |
| Magnesium | 1,300 | - | 500 to 25,000 |
| Chlorides | 19,000 | 250 | 20,000 to 150,000 |
| Bromides | 65 | - | 50 to 5,000 |
| Iodine | 0.05 | - | 1 to 300 |
| Sulfate | 2,700 | 250 | 0 to 3,600 |
| Carbonate | 0 | - | 0 to 1,200 |
| Tot. Dissolved Solids | 34,500 | 500 | 50,000 avg. |

Source: 40 CFR Sec. 141.11; 10 CFR Sec. 143.3; Reid, Brine Disposal Treatment Practices Relating to the Oil Production Industry, Kerr Environmental Research Laboratory (1974).

Where fresh ground water has been contaminated the presence of bromides and iodines in water are an indication that the contamination originated from oil field activities. As can be seen from the chart, the average level of total dissolved solids in produced water from the mid-continent region is approximately twice that of seawater.

Produced water is generally not fit for consumption by either humans or animals. Fresh water fit for human consumption has been defined as having less than 250 parts per million ("PPM") chlorides, less than 250 parts per million sulfates, and in no event more than 500 parts per million total dissolved solids ("TDS").

In general, the upper limits of contamination are 2,500 parts per million for poultry, 4,300 parts per million for swine, 6,000 parts per million for horses, and 10,000 parts per million for cattle. See generally: Case, Water Problems In Oil Production, The Petroleum Publishing Co., (1971); Donaldson, Environmental Aspects of Enhanced Oil Recovery, presented to the Department of Energy's Environmental Control Symposium (November, 1978)

Salt is toxic to plant life, interfering with the ability of the plant to extract water from the soil. Plants differ in their ability to tolerate salts. Soils will also have an impact on whether a plant will be able to tolerate salt intrusions, with clay soils generally retaining more moisture which will dilute the salt concentrations making it easier for plants to survive. Sandy soils on the other hand retain little moisture, and are more difficult to revegetate. See: Ward, Reclamation of Saline Damaged Alkalid Soils, Oklahoma State University. (note dried salt patch on surface of picture – a sure sign of severe contamination problems).

Salt water spills also affect the ability of the soil to resist erosion. Salt damaged soil can lose the ability to bind together, and is more susceptible to being eroded. The lack of plant life in damaged areas also contributes to the erosion potential. In older fields where salt water was diverted to nearby streams, aerial photographs will many times reveal severe erosion problems from the wellhead (or where the wellhead used to be located) to the nearest stream (see accompanying picture of severe erosion).

When reclaiming lands damaged by salt water, certain plants that are more salt tolerant can be used. In general, when water is less than 700 PPM TDS it will not harm plant life, between 700 PPM and 2,000 PPM TDS certain salt sensitive plants will be affected, and above 2,000 PPM TDS plant life will be adversely affected.

Produced water can intrude into fresh water formations from salt water disposal wells, secondary recovery injection wells, migrate via improperly plugged wells, or seep from unlined evaporation pits (not currently permitted in most jurisdictions). Due to the corrosive nature of produced water leaks or spills are not uncommon, and the contaminants can percolate down into the water table over time. Surface leaks or spills also damage the soil's ability to resist erosion. See generally: Dancy & Dancy, Environmental Constraints on Crude Oil Production in the United States, presented to the 9th Annual International Conference of the International Association of Energy Economics, Caracus, Venezuela (1989).

Once a fresh water aquifer is damaged, in most instances it is economically impossible to restore that aquifer to its original condition in any meaningful time period. Damages awarded for such contamination can therefore be substantial.

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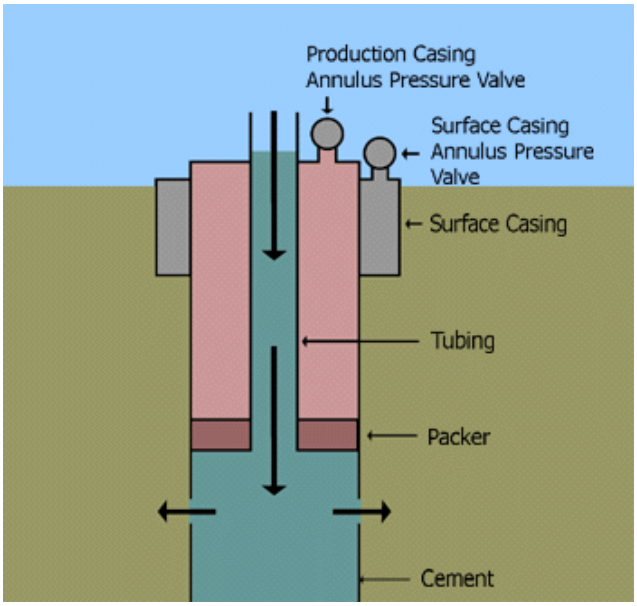
**PRODUCED WATER DISPOSAL**

Most produced water is disposed of in underground injection ("UIC") wells regulated under the provisions of the Safe Drinking Water Act. The Safe Drinking Water Act ("SDWA") focuses on the protection of groundwater that may be used for public drinking water supplies. 42 USCA Sec. 300h et. seq.

The EPA has designated five categories of injection wells under the SDWA:

Class I - Hazardous Waste Disposal Wells;
Class II – Oil & Gas Injection/Disposal Wells;
Class III - Mining & Power Generation Wells;
Class IV - Disposal Wells for Radioactive Wastes; and
Class V - Brine Mining Wells.




Class II injection/disposal wells dispose of non-hazardous oil and gas production waste (usually produced water), and are used in enhanced recovery and pressure maintenance projects. The SDWA contemplates that each state will take the lead in permitting and regulating UIC wells in accordance with certain minimum requirements that have been set out by the EPA.

Texas, Oklahoma, and Louisiana all have EPA approved state run UIC programs for Class II wells. Contamination resulting from the injection of salt water and other oil and gas production waste is also of concern to Texans. These injection operators are regulated by the Railroad Commission of Texas rather than the EPA.

The Railroad Commission of Texas has jurisdiction over injection wells used to inject oil and gas wastes -- mainly saltwater -- injection wells to be used for secondary recovery and those used to store hydrocarbons underground.

As of December of 2002, the Railroad Commission reported that it had permitted 51,338 so-called Class II injection wells, 33,026 of which were active. The vast majority of these consisted of secondary recovery wells (about 25,000), while there were about 8,000 saltwater disposal wells and some 500 active hydrocarbon and gas storage wells. Two confirmed cases of groundwater contamination resulting from injection wells have been documented in the past few years, though both have since been cleaned up.

Most officials agree that waste disposal through properly constructed and operated injection wells is safer and less likely to contaminate surface water or potable ground water than are landfills and other forms of land treatment. For example, injection of hazardous wastes into aquifers that serve or could serve as groundwater supplies for communities is not allowed.

Underground Injection and Disposal of Wastes - Texas Statewide Rule 9 and 46

Probably the most common, and least environmentally damaging, means to dispose of liquid wastes from oil and gas operations is by underground injection. In some cases new injection wells are drilled specifically to dispose of the waste, and in some cases old producing wells that are now depleted can be used to dispose of the waste.

Texas Railroad Commission Rule 9 and 46 authorizes the subsurface injection of produced water into underground injection or disposal wells, and sets out the monitoring and testing requirements for such wells. Disposal wells are regulated under Rule 9 and injection wells under Rule 46. Both rules are basically the same except for the type of well being regulated.

Disposal wells can be used to dispose of salt water or other non-hazardous waste by injection into porous formations not productive of oil or gas. Special surface facility requirements apply if the well is a commercial disposal well.

The strata into which the fluids are injected must be porous and permeable enough to accept the amount of fluids proposed to be injected, and such strata must effectively confine or isolate the injected fluid to that formation. Areas that are faulted or fractured may not assure the isolation of the injected substance.

Injection wells can be used to inject salt or fresh water, gas, or other materials into porous reservoirs to produce oil or gas. Usually injection wells are used in secondary or enhanced recovery projects. Special requirements apply if fresh water injection is proposed. A water injection well, as can be seen by the picture at right, can be quite simple and small in stature on the surface.

Notice of the application for a injection permit must be given to the surface owner, offset operators, and the county and city clerks, and must be published in a newspaper of general circulation in that county.

The operator must review all abandoned wells within a 1/4 mile radius and prove that they have been plugged in a manner that will prevent fluid migration in these wellbores. Injection pressures and volumes must be monitored and records kept, and any changes that would tend to indicate a failure must be reported to the TRRC within 24 hours.

Maximum pressures and volumes, and limitations on the injected substances, will be set out in the individual permit. Yearly reports are required to be filed with the TRRC on Form H-10.
Under most state agency regulations UIC wells are to be tested every five years. In Texas and

In addition, before a permit is issued the placement of the packer, injected water volumes, injected water pressures, addition of corrosion inhibitors, addition of surfactant, behind pipe cement integrity, etc., will be reviewed by the regulatory agency.

Oklahoma and Texas UIC wells must be tested for mechanical integrity ("MIT tests") once every five years, although due to the configuration of some wells they may be required by permit to be tested annually. See: TRC Rule 9(k); TRC Rule 46(j)(2); OCC-OGR Rule 3-305(c)1.

In addition, before a permit is issued the placement of the packer, injected water volumes, injected water pressures, addition of corrosion inhibitors, addition of surfactant, behind pipe cement integrity, etc., will be reviewed by the regulatory agency.

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**REMEDIATION OF DAMAGED LANDS**

Spills of Produced Water. At the present time there are no Texas Railroad Commission Guidelines as to how to clean up a produced water spill. In Oklahoma, Corporation Commission Guidelines require that soil samples be taken after a salt water spill. Flushing the surface with fresh water is appropriate in some situations, but normally is not considered an effective means of recovering contaminants by the Commission. If total dissolved solids in the soil exceed 2,500 ppm, removal and restoration of the soil required. Backfilling with compatible soil and re-vegetation may be required by the OCC.

Historically, the TRRC or OCC would allow an operator to flush the surface with fresh water in an attempt to remediate the problem. While such flushing sometimes was effective enough to allow the surface to be re-vegetated, unfortunately that solution usually was short term. In many cases capillary forces pulled the salts to the surface, or worse the flushing water carried the contaminants into the underlying fresh water formations.

Other alternatives to remediate the surface where produced water has spilled include re-vegetating with salt resistant plants or grasses, mixing the soil with uncontaminated soils to reduce salt concentrations, adding clay soils which generally allow plants to tolerate more salts, removing and replacing the contaminated soils, or placing a clay cap on the contamination and re-vegetating.

The mound in the picture at the right were planted with salt resistant plants in an attempt to resist erosion, however this effort has been only partially successful.

If groundwater has been contaminated by produced water very little can be done to remediate the

fresh water. Reverse osmosis can be utilized on a small scale basis, or wells can be drilled to attempt to contain or direct the "plume" of contaminants. Otherwise the landowner usually must wait for nature to clean up the problem, a process that generally takes hundreds of years.

Spills of Crude Oil. Spills of crude oil or petroleum hydrocarbons usually have a much less severe Pact. The Texas Railroad Commission has adopted a final rule on oil spill clean up standards that applies to entities it regulates. See: 18 Tex. Reg. 6835 (Oct. 5, 1993). The main points included in the rule are:

1. The rule does not apply to spills in "sensitive" areas, to spills before the effective date of the regulation (November 1, 1993), or to spills of condensate or liquids extracted from natural gas

2. The contaminated soil must be remediated to a level of less than 1.0% total petroleum hydrocarbons (TPH) within one year. The rule does not expressly require testing to determine if the 1.0% level has been attained.

3. If the spill results in contamination above 5.0% TPH, to avoid storm water contamination the material must be mixed with clean dirt to concentrations below that level, or removed from the site. Any free oil on the surface must be immediately removed. Care should be taken to avoid contamination of stormwater runoff.

4. A report of the spill to the Railroad Commission must set out: (1) the area and volume of soil contaminated, (2) a signed statement that all soil contaminated above 1.0% TPH was brought to the surface for remediation, (3) a signed statement that all soil left in place is below 5.0% TPH, (4) a detailed description of the remediation method to be used, and (5) the estimated cleanup date for the site.

5. For crude oil spills above 25 barrels, an additional report must be submitted to the Railroad Commission with test results certifying that the site had been cleaned up.

6. Spills of less than 5 barrels of crude oil must be cleaned up to these standards, but are not required to be reported to the Commission.

7. Spills of condensate or natural gas liquids, or spills to "sensitive areas" will be cleaned up on a site by site basis with the assistance of Railroad Commission personnel. What is a "sensitive" area will be determined on a case by case basis, and no general rules exist designating certain areas as "sensitive".

Crude oil contaminated soils are usually remediated in place in Texas, and are rarely taken to a landfill for disposal due to restrictions on landfill disposal of oil and gas wastes. im on the environment. Where crude oil has been spilled around wellheads or tanks it generally can be dug out, removed, and placed on a pad where it can be bio-remediated naturally or with purchased

In Oklahoma, the Corporation Commission requires that any oil on the surface be immediately removed. If in-situ bioremediation is usually the preferred option, the Commission suggests that the area should be disked to a depth of six inches and fertilized by applying 133 pounds of nitrogen, 33 pounds of phosphorous, and 33 pounds of potassium per acre. All affected areas must be restored to the level of productivity that existed before the spill occurred.
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## WATER CONTAMINATION FROM PITS AND UNDERGROUND STORAGE

In some cases wastes or trash generated from pipeline, processing, production, or compression operations have in the past been legally disposed of in pits at or around the facilities. Prudent operators today would not dispose of such materials in this manner.

Underground storage tanks (UST's) utilized at compressor stations or drip stations to collect liquids can also be a source of concern; the EPA has estimated that around 33% of all underground storage tanks will leak at some point during their lives. In most cases it is the piping that causes the leak, or spillage from overflow.

Aboveground storage tanks (AST's) utilized in pipeline, production, or processing operations can corrode over time, and such equipment can allow the contained product to escape into the environment.

Depending on the soil composition and the location of the water table soluble elements contained in such pits may leach into underground water, rendering the water unfit for agricultural or household use. In addition product leaks in storage tanks can, over time, migrate into the water table again rendering the water unfit for use.

Many underground and above ground storage tanks associated with exploration and production and pipeline operations are not regulated under federal laws, and are subject to state regulation if regulated at all. As such, many of the more stringent monitoring requirements recently imposed by federal laws may not apply to storage tanks associated with pipeline, processing plant, or similar operations.

Historically pits have been used to dispose of produced water, although the practice was prohibited in Texas and Oklahoma in the early 1960's. Even so, liquids that were stored in such pits could migrate into the ground water over time.
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## NATURALLY OCCURRING RADIOACTIVE MATERIALS (NORM)

Naturally Occurring Radioactive Materials, or "NORM", can accumulate over time in certain oil field equipment. In general, the more dissolved solids that are contained in the waters or liquids that are being handled, the higher the probably NORM may be a problem. NORM tends to concentrate in pipe or equipment scale, and is most commonly a problem with processing plant pumps, tubulars, and any scale encrusted equipment.

Many NORM problems become apparent when equipment is moved, repaired, or when a property is sold. In Louisiana certain restrictions are imposed on sellers to test certain equipment or property for NORM before title passes.

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From the Texas Railroad Commission Website:

### NORM in the Oil and Gas Field

NORM encountered in oil and gas exploration, development and production operations originates in subsurface formations, which may contain radioactive materials such as uranium and thorium and their daughter products, radium 226 and radium228. NORM can be brought to the surface in the formation water that is produced in conjunction with oil and gas. NORM in these produced waters typically consists of the radionuclides, radium 226 and 228. In addition, radon gas, a radium daughter, may be found in produced natural gas.

Because the levels are typically so low, NORM in produced waters and natural gas is not a problem in Texas unless it becomes concentrated in some manner. Through temperature and pressure changes that occur in the course of oil and gas production operations, radium 226 and 228 found in produced waters may co-precipitate with barium sulfate scale in well tubulars and surface equipment.

Concentrations of radium 226 and 228 may also occur in sludge that accumulates in oilfield pits and tanks. These solids become sources of oil and gas NORM waste. In gas processing activities, NORM generally occurs as radon gas in the natural gas stream. Radon decays to Lead-210, then to Bismuth-210, Polonium-210, and finally to stable Lead-206. Radon decay elements occur as a film on the inner surface of inlet lines, treating units, pumps, and valves principally associated with propylene, ethane, and propane processing streams.

Workers employed in the area of cutting and reaming oilfield pipe, removing solids from tanks and pits, and refurbishing gas processing equipment may be exposed to particles containing levels of alpha-emitting radionuclides that could pose health risks if inhaled or ingested.

## State Regulation: Railroad Commission Regulations for Disposal of Oil and Gas NORM

The Commission regulates the disposal of oil and gas NORM under Environmental Protection, Subchapter F, Oil and Gas NORM. Subchapter F establishes the requirements for oil and gas NORM waste disposal for the purpose of protecting public health and the environment.

Oil and gas NORM waste is defined as any solid, liquid, or gaseous material or combination of materials (excluding source material, special nuclear material, and by-product material) that spontaneously emits radiation in its natural physical state, is discarded or unwanted, constitutes, is contained in, or has contaminated oil and gas waste, and exceeds the exemption criteria specified in 25 Texas Administrative Code §289.259(d)(1)(B) and (d)(2) prior to treatment or processing that reduces the radioactivity concentration.

Subchapter F contains exclusions from certain activities, exemptions for certain disposal activities, and prohibitions against certain activities. Subchapter F also authorizes certain disposal methods and requires a permit for others.

The activities excluded from Subchapter F are activities that are regulated by the Texas Department of State Health Services (DSHS). These excluded activities include: recycling activities, decontamination of equipment unless the contamination is only as a result of disposal activities, and possession use, transfer, transport, and/or storage unless this occurs at a disposal site and occurs to facilitate disposal.

The disposal activities prohibited by Subchapter F include disposal of produced water by injection into a well permitted by the Commission or by discharge to surface waters in accordance with Commission regulations. In addition, disposal of equipment that has been decontaminated by a specific licensee in accordance with the DSHS regulations for decontamination and that meets the exemption criteria of §289.259 is exempt.

The disposal methods prohibited by Subchapter F include discharge of oil and gas NORM waste other than produced water, spreading of oil and gas NORM waste on public or private roads, and any other method that is not specifically provided for by Subchapter F.

The disposal options for NORM-contaminated solids differ from the options for NORM-contaminated equipment. NORM-contaminated solids, such as pipe scale, may be disposed of on the site where they were generated by burial or placement in a well that is being plugged and abandoned. Contaminated soil may be landspread under certain conditions. Subchapter F also authorizes disposal of oil and gas NORM waste at a licensed facility and injection of NORM treated by a DSHS specific licensee provided the operator complies with specific requirements contained in the rule. NORM-contaminated equipment that is waste, i.e., equipment that is no longer wanted, may be recycled as scrap metal under DSHS regulations or disposed of.

The equipment must be decontaminated if it is to be released for unrestricted use (e.g., used for some purpose other than for oil and gas activities). Subchapter F does not allow the burial of NORM-contaminated equipment. Buried flow lines that contain NORM, however, may remain buried contingent on the lease agreement. NORM-contaminated tubulars and other equipment may also be placed in a plugged and abandoned well.

The Commission's Statewide Rule 14 (§3.14), relating to well plugging, require equipment to be removed from a lease when the last well on the lease is plugged.

Rule 14(d)(12) requires all tanks, vessels, related piping, and flow lines be emptied, and requires all tanks, vessels, and related piping to be removed in 120 days.

Scrap metal dealers routinely screen for gamma radiation and reject scrap at their selected µR/hr settings. This factor in combination with the requirements of Subchapter F and rule 3.14 and necessitate that NORM-contaminated equipment be decontaminated and that NORM waste and equipment be properly disposed when a lease is abandoned.

Subchapter F contains permit requirements and standards for those disposal methods requiring a permit. Permits for disposal of oil and gas NORM waste by underground injection are issued under Rule 9. Permits for surface disposal of oil and gas NORM waste are issued under Rule 8. Permits for disposal of oil and gas NORM will contain requirements necessary to protect public health and the environment.
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**AIR ISSUES: "SOUR GAS" (HYDROGEN SULFIDE)**

In some fields natural gas contains hydrogen sulfide, a deadly contaminant that smells like rotten eggs. Gas containing this contaminant is called 'sour gas'. Care is taken during drilling and production to prevent the release of even minute quantities of these substances. Many states require special warning signs near sour natural gas wells, and require emergency planning in case of a release.

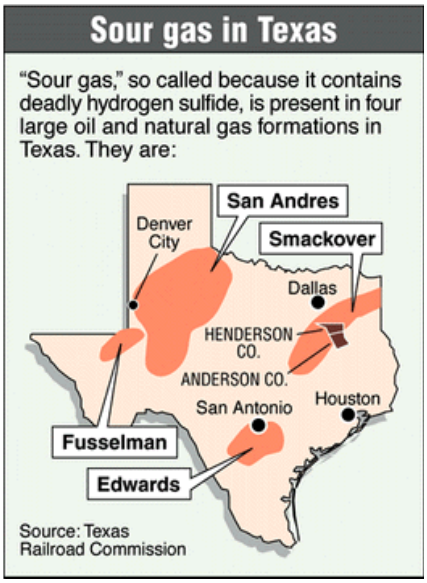
Photograph by Craig Sommer

The Della Pia well, located in a Filer Township neighborhood, contains 43,000 parts per million Hydrogen Sulfide gas, far exceeding the lethal concentration. This photograph shows that this dangerous well has no phone number posted in case of emergency.

In Texas, the Railroad Commission defines 'sour gas' in Statewide Rule 79:

> (*22) Sour gas--Any natural gas containing more than 1 1/2 grains of hydrogen sulphide per 100 cubic feet or more than 30 grains of total sulphur per 100 cubic feet, or gas in its natural state that if found by the commission to be unfit for use in generating light or fuel for domestic purposes.*

Texas Railroad Commission Statewide Rule 36 requires special precautions in areas where sour gas might be encountered, warning signs, specialized emergency equipment, and other precautions.





THE BRIMSTONE BATTLES: A Houston Chronicle Special Report

# One Man's Stand

## Oil and gas firms wary of bite from lonely watchdog

TOOL–Oil and gas companies tapping the extraordinarily sour fields of East Texas must brook a growing number of adversaries, but a consultant named Galen Hartman has proved particularly irksome.

Hartman, who lives on the western shore of Cedar Creek Lake in Henderson County, has a background in chemistry, likes to crunch numbers and is not afraid to speak publicly about what he calls "dry-labbing"–the concoction of data without benefit of precise laboratory analysis.


Rigs like these two drilling in the Pinnacle Reef near Buffalo are an increasingly common sight across East Texas.

Hartman maintains that many operators in East Texas are cutting corners in this fashion, deliberately understating the worst-case accident scenarios they must prepare under the Texas Railroad Commission's Rule 36, which governs the handling of hydrogen sulfide.

"The data is flawed," he said. "It's always flawed to the low side."

Such statements have made Hartman highly unpopular with some companies, notably Ultra Petroleum of Vancouver, British Columbia, which is trying to win state approval to begin producing from a dormant sour well near Tool.

In a Sept. 19 letter to Hartman, Ultra attorney John Soule charged the consultant with making inaccurate public comments about the company's contingency plan, filed with the Railroad Commission.

"Ultra takes these comments very seriously and will have to consider appropriate legal action if false statements are made in the future," Soule wrote.

Hartman's grievance centers on a document known as Railroad Commission Form H-9, which must be completed by companies wishing to drill or build pipelines or gas-processing plants in sour zones.

There is one box on the form for the hydrogen sulfide concentration in the well or pipeline, another for the "maximum escape volume" of the noxious gas.

The figures are plugged into two prescribed equations. A "radius of exposure" for a normally lethal dose of hydrogen sulfide–500 parts per million–is then calculated, as is a radius for a 100-ppm dose.

The extent of these two zones, which can be plotted as rings on a map, influences the type of contingency plan a company must develop: the greater the number of people at risk, the more intricate and potentially expensive the plan becomes.

The presence of, say, a school or a nursing home inside one of the rings further complicates the process because of the evacuation quandaries children and the elderly can create.

The East Texas wells feed processing plants such as the one operated in Henderson County by Houston-based Warren NGL Inc. and the one recently fired up in neighboring Anderson County by Pinnacle Gas Treating. At these plants, the hydrogen sulfide is extracted and converted to sulfur so the gas can be sent to consumers.

Pinnacle, a subsidiary of Denver-based Western Gas Resources, decided to build its gargantuan plant–which will be among the world's largest when it is running at capacity–about two miles from the Cayuga Independent School District's consolidated campus.

For a good part of the year, the plant will be upwind of 650 children, a situation that gave rise to considerable angst and the formation of a local group called Citizens Against Pollution (CAP) earlier this year.

The group, comprising a dozen or so property owners, was preparing to drag Pinnacle into hearings before the Railroad Commission and the Texas Natural Resource Conservation Commission when a settlement unexpectedly was announced on Aug. 7.

Pinnacle agreed to buy out its closest neighbors, reduce hydrogen sulfide emissions by installing a high-efficiency incinerator ahead of schedule and spend $215,000 on monitors, a long-term community health study and other projects.

In exchange, CAP agreed to drop its opposition to the plant. There will be no hearings.

"I wanted to stay here but I can't," said Ron Kotara, a former Cayuga High School civics teacher who agreed to sell his 40 acres to Pinnacle. "My conscience is bothering me, because nobody in this community stood up to (the company)."

On its current Form H-9, filed with the Railroad Commission on Aug. 1, Pinnacle estimates the hydrogen sulfide concentration of the gas entering the plant to be 5,000 ppm.

Based on a maximum escape volume of 700 million cubic feet per day, it predicts that a 500-ppm dose of the chemical would travel no more than 1.5 miles, a 100-ppm dose no more than 3.2 miles. The latter radius easily would include the Cayuga schools.

Hartman's figures for the plant are scarier. Assuming that the Pinnacle Reef wells feeding the plant contain 5,500 ppm of hydrogen sulfide and that the maximum escape volume is 12.6 billion cubic feet per day, Hartman determined that a 500-ppm dose could extend 9.3 miles from the plant, a 100-ppm dose 20.4 miles.

Why the big difference?

For one thing, Hartman believes 5,500 ppm to be a more accurate reflection of the hydrogen sulfide content of Pinnacle Reef wells than 5,000 ppm. More important, he and the company disagree about the maximum escape volume.

Although the plant eventually will be able to process 1.4 billion cubic feet of gas per day, Pinnacle says that its design ensures that no more than half that amount–700 million cubic feet–could come out at one time.

"We have the ability, from the plant, to shut in wells, adjust wells," said project manager Gary Davis. "We have a lot of control over our volume." Hartman, however, maintains that Pinnacle is being unrealistic about its ability to harness the incoming gas.

"If there's a catastrophic (pipeline) failure, you're going to have flow coming out of that rupture and from the wells," he said. "It will be a lot higher than 700 million cubic feet, I guarantee you." Hartman said that the Railroad Commission should have caught the discrepancy but didn't because "they just rubber-stamp these forms." He finds it odd, for example, that three wells supplying the Pinnacle plant are shown to have identical hydrogen sulfide concentrations and maximum escape volumes.

"You will never have two wells that are exactly the same," Hartman said.

Charles Ross, a compliance specialist with the Railroad Commission's Oil and Gas Division, insisted that H-9s are checked for accuracy.

"If it's an existing field classified as sour, the district offices and Austin will both have databases listing all the (hydrogen sulfide) concentrations," Ross said. "They're going to have a good idea what range is out there."

If a well is drilled in uncharted territory, he said, a hydrogen sulfide concentration of 100 ppm is assumed and a 3,000-foot protective zone is established until specific data are available.

Because of the disquiet in East Texas, the agency's three commissioners have instructed the Oil and Gas Division to review Rule 36 "to make sure we've got the right kinds of regulations in place," said Railroad Commission Chairman Charles Matthews.

Still, Matthews cautioned, "As we continue to urbanize the state of Texas, we will have more and more conflicts between residential areas and producing areas. Prices are high, and the industry's taking another look at some of these reserves."
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**AIR POLLUTION ISSUES: AIR TOXICS**

Oil and natural gas wells in many cases emit small amounts of toxic chemicals into the environment. Most common are benzene, xylene, toluene, and ethyl-benzene compounds – many of which could be carcinogenic (at least in tests with animals). Many of these compounds qualify as 'air toxics' under certain provisions of the Clean Air Act.

Due to the remote locations of most well sites, the small amounts of emissions, and the low level of exposure the regulatory system generally does not require controls – unless the equipment meets certain threshold volumes or is located in populated areas. None-the-less these emissions can create issues for the well operator, as the following article illustrates.

**Lawyers calling Beverly Hills High a hazard**
By Martin Kasindorf, USA TODAY

BEVERLY HILLS, Calif. — Allegations that elite Beverly Hills High School is the site of a "cancer cluster" are scaring parents and swinging the spotlight again to the environmental sleuth profiled in the movie *Erin Brockovich.*

The real-life Brockovich and her boss, lawyer Ed Masry, allege that toxic fumes from oil wells on the campus have caused 280 cases of Hodgkin's disease, non-Hodgkin's lymphoma and thyroid cancer since the 1970s. For the size of the population involved, "these statistics are 20 times higher than the national average for these three specific cancers," Brockovich says.

Masry's firm on Monday filed 25 personal-injury claims for damages with the school district and Beverly Hills, a famously wealthy city of 34,000. Masry says he expects to name the two government entities and three oil companies as defendants in dozens of individual lawsuits in November.

Government air-quality regulators and a cancer epidemiologist are telling worried parents that the wells at the 2,100-student school pose no unusual health risks. But under pressure from influential parents, officials are testing the school's soil, water and outdoor and indoor air.

Julia Roberts won the best-actress Oscar for portraying Brockovich in the 2000 film hit. Albert Finney played Masry. The screenplay centered on the $333 million that Masry's "toxic torts" firm obtained for 600 residents of Hinkley, Calif., in a 1996 settlement with Pacific Gas & Electric, which had polluted water with an industrial solvent.

Masry says he's not ready to name a figure for his Beverly Hills damage claims, but he says that "it's potentially more than Hinkley. We've never been involved with such affluent clients in a toxic case."

Beverly High, as the school is known, outranks Brockovich in connections with Hollywood. Many children of the rich and famous go there. Former students include actors Nicolas Cage, Richard Dreyfuss, Carrie Fisher, Rob Reiner, David Schwimmer and Alicia Silverstone, as well as musician Andre Previn and former presidential intern Monica Lewinsky.

An oil- and gas-drilling operation next to the athletic fields predates the school's opening in 1928. Pumping 450 barrels of oil and 400,000 cubic feet of natural gas a day, 18 active wells there bring the school system and the city a combined $700,000 a year in royalties.

Looming over the pumps is the school landmark: a 150-foot-tall oil derrick. Venoco, its operator since 1995, named the drilling rig the Tower of Hope in 2000, when the company unveiled a brightly colored soundproofing wrap with flowers painted by hospitalized children.

To some Beverly High parents, the Tower of Hope has become the Tower of Fear.

The cancer scare began in February with a report on Los Angeles' KCBS-TV. The station, tipped by Masry's firm, said tests by the firm of the air at Beverly High showed high concentrations of the toxic oil-field chemicals benzene, toluene and n-hexane.

At school board meetings, irate parents demanded that the wells be shut down. One boy's parents removed him from the baseball team. Other parents began asking doctors and air-quality officials whether they should pull their children out of school.

"I feel sorry for the neighborhood, because it's panicking," says Wendy Cozen, a cancer epidemiologist at the University of Southern California Keck School of Medicine.

Cozen says she has tried to ease parents' concerns by citing favorable results of air samplings that the South Coast Air Quality Management District (AQMD) has taken at the school on seven occasions since February.

Government monitoring "has not shown readings of benzene, hexane and other air toxic levels that are considered abnormal," says Barry Wallerstein, the regional smog agency's executive officer.

School Superintendent Gwen Gross says that tests by a scientist hired by the school system also found the level of airborne toxins to be "well below health limits established by the state."

Wallerstein, who is a Beverly High graduate, says the law firm's test results "don't appear to be logical." He says the firm's samples might have been "inadvertently contaminated."

Masry defends his firm's tests. "The AQMD, frankly, doesn't know what it's doing," he says. "It's not qualified to handle a toxic situation involving children."

The law firm has signed up dozens of Beverly High alumni as potential plaintiffs since 1992 graduate Lori Moss told Brockovich last year that she had discovered a pattern of cancer at the

school. In 1996, Moss was diagnosed with Hodgkin's disease, a cancer of the immune system. That cancer is in remission, but Moss, 28, now is being treated for thyroid cancer. "I feel betrayed and angry," she says.

Brockovich, the law firm's research director and host of a Lifetime cable show, *Final Justice*, says it's hard to persuade some potential plaintiffs to link their cancer with their school years.

"It's just that it's Beverly Hills," she says. "You look at the glamour and the beauty and the sunshine and the happiness of it all. To think that something like cancer lurks under the surface is maybe someplace we don't want to look."

Proving in court that the oil wells cause cancer won't be easy. Cozen, co-director of a program that tracks all Los Angeles County cancer cases, says statistics indicate that there is no more Hodgkin's disease, non-Hodgkin's lymphoma or thyroid cancer among Beverly Hills residents than in other area neighborhoods. The cancer numbers that the law firm gives for Beverly High graduates "would be so unusual that I just find it unlikely," Cozen says.

Beverly Hills has a high rate of one form of thyroid cancer, but so does the rest of Los Angeles' west side, Cozen says. Some cancer specialists say the high rate could stem from affluent residents receiving large numbers of medical X-rays.

"None of these cancers is well linked to petroleum or petroleum products," Cozen says. "There's oil wells all over L.A., and no cancer pattern is associated with neighborhoods with oil wells."

Studies typically have linked thyroid cancer with radiation, not with pollution from oil wells. Benzene has been linked with leukemia in oil-refinery workers, but Masry isn't alleging that the school's wells have caused leukemia. The EPA does not list toluene or n-hexane as suspected human carcinogens.

Masry, who initially blamed current oil production for health problems, now is focusing on 25 abandoned wells that he says were inadequately sealed. He blames ChevronTexaco and Occidental Petroleum, oil giants with deeper pockets as potential defendants than small, privately owned Venoco. Masry alleges that Occidental and Chevron (now part of ChevronTexaco) were the original partners that obtained leases to drill in Beverly Hills.

ChevronTexaco spokesman Rod Spackman says Chevron sold its leases before the 1920s. Company officials are checking whether Getty Oil, later bought by Texaco, operated wells here 60 years ago. "Our exposure here is very little, at best," Spackman says, "and it would go back many, many years ago, and we still question that."

Occidental says it has never owned or operated oil wells on the campus. "I have no idea what kind of fishing expedition these guys are on," Occidental spokesman Larry Meriage says.

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**AIR POLLUTION ISSUES: VOC'S AND OZONE STANDARDS**

Oil and gas operations can emit significant amounts of volatile organic compounds (VOC's) from their operations. VOC's are a major ingredient in ozone (or smog) formation. And Dallas and Houston, as well as a number of other areas, do not meet the existing ozone air quality requirements under the Clean Air Act.

As a result, new restrictions are being proprosed on oil and gas activities to reduce VOC emissions, as well as the emissions of methane (a prime greenhouse gas), and certain 'air toxics' like benzene. The article below discusses some of the issues.

## Air quality and all that gas

Sarah Gilman | Aug 08, 2011 05:00 AM

If you've been following the recent media blitz surrounding fracking -- where water, chemicals and sand are pumped at high pressure down a well to help release oil or natural gas -- you might think that concerns over the process are all about groundwater pollution. After all, thanks to the "Halliburton loophole," the process is not subject to the Safe Drinking Water Act, and in most states, companies aren't required to disclose the recipes of the chemical cocktails they're firing into the ground. . . .

During all this justifiable handwringing over the unknowns, another aspect of natural gas development that is undoubtedly having effects on nearby residents' health has pretty much gone uncovered by major media outlets (at least by comparison). There is no question, for example, that exposure to ozone above certain levels can cause serious respiratory problems, or that above certain concentrations, volatile organic compounds (VOCs) like benzene can cause cancer and other ailments. Nor is there any question that natural gas development, with all its diesel combustion, truck traffic, compressor stations, and occasional leaking pipes and wells, produces such pollutants (sometimes so much of them that rural areas near gaspatches end up with serious air quality problems on par with or worse than those in urban Los Angeles).

It comes as a relief, then, that the Environmental Protection Agency is positioning itself to do something significant (even if it was forced by a lawsuit). Last week, the agency proposed new air quality rules it is lauding as the first ever that cover fracking. The rules primarily target VOCs and air toxics like benzene, aiming for a 25 percent and 30 percent overall reduction in emissions of each, respectively, once fully implemented.

For VOCs, the rules will accomplish this primarily by imposing tight standards on compression and storage facilities and requiring "green completions" of fracked wells, which the agency notes are already mandatory in Wyoming and Colorado and used voluntarily by some companies. The technique involves special equipment that captures and separates gas and liquid hydrocarbons -- which can then be processed and sold -- brought up from a well during "flowback." That's when fluids used to frack the well return to the surface, a process which Jeremy Nichols of WildEarth Guardians, one of the groups that sued the EPA in the first place, described to ProPublica this way:

"Just imagine opening a bottle of soda," he said. (But) instead of carbon dioxide, ... this soda can contain methane, volatile organic compounds and toxic chemicals such as benzene, which (now)

generally spray into the environment." With green completions mandatory, the agency claims, an estimated 95 percent of the nastier emissions from this process would be kept out of the air.

For air toxics, the agency is proposing to significantly drop its public health standard for allowable emission levels from transmission and storage facilities.

As a byproduct of these measures, the EPA expects a 26 percent overall reduction in emissions of methane, a greenhouse gas more than 20 times more potent than carbon dioxide. And, the agency sunnily points out, even though the rules are projected to cost $754 million in 2015, the industry would be able to sell off captured gas and condensate at a cool $783 million annually.

What's not to like? Well, the gas industry doesn't seem thrilled with the proposal, but it also hasn't said too much against it yet. The American Petroleum Institute, a major industry lobbying group, is asking the agency to delay the rules beyond the current February 2012 deadline, and America's Natural Gas Alliance simply said it would study the rules and submit comments as necessary. If they do raise a stink, keep in mind that oil and gas trade groups often try to paint such regulations as job killers, even as drilling thrums along at a record pace.

Environmental groups seem delighted, of course, though they say the EPA should have gone farther, noting, for example, that the agency stopped short of imposing direct limits on methane emissions.

But before you get completely on the happy wagon, I have to point something out: As the EPA notes, Colorado and Wyoming already require green completions. And yet, they still have some of the country's most serious gaspatch air quality problems. Many of those are related to ozone, a byproduct of many industry processes. Right before the agency released the rules described in this blog, it announced it would be missing a federal court's July 29th deadline to issue a new ground-level ozone standard that is much more protective of human health than the current one.

So if you want to comment on EPA's fracking proposal (which goes by docket ID number EPA-HQ-OAR-2010-0505, instructions can be found at www.regulations.gov), you might also think about sending a letter to your U.S. Senator and Representative, asking them to put their support behind speedy and reasonable regulation of ozone pollution.

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## NOISE/VIBRATION ISSUES

Noise, dust, and vibration issues can arise – especially as oil and gas development occurs in developed areas. The following UPI article illustrates some of the issues faced by the producer as well as the landowners.

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Feature: Texas gas boom sparks new clash
By Phil Magers, UPI

DALLAS, Aug. 25 (UPI) -- Energy companies have stepped up drilling for natural gas within sight of suburban homes in the booming Dallas-Fort Worth area, making money for some landowners, schools and governments but sparking anger over noise and pollution.

Demand for natural gas is behind the surge in drilling, spurred on by new technologies that make it less disruptive, and the lure of the Barnett Shale Field, which lies under the northwest corner of the region in which 5.7 million people live and work. "It's one of the hottest plays in the nation going on right now," said Alex Mills, president of the Texas Alliance of Energy Producers in Wichita Falls.

Companies have been drilling in the Barnett field for 20 years but only recently have technologies developed that make it more feasible when demand and prices are right for investors. It may take a month to drill a single hole several thousand feet at a cost of $300,000 to $1 million.

Mark Baxter, director of the Maguire Energy Institute at Southern Methodist University's Cox School of Business, said investors are comfortable right now that the price of gas will be sustained while they are drilling in the formation. "You want to know by the time you get ready to produce that gas that the price is going to be up there," he said.

The spot price for natural gas is currently about $5 per mmBtu and Baxter believes it will stay at that level "for a while" because the nation is going into the winter season when natural gas usage is high. Storage levels area also low, he said.

Texas leads the nation in oil and gas drilling and about 86 percent of the drilling in the Lone Star state is for natural gas, which is a reverse of what it was 20 years ago. Of the 1,100 rigs drilling last week in the United States, nearly half were in Texas. The next most active states are Louisiana, Oklahoma, Wyoming and New Mexico.

The increased activity has been most visible in Denton County where the number of producing gas wells has climbed from 286 in 2000 to 959 as of February, according to the Texas Railroad Commission, which regulates the Lone Star state's oil and gas industry.

Although producing oil and gas wells have operated within the city limits of Texas cities for years, the activity is new to the booming North Texas Metroplex. It's created some new issues for people who never expected to see a drilling rig on their street. "We had a situation where a man had his dream home all laid out here in Denton County, woke up one morning looked out and his view of the sunrise was obstructed by a drilling rig across the street from him," said Ed Soph, a

spokesman for the Citizens for Healthy Growth. The oil patch has always been associated with more remote areas like West Texas, but the state is changing. Its population will double from 21 million to about 40 million people by 2050 and conflicts are inevitable.

Stacie Fowler, director of intergovernmental relations for the Texas Railroad Commission, said the agency attempts to meet with local governments facing the advance of oil and gas exploration and the industry has developed technology now that causes less disruption, like horizontal drilling.

"The production methods have become more affordable and they are able to get in there and get gas that was hard to get to in the past," she said. Nancy Paddack, who runs two feed stores and farms with her husband near Krum in North Texas, said there are two ways to look at the natural gas boom in her neighborhood. "On one hand it is a blessing." she said. "It has helped a lot of our customers who are farmers by providing them a second source of income. On another, if everything isn't handled correctly, it can destroy the value of the land."

When the Paddacks opened their business they truly were in the country, but now are surrounded by houses. Nancy Paddack and her husband own the mineral rights on their land and they have a gas well although production has fallen off, she said. Some of those upset with the stepped-up drilling don't own the mineral rights. In Texas, mineral rights don't necessarily pass with the sale of land and the surface owner may not have the legal right to stop drilling on his property. Soph said his grass-roots organization is concerned that governments are not prepared to address environmental issues like air and water quality. Unless adequate ordinances are enacted, he said, sensitive areas could be open to drilling.

"So many municipalities are strapped for money that people are taking the bait on drilling because of the revenue they get from it without really sitting down and saying what are we going to have on our hands in 15 to 20 years down the road," he said.

Denton County Judge Mary Horn, the county's top elected official, said county government and schools are benefiting from the increased tax revenue. Revenues from wells alone have increased from $119,081 in the 2000 to more than $1 million in the 2002 for the county government, not including schools. Although the drilling has benefited the county, Horn understands why some are upset with the noise and disturbance that a 115-foot-tall drilling rig can cause in a neighborhood because she has experienced it herself at her country home.

"It's a 24/7 operation," she said. "They don't stop just because the sun goes down. It can get pretty noisy because they go down so far. They may break a bit and have to pull it out." The energy companies meet with community leaders and attempt to address complaints, said Nate Webb, a spokesman for Oklahoma City-based Devon Energy Corp, one of the estimated 30 companies working in Denton County area.

Devon, which focuses primary on natural gas production, views the Barnett field as a "very promising and prolific area," he said. The company has about 1,400 producing wells in the field now and plans 400 new wells this year. "We have folks who are out explaining the process and trying as best we can to be good neighbors and partners," he said.

# Chapter 2: Use of the Surface for Oil & Gas Development

## USE OF THE SURFACE FOR OIL AND GAS DEVELOPMENT

In a common law lawsuit the landowner generally asserts that the operator (1) has been negligent, (2) created a nuisance, (3) is using more of the surface than is reasonable, or (4) is trespassing. The landowner generally asks for monetary damages for the environmental problem, and rarely asks for specific performance to remediate the property. See: Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989) ($5.4 million award for oil field pollution to lands in Beckham Co., Oklahoma); Gould v. Tenneco, unreported (Payne Co., Okla. Dist. Ct. Case C-84-129) ($4.2 million for contamination to a single water well from a salt water evaporation pit which had been closed in accordance with Corporation Commission regulations); Fischer et.al. v. Atlantic Richfield, unreported (Woods County, Oklahoma, District Court) ($3.6 million for contamination from a 75 year old oil field); Cole v. Phillips Petroleum Co. et.al., Dist. Ct. of Harris Co., Texas, Case No. 90-17888 (landowners were asking over $100 million in damages for groundwater contamination).

Query: Why would a landowner pursue a common law claim when so many federal and state environmental statues are applicable to oil and gas operations?

## USE OF THE SURFACE FOR OIL OR GAS DEVELOPMENT

i. Reasonable Use Doctrine

POWELL BRISCOE, Inc. v. PETERS
Supreme Court of Oklahoma
269 P.2d 787; 3 Oil & Gas Rep. 1364
April 6, 1954

O'NEAL, Justice. This is an action in which plaintiffs sought a permanent injunction against the defendants restraining them from using an earthen pit, or tank, for the impounding of salt water produced in the operation of certain oil wells upon land under an oil and gas lease owned and operated by the named defendant and two of its employees. From the granting of a permanent injunction, defendants appeal.

It was alleged in plaintiffs' amended petition that they owned the surface rights in 80 acres of land in Seminole County, Oklahoma; that the defendants Powell Briscoe, E. F. Briscoe, R. O. Reynolds and J. C. McKinney are the owners of an oil and gas lease upon plaintiffs' land, upon which the named defendants have drilled three oil wells; that the defendants Joe Collins and Bill Ennis are pumpers and employees of the defendant owners and operators of the lease; that the defendants, in the operation of the properties have constructed an earthen tank, or pond, upon the premises, and that the soil is of a sandy character and the brine in the pit, or tank, will seep into or permeate the surrounding soil and will destroy the vegetation and pollute the fresh water upon plaintiffs' land. It is alleged that the said acts constitute a private nuisance and will prevent plaintiffs from using and enjoying their property.

Defendants, by answer, plead the ownership of certain oil and gas leases upon plaintiffs' land, which leases were executed prior to plaintiffs becoming the owners of the surface rights of the land, and defendants specifically plead the rights so acquired under said leases; they operated

plead that the leases have been operated with due and reasonable care and in the usual and customary practice prevailing in the Mid-Continent area, as well as that of the Seminole area; they alleged that no damage has been done plaintiffs, and that their claim is a speculative possibility of damages.

The evidence tends to support a finding that the soil on plaintiffs' land, as well as lands in the area thereof, is of a loose sandy loam, and a large number of wells have been drilled and operated in the general area of plaintiffs' land.

The lands involved in this case are located in Eastern Oklahoma. What issues does that present?

Plaintiff, as a witness, testified at length with reference to oil production on lands lying to the west of his property. He identified that tract as the Gussie Porter land upon which there were ten producing oil wells. The soil upon that land was described as being perhaps a little more sandy than his land. Photographic exhibits of the Gussie Porter lease were introduced, which reflects the exterior and interior of a salt water pond upon that land. He testified as to the location of a lease south of the Kight school and another lease designated as the Jack Wade farm; that the soil on these lands was of a sandy loam formation; that from the condition of the soil near the salt water pits upon those leases, there was indication that salt water had destroyed the vegetation in the immediate vicinity of the pits.

He testified at length as to the methods employed by the Cities Service Company in disposing of their brine by emptying it into Little River, and that many producers in the oil field disposed of brine by emptying it into Little River, or the South Canadian River. With reference to the operation of the three wells on his land he stated that salt water produced upon the lease was conveyed in a pipeline to a pond situated in the southwest corner of his land. He did not testify that any salt water thus produced ever escaped from the pit or flowed over his land.


The Little River during spring season. During summer the flow is about one-quarter of this amount. The Little River flows into the South Canadian River which ultimately flows into the Gulf of Mexico. What are the legal implictions?

Plaintiff introduced the testimony of five additional witnesses, some of whom worked as pumpers on leases in the Sasakwa area. Their testimony is to the effect that some operators use intake wells to dispose of brine, some run their brine into Little River, or the South Canadian river, and others impound it in pits or tanks upon their respective leases; they expressed an opinion that salt water in pits in the area involved would seep causing some injury to vegetation near the pits. One witness stated that as defendants' wells were in close proximity to Little River, that no pumping equipment was necessary to dispose of the brine into Little River.

Plaintiff's last witness stated that the soil on plaintiff's farm is composed of three layers; the top soil is sandy loam soil; underneath is a soft friable clay, the bottom is stiff hard clay; that the pit on plaintiffs' land is located on the southwest ten acres of the eighty acre tract; that plaintiffs' house and improvements are located on the northwest ten acres of the farm, and upon higher land than the pit. He described the pit as between thirty and forty feet wide, ten to twelve feet deep and containing approximately three to four feet of salt water.

Defendants' testimony discloses that one well upon the land produced some salt water; that plaintiffs' land slopes to the east and north of the salt water pit, which is located on the southwest corner of the farm; that plaintiffs' house and improvements are located in the northwest corner of the land, upon an elevation of approximately fifteen to twenty feet above the pit; that the pit has never been filled with salt water, and that no salt water has escaped therefrom; that one well upon the lease produced approximately four barrels of brine a day; that if oil wells thereafter made enough salt water to fill the pits the owners were willing to dig an additional pit below the present one to catch any salt water that might seep out of the pit; that an intake well for the disposal of salt water would cost the defendants approximately $ 30,000.

It was stipulated that the defendant owners of the lease were financially able to respond in damages for any injury to plaintiffs' land arising out of their oil operations. Upon the submission of the case the trial court made a finding as follows:

'The Court further finds that at the time of the hearing herein there were three producing oil wells owned by the defendants located upon the property of the plaintiff, and that in all probability there will be additional wells drilling upon this 80 acre tract of land. The evidence discloses that one well is now producing some salt water. There is the probability that this well will increase its production of salt water and that possibly other wells will produce salt water, and if such is allowed to drain and flow into the tank constructed by the defendants it will constitute a nuisance which can be abated by the expenditure of money or labor,' and upon said finding entered an order and judgment that the temporary restraining order or injunction be made permanent.

The lease contract authorizes the operator for oil and gas development to lay pipelines, build tanks and structures upon the land to produce, save and take care of said products. The oil and gas lease here involved is the ordinary lease employed in the operation of oil and gas wells in the Mid-Continent field.

In Pure Oil Co. v. Gear, 183 Okl. 489, 83 P.2d 389, 390, we held:

> *'Under the ordinary oil and gas lease, the lessee in developing the premises in the production of oil and gas, is entitled to the possession and use of all that part of the leased premises reasonably necessary in producing and saving the oil and gas, including space to construct tanks and ponds, in which to confine salt water and other waste matter coming from the wells, and also including the space necessary to transport such waste matter from the wells into such tanks or ponds in a reasonably prudent manner.'*

In the case of Mary Oil & Gas Co. v. Raines, 108 Okl. 222, 235 P. 1085, it is said:

> *'In an oil and gas lease the lessee is entitled to the possession of the land so leased to the extent reasonably necessary to perform the obligations imposed on him by the terms of the lease, and the annoyances caused by production of oil and gas under a lease providing for the use of the surface for that purpose, in the absence of negligence on the part of the lessee, do not constitute a nuisance, and, where the same is being operated in the ordinary way and all precautions customarily prevailing in the oil and gas industry are being used to protect the rights of the surface owners, the incidental annoyances accompanying same offer no grounds for relief by injunction.'*

Construing the allegations of plaintiffs' petition and the proof submitted in support thereof in its most favorable light, we are of the view that the evidence wholly fails to sustain plaintiffs' contention that defendants in the operation of the lease by the impounding of salt water in the pit described, have created a private nuisance.

It will be observed that the court based its judgment upon a finding that additional wells may be drilled on the land, and further, that there is a probability that the present well, which is making four barrels of brine will, in the future, increase its salt water production, and that possibly other wells will produce salt water, and that if it is allowed to flow in the pit the salt water will constitute a nuisance. That finding, as its reading indicates, is based upon speculation and conjecture and it is without basis in the record. The salt water pit upon plaintiffs' land was constructed in the manner employed by all other producers in the field who impounded salt water upon their leases. Furthermore, there is no evidence that defendants have permitted any salt water to flow over plaintiffs' land. Concededly, plaintiffs admit no present injury, for no proof was submitted as to present damage.

To sustain the judgment for injunction under the facts here submitted, would result in depriving defendants of a substantial right under their oil and gas lease, and, in effect, deprive them of their property rights without plaintiffs having shown any present injury. As this court said in its opinion in Tidal Oil Co. v. Pease, 153 Okl. 137, 5 P.2d 389, 392.'To hold that operators could not flow salt water over the surface of land owned by them or leased by them for that purpose, or to deposit same in pools or tanks on their own land, would in many cases render impossible development for oil and gas in fields where salt water is produced.'

Salt from an old pit on the surface after the water evaporates. Does the salt evaporate with the waste water when left onsite? If we covered the area with 16 inches of topsoil would that remediate the problem?

The denial of injunctive relief does not deprive plaintiffs of their action at law if and when they establish injury to their land by reason of defendants' operation under its oil and gas lease. Fairfax Oil Co. v. Bolinger, 186 Okl. 20, 97 P.2d 574.

Moreover, the record here discloses that plaintiffs have a plain, speedy and adequate remedy at law for the recovery of damages in the event damages are sustained.

In Harris v. Smiley, 36 Okl. 89, 128 P. 276, we held:

'If it appears from the petition that plaintiff has a plain, speedy, and adequate remedy at law, equity will not grant him relief by injunction.'

In Sunray Oil Co. v. Cortez Oil Co., 188 Okl. 690, 112 P.2d 792, we held:

'An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action.'

In the case of Marshall v. Homier, 13 Okl. 264, 74 P. 368, we held:

'Where, in an action for an injunction, the alleged contemplated injury is such that can be fully compensated in money damages, and the defendants are wholly and unquestionably solvent, a temporary injunction should not be granted, and, where granted upon proper motion, should be dissolved, and the plaintiffs left to their adequate remedy for damages.'

Plaintiffs rely upon certain Oklahoma cases as follows: Gulf Pipe Line Co. v. Pawnee-Tulas Petroleum Co., 34 Okl. 775, 127 P. 252, 41 L.R.A.,N.S., 1108; Pulaski Oil Co. v. Conner, 62 Okl. 211, 162 P. 464, L.R.A.1917C, 1190; Phillips Petroleum Co. v. Mangan 189 Okl. 166, 114 P.2d 454; and Carter Oil Co. v. Kerley, 109 Okl. 69, 234 P. 737. The Gulf Pipe Line Co. case, supra, holds that the lessee of an oil and gas lease cannot arbitrarily locate a well in a place where it will endanger the property and lives of others when another location is equally advantageous to him.

In the Pulaski Oil Co. case, supra, the action at law was to recover damages arising out of defendants' operation of oil properties in which a default judgment was entered against defendants. The syllabus of the case discloses that the court held that the petition stated a cause of action to sustain the default judgment rendered.

The Phillips Petroleum Co. case, supra, was an action at law for the recovery of damages arising out of the pollution of a stream resulting in injury to plaintiff's land and plaintiff's water supply. The Carter Oil Co. case, supra, holds that under the provisions of section 7969, Comp.Stat.1921, Title 52 O.S.1951 @ 296, it is unlawful to permit oil or salt water to run over the land. We are of the view that the findings and conclusions of the trial court are not supported by the record.

The judgment granting a permanent injunction is reversed. The further contention made involving the question of venue need not be considered.

Judgment reversed.

JOHNSON, V. C. J., and WELCH, CORN, ARNOLD and WILLIAMS, JJ., concur.
BLACKBIRD, J., dissents.
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Briscoe v. Peters

Notes and Discussion

1. Disposal of produced salt water is a major environmental problem for operators of oil wells, and to a lesser extent natural gas wells. Briscoe (circa 1954) notes that operators routinely dispose of the produced water in creeks and local rivers, as well by injecting the water underground.

   What environmental impact would be expected when produced waters are disposed of in creeks and streams? Would you expect that this practice is still utilized today? How would you expect that produced waters are disposed of today?

2. Briscoe deals with the application of the reasonable use doctrine to the drilling and operation of oil wells. The case summarizes the doctrine as follows:

   In Pure Oil Co. v. Gear, 183 Okl. 489, 83 P.2d 389, 390, we held:

   > 'Under the ordinary oil and gas lease, the lessee in developing the premises in the production of oil and gas, is entitled to the possession and use of all that part of the leased premises reasonably necessary in producing and saving the oil and gas, including space to construct tanks and ponds, in which to confine salt water and other waste matter coming from the wells, and also including the space necessary to transport such waste matter from the wells into such tanks or ponds in a reasonably prudent manner.'

   In the case of Mary Oil & Gas Co. v. Raines, 108 Okl. 222, 235 P. 1085, it is said:

   > 'In an oil and gas lease the lessee is entitled to the possession of the land so leased to the extent reasonably necessary to perform the obligations imposed on him by the terms of the lease, and the annoyances caused by production of oil and gas under a lease providing for the use of the surface for that purpose, in the absence of negligence on the part of the lessee, do not constitute a nuisance, and, where the same is being operated in the ordinary way and all precautions customarily prevailing in the oil and gas industry are being used to protect the rights of the surface owners, the incidental annoyances accompanying same offer no grounds for relief by injunction.'

   Would such a doctrine apply to a pipeline? Compressor station located on a pipeline? Natural gas processing plant or refinery? What if the lease is silent as to use of the surface?

3. Under the reasonable use doctrine, can an oil and gas lessee install pipelines to the wellhead? Oil storage tanks on the property? Salt water storage tanks? Run electrical lines onto the property? Build roads to the well site?

4. Under the reasonable use doctrine, does the oil and gas lessee need to compensate the landowner for the use of the surface (i.e., yearly rentals, etc.)? If so, how are the yearly rentals calculated?

5. Would you expect a practice, such as disposing of salt water into creeks, which was considered reasonable at the time of Briscoe to also be considered a reasonable use of the surface today? How does this impact the operator?

6. The plaintiffs in this case ask the court to issue a permanent injunction against the defendants. What must they show the court?

7. The reasonable use doctrine has its origin in the Common Law, where the courts determined that a mine could use a reasonable amount of the surface for the mine workings, tailings piles, and ingress and egress purposes since the minerals were the "dominant" estate.

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Gulf Refining Co. v. Davis
Supreme Court of Mississippi
224 Miss. 464; 80 So. 2d 467; 1955 Miss. LEXIS 509; 4 Oil & Gas Rep. 983
May 23, 1955, Decided

JUDGES: Lee, J. Roberds, P. J., and Holmes, Arrington and Ethridge, JJ., concur.

OPINION: This is a suit by Malcolm Davis against Gulf Refining Company, a corporation, to recover for damages to his land and timber on account of the seepage and overflow from a salt-water pit, and the construction of a larger pit, on land of which he is the surface owner. There was a verdict and judgment for $1,500, and the Company appealed.

The declaration alleged that the plaintiff is the owner of 40 acres of land, as therein described, on which the defendant maintained a [***6] salt-water pit in connection with its production of natural gas; that saltwater seeped out and overflowed onto his land, rendering about 2 1/2 acres useless, and destroying 497 trees, which ranged from 2 to 10 inches in diameter; and that thereafter the defendant constructed another larger salt-water pit, on account of which he was further damaged.

The defendant, in its answer, admitted the construction of the salt-water pit, prior to the plaintiff's ownership of the land and its subsequent use, but it denied [*468] that salt water from the pit caused damage to the land or timber. It admitted the construction of the larger pit, and that it cut and removed trees of the value of $ 25.08.

It pled that its actions in the matter were pursuant to a certain oil, gas and mineral lease, of which it was the assignee, and that the original salt-water pit was constructed prior to the plaintiff's ownership of the land; that its operations, in connection with the smaller and in the construction of the larger pits, were conducted in a diligent and workmanlike manner, and were reasonably necessary. It attached thereto a copy of the original lease.

Among the rights therein granted were [***7] "the right to construct and use on said land * * * facilities for the * * * storage of minerals produced therefrom, as well as salt water * and all rights necessary to the full enjoyment of this lease * *." It also provided that "lessee shall be responsible

for all damages caused by lessee's operations other than damages necessarily caused by the exercise of the rights herein granted."

At the conclusion of the answer, it was stated that the defendant had an additional defense thereto, which it styled "first defense," and in which it was stated, "the declaration fails to state a cause of action against this defendant upon which relief can be granted," denied that it had damaged the plaintiff, and prayed for the dismissal of the cause with costs. The pleading was signed by the defendant's attorneys, but it did not represent that it was a demurrer. Section 1287, Code 1942. Nor did the attorneys attach their certificate that they believed it ought to be sustained. Section 1288, Code 1942. See also Section 1490, Code 1942.

If the pleading had amounted to a demurrer, the plaintiff could have amended his declaration by merely interposing the adverb "negligently," and it would have [***8] been sufficient. On motion of the defendant, a separate [*469] hearing on its first defense was granted, and the motion was properly overruled.

The proof showed that the original pit was about 23 feet long, 19 feet wide, and 2 1/2 or 3 feet deep; and that the plaintiff purchased the land in 1951, together with another 40 acres, long after the pit had been dug.

Davis testified that about six months after he purchased the land, salt water began to run out of the pit; that it overflowed about the middle and also drained out along the pipe; that it drained in an easterly direction and spread out and killed the vegetation and timber in its wake; that between 2 and 3 acres of his land was ruined; that 497 trees of varying diameters, mostly small, of a value of $ 500.00, were killed; that he made complaint several times to the defendant, but without result; [**469] that finally the defendant's agents came upon the land, without his consent, and constructed the larger pit, the dimensions of which were 90 yards long, 60 yards wide and 15 feet deep, and which covered a part of the previously damaged area, and on which about 250 of the trees had been growing.

Although he paid only [***9] $ 3,000.00 for his 80 acres in 1951, he was of the opinion that, prior to the damage, the 80 acres was worth $ 10,000.00 and that, after the damage, it was worth only $ 7,500.00. However, he testified that he was not asking for damage as to the whole 80 acres.

Several witnesses gave corroboration of the plaintiff's version as to the nature and extent of the damage to the land and as to the number and value of the trees. Several responsible employees of the defendant conceded that some salt water did get out of the small pit either by seepage or otherwise, and that it caused a small amount of damage. One witness admitted that he counted 75 trees that were injured, and then stopped. But most of the witnesses testified that the damage was nominal. Photographs of the scene were introduced in evidence.

Now [HN1] "a grant or reservation of mines or minerals gives to the mineral owner the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals." 58 C. J. S., Mines and Minerals, Section 159 b, page 332. See also Section 159 c, page 334 thereof, as follows: "A mineral [***10] owner, in the absence of additional rights expressly conveyed or reserved, is limited to as much of the surface and such uses thereof as are reasonably necessary properly to mine and carry away

the minerals." See also Grimes v. Goodman Drilling Co., 216 S. W. 202, a Texas case; Pure Oil Co. v. Gear, 83 P. 2d 389, an Oklahoma case.

But, "if the lessee, under the gas and oil lease, wrongfully injures the crops, he may be held liable for the damages." 24 Am. Jur., Gas and Oil, Section 41, page 548. And if he negligently occasions injury to the lessor, he may be held liable for any resultant damages. See 24 Am. Jur., Gas and Oil, Section 103, page 602. See also Phoenix v. Graham, 110 N. E. 2d 669, an Illinois case; Placid Oil Co. v. Lee, 243 S. W. 2d 860, a Texas case.

Thus under the law and under this particular oil and gas lease, the defendant had the right to dig the original pit and to use it for the storage of salt water. When it became insufficient, as the proof here disclosed, the defendant had the right to construct another; and it was the judge as to the kind of pit it should construct. Its act in so doing was not unreasonable, oppressive, or capricious. The plaintiff [***11] had complained that salt water from the small pit was overflowing onto his land. Besides the field was making more salt water, and it was necessary to increase the capacity of the then existing pit, or to dig a larger one.

However, it was not shown to be reasonably necessary for salt water to escape from the pit. Salt water [*471] was shown to be a menace to vegetation, trees and land; and if the defendant negligently permitted it to overflow or escape from the pit, it is liable for the resultant damage.

Under the evidence in this case, there was an issue for the jury as to whether or not the defendant negligently permitted the salt water to seep or overflow onto the plaintiff's land; and the governing principles of the law as to negligence in this regard were fairly stated in the given instructions both for the plaintiff and the defendant.

The appellant contends that the verdict is grossly excessive and evinces passion. From a consideration of all of the facts in this record, it must be said that the verdict is greatly out of proportion to the damage. It could not be upheld in that amount even if the record was free from error. It is so [**470] large as to shock the [***12] conscience and require a new trial.

Appellant complains of error in several given instructions for the plaintiff and in the refusal of several of its requested instructions. The plaintiff obtained an instruction which, in effect, informed the jury that if it believed from a preponderance of the evidence that the defendant negligently permitted the salt water to spread over the land and caused the trees to die, then it should assess the damages therefor at the amount that it found to be the actual fair market value thereof at the time said timber was destroyed. The plaintiff testified that 497 trees, 250 of which were in the area where the large pit was constructed, died; but that all of the trees were dead before the large pit was made.

The defendant admitted that, in the construction of the large pit, it cut and removed trees of a value of $ 25.08. The plaintiff also requested and was given the following instruction: "The court instructs the jury for the plaintiff that if you believe from a preponderance of the evidence that the defendant cut and removed and or destroyed timber [*472] from the land of the plaintiff, in the construction of salt water pits, although he had [***13] a right to do so under the terms of the lease, you shall return a verdict for the plaintiff including the fair market value of the timber so cut and removed or destroyed."

The jury was therefore warranted in believing that it could award the value of the trees which died as the result of salt water -- said by the plaintiff to be 497 -- and also the value of the trees that the defendant cut and removed or destroyed in constructing the large pit, said by the plaintiff to be 250 and by the defendant to be of the value of $ 25.08. Such an award would result in a pyramiding or doubling of damages. This instruction is not susceptible of the conclusion that its purpose was to inform the jury that the plaintiff was entitled at least to recover for such trees as the defendant had converted to its own use. It is confusing and misleading, and should not have been given. This was not a case for either punitive damages or for the recovery of the statutory penalty.

Appellant also complains that the court erred in refusing to admit testimony as to recent sales of this property. It offered, but on motion of the plaintiff the court excluded, the evidence of Rex Windham that he purchased the 80 [***14] acres of land here involved in February 1949 for $ 2,500; and that, during the same year, he sold the timber thereof for $ 1,700, and the land to B. Jernigan for $ 2,500. And of course the record shows that the plaintiff acquired the land from Jernigan in 1951, only two years later.

In eminent domain, prior sales are admissible in determining the value of property unless they are so remote in time as to have no bearing upon the question of present value. 18 Am. Jur., Eminent Domain, Section 351, page 994; 29 C. J. S., Eminent Domain, Section 273, page 1267. In Davis v. Pennsylvania R. Co., 215 Pac. St. Rep. 581, 64 A. 774, 7 Ann. Cas. 581, the price paid 17 years before the taking was excluded as [*473] too remote. The sales here occurred as recently as 4 or 5 years previous to the alleged damage, and were not too remote, unless there was great disparity in economic conditions between the date of such sales and the time of the damage complained of; and no such disparity was shown. This evidence should have been admitted for whatever it was worth.

In view of the fact that the plaintiff's recovery must be confined to the damage to the area of between 2 and 3 acres, less that which was utilized for the large pit, and for damage to vegetation and trees, and since there were no singular facts to justify a conclusion that the value of the balance of the 80 acres would be in any wise affected, it is presumed that the plaintiff will not again invoke the before and after damage rule.

For the reasons stated, the cause is reversed and remanded for a new trial.

Reversed and remanded. Roberds, P. J., and Holmes, Arrington and Ethridge, JJ., concur.

Gulf Refining Co. v. Davis

Notes and Discussion

1. Until the 1960's salt water pits were common in the oil and gas extraction industry. In this case, did the operator of the wells have the right to build such pits under the oil and gas lease? What if no lease provision addressed the issue?

2. Note the oil and gas operator built a second salt water pit on the plaintiff's property. How many pits could the operator build? Does the plaintiff/landowner have any say in the size of the pit? Where the pit is located? How many trees will be cut down to build the pit?

3. Did the fact that the first salt water pit had been built before the plaintiff / landowner acquired title raise any issues?

4. Davis (plaintiff) purchased the property with knowledge that oil and gas operations were ongoing on the tract, and of the use of the salt water pit. Does that preclude him from claiming damages?

5. Did the fact that the operator / defendant was an assignee of the oil and gas lease covering the property raise any issues?

6. Note the difficulty the court had with regard to determining damages. Are the damages measured by the value of the timber destroyed? The decline in the market value if the entire tract? By previous sales in the area?

7. Why did the court state:

*From a consideration of all of the facts in this record, it must be said that the verdict is greatly out of proportion to the damage. It could not be upheld in that amount even if the record was free from error.*

## USE OF THE SURFACE FOR OIL OR GAS DEVELOPMENT (CONTINUED)

ii. Impact of Oil & Gas Leases and Lease Provisions

A representative oil and gas lease from the American Association of Petroleum Landmen for Texas contains the following terms – note very little discussion of environmental issues or clean up in the contract language:

AAPL FORM 675
OIL AND GAS LEASE
TEXAS FORM-SHUT-IN CLAUSE, POOLING CLAUSE

THIS AGREEMENT made and entered into the _____ day of _____, 20_____, by and between_____, Lessor and _____, Lessee. WITNESSETH:

1. Lessor, in consideration of the sum of _____ Dollars ($_____), in hand paid, receipt of which is hereby acknowledged, and the royalties herein provided, does hereby grant, lease and let unto Lessee for the purpose of exploring, prospecting, drilling and mining for and producing oil and gas and all other hydrocarbons, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, and without additional consideration, does hereby authorize Lessee to enter upon the land covered hereby to accomplish said purposes, the following described land in _____ County, Texas, to-wit:

[LEGAL DESCRIPTION INSERTED HERE]

This Lease also covers and includes any and all lands owned or claimed by the Lessor adjacent or contiguous to the land described hereinabove, whether the same be in said survey or surveys or in adjacent surveys, although not included within the boundaries of the land described above. For the purpose of calculating rental payments hereinafter provided for the lands covered hereby are estimated to comprise _____ acres, whether it actually comprises more or less.

2. Subject to the other provisions herein contained this Lease shall be for a term of _____ years from this date (called "primary term") and as long thereafter as oil and gas or other hydrocarbons are being produced from said land or land with which said land is pooled hereunder.

3. The royalties to be paid by Lessee are as follows: On oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected. Lessee shall have the option to purchase any royalty oil in its possession, paying the market price therefore prevailing for the field where produced on the date of purchase. On gas, including casinghead gas, condensate or other gaseous substances, produced from said land and sold or used off the premises or for the extraction of gasoline or other products therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale.

While there is a gas well on this Lease, or on acreage pooled therewith, but gas is not being sold or used Lessee shall pay or tender annually at the end of each yearly period during which such gas is not sold or used, as royalty, an amount equal to the delay rental provided for in paragraph 5 hereof, and while said royalty is so paid or tendered this Lease shall be held as a producing Lease under paragraph 2 hereof. Lessee shall have free use of oil, gas and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil and gas shall be computed after deducting any so used.

4. Lessee, at its option, is hereby given the right and power to voluntarily pool or combine the acreage covered by this Lease, or any portion thereof, as to the oil and gas, or either of them, with other land, lease or leases in the immediate vicinity thereof to the extent hereinafter stipulated when in Lessee's judgment it is necessary or advisable to do so in order to properly develop and operate said leased premises in compliance with the Spacing Rules of the Railroad Commission of Texas, or other lawful authorities, or when to do so would, in the judgment of Lessee, promote the conservation of oil and gas from said premises. Units pooled for oil hereunder shall not substantially exceed 80 acres each in area, and units pooled for gas hereunder shall not substantially exceed 640 acres each in area plus a tolerance of ten per-cent thereof in the case of either an oil unit or a gas unit, provided that should governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations.

Lessee under the provisions hereof may pool or combine acreage covered by this Lease, or any portion thereof as above provided for as to oil in any one or more strata and as to gas in any one or more strata. The units formed by pooling as to any stratum or strata need not conform in size or area with the unit or units into which the Lease is pooled or combined as to any other stratum or strata, and oil units need not conform as to area with gas units. The pooling in one or more instances shall not exhaust the rights of Lessee hereunder to pool this Lease, or portions thereof, into other units. Lessee shall file for record in the county records of the county in which the lands are located an instrument identifying and describing the pooled acreage. Lessee may at its election exercise its pooling operation after commencing operations for, or completing an oil or gas well on the leased premises, and the pooled unit may include, but is not required to include, land or leases upon which a well capable of producing oil or gas in paying quantities has theretofore been completed, or upon which operations for drilling of a well for oil or gas have theretofore been commenced.

Operations for drilling on or production of oil or gas from any part of the pooled unit composed in whole or in part of the land covered by this Lease, regardless of whether such operations for drilling were commenced or such production was secured before or after the execution of this instrument or the instrument designating the pooled unit, shall be considered as operations for drilling on or production of oil or gas from the land covered by this Lease whether or not the well or wells are actually located on the premises covered by this Lease, and the entire acreage constituting such unit or units, as to oil and gas or either of them as herein provided, shall be treated for all purposes except the payment of royalties on production from the pooled unit as if the same were included in this Lease.

For the purpose of computing the royalties to which owners of royalties and payments out of production and each of them shall be entitled upon production of oil and gas, or either of them from the pooled unit, there shall be allocated to the land covered by this Lease and included in

said unit a pro rata portion of the oil and gas, or either of them, produced from the pooled unit after deducting that used for operations on the pooled unit. Such allocation shall be on an acreage basis, that is to say, there shall be allocated to the acreage covered by this Lease and included in the pooled unit that pro rata portion of the oil and gas, or either of them, produced from the pooled unit which the number of surface acres covered by this Lease and included in the pooled unit bears to the total number of surface acres included in the pooled unit.

Royalties hereunder shall be computed on the portion of such production, whether it be oil or gas or either of them, so allocated to the land covered by this Lease and included in the unit just as though such production were from such land. The production from an oil well will be considered as production from the Lease or oil pooled unit from which it is producing and not as production from a gas pooled unit; and production from a gas well will be considered as production from the Lease or gas pooled unit from which it is producing and not from the oil pooled unit.

5. If operation for drilling are not commenced on said land, or on acreage pooled therewith as above provided for, on or before one year from the date hereof, the Lease shall terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor, or to the credit of Lessor in the _____, Bank at_____, Texas, (which Bank and its successors shall be Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of _____ Dollars ($_____), herein called rentals, which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payment or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term hereof.

The payment or tender of rental under this paragraph and of royalty under on or before the date of payment. If such Bank, or any successor Bank, should fail, liquidate or be succeeded by another Bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another Bank as Agent to receive such payments or tenders. Cash payment for this Lease is consideration for this Lease according to its terms and shall not be allocated as a mere rental for a period. Lessee may at any time or times execute and deliver to Lessor, or to the depository above named, or place of record a release covering any portion or portions of the above described premises and thereby surrender this Lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

6. If prior to discovery of oil, gas or other hydrocarbons on this land, or on acreage pooled therewith. Lessee should drill a dry hole or holes thereon, or if after the discovery of oil, gas or other hydrocarbons, the production thereof should cease from any cause, this Lease shall not terminate if Lessee commences additional drilling or re-working operations within sixty (60) days thereafter, or if it be within the primary term, commences or resumes the payment or tender of rentals or commences operations for drilling or re-working on or before the rental paying date next ensuing after the expiration of sixty (60) days from the date of completion of the dry hole, or cessation of production. If at any time subsequent to sixty (60) days prior to the beginning of the

last year of the primary term, and prior to the discovery of oil, gas or other hydrocarbons on said land, or on acreage pooled therewith, Lessee should drill a dry hole thereon, no rental payment or operations are necessary in order to keep the Lease in force during the remainder of the primary term.

If at the expiration of the primary term, oil, gas or other hydrocarbons are not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or re-working operations thereon, or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, the Lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other hydrocarbons, so long thereafter as oil, gas or other hydrocarbons are produced from said land, or acreage pooled therewith.

In the event a well or wells producing oil or gas in paying quantities shall be brought in on adjacent land and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

7. Lessee shall have the right at any time during or after the expiration of this Lease to remove all property and fixtures placed on the premises by Lessee, including the right to draw and remove all casing. When required by the Lessor, Lessee shall bury all pipelines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn located on said land as of the date of this Lease without Lessor's consent.

8. The rights of each party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns, but no change or division in the ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations, or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished with a certified copy of recorded instrument or instruments evidencing such change of ownership. In the event of assignment hereof in whole or in part, liability for breach of any obligation issued hereunder shall rest exclusively upon the owner of this Lease, or portion thereof, who commits such breach.

In the event of the death of any person entitled to rentals hereunder, Lessee may pay or tender such rentals to the credit of the deceased or the estate of the deceased, until such time as Lessee has been furnished with the proper evidence of the appointment and qualification of an executor or an administrator of the estate, or if there be none, then until Lessee is furnished satisfactory evidence as to the heirs or devisees of the deceased, and that all debts of the estate have been paid. If at any time two or more persons become entitled to participate in the rental payable hereunder. Lessee may pay or tender such rental jointly to such persons, or to their joint credit in the depository named herein; or, at the Lessee's election, the portion or part of said rental to which each participant is entitled may be paid or tendered to him separately or to his separate credit in said depository; and payment or tender to any participant of his portion of the rentals hereunder shall maintain this Lease as to such participant.

In the event of an assignment of this Lease as to a segregated portion of said land, the rentals payable hereunder shall be apportioned as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If six or more parties become entitled to royalty

payments hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

9. The breach by Lessee of any obligations arising hereunder shall not work a forfeiture or termination of this Lease nor cause a termination or reversion of the estate created hereby nor be grounds for cancellation hereof in whole or in part unless Lessor shall notify Lessee in writing of the facts relied upon in claiming a breach hereof, and Lessee, if in default shall have sixty (60) days after receipt of such notice in which to commence the compliance with the obligations imposed by virtue of this instrument, and if Lessee shall fail to do so then Lessor shall have grounds for action in a court of law or such remedy to which he may feel entitled.

After the discovery of oil, gas or other hydrocarbons in paying quantities on the lands covered by this Lease, or pooled therewith, Lessee shall reasonably develop the acreage retained hereunder, but in discharging this obligation Lessee shall not be required to drill more than one well per eighty (80) acres of area retained hereunder and capable of producing oil in paying quantities, and one well per six hundred forty (640) acres of the area retained hereunder and capable of producing gas or other hydrocarbons in paying quantities plus a tolerance of ten per-cent in the case of either an oil well or a gas well.

10. Lessor hereby warrants and agrees to defend the title to said lands and agrees also that Lessee at its option may discharge any tax, mortgage or other liens upon said land either in whole or in part, and in the event Lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder towards satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if Lessor owns an interest in the oil, gas or other hydrocarbons in or under said land, less than the entire fee simple estate then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce such rental paid hereunder or over-payment of such rental hereunder shall not impair the right of Lessee to reduce royalties payable hereunder.

11. Should Lessee be prevented from complying with any express or implied covenant of this Lease, from conducting drilling, or reworking operations thereon or from producing oil or gas or other hydrocarbons therefrom by reason of scarcity of, or inability to obtain or to use equipment or material, or by operation of force majeure, or because of any federal or state law or any order, rule or regulation of a governmental authority, then while so prevented, Lessee's obligations to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this Lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on, or from producing oil or gas or other hydrocarbons from the leased premises; and the time while Lessee is so prevented shall not be counted against the Lessee, anything in this Lease to the contrary notwithstanding.

IN WITNESS WHEREOF this instrument is executed on the date first above set out.

_____

STATE OF Texas
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____known to me to be the identical person___ whose name___ are/is subscribed to the foregoing instrument, and acknowledged to me that __he __ executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the _____day of _____ A. D., 20_____.

_____

Notary Public in and for _____ County, Texas

**********

Oil & Gas Lease Questions:

1. Why do we have a 'notary' at the end of the document?

2. Remember that the oil and gas lease is a contract. What is the result if a party fails to insert the legal description, or include all the parties, or what if the execution is 'defective'? Why do you think it is common practice to use 'standard form' leases?

3. What provisions of the standard form oil and gas lease (above) might apply to the environmental issues encountered in exploration and development?

4. In light of the lease provisions, do you think many lawsuits are filed by landowners claiming a violation of the oil and gas lease terms?

5. What if lease provisions allowed an operator to conduct their operations in an illegal manner – say allowed them to dump salt water into the Trinity River in violation of numerous federal and state statutes and regulations. Would the lease provisions be enforceable by the operator if they wanted to take such a foolhardy course of operation?

6. On assignment of the oil and gas lease, is the operator/lessee relieved of liability?

WOHLFORD v. AMERICAN GAS PROD. CO.
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
218 F.2d 213; 4 Oil & Gas Rep. 448
January 4, 1955

Appellant, plaintiff below, sued the appellee, defendant below, for damages to four different kinds of property, grass, land, cattle, and fencing, which resulted from the blowing of a gas well. Appellant was the owner of the land, and the appellee, under a lease from appellant, owned and operated a gas well on the land.

Appellee, in its operation of said gas well, caused arsenic to be blown from said well and deposited on the surface of the land, thereby causing the damages. By his First Count, appellant sought to recover for the damage to grass as a growing crop under the specific provisions of the lease whereby appellee agreed to pay for damage to growing crops caused by its operations.

By his Second Count, appellant sought to recover all of the items of damage upon the ground that appellee used more of the surface of appellant's land than was reasonably necessary for the prudent operation and production of said lease. By his Third Count, appellant sought to recover all of the items of damage upon the ground of appellee's negligence which proximately caused the damage.

A natural gas well being 'blown down' into a pit - note the fluids, sand, water, and wastes fall into the pit - and the methane escapes to the atmosphere. What are the environmental or safety issues an operator should be concerned with?

Appellee admitted ownership and operation of the well, but denied that it was liable to appellant under any of the theories alleged. Affirmatively, appellee alleged that, as lessee, it was the owner and holder of the dominant estate in said section; that its operations were careful and prudent; that its operations were conducted in the usual and ordinary method; that it did not use more land than was reasonably necessary; and that it was not in any manner negligent.

Trial was to a jury, and upon a general charge the jury returned a verdict for the appellant, assessing damages as follows: 1. loss of grass, $ 552; 2. loss of cattle, $ 9,852; 3. damage to land, $ 3,220; 4. reasonable fencing expense, $ 900.

Appellant filed a motion for judgment on the verdict with certain reductions in the items of damage for grass and cattle. Appellee moved for judgment notwithstanding the verdict. The court denied appellant's motion, granted appellee's motion and entered judgment for appellee. The reason for the court's action, as stated in its judgment, was 'that there was no tenable ground of negligence or proximate cause shown'. n1

Appellant's first insistence is: 'Appellant is entitled to recover for damage to the growing grass crop on his land by the express provisions of the lease even though appellee did not use more land than was reasonably necessary and was not negligent in any manner.'

The following provision was printed in the lease: 'When required by lessor, the lessee shall bury its pipe lines below plow depth and shall pay for damages caused by its operations to growing crops on said land.' While the district court was preoccupied with the questions of negligence and proximate cause, not important so far as the contractual obligation is concerned, it necessarily held that the grass did not come within the provision of the lease requiring payment for damages to 'growing crops.'

From the pertinent authorities, n2 we think it clear that the expression 'growing crops', in its commonly recognized meaning, does not include the natural products of the soil, such as native grasses used for grazing cattle. n3

Appellant contends, however, that the land here involved was pasture grass land, had never been cultivated, and that under such circumstances natural grasses should be considered as growing crops. That argument would have more weight if the expression had been adopted with particular reference to the peculiar conditions of appellant's land. Instead, however, the words appear simply in the printed portion of the standard oil and gas mining lease form employed by the parties.

There the ideas of burying pipe lines below plow depth and of paying for damages to growing crops are expressed in a single sentence. Obviously, the draftsman had in mind products of the soil which result from planting, cultivation and labor.

Secondly, appellant contends: 'Appellant is entitled to judgment because appellee used more of appellant's land for its operations than was reasonably necessary and thereby caused appellant's damages.'

Under the Texas law, an oil and gas lessee is entitled to use so much, and only so much, of the land as is reasonably necessary for carrying out the purposes of the lease. n4 Appellant's contention is that appellee, in blowing its well, used more of appellant's land than was reasonably necessary for the prudent operation of the lease and thereby committed a trespass. n5

It is of course true, as appellant argues, that a trespasser is to be held liable without reference to negligence or the exercise of care. n6 However, appellee did not trespass on so much of the land as was reasonably necessary for the prudent operation of the lease. The only evidence tending to establish a trespass goes to show that appellee did not prudently operate the lease and thereby it used more land than was reasonably necessary. Despite the claim of trespass, therefore, appellant's second contention resolves itself into a negligence issue, the same as his third contention which is frankly based on negligence.

Thirdly, appellant insists that the evidence was sufficient to present questions for the jury as to appellee's negligence and the proximate results thereof. There is no real dispute about the material facts. The death of the cattle, and appellant's other damages were caused by arsenic blown from appellee's well on appellant's land. Gas wells have to be cleaned periodically. The gas passing through the earth's formations carries with it dirt, liquids, shale, rocks, oil and water which settle around the wells and materially reduce the flow of gas.

The object of blowing the well is to remove this accumulation, to blow it out of the well. The wells in this area are blown once or twice a year. The general practice is to open the top of the pipe and 'let her blow'. More pressure and velocity are thereby obtained and more rubbish blown out of the well; a better cleaning job is done than when an 'ell' is connected to the top outlet and the gas blown into a 'sump', or when a 'catcher' or 'separator' is attached to the pipe. These devices cause a loss of pressure differential, and while they permit a workable degree of cleaning, the most efficient way to clean gas wells is to open them directly to the atmosphere.

That is the method always used unless, because of the known presence in the well of salt water, oil, or perhaps some other objectionable or poisonous substance, the less efficient method of blowing into a catcher, separator or sump is required. This well was drilled in 1946; it had been blown in the same manner a number of times since completion without any apparent damage. The well contained no salt water nor oil to be guarded against. It is conceded that this is the first known case of arsenic damage from a gas well.

Appellant further concedes that the law of Texas is as announced by the Supreme Court of that State in Texas & Pacific Ry. Co. v. Bigham, 90 Tex. 223, 38 S.W. 162, 163: n7 '* * * a party should not be held responsible for the consequences of an act which ought not reasonably to have been foreseen. In other words, it ought not to be deemed negligent to do or to fail to do an act when it was not anticipated, and should not have been anticipated, that it would result in injury to any one. To require this is to demand of human nature a degree of care incompatible with the prosecutions of the ordinary avocations of life. It would seem that there is neither a legal nor a moral obligation to guard against that which cannot be foreseen, and under such circumstances the duty of foresight should not be arbitrarily imputed.'

Appellant relies upon the equally well established rule stated in Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S.W.2d 847, 849: n8 '* * * it is not required that the particular accident complained of should have been foreseen. All that is required is 'that the injury be of such a general character as might reasonably have been anticipated; and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.' San Antonio & A.P. Ry. Co. v. Behne, Tex.Com.App., 231 S.W. 354, 356.'

It seems to us, however, that when experience had eliminated from the hazards of blowing the well the dangers known sometimes to exist of salt water or oil, and when the presence of arsenic in the well admittedly could not have been foreseen, no duty rested on the appellee to protect the appellant from the unknown and unheard of hazard of arsenic in the well. See authorities cited in footnote (7), supra; especially the Restatement of the Law of Torts, Secs. 281 and 449, as brought forward in the 1948 Supplement, and Eldredge, Modern Tort Roblems, pp. 18 et seq. n9

We conclude, therefore, that the evidence did not present a jury question as to appellee's negligence, and judgment is Affirmed.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1. That reason was elaborated in a letter to counsel as follows:

'The briefs you have presented for and against the defendant's motion for judgment non obstante veredicto have been very helpful in my study of said motion. This has been a perplexing case, but the event was so unprecedented and astonishing that I have come to doubt any tenable ground of negligence or proximate cause, and accordingly grant the motion. It seems to me that this occurrence was without fault just as much as the explosion in Parrot v. Wells (Fargo & Co., 15 Wall. 524), 82 U.S. 524 (21 L.Ed. 206). 'A judgment in proper terms may be presented promptly.'

n2. Among which see Cooke v. Ellis, Tex.Civ.App., 196 S.W. 642; West Central Drilling Co. v. Malone, Tex.Civ.App., 219 S.W.2d 601; Czerner v. Kirby, 53 N.M. 311, 207 P.2d 531, 532, 534; Moore v. Hope Natural Gas Co., 76 W.Va. 649, 86 S.E. 564, 567; Miethke v. Pierce County, 173 Wash. 381, 23 P.2d 405; 13 Tex.Jur. 4; 15 Am.Jur., Crops, Sec. 2; Annotations 131 A.L.R. 618, 125 A.L.R. 1415; cf. Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994, 997.

n3. The appellant testified:

'Q. Is this a native prairie sod? A. Excellent sod.
'Q. Has it ever been plowed? A. No, sir.
'Q. What king of grass is on it' A. Grama and mesquite mostly.
'Q. Are those both good pasture grasses? A. Excellent.
'Q. And did you use this land for pasture and for no other purpose? A. Yes, sir; for no other purpose.
'Q. You never had any other kind of crop grown on it other than grass? A. No, virgin soil.'

n4. Moore v. Decker, Tex.Com.App., 220 S.W. 773; Joyner v. R. H. Dearing & Sons, Tex.Civ.App., 112 S.W.2d 1109, on second appeal, Tex.Civ.App., 134 S.W.2d 757; Placid Oil Co. v. Lee, Tex.Civ.App., 243 S.W.2d 860; Mid-Texas Petroleum Co. v. Colcord, Tex.Civ.App., 235 S.W. 710; United North & South Oil Co., Inc., v. Mercer, Tex.Civ.App., 286 S.W. 652; Stradley v. Magnolia Petroleum Co., Tex.Civ.App., 155 S.W.2d 649; Robinson Drilling Co., Inc., v. Moses, Tex.Civ.App., 256 S.W.2d 650; Yates v. Gulf Oil Corporation, 5 Cir., 182 F.2d 286; 31 Texas Jur. Sec. 27, p. 558.

n5. Appellant's complaint charged:

'The blowing of said well by defendant in such manner as to permit same to deposit arsenic or other poisonous substances upon the grass and surface of plaintiff's land was not reasonably necessary for the prudent operation and production of said lease, and the invasion and appropriation of approximately 200 acres of plaintiff's land for such purposes was not reasonably necessary for the prudent operation and production of said lease and constituted a trespass thereon, a nuisance thereto, and an unwarranted use of the surface of plaintiff's land.'

n6. 41 Texas Jur., Trespass, p. 414; Texas & Pacific Ry. Co. v. Frazer, Tex.Civ.App., 182 S.W. 1161. n7. See also El Paso Electric Co. v. Barker, 134 Tex. 496, 137 S.W.2d 17; San Antonio & A.P. Ry. Co. v. Biggs, Tex.Civ.App., 283 S.W. 627; Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S.W.2d 847; Cameron Compress Co. v. Whitington, Tex.Com.App., 280 S.W. 527; City of Dallas v. Maxwell, Tex.Com.App., 248 S.W. 667, 27 A.L.R. 927; Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S.W.2d 249; Parrot v. Wells, Fargo & Co., 15 Wall. 524, 82 U.S. 524, 21 L.Ed. 206; A.L.I. Restatement of the Law, 1948 Supp., Torts, Sec. 281, pp. 650, 651.

n8. See also Missouri-Kansas-Texas Ry. Co. of Texas v. McLain, 133 Tex. 484, 126 S.W.2d 474; Atchison v. Texas & P. Ry. Co., 143 Tex. 466, 186 S.W.2d 228. n9.

Appellant was interested also in the efficient operation of the well, he being the holder of a one-eighth royalty interest. Appellee may, therefore, have owed appellant some measure of duty countervailing to that insisted on in this action, namely to use the most efficient method for blowing the well, which without dispute was the method here employed.

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Wohlford v. American Gas Products Co.

Notes and Discussion

1. What impact do express provisions of the oil and gas lease have on the reasonable use doctrine?

2. Damages payable for harm to "growing crops" is commonly contained in oil and gas leases. Do growing crops include damage to native grasses? Native trees? Does environmental damage to the surface create a contract cause of action for the landowner under the "growing crops" clause?

3. Are there generally any environmental provisions contained in a typical oil and gas lease?

4. Oil and gas leases typically provide that a pipeline will be "buried below plow depth". In some cases such pipelines become contaminated with scale from the produced waters and may be low level radioactive. Is this a reasonable use of the surface? Does the operator need to remove such radioactive pipe from the ground when operations are finished? Remove buried pipe even if it is not radioactive?

5. With the advent of certain dry land farming techniques plow depth is significantly deeper than it was 25 years ago. How should the provision "below plow depth" be interpreted in light of the new farm technology? If a pipeline is not buried below plow depth and is ruptured by surface farming activities creating a major oil spill, will the liability of the operator be any different than if the pipeline was buried below plow depth?

6. Periodically an operator will “blow down” a well – open the valve and let the pressure of the natural gas or oil blow all the debris and water out of the hole.

In most cases the material is blown into a pit at the wellsite. This operation maintains the productive capacity of the well, and prevents water intrusion into productive formations. Once the debris is removed, the well can be put back online.

Many times a well will also be ‘blown down’ after it has been drilled and has just been ‘completed’. This practice removes some of the material downhole and recovers water and chemicals that might have been injected at high pressures into a well.

The picture at right is a poor shot taken from my phone at 4:30 am on I-20 in Grand Prarie heading toward the airport – it is a Barnett shale well being flared after a recent completion.

Signs were posted along the highway not to call the fire department, it was normal operations – even though in the darkness you could see the flare 5 miles away.

Is this a reasonable use of the surface? Do you think the light from the flaring/blowing creates a cause of action for neighbors? What about the noise (blowing wells sound very similar to a jet engine).

It is rare for an oil and gas lease to contain provisions that address the environment – but not unheard of. Due to their status as a major mineral owner many states have drafted leases that contain environmental clauses and requirements that the lands be restored. Federal leases also will have these provisions. The following case is an example of some of the provisions – in this case drafted by the State of Colorado – and some of the legal issues encountered.

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Frankfort Oil Company, a division of Joseph E. Seagram & Son, Inc. v. Harry R. Abrams, etc.
Supreme Court of Colorado
159 Colo. 535; 413 P.2d 190; 1966 Colo. LEXIS 761; 24 Oil & Gas Rep. 738
April 11, 1966, Decided

JUDGES: En Banc. Mr. Chief Justice Sutton delivered the opinion of the Court. Mr. Justice Frantz specially concurring in the result, and Mr. Justice McWilliams not participating.

OPINION: This writ of error concerns the question as to whether damages awarded a landowner for use of his land under a lease by an oil company were excessive, as one side contends or were inadequate, as the other side urges. The parties appear in the same order as in the trial court, and they will [**192] hereinafter be referred to by name or as the plaintiff and defendant.

Frankfort [***2] Oil Company is a Texas corporation engaged in oil and gas exploration and production; it is authorized to do business in Colorado. As the holder of a mineral leasehold estate located in Kiowa County, Colorado, it initially filed a complaint seeking both a temporary and permanent injunction against the surface owner, Harry R. Abrams. Frankfort thereby sought to enjoin and restrain Abrams from interfering with its operations, its rights of ingress and egress, and from threatening persons who attempted such entry.

The defendant filed an answer and added a counterclaim wherein he sought to recover damages in the amount of $ 1,500 for alleged injuries to the surface of his property. Abrams later amended his pleadings, raising the demand in his counterclaim to $ 14,500. He claimed therein that Frankfort's drilling operations had in addition damaged four other sections of his land.

After a hearing, the trial court entered a preliminary injunction on December 14, 1960. Trial on the main issue was had to the court on December 19, 1962. Later, pursuant to a stipulation by the parties, the trial court issued a permanent injunction against Abrams.

On August 28, 1963, some nine days [***3] prior to the granting of the injunction, the court awarded Abrams a judgment on his counterclaim in the amount of $4,737 with interest. Motion for new trial was dispensed with. This [*539] writ of error is solely concerned with the question of the damages awarded Abrams, which the plaintiff contends are excessive, while the defendant asserts, by way of a cross-error, that they were insufficient. Before setting forth the errors assigned, it becomes necessary to examine some of the pertinent facts in more detail. In his amended cross-complaint, Abrams sought damages to various portions of Sections 12, and Sections 13, 14, 23, and 24, Township 20 South, Range 49 West of the Sixth Principal Meridian.
Issue

was joined, however, only as to the West Half (W 1/2) and Southeast Quarter (SE 1/4) of Section 12, the South Half (S 1/2) of Section 14, and the Northeast Quarter (NE 1/4) of Section 23. Thus, Sections 13 and 24 are not involved here.

These lands were conveyed on April 16, 1957, by the State of Colorado to the defendant and his son as joint tenants under Patent Number 7022. Section 11, which was also mentioned in the patent, is not involved in this action. The patent [***4] contains the following reservation:

> *"RESERVING, however, to the State of Colorado, all rights to any and all minerals, ores and metals of any kind and character, and all coal, asphaltum, oil, gas or other like substance in or under said land, the right of ingress or egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances."*

Prior to the date of the above deed, Colorado had leased the mineral estate reserved from the abovedescribed land by means of Oil and Gas Lease No. 4623, Book 17, dated June 15, 1950 to one Ramon P. Colvert. Paragraph 11 of the lease provided:

> *"11. Lessee shall be liable and agrees to pay for all damages to the land, livestock, growing crops or improvements caused by lessee's operations on said lands. It is agreed and understood that no drilling operations shall be commenced on the lands hereinabove described unless and until the lessee or his assignees shall have [*540] filed a good and sufficient bond with the lessor in an amount to be fixed by lessor, to secure the payment for such damage to land, livestock, growing crops or [***5] improvements as may be caused by lessee or his assignee's operations of said lands. When requested by lessor, lessee shall bury pipe lines below plow depth." (Emphasis supplied.)*

There is in evidence, as Exhibit E, a written agreement executed by Abrams in August 1956 granting one of plaintiff's assignees consent to enter upon that part of Section [**193] 12 involved here (along with other lands). The grantee named therein is given express permission to enter, explore, drill, construct roads, tanks, pipelines, houses and other necessary structures and to perform its operations.

It was stipulated that Frankfort was the present holder of the lease in question and that Abrams owned the surface rights so "Neither party will have to prove title." It is also noted that prior to trial, the defendant's son assigned all his rights to the cause of action, which he may have had, to his father.

The court made the following conclusions of law which are relevant to this writ of error:

"1. That Harry R. Abrams is the owner of the surface of * * * (here properly listing the land located in Sections 12 and 14) and the North Half (N 1/2) and the Southwest Quarter (SW 1/4) of Section twenty-three
[***6] (23), * * *

"2. * * *

"3. * * *

"4. That Harry R. Abrams is a third party beneficiary under the terms of the oil and gas lease Number 4623 and therefore, Frankfort Oil Company has contractual obligations to him.

"5. That as a third party beneficiery Abrams has a right to maintain this action.

"6. That the question of whether or not Frankfort [*541] used 'normal oil field practices' or wasnegligent is not an issue in this case and is immaterial.

"7. That should the question of negligence be material, then it is the conclusion of this Court that Frankfort failed to use normal field practices; that Frankfort was negligent in its gas field operations; and, that Frankfort's negligent acts were the proximate cause of Abrams' damages.

"8. That the prairie hay produced annually by Abrams is a crop within the meaning of the lease.

"9. * * *

"10. That the questions of dominant estate, servient estate, and public policy are not justiciable issues in this case."
"* * *"
In addition, the court made certain findings of fact and assessed certain damages, the substance of which will be treated hereafter with particularity when relevant.

Frankfort assigned various [***7] grounds as error which can be summarized as follows:

(1) That the question of negligence was not a justiciable issue, but that should it be found to be material, it was error to find that Frankfort was negligent in its operations.

(2) That depreciation in value to surrounding surface land owned by the defendant, but not used by the plaintiff, which depreciation allegedly occurred as a result of Frankfort's operations, is not a compensable item of damage for it constitutes damnum absque injuria notwithstanding Paragraph 11 of the lease.

(3) That if such depreciation is compensable, the court erred in including the West Half (W 1/2) of Section 23.

(4) That as to the land that was used, there was no evidence that 28 acres were permanently destroyed.

(5) That as to the land used, it was error to award the amounts given, as there was no evidence as to the value of the land before and after Frankfort's use.
[*542]

(6) That it was error to award damages for injury to livestock, growing crops, a fence, a tractor tire and the loss of manhours in "policing the area," for these items were not specifically pled nor was evidence presented to support the findings.

(7) [***8] That if the items mentioned in (6) were properly pled and proven, it was error to:

> (a) Award separate damages for all the items mentioned (excepting "growing crops") for their values [**194] should only be considered in determining the difference in the market value of the land used before and after operations;
>
> (b) Award damages for the loss of the livestock because there was no evidence that the loss was caused by Frankfort's "operations" within the meaning of Paragraph 11 of the lease; and, that Frankfort's negligent acts were the proximate cause of Abrams' damages.
>
> (c) Award damages for the loss of prairie grass grown on the land used, for this is not a "growing crop" within the meaning of Paragraph 11.

In his Answer Brief, the defendant, in addition to meeting Frankfort's arguments, asks that the writ of error be dismissed, alleging that R.C.P. Colo. 111(f) and 115(a) and (c) relating to format for briefs were violated, and assigns as cross-error a claim that the trial court's measure of damage was incorrect as "disregarding all theories of evidence." As to the claim for a dismissal, we find it to be without merit. As to the assigned cross-error, we need not consider it separately for it is adequately covered by our discussion and rulings hereinafter [***9] made.

We must first resolve under what theory Abrams' counterclaim was prosecuted. Was it in tort because he claimed that Frankfort's practices were negligent? Or was it in contract because he asserted that he was a third party beneficiary under the original lease -- specifically Paragraph 11?

Our reading of the complaint, amended counterclaim and the stipulation in the Pre-Trial Order lead [*543] us to the conclusion that liability, if any, was based upon the contractual provisions of Paragraph 11of the lease. See: 1 C.J.S., Actions, § § 46 and 47. In this regard, we note that the trial proceeded on that basis and the court, in its conclusions of law, was careful to state that the question of negligence was not treated as an issue in the case, but rather that Frankfort's liability was contractual. We hold, therefore, that any right of recovery was limited to the provisions of the lease.

Since Frankfort's liability, if any, is contractual, a preliminary question must be resolved as to whether Abrams has standing as a third party beneficiary under the original lease issued to Frankfort's predecessor prior to the time that the patent to the surface estate was conveyed [***10] to the defendant. We hold that he had such a status. Haldane v. Potter, 94 Colo. 558, 561, 31 P.2d 709 (1934); 17 Am. Jur. 2d, Contracts, §304.

[materials regarding issues involved in measuring damages omitted] . . . .

[HN2] "The words of the contract should, of course, be taken in their ordinary sense, * * *, and in construing the contract a court must, if possible, ascertain the mutual intention of the parties from the language of the contract [*545] and the facts and circumstances attending its making. * * * * * *
"The damage, if any, for which payment was to be made was provided by the contract. It was to crops, surfaces, fences, and premises, not by the granting of the easement, but by 'the laying of each line of pipe.' * * * Depreciation in the market [***13] value of the land was evidently not in the

mind of either party or different language would have been used. The agreement nowhere refers to this. (Emphasis supplied.) See also: Fulkerson v. Great Lakes Pipe Co., 335 Mo. 1058, 75 S.W.2d 844, 846 (1934).

The same rationale can be applied to the case before us. Paragraph 11 provides for reimbursement for "* * * all damage to land, livestock, growing crops or improvements caused by lessee's operations on said lands * * *." (Emphasis supplied.)

Without a lease provision the rule seems to be that absent unreasonable use or statutory provisions or a suit brought in tort for negligence, no payment is due the surface owner for damage due to exploration or drilling. 4 Summers, Oil and Gas § 652 (perm. ed. 1962). It thus would appear that lease Paragraph 11 involved here was added by the state to the original lease to counteract such a rule and to give some relief to surface owners for damages due to the "operations" specified.

Absent a specific lease provision to extend liability to cover the indirect loss of value of the remaining land, we find that the lease itself was intended only to cover loss due to lessee's [***14] actual authorized operations on the land used. See also: Pitsenbarger v. Northern Nat. Gas Co., 198 F. Supp. 665, 672 (E.D. Iowa 1961).

[materials regarding issues involved in measuring damages omitted] . . . .

In summary then, the evidence indicates that some land was totally damaged and that some land lost value because of the time necessary before regrowth would occur. In order to determine the amount and location of each affected parcel of land it is necessary, therefore, to have specific findings by the trial court thereon. For this reason this phase of the case is also reversed and remanded.

Plaintiff, as its sixth ground, alleges that it was error to make an award for special damages asserted as to the hay crop, livestock, a fence, a tractor tire and costs of labor in that these items were neither pled nor proved. The record supports this contention as to the pleadings concerning everything except the loss of the crop. Cf. R.C.P. Colo. 9 (g). The items in question, except the crop, did not follow "naturally and ordinarily" from the injuries to the land involved and so could not be proved in the absence of being pled. The hay crop, however, is well within the wording of the crossclaim which asserted that there was "destruction of vegetation." See: City of Pueblo v. Griffin [***22] , 10 Colo. 366, 367, 15 Pac. 616 (1887); Tucker v. Parks, 7 Colo. 62, 1 Pac. 427 (1883); 22 Am. Jur. 2d, Damages, § § 272, 273. Therefore, that part of the judgment which awarded $ 309 for items other than crops is reversed.

As to the loss of "crops," as mentioned earlier, the defendant averred in his pleadings that the damage included the "destruction of vegetation" which it appears [*551] was natural prairie grass. The issue then becomes one as to whether prairie grass was a "growing crop" within the meaning of the lease. Frankfort's attorney, Christian K. Johnson, narrowed the issue even further when he admitted that the grass might be considered a "crop" after harvesting but not so long as it is used for grazing when he said: "If the Court please, I think our position might be that this grass might become a crop when harvested as hay and used for a particular purpose, but that (it) is not necessarily a crop when used for livestock for grazing, when it is not intended to be cut as hay. * * *"

An excellent discussion of this problem is found in 87 A.L.R.2d 235. That annotation follows the reporting of the case of Superior Oil Co. v. Griffin, (Okla.) 357 P.2d [***23] 987 (1960). In Griffin the court stated that [HN3] certain annual re-seeding prairie grasses were "growing crops" within the meaning of a provision of an oil and gas lease which provides for the payment of damages.

The court specifically pointed out that the test is not whether the grass is in fact left as a pasture or is harvested as hay or as a seed crop, for this "* * * would mean that the status of the crop could change from year to year or from time to time during the year." Rather, the court says: "* * * We are of the opinion that where * * * grasses are seeded for either pasturage, meadow, or seed crop purposes, the resulting crop should be treated as a growing crop within the purview of the provisions of an oil and gas lease to the effect that damages will be paid for damage to or destruction of growing crops."

Some of the testimony on this issue here was that this particular grass was used for "forage or feed"; that "It is cut for hay whenever the seasons are propitious."; that Abrams "cut hay every year" on his land; that Abrams, when he first located on the land in 1952 seeded it and used deferred grazing practices to stimulate the grass's growth; and that on at least [***24] one section, since 1959, an [*552] acre would produce about a ton of hay. We consider this evidence [**199] sufficient to show that the grass was more than mere "pasturage," and rather that it should be considered a "growing crop" within the meaning of the lease.

We find, therefore, that where the evidence shows that prairie grass has been used for both pasturage and haying purposes, it is to be considered a "growing crop" under the terms of an oil and gas lease provision as it appears in the case at issue. Cf. Wohlford v. American Gas Prod. Co., 218 F.2d 213 (5th Cir. 1955), where the native grass was never plowed or used for hay, but only as pasturage and where it was held not to be a "growing crop" because it was a natural product of the soil and not the result of planting, cultivation and labor.

Frankfort next asserts that even if this was a growing crop, the evidence was insufficient to support the court's findings that a ton of hay per acre (per year) was being produced around the well sites, or that it should be valued at $ 30 per ton as was done by the trial court. Without being drawn too far into that spider web and its multitude of ramifications, we can [***25] say that as to the crop yield, Abrams testified that "** * the total acreage damaged on all three sections add(s) up to twenty-five acres * * *." He then testified that his loss was twenty-five tons of hay valued at $ 30 per ton. [HN4] We have held that it is proper for an owner to testify as to the value of his own property. Grange Mutual Co. v. Golden Co., 133 Colo. 537, 298 P.2d 950 (1956).

We have also held that damages to crops must have a relation to time and place, and such value must be fixed at the time of loss. Smith v. Eichheim, 147 Colo. 180, 183, 363 P.2d 185 (1961). Here the court made no such finding. The evidence is that the oil well on Section 23 was begun on February 8, 1960, while the well located on Section 14 was started in December of 1959 and completed in January of 1960. It appears that the well on [*553] Section 12 may have been drilled at the same time as the one located on Section 23, although this fact was not clearly established and evidence should be taken as to this point. What the condition of the hay was at these times cannot be established for lack of evidence.

We refuse, as requested by Frankfort, to take judicial notice that during [***26] the months of December, January and February grass in Kiowa County lies dormant, for the condition of the grass during these months in the particular year of 1960 is a fact to be determined by proper evidence. Weather and moisture available and their effect on a particular crop at a particular time and in a particular place certainly are not constant.

Should the evidence yet to be taken show that the hay was of sufficient development to be considered an "immature" crop, and the injury excluded root damage, the court in the case of Colorado Consol. L. & W. Co. v. Hartman, 5 Colo. App. 150, 152, 38 Pac. 62 (1894), as cited with approval in the case of Hoover v.Shott, 68 Colo. 385, 387, 189 Pac. 848 (1920), set down [HN5] three methods of establishing damages, any one of which is appropriate:

"* * * One might be a year's rental value, with the cost of planting and bringing forward the crop until the time of its loss; another, what the crop would bring in its immature state at sale; and a third, the proof of the average yield and the market value of crops of (the) same kind planted and cared for in the same manner, less the cost of maturing, harvesting and marketing. * * *" [***27]

If, however, the facts to be established show that there was damage to the roots as well, as to those portions of land so injured, the measure of damages becomes the difference in the market value of the involved land before and after the destruction, including in the value of the land before destruction the value of the immature crop if there was one. See: Dandrea, [*554] supra; Colorado Springs Rapid Transit Ry.Co. v. Albrecht, 22 Colo. App. 201, 204, 123 Pac. 957 (1912).

[remainder of case omitted, case remanded for new trial for evidence on damages]

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Frankfort Oil v. Abrams

Notes and Discussion

1. In this case the surface was conveyed by the State of Colorado which reserved the minerals in the deed. A pre-existing oil and gas lease was in effect prior to the deed. What legal issues could this raise?

2. The operator (Frankfort) of the lease obtained a separate contract to enter the land in August of 1956 with Abrams. The oil and gas lease was granted in June of 1950 and still was in effect. Did the operator need to get such a contract before developing the leasehold premises? If not, why would they do so in this case?

3. Note the lease language in this case:

> Paragraph 11 of the lease provided:
>
> "11. Lessee shall be liable and agrees to pay for all damages to the land, livestock, growing crops or improvements caused by lessee's operations on said lands. It is agreed and understood that no drilling operations shall be commenced on the lands hereinabove described unless and until the lessee or his assignees shall have [*540] filed a good and sufficient bond with the lessor in an amount to be fixed by lessor, to secure the payment for

such damage to land, livestock, growing crops or [***5] improvements as may be caused by lessee or his assignee's operations of said lands. When requested by lessor, lessee shall bury pipe lines below plow depth." (Emphasis supplied.)

The State of Colorado as the lessor of the mineral interest most likely used a “standard form” lease, drafted by attorneys for the State of Colorado. Do you think a “standard form” lease drafted by a lessee would be similar?

Did this lease clause define how damages were to be measured?

4. What type of action is this, one for negligence or for breach of contract? Why does it matter?

5. Is hay or grass a ‘growing crop’ according to this court? Courts have been divided on this issue, cases appear to turn on the specific facts.

6. Note that the case points out that Abrams, the surface owner, “threatened persons” who attempted to enter the lands to conduct oil and gas exploration or production operations. These parties had a valid oil and gas lease so had the right of entry. How did the operator deal with this issue?

## USE OF THE SURFACE FOR OIL OR GAS DEVELOPMENT (CONTINUED)

iii. Accommodation Doctrine

Getty Oil Co. v. Jones
Supreme Court of Texas
470 S.W.2d 618; 14 Tex. Sup. J. 372; 53 A.L.R.3d 1;
39 Oil & Gas Rep. 657
May 26, 1971

John H. Jones, respondent, the surface owner of a tract of land in Gaines County, Texas, sued for an injunction to restrain Getty Oil Company, petitioner, an oil and gas lessee, from using vertical space for pumping units that prevent the use by him of an automatic irrigation sprinkler system, and for damages.

Upon trial, the jury found that it was not reasonably necessary for Getty to install pumps that prevented the operation of the irrigation system; and that by doing so Getty decreased the market value of the land $117,475, and decreased the value of the use of the land from the time of erection of the pumps until the trial by $19,000. The trial court granted Getty's Motion for Judgment Non Obstante Veredicto on the ground there
was no evidence that Getty used more lateral surface than reasonably necessary. Upon appeal, the court of civil appeals reversed the judgment of the trial court, holding that vertical as well as lateral space was restricted to that which is reasonably necessary.

The court remanded the case, however, on the further holding that the trial court had erroneously instructed the jury. One Justice dissented. 458 S.W.2d 93. Both parties have filed applications for writ of error. We affirm the judgment of the court of civil appeals.

In 1955 Jones purchased the 635 acre tract of land in question, which was subject to prior mineral leases in which he acquired no interest. Getty holds an oil, gas and mineral lease covering 120 acres in the west half of the tract; Amerada Petroleum Corporation holds a similar lease covering the remainder of the western half of the tract.

The lease for the eastern half of the tract is held by Adobe Oil Company. Jones has drilled seven irrigation wells since 1955, five of which are used to irrigate this tract of land. Prior to 1963, he used hand-moved, and later power roll, irrigation equipment to irrigate the tract. In 1963 he installed a self-propelled sprinkler irrigation system known as the "Valley System." This system consists of 1,300 feet of pipe supported at a height of seven feet above the ground by a series of steel towers which rotate in a clockwise direction around a pivot point. The system can negotiate most obstacles which are less than seven feet in height. The pivot points are connected by underground pipes to the irrigation wells. Labor is required only to move the system from one pivot point to another. There are six pivot points which provide for irrigation of the entire tract except for a few corner areas. At the time Jones installed the system Getty had one producing oil well in the northwest corner of the tract. This well had a beam-type pumping unit considerably over seven feet in height; however, the unit was outside the circumference of the closest pivot point and did not interfere with operation of the sprinkler system.

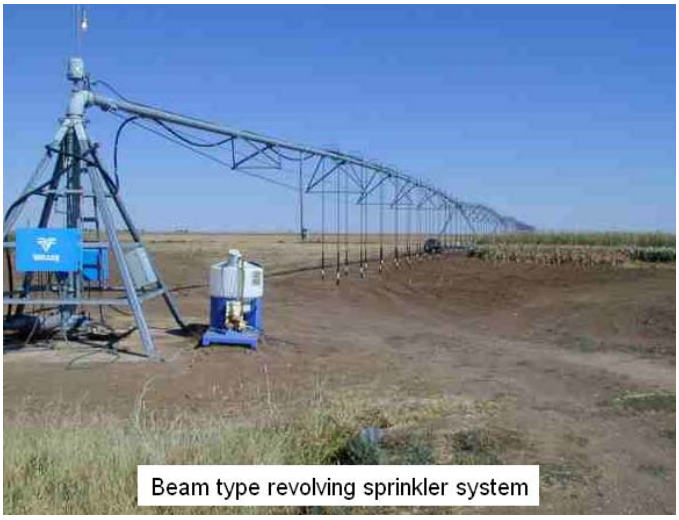
In December of 1967 Getty drilled two additional wells on its 120 acres which produced but would not flow. Getty installed two beam-type pumping units, one of which is seventeen feet high at the top of its upstroke, and the other thirty-four feet high.

A pump-jack is sized based on the depth of the well and the expected fluid volumes. Many wells produce both crude oil and produced water, with the water making up the majoring of the fluid stream. Some can get quite large - and will interfere with irrigation equipment

Because of this height, the pumps preclude the use of four pivot points of Jones' irrigation system with a consequent depreciation in the value of the land because of the reduction in its production potential. Getty also has battery tanks placed on the land that are outside the circumference of the irrigation system and do not interfere with it.

Prior to the time Getty developed its two new wells, Adobe had drilled four wells on the eastern half of the Jones tract and had installed beam-type pumping units on each of the wells. Two of these wells were outside the circumference of the closest pivot points of the sprinkler system; the others would have interfered with the system and were placed in concrete cellars to provide clearance. In addition, the cellars were placed so that the support towers of the sprinkler system would pass around them. In its portion of the tract Amerada also has two wells within the circumference of the irrigation system but both utilize hydraulic pumping units which are less than seven feet in height at the well head and hence do not interfere with the irrigation system.

The power unit for these hydraulic pumps is also located so as not to interfere with the system.



Beam type revolving sprinkler system

The oil and gas lease grants Getty the land "for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines, houses for its employees, and other structures thereon to produce, save, take care of, treat, transport, and own said products." The lease obligates the lessee to bury all pipe lines below ordinary plow depth when required by the lessor. The lease contains no specific provision concerning the vertical usage of the land.

Jones does not charge Getty with negligence nor deny Getty's right to determine the location of its wells and to install some type of pumping equipment when necessary for production. His position is that under the facts and circumstances it was not reasonably necessary for Getty to install pumping units in the manner which denies him the use of his irrigation equipment.

Getty's principal contention is that it has a right to exclusive use of the superadjacent airspace above the limited surface area occupied by the pumps and that only the lateral surface of the land should be subject to the established rule of reasonably necessary surface usage. We disagree. It has long been recognized that ownership of real property includes not only the surface but also that which lies beneath and above the surface. The use of land extends to the use of the adjacent air. See United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L. Ed. 1206 (1946); Broughton v. Humble Oil & Refining Co., 105 S.W.2d 480 (Tex. Civ. App. -- El Paso 1937, writ ref'd); Schronk v. Gilliam, 380 S.W.2d 743 (Tex. Civ. App. -- Waco 1964, no writ).

Although the earlier cases were generally limited to a consideration of the lateral surface, we held in Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961), that the rule of liability of the mineral lessee for negligently and unnecessarily damaging the surface estate includes the subsurface. This decision implicitly recognized that there are vertical as well as lateral boundaries to the use of the surface estate by the oil and gas lessee. We now hold explicitly that the reasonably necessary limitation extends to the superadjacent air space as well as to the lateral surface and subsurface of the land.

Getty further says that if it has acted in a reasonable manner in accomplishing the purposes of the oil and gas lease, its right to so use the surface and the air above is absolute, and that the consequences to the owner of the surface estate are of no legal effect. The expert witnesses agreed that the beam-type pumping units used by Getty were more economical than the hydraulic pumping units; and there was no evidence of any intrinsic value to Getty from the extra expense of constructing below-surface cellars to house the beam-type units. So, Getty argues that their placement of the beam-type pumping units on the surface was authorized by the lease as a matter of law. The question to be resolved, then, is whether evidence may be entertained to show the effect of Getty's manner of surface use upon the use of the surface by Jones, together with the nature of alternatives available to Getty, in resolving the issue of reasonable necessity.

It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate. Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133 (Tex.Sup. 1967); General Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668 (1961); Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961); see Keeton & Jones, Tort Liability and the Oil and Gas Industry, 35 Texas L. Rev. 1 (1956); Comment, Land Uses Permitted an Oil and Gas Lessee, 37 Texas L. Rev. 889 (1959); Lambert, Surface Rights of the Oil and Gas Lessee, 11 Okla. L. Rev. 373 (1958); Davis, Selected Problems Regarding Lessee's [*622] Rights and Obligations to the Surface Owner, 8 Rocky Mt. Min. L. Inst. 315 (1963). In another context we recently gave recognition to the surface soil as a natural resource in Acker v. Guinn, 464 S.W.2d 348 (Tex. Sup. 1971): "[the mineral estate] owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural . . . purposes will be destroyed or substantially impaired."

The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary. There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage. Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. -- Waco 1961, writ ref'd). And there may be necessitous temporary use governed by the same principle.

But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

The only evidence regarding reasonable means of irrigating this land is found in the testimony of witnesses presented by Jones. It was their testimony that a critical shortage of labor available to farms in the area necessitates the use of automatic sp nkling equipment in irrigating the land. Indeed, Jones testified that the decreasing availability of labor was the controlling factor in his installation of the self-propelled sprinkler system in 1963.

Getty sought by cross examination of the witnesses to establish that manual irrigation would suffice, or that a reversible automatic sprinkler would be an adequate alternative for Jones; all, however, rejected manual irrigation as a realistic alternative because of the labor shortage. Neither did the witnesses consider the reversible system a suitable substitute since it would require supervision night and day to avoid collision with the pumps; and that, even if supervisory labor is available, loss of a day's watering would result from moving the system to its proper position by the reversal procedures.

Although disputed by Getty, there was evidence to show that it had reasonable alternatives for obtaining its oil. A petroleum engineer presented by Jones testified that the construction of cellars adequate for the two pumping units required by Getty would have cost less than $12,000 when the pumps were initially installed, and that natural air circulation would alleviate the danger of hydrogen sulfide gas collecting in the cellars. He further testified that installation of large hydraulic pumps would have initially cost less than $5,000 more than the present pumps and would have annual operations costing from $350 to $1,000 more per year.

Another witness for Jones was a contract pumper for Adobe who was currently operating two beam-type pumps in cellars, together with twenty-five beam-type pumps on the surface. He testified that less maintenance was necessary on the units in the cellars than on the ones on the surface and that there was less leakage of hydrogen sulfide gas; he also testified that the prevailing winds ventilated the cellars.

The record thus indicates that the irrigation system currently in use affords Jones the most advantageous, and perhaps the only reasonable means of developing the surface for agricultural purposes. It is also indicated that there is available to Getty the two types of pumping installations -- the beam-type pumps in cellars or the hydraulic pumps on the surface -- which are reasonable alternatives to its present use of the surface; and that Getty's use of an alternative method of producing its wells would serve the public policy of developing our mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses.

Under such circumstances the right of the surface owner to an accommodation between the two estates may be shown, dependent, of course, upon the state of the evidence and the findings of the trier of the facts. Here, the trial court submitted the following special issue and accompanying instruction:

> "Do you find from a preponderance of the evidence that Getty Oil Company's erection of the pumping units in question at its Numbers One and Two Wells at such excess in height so that Plaintiff's sprinkler system will not pass over the same constituted a use of the surface of the land in question in a manner which is not reasonably necessary?
>
> "In answering the foregoing Special Issue, you are instructed that a determination of whether the erection of such pumping units by Getty Oil Company constitutes a use of the surface of the land in question in a manner which is not reasonably necessary involves weighing the degree of harm or inconvenience, if any, such pumping units cause to John H. Jones against the utility, if any, of such pumping units to Getty Oil Company and the suitability of other measures, if any, which would substantially serve the purpose of such pumping units to Getty Oil Company at less or no inconvenience or harm, if any, to John H. Jones."

We agree with the court of civil appeals that inclusion of the phrase "at such excess in height" in the issue was erroneous as a comment upon the weight of the evidence.

Additionally, and as also recognized by the court of civil appeals, the accompanying instruction erroneously calls for a weighing of harm or inconvenience to Jones against the considerations pertaining to Getty. This is not the proper test, particularly in the suggestion that inconvenience to Jones may be a controlling element. There must be a determination that under all the circumstances the use of the surface by Getty in the manner under attack is not reasonably necessary.

The burden of this proof is upon Jones, the surface owner. Cf. Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133 (Tex. Sup. 1967). Jones sought to discharge this burden by showing that the use which Getty is making of the surface is not reasonably necessary because of non-interfering and reasonable ways and means of producing the minerals that are available to Getty, the use of which will obviate the abandonment by Jones of his existing use of the surface, and that the alternatives available to Jones would be impractical and unreasonable under all the conditions. These are the elements to be considered by the trier of facts and the jury should be so instructed in resolving the issue of the reasonable necessity of the surface use by Getty, the mineral lessee.

We further hold, as urged by Getty, that in event it is ruled that Getty is making an unreasonable surface use, Getty will have the right to install non-interfering pumping units; and in such event Getty will not be liable in damages beyond the decrease in the value of the use of the land from the time the interfering pumps
were installed to the time of their removal.

The judgment of the court of civil appeals is affirmed.

Dissenting opinion by Associate Justice McGee in which Associate Justice Pope joins.

DISSENT: McGee, Associate Justice
I respectfully dissent. . . . .[discussion omitted]

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Getty Oil Co. v. Jones

Notes and Discussion

1. How does the accommodation doctrine set out in Getty impact the reasonable use doctrine?

2. To apply the accommodation doctrine must there be a pre-existing use of the surface?

3. What if there is no reasonable alternative to the oil and gas operator that would not interfere with the use of the surface?

4. Can an oil and gas operator drill a second well on the landowners property to dispose of salt water from an oil well producing on those lands? Dispose of salt water from wells located off the landowners property? Can the surface owner stop the use of their lands for salt water disposal if they are concerned about environmental harm? See: TDC Engineering v. Dunlap, 686 S.W.2d 346 (Tex 1985).

5. When determining whether the operator has violated the reasonable use doctrine or the accommodation doctrine, is it a question of law or a question of fact? Would this be advantageous to the landowner or to the oil and gas operator in most situations?

6. It is not uncommon to have oil wells and pumping units installed on agricultural lands. Notice that many pumps do not have fences in place to keep livestock away, many are powered by electricity so need an electric line to be run to the site, and a road will be required so the pump can be serviced. The road in most cases will wind  through the agricultural field and crops. A pipeline or storage tank for the oil and produced water will also be required. Harvest and planting most likely will be impacted to some degree. How does the reasonable use doctrine apply, especially if the agricultural property is located in Texas where the accommodation doctrine is in play?

7. Pennsylvania attorney Robert J. Burnett, Esq. published the following note on the Accommodation Doctrine and other courts that have adopted the reasoning:

*. . . Under the Accommodation Doctrine, the surface owner must generally show that the particular surface activities are not "reasonably necessary" to extract the oil or gas. Haupt Inc. v. Tarrant County Water, 870 S.W.2d 350 (Tex. App. Waco 1994). The surface owner can satisfy this threshold burden by showing that the mineral owner has available other reasonable means of production that will not interfere with the surface owner's use. "[I]f reasonable alternative drilling methods exist that protect [the surface owner's existing use], then an accommodation by the mineral owner would be required." Tarrant County Water v. Haupt Inc., 854 S.W.2d 909, 912-913 (Tex. 1993).*

*Texas courts recognize, however, that "if there is but one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage." See, Texas Genco LP v. Valence Operating Co., 187 S.W.3d 118, 122 (Tex. App. Waco 2006). As such, the burden is on the surface owner to introduce evidence that the mineral owner has alternative means of access and production and that the current surface usage is not "reasonably necessary" because a reasonable and cost-effective alternative exists.*

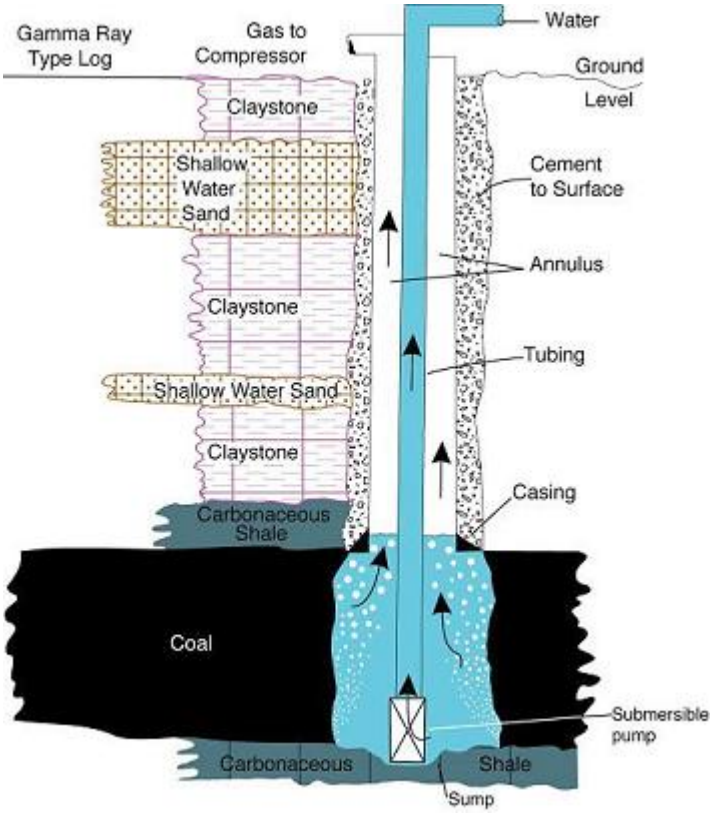
*Since the landmark Getty Oil decision, a number of other jurisdictions have adopted some version of the Accommodation Doctrine and have attempted to strike a delicate yet defined balance between the rights of the surface owner and the mineral owner. See, Amoco Production Co. v. Carter Farms, 703 P.2d 894 (N.M. 1985) ("Amoco's surface rights and the servitude it holds, however, must be exercised with due regard for the rights of the surface owner"); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979) ("...the owner of the mineral estate must have due regard for the rights of the surface owner and is required to exercise that degree of care and use which is a just consideration for the rights of the surface owner..."); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976) (mineral owner and surface owner "each should have the right to use and enjoyment of his interest..."); Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974) (mineral owner must make reasonable usage of the surface and is liable for damages caused by any unreasonable use); Buffalo Mining Co. v. Martin, 267 S.E.2d 721 (W.Va. 1980) (mineral owner's use of surface must be "reasonably necessary for the extraction of the mineral" and "without substantial burden to the surface owner"). . . .*

In addition to showing the operators activities are not reasonably necessary, what other elements must the surface owner prove to assert the Accommodation Doctrine?

Introductory note: Coal Bed Methane (CBM)

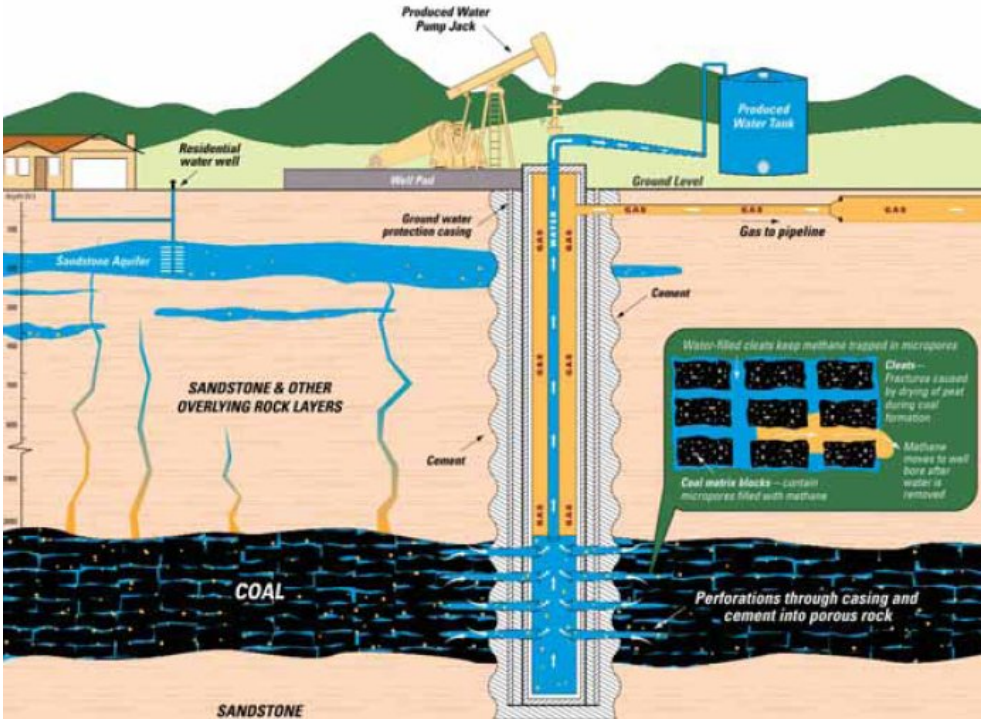
The oil and gas exploration and development industry is 150 years old in the U.S., yet procedures and operations are driven to a large extent by new technological developments. We will talk about 'horizontal drilling' and 'hydraulic fracturing' later in the course, as well as other technologies that have enhanced our ability to economically produce oil or gas resources.

Until the last couple of decades most natural gas wells were drilled vertically, straight down into the ground, and tapped into porous sands or limestone, and in some cases shale, to produce the natural gas in place. It has been recognized for centuries that natural gas also is commonly present in coal – in fact in England many miners wore a candle on their hat for light and would ignite the methane (natural gas) in the mine works, many times with fatal results.




About 25 years ago two unemployed drilling engineers in Wyoming decided to start a business to drill water wells until the oil and gas industry recovered. In drilling the water wells they found that as they produced the water in many cases natural gas also began to be produced – and sometimes in such quantities to create safety hazards at the surface.

Over a beer they devised an idea: drill shallow water wells into coal seams with the intent of producing the natural gas. Major companies had no interest – the amount was too small to make a difference in their production or reserves.




Professor Clayton Christensen wrote a book entitled "The Innovator's Dilemma" about this type of 'disruptive technology' – generally these technological advances start by being cheaper, simpler, smaller, more convenient, with lower profit margins and initially with worse performance (which is why most of the established

companies will overlook the advance).

Over time the technology improves as it is implemented, with a learning curve. Due to the nature of this process thee disruptive technologies are ideally suited for smaller firms.

The engineers started a small firm to drill into coal seams and produce natural gas – termed “coal bed methane” – and did very well financially as they perfected their process. Comparing the drilling of a conventional well to a coal bed methane well illustrates the differences – and opportunties:

| | Traditional Well | Coal Bed Methane Well |
|---|---|---|
| Well cost | $500,000 | $30,000 |
| Initial production | 1 to 4 million cubic ft/day | 0.1 to 0.2 million cubic ft/day |
| Time to drill | 2 – 4 months | 2 days |
| Depth | 6,000 to 14,000 feet | 100 to 500 feet |
| Life of well | 3 to 10 years | 10 to 75 years |
| Dry holes | 1 in 5 | 1 in 25 |
| Rig | oil and gas drilling rig | water well rig |

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Question. The following case deals with a coal bed methane development and raises the question:

> Under the Accommodation Doctrine how far must an oil and gas operator go to satisfy the surface owner, especially in light of the fact that coal bed methane wells are generally spaced very close together, produce a lot of water, require the natural gas to be ‘compressed’ into the pipeline using an engine, and require a lot of pipeline infrastructure to gather the produced gas?

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AMOCO PRODUCTION COMPANY v. THUNDERHEAD INVESTMENTS, INC. PLAT:

Plat of lands:


Aerial photo:

AMOCO PRODUCTION COMPANY, a Delaware Corporation, Plaintiff, v. THUNDERHEAD INVESTMENTS, INC., a Colorado Corporation

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

235 F. Supp. 2d 1163; 2002 U.S. Dist. LEXIS 23890; 157 Oil & Gas Rep. 225

December 9, 2002, Decided

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

I. Background

Trial to the Court was held December 2nd and 3rd, 2002. Thunderhead Investments is a Colorado corporation that owns a 40-acre tract of land located in the SE1/4SW1/4 of Section 1, Township 34 North, Range 7 West, N.M.P.M., La Plata County, Colorado ("the Property"). The land is adjacent to the Town of Bayfield, Colorado. Amoco, a Delaware corporation, owns the oil-and-gas estate in the Property pursuant to an oil-and-gas lease ("the Lease") granted to it in 1988 by the owner [**2] of the surface and mineral estates at that time.

Scott Fleming, a principal in Thunderhead, purchased the surface estate in 1994 by a deed that granted title to the surface subject to all oil and gas leases of record. The deed specifically included and referenced the Lease. The deed excepted and reserved to the grantors all coal, oil, gas and other minerals. Title to the surface estate was transferred from Fleming to Fleming and his wife as joint tenants, and then to Thunderhead. It is not disputed [*1165] that Thunderhead owns only the surface rights to the Property.

Thunderhead's surface title is junior and expressly subject to the Lease. Other persons, including property owners to the east and northeast, hold easement rights in portions of the surface of the Property along its northern boundary, specifically a 60-foot easement. The Property is unimproved, and is currently used for hay production and horse grazing. The Property remains a part of the unincorporated territory of La Plata County. A public middle school is located on property immediately north of the Property. A private residence (the "McNew Residence") is situated on property immediately west of the Property.

Thunderhead [**3] applied twice to the Town of Bayfield for annexation and subdivision of the Property. Two preliminary plats were approved. However, the town has never annexed the Property or approved a final subdivision plat. Bayfield requires two access roads for any future subdivision on the Property. One likely would be a short southward extension of Cedar Drive on the north side of the Property. However, Thunderhead would have to create the southern access road. This is a major obstacle to final plat approval.

Thunderhead would need easements from property owners south of the Property for the access road. It does not have such easements and none are pending. Thunderhead also must finance construction of the road and an interchange to connect it to Highway 160 to the south. This cost is estimated between $ 1 and $ 1.5 million. There is no evidence that plans are underway to construct the southern road.

Amoco and Thunderhead never reached a surface-use agreement regarding a well location or Amoco's access to the well. The Colorado Oil and Gas Conservation Commission (COGCC)

requires setbacks for the well: 1) a minimum of 150 feet from the well to any surface property line (COGCC Rule 603a.(2)); [**4] 2) at least 350 feet from the wellhead location to any building unit or educational facility (COGCC Rule 603b.(2)); and 3) at least 350 feet from the gas-production equipment to any building unit (COGCC Rule 603b.(3)).

On or about December 15, 2000, Amoco filed with the COGCC an Application for Permit to Drill (APD) a Fruitland coal-bed methane well on the Property. The proposed well location in the APD complied with all state and local regulations. On March 2, 2001, Amoco received permits from the COGCC and from La Plata County to drill on the Property within the spacing unit approved by the COGCC. The COGCC amended its permit by a Sundry Notice modifying the surface location of the well from that listed on the drilling permit to a location designated by the COGCC described as 1180 feet from the south line (FSL) of the Section and 1515 feet from the west line (FWL) of the Section. This location is within a 23-acre drilling window designated by the COGCC. Amoco drilled the well, Neva Dove Unit A # 2, in late November and early December, 2001.

At approximately the same time, Amoco built a gravel access road to the well pad running east-northeast across the northern portion of the [**5] Property. Amoco also buried water-and gas-gathering lines approximating but not exactly following the route of the road. The well as built meets all COGCC setbacks from the school, nearby residences, and property lines.

Claims. Plaintiff states one claim for declaratory judgment seeking four declarations. First, it contends under the present circumstances it was not required to request variances from state set-back and safety regulations.

Plaintiff argues it already moved its well site at Plaintiff's request. [*1166] It contends each of the other alternative sites Defendant suggests: a) is outside the drilling window prescribed by the COGCC, b) violates COGCC's set-back requirements, or c) is otherwise unreasonable.

Second, Plaintiff contends it has reasonably accommodated Defendant's surface use. Plaintiff contends it has accommodated present use of the land as a pasture. It argues it has also "in many ways and at great cost" accommodated possible future development of the Property. Third, Plaintiff asserts it is entitled to use and maintain the access road it built to its well. Plaintiff contends the road is required by state and local permits and is reasonable.

Finally, Plaintiff [**6] contends its sound mitigation is sufficient. Plaintiff contends it has achieved sound levels lower than those allowed by state law through the use of electric motors at Thunderhead's request. Defendant no longer contests issues related to sound.

Defendant states a counterclaim for declaratory judgment. Defendant does not seek injunctive relief or damages. Defendant contends its counterclaim is for trespass due to actual, unreasonable surface use.

Defendant requests the following declarations. First, it contends Amoco trespassed when it unreasonably located its gas-and water-gathering pipelines outside the purported easements Defendant unilaterally granted to Amoco.

Second, Defendant contends Amoco trespassed and acted unreasonably when it denied Defendant the right to designate a reasonable well location, opposed Defendant's suggestions

regarding reasonable well locations, and drilled in a location that unnecessarily adversely impacted Thunderhead's surface use.

Third, Defendant asserts Amoco's pumper will have reasonable access to Neva Dove Unit A # 2 on proposed subdivision roads and trails, and Amoco's work-over and drilling rigs will have reasonable access on subdivision trails. [**7] Defendant does not dispute issues related to sound, electric lines, or its ability to cross Plaintiff's gathering lines.

II. Findings of Fact

[HN1] Colorado Revised Statute § 34-60-101, et seq. (2001), the "Oil and Gas Conservation Act," established the COGCC. The Act grants the COGCC authority to promulgate regulations in many areas, including the health, safety and welfare of the general public and any person at an oil-and-gas well. C.R.S. §34-60-106(10) and (11) (2001). The COGCC also is authorized to establish drilling and production units. Id. at (16). Finally, the COGCC is required to prevent waste and to protect the correlative rights of owners in every well field or pool. Id. at (17).

Amoco and other gas operators applied for and received generalized permission to drill optional or additional wells in the Fruitland coal formation underlying certain lands and spacing units within La Plata and Archuleta Counties in Colorado. COGCC Cause No. 112, Order No. 112-156 approved these "infill" wells. The order covers the Property. The COGCC entered the order because the commission found that the additional wells would result in the recovery of more of the state's natural [**8] resources as mandated by C.R.S. § 24-33-103.

[HN2] Permission to drill an infill well in a spacing unit is a "general" permission in the sense that it does not authorize drilling any particular well. The order only provides that a second well may be drilled within the designated 23-acre drilling window for each 320-acre spacing unit. The drilling windows provide regional well setbacks so wells are spread out enough to cover and penetrate as much of the Fruitland coal bed as possible without overlapping well draining. In order to drill under the order, the gas operator must file [*1167] a well-specific APD with the COGCC. The operator may also be required to obtain permits from one or more additional regulatory agencies or governments (e.g., county) depending on site-specific facts. At the time any APD is filed with the COGCC, the applicant must then present specific information regarding, and a proposed location for, the requested well.

Typically, the gas operator and surface owner come to terms regarding certain aspects of a proposed well. Of approximately 140-150 infill wells drilled by Amoco in La Plata County, Neva Dove Unit A # 2 is the only one without a Surface Use Agreement. In the [**9] absence of such an agreement, the COGCC mandates that an onsite inspection be conducted in order to identify any potential public health, safety, and welfare, or significant adverse environmental impacts. The COGCC's 23-acre drilling window for Neva Dove Unit A # 2 consists entirely of developed and improved land except for that part of Thunderhead's property which is located in the southeast part of the window. [HN3] Because the subject well is located within 1,000 feet of an educational facility, the COGCC's high-density area rules apply pursuant to COGCC Rule 603.b.

The COGCC's Southwest Colorado Operations Manager, Morris Bell, conducted an on-site inspection of the Property on January 27, 2001 in the area in which Amoco proposed its well. The inspection was attended by nearby property owners and by representatives of Amoco,

Thunderhead, School District 10 JTR, La Plata County, and Bayfield. The public middle school includes a school building, a bus stop and "turnaround area" close to its southern property line, as well as a playground with a baseball field and dugout. The school district did not waive the benefit of regulatory setbacks. The owners of the McNew Residence did not waive [**10] the benefit of regulatory setbacks. Moreover, none of the owners of other residences in the immediate area waived the benefit of regulatory setbacks.

At the on-sight meeting, Thunderhead's Scott Fleming proposed a well location much further to the north and west than Amoco had proposed. Safety setbacks prevented Morris Bell from considering a site as far north as Thunderhead requested. However, pursuant to Thunderhead's request, he directed Amoco to evaluate a well location further to the north and west from the site set forth in Amoco's APD. This location met setback requirements because at the on-site inspection La Plata County waived compliance with its 400-foot setback from the nearest residence to the well-site perimeter. Amoco did not know, and did not expect, that the county would make such a waiver. Amoco agreed to consider the location. The final location of Neva Dove Unit A # 2 was the result of Thunderhead's request that the well be moved northwest of the APD location.

As a result of the on-site inspection and requests made by Thunderhead, the COGCC attached conditions to Amoco's COGCC permit, including:

1) Use of electric motors on all production equipment;
2) [**11] Use of a low-profile pump shall be used first, if artificial lift is necessary and if such pump is effective;
3) Use of a horizontal or low-profile production separator;
4) Any water tank at the site is to be ten feet or less in height;
5) Reclamation of the well pad after completing the well, including reseeding;
6) After drilling, subsequent operations are to be conducted during daylight hours;
7) A provision for completing an "as built" survey;
8) Gas and water lines shall be buried to 48 inches where practicable and located as close to the northern property boundary as practicable;
9) Minimal gravel areas at the wellsite.

The La Plata County permit for Neva Dove Unit A # 2 generally depicts the approved well location and layout of related facilities. It requires Amoco to offer money to adjacent property owners to pay for landscaping (visual mitigation) on their properties. Amoco paid the $ 10,000 in aggregate to the property owners. The county permit also requires that if the Property is developed in the future, Amoco will deposit $25,000 with the local government that has jurisdiction at that time to be used for landscaping at the wellsite.

On August 30, 2000, Scott [**12] Fleming responded to Plaintiff's notice of intent to drill by informing Plaintiff that the drill site is included in the preliminarily planned Los Pinos subdivision. Fleming provided Amoco with a copy of the Los Pinos Subdvision Preliminary Plat Plan. After meeting with Fleming on October 8, 2000, Scott Thompson, an Amoco Landman, wrote Fleming regarding the well. At that time, Thompson was aware of the Los Pinos subdivision and had been provided a proposed subdivision plat.

On October 30, 2000, Thompson e-mailed Amoco personnel that: there are now three possible locations [for the Neva Dove Well] any of which will work for Amoco: First proposed location staked in drilling window, second proposed location in green space as shown in his proposed development, third proposed location is a legal location that meets high density set-back requirements.

On November 17, 2000, Thompson described the second location as follows: this location was selected to cause minimal impact to your desired surface activities. It is in an area you propose to set aside as open space and it should not physically impact any of your possible locations for surface development. This location [**13] is 1200' FSL, 1660' FWL, and the elevation is 7025' ... Amoco believes that Location No. 2 is the best location for the well from your perspective, based upon what you have told us. This is because it will minimize any impact to your potential surface development areas. The access road will be routed from the East so as to cause minimal impact, and [it] will not physically cross any of the areas you identified as possible residential sites.

Brian Stepanek, Amoco's Infill Project Drilling Coordinator, testified credibly as a fact and expert witness. He noted the second location (1200' FSL, 1660' FWL) was "probably the best location, but not in compliance with" COGCC and county setbacks. Amoco understood that in order to drill the second location, the state would have to grant it setback variances. When Amoco filed its application for a permit to drill its well, it staked the well at a location 975' FSL, 1665' FWL, in the center of one of Thunderhead's proposed largest pods of residential lots. Stepanek testified that any preference Amoco might have stated accounted primarily for COGCC and La Plata Regulations and secondarily for the preferences of Defendant or other neighboring [**14] property owners.

Thunderhead's Scott Fleming proposed alternative locations for the well many times before Amoco drilled the well. He suggested the well be located approximately 1260' FSL, 1660' FWL, in proposed open space. The location would have required an exception to COGCC setback requirements, but would have alleviated the need for re-design, re-engineering, and re-consideration of the Los Pinos subdivision. Fleming proposed the well be located on open space south of the drilling [*1169] window designated by the COGCC. Defendant contends this location would not have required an exception to COGCC setback requirements if a deviated well (slant hole) were drilled. But if a straight hole were drilled, COGCC approval of an exception location would have been required. Fleming argued either way this also would have alleviated the need for re-design, re-engineering, and re-consideration of the Los Pinos subdivision. Defendant contends this was a reasonable alternative.

The COGCC in its order approving San Juan basin infill wells specifically noted:
Directional drilling from common surface locations is not a cost-effective or technically feasible option to mitigate surface impacts [**15] on 160-acre Fruitland coal seams well density because of the shallow (approximately 2000') target top depths, the long (average 2640') displacements and the resulting complications for artificial lift.
Brian Stepanek testified credibly at length that this southern location was not reasonable.

First, a vertical well would encroach on the rights of approximately 80 mineral owners to the south. Those mineral owners would have to waive their rights to the Fruitland gas before Amoco could drill. There is no reason to believe they would do so. Moreover, the coal is thicker to the north, and production is greater in Neva Dove Unit A # 1 to the north than in the well to the south.

Stepanek testified that directional drilling from the southern open-space surface location at an angle into the coal bed below the drilling window to the north would be problematic and ultimately not feasible. First, the coal bed depth is approximately 1,500 feet. A 46-degree slant would be necessary.

The tested limit in La Plata County is 36 degrees. Second, the angle and distance to the coal bed would require a longer bore hole and additional equipment. It is difficult to steer the drill at such an angle for [**16] such a distance, especially through the boulder-rich substrate found in the area. Third, cement used to secure the well-pipe casing to the drill hole often settles unevenly, undermining the integrity of the hole.

Fourth, directional drilling under the circumstances requires more water and gas pumping than normal, in part because the water tends to settle on the low side of the pipe. Pumps are usually powered by natural gas captured from the well itself. At Neva Dove Unit A # 2, electric motors are required, so pumping costs are much higher. Fifth, out of 140-150 infill wells in the San Juan Basin, only 10 are directional. Of those, all have significant problems.

On or before the on-site meeting, Fleming also suggested a well site 80 feet south of his northern property line. This requested location would have violated the safety setbacks calculated from property lines, buildings, public roads, the middle school, and the middle school baseball dugout. Fleming testified he thought Plaintiff should have requested a variance for some of these setbacks. The evidence showed that the COGCC likely would not grant variances for the safety setbacks.

Finally, Fleming suggested the gathering [**17] lines be routed directly north from the well and run eastward within ten feet of the northern Property boundary. The COGCC Permit reasonably accommodated his request: "the gas and water flow lines shall be routed to the east of the location as close to the northern property boundary as practicable." Amoco routed its lines in an east-northeast orientation, "as close to the northern property boundary as practible."

Amoco's John Mummery testfied credibly as a fact and expert witness. He testified that physical obstacles played a critical role in Amoco's location for its water and gas lines. It had to avoid a 60-foot [*1170] access easement along the northern property line in favor of property owners to the east and northeast, and a ditch-company easement for an irrigation canal. Amoco was forced to stay far enough away from the irrigation ditch running through the Property to prevent destabilizing the supportive ditch berm.

Amoco bored a hole for the lines in one section to prevent the disruptive effects of trenching. It also had to negotiate a route around an oak tree stand on the northern edge of the property east of the well. Moreover, Amoco had to avoid irrigation pumping equipment and a [**18] power line running south from the northern boundary to that equipment. Where appropriate, the water and gas lines were buried 14 feet deep at a cost of $ 150,000, and five feet deep otherwise at a cost ten times less. Amoco used trenching and boring methods common in the oil-and-gas industry to bury these lines. Thunderhead's Scott Fleming testified that this was a "good" depth for him and that he could run his sewer, water, and other utility lines over the deeper pipes if and when his subdivision was approved and built.

Plaintiff did not include Thunderhead in discussions with the ditch company and the Southview Property owners to the east about possible gathering line and road locations. But the road and gathering lines cross the ditch at a perpendicular point required by the ditch company.

On January 26, 2001, the day before the on-site meeting, Scott Fleming proposed surface-use conditions for Neva Dove Unit A # 2. He informed Amoco that its gas-and water-gathering lines should be located within 10 feet of the north boundary of Thunderhead's property, in order to avoid unnecessary interference with and re-design of the Los Pinos Subdivision. He told Amoco that no permanent road [**19] should be maintained to the well pad or production area. He suggested Amoco's pumper should "walk" to the Neva Dove well from Oak Drive or a from a subdivision road. As a trial witness, Fleming testified that what he really meant was that Amoco's well and pump personnel should drive their vehicles and equipment slowly across the Property without a road. Fleming testified this was the meaning of "walk" in the construction industry.

That may be so but I am unconvinced that was his meaning or intent at the time. Scott Thompson testified that Thunderbird's demands were unreasonable. During trial, Fleming testified that Amoco's access road, as it is now built, is "O.K."

Even after the on-site meeting, Thunderhead continually attempted to influence Amoco's logistical decisions. For example, on October 1, 2001, without consulting with Amoco or sharing preliminary drafts with Amoco, Thunderhead recorded a Grant of Right-of-Way and Easement that conveyed to Amoco a nonexclusive right-of-way for one water-and one gas-gathering line to be located within 12 feet of Thunderhead's northern property line. Also on October 1, 2001, Thunderhead unilaterally recorded a Grant of Right-of-Way and Easement [**20] that conveyed to Amoco a non-exclusive right-of-way for an underground electric line to be located within 10 feet of the northern boundary of the Property.

On December 4, 2001, Plaintiff filed a Notice of Non-Acceptance of the granted easements. Amoco stated it did not accept the easements in part because under the Lease Amoco could place its gathering and electric lines without an express easement. After completing Neva Dove Unit A # 2 in December 2001, Plaintiff provided Thunderhead with an "as-built" survey of the gas-and water-gathering lines, electric line,
and access road.

III. LAW

Jurisdiction rests on diversity. I apply Colorado law. [*1171] [HN4] "The owner of a severed mineral estate or lessee is privileged to access the surface and use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 926 (Colo. 1997). See also, Frankfort Oil Co. v. Abrams, 159 Colo. 535, 413 P.2d 190, 194 (Colo. 1966); Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415, 366 P.2d 577, 580 (Colo. 1961) ("The owner of a mineral estate has rights of ingress, [**21] egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of his interest.").

Gerrity is the leading case in Colorado on the subject of reasonable accommodation in the oil-and-gas context. Because the oil-and-gas industry is highly regulated, Gerrity must be read in the

context of matters covered by statute, regulation, and lease terms. The essential disputes in this case are covered by statute, regulation, and lease terms. Therefore, state and county regulations and lease terms provide the major legal framework for this case. Critically, they address fundamental health, safety, and welfare concerns. C.R.S. 34-60-106 (10) and (11) (2001).

[HN5] A mineral owner must have "due regard" for the rights of a surface owner. Gerrity, 946 P.2d at 933. To make a prima facie case for relief a surface owner must establish a material interference with surface use. Id. "Evidence that the operator's conduct was merely inconvenient to the surface owner is insufficient." Id. Even if there is an interference with surface uses that is material, the mineral owner may justify his conduct by showing that it was "reasonable and necessary. [**22] " Id. However, there is no requirement that the mineral operator's use must be limited by the presence of any alternative requested by the surface owner. Id. The alternative must be a "reasonable alternative" under all the circumstances. Id. See also, Smith v. Linmar Energy Corp., 790 P.2d 1222, 1224 (Utah Ct. App. 1990) ("... The lessee is not required to utilize any possible alternative, but only one that is both 'reasonable and practical under the circumstances.'").

The Gerrity court further stated:

> The operator must present evidence, by means of expert testimony or otherwise, that explains why its surface conduct was reasonable and necessary [from the perspective of the operator, and present evidence that its operations conformed to standard customs and practices in the industry.

Gerrity, 946 P.2d at 933. Finally, [HN6] the mineral owner is not required to accommodate a surface owner's reasonable requests where there are contradictory regulatory requirements. Id. at 926.

Thunderhead urges that RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 4.8 (2000) be adopted here in the oil and gas context. Yet, [**23] the very first section of the RESTATEMENT is entitled "Servitude Defined: Scope of Restatement." It states:

> Servitudes are used in several specialized areas where the rules and considerations governing their operation are different from those ordinarily applied to the servitudes covered in this Restatement. Landlord-tenant law, real-property security law, oil and gas law, timber law, and the law governing extraction of other minerals are such specialized areas. No attempt has been made in this Restatement to take account of the special rules and considerations governing servitudes used in those contexts.

RESTATEMENT § 1.1 cmt. e (2000) (emphasis added). Application of this secondary authority would contradict the authors' clear intentions and run contrary to the Colorado Supreme Court's ruling in Gerrity. The RESTATEMENT OF THE LAW OF PROPERTY, SERVITUDES does not apply to this case.

IV. Discussion and Conclusions of Law

Thunderhead argues Amoco did not adopt the least-intrusive, reasonable alternative means of access to its minerals contrary to Gerrity. Therefore, it contends Amoco's use is excessive and constitutes a trespass. I disagree. [**24]

The first question is whether Amoco's well and associated infrastructure complies with state and local regulations, permits, and the Lease. Amoco complied with all the COGCC setbacks and other regulations that govern the well. Amoco complied with all applicable La Plata County regulations. It complied with the COGCC and La Plata County permits. Amoco also complied with the terms of the Lease.

The next question is whether Amoco, given its obligations to comply with those regulations and agreements, selected "reasonable alternatives" necessary under the circumstances. See Gerrity, 946 P.2d at 933. Evidence that Amoco's surface use is merely inconvenient for Thunderhead is insufficient. Id. For the following reasons, I conclude that Amoco's choices were reasonable and necessary in conformity with standard industry customs and practices.

Gathering Lines

Amoco installed its water-and gas-gathering lines in a reasonable and necessary manner. Amoco installed the lines using methods common and acceptable to the industry. Their depth allows space for Defendants' future utilities. Their location was reasonable and necessary in light of physical considerations [**25] (the canal, trees, and pumping equipment). Their location respects the legal rights of various owners of interests in the surface estate (the 60-foot access easement, the ditch company's canal easement, the irrigation lines). Given these considerations, the lines were placed as far north as practicable.

Access Road

Mr. Fleming testified that the access road as it now stands is "O.K.," but has continually requested that Amoco use proposed subdivision roads for access to its well. Thunderhead requests that if the surface is developed for a future residential subdivision, Amoco utilize subdivision roads for partial access to the site and then have its workers walk to the wellsite. There is no certainty as to if and when residential development may occur, whether Bayfield will annex the Property, what the road locations and specifications would be, and whether Amoco's equipment would meet Bayfield load requirements. Beyond this general statement, I am unable to speculate about potential, future conflicts in the absence of a real, present controversy based on concrete evidence. Neither a subdivision nor its roads exist.

Bayfield will not allow Defendant to build until it has [**26] been granted easements from southern property owners for, and financed, a southern access road. Amoco cannot be required to access its well site without a road. Subdivision roads are speculative at this point and subject to unknown future events.

Future work on the subject well can range from minor operations (albeit still involving tools and heavy equipment) to those requiring large rigs. Requesting that rigs and equipment be transported to the wellsite without a road is not a reasonable alternative method of operation. In Colorado, no

judicial decision has directly addressed the question whether a road is a reasonable use of the surface by a mineral lessee.

However, [HN7] COGCC regulations require that a wellsite within 1,000 feet of a school have a road "constructed to accommodate local emergency vehicle access requirements" and that it be "maintained in [*1173] a reasonable condition." COGCC Rule 603.b.(14). Gerrity instructs that the rule of reasonable accommodation applies "in the absence of, statutes, regulations, or lease provisions to the contrary ...." Gerrity, 946 P.2d at 926. The Lease grants the right to install a road. Amoco installed its road in a reasonable [**27] manner and at a location that was both reasonable and in compliance with the county and COGCC permits. The access road is reasonable and necessary.

Surface Use

Amoco requests a declaration that its operations accommodate Thunderhead's surface use. Pursuant to its oil-and-gas lease, and under the authority of the state and county permits issued in this case, Amoco was entitled to use the surface estate of the Property in the current manner. As stated in Gerrity, "how much accommodation is necessary will, of course, vary depending on surface uses and on the alternatives available ...." Gerrity, 946 P.2d at 927. The evidence established that this is a highly mitigated well. The well and related equipment do not materially interfere with the current use of the surface estate as a pasture. The Texas Supreme Court limits the accommodation doctrine to existing uses, stating:

> [HN8] Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage [**28] of the surface may require the adoption of an alternative by the lessee."

Getty Oil Co. v. Jones, 470 S.W.2d 618, 622, 14 Tex. Sup. Ct. J. 372 (Tex. 1971) (emphasis added). This authority is persuasive and not in conflict with Gerrity. It is unreasonable to require Amoco to accommodate speculative future surface uses. As Plaintiff states in its trial brief, "it is one thing to have a building permit in hand and the legal right to proceed with construction. It is quite another to have a tentative plan."

Thunderhead may not construct the subdivision it asked Amoco to accommodate without overcoming major obstacles (the southern access road, receiving Bayfield final plat approval, and annexation). Further, Amoco mitigated to a reasonable extent potential effects on possible future uses. Amoco reasonably accommodated Thunderhead's requests regarding location of the well within the parameters of applicable regulations and permit conditions. Amoco's use of the surface was reasonable and necessary as measured by the usual, customary, and reasonable practices of the oil-and-gas industry and in light of applicable regulations.

Well Location

The as-built and approved location [**29] of the subject well reasonably accommodated Thunderhead's request that the well be moved to the north and west from the APD location. Thunderhead's requests for southern locations were not reasonable alternatives. First, Amoco

would need a COGCC exception to drill vertically. If the well were drilled vertically, it would drain the gas owned by numerous interest holders in the spacing unit to the south. Waivers from those owners would be required. There is no reason to believe they would be granted.

Drilling directionally from a southern site so as to "bottom" within the drilling window also is not a reasonable alternative. As Brian Stepanek testified, directional drilling at a 46-degree angle was not feasible.

Given the regulatory and permit limits on Plaintiff's well location, combined with the adjacent land-owners' refusals to waive setback restrictions, Plaintiff's well location is reasonable and necessary. Thunderhead argues that Plaintiff should have at least [*1174] requested safety and/ or property-line setback variances from the COGCC. A variance request would have been futile because the COGCC would not vary the setbacks without waivers, and the affected nearby property owners and [**30] the School District refused to grant waivers.

Amoco has reasonably accommodated Thunderhead. First, it changed its well location in the direction requested by Thunderhead at the on-site meeting. Second, the COGCC permit is laced with conditions requested by Thunderhead to minimize adverse impacts to future development. Third, Amoco assessed several well locations with a view toward minimizing interference with Defendant's planned subdivision.

Fourth, Thunderhead's development of the Property into a subdivision is speculative and far from final approval. Under the present circumstances where there is no threat of imminent development, Amoco has reasonably accommodated the present use of the Property.

Accordingly, IT IS ORDERED THAT JUDGMENT ENTER DECLARING THAT:

1) PLAINTIFF is not and was not required to request state and/ or county variances for setback and safety regulations;

2) PLAINTIFF has reasonably accommodated DEFENDANT'S present surface use and speculative future surface use;

3) PLAINTIFF may use and maintain its access road as it is built to access Neva Dove Unit A #2; and

4) PLAINTIFF's sound mitigation issue is moot.
Further, IT IS [**31] ORDERED THAT:

5) DEFENDANT'S counter-claim for declaratory judgment is DISMISSED; and

6) PLAINTIFF is awarded its costs.

Amoco v. Thunderhead Investments

Notes and Discussion

1. Note that this case involved the drilling of a “coal bed methane” (CBM) well. Are those covered by the terms of an oil and gas lease? By their nature CBM wells create special problems for the surface owner – they are generally drilled on a high density basis, many produce water or require the water table to be lowered to enhance production, and produce small amounts of low pressure natural gas (methane) for long periods of time (the CBM well generally has a life longer than the “normal” gas well.

Note the number of coal bed methane (CBM) wells that need to be drilled to recover the natural gas from the coal formation, along with the roads and pipelines.

What problems could these attributes cause for the mineral owner/oil and gas lessee or the surface owner?

2. Note Amoco in this case is dealing with State regulations relating to well ‘spacing’ and local ordinances relating to setbacks. Does the operator/lessee need to comply with both sets of regulations and ordinances?

3. What is the developer’s problem in this case? What different elements of development might create conflicts between the surface owner and mineral owners/lessees interest in building pipelines, water storage or disposal, roads to the well head, electric lines?

4. The Accommodation Doctrine is subject to what limitations according to this case? Is a plat of a subdivision a pre-existing use of the surface? Is the Accommodation Doctrine based on questions of fact or questions of law?

5. In areas where the surface is being developed conflicts with mineral development can be quite frequent. How far does the operator need to go to accommodate the surface owner?

6. The Barnett shale play just north and west of Fort Worth has become the largest natural gas field in the State of Texas – and one ripe for potential conflicts between surface owners in developed and developing areas and energy producers who are attempting to exploit this formation under the terms of their oil and gas leases. The following article discusses the success Devon Energy has had in the Fort Worth Barnett field:

# Devon Energy's Barnett Shale bet pays off

Posted Saturday, Aug. 13, 2011
**BY JACK Z. SMITH**

Ten years ago today, Devon Energy made a multibillion-dollar bet on the Barnett Shale.
On Aug. 14, 2001, the Oklahoma City-based oil and gas company announced a deal to acquire Mitchell Energy & Development of Houston for $3.5 billion.

Mitchell Energy, led by legendary oilman George Mitchell, was the pioneering company that cracked the code of the Barnett's dense shale rock by using new hydraulic fracturing techniques and experimenting with horizontal drilling. At the time, it had drilled about 400 wells in the Barnett, and executives saw the potential for 1,200.

But over the decade, Devon would advance the ball significantly with improved horizontal drilling and an expansion of drilling far beyond areas north of Fort Worth where Mitchell Energy had focused. The result would be a drilling boom that by 2008 would draw numerous rivals into the field and make the Barnett the biggest gas-producing area in the U.S. Tarrant and Johnson counties would emerge as the top two gas-producing counties in Texas.

Today, Devon has drilled more than 4,700 wells in the Barnett. The field now accounts for 39 percent of the company's total production, which includes operations that stretch to the Rocky Mountains and into Canada.

In the Barnett, "our drilling costs are down, our production is up and our efficiencies are increasing," said Brad Foster, senior vice president of Devon's Central Division, which includes Barnett operations.

Devon has achieved, or is on the verge of, several Barnett milestones:
It posted record production in this year's second quarter, averaging the equivalent of 1.28 billion cubic feet of gas per day, even while keeping only 12 drilling rigs busy. That's less than a third as many as it ran in 2008, before gas prices cratered.

Devon's total Barnett production since the Mitchell acquisition is expected to hit the equivalent of 3 trillion cubic feet by year's end, spokesman Chip Minty said. It's at 2.8 trillion now.
Despite weak gas prices, now about $4 per 1,000 cubic feet, Devon is realizing solid returns from the Barnett because "our ability to drill wells economically just gets better every year," said Chairman Larry Nichols, who was CEO during the Mitchell acquisition.

**A 35-well pad site**

Devon's advances in the Barnett are exemplified at a rural 12-acre drilling site in far southwest Tarrant County. The 31st well there was drilled last week by contractor Patterson-UTI Drilling Co. Devon expects to have 35 producing wells at the site by March, said Jay Ewing, its manager of Barnett well completions.

That will be the most wells ever on a single Barnett Shale pad site, but the project development has "been pretty routine. ... It's been pretty close to plan," Ewing said. Horizontal legs of the wells, called "laterals," will be steered thousands of feet under Benbrook Lake.

Devon estimates that the 350 Barnett wells it drills this year will yield, on average, the equivalent of 3.2 billion cubic feet of gas apiece over their producing lifetimes. By that measure, the 35 at the southwest Tarrant pad site cumulatively would produce 112 billion cubic feet. That's enough fuel for gas heating and cooking at more than 1.5 million homes for a year, based on American Gas Association data.

If Devon maintains its current drilling pace, it will drill its 5,000th well next year. Less than 1 percent of Devon's Barnett wells have been dry or otherwise not worth putting into production. Devon, which has more than 600 Barnett employees and an office in downtown Fort Worth, has boosted its Barnett reserves for seven straight years. Proven reserves are now the equivalent of 6.7 trillion cubic feet.

**Drilling time slashed**

When Devon began drilling in the Barnett in 2002, it took three to six weeks to drill a single horizontal well, said David Fortenberry, Devon vice president of technology. "The rigs we used were really too small and underpowered for horizontal wells," he said.

Now, with higher-efficiency rigs and much more experience, Devon averages only about 12 days to drill a Barnett well, and "we've actually drilled some wells down in southwest Johnson County in about six days," Foster said.

Drilling-rig design "has improved dramatically in the past 10 years," with rigs now "ideally suited to drill these horizontal wells," Nichols said.

Devon uses a "walking rig" device to scoot a 156-foot-high rig between surface well bores at its southwest Tarrant pad site. If well bores are 20 feet apart, the rig can move that far in just an hour. Without the walking device, it could take two days to disassemble a rig and set it up 20 feet away. The Barnett wells that Devon has drilled this year have provided "some of the best results we've ever gotten," Nichols said.

**Supply rises, prices fall**

Ample supplies from dramatic increases in U.S. shale-gas production have kept prices low, as the industry has become "in part ... a victim of our own success," Nichols said.

Devon has dropped to 12 drilling rigs because it can keep production at least flat at that level of activity and because "at this time, the country just doesn't need any more natural gas," Nichols said.

Production declines have been lower than expected in Barnett wells, he said. There will be "steep declines in the first year, but it flattens out a lot sooner than we originally thought" -- often after 12 to 18 months of production, he said.

The Barnett may soon lose its spot as the top gas-producing area, if it hasn't been already, to the Haynesville Shale in northwest Louisiana and East Texas. But Devon has lots more drilling to do in the Barnett.

**7,500 drill sites left**

Foster said Devon still has "7,500 potential drilling locations," which represent "probably over 20 years of inventory" for future drilling.

About 2,500 are in "the liquids-rich portion of the play," Foster said. Natural gas liquids such as ethane, propane and butane generate higher profit margins.

Future gas prices will determine how many of the 7,500 locations are eventually drilled, he said. On average, drilling and completing a Barnett well costs Devon $2.8 million. Wells are 6,500 to 9,200 feet deep, and the average lateral length is more than 4,000 feet. Devon's Barnett production is 78 percent natural gas, 21 percent natural gas liquids, and 1 percent oil.

In announcing Devon's purchase of Mitchell Energy 10 years ago, Nichols said the Mitchell properties "fit perfectly with our long-term objectives." That appears perhaps even more so now, as Devon has sold international and Gulf of Mexico properties in the last two years as it embraces a new focus on onshore production in North America.

# Part 2 - COMMON LAW LEGAL THEORIES & ENVIRONMENTAL DAMAGE

## Chapter 3: Negligence Cause of Action

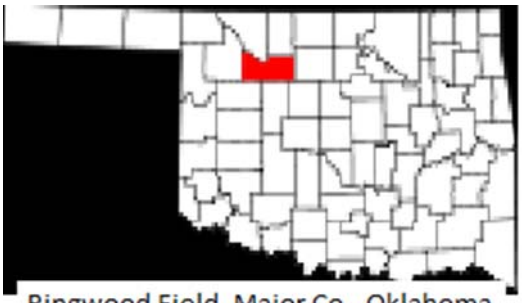
Chapter 3: Negligence Cause of Action

According to some cases the essential elements of actionable negligence are the existence of a duty on the part of one person to protect another against injury, a breach of that duty, and an injury to the person to whom the duty is owed as result of the breach of duty. The potential harm should be foreseeable - a person of ordinary intelligence and circumspection, should reasonably have foreseen that their negligent act would imperil others

We will examine the claim of negligence, as it applies to environmental disputes, in the following cases.

i. Proof Requirements/Circumstantial Evidence

The following case deals with developmental activities in the Ringwood Field, Major County, Oklahoma. The Field was discovered in the 1940's and was primarily focused on the Manning formation which contained crude oil. The crude oil from the Manning zone generally contained natural gas dissolved in the oil that escaped when the oil was brought to the surface. The natural gas which bubbled out of the oil was called 'casinghead' natural gas.


Ringwood Field, Major Co., Oklahoma

Later, in the 1950's, after a natural gas pipeline was installed in the area producers drilled for the shallower Cherokee formation that held high pressure natural gas reserves. The case deals with an operator that was drilling for the oil rich Manning formation – but the surface owner encounters problems with natural gas emissions allegedly due to the operator's negligence..

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MAZDA OIL CORP. v. GAULEY
Supreme Court of Oklahoma
290 P.2d 143; 5 Oil & Gas Rep. 229
November 15, 1955

PER CURIAM. H. C. Gauley, defendant in error, brought action in the district court of Major County to recover damages to his farm occasioned by gas escaping from below the surface. Defendant claimed damage to growing crops and permanent damage to his real estate praying judgment for $ 32,020. The case was tried to a jury and a verdict returned awarding recovery in the sum of $ 14,852. The Mazda Oil Corporation, defendant in the trial court, against which judgment was rendered on the verdict by the jury, appeals.

For convenience the parties will be referred to as they appeared in the trial court.
The defendant corporation as lessee under an oil and gas lease drilled a well on plaintiffs' farm. Drilling was completed on or about 11-3-48 and the well produced oil.

Plaintiff predicated his right of recovery from damages suffered to his property by reason of escaping gas from defendant's well and alleges negligence and want of care by defendant in one or all of several particulars, briefly stated as follows: Defendant was negligent in the manner of setting surface pipe in the well; in not taking proper precautions to prevent the escape of gas from the well to the upper structures and strata; in failing to properly cement the well to protect the upper strata from gas from producing sand; and negligence and want of care in failing to take proper action to prevent and stop escaping gas from the producing sands to the upper structures after the escaping of gas became known to the defendant.

Briefly stated the defense was that defendant's well was not the proximate cause of the alleged damage, the well never produced gas and defendant was not guilty of any actionable negligence.

The record is voluminous. The testimony includes that of both laymen and those specially trained in their particular field of study and experience whose testimony was calculated to shed light upon the complex situation arising in the case. The testimony and exhibits revealed the use of scientific tests relative to the physical aspects of an oil well and the condition of the soil surrounding it.

The Ringwood Oil Field, in Major County, is large in area, covering several sections. The well drilled by the defendant on plaintiff's farm was one of the first in the field. At the time it was drilled, gas in any considerable amount had not been discovered. Later, gas from what is known as the [*145] Cherokee Sand was encountered at a depth of some 6,000 feet. It proved to be extensive in area and when released showed very high pressure.

Defendant denies that gas was produced from its well in any considerable amount at any time and that none came through or from it to plaintiff's damage. This constitutes a major issue in the suit.

Plaintiff's evidence in support of his claim reasonably tends to show that he had owned and lived on the farm involved since 1926 and conducted farming operations; that defendant had drilled a water well to a depth of 200 feet on plaintiff's farm for use in drilling the oil well, which water well was 40 feet north and 100 feet east of the oil well and some 50 or 60 feet from his home; the oil well was some 300 feet from the house; that when the drilling of the oil well reached 190 to 200 feet, a channel or fissure connecting the oil well and the water well was discovered; that such channel was large enough for cotton seed hulls used with the drilling fluid to pass through to the water well; that there were many manifestations of seeping and erupting gas on the farm.

That in October or November of 1949 gas escaped from plaintiff's domestic water well located about 100 feet northeast of the defendant's water well; that the water from the domestic well came through pipes to plaintiff's home and at times had sufficient gas pressure to knock a glass from the hand; that this condition continued until spring of 1951; that gas and liquids erupted from a bradenhead valve on defendant's oil well; that drilling mud came into the domestic water well and it had to be abandoned and another drilled to a depth of 51 feet some 10 or 12 feet northwest; that it developed gas in the fall of 1950 and the following February, 1951, caught fire; that in June of 1950, defendant's water well was discovered to contain gas in sufficient amount to ignite; that on July 19, 1950, the defendant's water well started to erupt gas and water, the eruption at first

reaching a height of some two feet and later increasing to approximately 200 feet, and continuing for a week.

That an oil well identified as the Wilco started drilling on the offset west, one-fourth of a mile from the defendant's well; that at 240 feet and 340 feet gas blew from this well with great force, which caused a subsidence in the eruptions of the water well; that after the disturbance in the water well and the Wilco well, a large eruption occurred through a seismograph hole, also on plaintiff's farm, which hole was about 100 feet northwest of the defendant's oil well and some 40 feet to the northeast of the Wilco well; that on August 15, 1950, another eruption, southwest of the seismograph hole some 100 feet from the Wilco well, blew gas and other substances 15 feet in the air and affected an area 30 feet in diameter; that a similar eruption affecting an area 60 feet in diameter occurred southwest of the Wilco well, the last previous eruption subsiding as this one began; that this last eruption was stopped when heavy rain and water ran into the holes created by the eruptions and disappeared.

That gas seepage killed a wind break of trees and other trees near plaintiff's house; that strips or spots of feed vegetation and later growing wheat began to die due to gas seepage first observed in the fall of 1951, the first such strip being some 45 feet from the oil well; that the area affected by gas seeping into the soil broadened, appearing in spots, eventually extending to 1600 feet.

That a soil analysis showed the soil to be in numerous places saturated with gas; that the soil contained carbon-dioxide 300 times that of normal soils and such condition is not found normally elsewhere in Oklahoma or in plaintiff's community; that there was a definite source of seepage coming from one point; that the seepage only appeared near defendant's well and from a visual examination of the area it was confined to the quarter section in which defendant's well is located; that there was a gassy smell very close to the well and the area around the well had such odor, which odor disappeared 20 yards from the well but reappeared from the holes dug for soil analysis; that the vegetation slopped out from the oil well; that a substance identified as oil well cement in the form of small granules was washed from the defendant's water well and deposited nearby in considerable quantity.

That [*146] it is necessary to set and adequately cement surface pipe in drilling an oil well to protect the upper porous fresh water area above the lower impervious structure from hydrocarbons or salt water and to contain and control contaminating or dangerous substances that may come from below the impervious structure; that the surface pipe is usually ten and three fourths inches in diameter and when it is set to the proper depth is cemented in place; that in cementing this pipe the cement is pumped under pressure through the pipe until it returns from the bottom through the annular space around it to the surface; that when so set any deleterious and dangerous substances that come into the hole are contained; that defendant drilled to a depth below 6,000 feet to the Manning zone, the known producing area of the field, and the well produced oil; that defendant set 303 feet of surface pipe and used 180 sacks of cement; that 500 sacks of cement were used in cementing the drill pipe at the bottom of the well.

That a mechanical test showed the surface pipe to be set in the impervious structure at an undetermined depth; that two reports of the defendant corporation to the Corporation Commission showed the bottom of the surface pipe to be 17 feet above the impervious structure; that the nearest previous drilling in the area was one half mile distant and accordingly little was known of the subterranean strata to be explored.

Previous wells in the area, according to Corporation Commission records, had set at least 2,000 feet of surface pipe; the 180 sacks of cement used by defendant in cementing the surface pipe was the least amount used in any of the area drilling; the channel between the defendant's oil well and water well was an inch thick, and it would take approximately 3,350 sacks of cement to fill it and there were other channels or fissures extending out from the oil well under plaintiff's farm; sufficient pressure on an adequate amount of cement should have been exerted to fill the known channels and fissures and the surface pipe should have been set through the impervious structure of some 1,500 feet thickness and cemented therein; the impervious structure, until perforated, was sufficient to contain gas of any pressure released below it; there were sands explored by defendant's well capable of containing gas.

Such sands are above the Cherokee sand and could carry gas from that zone to defendant's well if released from the Cherokee; the defendant's oil well and wells known to have penetrated the Cherokee zone were uncemented in an extended area below the impervious structure to the top of the cement extending from the bottom; gas could travel through lower porous strata from these wells to defendant's well; the bradenhead on the oil well was opened and showed a puff of gas indicating a gas leak; the oil well cement came from defendant's oil well. Plaintiff's farm was damaged by escaping gas.

Defendant's demurrer to plaintiff's evidence was overruled.

From plaintiff's evidence standing alone a reasonable inference can be drawn that gas escaped from defendant's well, coming from the explored subterranean area, that the defendant was negligent in setting and cementing the surface pipe and that the negligence of the defendant was the proximate cause of plaintiff's damage. The demurrer to the evidence was properly overruled.

The evidence of defendant reasonably tends to show that the setting of the surface pipe and cementing of the well were conducted in a prudent and careful manner; that no gas had at any time been produced or encountered in the well or had passed through it to the damage of plaintiff's farm or crops; that the well as completed and used effectually sealed off any gas from below the impervious structure and none escaped; that there were other wells in the field capable, from the manner of construction and operation, of producing through the escape of gas therefrom the damage to plaintiff and that even if gas had been released from a zone unexplored by its well and traveled through other changeable porous strata to defendant's well it could not have come to the surface through the confines of its well.

At the close of all the testimony defendant renewed its demurrer to the plaintiff's evidence and moved for a directed verdict. Both were overruled.

Three propositions of error are advanced by defendant as plaintiff in error on appeal. It is contended, first, that if a third party injected gas into its well and the gas escaped therefrom because of insufficient surface casing, such act of the third party was the proximate cause of the escape and defendant would not be liable; second, that there was no evidence of defendant's negligence in drilling, completing or operating its well, and, third, that the verdict and judgment are based on conjecture and speculation and not reasonably supported by the evidence.

We are unable to agree that the verdict and judgment were based on conjecture and speculation. While the evidence on behalf of plaintiff was circumstantial, it was sufficient to require the submission of the case to the jury and to sustain the verdict and judgment. From the verdict it is clear that the jury believed the witnesses produced by plaintiff. Although the evidence was conflicting, the jury was not compelled to accept that offered by the defendant. We have held this court would review a verdict founded on conflicting evidence only for the purpose of determining whether it was supported by competent evidence and that essential facts might be proved by circumstantial evidence, in which event it was not necessary that the proof rise to a degree of certainty which would exclude every other reasonable conclusion than the one reached by the jury. Wood Oil Co. v. Washington, 199 Okl. 115, 184 P.2d 116; Cities Service Gas Co. v. Eggers, 186 Okl. 466, 98 P.2d 1114, 129 A.L.R. 1278

Reasonable inferences sufficient to support plaintiff's case can be drawn from the evidence. A reasonable inference which may be drawn from circumstantial evidence is itself proof and does not fade away in the light of positive proof to the contrary. Great Lakes Pipe Line Co. v. Smith, Okl., 271 P.2d 1112; Gypsy Oil Co. v. Ginn, 152 Okl. 30, 3 P.2d 714.

The duty of the defendant under the facts in evidence was plain. It is a matter of common knowledge that the inner earth contains powerful gaseous forces frequently found in proximity to and in connection with deposits of oil. The defendant, by its act of boring the well, undertook the burden and responsibility of controlling and confining whatever force or power it uncovered. The jury found that the defendant was negligent in failing to guard against the escape of gas from its well. It follows that defendant is liable for damages proximately resulting from its negligence.

Defendant takes the position under its first proposition of error, that plaintiff failed to prove that gas ever was in or came through defendant's well and that its evidence clearly negatives the possibility; that even if it had been negligent and gas passed through its well, the negligence of a third party in allowing the gas to escape was the proximate cause of plaintiff's damage and that it had no liability.

The only matter left for consideration under such contention is that of proximate cause under the circumstances argued by defendant. At the time defendant started drilling operations, gas was a very probable substance of discovery. That such was not found on first exploration, as contended by defendant, does not relieve from the original duty or negative the element of required care predicated upon the probabilities as of the time the surface pipe was set, unless we are prepared to say that the injection of gas thereafter into the bore hole of the well, not through producing sands but through sands or porous areas capable of being charged therewith, may not reasonably be foreseen or anticipated, either by natural developments, negligent operation of other drillers, or by occurrences usual to the industry. It does not appear that the escape of gas through defendant's well must have, in the absence of production from the sands explored thereby, been through the negligent act of a third party.

Under the facts and circumstances of the case we cannot say that the jury adopted this theory to the exclusion of others supported by evidence reasonably tending to support them. However, under applicable rules of law, long established in this court, the verdict under the evidence accepted by the jury is sustained even if the gas escaped through defendant's well negligently drilled and operated although injected in defendant's well by the negligent act of a third party.

In the case of Oklahoma Natural Gas Co. v. Courtney, 182 Okl. 582, 79 P.2d 235, we held that one guilty of negligence or omission of duty is responsible for all the consequences which a prudent and experienced party, fully acquainted with all the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought at the time the negligent act as reasonably possible to follow, if they had been suggested to his mind.

We further held that assuming there was an intervening responsible agency which produced the injury, the question as to whether the original negligence is to be regarded as the proximate cause of the injury, or only a condition, or remote cause is to be determined by ascertaining whether the agency which intervened was of such character, and the circumstances under which it occurred were such, that it might have reasonably expected that such agency, or a similar one, would intervene in such a way as to be likely to produce an injury similar to the one actually caused, if under the circumstances, the intervention of such an agency in the manner stated might have been expected in the usual course of events, and according to common experience, then the chain of causation extending from the original wrongful act to the injury, is not broken by the independent, intervening agency, and the original wrongful act will be treated as the proximate cause.

Even though there were separate independent acts of negligence which combined to produce the damage to plaintiff and there was no concert between defendant and a third party, either or both would be responsible for the entire result even if defendant's negligence alone might not have caused the injury. Caesar v. Phillips Petroleum Co., 187 Okl. 559, 104 P.2d 429; Phillips Petroleum Co. v. Vandergriff, 190 Okl. 280, 122 P.2d 1020.

Tested by the rules of law above announced, we consider the evidence sufficient to present to the jury for determination the question of negligence and whether such was the proximate cause of plaintiff's damage. A general verdict on conflicting evidence presumably includes all the facts necessary to establish the prevailing party's claim. Johnson v. Jones, 39 Okl. 323, 135 P. 12, 48 L.R.A.,N.S., 547; Phelps v. Maline, 193 Okl. 239, 142 P.2d 849. This court will not overturn a verdict of a jury and a judgment in accordance therewith in a negligence action where the evidence tends to support them. Great Lakes Pipe Line Co. v. Smith, supra.

It follows that there was no error in overruling the demurrer and refusing to direct a verdict for defendant. The instructions of the trial court taken together and considered as a whole, fairly presented the law applicable to the issues. We find no error in the instructions given. The defendant does not challenge the verdict as being excessive.

On the entire record we are convinced that the defendant had a fair trial and that the verdict and judgment is reasonably sustained by the evidence. The judgment is affirmed.

The Court acknowledges the aid of the Supreme Court Commissioners in the preparation of this opinion. After a tentative opinion was written by Commissioner J. W. Crawford and approved by Commissioners Jean R. Reed and James H. Nease, the cause was assigned to a Justice of this Court for examination and report to the Court. Thereafter, upon report and consideration in conference, the foregoing opinion was adopted by the Court.

JOHNSON, C. J., WILLIAMS, V. C. J., and CORN, BLACKBIRD, JACKSON and HUNT, JJ., concur.
HALLEY, J., dissents.

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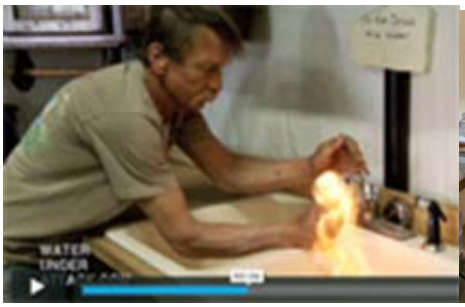
Mazda Oil Corp. v Gauley

Notes and Discussion

1. The oil and gas lease is a contract. Why did the landowner bring a tort claim for negligence against the oil company versus a breach of contract claim?

2. What elements must the landowner in Mazda establish for a negligence cause of action?

3. Can circumstantial evidence be used to prove pollution? Speculative evidence? In some recent cases natural gas has infiltrated drinking water, occasionally shortly after drilling and completion activities have been completed.



What problems will these homeowner's have in pressing a claim against an oil and gas operator for such contamination? Can you suggest what an owner might do before drilling to document drinking water quality?

4. What if separate independent acts by more than one party cause damage to the lands. Can a defendant use this as a defense to liability?

5. Note that the landowner's water wells were impacted by the defendants alleged activities such that they were not useable. In rural areas what alternative water sources are available for the landowner to replace the water from contaminated wells?

6. Did the defendant's well produce crude oil or natural gas according to the case? Why is this an issue in the case?

7. One of the elements of negligence is the requirement that the potential harm was foreseeable. Since this was a new field, can the operator make the argument that any potential harm from development was not foreseeable? What did the court say on this issue?

8. Note that prior to 1960 most wells were drilled for crude oil. Wells that discovered natural gas many times were considered failures, at least from a financial point of view. In fact, in the early years (1900-1930) many states enacted statutes or regulations requiring natural gas wells to be

plugged since operators were abandoning such wells as "dry holes" – in some cases they were continuing to vent natural gas to the atmosphere. Today, the value of production from natural gas wells exceeds the value of production from oil wells in Oklahoma and Texas.

The following case mentions the venting of natural gas in the Ringwood Field:

W. D. GREENSHIELDS, Appellant, v. WARREN PETROLEUM CORPORATION
248 F.2d 61
10th Cir. Sept. 3, 1957.

. . . The Ringwood Field produces both oil and gas from two zones, the Manning and the Cherokee. The Manning zone was first discovered in 1945 and 233 wells are still producing oil and casinghead gas from that zone. Prior to 1951, the date of the gas purchase contracts here in dispute, the wells were operated by the lessee defendants whose operating facilities saved only the oil produced. ***Vast quantities of casinghead gas produced simultaneously with the oil were wasted by venting into the air.***

The conservation problem so created was considered by the Oklahoma Corporation Commission and the possibility of authoritative capping of the wells was brought to the attention of those operating in the field. Faced with the possibility of a complete shutdown if the venting of casinghead gas continued the producers made an extensive survey of potential market outlets.

Approaches were made to Phillips Petroleum, Stearns-Rogers, Skelley, Sinclair, Continental and other companies capable of making the financial outlay necessary to gather and market the gas. None considered the investment economically sound, including Warren Petroleum Co. whose engineering survey was unfavorable as to the construction of both compression and extraction facilities.

However, in late 1950, Oklahoma Natural, a public utility, agreed to construct the gathering and compression facilities upon the terms ultimately included in the gas purchase contracts. Similarly, Warren agreed to construct and operate the gasoline extraction facilities. On January 17, 1951, Superior Oil and Mazda Oil entered into the gas purchase contracts with Warren and Oklahoma Natural and subsequently all other producers in the field executed identical agreements. After construction of the plants at a total cost of $5,500,000, Great Western, in 1953, contracted for the sale of its gas at a similar price but expressly limited to production from the Manning zone. . . .

Subsequent to the erection of the processing plant, commercial production from the Cherokee sand lying above the Manning zone was begun. The gas from the Cherokee zone contains distillate and is not produced with oil as is the casinghead gas from the Manning zone. It is different from that produced in the Manning zone in that its gathering would not ordinarily require the low pressure system necessary to channel Manning zone gas into the residue pipe line.

However, both gases require the reduction of liquifiable hydrocarbons before they can be introduced into the pipe line, and the trial court found that there are not sufficient daily volumes of Cherokee zone gas to maintain sustained pressure economically justifying the construction of a separate high pressure gathering system. Some wells were dually completed to produce from both zones without commingling the two substances; other wells, originally Manning wells, were later expanded to produce from the Cherokee zone.

With the exception of Cherokee gas produced by Great Western Producers, Inc., specifically excluded in its contract with the purchasers, the purchasers claim the right to all gas produced in the Ringwood Field under their contracts of purchase with the producers and the trial court has upheld their contention. Although no recovery of Cherokee gas was being made at the time of the execution of the gas purchase agreements, the granting clause in those agreements provides: '* * * the seller hereby grants, bargains and sells and agrees to deliver to buyer and buyer agrees to purchase and take from seller * * * all gas now or hereafter produced from the wells on the lands * * *'. The lack of ambiguity in this provision, fortified by evidence that the existence of gas in the Cherokee zone was commonly known, leads us to reject, as did the trial court, the contention of appellants that the gas purchase agreements do not include sale of Cherokee gas. . .

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9. In addition to being a nuisance for drillers looking for crude oil, in some cases natural gas accumulated in low lying areas and ignited – creating safety issues for the operator and landowners. Many times odorless, natural gas could ignite unexpectedly, and tragically in some cases, as the following article and picture from the Texas State Library and Archives and more recent articles indicate:



The biggest story of the early years of natural gas in Texas was also one of the most tragic accidents in American history. At 3:05 p.m. on March 18, 1937, a massive natural gas explosion ripped through the school building in New London, Texas, a Rusk County town in the East Texas oil fields.

The blast lifted the school off its foundations and sent it crashing back to earth, the entire structure collapsing in a huge pile of brick, steel, and concrete. Despite a frantic rescue effort, more than one half of the students and teachers – some 298 people -- were killed.

The subsequent investigation exposed the unsafe practice of “green” gas being tapped off as residue from the oilfields. Because natural gas is heavier than air, leaking natural gas flows along the ground surface, pooling in low spots. The New London School was located in just such a low spot.

Since most East Texas natural gas is odorless, the stage was set for tragedy. As a direct result of the New London disaster, states all over the

country began to require that natural gas be mixed with a malodorant to give early warning of a gas leak. The foul odor most people associate with gas is actually Mercaptan, the odorant added to natural gas. In Texas, the responsibility for overseeing this safety measure was added to the duties of the Railroad Commission.

**Natural gas explosion rocks closed Wichita middle school**

The Associated Press
Thursday, November 25, 2004

WICHITA — An apparent natural gas explosion Wednesday morning knocked down a wall on two floors of the Marshall Middle School, which was not in session because of the Thanksgiving holiday.

"We can thank the Lord this occurred today and not yesterday," Wichita Deputy Fire Chief Mike Rudd told reporters. . .

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**Irving Home Explodes Due to Gas Leak**

by BRETT SHIPP / WFAA-TV
wfaa.com
Posted on February 2, 2010 at 10:55 PM

IRVING — An elderly Irving couple is hospitalized — one of them clinging to life — following yet another natural gas explosion in North Texas.

The blast ripped through their home early Sunday morning. It has all the earmarks of a tragedy that has repeatedly injured and killed North Texans over the past 30 years. Relatives say Joseph and Peggy Manthiey never smelled a thing before being blown out of bed early Sunday morning.

Kyla Kirby and Jake Westerman raced across the street and found the house in flames and the Manthieys burned and in shock in their front yard. They said Mr. Manthiey was burned the worst. "The explosion had blown him out of the house into the back yard," Kirby said. "He was so burned, he was like — his flesh was off."

Atmos Energy crews have since discovered probable culprit, a major leak on a service line across the street from the Manthiey's home. While that leak has been repaired, crews are still working up and down the block finding more.

Neighbor Kayla Rice said Atmos Energy crews found a leak in her front yard. "It bothers me that they won't give me any information and tell us anything," she complained. "They are in our front yard working all day long, but they won't say anything." Atmos Energy declined an on-camera interview with News 8, but issued this written statement:

"Safety is our number one priority. We have checked out the area to make sure it is safe and are working with the city and state to investigate the cause."

It's similar to the statement Atmos issued after a house explosion in Mesquite last November. Kristi Samons was at home at the time and survived the gas explosion, which Atmos first blamed on carbon monoxide.

The official preliminary cause of that blast was judged to be a leaking compression coupling on the Atmos gas line. For days afterward, gas leaks were discovered all over the Mesquite neighborhood.

Much like the situation in Mesquite just a couple of months ago, Atmos crews are finding more leaks in the Irving neighborhood surrounding Sunday's blast.

In May of last year, less than a mile away from Sunday's explosion in Irving, another house exploded. Again, it is being blamed on a leaking compression coupling on an Atmos gas line.

In Cleburne in 2007, two people died in a house explosion, which again, was blamed on a leaking compression coupling. In Wylie in 2006, there was another house explosion. Two people died and again, a leaking compression coupling was blamed.

Following a News 8 investigation, the Texas Railroad Commission ordered the removal of faulty couplings attached to gas meters. But there are an estimated three million other compression couplings still in the ground that may be prone to leaks.

State Rep. Robert Miklos (D-Mesquite) says the time has come for Railroad Commissioners to order the rest of the dangerous couplings removed. "We can't say that five, ten, fifteen people a year blowing up in their homes is somehow the cost of doing business," Miklos said. "The government's role is to ensure the safety of its citizens."

Rep. Miklos says he will file a request for a special legislative hearing on the explosions, calling for the Texas Railroad Commission to answer questions about what more can be done to keep this from happening again.

**SHELL OIL CO. v. HAUNCHILD**

Supreme Court of Oklahoma
203 Okla. 456; 223 P.2d 333
October 10, 1950

GIBSON, Justice. This is an action by defendants in error against Shell Oil Company, Continental Oil Company, and others, to recover damages arising from the salt water pollution of the soil of plaintiffs' farm alleged to have been caused by defendants. Plaintiffs were awarded judgment in the sum of $ 1,000 against the defendants named and they appeal therefrom. The parties will be referred to as they appeared in the trial court.

Plaintiffs' farm, consisting of 90 acres and described as E 1/2 SW1/4 Sec. 8, Twp. 28 N., R. 1 W. and SW 1/4 SE 1/4 NW 1/4 of said section, is located within an oil field known as South Braman.

For years oil, accompanied by salt water, had been and was, at the time of the injury complained of, being produced on plaintiffs' farm and the adjoining acreage. Defendants operate an oil and gas lease on the land adjoining plaintiffs' farm on the north and thereon, about 800 feet north of plaintiffs' 10-acre tract, there is a well known as the Horn well which is used by defendants for disposal of salt water by pumping same under pressure into the Tonkawa Sand at depth of 2,400 feet.

The Horn well was converted into a disposal well in 1929 by Comar Oil Company, defendants' predecessor. Underlying the area of the oil field involved is a water sand which is 15 feet below the surface at the Horn well and 14 feet below at plaintiffs' 10-acre tract whereon plaintiffs have a well through which water was obtained for domestic purposes. In 1932 plaintiffs recovered judgment in damages against the Comar Oil Company for the permanent pollution of said water sand under the area of their farm. In 1932, by reason of the condition of the well, salt water injected therein arose to the surface around the casing and stood in the cellar.

To rectify the condition cement was forced down through the inner casing until it came up to the surface between the inner and outer casings and between the casings and the wall of the hole. It is recognized by plaintiffs that the effect of the cementing was to prevent any further leak of salt water from the time of the cementing until the occasion involved herein.

The present action was instituted February 7, 1947, against defendants named and others operating leases on the northeast and southeast quarters of said Section 8. It is alleged in the petition that the defendants and each of them have permitted salt water to escape upon the surface of the land the drainage of which is over the farm of the plaintiffs; have deposited same in ponds where they percolate into the soil and the underlying water strata; and have pumped same into wells with such force that the salt water in the underground sands and shales is forced to the surface, and that as a result thereof the soil of an area in the south 40 acres of plaintiffs' farm was permanently destroyed. Defendants, other than those appealing, went out of the case when their demurrers to plaintiffs' evidence were sustained.

Defendants make two contentions. One, that there is no evidence establishing a causal connection between the acts of defendants and the injury of which plaintiffs complain. The other, that plaintiffs' action is barred by the statute of limitations. We consider them in the order made. There is no direct evidence of the fact of salt water escaping from defendants' well into the water sand, and the question is whether there is competent circumstantial evidence from which such fact could be reasonably inferred.

Plaintiffs' south 40, whereon the damage was sustained, except the eastern part thereof, is bottom land and is of approximately 10 feet lower elevation than the land north and east thereof, and said water sand lies about 4 feet below the surface. The surface drainage from the lands north and northeast is over said 40-acre tract. Extending east and west along the north line of the 40 is an open drainage ditch which connects with a similar ditch extending southward from the northwest corner of the 40.

The ditches carried salt water that escaped from salt water ponds, and the northsouth ditch was of sufficient depth to touch said water sand, and in 1946 water was seeping out of it into the ditch. The area damaged consists of 15 acres lying in the northwest part of the 40 and abuts said ditches. There are two producing wells upon plaintiffs' farm, one in the southeast corner of the 10-acre tract and the other directly south thereof on the north 40. The salt water produced is deposited in a pond on the southeastern part of the north 40. The salt water produced on the northeast quarter of the section is deposited in three ponds located in the southwest quarter thereof.

Plaintiff W. A. Haunchild testified that his pond was about 7 feet deep and those on the northeast quarter 8 feet or more; that the latter ponds did not overflow; that the salt water flowed therein, apparently constantly, in a stream equivalent to that of a good hand pump. When asked what became of it, he replied 'surface sand.' The natural drainage from these ponds and the one on plaintiffs' farm is to the east-west ditch mentioned. Salt water was being produced on the land adjoining plaintiffs' land on the west but there is no evidence of the manner of the disposal thereof.

There is no evidence concerning the alleged operations on the southeast quarter of the section or of the operations on the land south of plaintiffs' farm. Said plaintiff testified that during the early part of 1945 salt water bubbled up out of the soil over the said damaged area and ran off the surface into the ditches and thence south to the river; that said bubbling continued for a period of at least three months; that before the bubbling ceased one Robinson, a claim agent of defendant, noted the condition and inquired whence the water came and that he replied that he was satisfied that it was coming from defendants' disposal well by reason of the pressure applied therein, that some days later defendants had a crew working at the well with baler and other tools for about five days.

The defendants used the Horn well for disposal of salt water produced on the northwest quarter of said section and other lands and same was introduced into the Tonkawa Sand through the Horn well at a pressure to about 500 pounds. During December 1944 the pressure required increased to as much as 900 pounds, and the resistance was sufficient to break the pump. In the latter part of that month they cleaned out the well and in January they acidized the Tonkawa Sand to insure greater porosity, and thereafter the salt water was injected at a pressure usually about 500 pounds. The uncontradicted evidence is that the increased pressure was due to accumulation in bottom of the well of a deposit that salt water leaves in the lines as it passes through. Throughout

that period the pressure was constant and remained so when not pumping. The uncontradicted testimony of defendants' witnesses is to the effect that when a leak occurs the pressure will go down.
C. A. Stoldt, civil engineer, testifying as an expert witness for plaintiffs, in answer to the question whether water injected under pressure into the water sand at the Horn well could cause bubbling of water therefrom in the damaged area, replied: 'Assuming that there was pressure applied up here to the water in that surface water sand the water, or I mean sand that carries water close to the surface of the ground, assuming there was pressure applied up there it could cause a spring to break out or seep out most any place in the vicinity of that.'

On cross-examination he testified further as follows:

'Q. If that pressure had been maintained constantly from 1932 until 1935 and there had been no springs show up at any time and shortly after 1945 the springs appeared, would you say that was coming from pressure and, if so, where?

A. It would definitely be coming from pressure. That pressure could have been caused probably from a lot of things. But the only unusual thing apparently that I know anything about -- there hasn't been any other mentioned -- is that the brine was being put in this well under pressure and if springs, if it was a normal season and springs that had never existed broke out down here I would have to assume it was coming from the pressure
being applied to that well.

'Q. Now Mr. Stoldt, if the pressure was applied to this well and remained constant when shut in and otherwise if there had been a leak there would there have been a drop in pressure on that gauge?

A. That's true. When shut in -- do you mean while the pumps are running or would you put the pressure gauge on there and bring it up to a definite pressure then [**336] close the valve and that pressure then remain constant?

'Q. I mean when the salt water was not being pumped in that your gate would be closed. At that time whatever pressure was on there would remain constant. A. if those were the conditions it would prove the well was not leaking.

'Q. Now Mr. Stoldt, as a matter of fact, moisture or rain or other type of liquid that would penetrate the soil up here, if the slope of that water sand is this sand here, and outcrop down here, that could be surface water which would cause a spring? A. That's true. I think I mentioned that while ago.

'A. There has been no testimony, so far as I know, whether it was a rainy season or whether it was a dry season or what. There is a lot about this that I don't know. The only thing here, you are applying your brine up here under pressure. And you say you close the valve and the pressure remains constant. If there is not a drop in pressure there, I can't see how your well is taking any water.

'Q. You have to eliminate every other possible source of water in that zone before you can say definitely it comes from one place or another?

A. That's right.

'Q. Have you eliminated all possible sources not only on this farm but all over the countryside?

A. The question which was hypothetical, as I recall it, was that if pressure was applied to the sand up here --

'Q. Yes, that's right.

A. -- could it possibly cause springs to show up down here?

'Q. Yes.

A. I said it could.

'Q. Would it cause them to show up any place between there and the well? A. Yes.'

The evidence is to be considered under the following rules. In Shell Petroleum Corporation v. Blubaugh, 187 Okl. 198, 102 P.2d 163, 166, there is said:

'It is noted that no witness testified either directly or by opinion that the gas and oil found in plaintiff's water well escaped from any of the operations of defendants. Plaintiff's theory is that the circumstances shown are sufficient to sustain a finding of the jury on this point.'* * *

In order to sustain a recovery, however, it was incumbent upon plaintiff to establish a causal connection between the violation complained of and the injury received. See Pine v. Rizzo, 186 Okl. 35, 96 P.2d 17. Such connection cannot be established by basing inference upon inference, or presumption upon presumption. Prest-O-Lite Co. v. Howery, 169 Okl. 408, 37 P.2d 303; Turman Oil Co. v. Carman, 179 Okl. 388, 65 P.2d 963.' And in Phillips Petroleum Co. et al. v. Davis et al., 182 Okl. 397, 77 P.2d 1147, we said: 'A verdict may properly be predicated on circumstantial evidence, but it cannot be based upon mere speculation and conjecture.'

As declared by Mr. Justice Pollock in Chicago, R. I. & P. Ry. Co. v. Rhoades, 64 Kan. 553, 68 P. 58: 'So to establish a theory by circumstantial evidence that it may be accepted as a fact proven, the known facts relied upon as a basis for the theory must be of such a nature and so related to each other that the only reasonable conclusion that may be drawn therefrom is the theory sought to be established.'

The alleged act of negligence which must be proved in order to warrant the verdict is the fact that salt water escaped from the disposal well. The theory of plaintiffs is stated as follows:

'The salt water going into defendants' disposal well was pressurized and the salt water coming out on plaintiffs' farm was pressurized: It came out not as a seepage, but under such pressure as to cause it to 'bubble up.' It came up out of the ground with such force as to bring up with it quantities of sand. Fountains developed over a large area. It is our theory that this matter of Pressure proves our case both affirmatively and by elimination: Affirmatively, in that the evidence shows

defendants were using pressure in their near-by disposal well; and by elimination in that no where else in that vicinity was pressure being applied to the disposal of salt water.

'For 12 years or more, defendants had operated their disposal well under 500 pounds pressure or less. Then the deep salt water sand began to clog and defendants began using additional pressure, running it up to as high as 900 lbs. per square inch. A short time after the pressure was increased the salt water fountains suddenly developed in the alfalfa field. Soon thereafter the disposal well was acidized and the pressure was lowered back to and below its 12 year normal and immediately the 'bubbling up' ceased, the salt water stopped and the alfalfa field returned to normal except that it is now sterile from the salt deposits. Thus directly following the excessive pressuring, the salt water fountains developed in our alfalfa field; and immediately following the release of the excessive pressure, the fountains ceased.

'It is plaintiffs' contention that there circumstances establish defendants' liability beyond any doubt.'

The word 'nearby' is hardly appropriate in view of the fact the well was one-half mile or more from the polluted area. And the statement that there was no other disposal well in the vicinity has no support in the evidence. That the bubbling showed the existence of pressure is clear but plaintiffs' witness Stoldt testified specifically that the pressure could have arisen other than from a disposal well under pressure. Any theory that the fact of escape from defendants' well has been established through elimination is untenable by reason of the absence of any evidence to such effect.

The mere fact of the coincidence in point of time between the bubbling on the premises and the application of extraordinary pressure at the well is not sufficient to establish the fact of escape at the well. If the fact of such escape were shown to exist at the time of the bubbling a permissible inference of cause and effect could properly arise. But without evidence of such escape other than the fact of the bubbling which denoted pressure that could come from the well, if there applied, is to predicate the escape upon inference on inference or conjecture.

In principle the following, said in Shell Petroleum Corporation v. Blubaugh, supra, is applicable here: '* * * No witness, expert or non-expert, gave an opinion that the damage to the well was traceable to the abandoned oil wells hereinbefore referred to. There was no evidence and no facts presented from which it might be inferred or presumed that there was an escape of pollutive substances from the abandoned wells of defendants into the fresh water strata of plaintiff's water well at any place on the lease or in the vicinity thereof. In the absence of such showing we have no alternative but to hold that there is no evidence that the pollution of plaintiff's well is traceable to any operation of defendant company.' The whole theory of the escape into the water sand is based upon the extraordinary pressure that was applied and continued at the disposal well.

Such an inference can have no proper foundation, for the testimony of plaintiffs' witness (Stoldt) and that of defendants' show positively that the pressure would fall if there were a leak. The force of this evidence is recognized by plaintiff and the effect thereof is sought to be minimized by contending that it is at most opinion evidence and does not negative the possibility that the salt water could have escaped and not reaching the pit of the well by reason of the cement found outlet under pressure through the water sand. As a matter of fact such an escape is negatived by the evidence, but since there is no evidence, direct or by reference, to support the fact of such an

escape and same is posed as a possibility, it is in the realm of conjecture and not competent as evidence. Undisputed credible testimony may be overcome by circumstantial evidence, but such is true only where same is at variance with the facts and circumstances of the case or reasonable inferences to be drawn therefrom. Ironside v. Ironside, 188 Okl. 267, 108 P.2d 157, 134 A.L.R. 621. From what has been said it follows that the evidence is insufficient to support the verdict.

In support of the second proposition defendants urge that the permanent damage was obvious to plaintiffs as early as in December, 1944, which was two years before the institution of the action on February 7, 1947. This conclusion is sought to be supported by plaintiffs' statement that the water was bubbling out before they cleaned the well out, which was in December. It is not clear from the witness' testimony whether the occasion referred to by the witness was the cleaning out in December or the acidizing in January 1945, nor is the time of the acidizing fixed in the evidence.

The force of this evidence is to establish the time at which he had knowledge of the bubbling and does not necessarily denote the time when he permanent damage was obvious, which is controlling. Shell Petroleum Corporation v. Hess, 190 Okl. 669, 126 P.2d 534. Plaintiff testified that same was obvious in the 'spring of 1945' and tied the fact to the condition of the alfalfa at that time. The burden of proof was upon the defendants. The evidence is indefinite and it cannot be said as a matter of law that burden was sustained.

The judgment is reversed and case remanded with instructions to grant a new trial.
DAVISON, C. J., and WELCH, LUTTRELL, HALLEY, JOHNSON and O'NEAL, JJ., concur.

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**Shell Oil v. Haunchild**

Notes and Discussion

1. Why was the doctrine of res judicata not applicable due to the 1932 lawsuit?

2. Who has the burden of proof to prove negligence? Does this create a problem for the landowner in an environmental lawsuit?

3. Can negligence be proven by circumstantial evidence? What if the operator is only following customary industry practice in use at the time? What evidence was present in the instant case?

4. How did the court distinguish between circumstantial and speculative damages?

5. What factors have changed over the last 25 years to make it easier to prove environmental contamination?

6. Disposal of salt water produced from wells into earthen pits has been prohibited since the early 1960's. Currently, underground injection wells generally are used to re-inject produced water into the formation. What legal issues are presented should any of the earthen pits used for salt water disposal, now no longer in use, cause current environmental problems to the surface or ground water?

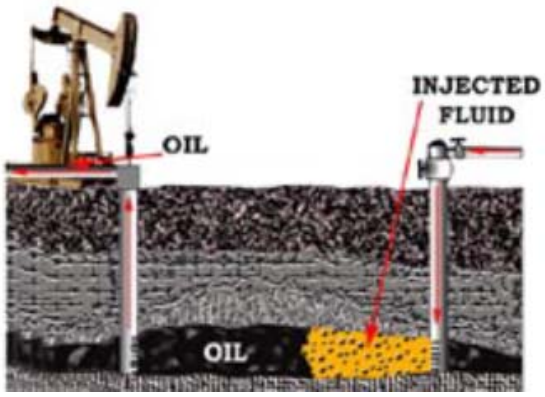
7. How is this case different from the previous case from an evidence standpoint?

8. In many cases of early oil field development any excess water was either drained off to the nearest creek, or held in ‘evaporation ponds’ where it in theory evaporated (in reality the water many times seeped into the ground along with the salt). Today under the Clean Water Act a creek is a ‘navigable’ water and any discharge into the creek requires a permit (NPDES). Likewise evaporation pits were banned around 1960 in most states.

The picture at right is a modern oil field pit – and is lined to prevent seepage into groundwater. Regulations require the pit to be emptied if the fluid level gets too high.

Pits in Texas are regulated under Statewide General Rule 8 (more on this rule later in the text).

Most produced water today is disposed of through injection wells – either to dispose of the water, or to force additional oil to existing wellbores. The illustration at left is one where the waste water is reinjected, forcing the remaining oil in place toward the wellbore.




Oil and gas injection and disposal wells are regulated by the Texas Railroad Commission under the provision of the Safe Drinking Water Act, and are classified as “Class II” injection wells (different technical standards apply to different classes of wells depending on the fluid being injected).

These water injection or disposal wells require a Texas Railroad Commission order (more on the applicable rules later in the text). The photo at right is an actual Class II oil and gas water injection can be relatively small compared to other oil and gas related equipment on the property.

Due to the nature of the fluid injected, and leaks at the surface will many times kill any vegetation, and will destroy the ability of many soils to bind together – creating erosion issues for the surface owner.

9. In SPLINTER v. CITY OF NAMPA et al., 256 P.2d 215, the issue was the sufficiency of the evidence to sustain a case by the owner where a building exploded due to a butane gas leak. The court stated:

> Circumstantial evidence is competent to establish negligence and proximate cause. Facts, which are essential to a liability for negligence, may be inferred from circumstances which are established by evidence. But, where circumstantial evidence is relied upon, the circumstances must be proved, and not themselves be left to presumption or inference. [citations] This court has held that inference cannot be based upon inference, nor presumption on presumption.
>
> The underlying principle applicable here is that a verdict cannot rest on conjecture; that where a party seeks to establish a liability by circumstantial evidence, he must establish circumstances of such nature and so related to each other that his theory of liability is the more reasonable conclusion to be drawn therefrom; and that where the proven facts are equally consistent with the absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover. [citations]
>
> Where it remains equally probable from a consideration of all of the evidence, that the injury resulted from the cause suggested by the defendant, as from that suggested by the plaintiff, the plaintiff has not established his case.
>
> Circumstances which are merely consistent with liability are insufficient. [citations]. Here the evidence leaves the source of the gas which caused the explosion entirely to conjecture. There is no direct evidence of a leakage of gas at the tank connections prior to the explosion.

The technology available to investigate alleged environmental problems has advanced markedly over the last two decades. But environmental investigations and sampling can be very expensive and time consuming. The following case answers the question of whether a landowner, to meet their burden of proof, has an obligation to test and sample for pollution and environmental damage.

STANOLIND OIL & GAS CO. v. CARTWRIGHT
Supreme Court of Oklahoma
200 Okla. 633; 198 P.2d 737
October 5, 1948

GIBSON, Justice. Defendants in error, B. F. Cartwright and Mary Cartwright, as plaintiffs, instituted this action against plaintiff in error, Stanolind Oil and Gas Company, as defendant, to recover a money judgment for damages to real estate and to personal property. The cause was tried to a jury which rendered a verdict for plaintiffs in the sum of $ 1,500. Upon hearing motion for new trial plaintiffs, in order to avoid the motion being sustained upon the ground that the judgment was excessive, filed a remittitur of the amount thereof in excess of $ 1,000, and thereupon the motion was overruled and judgment was awarded plaintiffs in the sum of $ 1,000. Defendant appeals.

The parties will be referred to as they appeared in the trial court. For reversal there is urged insufficiency of the evidence to sustain the judgment and error in the court's instructions to the jury.

Plaintiffs are owners of a two-acre tract of land upon which they reside, have a vegetable garden, an orchard, and raise chickens. The tract lies contiguous to lands of defendant, lying south, upon which it operates a laboratory for research and experiments involving, among other things, analysis of oil. Adjoining defendant's property on the southeast are premises upon which U. S. Engineers operated a plant where trucks and other equipment were overhauled and prepared for reshipment.

Beginning on the Engineers' property and extending thence in a northwesterly direction through the lands of defendant onto and across the lands of plaintiffs, there is a small drainage ditch. The lands of both plaintiffs and defendant, lying southwest and northeast thereof, slope toward the ditch and the surface drainage in said areas, within which defendant's plant is located, flows into the ditch. On defendant's land, and adjacent to the ditch, is a low marshy area which gathers surface drainage and by aid of a slight embankment made by defendant a pond is formed for the retention of the drainage.

It is alleged in plaintiffs' petition that the defendant 'permitted large amounts of oil and other poisonous and deleterious substances' to escape from their premises and flow over the lands of plaintiffs, causing the injuries complained of.

In support of the assignment of the insufficiency of the evidence to sustain the judgment, it is urged that it was incumbent upon the plaintiffs to prove that the oil as well as any other substances included in the allegation were of such nature and character as to cause the resulting damage. Also, that there is no evidence of any substance escaping other than the oil floating upon the water and that no chemical analysis was made to show that the oil so floating was poisonous.

There is cited 29 O.S.1941, @ 273, inhibiting the escape of 'crude oil or other deleterious substance'. It is urged that the statutory recognition of the deleterious character of oil applies only to crude oil and that, since there is no proof that the oil which escaped was crude oil, it was incumbent upon plaintiffs to prove that the oil was deleterious and that, independently thereof, there is no foundation for the jury's verdict other than conjecture.

It is true that such burden rests upon the plaintiffs. But it does not necessarily follow it can be sustained only by direct evidence of the identity or qualities of the substance. Such is true because a cause may be proven by the effect thereof. Such additional method of proof is recognized in Prest-O-Lite Co. v. Howery, 169 Okl. 408, 37 P.2d 303, 305, as follows: 'If it had been proved that at the time the injuries were incurred there were poisonous or deleterious substances in the water, harmful to animal life, or if it had been proved that the animals and fowls died as a result of drinking the water, a different situation would prevail, but the failure to prove one of these circumstances is fatal to plaintiff's right of recovery.'

On the occasion of the injuries, in March 1944, there was a heavy rain-fall. The water, carrying oil, spread over areas of plaintiffs' land lying on both sides of the ditch and into their henhouse. On recession oil was left clinging to the vegetation in the area of the overflow and upon the chickens that had gone to roost in the henhouse and on the 'setting eggs' therein. There is testimony that quickly following the overflow the leaves upon the trees and the vegetation in the area of the overflow turned brown and died, that the land in the area had failed thereafter to produce, and that the chickens died and the eggs failed to hatch.

It is suggested that the use by the plaintiffs of gasoline to wash the oil from the chickens was a more potent cause for their death than the oil, that the washing of surface ground from the roots of the trees was a more probable cause of their death. The variety of the things injured and the coincidence in the point of the time thereof, and all immediately following a common circumstance, negative the idea of separate and independent causes.

We consider such evidence competent and material in determining the question of the proximate cause of the injury, and therefore the question was for the jury and not the court. Lone Star Gas Co. v. Parsons, 159 Okl. 52, 14 P.2d 369.

Error is predicated upon the following instructions of the court which are numbered one and two, respectively:

'Instruction No. 1

> 'You are instructed that in order for Plaintiffs to recover the damages claimed, or any damages from defendant, they must establish to your satisfaction, by a fair preponderance of the evidence, not only that Defendant carelessly and negligently permitted such substance to overflow the land of Plaintiffs but that such substances other than oil were poisonous or deleterious and were of such nature and character to cause the injury

complained of. The burden of proof rests upon Plaintiffs to establish the harmful or dangerous nature of the substances claimed by them to have been deposited on their land, and that the nature and character thereof was such as would produce such injury or damage.

'Instruction No. 2.

'The mere fact that plaintiffs may have suffered damage is not of itself sufficient to entitle them to recover therefor of Defendant. The proof must show that such damage resulted from the careless or negligent act of Defendant. You may not speculate as to the cause of the damage or the amount thereof, and unless you are able to find from a preponderance of the evidence that the substances deposited on the land of Plaintiffs were in fact poisonous or deleterious, and of a nature and character which would have caused the damage, you would not be warranted in finding that Defendant was liable for such injury or damage.'

As to instruction No. 1, it is urged that it is a judicial determination of the deleterious and poisonous character of oil without reference to the actual fact, and therefore an invasion of the province of the jury. And concerning the effect arising from this instruction and instruction No. 2, which is recognized as correctly stating the law, it is declared: 'In one instruction the jury are told they need not find that the only substance, namely, waste refined oil, was poisonous or deleterious, but should assume such without proof, and in the other, that unless they did so find from the preponderance of the evidence, they could not hold defendant liable.'

And it is contended there is an irreconcilable conflict which tends to confuse the jury. Standing alone, instruction No. 1 appears to take judicial notice that the oil which escaped was poisonous and deleterious, but the inference arises only because the requirement of proof of such qualities is applied only to the substances other than the oil.

By instruction No. 2 there is a positive requirement that proof be made that the oil was poisonous and deleterious. In such situation we have repeatedly held, as in Rafferty et al. v. Collins et al., 160 Okl. 63, 15 P.2d 600, as follows: 'In a law action instructions given by the trial court must be considered as a whole. An instruction which, when standing alone, would seem to assume the existence of a controverted fact in issue, is not erroneous when considered with other instructions which tell the jury that before a verdict can be found for plaintiff they must find from a preponderance of the evidence the existence of such controverted fact.'

And in Wilson & Co., Inc., v. Campbell, 195 Okl. 323, 157 P.2d 465, 466, we said: 'An instruction which by itself would be erroneous but which is cured by a later instruction which fairly incorporated the issues presented is harmless error and will not work a reversal of a judgment.'

In plaintiffs' petition it is alleged that the oil is deleterious. In court's instruction No. 10 it is declared, without qualification, that the burden is upon the plaintiffs to prove the allegations of the petition. Considering the instructions as a whole, we think it clear that the jury was given to understand that the poisonous and deleterious quality of the oil was a controverted fact and that proof thereof by plaintiffs was necessary in order to recover and hence could not have been confused.

Affirmed.

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Stanolind Oil & Gas Co. v Cartwright

Notes and Discussion

1. In light of the holding in Stanolind Oil & Gas Co. v Cartwright, does the landowner need to conduct scientific tests of the soil or groundwater to prove oil and gas related pollution? See: Magnolia Oil v McGeely, 223 P.2d 131.

2. Since samples of the alleged pollution are used to support claims of environmental contamination in many modern cases, what are the additional legal issues that may arise regarding such sampling and the use of the results?

3. In many modern cases quantitative analysis of soil or water samples are presented by the landowner. The quality of water many times will be determined by testing for total dissolved solids - the more salts and other materials that are dissolved the higher the measurement and lower the quality of water.

When operating in an area where ground waters are used for irrigation, it may be advisable for the oil and gas operator to take water samples from existing wells or ponds before activities are commenced so as to have a "baseline" level of water quality should the landowner claim oil and gas activities have contaminated the water.

Soil samples will also yield data on the amount of total dissolved solids contained in such soils. Generally, the more dissolved solids in the soil the more difficult it is for plants to survive - too much salt will cause plants to dehydrate.

Radiation from pipe or equipment cannot be seen - it can only be measured using expensive measuring devices. Where radiation is present it is usually present at very low levels, although protective clothing is recommended when conducting sampling activities (see pictures).

Measuring instruments, called scintillation meters, need to be calibrated periodically, and standard measurement protocols have been established by regulation (probe is to be a set distance from the object, in some cases a pattern or grid survey is required versus random surveys at the location, etc.)

If samples are taken it is wise to prepare a chain of custody record to insure the samples represent the conditions on the property at the time they are taken, and that they are not contaminated, misplaced, or misidentified.

# CHAIN OF CUSTODY RECORD

**AMERICAN PROTEINS, CUTHBERT DIVISION**
**HWY 82E POB 528**
**CUTHBERT GEORGIA 31740-0528**
**912-732-2114 FAX 912-732-3896 or 732- 5594**

**TEST SAMPLES FOR:**

Tracking identification: DATE_____,

Sampler: _____, #_____

| | pH | Temp | Dissolved O2 | Appearance | time | unique ID | Point Source Process Sample Description | BOD | COD | AMMONIA NH3 | NITRATE NO3 | OIL AND GREASE | Qty of Containers |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | | | | | | | | | | | | |
| 2 | | | | | | | | | | | | | |
| 3 | | | | | | | | | | | | | |
| 4 | | | | | | | | | | | | | |
| 5 | | | | | | | | | | | | | |
| 6 | | | | | | | | | | | | | |
| 7 | | | | | | | | | | | | | |
| 8 | | | | | | | | | | | | | |
| 9 | | | | | | | | | | | | | |
| 10 | | | | | | | | | | | | | |

**CUSTODY TRANSFER**

DATE_____ TIME _____
FROM: _____
ORGANIZATION_____

TO: _____
ORGANIZATION_____

**CUSTODY TRANSFER**

DATE_____ TIME _____
FROM: _____
ORGANIZATION_____

TO: _____
ORGANIZATION_____

**CUSTODY TRANSFER**

DATE_____ TIME _____
FROM: _____
ORGANIZATION_____

TO: _____
ORGANIZATION_____

**CUSTC**

DATE____
FROM: __
ORGANIZA

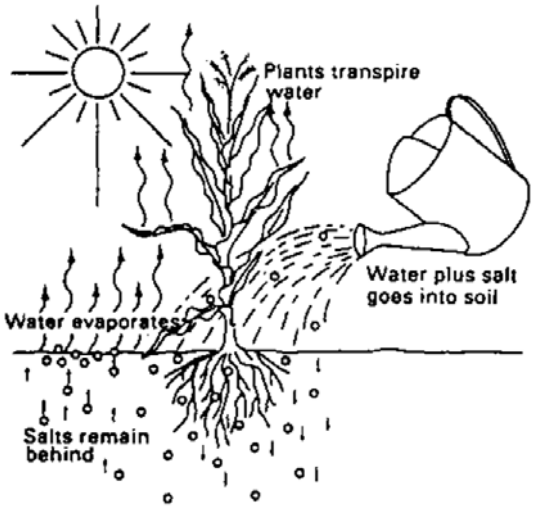
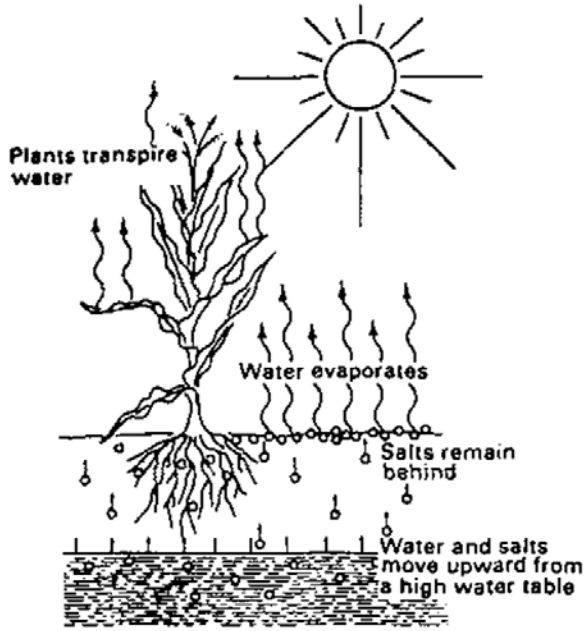
TO: _____
ORGANIZA

4. A Berkeley environmental blog notes that when water evaporates from a salt pond the salt becomes much more concentrated – and a larger environmental danger. The blog notes:

> When salt ponds evaporate the salinity skyrockets. Sure enough, the salinity of the thin half-centimeter layer of water covering the wet mud shown in the photograph below of the Weep Site was 250-PPT [Parts per Thousand]. Sea water salinity is about 34-PPT, so this water was more than seven-times as salty. Few organisms can tolerate this intense salinity.

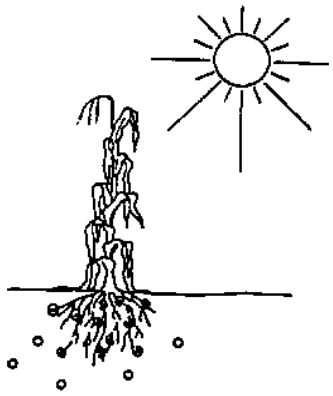
Source: http://arch.ced.berkeley.edu/hiddenecologies/

5. The FAO corporate document repository had the following discussion on why salt is bad for crops and vegetation in their database:

> A soil may be rich in salts because the parent rock from which it was formed contains salts. Sea water is another source of salts in low-lying areas along the coast. A very common source of salts in irrigated soils is the irrigation water itself. Most irrigation waters contain some salts.
>
> 
> 
>
> After irrigation, the water added to the soil is used by the crop or evaporates directly from the moist soil. The salt, however, is left behind in the soil. If not removed, it accumulates in the soil; this process is called salinization (see Fig. 102). Very salty soils are sometimes recognizable by a white layer of dry salt on the soil surface.
>
> 
> 
>
> Most crops do not grow well on soils that contain salts.

One reason is that salt causes a reduction in the rate and amount of water that the plant roots can take up from the soil (see Fig. 105). Also, some salts are toxic to plants when present in high concentration.

Salty groundwater may also contribute to salinization. When the water table rises (e.g. following irrigation in the absence of proper drainage), the salty groundwater may reach the upper soil layers and, thus, supply salts to the rootzone (see Fig. 103).
Soils that contain a harmful amount of salt are often referred to as salty or saline soils. Soil, or water, that has a high content of salt is said to have a high salinity.



Some plants are more tolerant to a high salt concentration than others. Some examples are given in the following table:

| Highly tolerant | Moderately tolerant | Sensitive |
|---|---|---|
| Date palm | Wheat | Red clover |
| Barley | Tomato | Peas |
| Sugarbeet | Oats | Beans |
| Cotton | Alfalfa | Sugarcane |
| Asparagus | Rice | Pear |
| Spinach | Maize | Apple |
| | Flax | Orange |
| | Potatoes | Prune |
| | Carrot | Plum |
| | Onion | Almond |
| | Cucumber | Apricot |
| | Pomegranate | Peach |
| | Fig | |
| | Olive | |
| | Grape | |

ii. Res Ipsa

NORMAN v. GREENLAND DRILLING CO.
Supreme Court of Oklahoma
403 P.2d 507; 22 Oil & Gas Rep. 794
May 11, 1965.

JUDGES: DAVISON, J., wrote the opinion. HALLEY, C.J., JACKSON, V.C.J., and WILLIAMS, BLACKBIRD, and HODGES, JJ., concur. IRWIN and BERRY, JJ., concur in results.

OPINION: Thurman F. Norman and Carolyn Sue Norman (plaintiffs below) appeal from an order and judgment of the lower court sustaining the demurrer of Greenland Drilling Company (defendant below) to the evidence of plaintiffs.

Plaintiffs instituted the action to recover damages for pollution of their land, ponds and water well allegedly caused by gas, oil and salt water that escaped from the oil well of defendant. The plaintiffs were the owners of a tract of land in Lincoln County, Oklahoma, on which the water well and two stock ponds were located. Defendant had drilled an oil well on the adjoining tract of land, west of plaintiffs' land, and was producing oil from the well. The exact distance between the oil well and the improvements of the plaintiffs is not shown but they are located on adjoining 40-acre tracts. There are other wells located in the surrounding area.

Plaintiffs alleged in their petition that gas, oil and salt water, blew out and escaped from defendant's oil well from some location beneath the surface of the ground and thence over, under and into the land of plaintiffs where it created holes and fissures in an area of 8 or 10 acres and percolated into the water well and stock ponds and soaked and permeated the pasture and lands of the plaintiffs.

Plaintiffs alleged that defendant was negligent in setting the surface pipe and in failing to properly cement the well and was generally negligent in failing to take proper precautions to prevent escape of gas and petroleum products from structures penetrated by the well, and contrary to law permitted the described substances to flow over, upon and into the plaintiffs' lands.

The record reflects that the trial court sustained the demurrer to plaintiffs' evidence on the ground that their evidence did not show any negligence on the part of the defendant. Plaintiffs contend that the evidence shows that 52 O.S. 1961, Sec. 296, was applicable and no proof of negligence was required. Plaintiffs also urge, in the alternative, that the evidence was sufficient to invoke the doctrine of res ipsa loquitur.

To the extent that it is pertinent to the above propositions, the evidence reflects that on October 1, 1962, gas and water started flowing up through the surface of about 2 acres of plaintiffs' land in the area of the stock ponds, to a height of 2 feet or more, and gas bubbled up in one of the ponds and in the water well; that this was reported to an employee of defendant and to the operator of other oil wells in the general area and the wells were examined to determine the source of the gas and water; that defendant's employee examined the defendant's oil well, and "he had the casing

opened on it and it was flowing saltwater," and he said "This is it, we have checked the volume," and "At the fissure hole we have checked the volume and shut the well in and we'll get it fixed just as soon as possible;" that the next day a pulling unit was pulling the tubing and a Halliburton Oil Well cementing outfit was at the well site; and after that day the gas quit coming out on plaintiffs' property. There was testimony that small holes and fissures were left on plaintiffs' land where the gas and water came up and the water in the pond and water well tasted "salty" or "more of a slick slimey taste to it."

The plaintiffs introduced no evidence of acts or omissions constituting negligence or lack of care on the part of defendant in drilling and completing the well or thereafter in the operation of the well. Plaintiffs contend their evidence establishes the existence of a situation falling within the provisions of 52 O.S. 1961, Sec. 286, and therefore relieves them of the burden of showing defendant's negligence was responsible for the gas, oil and salt water escaping from the well. The cited section is as follows:

> *"No inflammable product from any oil or gas well shall be permitted to run into any tank, pool or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall it be permitted to flow over the land. Salt water shall not be allowed to flow over the surface of the land."*

In Franklin Drilling Co. v. Jackson, 202 Okl. 687, 217 P.2d 816, 19 A.L.R. 2d 1015, we said that in an action to recover damages resulting from a violation of the cited statute, proof of negligence was not essential to a recovery.

The statute is a penal statute and in Pure Oil Co. v. Gear, 183 Okl. 489, 83 P.2d 389, it is stated that the violation of the statute is not to be lightly presumed, but must be proved by competent and substantial evidence.

In the present case all of the creditable evidence and the inferences to be drawn therefrom is that the gas and fluids escaped from the oil well at some underground level and flowed beneath the surface to a point under plaintiffs' land, where it passed upward, polluting the soil and surface, the pond and the water well. There is no evidence that it flowed across the surface from the well and thence upon plaintiffs' land.

In Ross v. Fink, Okl., 378 P.2d 1011, the plaintiff lessor sought damages from the lessee based on negligence of the lessee in constructing salt water pits on porous ground, so that salt water permeated the porous soil and flowed or was carried by subterranean waters for a distance where it came to the surface, spreading over the surface causing damage in violation of 52 O.S. 1961, Sec. 296 (supra).

We there held that in such a situation it was improper to instruct the jury that negligence of the defendant was not an element necessary for the plaintiff to prove, in order to recover. Therein the law is stated in the syllabus thereof as follows: "In an action to recover damages to land due to pollution from underground sources, 52 O.S. 1961, @ 296, has no application. "Recovery, if any, under the conditions set forth in paragraph one, must be upon the basis of negligence or

nuisance." Plaintiffs do not allege nuisance as a ground for recovery and they are confined to the issue of negligence.

It is our conclusion that the circumstances shown by the evidence do not fall within 52 O.S. 1961, Sec. 296, and plaintiffs are not entitled to the benefits of such statute.

This brings us to plaintiffs' contention that the situation justifies application of the doctrine of res ipsa loquitur and thereby negligence of the defendant may be fairly inferred. The evidence shows that gas pressure was responsible for the flow of the gas and liquids to, through, and to the surface of plaintiffs' land, and for the alleged damage.

Other evidence offered by plaintiffs tended to prove that other wells in close proximity to plaintiffs' land in question were not responsible for the damages to plaintiffs' water well and ponds. By such a process of elimination of other wells and by the statements, and by the circumstances that the flow of the substances ceased after work was completed upon defendant's well, it may reasonably be concluded that the gas and liquids originated from defendant's well.

In Oklahoma Natural Gas Co. v. Colvert, Okl., 260 P.2d 1076, this court stated, relative to the doctrine of res ipsa loquitur, as follows:

> *"Where the instrumentality or thing which causes injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from the want of care." See, also, Smith v. Vanier, Okl., 307 P.2d 539, 540.*

It is our conclusion that the evidence of plaintiffs entitled them to the benefits of such rule of law. For the reasons stated the trial court erred in sustaining the demurrer to plaintiffs' evidence and the order is reversed with directions to grant a new trial.

HALLEY, C.J., JACKSON, V.C.J., and WILLIAMS, BLACKBIRD, and HODGES, JJ., concur. IRWIN and BERRY, JJ., concur in results.

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Norman v. Greenland Drilling Co.

Notes and Discussion

1. What requirements are necessary to assert the doctrine of res ipsa loquitur?

2. Does the landowner have the option of asserting negligence or res ipsa? How are the theories related?

3. Would you expect the doctrine of res ipsa to be commonly applied to oil and gas pollution cases? Why or why not?

4. Oil and gas exploration activities are extremely high risk ventures. Unknown formations, pressures, etc., are common, as are the occasional "blowouts" where oil or gas flows uncontrolled

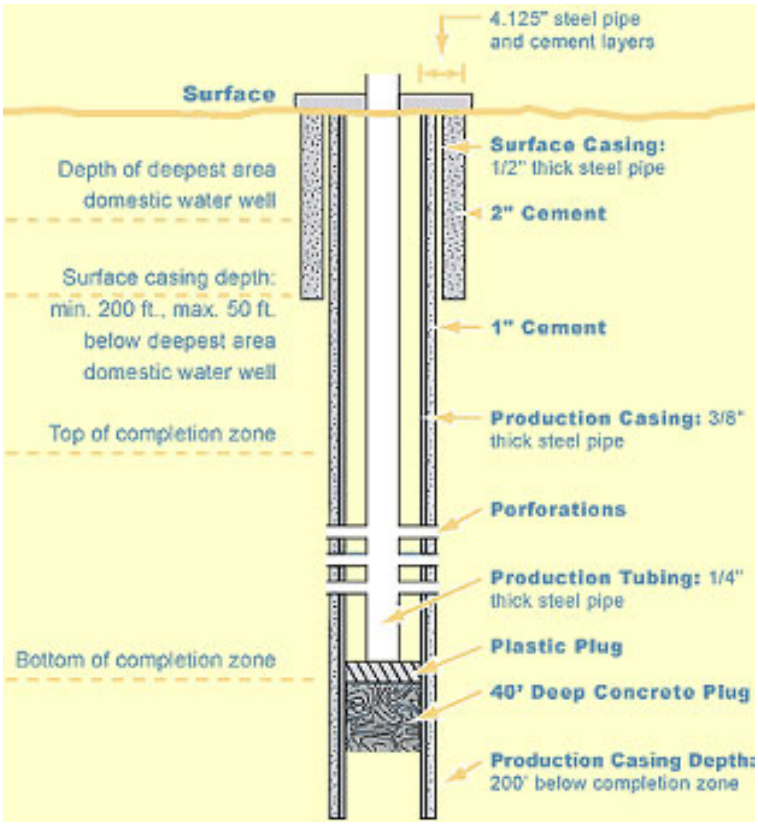
to the surface. Would the fact the oil and gas exploration is a risky business by nature affect the ability of the plaintiff to utilize the res ipsa theory?

5. “Plaintiffs alleged that defendant was negligent in setting the surface pipe and in failing to properly cement the well”.

Current regulations require that the surface casing is cemented to a depth 50 feet below the deepest domestic water table (see diagram). Production casing is also cemented in the well.

The cement keeps oil or natural gas from migrating up or down the well bore, and keeps water zones isolated and uncontaminated if done correctly.

In some cases the production casing will not be centered in the wellbore and one side of the casing might not be ideally cemented into the well. To avoid this problems mechanical devices attempt to get the casing centered in the wellbore before the cement is injected.




As with other cases, note the degree of effectiveness of cement will be difficult to observe directly – only circumstantial evidence like we saw in the Norman case will indicate that a problem exists. Experts be required to testify as to what they think occurred downhole, and why in their opinion that led to environmental damage.

BLACKBURN v. MILLER-STEPHENSON CHEM. CO.
SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF DANBURY
1995 Conn. Super. LEXIS 123
January 12, 1995, Decided

OPINION: MEMORANDUM OF DECISION ON MOTION TO STRIKE

On July 13, 1993, the plaintiff, Barbara Blackburn, filed a nine count complaint seeking, inter alia, damages for an alleged contamination of her well water supply. In the first count, the plaintiff states that her property, located at 44 Backus Avenue in Danbury, Connecticut, is served by a private on-site well that serves as a source of water for both drinking and domestic use. The plaintiff further states that the defendant, Miller-Stephenson Chemical Company, Inc. ("defendant"), owns and operates a facility located at 55 Backus Avenue in Danbury, Connecticut.

According to the plaintiff, the defendant packages and distributes chemicals at its facility, an activity that includes packaging volatile organic compounds. The plaintiff alleges that the Connecticut Department of Environmental Protection ("DEP") conducted soil samples at the defendant's facility which indicated that the soil was contaminated with five different compounds, including the compound benzene, in excess of state standards and that groundwater samples taken at the defendant's facility in 1989 revealed that the water contained three contaminants in excess of state standards.

The plaintiff alleges that well water samples taken at her property indicated the presence of five contaminants.The plaintiff alleges that two of these contaminants, trichloroethane and benzene, were present in amounts that exceeded state standards. The plaintiff then alleges that on April 16, 1993, the Commission of Health and Services determined that the benzene pollution of the plaintiff's well water supply could reasonably be expected to create an unacceptable risk of injury to the health or safety of those using her well as a source of drinking water.

As a result of the contamination found at the defendant's facility and the plaintiff's water supply, the plaintiff alleges: (1) that the defendant was ordered to provide bottled water to the plaintiff as a short-term drinking water supply, and to extend public water lines to her property as a long-term measure; (2) that plaintiff's tenant, upon notification of the well water contamination, vacated the premises and the plaintiff is unable to rent her property to another tenant due to not only the health hazards posed by the contamination, but also due to the guidelines for domestic use imposed by the
Department of Health Services; (3) that the market value of her property has permanently diminished; and, (4) that she "may incur significant costs in investigating, containing, removing or otherwise initiating the effects of the contamination at her property."

Therefore, the plaintiff alleges negligence in count one against the defendant in that the defendant, as owner and operator of the facility, had a duty to use its facility in a reasonable manner and that the defendant knew, or in the exercise of reasonable care should have known, that its activities would result in soil and groundwater contamination.

The plaintiff alleges in the second count that the defendant's actions violated General Statutes, Secs. 22a-427, 22a-430, and Sec. 22a-454, and by violating such sections, the defendant was negligent per se. Counts three through five allege common law actions in res ispa loquitur,

nuisance and trespass, respectively. The sixth count alleges strict liability based on an ultrahazardous activity. Counts seven through nine allege violations of General Statutes, Secs. 22a-451, 22a-452 and 22a-16, respectively.

On August 19, 1993, the defendant filed a motion to strike the second, third, fifth, sixth, seventh, eighth and ninth counts of the plaintiff's complaint on the grounds that: (1) counts two and three do not set forth legal causes of actions; (2) count five is barred pursuant to Connecticut law; (3) the use of volatile organic compounds in the packaging and distribution of chemicals is not an ultrahazardous activity as alleged in count six; (4) section 22a-451 does not provide for a private cause of action as alleged in count seven; (5) plaintiff is not entitled to relief under section 22a-452 because she has not alleged that she has incurred response costs in count eight; and, (6) section 22a-16 does not apply to plaintiff's claim as alleged in count nine.

The defendant filed a memorandum of law in support of its motion. The plaintiff then filed a memorandum of law in opposition to the defendant's motion. Thereafter, the defendant filed a memorandum of law in response to the plaintiff's opposition memorandum. The purpose of the motion to strike is to challenge the legal sufficiency of the allegations of any complaint. Gordon v. Bridgeport Housing Authority, 208 Conn. 161 170, 544 A.2d 1185 (1988).

In judging the motion, it does not matter whether the party can prove the allegations at trial. Levine v. Bess and Paul Sigel Hebrew Academy of Greater Hartford, Inc., 39 Conn. Sup. 129, 131, 471 A.2d 679 (Super. Ct., 1983). The motion admits all facts well pleaded, but does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings. Mingachos v. CBS, Inc.,196 Conn. 91, 108, 491 A.2d 368 (1985). The sole inquiry is whether the plaintiff's allegations, if proved, state a cause of action. Id.

I. The Second and Third Counts

In the second count, the plaintiff incorporates the factual allegations as set forth in the first count of her complaint and further alleges, inter alia, that (1) the defendant, by discharging volatile organic compounds at its facility, violated section 22a-427 by causing pollution and discharging wastes in violation of Chapter 446k of the General Statutes; (2) the defendant created or maintained a discharge into the waters of this state without a permit in violation of section 22a-430; and, (3) the defendant operated a hazardous waste facility or disposed of hazardous waste at its facility in violation of section 22a-454. The plaintiff further alleges that she is a member of the class of persons that the above statutes were designed to protect, and that the defendant's actions in violating those statutes constitutes negligence per se and proximately caused the contamination of her property.

'The doctrine of negligence per se serves to superimpose a legislatively prescribed standard of care on the general standard of care.' [Citations omitted.] 'Where a statute is designed to protect persons against injury, one who has, as a result of its violation, suffered such an injury as the statute was intended to guard against has a good ground of recovery.' [Citations omitted.] That principle of law sets forth two conditions which must coexist before statutory negligence can be actionable. First, the plaintiff must be within the class of persons protected by the statute. [Citations omitted.] Second, the injury must be of the type which the statute was intended to prevent. [Citations omitted.]' Gore v. People's Savings Bank, 35 Conn. App. 126, 130, 131, , 644 A.2d 945 A.2d (1994).

In its supporting memorandum, the defendant argues that negligence per se is not a distinct cause of action but a legislative standard derived from traditional tort principles. Therefore, the defendant argues that the second count of the plaintiff's complaint does not set forth a cognizable claim and should be stricken.

The plaintiff counters that negligence per se is a valid, independent cause of action and that the defendant's negligent acts in contaminating her land as alleged in the first count are different from the statutory violations as alleged in the second count. Therefore, the plaintiff argues that she has properly alleged separate causes of action.

In the present case, the plaintiff has alleged that the defendant has violated several statutory sections and has further alleged that those violations caused the contamination of her property. "If a plaintiff alleges that a statute, ordinance or regulation has been violated, thereby relying on negligence per se, and also alleges that there is a causal connection between such negligence and the injuries sustained, a cause of action has been stated." Commercial Union Ins. Co. v. Frank Perrotti & Sons, Inc., 20 Conn. App. 253, 258, 566 A.2d 431 (1989). Therefore, the plaintiff has stated a cause of action based on negligence per se.

Turning to the allegations as set forth in the third count, the plaintiff alleges negligence based on the doctrine of res ipsa loquitur in that contamination would ordinarily not have occurred at defendant's facility without careless construction, inspection, or use of materials and that construction, inspection, and use of materials at the defendant's facility were all in the control of the defendant. Based on the foregoing, the plaintiff alleges that the defendant is liable in negligence for her damages.

The doctrine of res ipsa loquitur is predicated on the following three elements: '(1) The situation, condition, or apparatus causing the injury must be such that in the ordinary course of events no injury would result unless from a careless construction, inspection or user. (2) Both inspection and user must have been at the time of the injury in the control of the party charged with neglect. (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured.' Malvicini v. Stratfield Motor Hotel, Inc., 206 Conn. 439, 443, 538 A.2d 690 (1988), quoting Schurgast v. Schumann, 156 Conn. 471, 479-81, 242 A.2d 695 (1968).

'The doctrine of res ipsa loquitur is a rule of common sense and not a rule of law which dispenses with proof of negligence. It is a convenient formula for saying that a plaintiff may, in some cases, sustain the burden of proving that the defendant was more probably negligent than not, by showing how the accident occurred, without offering any evidence to show why it occurred.' Malvicini v. Stratfield Motor Hotel, Inc., supra, 442. "The doctrine has no evidential force, does not shift the burden of proof and does not give rise to a presumption. [Citation omitted.] It is but a specific application of the general principle that negligence can be proved by circumstantial evidence." Id.

The defendant argues that the third count of the plaintiff's complaint should be stricken because it fails to allege a legal cause of action and only asserts a claim for relief based upon a "procedural device."

Conversely, the plaintiff argues that the third count alleges facts separate and distinct from those facts alleging negligence as set forth in the first count. Therefore, the plaintiff argues that she has not lost her right to rely on the allegations set forth in the third count, which are separate and distinct from the allegations of specific negligence set forth in the first count.

In Estate of Just v. Aparo, 8 CSCR 542 (April 27, 1993, Higgins, J.), the plaintiff brought an action arising out of the drowning of his decedent in a boating accident. The plaintiff, in the third count of a revised nine count complaint, asserted an action based on the doctrine of res ipsa loquitur. The defendant Aparo argued that the third count of the plaintiff's complaint should be stricken because there is no independent cause of action based on that doctrine. The court in Aparo held: Count three of the plaintiff's complaint is stricken on the ground that it fails to state a cause of action. In count three the plaintiff has repeated his cause of action for negligence from count one and added allegations associated with the doctrine of res ipsa loquitur.

The doctrine of res ipsa loquitur is a rule of circumstantial evidence that is designed to allow the inference of negligence and is not an independent cause of action. While this case may be a proper one to apply the doctrine of res ipsa loquitur, it is not proper to plead it as a separate cause of action. The plaintiff, having already alleged a cause of action for negligence in count one, cannot allege the same action again in count three by merely claiming it is a separate action based on the doctrine of res ipsa loquitur. Id., 543. See also Estate of Shrader v. Atlantic Coast Cable, 8 CSCR 738 (June 28, 1993, Fuller, J.) (the doctrine of res ipsa loquitur cannot survive independently as an additional count for negligence in a complaint which already contains a negligence count based on the same facts)
.
Since it is not necessary to allege the elements of res ipsa loquitur in order to rely upon them, and since a plaintiff does not waive the right to rely upon the doctrine by pleading specific acts of negligence; Schurqast v. Schumann supra, 479; Estate of Shrader v. Atlantic Coast Cable, supra, 739; the defendant's motion to strike count three of the plaintiff's complaint is granted.

. . . . [remainder of case omitted]

Stodolink, J.

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Blackburn v. Miller-Stephenson Chemical Co.

Notes and Discussion

1. Is the doctrine of res ipsa a separate cause of action from negligence?

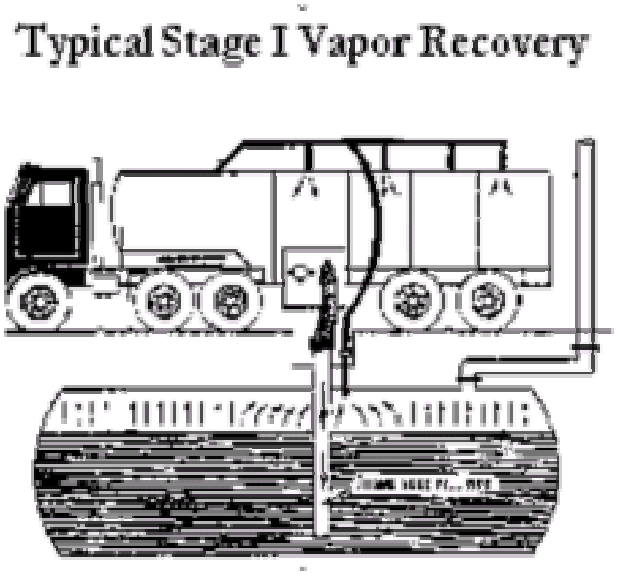
2. Does res ipsa shift the burden of proof in an environmental case?

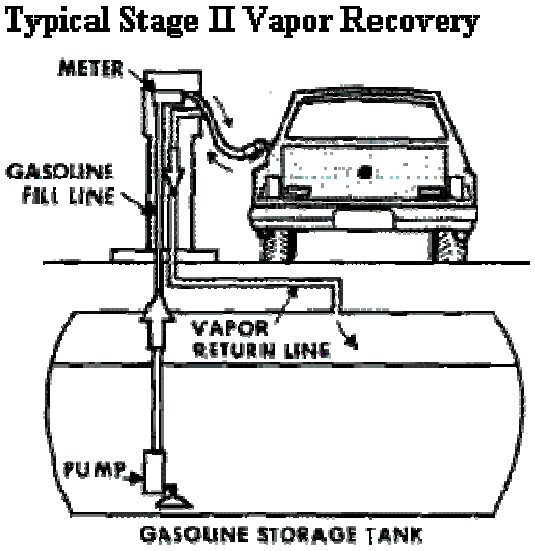
3. Benzene is a carcinogenic compound commonly found in oil and gas wastes and emissions. It has been classified as a characteristic toxic hazardous waste under RCRA above certain concentrations, and as a hazardous air pollutant under the Clean Air Act. One common problem currently facing oil and gas producers deals with benzene air emissions from equipment that removes water vapor from the natural gas which has been produced. Why would a producer or pipeline want to remove water vapor from natural gas?

4. Volatile organic compounds (VOC's) mentioned in the case include hydrocarbons that occur as a gas, and commonly include vapors that emanate from liquid fuels like gasoline. VOC's combine with nitrogen oxides from internal combustion engines to form ozone and smog.

Natural gas delivered from a pipeline to an end user is mainly methane, and is much less reactive with nitrogen oxides than VOC's from liquid fuels. As a result, in Clean Air Act 'NAAQS non-attainment areas' such as Dallas and Houston controls are generally focused on liquid fuels and internal combustion engines that utilize such liquid fuel.

In these areas Stage I and II recovery systems like those illustrated below, or similar systems, will be in place by regulation at gasoline service stations.




Gasoline dispensers in these areas will have the vapor recovery cup on the pump such as the following.

Jones v. NAFCO Oil & Gas, Inc.
The Supreme Court of Texas
380 S.W.2d 570; 7 Tex. Sup. J. 480; 20 Oil & Gas Rep. 862
Jun. 10, 1964

This is a suit brought by petitioner, who was the plaintiff in the trial court, against respondent Nafco Oil and Gas (hereinafter called Nafco) and its employee, San Wysong, as defendants, for damages suffered by plaintiff's cattle. This damage was alleged to have been caused by the negligence of the defendants in permitting the escape of condensate, a liquid hydrocarbon, on the ground where plaintiff's cattle drank the same.

Upon the conclusion of plaintiff's testimony, the trial court gave the jury an instructed verdict in favor of the defendants. This action was affirmed by the Court of Civil Appeals. 371 S.W. 2d 584. Plaintiff's application for writ of error was granted. The parties will be referred to by the designation they had in the trial court.

We affirm the judgment of the Court of Civil Appeals.

September 29, 1959, plaintiff was pasturing some cattle on the section of land in Hansford County, Texas, whereon defendant Nafco had a gas well which in addition to gas, produced as a byproduct a hydrocarbon liquid referred to as distillate or condensate. This well was being produced by Nafco under an oil and gas lease dated in 1953, and covering the section of land whereon the gas well was located. This well had been producing for some five or six years prior to September, 1959.

Plaintiff Jones lived in Hansford County, Texas, and had been familiar with the section of land and the gas well thereon for some time prior to his taking a grazing lease from the owner of the land in May, 1958. This grazing lease of the surface was for a one-year period, and in May, 1959, plaintiff renewed the same for an additional year.

The gas well, separator, storage tanks and discharge pipe all were on the land May 1st in 1958, and continued to operate in the same manner and methods at all times prior to September 22, 1959, and on up to the date of trial of this cause in November, 1962.

Plaintiff Jones testified that prior to the time before September 22, 1959, he had not seen any liquid hydrocarbons out on the surface of that section anywhere. He testified he had been over all that section many times during the life of his grazing lease; that he had "never seen any liquid hydrocarbons loose or any indication of them being loose on that section;" that he knew that the contents of the storage tanks were trucked from the premises at irregular intervals by trucks which had the name "Groendyke" on them. He further testified that on September 22, 1959, around 2:00 or 3:00 o'clock in the afternoon was the first time he had ever seen any fluid, whether it was condensate

or salt water or anything else, around that well location. Never before on that day, the preceding day nor any time before, had he seen any fluid spilled out there on the section.

Plaintiff testified that around 10:00 o'clock in the morning of September 22, 1959, the cowboy who was looking after the cattle on this section called into Spearman to plaintiff and reported some of the cattle were dead, and others sick and dying. Plaintiff immediately drove to the pasture, and seeing his cattle dead and dying, got in touch with Dr. Rinker, a veterinarian, and took him out to see the cattle.

Dr. Rinker testified to seeing the cattle, performing two or more autopsies on dead cattle, and that from what he found as a result of the autopsies, it was his opinion that the cattle were suffering from liquid hydrocarbon poisoning. He treated a number of cattle that afternoon and until a little after dark. Dr. Rinker on cross-examination was asked: "To be perfectly fair and honest with us * * * you say that that (drinking liquid hydrocarbons) is possibly what caused it, and that is all you will say, isn't it?" He answered: "That is right."

The doctor and plaintiff each testified that about 2:00 or 3:00 o'clock that afternoon they went to the gas well and there observed a puddle of condensate or distillate at the end of a drainpipe connected to a valve at or near the bottom of each of the storage tanks. The evidence showed that all the equipment of this well, except the well head, was enclosed with a wire fence sufficient to turn the cattle in the pasture. The drainpipe extended from the storage tanks under the surrounding fence, and to a point 4 to 6 feet beyond the fence.

At the end of this drainpipe was the puddle of liquid testified to by Dr. Rinker and the plaintiff, and one or two other witnesses. No witness saw any one or more of the cattle drink any of this liquid hydrocarbon at any time. Dr. Rinker and plaintiff testified they observed a discolored strip of grass where it appeared some of the liquid had run 30 to 50 feet down a slight slope. All witnesses who testified to this fact, testified there was no liquid on said slope, that the ground was not damp or wet, but was dry, and none saw any cattle eating any of the grass or drinking any liquid of any kind from this discolored strip which in their opinion smelled like and was caused by liquid from the end of the drainpipe.

Dr. R. H. Miller, Jr., a veterinarian from Amarillo, Texas, was called by plaintiff to examine his sick cattle. Dr. Miller reached the pasture September 24, 1959, and at Mr. Jones' request, performed an autopsy on a sick heifer which had been killed by Mr. Jones after Dr. Miller reached the pasture.

Dr. Miller testified that from his autopsy of the dead animal he found symptoms indicating the heifer had died from liquid hydrocarbon poisoning. He also testified: "Those symptoms I just gave are common, commonly observed in this condition, but they can also be symptomatic of other conditions as well, other diseased conditions as well. They are not specific, in other words."

Mr. Sam Wysong, the only witness offered by defendants, testified he was the "switcher" employed by Nafco to keep the equipment on the well, the separator and the storage tanks in good repair, and to check the storage tanks to see they were emptied by Groendyke at such times as to prevent the waste of the condensate stored therein.

He testified he was on this lease five days out of each week; that he and Herman Dye, Nafco's production superintendent in the field, were the only employees of Nafco who had keys that would unlock the valves at the bottom of the storage tanks and through which must pass the drainage from the tanks into the discharge pipe leading outside the fence enclosing the tanks; that a Mr. McRee, who drove the Groendyke tank truck into which the condensate was unloaded and transported to the destination as directed by his Nafco supervisors, also had a key to these valves; that Groendyke was paid by the barrel for each tank of condensate it hauled from the lease; that he would notify Groendyke when there was a tank truck load of condensate to haul away from the lease, but that he did not direct Groendyke where to deliver and unload the tank truck because Groendyke's employee knew where it was supposed to go.

He further testified that he did not unlock the valves on the drainpipe prior to, nor on the day the cattle sickened and died; that the only time prior to September 22, 1959, that he had seen any liquid on the ground on this lease standing in a puddle at the end of the drainpipe or elsewhere was when Mr. McRee, Groendyke's driver, would drain off two or three barrels of water from the bottom of the tanks, prior to unloading the tanks into Groendyke's tank truck; that this unloading took place on the average of every thirty (30) days to six (6) weeks, depending on weather conditions; that prior to that time he had never seen any discolored strip of grass or ground leading downhill from the end of the drainpipe.

On the afternoon of the 21st of September, 1959, he was at the well and gauged the tanks and determined they needed emptying and that when he reached Spearman, he notified Groendyke that the tanks [*573] needed emptying the next day; that he had never seen these tanks overflow; that he did not open the drain valves, and that there was no leakage from these valves; that he did check the valves, other equipment and the drainpipe and there was no dripping of liquid from the pipe nor puddles of any liquid on the ground at this time; that he was again at this well about 8:00 A.M. the morning of September 22, 1959, and prior to Groendyke's unloading of the tanks, and again he inspected the premises and the equipment and the valves were not leaking, nor was there any puddle of liquid nor dripping from the drainpipe; that when he arrived on the lease that morning some of plaintiff's cattle appeared to be sick and some were lying down, but he could not say if any were dead.

Mr. Wysong was back on the lease the afternoon of September 22, 1959, and after he had been notified that plaintiff's cattle were sick, dead and dying. That he again was at the well and inspected the premises and found the drain valves locked and no leakage of the valves; that the storage tanks had been emptied by Groendyke since he was at the well at 8:00 A.M. that morning; that there was a small puddle of fresh liquid on the ground at the end of the drainpipe, and that he saw someone present stand on the end of the drainpipe and a small amount of liquid ran out of this pipe onto the ground; that he never saw any of plaintiff's cattle drinking from this puddle, nor around the well and equipment; that in his opinion, there was no leakage of the tank drain valves, and that the liquid which came from the drainpipe when it was pushed down, resulted from the fact that it was liquid left in the pipe when Groendyke's man, Mr. McRee, had bled the water off from the tank bottoms in order to unload the condensate from the top into Groendyke's tank truck.

Mr. Herman Dye, defendant Nafco's field superintendent September 22, 1959, testified he had a key to the drainage valves but he did not open these valves; that he also was on the lease the afternoon of September 22, 1959, and that he saw the puddle of liquid at the end of the drainpipes, and that it was fresh liquid. He saw someone depress the end of the pipe and the

trickle of the liquid therefrom and had the same explanation for this happening as Mr. Wysong. Mr. Dye was put on the stand by plaintiff.

Mr. W. A. McRee, a witness for plaintiff, testified he worked for Groendyke as driver of a tank truck, and had been emptying Nafco's storage tank in question for some three to five years; that Mr. Wysong, Nafco's switcher, would call in to Groendyke's office that the storage tanks were ready to be unloaded and he would take Groendyke's tank truck to the storage tanks in question and pump his truck full of condensate from the top of the storage tanks; that on the bottom of the tanks would be accumulated water and other "dredges" (impurities) necessary to be drained off prior to beginning his loading operations; that he had a key to the drain valves at the bottom of the tanks and through which water and other impurities were drained out of the tanks so as to prevent these from being pumped into the truck; that he tried not to let any condensate drain out through this discharge pipe, but in order to be sure he had the water, etc. out of the tank, a small amount of condensate might also be drained out on the ground; that this was the way he had handled the operation at all times he had been picking up the condensate.

He testified that he arrived on the lease around 10:00 o'clock the morning of September 22, 1959, and drove to the tanks; that he did not see plaintiff, Dr. Rinker nor any others on the lease; that he saw some of the plaintiff's cattle that were lying down and acted as if they were sick; he did not know if any were dead.

In driving up to the tanks to get his truck in the proper place to unload, he drove by the end of the discharge pipe and at that time there was no puddle of liquid at the end of the drainpipe, nor did he see any discolored strip of grass or ground; that he unlocked the drain valves at the bottom of the storage tanks and let four or five gallons of liquid run out through the drainpipe and the liquid collected in a puddle on the ground at the end of the pipe; that he saw no cattle around the well or the drainpipe, nor drinking from this puddle of liquid. As soon as he had drained the water and impurities from the storage tanks, he closed the drain valves and locked them securely; that there was no leakage from the valves; that he loaded his tank truck and left the lease and took his load of condensate to its destination.

We have set out the evidence at length, because this is a case where at the close of the testimony the trial court instructed the jury to return a verdict against plaintiff and in favor of the defendants.

In such cases we must examine all the testimony that is relevant to the issues of defendants' negligence, and consider the evidence in the light most favorable to the plaintiff, disregarding all conflicts and indulging in every intendment reasonably deducible from the evidence in favor of the plaintiff. 4 Tex. Jur. 2d, p. 384, Appeal & Error - Civil sec. 835, and the authorities therein cited.

In Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W. 2d 410 (1954), this court had before it a case wherein Martin sought damages from Petroleum Company resulting from the death of Martin's cattle by virtue of having drunk crude oil standing in puddles about five feet from Warren's oil well. The well machinery was not enclosed with a fence. It was alleged that the pump used to pump oil from Warren's well was defective in permitting oil to be thrown up and out from the well and form in puddles about five feet from the well. The evidence showed that these puddles of oil had been seen on various occasions by various witnesses, and that plaintiff's cattle died as a result of drinking liquid hydrocarbons and that the cattle drank such oil and had access to no other liquid hydrocarbons.

Upon a trial to a jury, the jury found that Warren permitted oil to escape from the well; that such was negligence; that the cattle drank such oil, and some died and others were injured as a result of drinking the oil; that Warren did not intentionally injure said cattle, and fixed the amount of damages. Judgment was for Martin and the Court of Civil Appeals affirmed this judgment. This court reversed and rendered the judgment granted by the trial court against Warren for the damages suffered by Martin as a result of his cattle drinking the oil, but affirmed damages done to growing crops, fences, etc. resulting from the action of Warren's employees. This Court in the Martin case relied on the case of Carter v. Simmons (Tex. Civ. App.) 178 S.W.2d 743 (1944) no writ history.

This Court quoted from 30 Tex. Jur. Sec. 127 p. 800 as follows:

> "Negligence or a failure to perform a duty required by law is never presumed as a fact, but must be proved by the evidence; and the burden of proving it is on the party seeking a recovery of damages by reason of such negligence or failure of duty." (Now found in 40 Tex. Jur. 2d 657, Negligence Sec. 139).

This court went on to quote further from Carter v. Simmons, supra, "In our opinion, the mere fact that appellant permitted the storage tanks to overflow, without any showing as to what the operating conditions on the leases might have been at such times, could not form the basis for a legal inference that his conduct in this respect constituted negligence on his part or a breach of duty which he might have owed to appellees under the existing circumstances."

In the Martin case, there was testimony from a witness that a well pumping oil, throwing oil out twelve or fifteen inches up in the air above the coupling, with the wind blowing that oil out over the ground and forming puddles of oil (as the testimony in that case showed were the facts) was not the "usual and customary method of producing and the precautionary way of producing oil in the Olney territory."

In discussing this evidence as showing negligence on the part of the operator, this Court said: "This evidence of failure to follow custom, which at the most only shows that the result accomplished was not the usual and customary result, does not aid in proving negligence in the absence of proof that the equipment on the lease was not the equipment customarily used or that the lease was not being pumped or handled in a way that was not customary."

In the case at bar all the evidence on the point shows that this lease equipment was such as customarily and ordinarily used in producing gas wells in this territory, and no contention was made to the contrary. There was testimony that some similar gas wells in this field ran their drainpipe into a pit where the water and impurities were caught, in the event there was a large quantity of water, etc. produced by a gas well. This testimony also showed the well here involved produced only small quantities of water, etc., along with its gas production.

In our case, plaintiff relied on acts of negligence on the part of Nafco and its employees in manual dumping, draining or purging of the condensate tanks and/or separator, turning a substantial quantity of condensate and salt water into the drainpipe and permitting it to flow outside the fence and form in puddles and pools when same was available to plaintiff's cattle.

There is no evidence in this record to sustain such allegation. Plaintiff himself testified that prior to September 22, 1959, he never had seen any puddles, pools or wet places on the ground caused by liquid hydrocarbons, during the eighteen months he had used this section for grazing his cattle. Plaintiff did not know, nor could he testify, who it was that operated the drain valves at the bottom of the storage tanks.

Plaintiff's witness, McRee, who drove the Groendyke truck carrying the condensate from the storage tanks off the lease, testified that there were no puddles or pools of condensate, or any other liquid around or near the well, or at the end of the drainpipe when he arrived at the well on the 22nd of September; that the ground and grass were dry and not damp. He testified that he, and he alone, opened the drain valves and drained off the water and other impurities; that he securely closed and locked these valves when he left and that the only liquid on the ground at the end of the drainpipe was what he had put there by draining the bottom of the tanks.

Also, McRee testified, and this was the testimony of all witnesses who testified as to these facts, that plaintiff's cattle were down and sick, and perhaps some dead at the time McRee drove onto the lease that morning, and prior to his drawing the fluid out of the storage tanks onto the ground.

Under this record, McRee was the agent of Groendyke, and if his act in draining the bottom of the tanks caused the death and damage to plaintiff's cattle, defendants would not be liable therefor.

Plaintiff relies upon the doctrine of res ipsa loquitur to establish negligence. The evidence fails to show that Nafco had exclusive control of these facilities and the draining of the storage tanks but shows that McRee, the agent of the independent contractor, Groendyke, also had a key to the drain valves, and that he was the only one - under this record - who caused any liquid hydrocarbon to be drained on the ground. Under the circumstances, the doctrine of res ipsa loquitur is not applicable. Wichita Falls Traction Co. v. Elliott, 125 Tex. 248, 81 S.W. 2d 659 (1935); Universal Atlas Cement Co. v. Oswald, 138 Tex. 159, 157 S.W. 2d 636 (1-3) (1941); Carter v. Simmons (Tex. Civ. App.) 178 S.W.2d 743(1944); Warren Petroleum Co. v. Martin, 153 Tex. 465, 271 S.W. 2d 410, 413.

Plaintiff alleged that the acts of defendants constitute an unreasonable, unauthorized and excessive use of the lands upon which plaintiff grazed his cattle, and such caused the injuries and death suffered by the cattle. As we have pointed out above, there is no evidence that Nafco or its employees did anything to cause the only puddle or pool of liquid hydrocarbons shown by the evidence herein. Neither is there [*576] any evidence that permitting the liquid to be discharged from the drainpipe was an unauthorized, unreasonable, or excessive use of land to produce, store and market the condensate, nor that Nafco was guilty of any negligence in connection therewith. Therefore, plaintiff cannot recover on this count in his petition. General Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W. 2d 668, 670.

The judgment of the Court of Civil Appeals is affirmed.

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Jones v. NAFCO Oil & GAS
Notes and Discussion

1. In many cases one party will be named the "operator" of a well, even though the well has multiple fractional owners. The operator's employee or a third party contract employee generally check on the well once a day; this review usually only takes around 15 minutes.

The well is unmanned for the remaining 23 hours in many cases. Further, the surface owner or surface lessee also has access to the property. Does this impact the applicability of res ipsa?

Note the livestock around the oil storage tanks in the background in the picture at right. Due to the liquids that accumulate around the tanks sometimes the equipment will attract the animals.

Operators can fence off areas, but fencing tends to interfere with oil and gas operations – and in some cases the surface owner's use.

Most regulators do not require that oil field operations be fenced, especially if they are located in rural areas.

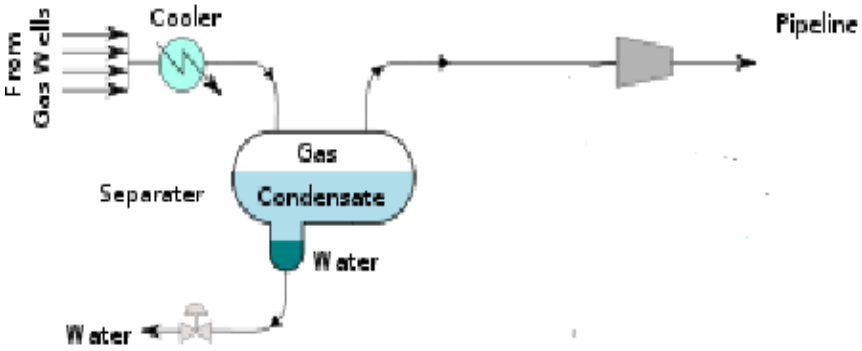
2. Most wells are located in "fields" where there may be numerous wells operated by different parties, all in close proximity to one another. Does this impact the applicability of res ipsa?

3. Under most state regulations most oil storage tanks are required to have 'berms' constructed around the tank to hold any fluid that might leak from the tank.

Salt water, or oil, can accumulate in the bermed area, and allows cattle access to these liquids (both of which are poisonous to livestock).

What problems would a landowner have in this case (see oil spilled around tank) using the doctrine of res ipsa?

4. Natural gas produced from deep underground is usually trapped underground at elevated temperatures and pressure. As it comes to the surface it will cool, and in many cases encounter lower pipeline pressure, which causes dissolved water vapors and the ‘condensate’ elements to precipitate out of the natural gas stream as a liquid. Condensate can be quite valuable, so is usually collected and sold if it is produced in any quantity.

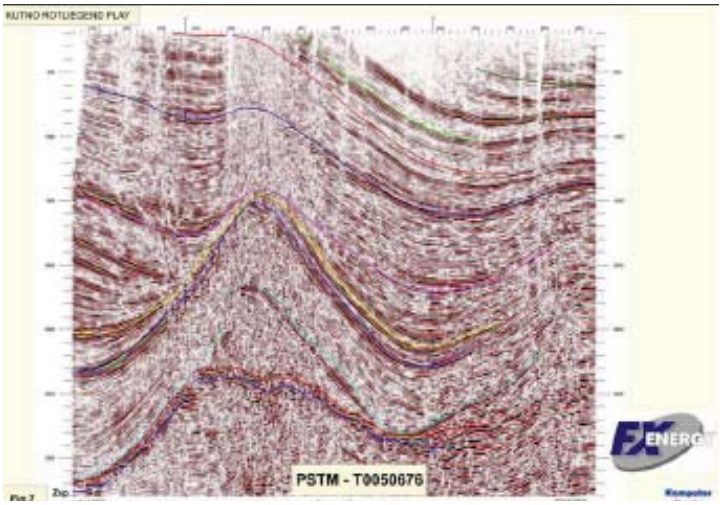



As noted in the Jones case both the water and condensate are liquids, with the water falling to the bottom of the tank and the condensate situated just above.

The water is a waste stream so is usually disposed of, in this case by draining the water on the ground. The quality of this water can vary, but it can be contaminated with condensate and suspended solids that might be poisonous to livestock.

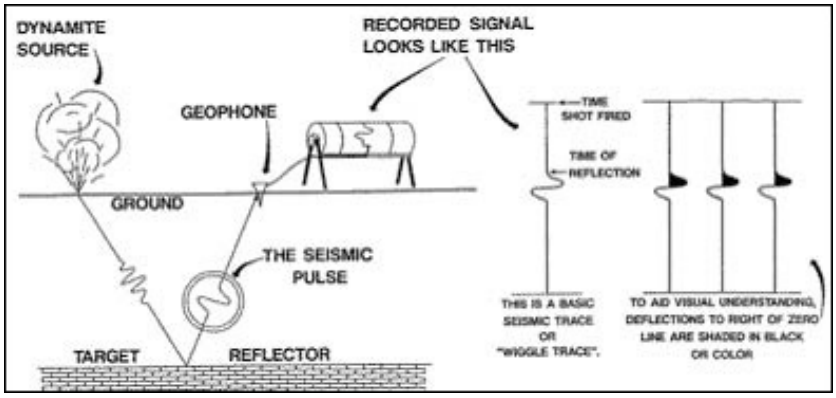
STANOLIND OIL & GAS CO. v. GILES – Introductory comments

Starting in the 1930's oil and gas operators developed a new tool to assist them in locating their exploration wells. 'Seismic' exploration used shock or sound waves generated on the surface to penetrate the ground, and when such waves encountered different formations or rocks they tended to be reflected back to the surface to varying degrees.




Using the data an operator could map the structure underground, and the features which might contain oil. The seismic data at right indicates a massive structure exists in Central Poland that is the largest undrilled structure in onshore Europe at this time – and a well is being spudded to penetrate this structure in the fall of 2011.

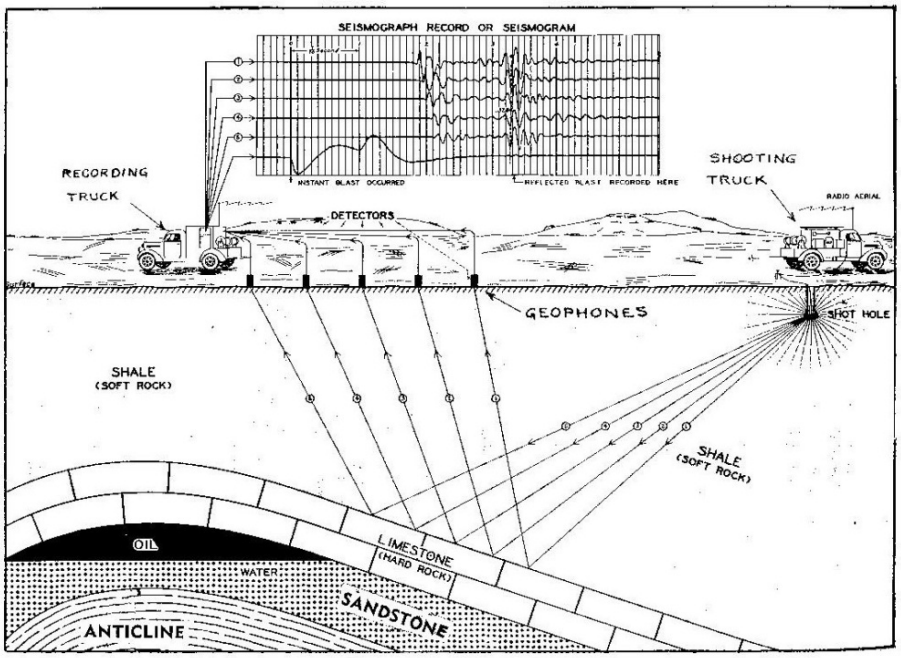
To generate the shock waves operators used dynamite in many cases. It was not uncommon for such shock waves to damage existing water and oil or natural gas wells.




The following case deals with such an instance, and the use of res ipsa with regard to a fresh water well that had stopped producing shortly after the seismic exploration activity.

Note that alternative supplies of fresh water in many places are limited, so if a water well is damaged a rancher many times has a major issue obtaining alternative supplies.

Due to the damage dynamite can cause modern exploration efforts generally use trucks that generate pulse waves into the ground – a more environmentally friendly method to obtain seismic data.



STANOLIND OIL & GAS CO. v. GILES
UNITED STATES COURT OF APPEALS FIFTH CIRCUIT
197 F.2d 290; 1952 U.S. App. LEXIS 2619; 1 Oil & Gas Rep. 1437
June 6, 1952

OPINION: Stanolind Oil & Gas Company has appealed from a judgment rendered against it in favor of J. M. Giles for the destruction of Giles' water well. Trial was to the court without a jury, and the Court stated its findings of fact in a brief oral opinion as follows:

'I find, gentlemen, as facts, that the plaintiff had a satisfactory well of water, which had served his sixhundred-and-some-odd acre farm for a great many years, for stock water, for water in his home, and for irrigation purposes.

'That in the year 1949, while that was the situation, the defendant set off an extensive charge of explosive, 646 feet from this particular well.

'That following these explosive discharges, the well ceased to furnish water, and is now a practically dry well, merely having a moist bottom, where there was water.

'That that geophysical discharge was not on the plaintiff's property, but was just across the public road from it.

'That the charge which was set off would have its wave effect, as far as 1741 feet, in any and all directions. I find, as a matter of fact, that that so setting off in that proximity was negligence, and the proximate cause of the damages to the plaintiff in the sum being sued for, to-wit, $ 3,175.00.

'As a conclusion of law, it must follow, of course, from what I have said, judgment goes for the plaintiff for that sum.'

The appellant's contentions upon this appeal go to the sufficiency of the evidence in the three essentials: 1, to support a finding that appellant was negligent in discharging the explosives in question; 2, to support a finding that the damage to plaintiff's water well was the proximate result of any negligent act or omission of defendant; and 3, to support the judgment as to the amount of plaintiff's damages. The sufficiency of the evidence to support the allegations of negligence appellant terms the principal question presented by this appeal. Plaintiff alleged his cause of action in the alternative.

One theory of recovery was predicated upon res ipsa loquitur, while the other was based on allegations of negligence in terms so general and broad [**3] as to cover practically every possible ground of negligence, i.e.: (1) using high explosives in the ground in the close proximity to plaintiff's water well; (2) using excessively large charges of explosives; (3) failure to take the proper precautions to prevent the destruction of plaintiff's water well by such explosives.

In this state of the pleadings we do not think that anything said by this court in Mitchell v. Swift & Co., 5Cir., 151 F.2d 770, 771 would preclude the plaintiff from relying upon a rule of evidence substantially equivalent to res ipsa loquitur.

Whether under the facts admitted or shown by the evidence that rule was available to the plaintiff is a question to be determined by the state law. Ramsel v. Ring, 8 Cir., 173 F.2d 41, 42, 43. n1 The plaintiff in this case did not attempt to rely upon the rule of absolute liability as to the storage and use of explosives laid down in Rylands v. Fletcher, L.R. 3, H.L. 330, and it seems to be conceded that under the law of Texas the liability asserted in this case must be based upon negligence. See Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221; Stanolind [*292] Oil & Gas Co. v. Lambert Tex. Civ. App., 222 S.W.2d 125; [**4] McKay v. Kelly, Tex. Civ. App., 229 S.W.2d 117.
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The res ipsa loquitur doctrine, as it exists in Texas, is succinctly stated in Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968, 969, 160 A.L.R. 1445;'Res ipsa loquitur is a rule of evidence whereby negligence of the alleged wrongdoer may be inferred from the mere fact that the accident happened, provided (1) the character of the accident and the circumstances attending it lead reasonably to the belief that, in the absence of negligence, it would not have occurred, and (2) the thing which caused the injury is shown to have been under the management and control of the alleged wrongdoer.' See also Stokes v. Burlington-Rock Island R. Co., Tex. Civ. App., 165 S.W.2d 229, 231; Vol. 26 Texas Law Review, p. 269.

In Stanolind Oil & Gas Co. v. Lambert, supra, the doctrine was held inapplicable because the proof was deficient in failing to show that the accident was such as in the ordinary course of things does not happen if those who have the management or control use proper care. On the other hand, in the latter case of McKay v. Kelly, the [**5] Austin Court of Civil Appeals said:

'We believe it to be a matter of general knowledge that [HN3] blasting by the use of explosives will not cause damage to adjacent property unless negligently conducted. Witness the many excavations in large cities for the construction of buildings, houses, streets, sewer and water lines and for other purposes in which the use of high explosives is made as a matter of course and without the slightest damages to adjacent or nearby property.

'In Wichita Falls Traction Co. v. Elliott, 125 Tex. 248, 81 S.W.2d 659, 663, the court approvingly quoted the following from 45 C.J.,p. 1200: 'The doctrine of res ipsa loquitur, now a familiar rule of practice in the trial of negligence cases, which is frequently recognized and applied without specifically naming it [HN4] is not a rigid or arbitrary formula but a rule that adjusts itself to circumstances.

However, as it is not the naked injury but the manner and attending circumstances of the accident that justify the application of the doctrine in an action for the negligent breach of an ordinary duty, it follows, as a matter of course, that the applicability of the doctrine must depend upon [**6] the peculiar facts and circumstances of each individual case.'

'We believe the facts and circumstances of this case make the applicability of the rule of res ipsa loquitur very appropriate. If a person in, say, blasting stumps sets off an explosion which levels his neighbor's house several hundred feet away, it would be rather ridiculous to require proof of the exact amount of explosive used in order to show that he used too much.' 229 S.W.2D 120.

The Supreme Court of Texas granted a writ of error in that case on the point of whether the rule of res ipsa loquitur could properly be applied, but upon full consideration found it unnecessary to

decide that question 'because there was some evidence offered by the plaintiffs which would reasonably sustain a judgment in their favor, without the aid of the rule of res ipsa loquitur'. Kelly v. McKay, Tex. Sup., 233 S.W.2d 121, 122.

The matter upon which the proof was held deficient in Stanolind Oil & Gas Co. v. Lambert, supra, and which was assumed as a matter of general knowledge in McKay v. Kelly, supra, was affirmatively proved by the defendant itself in the present case. Its [**7] expert witness, Dart Wantland, testified that the maximum charge of explosive claimed to have been used, namely a 50 pound charge of gelatin explosive, discharged at a distance of 600 feet (46 feet closer than the distance involved here) will have a tremor effect of only 4/1000ths of an inch, and will not have any effect on a well or on the water supply flowing to it.

It would seem to follow that if in fact the plaintiff's well was [*293] injured as a proximate result of the explosion that there must have been some negligence on the part of the defendant. Under the peculiar facts and circumstances of this case therefore, the evidence was sufficient to prove the negligence charged in the complaint, if it was sufficient to prove the casual connection between the explosion and the damages to plaintiff's well.

We come then to the appellant's second contention as to whether the evidence was sufficient to support a finding that the damage to plaintiff's water well was the proximate result of the explosion. See Young v. Massey, 128 Tex. 638, 101 S.W.2d 809. We think that there was substantial evidence that the blasting by defendant was a proximate cause [**8] of plaintiff's damages. For 32 years prior to the blasting the waterwell had been an unusually strong well. It had 'sanded in' in 1943, not because of a loss of water, but because the cylinder became clogged up so that the available water could not be produced.

When it was cleaned out on that occasion the well produced as much water as ever. On the present occasion, within ten days after the blasting, or apparently when the stored water was used up, it was discovered that the well had gone dry. It has never produced water again although nearly two years elapsed prior to trial.

As its third and last contention, the appellant insists that there was not sufficient evidence as to the amount of plaintiff's damages to support the judgment of the district court. An expert witness as to the values of real estate in that vicinity testified that the reasonable market value of the plaintiff's land at that time was about $ 75.00 an acre, and that after the water well went dry the reasonable market value of that land would be about $ 65.00 an acre. The defendant offered no evidence to dispute this testimony.

The plaintiff had prayed for a recovery of only $ 3,175.00 and his [**9] recovery was so limited. We think that there was sufficient evidence to authorize the court to find that plaintiff's land had suffered a permanent injury. Although the well had been an unusually good well since 1917 it went dry in 1949 shortly after defendant's nearby blasting and remained dry until the time of trial.

A little seep spring close by was also dry with only stagnant water. Water in that area is difficult to locate by putting down new wells. The plaintiff had previously drilled two deep wells in the nearby vicinity without success. We do not think that there was any necessity or reason to clean out the well because it had not caved in, the water supply had simply disappeared. The plaintiff tried to obtain another water supply by building a

large surface tank but this source of water was inadequate and since 1949 it has been necessary to have water hauled to the plaintiff's land from Winters, Texas, ten miles away, at a cost of $ 3.50 per load.

The only other available water is a small surface stock tank on the other side of the farm. We conclude that the evidence was sufficient to show that the plaintiff's land had been permanently injured and that [**10]if claimed a larger recovery would have been justified.

Finding no error in the record, the judgment is affirmed.

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Stanolind Oil & Gas v. Giles

Notes and Discussion

1. With regard to the use of res ipsa as a legal theory, how is this case differentiated from many oil and gas related cases?

# Part 2 - COMMON LAW LEGAL THEORIES & ENVIRONMENTAL DAMAGE (con't)

## Chapter 4: Negligence Per Se & Strict Liability

NEGLIGENCE PER SE & STRICT LIABILITY

i. Negligence Per Se

A common definition of negligence per se is as follows:

> The violation of a statute, ordinance, or administrative rule or regulation may constitute negligence as a matter of law. The court may accept the regulation as defining the standard of conduct for a reasonable person, therefore establishing the level of duty owed

The State of Oklahoma enacted one of the first statutes that addresses oil and gas wastes. Adopted right after statehood (1910) the statute provides as follows:

> § 296. Refuse from wells--Disposition
>
> *No inflammable product from any oil or gas well shall be permitted to run into any tank, pool or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall it be permitted to flow over the land. Saltwater shall not be allowed to flow over the surface of the land.*

It should be no surprise that many early environmental cases utilizing the negligence per se theory originated in Oklahoma. The following case is one where the surface owners used Section 296 to their advantage.

**********

WILCOX OIL CO. v. WALTERS
Supreme Court of Oklahoma
284 P.2d 726; 4 Oil & Gas Rep. 1129
May 10, 1955

PER CURIAM. The plaintiffs, in petition, alleged they were conducting farm and dairy operations upon certain leased land during a certain year, and that during the time the defendant was producing, separating and storing oil from and upon said lands, and that the defendant in its operation negligently permitted base sediment, oil, salt water and other poisonous substances to escape from its separation tanks and earthen reservoirs to and upon the plaintiffs' pasture lands and into a stream on the premises and from which plaintiffs' cattle drank, and with resulting loss and damages to the plaintiffs specified as follows:

1. Loss of cattle $ 1000.00
2. Decrease in value of cow 100.00
3. Loss of pasture 50.00
4. Medical bills, medicine and special feeding 390.00
5. Loss of milk 1000.00

Total $ 2540.00

The plaintiffs prayed judgment against the defendant upon their first cause of action in the amount of $2,540.

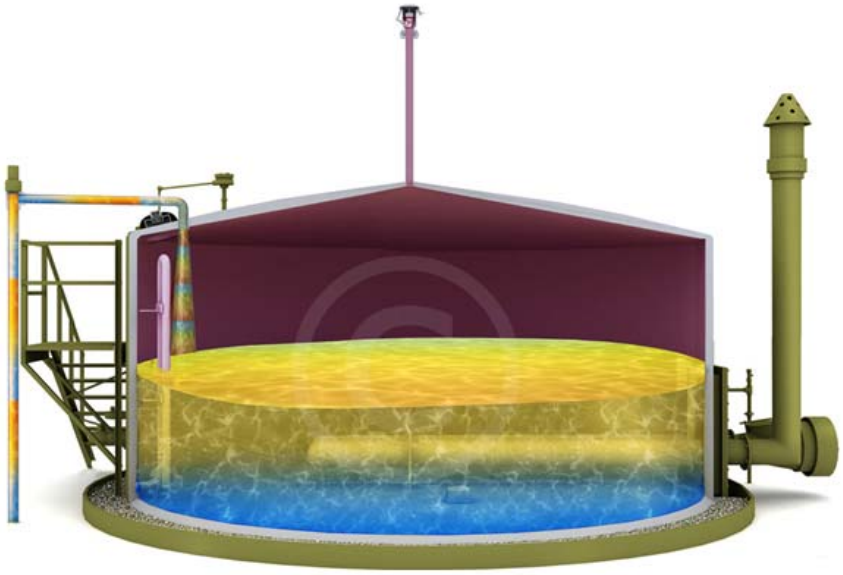
In the said petition, and under designation of second, third and fourth causes of action, the plaintiff alleged other and further acts of the defendant as the cause of loss and damage to the plaintiffs in specified amounts, and for a fifth cause of action that all the acts and omissions of the defendant as set forth in the said petition occurred through gross negligence and malice of the defendant. In final paragraph of their petition the plaintiffs prayed for punitive damages in such an amount that together with the actual damages sustained by the plaintiffs should total a sum of $ 3,000.

At trial at the close of the plaintiff's evidence a demurrer to the evidence was sustained as regards plaintiffs' second, third, fourth and fifth causes of action. The demurrer as directed to the plaintiffs' first cause of action was overruled.

Trial resulted in verdict for the plaintiffs in the amount of $ 2,540, and judgment was entered in accord with the verdict.

The defendant contends the trial court erred in failing to sustain the defendant's demurrer to plaintiffs' first cause of action for the reason that the facts in pleading give rise to several causes of action.

Attention is directed to allegations of the petition to the effect that the defendant permitted the escape of salt water from its separation tanks to flow over the surface of the plaintiffs' pasture, and that the defendant ran salt water from its pipe line into a stream from which the plaintiffs' cattle drank, and the defendant so constructed an earthen reservoir tank on the edge of a creek that salt water escaped therefrom into the stream and that the defendant placed large amounts of salt water and other poisonous substances from its oil well into an open reservoir and because of a failure to burn or transport the substances from the premises a freshet washed the base sediment over the surface of the plaintiffs' pasture.



Using separation tanks or related equipment crude oil separates from the basic sediment and produced water (known as 'BS & W). The oil, being lighter, floats on the surface while the produced water and basic sediment fall to the floor of the tank. Periodically the basic sediment at the bottom of the tank will be shovelled out or otherwise removed by the operator.

It is suggested that all of these allegations refer to separate and distinct acts or omissions on the part of the defendant, and each or any of which, if true, gave rise to a separate cause of action. Reference is made to 12 O.S.1951 @ 266, which provides:

'Where the petition contains more than one cause of action each shall be separately stated and numbered.'

Reference is also made to 12 O.S.1951 @ 267, which provides:

'The defendant may demur to the petition * * * when it appears on its face * * *:
'That several causes of action are improperly joined.'

12 O.S.1951 @ 265 provides:

'The plaintiff may unite several causes of action in the same petition * * * where they all arise out of any one of the following classes: * * *

'3. Injuries, with or without force, to person and property, or either. * * *

'But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, * * *.'

Thus, in statute, @ 265, supra, joinder of causes of action is authorized in certain circumstances. In the succeeding provision, @ 266 supra, the manner of the pleading of several causes of action in the same petition is directed. Section 266 provides a statutory right in favor of the defendant which may be waived by the defendant, and where the petition fails to comply with the statute, and the defendant fails to move for amendment to comply with the same, the right is waived. Gallemore v. Buzzard, 98 Okl. 104, 224 P. 293.

Obviously, a demurrer to a petition does not present a question of failure to separately state and number causes of action. The only question presented by the defendant's demurrer was whether or not a cause of action was stated and whether or not several causes of action are improperly joined. It is admitted that several causes of action were stated.

In their petition the plaintiffs alleged negligence of the defendant in several acts or omissions, and that each said act or omission was a cause of injury to the plaintiffs' property. Thus the petition reflects that the several causes of action stated therein all arise out of injuries to the plaintiffs' property and are such as affect all the parties to this action.

Under express provisions of section 265, supra, causes of action arising out of injuries to property, affecting all the parties to the action, may be united in the same petition. The defendant complains of an opening statement of plaintiffs' counsel not within the issues, and of the conduct of plaintiffs' counsel in asking improper questions during course of the trial.

We have examined the record and note that the trial court was prompt in admonishing the jury to disregard statements of counsel not within the issues, and prompt in sustaining objections, and in admonishing counsel, witnesses, and the jury, concerning improper questions, statements and answers.

It might be said that there was some misconduct of counsel in opening statement and in examination of witnesses, but we are not impressed that the verdict was substantially influenced thereby, or that the defendant suffered prejudice as to be denied a fair trial.

The defendant contends the evidence is insufficient to support the verdict and judgment; that the evidence failed to establish that defendant was negligent in operation of its leasehold, or that defendant's negligence, if any, was the proximate cause of plaintiffs' injury; that the evidence failed to establish damages suffered by the plaintiffs lawfully recoverable from defendant; that the verdict and judgment were excessive.

There was testimony to the effect that during the year involved the plaintiffs operated a dairy on the premises involved under an agricultural lease of the premises. The plaintiffs owned twelve milk cows which grazed on the premises and the plaintiffs received an income from the sale of cream produced by the cows.

The defendant maintained an earthen reservoir on the premises in which it stored salt water and other oil well refuse. The reservoir was formed in part by an earthen dam constructed of sandy soil, and salt water seeped through the same from the reservoir and flowed into a creek or natural watercourse on the premises. The defendant also maintained oil separation tanks on the premises and permitted salty water therefrom to flow into the creek or natural watercourse. The plaintiffs' cattle drank from the natural watercourse.

Beginning in June the cows became sickened and began rapidly to lose weight and dry up in their production of milk. A veterinarian was called to treat the cows. The veterinarian testified that he had practiced in an oil field area for more than twenty years; that plaintiffs' cows had all the symptoms of salt water poisoning; that he prescribed certain medicines and special feeds for the cows; that the cows were underweight and in such condition as to be capable of but little milk production and were of a physical condition that they would likely abort their calves; that the cows responded to his prescribed treatment only in that they did not die, and that their aforesaid poor physical condition became permanent; that five of the cows aborted calves; that he visited the creek on the premises and observed salt and oil and cow tracks along the banks of the creek; that he tested the water in the creek and found it too salty to be consumed by livestock.

In Sun Oil Co. v. Hoke, 197 Okl. 261, 169 P.2d 753, it was held:

> 'An operator of an oil and gas leasehold owes a duty to the holder of an agricultural and grazing lease on the same lands not to permit the escape of oil, salt water and other deleterious substances coming from its wells as waste matter to flow, by seepage or otherwise, upon and across the grazing lands so as to poison and pollute the fresh water supply to which the livestock of the surface lessee have access, and where this duty is not performed and by reason thereof injury and damage result to such livestock liability exists to make compensation to their owner for such injury and damage.

In statute 52 O.S.1951 @ 296, it is required that all waste of oil and refuse from tanks or wells shall be drained into proper receptacles and be immediately burned or transported from the premises and in no case shall the same, or salt water, be allowed to flow over the surface of the land. The statute is a penal statute, see 52 O.S.1951 @ 303. A violation of the statute constitutes negligence and a violation resulting in an injury to another constitutes actionable negligence. Texas Co. v. Belvin, 207 Okl. 549, 251 P.2d 804.

Herein, from the testimony above noted, it appears there was sufficient evidence to authorize a finding that the defendant allowed oil and salt water to escape in violation of the above statute, and with resulting injury to the plaintiffs' cows. However, we find no sufficient evidence to support the judgment in the full amount for which it was entered.

Although there was some evidence to support a conclusion that all twelve of the plaintiffs' cows were injured, and permanently, and so depreciated in value, there was no proof under which damages for permanent injuries could be measured except in the instance of one cow.

In Deep Rock Oil Corp. v. Griffeth, 177 Okl. 208, 58 P.2d 323, it was held:

'Where cattle are damaged and depreciated in value as a result of [*730] drinking water from a polluted stream, the measure of damages is the difference between the reasonable market value of said cattle immediately prior to and subsequent to the injury.'

The foregoing rule is here applicable. Herein there was evidence to show the difference between the reasonable market value of one cow immediately prior to and subsequent to injury, and that difference was shown to be $ 100. Otherwise the only evidence affording a basis of calculation of financial detriment suffered by the plaintiffs rests in testimony concerning expenditures by the plaintiffs in treatment of their sickened cows, and that there was a loss of produce of the animals after they became disabled.

In Carter Oil Co. v. Means, 180 Okl. 585, 71 P.2d 705, it was held:

> 'A property owner seeking to recover damages for injury to real property has the burden of proving every fact essential to establish his cause of action, including the basis upon which a jury may calculate the financial detriment.'

The above rule is applicable in the recovery of damage for injury to personal property.

In this connection, according to testimony, before the plaintiffs' cows became sick their production of cream was such that plaintiffs derived an income therefrom in amount of $ 25 to $ 30 per month. After the cows became sick the production from said cows was such that plaintiffs derived income therefrom averaging $2.50 per each two weeks. The plaintiffs paid out $ 80 for veterinary services, and on advice of the veterinarian the plaintiffs bought medicines and special feeds for the cows; the special feed at a cost of $ 10 per week.

From testimony concerning the time the plaintiffs' cows became acutely weakened and their continuing condition thereafter it may reasonably be inferred that the plaintiffs' reduced income and their expenditures for special feeds commenced in June, and continued for the balance of the year.

With loss of income calculated at $ 20 per month for six months and with expenditures for special feeds calculated at $ 40 per month for six months, and with $ 80 for veterinary fees, added and with $ 100 added as the measurable damages for permanent injuries to one cow, it is made to appear that the plaintiffs suffered a pecuniary loss of $ 540. Such appears to be the maximum of the financial detriment suffered by the plaintiffs that is calculable from the evidence. Accordingly we find the verdict and judgment for the sum of $ 2,540 is excessive to the extent of $ 2,000. We

find that a recovery of $ 540 in favor of the plaintiffs and against the defendant is authorized by the evidence.

The defendant asserts error in the statement of the case as given by the court in the instructions to the jury, and error in certain of the instructions given to the jury, as including issues not sustained by evidence.

In the circumstances herein, that the judgment on the verdict of the jury is fully susceptible of correction, and must be corrected to exclude all items of damages tendered in pleadings and stated in the instructions, and which were not sustained by the evidence, we do not perceive that the defendant has suffered a substantial prejudice in the instructions given, and, accordingly hold that the errors in the instructions, if any, are rendered harmless.

For the reasons hereinbefore noted, the judgment in favor of the plaintiffs is affirmed for an amount of $540, on condition that plaintiffs file remittitur in the amount of the judgment that was entered which exceeds the sum of $ 540, otherwise the judgment is reversed for new trial.

JOHNSON, C. J., WILLIAMS, V. C. J., and WELCH, CORN, DAVISON, HALLEY, BLACKBIRD and JACKSON, JJ., concur.

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Wilcox Oil v. Walters

Notes & Discussion

1. What impact does the violation of a statute or regulation have on the landowner's allegation of negligence?

2. In Wilcox, if salt water percolated underground to a stream would it be considered negligence per se?

3. If a party drove his truck off a bridge and drowned in a pool of salt water which was deposited there in violation of a statute such as 52 O.S. §296, would the operator be liable to the heirs? See: Sinclair Prairie Oil Co. v. Stell, 124 P.2d 255 (Okla. 1942).

4. In Rodriguez v. American Cyanamid Co., 858 F.Supp. 127 (D.C. Ariz. 1994) the court noted as follows:

> A statutory violation is negligence per se if the court allows the statute to stand in for the reasonable standard of conduct. The infraction then constitutes a deviation from the standard of care, and the plaintiff need not prove the existence of a duty and a breach. Arizona courts follow the rule set forth in the Restatement of Torts. See, e.g., Carrillo v. El Mirage Roadhouse, Inc., 164 Ariz. 364, 369, 793 P.2d 121 (App. 1990). Under the Restatement:
>
> > The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part:

(a) to protect the particular class of persons which includes the one whose interest is invaded,
(b) to protect the particular interest which is invaded, and
(c) to protect that interest against the kind of harm which has resulted, and
(d) to protect that interest against the particular hazard from which the harm results.

Restatement (Second) of Torts @ 286 (1965).

5. In Cleary Petroleum v. Copenhaver, 476 P.2d 327 (Okla. 1970), the court discussed 52 O.S. 1961, §296, noting:

> The statute by its terms prohibits pollution from oil and gas wells. Defendant cites two cases where the statute was held restricted in view of those terms to pollution from wells, but inapplicable therefore to pollution from refineries, or from pipelines. Johnson Oil & Refining Co. v. Carnes, 174 Okl. 599, 51 P.2d 811 (1935), and Gulf Pipeline Co. v. Alred, 182 Okl. 400, 77 P.2d 1155 (1938). Defendant also cites Tidal Oil Co. v. Pease, 153 Okl. 137, 5 P.2d 389 (1931), wherein this Court indicated that the statute was inapplicable to pollution confined to pits or ponds located on the operator's own premises.
>
> The present case, however, does not come within any of the preceding exceptions to the statute since the pollution here emanated from a plugged and abandoned well located upon Defendant's waterflood lease and thereafter entered a stream crossing Plaintiff's pasture. The Defendant's arguments and authorities cited, therefore, fail to demonstrate the statute's inapplicability . . .

Why would this statute be inapplicable to pollution from refineries, pipelines, or from ponds located on the operator's own premises? Note that the express language of the statute defines what constitutes negligence per se.

Gulf Oil Corp. v. Alexander
Court of Civil Appeals of Texas, Amarillo
291 S.W.2d 792; 6 Oil & Gas Rep. 457
June 4, 1956

Appellee, Bob Alexander, owns a 372 acre farm adjoining the leasehold of appellant, Gulf Oil Corporation. The freshwater strata underlying appellee's farm and supplying his irrigation well was polluted by the seepage of salt water from a salt water disposal pit constructed and used by appellant in oil and gas operations on its leasehold adjoining appellee's farm land. Appellee sued for damages accruing to him by reason of the pollution of the freshwater strata as used by him in irrigating his farm lands and recovered judgment in the sum of $22,320. Appellant perfected its appeal based on three points of error.

The undisputed evidence reveals that appellant's disposal of its salt water polluted appellee's supply of irrigation water. But, appellant by its three points of error asserts that it is not liable for appellee's damages by reason of the fact that there is no evidence of any negligence in its disposal of the salt water and that appellee's cause of action is barred by the two year statute of limitations, Vernon's Ann.Civ.St. art. 5526. As to the issue of negligence, appellee asserts that the evidence sustains the jury findings on such issue and, further, that its pleading and proof that appellant violated Rule 20 as promulgated by the Railroad Commission renders appellant liable for the damage accruing to appellee.

Appellant's first point of error alleging there is no evidence to sustain the jury finding that appellants were negligent in disposing of the salt water requires an examination of the record in the light of the applicable rules. The record reveals that a large quantity of salt was deposited in the disposal pit on appellant's leasehold.

Appellee relies on this fact as supporting the jury finding of negligence. The evidence also reveals that the top layer of soil in the disposal pit was of a porous nature. On the issue of whether there is any evidence of negligence, the fact that a large quantity of salt was deposited in the disposal pit is not evidence of negligence in itself. The record is wholly silent as to whether this amount of salt was so excessive as compared to the amount of salt deposited in other disposal pits in the oil field as to require appellant to take additional measures to contain the same. There is also no evidence that the soil where the pit was constructed was more porous than the soil in other disposal pits in the oil field and required additional care as to construction of the pit.

The undisputed evidence reveals that appellant's method of disposal of the salt water was the universal method of disposal in the oil field in that territory. In fact, like disposal pits were located on appellee's tract ofland. Since the uncontroverted evidence establishes that appellant's disposal of the salt water was wholly in conformity with the conduct of such business in that oil field there is no evidence in the cause establishing negligence in its usual sense. Houston & T.C.R. Co. v. Alexander, 103 Tex. 594, 132 S.W. 119.

The above ruling requires the examination of another principle of law as to liability or non-liability under the facts in the cause. Appellee pleaded and proved that Rule 20 as promulgated by the Railroad Commission of Texas makes the following requirement with reference to the disposal of salt water:

> "Fresh water, whether above or below the surface shall be protected from pollution, whether in drilling, plugging or disposing of salt water already produced."

It is apparent this rule specifically prohibits the pollution of fresh water by the disposal of salt water without any reference to negligence. Since appellant admits, as established by the undisputed record, that it polluted appellee's fresh water strata with salt water, appellant is liable for such pollution by reason of its violation of Rule 20 above set forth. This principle is recognized in Peterson v. Grayce Oil Company, Tex.Civ.App., 37 S.W.2d 367 (Syl. 3) in the following language: "It is our conclusion that there is no merit in the contention [*795] that the alleged violation of Rule 40 of the Railroad Commission could not be made the basis of plaintiffs' asserted right of recovery of actual damages on the ground that the delegation of authority to enact the rule was in violation of the Constitution."

This cause was affirmed on other grounds by the Supreme Court in 128 Tex. 550, 98 S.W.2d 781. The same case was likewise cited as an authority by the Supreme Court in Elliff v. Texon Drilling Company, 146 Tex. 575, 210 S.W.2d 558 (Syl. 2, 3), 4 A.L.R.2d 191. Turner v. Big Lake Oil Company, 128 Tex. 155, 96 S.W.2d 221, 223, further substantiates the above principle by the following ruling: "'In the absence of some positive law forbidding or regulating the keeping or use of the thing, the fundamental question is one of negligence vel non'". (Italics added.)

In the light of the above authorities, it must be observed that the rule at issue in the cause here on appeal is not a legislative enactment but it is a rule duly promulgated by the Railroad Commission of Texas under express authority from the legislature. There is no proof of negligence in the cause other than might arise from the undisputed proof that appellant in polluting appellee's fresh-water strata violated a duty placed on it by Rule 20. Irrespective of any technical discussion of the principles of negligence, it is ruled that the violation of Rule 20 by appellant in polluting the fresh water supply of appellee's irrigation well gave right to the cause of action on the part of appellee for his damage suffered by reason of such violation.

On the issue of limitation, the jury found that salt water from appellant's salt water disposal pit invaded water bearing formations underlying a part of plaintiff's land more than two years prior to August 1954. (Italics added.) But, the jury further found that the appellee first discovered the invasion of the subsurface fresh-water strata by salt water on March 1, 1953. Plaintiff's original petition was filed on August 1, 1954. In support of the last finding by the jury the evidence reveals, without dispute, that appellee drilled his irrigation well and used the same for irrigation purposes without the same being polluted in any way by salt water until he discovered the same was first polluted on or about March 1, 1953. It is apparent that had the appellee continued the use of his irrigation well without any salt water ever having intruded the area of strata from which appellee was pumping irrigation water, he would have had no cause for complaint as to any damage to his irrigation water.

The two year statute of limitation is applicable to appellee's cause of action for pollution of the subsurface strata of water furnishing his irrigation well. Such statute of limitation began to run on March 1, 1953, the date on which the uncontroverted evidence reveals that appellee discovered that the water as pumped for irrigation was polluted by salt water.

The rule as applied here as to pollution of appellee's subsurface strata of water is that limitation ran from the time the injury complained of became apparent or should have been discovered by

due diligence on the part of the appellee. Beck v. American Rio Grande Land & Irrigation Co., Tex.Civ.App. 39 S.W.2d 640; Wichita County Water Improvement Dist. No. 1 v. Pearce, Tex.Civ.App., 59 S.W.2d 183; Kolberg v. Hidalgo County Water Improvement Dist., Tex.Civ.App., 110 S.W.2d 961; Cities Service Gas Co. v. Eggers, 186 Okl. 466, 98 P.2d 1114, 126 A.L.R. 1278; Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336, and like authorities cited by appellant, are not applicable to an issue as to subsurface water pollution by salt water intrusion.

In the light of the court's application of Rule 20, appellant's first point is held to be without merit and overruled. Appellant's second and third points as to limitation are likewise overruled. The judgment of the trial court is affirmed.

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Gulf Oil Co. v. Alexander

Notes & Discussion

1. Was Gulf Oil's method of disposal the customary method to dispose of produced water at the time of the case? Was Gulf Oil negligent in the customary sense - was their practice any different than what was customary in the industry?

2. What Railroad Commission rule did Gulf violate? Does it matter that this was a regulation and not a statutory provision?

3. How can an operator protect itself from liability for produced water contamination of fresh water irrigation wells?

4. In 1919 Statewide Rule 20 was adopted by the Texas Railroad Commission:

> *Fresh Water to be Protected - Fresh water, whether above or below the surface, shall be protected from pollution, whether in drilling or plugging.*

In 1933, Rule 20 was amended to require the protection of fresh water from oil and gas production activities. In 1964, Rule 20 was further amended and renumbered as Statewide Rule 8. Rule 8 has been amended at least five times since 1964 to prevent specific practices that may cause pollution.

5. The Texas Supreme Court reviewed this decision at 295 S.W.2d 901, and upheld the lower court decision with the following opinion:

> OPINION: Although both parties have filed applications for writs of error, it is evident that Bob Alexander, who was successful in both of the courts below, only seeks to preserve the judgment in his favor. We have concluded that there is evidence to support the jury findings of common law negligence and proximate cause, and both applications are denied with the notation "Refused. No reversible error."

This order must not be taken as indicating either approval or disapproval of the views expressed by the Court of Civil Appeals as to the legal effect of Rule 20 promulgated by the Railroad Commission of Texas. 291 S.W.2d 792

Opinion delivered October 24, 1956.

Why might the court want to affirm the lower court decision in this manner?

Murfee v. Phillips Petroleum Co.
Court of Civil Appeals of Texas, Eighth District, El Paso
492 S.W.2d 667; 46 Oil & Gas Rep. 78
February 21, 1973

This is a water pollution case filed by the appellants as owners of the surface estate of a seven section ranch against the four appellees who were the oil and gas lessees and producers thereon. The action was for depreciated market value of the land, due to negligence and proximate cause for the salt water pollution of the underground water supply caused by the lessees' disposal of produced brine in unlined earthen surface disposal pits located on the seven sections.

Trial was to a jury, and based upon the jury's findings to the 81 submitted special issues, judgment was entered by the trial Court that the plaintiffs-appellants take nothing. We affirm the judgment of the trial Court.

The seven sections are largely in Upton County though a portion of the property is in Reagan County. The original oil and gas lease, under which the lessees and operators acquired their interests, was executed in March, 1945, by B. Sherrod and his wife, as lessors. Partial assignments of the lease were thereafter acquired by appellees, Ashland Oil & Refining Company, Paul F. Barnhart, and Sunray DX Oil Company, Sun Oil Company being the latter's successor by merger.

Oil was discovered under the lease in 1951 and the lessee operators drilled and completed some 35 oil wells on the property, mainly during the years 1951 and 1952. Commencing in 1951, some 17 unlined surface pits were constructed on the seven sections by these three appellees and were used to dispose of the oil field brines produced from the wells.

Throughout the 1950's there was no market for produced brine, and the prevailing custom and practice in the area was to dispose of the salt water in surface pits. It is undisputed that during the period of oil operations on these lands that the defendants deposited between five to eight million pounds of pure salt into the various pits on the ranch.

Before the execution of the oil and gas lease and thereafter for many years, the surface of the land had been used only for grazing, which was the usual surface use of the land in that portion of Upton and Reagan Counties. About the year 1956, a surface tenant drilled a water well in the northeast quarter section of that section lying in the most northeasterly corner of the 4,480 acre ranch. This water well was drilled some 224 feet from a salt water disposal pit constructed and used originally by Paul F. Barnhart.

The 160 acres in this quarter section was broken for cultivation and was farmed thereafter for two years, when the farm and the water well were abandoned. This so-called "1956 Sherrod irrigation well" was uncased and unplugged and remained as an abandoned well for approximately seven years, until November 15, 1963, when the plaintiffs below attempted to rehabilitate it and determined that its water was salty and was ruined for irrigation purposes. After November 16, 1963, and before the trial, the appellants had completed and their tenants had used four additional irrigation wells on this same northeast quarter section, each of which well is presently producing unpolluted water. In addition, two other water wells were completed on the ranch and these together with four existing windmill wells thereon are producing fresh water.

During July of 1962, the North Pembrook Sprayberry Unit was completed, and thereafter all operations on the seven section ranch were conducted by appellee, Phillips Petroleum Company, under the control and supervision of the working interest owners. For a period of more than a year thereafter and until a Railroad Commission "no pit" order became effective, Phillips continued to dispose of salt water in some of the pits which had been constructed and used by Sunray, Ashland, and Barnhart.

By deeds, dated December 10, 1962, and January 2, 1963, B. Sherrod and his wife conveyed to their daughter, Mrs. Murfee, and the three Murfee children the seven sections excepting and reserving to the grantors all oil, gas and other minerals, the conveyances being also made subject to all oil and gas leases. It was on November 15, 1963, that the plaintiff below, Mr. Murfee, tested the water in the 1956 Sherrod irrigation well and discovered that the well was salty.

After discovering the pollution in this irrigation [*671] well, the appellants drilled three additional test wells by which they contended that they discovered additional salty and polluted subterranean water. These will be referred to as the Murfee test holes. The three test wells were drilled near the center of the sections lying to the west, the southwest and to the south of the section where the 1956 Sherrod water well was located. The appellees contend that these three test wells were purposely drilled near existing salt water disposal pits, that they were left uncased and unprotected and that it was through these uncased test holes that salt water also reached and polluted the fresh water.

The physical characteristics of the subsurface of the ranch are uniform and agreed upon. The top soil extends down to a depth of 6 feet. Beneath the top soil is then found a layer of caliche some 20 feet thick with approximately 30 percent porosity. Beneath the layer of caliche is a zone of limestone. This limestone barrier is approximately 100 feet thick over the entire ranch. It is beneath the limestone barrier that the Trinity fresh water sand is located. This sand is some 200 feet thick and is the only source of fresh water found under the ranch.

The crucial dispute concerned the nature of the 100 foot limestone barrier covering the Trinity fresh water sand. Appellants' hydrologists were of the opinion that the salt water deposited in all of the salt water pits was gradually penetrating and working its way down through the limestone barrier into the fresh water sand, and that there was an area of contaminated fresh water associated with each of the salt water pits which would progressively increase through the years. The hydrologists and geologists for the appellees maintained that the layer of limestone acted as an impenetrable and impervious barrier over the entire ranch and fully protected the Trinity fresh water sands. They were of the opinion that the salt water placed in the disposal pits became permanently lodged in the layer of porous caliche beneath the general area of each pit; that the salt water would move laterally in the caliche above the limestone barrier, and some brine encountered the open uncased and unplugged 1956 Sherrod irrigation well and the three open and uncased Murfee test holes, and gravity then took the salt water down these open holes to the Trinity sands.

The appellees' hydrologists were also of the opinion that had the 1956 Sherrod irrigation well and the three Murfee test holes been properly cased and cemented there would have been no contamination of the fresh water supply. As pointed out, the opinion testimony of the respective

experts differed. However, they all agreed that except for the three Murfee test holes and the 1956 Sherrod water well there was no proven pollution on any part of the seven section ranch.

The appellants alleged the following acts of negligence against the appellees:

"A. The Defendants negligently permitted salt water to escape from their pits.
B. The Defendants negligently permitted salt water to penetrate into the sub-surface fresh water strata of Plaintiffs' land.
C. The Defendants negligently permitted salt water to collect in surface pits from which they knew, or in the exercise of ordinary care, should have known, such salt water would escape and percolate into and pollute Plaintiffs' fresh water supply.
D. The Defendants negligently failed to adopt any effective method of disposing of their salt water to prevent pollution of fresh water stratas.
E. The Defendants negligently permitted salt water to drain onto Plaintiffs' land and pollute fresh water stratas.
F. The Defendants in so disposing of salt water in open, unlined, surface salt water disposal pits that would not hold and retain water and thereby allowing it to percolate and to seep into and pollute the sub-surface strata and water sands, violated Rule 20 of the Railroad Commission of Texas which was duly adopted promulgated and published by said Commission and became effective on October 17, 1933, which rule reads as follows:

> 'Fresh water, whether above or below the surface, shall be protected from pollution, whether in drilling, plugging or disposing of salt water already produced.'

That the violation of such rule constitutes negligence both at common law and negligence per se, and negligence as a matter of law."

In addition to these acts of ordinary negligence, Phillips Petroleum was alleged to have committed gross negligence by disposing of the salt water after November, 1963, and after being advised by the appellants that pollution was occurring.

Among the defenses raised by the appellees, they pled generally the contributory negligence of the appellants and of their predecessors in maintaining the 1956 Sherrod irrigation well and the three test holes as open, uncased and uncemented holes, thereby permitting the salt water to escape from the caliche layer through these holes down to the Trinity fresh water sand.

In short, the case which the plaintiffs sought to make was not for the loss of the 1956 Sherrod irrigation well, nor for damages to the quarter section on which this polluted well was located, but was for diminution of the market value of the entire seven section ranch on the theory that foreseeably, and by gravity alone, the salt water from each of the 17 disposal pits had penetrated the rock of the subsurface strata and had reached and already polluted the fresh water generally under the land or that the salt water would reach and pollute the fresh water generally in the future.

As stated, the theory of the defendants was that the fresh water was protected from any pollution by the impenetrable limestone barrier and that any pollution of the fresh water was brought about by the contributory negligence of the defendants.

Summarizing the jury findings, it may be said that the jury refused to find that either the plaintiffs or the defendants were negligent until after the salt water pollution was discovered in the Sherrod irrigation well in November, 1963; that thereafter only the defendant Phillips was negligent, but that likewise the plaintiffs were contributorily negligent, the negligence of both Phillips and of the plaintiffs being a proximate cause of the water pollution. In addition, the jury determined that the plaintiffs' land "had not been damaged" by reason of any pollution of the fresh water proximately caused by the respective defendants. On these findings, in this negligent action, the trial Court entered judgment for the defendants.

As to the complaints on this appeal, we are first confronted by the appellants' principal contention contained in their first eight points that by the application of Rule 20 of the Railroad Commission together with applicable jury findings, each defendant has been convicted by the jury of committing acts which were negligent per se and which proximately caused the pollution of fresh water underlying the plaintiffs' land.

In the first three issues submitted, the jury found in the language of Rule 20 that in disposing of salt water on plaintiffs' land Phillips failed to protect from pollution the underlying fresh water; the jury then answered "no" to the accompanying negligence inquiry but then found that the failure to protect was a proximate cause of the pollution of the underlying fresh water. Duplicate answers were returned concerning the other three defendants in special issues Nos. 4 through 12.

The only Texas decision to date that has directly held that a violation of Rule 20 is negligence per se [*673] and entitles the plaintiff to a recovery without a finding by the jury of negligence is the Court of Civil Appeals opinion of Gulf Oil Corporation v. Alexander, 291 S.W.2d 792 (Amarillo 1956) ref. n.r.e., 156 Tex. 455, 295 S.W.2d 901 (1956). The Supreme Court, however, refused to pass on the question of negligence per se holding it was not necessary to decide for the reason that there was proof of common law negligence in the case.

The appellants' argument is concise and to the point. Violation of a statute, ordinance, or rule of a regulatory body is generally held to be negligence per se if the damage occasioned by violation of such statute, ordinance, or rule is the damage intended to be prevented by the passage of the rule. Gulf Oil Corporation v. Alexander, supra; Loeffler v. King, 228 S.W.2d 201 (Tex.Civ.App. -- Fort Worth 1950) rev'd on other grounds, 149 Tex. 626, 236 S.W.2d 772 (1951); Peterson v. Grayce Oil Co., 37 S.W.2d 367 (Tex.Civ.App. -- Fort Worth 1931), aff'd, 128 Tex. 550, 98 S.W.2d 781 (1936); Rozner v. Harrell Drilling Co., 261 S.W.2d 190 (Tex.Civ.App. -- Galveston 1953, writ ref'd n.r.e.); Parrott v. Garcia, 436 S.W.2d 897 (Tex.Sup. 1969); Missouri-Kansas-Texas Railroad Company of Texas v. McFerrin, 156 Tex. 69, 291 S.W.2d 931 (1956); William B. Patton Towing Company v. Spiller, 440 S.W.2d 869 (Tex.Civ.App. -- Houston (14th Dist.) 1969, no writ); Lewie Montgomery Trucking Co. v. Southern Pacific Company, 439 S.W.2d 691 (Tex.Civ.App. -- Houston (14th Dist.) 1969, writ ref'd n.r.e.); Holeman v. Greyhound Corporation, 396 S.W.2d 507 (Tex.Civ.App. -- Houston 1965, writ ref'd n.r.e.).

The intent of the Railroad Commission in the passage of Rule 20 was to prevent exactly the sort of damage that occurred here. Violations of other rules of the Railroad Commission by oil producers have been held to be negligence per se. The case of Peterson v. Grayce Oil Co., supra, established that a violation of Rule 40 of the Railroad Commission gave the right of recovery absent any finding of negligence. The rules of the Railroad Commission, including Rule 20, are statutory or legislative in character. Pickens v. Railroad Commission of Texas, 387 S.W.2d

35 (Tex.Sup. 1965); L & G Oil Company v. Railroad Commission of Texas, 368 S.W.2d 187 (Tex.Sup. 1963); and Harrington v. State, 385 S.W.2d 411 (Tex.Civ.App. -- Austin 1964) reversed on other grounds, Tex., 407 S.W.2d 467.

Appellees aim their reply to this argument at the generality of the rule and assert that the language of Justice Smith in the dissent in Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961) should be adopted when he stated that: "There must be something more than the wording of Rule 20 itself to impose both negligence and foreseeability upon the lessees . . . . I cannot conceive of this court holding that Rule 20, which simply says -- 'Thou shalt not pollute', can be treated as establishing negligence, much less proximate cause."

The following was stated by Allison and Mann in 13 Baylor L. Rev., at p. 212:

> "The rule is general in scope. On the other hand a rule could not possibly detail its application to each and every situation of salt water disposition made. It would be difficult to visualize a rule that would minutely cover every detail of every conceivable situation. The end result intended to be accomplished by the rule was the protection of fresh water. If the rule is violated it is a specific act which may or may not be negligence and may or may not be a proximate cause."

Without attempting to pass on the effect of Rule 20 in every case, it seems to us that the present facts call for a specific finding of negligence as a necessary basis for the establishment of liability. It was the contention of the defendants in the present case that the using of the salt water pits, without lining or other precaution was not negligence due to the 100 feet of impermeable subsurface material underlying the entire ranch and protecting the fresh water sands.

There was in effect a natural lining to the pits present, thicker and more durable than could conceivably ever be constructed by an oil operator. Reading of the charge and jury answers thereto reflect that this position was adopted by the jury. By special issues Nos. 13 through 32 the jury was asked a series of questions centered on the issue as to each defendant as to whether a portion of the salt water placed in the salt water disposal pits penetrated the sub-surface stratas. The jury returned negative answers as to each defendant. Again, in the damage issues, Nos. 41A through 41D, the jury was asked if the plaintiffs' land had been damaged by reason of the pollution of fresh water being proximately caused by each respective defendant. As to each defendant, the jury answered: "It has not been damaged."

A series of the issues submitted in Brown v. Lundell, supra, tracked Rule 20 and were similar to issues numbered 1 through 12 in the instant case. There the jury found that the salt water from Brown's disposal pit penetrated the sub-surface fresh water strata and also found that Brown, in disposing of the salt water, failed to protect (Rule 20) the fresh water strata from pollution, that such failures were negligence and that such negligence was a proximate cause. In affirming the case for the plaintiff, the Supreme Court while having an opportunity to apply Rule 20 decided the case as an ordinary negligence action without even discussing Rule 20 in the majority opinion. To the same effect see General Crude Oil Company v. Aiken, 162 Tex. 104, 344 S.W.2d 668 (1961).

We hold that under the present facts, a finding of negligence was necessary to base a cause of action. . . .

[discussion of contributory negligence and measure of damages omitted]

The trial Court charged the jury that "In connection with the definitions of 'negligence' and 'ordinary care',you are instructed that while compliance with a custom or conformity with usual and ordinary practices is not an absolute test of freedom from negligence, you may nevertheless properly consider the usual and customary practices of other operators engaged in the same or similar business and whether the defendants complied therewith, in determining whether any of the defendants was guilty of negligence." Complaint is made as to the adequacy of the instruction in that there should have been added that "A custom may, in itself, be negligent." This additional instruction was sufficiently covered. The charge was approved in Brown v. Lundell, supra. No error is shown.

We have considered all of the appellants' points and they are overruled. The judgment of the trial Court is affirmed.

DISSENT: Stephen F. Preslar, Associate Justice

I respectfully dissent and would reverse the judgment of the trial Court, in the belief that we are committed to apply Rule 20 of the Railroad Commission to this case, and that there is conflict in the issues found by the jury which requires a remand.

As to the application of Rule 20, the jury found that each defendant (issue No. 1) "in disposing of salt water on Plaintiffs' land . . . failed to protect from pollution fresh water underlying Plaintiffs' land," (issue No. 2) such failure was not negligence, and (issue No. 3) such failure was a proximate cause of the pollution of fresh water underlying plaintiffs' land.

In Gulf Oil Corporation v. Alexander, 291 S.W.2d 792 (CCA 1956), the Amarillo Court of Civil Appeals decided the exact question before us, so that we have the choice of following that decision or being in direct conflict with it. There is no distinction to be made between the two cases, except theirs was an adjoining landowner to the oil and gas lessee while ours is an owner of the surface only on the same premises as the oil and gas lessee. The distinction has no bearing under the theory on which the cases were tried. The Amarillo Court held that there was no evidence of negligence, but that the landowner was entitled to recover because of the violation of Rule 20, saying:

"In the light of the above authorities, it must be observed that the rule at issue in the cause here on appeal is not a legislative enactment but it is a rule duly promulgated by the Railroad Commission of Texas under express authority from the legislature. There is no proof of negligence in the cause other than might arise from the undisputed proof that appellant in polluting appellee's fresh-water strata violated a duty placed on it by Rule 20. Irrespective of any technical discussion of the principles of negligence, it is ruled that the violation of Rule 20 by appellant in polluting the fresh water supply of appellee's irrigation well gave right to the cause of action on the part of appellee for his damage suffered by reason of such violation."

As noted by the majority, the Supreme Court (156 Tex. 455, 295 S.W.2d 901) refused applications for writ of error in a Per Curiam opinion saying:

> "We have concluded that there is evidence to support the jury findings of common law negligence and proximate cause, and both applications are denied with the notation 'Refused. No reversible error.' This order must not be taken as indicating either approval or disapproval of the views expressed by the Court of Civil Appeals as to the legal effect of Rule 20 promulgated by the Railroad Commission of Texas. 291 S.W.2d 792."

Since the holding of another Court of Civil Appeals still stands, not being disapproved, it seems to me that the better course is for this Court to apply the law in accord with it. Also, it can be argued that the Supreme Court was in accord with the application of Rule 20, under some view, in their opinion in Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961) in which the evidence as to negligence was practically the same as in the case before us. In Brown v. Lundell, the majority opinion makes no mention of Rule 20, but the dissent makes a valid argument that the majority was applying it, without name.

In Brown v. Lundell, the parties were lesser and lessee in an oil and gas lease on the premises involved with certain of their rights and duties controlled by the lease. In fact, one imminent writer has observed that the dissenting opinion was founded principally on reasoning that it had not been demonstrated that the defendant used more land than was reasonably necessary, as allowed by his lease. Browder, The Dominant Oil and Gas Estate, 17 Sw.L.J. 25. Because of the application of Rule 20 by the Amarillo Court of Civil Appeals in Gulf Oil Corporation v. Alexander, and because of the language of the Supreme Court in Brown v. Lundell, I am of the opinion that we should apply Rule 20 in this case.

It is possible to resolve all conflicts in the jury findings except those pertaining to damage. There are findings that there was no damage. These conflict with findings that there was a diminution in market value, that the damage was permanent, that there was a failure to protect which proximately caused pollution, and that salt water ran down the walls of the Sherrod well into the fresh water formation.

Obviously the conflict between damage and no damage is a material one from which different judgments would result, and requires a reversal, if it cannot be resolved. By issues numbered 41A, 41B, 41C, and 41D, the jury found as to each defendant an issue like the following 41A:

"Do you find from a preponderance of the evidence that Plaintiffs' land has been damaged by reason of the pollution, if any, of fresh water under Plaintiffs' land, proximately caused by Phillips Petroleum Company."

Answer: "It has not been damaged."

By the very next issue, No. 42, the jury found that "the damage, if any, to Plaintiffs' land by reason of pollution, if any, of fresh water" is permanent. Conflict: The damage is permanent, but there is no damage. By issue No. 43, it was determined that the plaintiffs discovered salt water pollution in the irrigation well in the NE/4 of Sec. 44 on or about November 15, 1963. Conflict: There is salt water in the irrigation well, but no damage, by reason of pollution. By issue No. 44 it was determined that "the reasonable market value of plaintiffs' land immediately before such discovery of the salt water pollution," was $55.00 per acre. By similarly worded issue No. 45, it was determined the value of "Plaintiffs' land" was $45.00 per acre immediately after discovery of the

salt water pollution. Conflict: Salt water pollution reduced value of "Plaintiffs' land" by $10.00 per acre, but there was no damage to "Plaintiffs' land," by reason of pollution.

And as noted earlier, by issues Nos. 1 and 3, the jury found that the defendants failed to protect the fresh water from pollution, and such failure was a proximate cause of the pollution of such fresh water. Add to that the findings by issue No. 62:

"Do you find from a preponderance of the evidence that salt water reached the Trinity sand in the 1956 Sherrod irrigation well by running down the sides of the uncased hole?"

Answer: "We do."

The jury made additional findings as to this well: By issue No. 72 it was found that the cash market value of the one-quarter section on which it was located could not be restored to what it was prior to the discovery of salt in it by drilling additional wells, nor, (issue No. 74) by casing it and pumping thousands of barrels of water out. A conflict with the "no damage to plaintiffs' land" issues can only be avoided by taking the unreasonable position that pollution by salt of the fresh water in a well used for irrigation purposes does no damage. Even then, such untenable position would be in conflict with findings as to diminution of fair market value. Another way to avoid conflict would be to assume that when the jury found there was no damage to plaintiffs' land they were thinking only of the surface with its growing crops. This would be an unwarranted assumption in view of the plain use of the word "land" in each of the issues.

My summation of this case is that liability is established because the prior decisions discussed make applicable Rule 20 of the Railroad Commission and eliminate the necessity for a finding that the failure to protect was negligence. I make no determination as to the evidence on the negligence issue, but would simply follow the law as I believe it has been interpreted. This is more than a "thou shall not pollute" interpretation since it requires proof of a [*680] failure to protect which proximately causes pollution of fresh water. Ajudgment of remand is required because of the conflicts as to the damages.

[discussion of contributory negligence omitted]

I would reverse and remand this case.

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Murfee v. Phillips Petroleum Co.

Notes and Discussion

1. What Texas Railroad Commission rule applied in this case? Is a violation of this rule negligence per se? How did the court distinguish this case from the general rule?

2. Using the rationale of the majority in the Murfee case, how might a court interpret a violation of the following Oklahoma statute?

165:10-7-5. Prohibition of pollution

(a) General. Pollution is prohibited. All operators, contractors, drillers, service companies, pit operators, transporters, or other persons shall at all times conduct their operations in a manner that will not cause pollution.

3. In Schwartzman v. Atchison, Tokeka & Santa Fe RR Co., 857 F.Supp. 838 (D.C. New Mex. 1994), the court noted:

> Assertion of a negligence cause of action predicated on an alleged violation of a statute is little more than an attempt to assert a private cause of action for [**31] damages by privately enforcing the statute in question. "A negligence per se claim alleging a violation of [a statute] is little different than an implied right of action under [the statute] for money damages." Sanford Street Local Dev. v. Textron, Inc., 768 F. Supp. 1218, 1224 (W.D. Mich. 1991), vacated pursuant to settlement, 805 F. Supp. 29 (W.D. Mich. 1991).
>
> Under both theories, the overriding criterion is legislative intent. "Not every statutory violation gives support to a claim of negligence per se. Instead, a court must examine legislative intent. . . ." Fallowfield Dev. Corp v. Strunk, Nos. 89-8644, 90-4431, 1991 U.S. Dist. LEXIS 1699, at *23-24 (E.D. Pa. Feb. 11, 1991). "The issue of whether a plaintiff can assert a cause of action based on negligence per se is closely related to the question of whether a private cause of action exists under a statute. . . .Both . . . address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability." Lutz v. Chromatex, 718 F. Supp. 413, 428 (M.D. Pa. 1989). [**32]
>
> In addition, Restatement (Second) of Torts @ 288 (1977) expresses concern for legislative intent, and provides that a court should not adopt a statute as a standard of conduct when the legislature intended to protect the interests of the state, or when the legislature intended only "to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public . ." Id. at @ 288(b).

The court went on to note that many of the environmental statutes cited by the plaintiff in the case require a clean up but do not provide for money damages, therefore the application of negligence per se is not appropriate:

> In conclusion, Plaintiff's negligence per se claims predicated on violations of the New Mexico Hazardous Waste Act, Water Quality Act, and public nuisance statutes are dismissed. None of the statutes in question authorize, either implicitly or explicitly, recoverability of pecuniary damages by private litigants, and indeed such actions appear contrary to legislative intent.

Is such an analysis appropriate in the instant case?

FLORENCE HICKS, INDIVIDUALLY AND AS SURVIVING SPOUSE OF, AND FOR THE HOUSTON HICKS ESTATE, ET AL., Appellants v. HUMBLE OIL AND REFINING COMPANY, EXXON CORPORATION AND EXXON CORPORATION, D/B/A EXXON COMPANY USA, Appellees

970 S.W.2d 90; 1998 Tex. App. LEXIS 2816

May 14, 1998, Rendered

May 14, 1998, Opinion Filed

OPINION: Appellants (Hicks) appeal from a summary judgment for appellee (Exxon) in a damage suit. In three points of error, appellants contend the trial court erred in granting summary judgment because Exxon's summary judgment evidence was insufficient and there are genuine issues of material fact preventing summary judgment. We affirm.

I. BACKGROUND.

Exxon bought a 45 acre tract in Webster in 1921 and dug two unlined earthen pits on the property, and used the pits for storage of crude oil. Exxon covered the storage pits with wooden covers which were destroyed by a tornado. Exxon abandoned the use of the pits for oil storage after the tornadoes and subsequently sold the tract to Thomas H. Hicks for $ 600.00 in 1945.

Thomas Hicks gave his son and daughter small tracts in the eastern and southern corners of Lot 8 on the tract, and all members of the Hicks families built their homes on the land. Several members of the Hicks family filed suit in 1994 claiming Exxon was negligent in storing [**2] the oil on the land because that oil contaminated the land, and caused personal injuries to the Hicks family. Appellants' suit alleged negligence, negligence per se, nuisance, and strict liability claims against Exxon arising out of the oil storage in the 1920's.

II. SUMMARY JUDGMENT.

Exxon filed its motion for summary judgment alleging: (1) Exxon was not negligent and owed no legal duty to Hicks; (2) Exxon was not negligent per se by violating environmental statutes and Railroad Commission rule 39; (3) Exxon did not create a nuisance; (4) Exxon was not strictly liable for any dangerous conditions caused by the oil storage pits; (5) Hicks' claims are barred by the statute of limitations and the statute of repose. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 & 16.009 (Vernon 1986 & Supp. 1998).

Appellants responded claiming Exxon did owe a legal duty, was negligent per se by violating environmental statutes and rule 39, did create a nuisance, was strictly liable, and was not barred by limitations and the statute of repose.

A. Standard of Review.

A movant for summary judgment has the burden to show that there are no genuine issues of material fact and that it is entitled to judgment [**3] as a matter of law. See TEX. R. CIV. P. 166a(c).

To be entitled to summary judgment, a defendant must either (1) conclusively negate at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establish each element of an affirmative defense to each claim. See Science Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997). In reviewing a summary judgment, evidence favorable to the nonmovant is taken as true, and all reasonable inferences are indulged in the nonmovant's favor. See Johnson Co. Sheriff's Posse v. Endsley, 926 S.W.2d 284, 285 (Tex. 1996).

A summary judgment may be affirmed on any of the movant's theories which has merit. See [*93] Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 627 (Tex. 1996). Appellate courts should consider all grounds for summary judgment the movant presented to the trial court when properly preserved for appeal. Id. at 625.

B. Analysis.

1. Exxon owed no legal duty to Hicks. In its motion for summary judgment, Exxon contended it owed no legal duty to Hicks as a matter of law because Exxon sold the property to Hicks in 1945; Hicks was aware of the existing earthen pits, and the fact Exxon stored [**4] oil in them. Appellants argue that the deed was silent as to the earthen pits, and it is questionable that an uneducated man such as Hicks had "actual notice" of the toxic contamination of the pits.

Exxon conveyed the property to Thomas H. Hicks by general warranty deed dated February 15, 1945, and a copy was attached to Exxon's motion for summary judgment as evidence of their transfer of the subject property. The deed is silent as to the presence of any earthen pits. As evidence of Hicks' "actual notice" of the presence of the pits, Exxon furnished the affidavit of Thomas H. Hicks, dated March 20, 1958, wherein he stated he knew Exxon had earthen storage pits on the land in 1921, which were covered with wood covers that were destroyed by a tornado.

Appellants objected to Exxon's exhibits as not being properly authenticated but did not get a ruling of the trial court on any of their objections. By failing to secure rulings on their objections to Exxon's summary judgment proof, appellants have waived any complaint on this appeal as to their admissibility into evidence. Roberts v. Friendswood Dev. Co., 886 S.W.2d 363, 365 (Tex. App. – Houston [1st Dist.] 1994, writ denied). [**5]

In their response, appellants submitted an affidavit signed by one of the plaintiffs, Tommye L. H. Randolph, which stated Exxon never notified her father (Thomas Hicks) of the contamination of the land.

Appellants presented no evidence negating the affidavit of Thomas H. Hicks that stated he was well aware of the earthen pits on the land and the fact they had been used to store oil. Appellants did not present any evidence to controvert the deed to Thomas Hicks in 1945 or any other summary judgment evidence to controvert the fact Exxon had no ownership interest in the land after conveying it to Hicks.

Exxon argued in its motion for summary judgment that once it transferred the property to Hicks, its liability for any injuries on the property ceased. Generally, [HN2] vendors of real property are not liable for injuries caused by dangerous conditions on real property after the conveyance. First Fin. Dev. Corp. v. Hughston, 797 S.W.2d 286, 291 (Tex. App. -- Corpus Christi 1990, writ denied).

However, there is an exception to the rule: when a dangerous condition exists at the time the vendor transfers possession, the vendor is not subject to liability for injuries caused to others while [**6] upon the premises after vendee has taken possession, unless the vendor does not disclose or actively conceals the existence of the condition. Id.

This exception does not apply when the vendee discovers or should have discovered the dangerous condition and has a reasonable opportunity to take precautions, or when the vendee has actual notice of the condition. 797 S.W.2d at 291-92 (citing § 353(2) of Restatement). n1 See also Roberts, 886 S.W.2d at 367-68.

Appellants have failed to demonstrate by competent summary judgment evidence that Thomas H. Hicks did not have actual notice of the existence of the tanks on the premises when he bought the land.n1 The supreme court has not adopted section 353 of the restatement. Lefmark Management Co. v. Old, 946 S.W.2d 52, 54 (Tex. 1997). The supreme court stated section 353 did not apply to the facts in Lefmark, and that section 353 is limited in application to "vendors" of land. Id.

Appellants argue that Thomas Hicks had no notice of the contamination [**7] caused by the oil in the pits and contend the contamination was the "dangerous condition" requiring notice.

Appellants cite no authority to support their argument that Exxon's duty was to disclose contamination that could allegedly arise from the oil they suffered injury from contamination from oil that infiltrated the water supply from those pits. We find no authority to substantiate appellants' contention that Exxon had a duty to give notice of the toxic contamination that could result from the earthen pits, and appellants cite none. Because appellants had actual notice of the "dangerous condition" (the oil pits) when Thomas Hicks bought the land, we find Exxon established that it did not owe a legal duty to appellants, and the summary judgment was proper on this ground.

2. Negligence per se.

In their response to Exxon's motion for summary judgment, appellants contend Exxon violated numerous statutes by putting the earthen pits on the property to store oil in 1921. Specifically, appellants contend that Exxon violated the Texas Water Pollution Control Act of 1961, the [**8] Texas Water Quality Act of 1957, and Chapter 26 of the Texas Water Code, and the Texas Clean Air Act of 1987, and the Sanitation and Health Section of former article 4477-1 of 1987 (now TEX. HEALTH & SAFETY CODE ANN. § 341.001, et seq. (Vernon 1992). Each of these statutes was enacted after Exxon had ceased to operate the earthen storage tanks and cannot form the basis of a negligence per se claim.

Appellants cite no authority holding these statutes should apply retroactively. [HN3] A statute is presumed to be prospective unless it is clear from a fair reading of the statute that the legislature intended it to apply to both past and present controversies. Ex Parte Abell, 613 S.W.2d 255, 258 (Tex. 1981). Article I, section 16 of the Texas Constitution, prohibits retroactive laws. Section 311.022, Texas Government Code, provides a "statute is presumed to be prospective in its operation unless expressly made retrospective."

A statute is retroactive, and thus prohibited, if it impairs vested rights acquired under existing laws. See Trahan v. Trahan, 894 S.W.2d 113, 118 (Tex. App. -- Austin 1995, writ denied), cert. denied, 517 U.S. 1155, 116 S. Ct. 1542, 134 L. Ed. 2d 646 (1995). [**9] We find nothing in these statutes that would give retroactive application to Exxon's use of the land in the 1920's. Appellants' contention that installation of the earthen storage pits was negligence per se under environmental statutes passed many years later is without merit.

Appellants further argue Exxon violated rule 39 of a Railroad Commission order, which violation constituted negligence per se. Rule 39 provided, in pertinent part:

> (7) Open earthen storage for merchantable oil is hereafter prohibited, except when the Commission grants special permission order to meet an unforeseen emergency. Where such storage is now in use, it must be discontinued within a reasonable time.

The rule was adopted May 1, 1920; Exxon bought the land in 1921. Appellants cite no authority to support their argument that they were a member of the class of injured persons protected by this rule 39. Exxon alleged in its motion for summary judgment that rule 39 was enacted for the prevention of waste and/or conservation of oil and gas, and not for protection of human health. We are limited in our review of this point to the ground presented to the trial court in Exxon's motion for summary judgment. [**10] McConnell v. Southside School District, 858 S.W.2d 337, 343 (Tex. 1993).

The tort concept of negligence per se is expressed in the RESTATEMENT (SECOND) OF TORTS § 288B (1965), as follows:

> (1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.

The rule has been adopted by the Supreme Court. Southern Pacific Company v. Castro, 493 S.W.2d 491, 497 (Tex. 1973). However, we have not been cited to any authority, and have found none, which expressly adopts or rejects rule 39 as defining the standard of conduct of a reasonable person.

The rules of construction which apply to statutes apply with equal force to administrative rules and regulations. Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co., 121 Tex. 594, 51 S.W.2d 284, 287 (1932). The mere fact that an administrative agency promulgates a rule or regulation does not require the courts to accept it as a standard for civil liability. Carter v. William [*95] Sommerville and Son, Inc., 584 S.W.2d 274, 278 (Tex. 1979).

The power of adopting or rejecting a standard of conduct [**11] rests with the civil courts. Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201, 205 (1959). Therefore, the concept of negligence per se becomes viable in the cause only if the courts adopt rule 39 as defining the standard of conduct of a reasonably prudent person. Moughon v. Wolf, 576 S.W.2d 603, 604 (Tex. 1978).

The courts will not adopt an administrative rule or regulation as a standard for negligence unless a purpose of the rule is to afford protection to the class of persons to which the injured party belongs against the hazard involved in the particular case. Nixon v. Mr. Property Management, 690

S.W.2d 546, 549 (Tex. 1985). Thus, we must ascertain the intent of the Railroad Commission in its promulgation of rule 39.

The intention should be ascertained from the entire document and not from isolated portions thereof. Merchants Fast Motor Lines v. Railroad Com'n, 573 S.W.2d 502, 505 (Tex. 1978). Rule 39 was passed pursuant to Oil and Gas Conservation Laws Act of March 31, 1919, 36th Leg., R. S., ch. 155, art. 1, 1919 Tex. Gen. Laws. The Railroad Commission issued its "Conservation Rules and Regulations" on July 26, 1919, defining "waste" and setting out rules for [**12] preventing waste and conservation of oil and gas. Rule 1, provided: "Natural gas and crude oil or petroleum shall not be produced in the State of Texas in such manner and under such conditions as to constitute waste."

Rule 4 stated, in part: "all operators . . . shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil and gas . . . in storage . . . ." Rule 39 listed thirteen specific restrictions on the use of oil tanks on producing leases or farms, along with various safety regulations. The restriction on open earthen storage tanks was numbered (7).

The prohibition against the use of open pits or earthen storage is now found in TEX. NAT. RES. CODE ANN. § 85.046 (Vernon 1993), which provides:

(a) The term " waste," among other things, specifically includes:
* * * * * * * * *

> (8) surface waste or surface loss, including the temporary or permanent storage of oil or the placing of any product of oil in open pits or earthen storage, and other forms of surface waste or surface loss including unnecessary or excessive surface losses, or destruction without beneficial use, either of oil or gas;

Article 7 of the enabling legislation [**13] (Act of March 31, 1919, S.B. 350, 36th Leg.) provided that a violation of any of the regulations of the Railroad Commission "shall be subject to a penalty of not more than five thousand ($ 5,000.00) dollars, to be recovered in any court of competent jurisdiction . . . ."

The supreme court found that article 6036, of Vernon's Annotated Civil Statutes (Vernon 1925) (the penalty provision as codified in 1925) was a civil penalty statute enacted for the primary purpose of promoting and encouraging law enforcement and deterring violations of the rules, regulations and orders of the Railroad Commission. State v. Harrington, 407 S.W.2d 467, 474 (Tex.1966), cert. denied, 386 U.S. 944, 87 S. Ct. 977, 17 L. Ed. 2d 874 (1967).

The Harrington court analyzed Rule 37, a well spacing rule, and "recognized that the basic purpose of the rule was the prevention of waste or confiscation." Rules 39 and 40 were adopted by the Railroad Commission on May 1, 1920. Rule 39 did not completely prohibit the use earthen storage tanks because it also provided the Commission could grant special permission to use the storage tanks "to meet an unforeseen emergency."

None of the rules provide for the fixing [**14] of civil liability in a civil action, such as this case, for failure to comply with Rule 39. There are no Texas cases where Rule 39 was used to establish civil liability. We find Rule 39 had prevention of waste and conservation of oil as its purpose. We hold that a failure to comply with the provisions of Rule 39 (now TEX. NAT. RES. CODE ANN. §

85.046 (Vernon 1993)) does not constitute negligence per se. See Continental Oil Co. v. Simpson, 604 S.W.2d 530, 534-36 (Tex. Civ. App. -- Amarillo 1980, writ ref'd n.r.e.). The trial court did not abuse its discretion granting Exxon summary judgment on this ground.

. . .

III. CONCLUSION.

On the grounds discussed above, we uphold the summary judgment on the claims actually before us. . . .

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Hicks v. Humble Oil

Notes and Discussion

1. Rule 39 has been for the most part incorporated into current Railroad Commission Rule 8. Note the storage of oil in unlined pits was once common practice. Why would an operator store oil in unlined pits, when they knew the oil would evaporate, seep into the ground, become contaminated with dirt, and possibly ignite?

2. How did the court treat the fact that the plaintiff bought the land with apparent knowledge that pits were used to store oil on the premises?

3. Depending on the soil composition, oil can remain in buried sediments for decades with little decomposition. As such, any toxic chemicals found in oil production or in the oil itself might be a latent defect in any real estate that once contained these storage pits.

4. What did the court say with regard to Exxon's liability as a vendor? When was Exxon relieved of liability? What actions could an operator take to enhance this defense should future environmental issues arise after conveyance?

5. Why would the Railroad Commission grant an exception in the early days with regard to the use of unlined pits? One reason might exist where a well blows out creating an emergency where oil needs to be stored temporarily.

With regard to oil blowouts, many are under the mistaken belief that the recent British Petroleum blowout in the Gulf of Mexico was the worst spill in US history. To the contrary, the worst spill occurred about a century ago, onshore, in California:

> The worst oil spill in US history, the Lakeview Gusher Number One that occurred 100 years ago in Kern County, California. The gusher, drilled by the Lakeview Oil Company, blew on March 14, 1910, when the drill reached the 2,440-foot level.
>
> This gusher shot oil more than 200 feet into the air for an astonishing 544 days, spewing more than 9 million barrels (378 million gallons/1.4 billion liters) of oil into the environment -- less than half of which was removed.

The large flow created a creek of crude oil running downhill from the well site that was contained by walls built of sand bags, rock and even sage brush. The rest of that oil remains in place to this very day and even 100 years later, this oil-contaminated area is not good for anything, although there is a museum there  describing the oil spill.

http://scienceblogs.com/grrlscientist/2010/06/the_worst_oil_spill_in_us_hist.php

The 1910-1911 Kern County blowout literally created a lake of oil:

ii. **TEXAS RAILROAD COMMISSION OIL & GAS RULES**

The following rules address some of the more common environmental issues encountered in oil and gas operations. While Texas specific, every state with oil and gas production has rules that are very similar to those set out below.

The Resource Conservation and Recovery Act (RCRA) delegates regulatory authority over non-hazardous oil and gas production and exploration wastes to the states, provided the state has in place rules and regulations that effectively prevent environmental damage. As such, many states have adopted EPA approved rules and regulatory schemes with regard to waste management regulation – which creates consistency across state lines for oil and gas waste management.

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Rule 3.7 Commentary – This rule provides that fluids in a well should not be allowed to infiltrate fresh water zones or other zones that might be encountered in drilling. When drilling a well high pressure natural gas zones and crude oil zones might be encountered. These high pressure fluids need to be controlled to minimize environmental damage from fluid migration up or down a well.

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RULE §3.7 Strata To Be Sealed Off

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Whenever hydrocarbon or geothermal resource fluids are encountered in any well drilled for oil, gas, or geothermal resources in this state, *such fluid shall be confined in its original stratum until it can be produced and utilized without waste. Each such stratum shall be adequately protected from infiltrating waters*. Wells may be drilled deeper after encountering a stratum bearing such fluids if such drilling shall be prosecuted with diligence and *any such fluids be confined in its stratum and protected as aforesaid upon completion of the well*. The commission will require each such stratum to be cased off and protected, if in its discretion it shall be reasonably necessary and proper to do so.

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Rule 3.8 Commentary – This is the major Texas Railroad Commission Rule dealing with environmental issues related to pits, waste disposal, and record keeping.t

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RULE §3.8 Water Protection

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(a) The following words and terms when used in this section shall have the following meanings, unless the context clearly indicates otherwise. . . .

[definitions of various pits, wastes, etc.]

(b) *No pollution. No person conducting activities subject to regulation by the commission may cause or allow pollution of surface or subsurface water in the state.*

(c) Exploratory wells. Any oil, gas, or geothermal resource well or well drilled for exploratory purposes shall be governed by the provisions of statewide or field rules which are applicable and pertain to the drilling, safety, casing, production, abandoning, and plugging of wells.

(d) Pollution control.

(1) *Prohibited disposal methods*. Except for those disposal methods authorized for certain wastes by paragraph (3) of this subsection, subsection (e) of this section, or §3.98 of this title (relating to Standards for Management of Hazardous Oil and Gas Waste), or disposal methods required to be permitted pursuant to §3.9 of this title (relating to Disposal Wells) (Rule 9) or §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) (Rule 46), *no person may dispose of any oil and gas wastes by any method without obtaining a permit to dispose of such wastes. The disposal methods prohibited by this paragraph include, but are not limited to, the unpermitted discharge of oil field brines, geothermal resource waters, or other mineralized waters, or drilling fluids into any watercourse or drainageway, including any drainage ditch, dry creek, flowing creek, river, or any other body of surface water*.

(2) *Prohibited pits. No person may maintain or use any pit for storage of oil or oil products*. Except as authorized by paragraph (4) or (7)(C) or (8) of this subsection, no person may maintain or use any pit for storage of oil field fluids, or for storage or disposal of oil and gas wastes, without obtaining a permit to maintain or use the pit. A person is not required to have a permit to use a pit if a receiver has such a permit, if the person complies with the terms of such permit while using the pit, and if the person has permission of the receiver to use the pit. *The pits required by this paragraph to be permitted include, but are not limited to, the following types of pits: saltwater disposal pits; emergency saltwater storage pits; collecting pits; skimming pits; brine pits; brine mining pits; drilling fluid storage pits (other than mud circulation pits); drilling fluid disposal pits (other than reserve pits or slush pits); washout pits; and gas plant evaporation/retention pits*. If a person maintains or uses a pit for storage of oil field fluids, or for storage or disposal of oil and gas wastes, and the use or maintenance of the pit is neither authorized by paragraph (4) or (7)(C) or (8) of this subsection nor permitted, then the person maintaining or using the pit shall backfill and compact the pit in the time and manner required by the director. Prior to backfilling the pit, the person maintaining or using the pit shall, in a permitted manner or in a manner authorized by paragraph (3) of this subsection, dispose of all oil and gas wastes which are in the pit.

(3) *Authorized disposal methods*.

(A) *Fresh water condensate*. A person may, without a permit, dispose of fresh water which has been condensed from natural gas and collected at gas pipeline drips or gas compressor stations, provided the disposal is by a method other than disposal into surface water of the state.

(B) *Inert wastes*. A person may, without a permit, dispose of inert and essentially insoluble oil and gas wastes including, but not limited to, concrete, glass, wood, and wire, provided the disposal is by a method other than disposal into surface water of the state.

(C) *Low chloride drilling fluid*. A person may, without a permit, dispose of the following oil and gas wastes by landfarming, provided the wastes are disposed of on the same lease where they are generated, and provided the person has the written permission of the surface owner of the tract where landfarming will occur: water base drilling fluids with a chloride concentration of 3,000 milligrams per liter (mg/liter) or less; drill cuttings, sands, and silts obtained while using water base drilling fluids with a chloride concentration of 3,000 mg/liter or less; and wash water used for cleaning drill pipe and other equipment at the well site.

(D) *Other drilling fluid*. A person may, without a permit, dispose of the following oil and gas wastes by burial, provided the wastes are disposed of at the same well site where they are generated: water base drilling fluid which had a chloride concentration in excess of 3,000 mg/liter but which have been dewatered; drill cuttings, sands, and silts obtained while using oil base drilling fluids or water base drilling fluids with a chloride concentration in excess of 3,000 mg/liter; and those drilling fluids and wastes allowed to be landfarmed without a permit.

(E) *Completion/workover pit wastes*. A person may, without a permit, dispose of the following oil and gas wastes by burial in a completion/workover pit, provided the wastes have been dewatered, and provided the wastes are disposed of at the same well site where they are generated: spent completion fluids, workover fluids, and the materials cleaned out of the wellbore of a well being completed or worked over.

(F) Effect on backfilling. A person's choice to dispose of a waste by methods authorized by this paragraph shall not extend the time allowed for backfilling any reserve pit, mud circulation pit, or completion/workover pit whose use or maintenance is authorized by paragraph (4) of this subsection.

(4) *Authorized pits. A person may, without a permit, maintain or use reserve pits, mud circulation pits, completion/workover pits, basic sediment pits, flare pits, fresh makeup water pits, fresh mining water pits, and water condensate pits on the following conditions*.

(A) *Reserve pits and mud circulation pits. A person shall not deposit or cause to be deposited into a reserve pit or mud circulation pit any oil field fluids or oil and gas wastes, other than the following:*

*(i) drilling fluids, whether fresh water base, saltwater base, or oil base;*

*(ii) drill cuttings, sands, and silts separated from the circulating drilling fluids;*

*(iii) wash water used for cleaning drill pipe and other equipment at the well site;*

*(iv) drill stem test fluids; and*

*(v) blowout preventer test fluids.*

(B) Completion/workover pits. A person shall not deposit or cause to be deposited into a completion/workover pit any oil field fluids or oil and gas wastes other than spent completion fluids, workover fluid, and the materials cleaned out of the wellbore of a well being completed or worked over.

(C) *Basic sediment pits. A person shall not deposit or cause to be deposited into a basic sediment pit any oil field fluids or oil and gas wastes other than basic sediment removed from a production vessel or from the bottom of an oil storage tank*. Although a person may store basic sediment in a basic sediment pit, a person may not deposit oil or free saltwater in the pit. The total capacity of a basic sediment pit shall not exceed a capacity of 50 barrels. The area covered by a basic sediment pit shall not exceed 250 square feet.

(D) Flare pits. A person shall not deposit or cause to be deposited into a flare pit any oil field fluids or oil and gas wastes other than the hydrocarbons designed to go to the flare during upset conditions at the well, tank battery, or gas plant where the pit is located. A person shall not store liquid hydrocarbons in a flare pit for more than 48 hours at a time.

(E) Fresh makeup water pits and fresh mining water pits. A person shall not deposit or cause to be deposited into a fresh makeup water pit any oil and gas wastes or any oil field fluids other than water used to make up drilling fluid. A person shall not deposit or cause to be deposited into a fresh mining water pit any oil and gas wastes or any oil field fluids other than water used for solution mining of brine.

(F) Water condensate pits. A person shall not deposit or cause to be deposited into a water condensate pit any oil field fluids or oil and gas wastes other than fresh water condensed from natural gas and collected at gas pipeline drips or gas compressor stations.

*(G) Backfill requirements.*

*(i) A person who maintains or uses a reserve pit, mud circulation pit, fresh makeup water pit, fresh mining water pit, completion/workover pit, basic sediment pit, flare pit, or water condensate pit shall dewater, backfill, and compact the pit according to the following schedule.*

*(I) Reserve pits and mud circulation pits which contain fluids with a chloride concentration of 6,100 mg/liter or less and fresh makeup water pits shall be dewatered, backfilled, and compacted within one year of cessation of drilling operations.*

*(II) Reserve pits and mud circulation pits which contain fluids with a chloride concentration in excess of 6,100 mg/liter shall be dewatered within 30 days and backfilled and compacted within one year of cessation of drilling operations.*

*(III) All completion/workover pits used when completing a well shall be dewatered within 30 days and backfilled and compacted within 120 days of well completion. All completion/workover pits used when working over a well shall be dewatered within 30 days and backfilled and compacted within 120 days of completion of workover operations*.

*(IV) Basic sediment pits, flare pits, fresh mining water pits, and water condensate pits shall be dewatered, backfilled, and compacted within 120 days of final cessation of use of the pits*.

(V) If a person constructs a sectioned reserve pit, each section of the pit shall be considered a separate pit for determining when a particular section should be dewatered.

(ii) A person who maintains or uses a reserve pit, mud circulation pit, fresh makeup water pit, or completion/workover pit shall remain responsible for dewatering, backfilling, and compacting the pit within the time prescribed by clause (i) of this subparagraph, even if the time allowed for backfilling the pit extends beyond the expiration date or transfer date of the lease covering the land where the pit is located.

(iii) The director may require that a person who uses or maintains a reserve pit, mud circulation pit, fresh makeup water pit, fresh mining water pit, completion/workover pit, basic sediment pit, flare pit, or water condensate pit backfill the pit sooner than the time prescribed by clause (i) of this subparagraph if the director determines that oil and gas wastes or oil field fluids are likely to escape from the pit or that the pit is being used for improper storage or disposal of oil and gas wastes or oil field fluids.

(iv) Prior to backfilling any reserve pit, mud circulation pit, completion/workover pit, basic sediment pit, flare pit, or water condensate pit whose use or maintenance is authorized by this paragraph, the person maintaining or using the pit shall, in a permitted manner or in a manner authorized by paragraph (3) of this subsection, dispose of all oil and gas wastes which are in the pit.

(5) Responsibility for disposal. . . .

(e) Pollution prevention (reference Order Number 20-59,200, effective May 1, 1969).

(1) The operator shall not pollute the waters of the Texas offshore and adjacent estuarine zones (saltwater bearing bays, inlets, and estuaries) or damage the aquatic life therein.

(2) All oil, gas, and geothermal resource well drilling and producing operations shall be conducted in such a manner to preclude the pollution of the waters of the Texas offshore and adjacent estuarine zones. Particularly, the following procedures shall be utilized to prevent pollution. . . .

(g) Recordkeeping.

(1) Oil and gas waste. When oil and gas waste is hauled by vehicle from the lease, unit, or other oil or gas property where it is generated to an off-lease disposal facility, the person generating the oil and gas waste shall keep, for a period of three years from the date of generation, the following records:

(A) identity of the property from which the oil and gas waste is hauled;

(B) identity of the disposal system to which the oil and gas waste is delivered;

(C) name and address of the hauler, and permit number (WHP number) if applicable; and

(D) type and volume of oil and gas waste transported each day to disposal. . . .

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Rule 3.9 Commentary – This rule provides details with regard to produced water disposal wells, testing, and permitting.

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RULE §3.9 Disposal Wells

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Any person who disposes of saltwater or other oil and gas waste by injection into a porous formation not productive of oil, gas, or geothermal resources shall be responsible for complying with this section, Texas Water Code, Chapter 27, and Title 3 of the Natural Resources Code.

(1) *General. Saltwater or other oil and gas waste, as that term is defined in the Texas Water Code, Chapter 27, may be disposed of, upon application to and approval by the commission, by injection into nonproducing zones of oil, gas, or geothermal resources bearing formations that contain water mineralized by processes of nature to such a degree that the water is unfit for domestic, stock, irrigation, or other general uses*. Every applicant who proposes to dispose of saltwater or other oil and gas waste into a formation not productive of oil, gas, or geothermal resources must obtain a permit from the commission authorizing the disposal in accordance with this section. Permits from the commission issued before the effective date of this section shall continue in effect until revoked, modified, or suspended by the commission.

(2) *Geological requirements. Before such formations are approved for disposal use, the applicant shall show that the formations are separated from freshwater formations by impervious beds which will give adequate protection to such freshwater formations*. The applicant must submit a letter from the Texas Commission on Environmental Quality or its successor agencies stating that the use of such formation will not endanger the freshwater strata in that area and that the formations to be used for disposal are not freshwater-bearing.

(3) Application. . . .

(8) Casing. *Disposal wells shall be cased and the casing cemented in compliance with §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements) in such a manner that the injected fluids will not endanger oil, gas, geothermal resources, or freshwater resources*.

(9) Special equipment. . . .

(11) *Monitoring and reporting.*

*(A) The operator shall monitor the injection pressure and injection rate of each disposal well on at least a monthly basis.*

*(B) The results of the monitoring shall be reported annually to the commission on the prescribed from.*

*(C) All monitoring records shall be retained by the operator for at least five years.*

*(D) The operator shall report to the appropriate District Office within 24 hours any significant pressure changes or other monitoring data indicating the presence of leaks in the well.*

(12) *Testing.*

*(A) Purpose. The mechanical integrity of a disposal well shall be evaluated by conducting pressure tests to determine whether the well tubing, packer, or casing have sufficient mechanical integrity to meet the performance standards of this rule*, or by alternative testing methods under subparagraph (E) of this paragraph.

(B) Applicability. Mechanical integrity of each disposal well shall be demonstrated in accordance with provisions of subparagraph (D) and subparagraph (E) of this paragraph prior to initial use. In addition, mechanical integrity shall be tested periodically thereafter as described in subparagraph (C) of this paragraph.

(C) *Frequency.*

*(i) Each disposal well completed with surface casing set and cemented through the entire interval of protected usable-quality water shall be tested for mechanical integrity at least once every five years.*

*(ii) In addition to testing required under clause (i), each disposal well shall be tested for mechanical integrity after every workover of the well*.

(iii) A disposal well that is completed without surface casing set and cemented through the entire interval of protected usable-quality ground water shall be tested at the frequency prescribed in the disposal well permit.

(iv) The commission or its delegate may prescribe a schedule and mail notification to operators to allow for orderly and timely compliance with the requirements in clauses (i) and (ii) of this subparagraph. Such testing schedule shall not apply to a disposal well for which a disposal well permit has been issued but the well has not been drilled or converted to disposal.

(D) *Pressure tests.*

*(i) Test pressure.*

*(I) The test pressure for wells equipped to dispose through tubing and packer shall equal the maximum authorized injection pressure or 500 psig, whichever is less, but shall be at least 200 psig*.

(II) The test pressure for wells that are permitted for disposal through casing shall equal the maximum permitted injection pressure or 200 psig, whichever is greater.

(ii) Pressure stabilization. The test pressure shall stabilize within 10% of the test pressure required in clause (i) of this subparagraph prior to commencement of the test.

(iii) Pressure differential. A pressure differential of at least 200 psig shall be maintained between the test pressure on the tubing-casing annulus and the tubing pressure.

(iv) Test duration. A pressure test shall be conducted for a duration of 30 minutes when the test medium is liquid or for 60 minutes when the test medium is air or gas.

(v) Pressure recorder. Except for tests witnessed by a commission representative or wells permitted for disposal through casing, a pressure recorder shall be used to monitor and record the tubing-casing annulus pressure during the test. The recorder clock shall not exceed 24 hours. The recorder scale shall be set so that the test pressure is 30 to 70% of full scale, unless otherwise authorized by the commission or its delegate.

(vi) Test fluid.

(I) The tubing-casing annulus fluid used in a pressure test shall be liquid for wells that inject liquid unless the commission or its delegate authorizes the use of a different test fluid for good cause.

(II) The tubing-casing annulus fluid used in a pressure test shall contain no additives that may affect the sensitivity or otherwise reduce the effectiveness of the test.

(vii) Pressure test results. The commission or its delegate will consider, in evaluating the results of a test, the level of pollution risk that loss of well integrity would cause. Factors that may be taken into account in assessing pollution risk include injection pressure, frequency of testing and monitoring, and whether there is sufficient surface casing to cover all zones containing usable-quality water. A pressure test may be rejected by the commission or its delegate after consideration of the following factors:

(I) the degree of pressure change during the test, if any;

(II) the level of risk to usable-quality water if mechanical integrity of the well is lost; and

(III) whether circumstances surrounding the administration of the test make the test inconclusive.

(E) Alternative testing methods.

(i) As an alternative to the testing required in subparagraph (B) of this paragraph, the tubing-casing annulus pressure may be monitored and included on the annual monitoring report required by paragraph (11) of this section, with the authorization of the commission or its delegate and provided that there is no indication of problems with the well. Wells that are approved for tubing-casing annulus monitoring under this paragraph shall be tested in the manner provided under subparagraph (B) of this paragraph at least once every ten years after January 1, 1990.

(ii) The commission or its delegate may grant an exception for viable alternative tests or surveys or may require alternative tests or surveys as a permit condition.

*(F) The operator shall notify the appropriate district office at least 48 hours prior to the testing. Testing shall not commence before the end of the 48-hour period unless authorized by the district office.*

*(G) A complete record of all tests shall be filed in duplicate in the district office on the appropriate form within 30 days after the testing.*

(H) In the case of permits issued under this section prior to the effective date of this amendment which require pressure testing more frequently than once every five years, the commission's delegate may, by letter of authorization, reduce the required frequency of pressure tests, provided that such tests are required at least once every three years. The commission shall consider the permit to have been amended to require pressure tests at the frequency specified in the letter of authorization.

(13) Plugging. Disposal wells shall be plugged upon abandonment in accordance with §3.14 of this title (relating to Plugging).

(14) Penalties. . . .

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Rule 3.13 Commentary – This rule provides that water and other zones should be isolated to avoid contamination.

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RULE §3.13 Casing, Cementing, Drilling, and Completion Requirements

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(a) General.

(1) The operator is responsible for compliance with this section during all operations at the well*. It is the intent of all provisions of this section that casing be securely anchored in the hole in order to effectively control the well at all times, all usable-quality water zones be isolated and sealed off to effectively prevent contamination or harm, and all potentially productive zones be isolated and sealed off to prevent vertical migration of fluids or gases*

*behind the casing*. When the section does not detail specific methods to achieve these objectives, the responsible party shall make every effort to follow the intent of the section, using good engineering practices and the best currently available technology. . .

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Rule 3.14 Commentary – This rule provides that wells should be o

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RULE §3.14 Plugging

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(a) Definitions and application to plug. . . .

[definitions omitted]

(2) *The operator shall give the Commission notice of its intention to plug any well or wells drilled for oil, gas, or geothermal resources or for any other purpose over which the Commission has jurisdiction*, except those specifically addressed in §3.100(e)(1) of this title (relating to Seismic Holes and Core Holes) (Statewide Rule 100), prior to plugging. The operator shall deliver or transmit the written notice to the district office on the appropriate form.

(3*) The operator shall cause the notice of its intention to plug to be delivered to the district office at least five days prior to the beginning of plugging operations. The notice shall set out the proposed plugging procedure as well as the complete casing record*. The operator shall not commence the work of plugging the well or wells until the proposed procedure has been approved by the district director or the director's delegate. The operator shall not initiate approved plugging operations before the date set out in the notification for the beginning of plugging operations unless authorized by the district director or the director's delegate. The operator shall notify the district office at least four hours before commencing plugging operations and proceed with the work as approved. The district director or the director's delegate may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location, and ready to commence plugging operations. Operations shall not be suspended prior to plugging the well unless the hole is cased and casing is cemented in place in compliance with Commission rules. The Commission's approval of a notice of intent to plug and abandon a well shall not relieve an operator of the requirement to comply with subsection (b)(2) of this section, nor does such approval constitute an extension of time to comply with subsection (b)(2) of this section.

(4) *The surface owner and the operator may file an application to condition an abandoned well located on the surface owner's tract for usable quality water production operations*. The application shall be made on Commission Form P-13, the Application of Landowner to Condition an Abandoned Well for Fresh Water Production.

(A) Standard for Commission Approval. Before the Commission will consider approval of an application:

*(i) the surface owner shall assume responsibility for plugging the well and obligate himself, his heirs, successors, and assignees to complete the plugging operations;*

*(ii) the operator responsible for plugging the well shall place all cement plugs required by this rule up to the base of the usable quality water strata; and*

*(iii) the surface owner shall submit:*

(I) a signed statement attesting to the fact that:

(-a-) there is no groundwater conservation district for the area in which the well is located; or

(-b-) there is a groundwater conservation district for the area where the well is located, but the groundwater conservation district does not require that the well be permitted or registered; or

(-c-) the surface owner has registered the well with the groundwater conservation district for the area where the well is located; or

(II) a copy of the permit from the groundwater conservation district for the area where the well is located.

*(B) The duty of the operator to properly plug ends only when:*

*(i) the operator has properly plugged the well in accordance with Commission requirements up to the base of the usable quality water stratum;*

*(ii) the surface owner has registered the well with, or has obtained a permit for the well from, the groundwater conservation district, if applicable; and*

*(iii) the Commission has approved the application of surface owner to condition an abandoned well for fresh water production.*

(5) The operator of a well shall serve notice on the surface owner of the well site tract, or the resident if the owner is absent, before the scheduled date for beginning the plugging operations. A representative of the surface owner may be present to witness the plugging of the well. Plugging shall not be delayed because of the lack of actual notice to the surface owner or resident if the operator has served notice as required by this paragraph. The district director or the director's delegate may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location and ready to commence plugging operations.

(b) Commencement of plugging operations, extensions, and testing.

*(1) The operator shall complete and file in the district office a duly verified plugging record, in duplicate, on the appropriate form within 30 days after plugging operations are*

*completed*. A cementing report made by the party cementing the well shall be attached to, or made a part of, the plugging report. If the well the operator is plugging is a dry hole, an electric log status report shall be filed with the plugging record.

*(2) Plugging operations on each dry or inactive well shall be commenced within a period of one year after drilling or operations cease and shall proceed with due diligence until completed unless the Commission or its delegate approves a plugging extension* under §3.15 of this title (relating to Surface Equipment Removal Requirements and Inactive Wells). . . .

(d) General plugging requirements.

(1) *Wells shall be plugged to insure that all formations bearing usable quality water, oil, gas, or geothermal resources are protected*. All cementing operations during plugging shall be performed under the direct supervision of the operator or his authorized representative, who shall not be an employee of the service or cementing company hired to plug the well. Direct supervision means supervision at the well site during the plugging operations. The operator and the cementer are both responsible for complying with the general plugging requirements of this subsection and for plugging the well in conformity with the procedure set forth in the approved notice of intention to plug and abandon for the well being plugged. The operator and cementer may each be assessed administrative penalties for failure to comply with the general plugging requirements of this subsection or for failure to plug the well in conformity with the approved notice of intention to plug and abandon the well.

(2) *Cement plugs shall be set to isolate each productive horizon and usable quality water strata*. Plugs shall be set as necessary to separate multiple usable quality water strata by placing the required plug at each depth as determined by the Texas Commission on Environmental Quality or its successor agencies. The operator shall verify the placement of the plug required at the base of the deepest usable quality water stratum by tagging with tubing or drill pipe or by an alternate method approved by the district director or the district director's delegate.

(3) Cement plugs shall be placed by the circulation or squeeze method through tubing or drill pipe. Cement plugs shall be placed by other methods only upon written request with the written approval of the district director or the director's delegate.

(4) All cement for plugging shall be an approved API oil well cement without volume extenders and shall be mixed in accordance with API standards. Slurry weights shall be reported on the cementing report. The district director or the director's delegate may require that specific cement compositions be used in special situations; for example, when high temperature, salt section, or highly corrosive sections are present. An operator shall request approval to use alternate materials . . .

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Rule 3.16 Commentary – This rule requires details of the plugging operation should be filed with the regulatory agency.

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RULE §3.16 Log and Completion or Plugging Report

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(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Basic electric log--A density, sonic, or resistivity (except dip meter) log run over the entire wellbore.

(2) Drilling operation--A continuous effort to drill or deepen a wellbore for which the commission has issued a permit.

(3) Operator--A person who assumes responsibility for the regulatory compliance of a well as shown by a form the person files with the commission and the commission approves.

(4) Well--A well drilled for any purpose related to exploration for or production or storage of oil or gas or geothermal resources, including a well drilled for injection of fluids to enhance hydrocarbon recovery, disposal of produced fluids, disposal of waste from exploration or production activity, or brine mining.

(b) *Completion and plugging reports. The operator of a well shall file with the commission the appropriate completion report within 30 days after completion of the well or within 90 days after the date on which the drilling operation is completed, whichever is earlier. The operator of a well shall file with the Commission an amended completion report within 30 days of any physical changes made to the well, such as any change in perforations, or openhole or casing records. If the well is a dry hole, the operator shall file with the commission an appropriate plugging report within 30 days after the well is plugged.*

(c) *Basic electric logs. Except as otherwise provided in this section, not later than the 90th day after the date a drilling operation is completed, the operator shall file with the commission a legible and unaltered copy of a basic electric log, except that where a well is deepened, a legible and unaltered copy of a basic electric log shall be filed if such log is run over a deeper interval than the interval covered by a basic electric log for the well already on file with the commission. In the event a basic electric log, as defined in this section, has not been run, subject to the commission's approval, the operator shall file a lithology log or gamma ray log of the entire wellbore*. In the event no log has been run over the entire wellbore, subject to the commission's approval, the operator shall file the log which is the most nearly complete of the logs run.

(d) Delayed filing based on confidentiality. Each log filed with the commission shall be considered public information and shall be available to the public during normal business hours. If the operator of a well desires a log to be confidential, on or before the 90th day after the date a drilling operation is completed, the operator must submit a written request

for a delayed filing of the log. When filing such a request, the operator must retain the log and may delay filing such log for one year beginning from the date the drilling operation was completed. The operator of such well may request an additional filing delay of two years, provided the written request is filed prior to the expiration date of the initial confidentiality period. If a well is drilled on land submerged in state water, the operator may request an additional filing delay of two years so that a possible total delay of five years may be obtained. A request for the additional two year filing delay period must be in writing and be filed with the commission prior to the expiration of the first two year filing delay. Logs must be filed with the commission within 30 days after the expiration of the final confidentiality period, except that an operator who fails to timely file with the commission a written request under this subsection for an extension of the period of log confidentiality shall file the log with the commission immediately after the conclusion of the period for filing the request.

(e) Sanctions. If an operator fails to file a completion report or log in accordance with the provisions of this section, the commission may refuse to assign an allowable to a well, set the allowable for such well at zero, and/or initiate penalty action pursuant to the Texas Natural Resources Code, Title 3.

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Rule 3.20 Commentary – This rule provides that the operator needs to notify the agency in the event of a leak or blowout.

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RULE §3.20 Notification of Fire Breaks, Leaks, or Blow-outs

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(a) General requirements.

(1) *Operators shall give immediate notice of a fire, leak, spill, or break to the appropriate commission district office by telephone or telegraph. Such notice shall be followed by a letter giving the full description of the event, and it shall include the volume of crude oil, gas, geothermal resources, other well liquids, or associated products lost.*

(2) *All operators of any oil wells, gas wells, geothermal wells, pipelines receiving tanks, storage tanks, or receiving and storage receptacles into which crude oil, gas, or geothermal resources are produced, received, stored, or through which oil, gas, or geothermal resources are piped or transported, shall immediately notify the commission by letter, giving full details concerning all fires which occur at oil wells, gas wells, geothermal wells, tanks, or receptacles owned, operated, or controlled by them or on their property, and all such persons shall immediately report all tanks or receptacles struck by lightning and any other fire which destroys crude oil, natural gas, or geothermal resources, or any of them, and shall immediately report by letter any breaks or leaks in or from tanks or other receptacles and pipelines from which oil, gas, or geothermal resources are escaping or have escaped*. In all such reports of fires, breaks, leaks, or escapes, or other accidents of this nature, the location of the well, tank, receptacle, or line break shall be given by county, survey, and property, so that the exact location thereof can be readily located on the ground. Such

report shall likewise specify what steps have been taken or are in progress to remedy the situation reported and shall detail the quantity (estimated, if no accurate measurement can be obtained, in which case the report shall show that the same is an estimate) of oil, gas, or geothermal resources, lost, destroyed, or permitted to escape. In case any tank or receptacle is permitted to run over, the escape thus occurring shall be reported as in the case of a leak. (Reference Order Number 20-60,399, effective 9-24-70.)

(b) *The report hereby required as to oil losses shall be necessary only in case such oil loss exceeds five barrels in the aggregate. . . .*

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Rule 3.36 Commentary – This rule provides that special precautions need to be taken in areas that might produce 'sour gas' – a potentially deadly substance.

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RULE §3.36 Oil, Gas, or Geothermal Resource Operation in Hydrogen Sulfide Areas

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(a) Applicability. Each operator who conducts operations as described in paragraph (1) of this subsection shall be subject to this section and shall provide safeguards to protect the general public from the harmful effects of hydrogen sulfide. This section applies to both intentional and accidental releases of hydrogen sulfide.

(1) Operations including drilling, working over, producing, injecting, gathering, processing, transporting, and storage of hydrocarbon fluids that are part of, or directly related to, field production, transportation, and handling of hydrocarbon fluids that contain gas in the system which has hydrogen sulfide as a constituent of the gas, to the extent as specified in subsection (c) of this section, general provisions.

(2) This section shall not apply to:

(A) operations involving processing oil, gas, or hydrocarbon fluids which are either an industrial modification or products from industrial modification, such as refining, petrochemical plants, or chemical plants;

(B) operations involving gathering, storing, and transporting stabilized liquid hydrocarbons;

(C) operations where the concentration of hydrogen sulfide in the system is less than 100 ppm. . . .

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Rule 3.46 Commentary – Similar to rule 3.9 dealing with injection of produced water for disposal, this rule deals with injection of produced water into productive reservoirs to enhance oil recovery.

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RULE §3.46 Fluid Injection into Productive Reservoirs

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(a) Permit required. Any person who engages in fluid injection operations in reservoirs productive of oil, gas, or geothermal resources must obtain a permit from the commission. Permits may be issued when the injection will not endanger oil, gas, or geothermal resources or cause the pollution of freshwater strata unproductive of oil, gas, or geothermal resources. Permits from the commission issued before the effective date of this section shall continue in effect until revoked, modified, or suspended by the commission. . . . .

(i) Monitoring and reporting.

(1) *The operator shall monitor the injection pressure and injection rate of each injection well on at least a monthly basis.*

*(2) The results of the monitoring shall be reported annually to the commission on the prescribed form.*

*(3) All monitoring records shall be retained by the operator for at least five years.*

*(4) The operator shall report to the appropriate District Office within 24 hours any significant pressure changes or other monitoring data indicating the presence of leaks in the well.*

(j) Testing.

(1) *Purpose. The mechanical integrity of an injection well shall be evaluated by conducting pressure tests to determine whether the well tubing, packer, or casing have sufficient mechanical integrity to meet the performance standards of this rule*, or by alternative testing methods under paragraph (5) of this subsection.

(2) Applicability. Mechanical integrity of each injection well shall be demonstrated in accordance with provisions of paragraphs (4) and (5) of this subsection prior to initial use. In addition, mechanical integrity shall be tested periodically thereafter as described in paragraph (3) of this subsection.

(3) Frequency.

(A*) Each injection well completed with surface casing set and cemented through the entire interval of protected usable-quality water shall be tested for mechanical integrity at least once every five years.*

*(B) In addition to testing required under subparagraph (A), each injection well shall be tested for mechanical integrity after every workover of the well.*

(C) An injection well that is completed without surface casing set and cemented through the entire interval of protected usable-quality ground water shall be tested at the frequency prescribed in the injection permit.

(D) The commission or its delegate may prescribe a schedule and mail notification to operators to allow for orderly and timely compliance with the requirements in subparagraph (A) and subparagraph (B) of this paragraph. Such testing schedule shall not apply to an injection well for which an injection well permit has been issued but the well has not been drilled or converted to injection.

(4) Pressure tests.

(A) Test pressure.

(i) The test pressure for wells equipped to inject through tubing and packer shall equal the maximum authorized injection pressure or 500 psig, whichever is less, but shall be at least 200 psig.

(ii) The test pressure for wells that are permitted for injection through casing shall equal the maximum permitted injection pressure or 200 psig, whichever is greater.

(B) Pressure stabilization. The test pressure shall stabilize within 10% of the test pressure required in subparagraph (A) of this paragraph prior to commencement of the test.

(C) Pressure differential. A pressure differential of at least 200 psig shall be maintained between the test pressure on the tubing-casing annulus and the tubing pressure.

(D) Test duration. A pressure test shall be conducted for a duration of 30 minutes when the test medium is liquid or for 60 minutes when the test medium is air or gas.

(E) Pressure recorder. Except for tests witnessed by a commission representative or wells permitted for injection through casing, a pressure recorder shall be used to monitor and record the tubing-casing annulus pressure during the test. The recorder clock shall not exceed 24 hours. The recorder scale shall be set so that the test pressure is 30 to 70% of full scale, unless otherwise authorized by the commission or its delegate.

(F) Test fluid.

(i) The tubing-casing annulus fluid used in a pressure test shall be liquid for wells that inject liquid unless the commission or its delegate authorizes use of a different test fluid for good cause.

(ii) The tubing-casing annulus fluid used in a pressure test shall contain no additives that may affect the sensitivity or otherwise reduce the effectiveness of the test.

(G) Pressure test results. The commission or its delegate will consider, in evaluating the results of a test, the level of pollution risk that loss of well integrity would cause. Factors that may be taken into account in assessing pollution risk include injection pressure,

frequency of testing and monitoring, and whether there is sufficient surface casing to cover all zones containing usable-quality water. A pressure test may be rejected by the commission or its delegate after consideration of the following factors:

(i) the degree of pressure change during the test, if any;

(ii) the level of risk to usable-quality water if mechanical integrity of the well is lost; and

(iii) whether circumstances surrounding the administration of the test make the test inconclusive. . . .

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Rule 3.57 Commentary – This rule provides for the reclamation of certain wastes.

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RULE §3.57 Reclaiming Tank Bottoms, Other Hydrocarbon Wastes, and Other Waste Materials

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(a) Applicability. *This section is applicable to reclamation of tank bottoms and other hydrocarbon wastes generated through activities associated with the exploration, development, and production (including transportation) of crude oil and other waste materials containing oil, as those activities are defined in §3.8(a)(30) of this title (relating to Water Protection). The provisions of this section shall not apply where tank bottoms or other hydrocarbon-bearing materials are recycled or processed on-site by the owner/custodian and are returned to a tank or vessel at the same lease or facility*. This section is not applicable to the practice of recycling or reusing drilling mud, except as to those hydrocarbons recovered from such mud recycling and sent to a permitted reclamation plant.

(b) Definitions. . . .

(c) Permitting process.

(1) Removal of tank bottoms or other hydrocarbon wastes from any producing lease tank, pipeline storage tank, or other production facility, for reclaiming by any person, is prohibited unless such person has either obtained a permit to operate a reclamation plant, or is an authorized person. Applicants for a reclamation plant operating permit shall file the appropriate form with the commission in Austin.

(2) The applicant shall give notice by mailing or delivering a copy of the application to the county clerk of the county where the reclamation plant is to be located, and to the city clerk or other appropriate city official of any city where the reclamation plant is located within the corporate limits of the city, on or before the date the application is mailed to or filed with the commission.

(3) In order to give notice to other local governments and interested or affected persons, notice of the application shall be published once by the applicant in a newspaper of general circulation for the county where the reclamation plant is to be located, in a form approved by the commission. Publication shall occur on or before the date the application is mailed to or filed with the commission. The applicant shall file with the commission in Austin proof of publication prior to the hearing or administrative approval.

(4) If a protest from an affected person or local government is made to the commission within 15 days of receipt of the application or of publication, or if the commission determines that a hearing is in the public interest, then a hearing will be held on the application after the commission provides notice of hearing to all affected persons, local governments, or other persons who express an interest in writing in the application.

(5) If no protest from an affected person or local government is received by the commission within the allotted time, the director may administratively approve the application. If the director denies administrative approval, the applicant shall have a right to a hearing upon request. After hearing, the examiner shall recommend a final action by the commission.

(6) Applicants must demonstrate they are familiar with commission rules and have the proper facilities to comply with the rules. . . .

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Rule 3.91 Commentary – This rule provides for the clean up of contaminated soil at wellsites.

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RULE §3.91 Cleanup of Soil Contaminated by a Crude Oil Spill

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(a) Terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Free oil--The crude oil that has not been absorbed by the soil and is accessible for removal.

(2) Sensitive areas--These areas are defined by the presence of factors, whether one or more, that make an area vulnerable to pollution from crude oil spills. Factors that are characteristic of sensitive areas include the presence of shallow groundwater or pathways for communication with deeper groundwater; proximity to surface water, including lakes, rivers, streams, dry or flowing creeks, irrigation canals, stock tanks, and wetlands; proximity to natural wildlife refuges or parks; or proximity to commercial or residential areas.

(3) Hydrocarbon condensate--The light hydrocarbon liquids produced in association with natural gas.

(b) Scope. These cleanup standards and procedures apply to the cleanup of soil in non-sensitive areas contaminated by crude oil spills from activities associated with the exploration, development, and production, including transportation, of oil or gas or geothermal resources as defined in §3.8(a)(30) of this title (relating to Water Protection). For the purposes of this section, crude oil does not include hydrocarbon condensate. These standards and procedures do not apply to hydrocarbon condensate spills, crude oil spills in sensitive areas, or crude oil spills that occurred prior to the effective date of this section. Cleanup requirements for hydrocarbon condensate spills and crude oil spills in sensitive areas will be determined on a case-by-case basis. Cleanup requirements for crude oil contamination that occurred wholly or partially prior to the effective date of this section will also be determined on a case-by-case basis. Where cleanup requirements are to be determined on a case-by-case basis, the operator must consult with the appropriate district office on proper cleanup standards and methods, reporting requirements, or other special procedures.

(c) Requirements for cleanup.

(1) Removal of free oil. To minimize the depth of oil penetration, all free oil must be removed immediately for reclamation or disposal.

(2) Delineation. Once all free oil has been removed, the area of contamination must be immediately delineated, both vertically and horizontally. For purposes of this paragraph, the area of contamination means the affected area with more than 1.0% by weight total petroleum hydrocarbons.

(3) Excavation. At a minimum, all soil containing over 1.0% by weight total petroleum hydrocarbons must be brought to the surface for disposal or remediation.

(4) Prevention of stormwater contamination. To prevent stormwater contamination, soil excavated from the spill site containing over 5.0% by weight total petroleum hydrocarbons must immediately be:

(A) mixed in place to 5.0% by weight or less total petroleum hydrocarbons; or

(B) removed to an approved disposal site; or

(C) removed to a secure interim storage location for future remediation or disposal. The secure interim storage location may be on site or off site. The storage location must be designed to prevent pollution from contaminated stormwater runoff. Placing oily soil on plastic and covering it with plastic is one acceptable means to prevent stormwater contamination; however, other methods may be used if adequate to prevent pollution from stormwater runoff.

(d) Remediation of soil.

(1) Final cleanup level. A final cleanup level of 1.0% by weight total petroleum hydrocarbons must be achieved as soon as technically feasible, but not later than one year

after the spill incident. The operator may select any technically sound method that achieves the final result.

(2) Requirements for bioremediation. If on-site bioremediation or enhanced bioremediation is chosen as the remediation method, the soil to be bioremediated must be mixed with ambient or other soil to achieve a uniform mixture that is no more than 18 inches in depth and that contains no more than 5.0% by weight total petroleum hydrocarbons.

(e) Reporting requirements.

(1) Crude oil spills over five barrels. For each spill exceeding five barrels of crude oil, the responsible operator must comply with the notification and reporting requirements of §3.20 of this title (relating to Notification of Fire Breaks, Leaks, or Blow-outs) and submit a report on a Form H-8 to the appropriate district office. The following information must be included:

(A) area (square feet), maximum depth (feet), and volume (cubic yards) of soil contaminated with greater than 1.0% by weight total petroleum hydrocarbons;

(B) a signed statement that all soil containing over 1.0% by weight total petroleum hydrocarbons was brought to the surface for remediation or disposal;

(C) a signed statement that all soil containing over 5.0% by weight total petroleum hydrocarbons has been mixed in place to 5.0% by weight or less total petroleum hydrocarbons or has been removed to an approved disposal site or to a secure interim storage location;

(D) a detailed description of the disposal or remediation method used or planned to be used for cleanup of the site;

(E) the estimated date of completion of site cleanup.

(2) Crude oil spills over 25 barrels. For each spill exceeding 25 barrels of crude oil, in addition to the report required in paragraph (1) of this subsection, the operator must submit to the appropriate district office a final report upon completion of the cleanup of the site. Analyses of samples representative of the spill site must be submitted to verify that the final cleanup concentration has been achieved.

(3) Crude oil spills of five barrels or less. Spills into the soil of five barrels or less of crude oil must be remediated to these standards, but are not required to be reported to the commission. All spills of crude oil into water must be reported to the commission.

(f) Alternatives. Alternatives to the standards and procedures of this section may be approved by the commission for good cause, such as new technology, if the operator has demonstrated to the commission's satisfaction that the alternatives provide equal or greater protection of the environment. A proposed alternative must be submitted in writing and approved by the commission.

iii. Federal Statutes

Numerous federal statutes and regulations impact oil and gas operations. The more common regulations impacting oil and gas production activities are set out below.

## Federal Water Pollution Control Act / Clean Water Act

In 1972 Congress established a comprehensive program of federal regulation of water pollution by enacting the Federal water Pollution Control Act of 1972 (FWPCA). This Act was extensively amended in 1977 and renamed the Clean Water Act (CWA).

Prior to the FWPCA the Refuse Act of 1899 had been used to regulate discharges into navigable water. The Refuse Act was enacted primarily to protect navigation, and prohibited almost all discharges into navigable waters without a permit. See: 33 USCA Sec. 407. The Refuse Act contains one notable exception that allows discharges of stormwater runoff without a permit.

### NPDES PERMITS

The main tool that is used by the Clean Water Act to regulate the discharge of pollutants into surface waters is the National Pollution Discharge Elimination System ("NPDES") permit. The NPDES permit is required for the discharge of any pollutant from any point source into the navigable waters of the United States. See: 33 USCA Sec. 1342.

A NPDES permit which is issued under the CWA will been deemed to fulfill the permitting requirements of the Refuse Act of 1899. U.S. v. Rohm & Haas Co., 500 F.2d 167 (5th Cir. 1974).

Under the CWA the term "point source" is defined to mean any discernible confined and discrete conveyance of a discharge, including, but not limited to, any pipe, ditch, channel tunnel, or conduit from which pollutants could be discharged. 33 U.S.C.A. Sec. 1362(14). The term "discharge" is defined as the addition of any pollutant to navigable waters. 33 USCA Sec. 1362(12).

"Pollutant" includes dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, rock, sand, industrial, municipal, and agricultural waste discharged into .water. 33 USCA Sec. 1362 (6).

Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, are not considered a "pollutant" for NPDES permitting purposes. 40 CFR Sec. 122.2.

"Waters of the united States" have been defined to include navigable waters, tributaries of navigable waters, interstate waters, intrastate waters used by interstate travelers or industry.

The EPA has been authorized to delegate regulatory responsibility to the states meeting certain minimum requirements. Where required an "individual", or site specific, NPDES permit can be obtained for the discharge of a pollutant from an oil and gas facility. 40 CFR Sec. 122.21. Where

the facility is owned by one party and operated by another the operator has the duty to obtain the permit. 40 CFR Sec. 122.21(b).
Because of the large number of potential individual permits, "general" National Pollution Discharge Elimination System ("NPDES") permits are available from the EPA, versus the "individual" NPDES permits for each facility. 40 CFR Part 122.28. Onshore E & P operations in Louisiana, New Mexico, Texas and Oklahoma can obtain NPDES general permits.

Waste water discharges can be classified into two categories: "process related" and "non-process" type discharges. Process related waste water includes produced water and sands, drilling muds, completion fluids, oil and condensate spills! well treatment fluids, refinery wastes, and equipment maintenance fluidso Non-process related waste water discharges generally include contaminated storm water runoff.

(a) permitting of "process related" waste water discharges

i. Petroleum Refining & other Source NPDES permits

Any discharge of pollutants into the waters of the United States is prohibited unless the discharge is authorized by a NPDES permit issued pursuant to section 402 of the CWA.

Section 402 of the CWA provides that any NPDES permit which is issued will incorporate new source performance standards (NSPS) and/or effluent guidelines that have been adopted. In addition, the NPDES permit must incorporate any state water quality or treatment guidelines in effect.

An applicant for a NPDES permit under the CWA who is proposing a new discharge into navigable waters should generally apply at least 180 days before the date on which the discharge is to commence. See: 40 CFR Sec. 122.21.

Generally an individual NPDES permit application will require that the following information be submitted: (1) outfall location, (2) name of receiving waters, (3) type of wastes, (4) flow rates, (5) effluent characteristics, etc. See: 40 CFR Sec. 122.21(g) & (h). Other information with regard to the discharge and applicant will also be required.

The NPDES permit application will need to be signed by a responsible corporate officer, defined as one who is the president, secretary, treasurer, or manager of one or more manufacturing facilities employing 250 persons or having gross annual sales in excess of $25 million. 40 CFR Sec. 122.2(a) (1). Reports that are required under the NPDES permit will also be required to be signed by the responsible corporate officer. 40 CFR Sec. 122.2(b).

ii. Exploration & production NPDES permits

Process discharges from oil and gas wells are categorized into "onshore", "offshore", "coastal", "stripper", and "agricultural" sub-categories. See: 40 CFR Part 435. For "onshore" operations which include production, field exploration, drilling, well completion, and well treatment activities the EPA's effluent guidelines provide as follows:

*There shall be no discharge of waste water pollutants into navigable water from any source associated with production, field exploration, drilling, well completion, or well treatment (i.e., produced water, drilling muds, drill cuttings, and produced sand).*

In an environmental audit of onshore oil and gas wells, it should be determined that there are no discharges of waste water pollutants into navigable waters from any exploration and production activities since such discharges are prohibited under the Clean Water Act.

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## The Safe Drinking Water Act ("SDWA")

The Safe Drinking Water Act ("SDWA") focuses on the protection of groundwater that may be used for public drinking water supplies by regulating underground injection ("UIC") wells. 42 USCA Sec. 300h et. seq.

The EPA has designated five categories of injection wells under the SDWA:

Class I - Hazardous Waste Disposal Wells;
Class II - Oil & Gas Injection/Disposal Wells;
Class III - Mining & Power Generation Wells;
Class IV - Disposal Wells for Radioactive Wastes; and
Class V - Brine Mining Wells.

Class II injection/disposal wells dispose of non-hazardous oil and gas production waste (usually produced water), and are used in enhanced recovery and pressure maintenance projects.

The SDWA contemplates that each state will take the lead in permitting and regulating UIC wells in accordance with certain minimum requirements that have been set out by the EPA. Texas, Oklahoma, and Louisiana all have EPA approved state run UIC programs for Class II wells.

1. MIT TESTS ON CLASS II UIC WELLS

Under most state agency regulations UIC wells are to be tested every five years. In Texas and Oklahoma UIC wells must be tested for mechanical integrity (“MIT tests") once every five years, although due to the configuration of some wells they may be required by permit to be tested annually. See: TRC Rule 9(k); TRC Rule 46(j) (2); OCC-OGR Rule 3-305(c).

In addition, before a permit is issued the placement of the packer, injected water volumes, injected water pressures, addition of corrosion inhibitors, addition of surfactant, behind pipe cement integrity, etc., will be reviewed by the regulatory agency.
On the sale or purchase of a well the MIT test results and annual disposal/injection monitoring report should be reviewed to insure any UIC well on the property is mechanically sound. See: TRC Form H-10; TRC Form H-5; OCC Form 1012; OCC Form 1012A. Further, injection volumes and pressures should be reviewed to insure that they comply with any limitations set out in the UIC permit.

2. SUBSTANCES PERMITTED FOR A CLASS II UIC WELL

RCRA hazardous wastes cannot be disposed of in a Class II well. 40 CFR Part 144.6(b). Certain oil and gas wastes are exempt from classification as a "hazardous waste" under RCRA, and can be injected into a Class II well with agency approval.

These RCRA exempt wastes include produced water, drilling fluids, drilling cuttings, well completion fluids, as well as other materials. The state issued UIC permit may limit the substances that can be injected into the UIC well. Produced water is most commonly injected into Class II wells, and corrosion inhibitors, surfactants, or other chemicals may be added to the injected water.

On the purchase of a producing property, it should be determined that no non-exempt RCRA hazardous wastes have been injected into the Class II UIC well. Any additives to the injected water should be ascertained and noted in the assessor's report. The UIC permit should be reviewed to determine what substances have been approved for injection into the well.

3. RIGHT TO INJECT/DAMAGE TO OFFSET PRODUCTION

Where the surface and mineral estate have been severed several cases have addressed the issue of whether the mineral or surface owner has the right to inject salt water into the underlying formations. See: Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792 (Okla. 1941); Ellis v. Arkla, 450 F. Supp. 412 (E.D. Okla. 1978).

In Ellis, the court indicated that the surface owner owns the pore spaces in the formations, therefore the right to inject would be owned by the surface owner. Even if the surface owner has the right to inject water the law is clear that if the minerals are being developed the mineral owner can use a reasonable amount of the surface to develop the underlying minerals. Dunn v. Southwest Ardmore Tulip Creek Sand Unit, 548 P.2d 685 (ct. App. 1976); West Edmond Salt Water Disposal Association v. Rosecrans, 226 P.2d 965 (Okla. 1950). As such, the oil and gas operator can inject water produced from the property back into a UlC well on that property. TDC Engineering, Inc. v. Dunlop, 686 S.W. 2d 346 (Tex. App. 1985).

Where produced water is transported to a UlC well from off the lease the underlying minerals are not being developed, therefore the surface owner needs permission to inject such substances. Where water is injected into a UIC well the offset owners may have a cause of action for damage to their wells even if the injection is done in accordance with the permit issued by the state agency. West Edmond Hunton Lime unit v. Lillard, 265 P.2d 730 (Okla. 1954).

In some cases the owner of a UlC well will purchase the surface to avoid any conflicts over environmental damage from produced water spills. As owner of the surface, the producer can also inject water brought in from off the lease.

4. TEXAS UlC PROGRAM

Statewide Rule 9 and 46 - Underground Injection. Texas Railroad Commission Rule 9 and 46 authorizes the subsurface injection of produced water into underground injection or disposal wells, and sets out the monitoring and testing requirements for such wells. Disposal wells are regulated under Rule 9 and injection wells under Rule 46. Both rules are basically the same except for the type of well being regulated.

# The Resource Conservation and Recovery Act ("RCRA")

The Resource Conservation and Recovery Act ("RCRA") of 1976, as amended by the Hazardous and Solid waste Amendments of 1984, established a comprehensive statute to regulate the disposal of "solid wastes". 42 USCA Sec. 6901 et seq.

Solid wastes by statutory definition can consist of solid, liquid, or gaseous materials, and mayor may not be classified as "hazardous". 42 USCA Sec. 2011. Prior to RCRA the disposal of solid wastes were generally regulated by the states under the provisions of the Solid Waste Disposal Act ("SWDA"), predecessor of RCRA.

RCRA was enacted by Congress to address three goals:

> To provide a system of tracking and preserving a record of the movement of hazardous waste from origin to disposal. This "cradle to grave" concept is implemented with the manifest system.
>
> To insure that the disposal of hazardous waste was accomplished by a method to prevent the escape of waste into the environment.
>
> To provide an enforcement mechanism to insure that the first two goals are met.

Modern solid waste legislation began with the enactment of the Solid Waste Disposal Act in 1965 to assist states in the regulation of dump sites. This statute was amended in 1970 with the passage of the Resource Recovery Act which encouraged the recovery and recycling of solid wastes. In 1976 the Resource Conservation and Recovery Act was enacted to track hazardous waste disposal from "cradle to grave", and for the purposes set out above.

In 1984 the Hazardous Waste Amendments to RCRA were enacted which required landfills to be lined, regulated underground storage tanks, and restricted the materials that could be disposed of in a landfill without treatment (the "land ban"). In 1986 the Superfund Amendments and Reauthorization Act further amended RCRA to require owners of underground storage tanks carry certain financial insurance for leaking tanks, and established a clean up fund for the tanks.

## RELATIONSHIP OF RCRA AND CERCLA (SUPERFUND)

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was enacted in 1980 to address "hazardous substances", while RCRA was enacted several years earlier to deal with "hazardous wastes". While the Acts are related, at least two major differences exist.

First, CERCLA addresses the clean up of existing sites contaminated with hazardous substances, while RCRA generally deals with the ongoing operations of generators, transporters, and the disposal of hazardous waste. CERCLA therefore generally deals with clean up of existing contamination, while RCRA deals with the prevention of future contamination.

Secondly, CERCLA regulates a much larger number of substances and materials than RCRA. RCRA addresses the handling and management of "hazardous wastes", while CERCLA addresses hazardous wastes as well as other compounds defined as "hazardous substances" in that Act.

From a waste management standpoint, the oil and gas facility operator/owner must address with both RCRA and CERCLA issues when managing oil field wastes and materials.

## RELATIONSHIP OF FEDERAL AND STATE LAW

Hazardous waste management is regulated at both the federal and the state level. Under RCRA, states are not prohibited from establishing more stringent waste management 'procedures. See: 42 USCA Sec. 6929. The states can be delegated the authority to enforce RCRA provisions in lieu of the EPA.

In many cases states have adopted waste management programs that are very similar to the federal program or statutes. In Texas, the Solid Waste Disposal Act has been enacted to regulate solid wastes, and the Texas Water Commission has been delegated the responsibility to enforce most of the RCRA provisions dealing with hazardous and industrial wastes. Tex. Health & Safety Code, Sec. 361.001. The Texas Railroad Commission has authority to regulate non-hazardous oil and gas wastes, including pipeline operations and processing plants. Id. at Sec. 361.073.

## RCRA HAZARDOUS WASTES

Definitions:

> (a) "Solid wastes". RCRA regulates both "solid wastes" and a subcategory of solid wastes classified as "hazardous wastes". Solid wastes include those materials "discarded", which include abandoned or "inherently waste-like" materials. See: 40 CFR Sec. 261.2(a). Recycled materials that are used in a manner constituting disposal, burned for energy recovery, or are reclaimed can be hazardous wastes under RCRA. 40 CFR Part 261.2. If the material can be reused in its current state as an original ingredient to make a product, or returned immediately to the same industrial process in a closed loop process such recycled material may not considered a RCRA solid waste (see discussion on recycling below). American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990); American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987).

(b) Subtitle "C" "Hazardous wastes".Under RCRA a solid waste can be considered a "hazardous waste" if: (1) the material is "listed" by the EPA as hazardous, or (2) exhibits one of four "characteristic" attributes identified by the EPA which make it hazardous. Such materials are regulated under "Subtitle 'e'" of RCRA.

Listed Wastes. Three separate lists exist to define "listed" hazardous wastes: (1) non-specific sources, (2) specific sources, and (3) discarded commercial chemical products. See: 40 CFR Parts 261.31, 261.32, 261.33.

Listed wastes are assigned an EPA waste number; wastes from non-specific sources are "F-listed" wastes, that is their waste number will start with the letter "F". Hazardous wastes from specific sources are "K-listed" wastes, and discarded commercial chemical products are either "P-listed" wastes if they are "acutely hazardous" or "U-listed" wastes if they are "toxic" over a period of prolonged exposure.

Characteristic Wastes. The "characteristic" attributes of hazardous wastes include: (1) ignitability, (2) corrositivity, (3) reactivity, or (4) toxicity. 40 CFR Part 261 subpt. C. Toxicity testing procedures were revised in 1990, and many materials that would not have been considered hazardous under the previous test are now considered hazardous waste under the new test.

The Toxicity Characteristic Leaching Procedure ("TCLP"), is designed to test the mobility of contaminants present in the waste. 40 CFR Part 261 App. II. The original toxicity test concerned itself with the presence of eight metals, four insecticides, and two herbicides. Maximum benzene levels of 0.5 part per million will make many petroleum related wastes exceed RCRA TCLP toxicity standards, and these wastes should be treated as hazardous unless exempted.

**RCRA E & P EXEMPTIONS**

In 1980 RCRA was amended so as to exclude several major categories of waste materials until the EPA could conduct special studies of the wastes to determine if they needed to be covered by a stringent waste management program. This amendment, named the "Bevill Amendment", required a study of high volume·low toxicity wastes generated in oil and gas operations. See: 42 USCA Sec. 6921(b) (2) and 6982(m).

(a) E & P Exempted Materials

As a result of such studies the EPA determined that an exemption from the hazardous waste management provisions of RCRA Subtitle C should exist for wastes associated with the exploration, development, or production of crude oil or gas. The EPA has determined that the following wastes'are included in the statutory exemption:

produced waters drilling fluids drill cuttings rig wash
geothermal production fluids

well completion and stimulation fluids basic sediment and water
pit sludges and sludges from storage and disposal of
exempt wastes
workover wastes
gas plant dehydration wastes
gas plant sweetening wastes for sulphur removal cooling tower blowdown
spent filters, filter media
packing fluids
produced sand
pipe scale and other deposits removed from piping and
equipment
soil containing hydrocarbons
pigging wastes from gathering lines constituents removed from produced waters
liquid hydrocarbons from the production stream gases from the production stream
materials ejected during blow down
waste crude oil from field operations

The following oil and gas wastes are subject to regulation under Subtitle C of RCRA, and can be considered a RCRA hazardous waste:

painting wastes
unused fracturing fluids or acids
gas plant cooling tower cleaning wastes oil and gas service company wastes refinery wastes
used equipment lubrication oils waste compressor oil and filters
used hydraulic oil
waste solvents
waste in transportation pipeline pits caustic or acid cleaners
pesticide wastes
sanitary wastes
boiler cleaning wastes, drums, insulation
pigging wastes from transportation lines

Because regulated wastes must be disposed of properly, in an environmental audit special care should be taken to examine the property for the presence of such non-exempt wastes. Where hazardous wastes are transported off the lease'premises for disposal, a waste manifest must be prepared.

iv. Strict Liability & Nuisance Per Se

Turner v. Big Lake Oil Co.
Supreme Court of Texas
128 Tex. 155; 96 S.W.2d 221
July 15, 1936, Decided

OPINION: The primary question for determination here is whether or not the defendants in error, without negligence on their part, may be held liable in damages for the destruction or injury to property occasioned by the escape of salt water from ponds constructed and used by them in the operation of their oil wells. The facts are stated in the opinion of the Court of Civil Appeals (62 S. W. (2d) 491), and will be but briefly noted in this opinion.

The defendants in error in the operation of certain oil wells in Reagan County constructed large artificial earthern ponds or pools into which they ran the polluted waters from the wells. On the occasion complained of, water escaped from one or more of these ponds, and, passing over the grass lands of the plaintiffs in error, injured the turf, and after entering Garrison draw flowed down the same into Centralia draw.

In Garrison draw there were natural water holes, which supplied water for the livestock of plaintiffs in error. The pond, or ponds, of water from which the salt water escaped were, we judge from the map, some six miles from the stock-water holes to which we refer. The plaintiffs in error brought suit, basing their action on alleged neglect on the part of the defendants in error in permitting the levees and dams, etc., of their artificial ponds to break and overflow the land of plaintiffs in error, and thereby pollute the waters to which we have above referred and injure the turf in the pasture of plaintiffs in error.

The question was submitted to a jury on special issues, and the jury answered that the defendants in error did permit salt water to overflow from their salt ponds and lakes down Garrison draw and on to the land of the plaintiffs in error. However, the jury acquitted the defendants in error of negligence in the premises. The questions and answers are shown in the opinion of the Court of Civil Appeals, and will not be here repeated.

Various questions are raised in this Court, but we are well satisfied with the opinion of the Court of Civil Appeals, and will take occasion to discuss only two issues.

The plaintiffs in error in their application say that the Court of Civil Appeals in its opinion has held that in order for plaintiffs in error to recover because the defendants in error permitted salt water to overflow their land, kill the vegetation, and pollute the water of their live stock, "they must allege and prove some specific act of neglect or must allege and prove that the water polluted was a water course." In this conclusion we think the Court of Civil Appeals stated the correct rule. Gulf C. & S. F. Ry. Co. v. Oakes, 94 Texas, 155; 58 S. W., 999, 52 L. R. A., 293, 86 Am. St. Rep., 835; Galveston, H. & S. A. R. Co. v. Currie, 100 Texas, 136, 96 S. W., 1073, 10 L. R. A. (N. S.) 367; Cosden Oil Co. v. Sides, 35 S. W. (2d) 815; Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 117, 11 S. W., 160, 3 L. R. A., 639; 15 Am. St. Rep., 771; Houston & T. C. Ry. Co. v. Anderson, 44 Texas Civ. App., 394, 98 S. W., 440; Rigdon v. Temple Waterworks Co., 11 Texas Civ. App., 542, 32 S.

W.,828; 67 Corpus Juris, p. 915, sec. 356, p. 930, sec. 385; Farnham on Waters, Vol. 3, p. 2546, sec. 875; Thompson on Negligence, Vol. 1, secs. 696, 706, 707.

The Court of Civil Appeals quite correctly determined that the rules of law applicable to the pollution of streams and water courses or public waters were not applicable here, for reasons which that court stated. So the immediate question presented is whether or not defendants in error are to be held liable as insurers, or whether the cause of action against them must be predicated upon negligence. We believe the question is one of first impression in this Court, and so we shall endeavor to discuss it in a manner in keeping with its importance.

Upon both reason and authority we believe that the conclusion of the Court of Civil Appeals that negligence is a prerequisite to recovery in a case of this character is a correct one.

There is some difference of opinion on the subject in American jurisprudence brought about by differing views as to the correctness or applicability of the decision of the English courts in Rylands v. Fletcher, L. R. 3 H. L. 330. The doctrine of this case is correctly stated in the notes to 15 L. R. A. (N. S.), p. 541, as follows:

> "In Rylands v. Fletcher, L. R. 3 H. L. 330, Affirming L. R. 1 Exch. 265, which is the leading case, the plaintiff was the lessee of mining privileges which had passages communicating with abandoned mines under the land of a mill owner who built a reservoir over some shafts which had been filled in, and the pressure of the water forced the same through these shafts and injured plaintiff's mines.
>
> The defendant did not know that the mines were being worked underneath the land. It was said that the failure on the part of the engineer or contractor to block up these abandoned shafts was an act of negligence for which the defendant would be liable. But it was held that the defendant was liable on the ground that he had brought on his premises, and stored, a dangerous substance without restraining it.
>
> Cranworth, J., said: 'The defendants, in order to effect an object of their own, brought onto their land, or onto land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however, skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.'" (Italics ours.)

The italicized portion of the above quotation shows that in fact the case was one of negligence, and that the damages could have been placed upon that ground. The distinguished judge who wrote the opinion in truth went beyond and outside the facts of his case in holding that there could be liability without negligence. This dictum, however, with some modification, became the rule of decision in England and in some of the American courts. (See Thompson on Negligence, Vol. 1, secs. 697 to 703, inclusive.)

In a qualified sense, therefore, Rylands v. Fletcher may be regarded as a statement of the common law rule; not, however, of such universal acceptation as to be controlling on the American courts.

While the rule has been followed to some extent in this country, in general the American courts base liability, where dams have broken, on negligence, either in the original construction of the reservoir or in failing properly to provide against all such contingent damages as might reasonably be anticipated. 67 Corpus Juris, p. 916, sec. 356; Thompson on Negligence, Vol. 1, secs. 696, 706, 707; 15 L. R. A. (N. S.) Notes, pp. 541 to 546; Sedgwick on Damages (8th ed.), Vol. 1, p. 34, sec. 33.

This Court long since repudiated the general rule announced in Rylands v. Fletcher. Associate Justice Williams, in the case of Gulf C. & S. F. R. Co. v. Oakes, cited above, a case involving the planting and subsequent spreading of Bermuda grass, after stating the rule in Rylands v. Fletcher, declined to follow the same, and in part said:

> "There have been subsequent decisions in England which some authorities regard as relaxing the rule in Fletcher v. Rylands, but it is unnecessary to refer especially to them. Cooley on Torts, 677-680. The rule laid down was largely deduced from prior rulings establishing absolute liability for damages caused by fires kindled on one's premises and spreading to those of another; by injuries inflicted by one, in his lawful self defense against another, upon an innocent bystander; and by animals straying from the lands of their owners upon those of others. The law has become settled, in this country at least, that there is no liability in the two first instances without negligence on the part of the person permitting the fire to spread or inflicting the injury; and in the case of animals, the law is entirely different in this and other States. Clarendon, etc., Co. v. McClelland Bros., 86 Texas, 179, same case, 89 Texas, 483.

"By making the liability absolute, the rule in Fletcher v. Rylands, taken literally, imposes an unqualified restriction upon the right of an owner of land to put it to a use lawful in itself, and this is the aspect in which it has the most direct bearing upon the question before us. It so applies the maxim, 'sic utere tuo,' etc., as to make the owner of the land liable, in all cases, for loss or damage suffered by another in consequence of the escape of anything brought by the owner upon his land, which, in escaping, is likely to do mischief. Of course, the broad proposition was laid down with reference to such things as the court had in mind and should not, even if accepted as generally correct, be applied indiscriminately to other facts which, in their nature, are essentially different.

Even if the rule stated were a just one defining the duty of one storing so dangerous and destructive an element as water is when moving in large volume, it should be applied with careful discrimination to things which, like grass, spread slowly and are subject to more or less control. The fact that the proposition as abstractly stated cannot be justly applied to all subjects which its terms embrace is enough to show that it is incorrect as a statement of a general principle of law. Accordingly, it has not met with general acceptance in this country, most of the authorities holding that liability for such injuries must be based upon negligence or other culpability on the part of the person sought to be held responsible.

The authorities are so numerous as to make a review or even the citation of them all impracticable. Cooley on Torts. 776, 777; Bishop on Non-Con. Law, 839, note 3; 1 Thomp. on

Neg., 96; Coal Co. v. Sanderson, 113 Pa. St., 126; Loser v. Buchanan, 51 N. Y., 476; Brown v. Collins, 53 N. H., 442; Marshall v. Welwood, 38 N. J. L., 339."
As noted by Associate Justice Funderburk in Cosden Oil Co. v. Sides, 35 S. W. (2d) 816, 818, this Court in Galveston, H. & S. A. R. Co. v. Currie, supra, in an opinion also by Associate Justice Williams, interpreted and applied its holding in the Oakes Case, saying in part:

> "In the absence of some positive law forbidding or regulating the keeping or use of the thing, the fundamental question is one of negligence vel non, depending, as in other cases of negligence, upon the inquiry whether or not there has been a neglect or violation of the duty which the law imposes upon all persons to use due care in the use of their property or the conduct of their business to avoid injury to others. Some of the older cases in England seem to assert the absolute liability of an insurer, but it is settled in this state that the question is one of negligence (Gulf, C. & S. F. Ry. Co. v. Oakes, 94 Texas, 155); * * *"

In the Cosden Oil Co. Case, cited above, the Court of Civil Appeals had before it a case involving damage to land brought about by the flow of "oils, waste oil and products." The court in an able opinion by Associate Justice Funderburk held, correctly we think, that no right of recovery was shown independently of the existence of negligence.

In the case of Rigdon v. Temple Waterworks, 11 Texas Civ. App., 542, 32 S. W., 829, involving damages due to the falling of a water tower and tank, the Court of Civil Appeals applied the rule of negligence as a predicate for damages, although the exact question here involved may have not been presented in that case.

In Houston & T. C. R. Co. v. Anderson, 44 Texas Civ. App., 394, 98 S. W., 440, the Court of Civil Appeals, in an opinion by Associate Justice Pleasants, held that in the absence of negligence, damages due to the flow of crude oil from a wrecked freight train could not be recovered.

As pointed out in the quotation above from Judge Williams' opinion in the Oakes Case, our courts hold that one who uses fire, an agency as dangerous as water, is not an insurer of his neighbors' safety, but is only liable for damages due to negligence. 19 Texas Jur., p. 660, sec. 2, and cases cited in the notes; Missouri Pac. Ry. Co. v. Platzer, 73 Texas, 117, 11 S. W., 160, 3 L. R. A., 639; Missouri, K. & T. Ry. Co. v. Carter, 95 Texas, 483, 68 S. W., 159; Pfeiffer v. Aue, 53 Texas Civ. App., 98, 115 S. W., 300 (writ refused).

As to liability for trespass by animals, we have likewise departed from the common law rule, because unsuited to our conditions. 2 Texas Jur., p. 751, sec. 15, p. 755, sec. 19; Clarendon Land etc. Co. v. McClelland Bros., 89 Texas, 483, 34 S. W., 98; Pace v. Potter, 85 Texas, 473, 22 S. W.,300.

We have also discarded the common law of liability for injuries to an innocent bystander by one in his lawful selfdefense against another, and hold that civil liability in such instances can be predicated only upon negligence. Gulf, C. & S. F. Ry. Co. v. Oakes, 94 Texas, 155, 158, 58 S. W., 999; Koons v. Rook, 295 S. W.,592.

The storage and use of explosives is clearly within the rule of absolute liability laid down in Rylands v. Fletcher; but, as to these, we have also changed from the common law rule, and predicate liability upon negligence, in the absence of controlling statutes or facts so obvious as to

constitute a nuisance as a matter of law. 19 Texas Jur., p. 458, sec. 4, p. 459, sec. 5, p. 461, sec. 7, p. 462, sec. 8, p. 464, sec. 9.

Associate Justice Williams in the opinion in the Oakes Case, supra, states that the rule of absolute liability announced in Rylands v. Fletcher was largely deduced from prior rulings establishing absolute liability for damages caused by; (1) fires kindled on one's premises and spreading to those of another; (2) by injuries inflicted by one in his lawful defense against another upon an innocent bystander; and (3) by animals straying from the lands of their owners upon those of others.

As shown above, in these three instances, as well as others where in England the same rule was applied, we have departed from the common law, and only award damages when predicated upon negligence.

Since we have repudiated the bases of the rule announced in Rylands v. Fletcher, it follows as a necessary corollary that we should not apply the rule in cases such as the one before us. It is true that the Oakes Case, in which Justice Williams announced in general terms our repudiation of the absolute liability doctrine, was not a water case; but the reasons for its repudiation there are equally cogent here.

No good reason can be assigned for declining to follow the common law rule as applied to damages due to fires, to the destruction of property by animals, and to injuries to an innocent bystander by one engaged in his own defense, the basis of the rule applied to the water case of Rylands v. Fletcher, and then apply the repudiated rule in the type of case before us. In general, we believe, it may be said that the doctrine of absolute liability announced in Rylands v. Fletcher has been likewise generally repudiated in the United States, although some States in at least a modified form adhere to it. Authorities supra.

Thompson in his masterly work on Negligence, Vol. 1, sec. 694 et seq., reviews at length the English common law rule of absolute liability in the use and control of agencies, which from their nature have a tendency to escape control and get upon land of adjoining owners, and there produce injury, which he says make those who employ such agencies "liable as an insurer." He then states that the American rule is to the contrary; that here liability can only arise from negligence. He says:

> "Sec. 706. But the American Doctrine Decisively Against that Case (Rylands v. Fletcher) in Respect of Liability for Escape of water. -- Where water is collected in reservoirs, behind dams, in canals or in ditches, in the ordinary manner for the purpose of being used as a motive power, in navigation, in irrigation, in mining, or for any other convenient and lawful end, the rule, in reason and according to the decisive weight of American judicial opinion, is different. There is nothing unlawful in collecting water for such purposes; and hence, in case it escapes and does mischief, the person so collecting it can only be held liable on the ground of something unlawful in the manner in which he has built or maintained his structure, -- that is, on the principle of negligence. * * *
>
> It follows, therefore, that if a dam breaks away, to the injury of property below, the owner will not be liable unless the person injured can show negligence; and if it appear in proof that the dam was well and properly built, upon a proper model, he will not be liable merely

> from the fact that it gave way; but otherwise, if it broke away in consequence of having been improperly constructed, or maintained in unsafe condition."

" Sec. 707. Rule of Diligence in Restraining Water is Ordinary Care. -- The rule of diligence which the law puts upon an owned or occupier of land in restraining water artificially collected thereon is the rule described as ordinary or reasonable care; and here, as in other cases, this rule of care various in proportion to the danger likely to accrue to others from the escape of water. It may be discharged by slight attention in some cases, and it may require the most exacting and unremitting attention, care and skill in others. The rule of diligence here exacted is, as in other cases, ordinary care which men employ where the risk is their own; * * *"

Judge Thompson then says, and with this we concur:

> "For this rule of ordinary care exacts here, as in other cases, a degree of vigilance, attention, and skill in proportion to the probabilities of danger. In an action for damages caused by the breaking away of a dam, it will not do for the owner to say that he built it strong enough to resist ordinary freshets; he must build it strong enough to resist those extraordinary freshets which sometimes occur, and which are therefore reasonably to be anticipated."

A review of the decisions made the basis of Judge Thompson's text, as well as those subsequent, leads to the conclusion stated by him, that the American rule in cases of the character before us requires negligence as the basis of the recovery of damages; that the doctrine of Rylands v. Fletcher is not the common law rule as applied generally in this country to cases of the character before us. This conclusion is not only supported by Thompson and the various cases cited in Sedgwick and the notes to 15 L. R. A. (N. S.), supra, but the editor of the notes in the latter declares:

> "The weight of authority in this country is that the defendant maintaining a water ditch or tank, or operating and using water pipes, will not be liable for damages caused to others from the escape of the water from his premises in the absence of negligence."

Likewise Corpus Juris (Vol. 67, p. 915, sec. 356) states:

> "The English rule has been followed to some extent in this country; but in general the American courts base the liability on negligence, either in the original construction of the reservoir or other receptacle, in subsequently allowing it to become defective, or in failing properly to provide against all such contingent damages as might reasonably be anticipated."

The American conception of the common law is the rule of decision with us, rather than the rule as understood and applied in England. 9 Texas Jur., p. 307, sec. 9; Dickson v. Strickland, 114 Texas, 176, 265 S.W., 1012. Applying the common law rule as deducible generally from the decisions of the American courts, we are compelled to say that negligence is a necessary basis for actions of the character before us.

Another rule with reference to the adoption of the English common law is that in adopting it as the rule of decision we have done so only in so far as consistent with the conditions which obtain in this State. 9 Texas Jur., p. 310, sec. 12; Motl v. Boyd, 116 Texas, 82, 115, 286 S. W., 458.

In Rylands v. Fletcher the Court predicated the absolute liability of the defendants on the proposition that the use of land for the artificial storage of water was not a natural use, and that, therefore, the land owner was bound at his peril to keep the waters on his own land. Rylands v. Fletcher, L. R. 3, H. L., 330; City Water Power Co. v. Fergus Falls, Anno. Cas. 1912A, p. 110 (note); 27 R. C. L., p. 1206, sec. 124. This basis of the English rule is to be found in the meteorological conditions which obtain there. England is a pluvial country, where constant streams and abundant rains make the storage of water unnecessary for ordinary or general purposes.

When the Court said in Rylands v. Fletcher that the use of land for storage of water was an unnatural use, it meant such use was not a general or an ordinary one; not one within the contemplation of the parties to the original grant of the land involved, nor of the grantor and grantees of adjacent lands, but was a special or extraordinary use, and for that reason applied the rule of absolute liability. This conclusion is supported by the fact that those jurisdictions which adhere to the rule in Rylands v. Fletcher do not apply that rule to dams or reservoirs constructed in rivers and streams, which they say is a natural use, but apply the principle of negligence. 27 R. C. L., p. 1207, sec. 125. In other words, the impounding of water in streamways, being an obvious and natural use, was necessarily within the contemplation of the parties to the original and adjacent grants, and damages must be predicated upon negligent use of a granted right and power; while things not within the contemplation of the parties to the original grants, such as unnatural uses of the land, the land owner may do only at [**226] his peril.

As to what use of land is or may be a natural use, one within the contemplation of the parties to the original grant of land, necessarily depends upon the attendant circumstances and conditions which obtain in the territory of the original grants, or the initial terms of those grants.

In Texas we have conditions very different from those which obtain in England. A large portion of Texas is an arid or semi-arid region. West of the 98th meridian of longitude, where the rainfall is approximately 30 inches, the rainfall decreases until finally, in the extreme western part of the State, it is only about 10 inches.

This land of decreasing rainfall is the great ranch or live stock region of the State, water for which is stored in thousands of ponds, tanks, and lakes on the surface of the ground. The country is almost without streams; and without the storage of water from rainfall in basins constructed for the purpose, or to hold waters pumped from the earth, the great live stock industry of West Texas must perish. No such condition obtains in England.

With us the storage of water is a natural or necessary and common use of the land, necessarily within the contemplation of the State and its grantees when grants were made, and obviously the rule announced in Rylands v. Fletcher, predicated upon different conditions, can have no application here.

Again, in England there are no oil wells, no necessity for using surface storage facilities for impounding and evaporating salt waters therefrom. In Texas the situation is different. Texas has

many great oil fields, tens of thousands of wells in almost every part of the State. Producing oil is one of our major industries. One of the by-products of oil production is salt water, which must be disposed of without injury to property or the pollution of streams.

The construction of basins or pounds to hold this salt water is a necessary part of the oil business. In Texas much of our land was granted without mineral reservation to the State, and where minerals were reserved, provision has usually been made for leasing and operating. It follows, therefore, that as to these grants and leases the right to mine in the usual and appropriate way, as, for example, by the construction and maintenance of salt water pools such as here involved, incident to the production of oil, were contemplated by the State and all its grantees and mineral lessees, that being a use of the surface incident and necessary to the right to produce oil. 40 Corpus Juris, p. 752, sec. 74.

From the foregoing it is apparent that we decline to follow and apply in this case the rule of absolute liability laid down in Rylands v. Fletcher, because: (a) The rule has been generally repudiated by this Court in Gulf, C. & S. F. R. Co. v. Oakes, 94 Texas, 155, 58 S. W., 999; and Galveston, H. & S. A. R. Co. v. Currie, 100 Texas, 136; 96 S. W., 1073; (b) the basis of the rule drawn from its application in England in cases of fire, damage by live stock, and injuries to an innocent bystander have been repudiated by us; (c) the conditions which obtain here are so different from those of England that the rule should not be applied here; (d) and because the rule of negligence, instead of absolute liability, while not obtaining universally in the United States, is of such general application as to constitute, as Thompson says, the "American Rule," in effect the common law rule as applied in America, which is the common law which we follow rather than that declared by the English courts.

Against the adoption of the negligence rule in cases of this character, we are cited to a number of cases which it is claimed conflict therewith. We do not find it necessary to discuss all of them by name.

The pipe line cases can have no application here, for the reason that these cases generally have some form of contract as a basis, or else the facts show injury due to an obvious nuisance. Nor are we prepared to say that the conveyance of oil by pipe lines is an unnatural use of land, and that the rule of absolute liability should be applied to them. Pipe lines are but a means of transportation, and certainly it was within the contemplation of the State and the original grantees of all lands that the latter could be used to carry transportation agencies.

Besides, it appears that the opinion of Associate Justice Sharp in Lone Star Gas Co. v. Hutton, 58 S. W. (2d) 20, strongly indicates that in that type of case the rule of negligence should be applied. Nor is it necessary for us to discuss cases of the pollution of public waters or riparian streams, as these are predicated upon statutes or riparian rights protected by law from invasion.

Other cases to which our attention has been directed are nuisance cases, where the undisputed facts showed an actionable nuisance. Nor need we discuss cases where injury was the necessary result of the operation of some business, regardless of care or a failure to use care. We do think, however, [**227] that the cases of Texas & P. R. Co. v. O'Mahoney, 50 S. W., 1049, 60 S. W., 902, and Texas & P. R. Co. v. Frazer, 182 S. W., 1161, deserve discussion because writs of error were refused by this Court.

In the last appeal of the O'Mahoney Case, 24 Texas Civ. App., 631, 60 S. W., 902, the Court of Civil Appeals held that where the railroad company constructed an artificial lake or pond on its own land, by means of a dam, and diverted a natural stream thereto through a ditch, and maintained the water therein so high that by reason of its pressure the water percolated through the dam and destroyed plaintiff's land, and caused sickness, etc., the railroad company was liable for damages, regardless of the question of negligence in the construction of the dam. In making this holding the court used some language and cited some authorities which can be urged as an approval of the rule of absolute liability, announced in Rylands v. Fletcher, although the Rylands Case was not cited. We shall not quote the court's statement of the facts, since the opinion is available.

It is obvious from the statement made by the Court that the railroad company had not only created a nuisance as a matter of undisputed fact, but had, in violation of the Constitution, substantially taken a portion of O'Mahoney's property; and, of course, in such a case proof of negligence was not necessary. 31 Texas Jur.,p. 421, sec. 11.

In its essential aspects the case of Texas & P. Ry. Co. v. Frazer, supra, was one of the diversion of surface waters from their place of natural flow in such manner as to injure the owner of the lower estate. In addition to the water diverted by the barrow pits of the railroad company, it had constructed a levee and ditch 1400 yards long, apparently around at least a part of the town of Toyah, which carried the water from its natural drainage way on the north side of the railway track to the company's reservoir on the south side of the track.

The case was not one where the company had merely erected a dam in a natural basin to impound waters which would naturally flow into it. This tortious act of the railway company in diverting surface water from its natural course, and concentrating it above the plaintiff's land in this case, was the real basis of the action, and as to which there was no dispute. Had no reservoir been constructed and the diverted waters been thrown upon the plaintiff's land to his damage, he would have had a cause of action without the necessity of alleging negligence. The diversion of the water and throwing it on the plaintiff's land to his damage would have been an invasion of his rights, just as though his property had been bodily taken. Bunch v. Thomas, 121 Texas, 225, 229, 49 S. W. (2d) 421; 27 Ruling Case Law, p. 1151, sec. 79.

Nor do we believe that the facts that the diverted water was collected in a reservoir before being cast on the plaintiff's land changes the rule. It was merely one of the instrumentalities of the wrongful diversion by which the diverted agency was concentrated and rendered more destructive. 67 Corpus Juris, p. 877, sec. 300.

That the Court of Civil Appeals considered the case as essentially one of the diversion of surface waters is shown by the fact that it sustained the action of the trial court in refusing a charge upon the defense of unprecedented rainfall, upon the ground that such a plea was no defense when surface waters had been diverted to the plaintiff's injury, citing the case of Galveston, H. & S. A. R. Co. v. Riggs, 107 S. W., 589.
If the case had been one simply of impounding water, and the court thought that the principles of Rylands v. Fletcher should rule it, then an act of God, such as an unprecedented rainfall, would have been a defense.Thompson on Negligence, Vol. 1, sec. 700.

But where the act of God combined with the negligence or actionable conduct of the defendant as a proximate cause to bring about the injury and damage, vis major is
not a defense, and of course the holding of the Court of Civil Appeals was correct. 1 Texas Jur., p. 700, sec. 5; 67 Corpus Juris, p. 931, sec. 385; Patterson v. Speer, 229 S. W., 275, 276 (Mo.).

We have heretofore stated that this Court refused to grant writs of error in both the O'Mahoney and Frazer Cases. At the time the Supreme Court refused these writs of error, it was compelled by its jurisdictional statutes to either grant or refuse the applications. Since the judgments were correct, it is obvious that it was the Court's duty to refuse the writs. Such refusals are not to be construed as an approval of all the reasons assigned by the Courts of Civil Appeals for their legal conclusions. The refusals, however, were obviously correct on the grounds we have stated above.

The plaintiffs in error insist that the waters of Garrison Draw, if not the waters of a stream, the pollution of which is prohibited by law, are neverthless public waters under R. S., Art. 7467, to which the anti-pollution statutes apply. The statute in so far as here involved reads:

> "Art. 7467. Property of the State. -- The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter." (Italics ours.)

The contention here is that this Article, particularly the italicized words, makes the water from rainfall while on the watershed, or in ravines and draws, and while it is still regarded in law and fact as surface water, and before it has reached a riparian or public stream, public waters, the pollution of which is prohibited by positive enactment.

The statute is capable of this construction if it alone were to be looked to for its meaning. It must be interpreted, however, in the light of the Constitution and of the common law and Mexican civil law under which lands have been granted in this State. Miller v. Letzerich, 121 Texas, 248.

Under both the common law and the Mexican civil law the owners of the soil on which rains may fall and surface waters gather are the proprietors of the water so long as it remains on their land, and prior to its passage into a natural watercourse to which riparian rights may attach. Farnham on Water Rights, Vol. 3, sec. 883, and cases cited in the note; Miller v. Letzerich, 121 Texas, 248, 254, 256, 49 S. W. (2d) 404; Hall's
Mexican Law (1885), p. 402, sec. 1372.

No citation of authority is necessary to demonstrate that the right of a land owner to the rain water which falls on his land is a property right which vested in him when the grant was made. Being a property right, the Legislature is without power to take it from him or to declare it public property and subject by appropriation or otherwise to the use of another. This is so regardless of the question as to whether the grant was made by Texas or Mexico. Miller v. Letzerich, 121 Texas, 248, 49 S. W. (2d) 404.

If Article 7467, quoted above, is to be construed so as to make surface water public waters and subject to appropriation, then it would be clearly void, because in violation of the State Constitution. Article 7469 declares that the provisions of Article 7467 and related provisions shall not prejudice vested rights.

Interpreting Article 7467 we would, in order to sustain its validity, be compelled to say that it has no application to lands granted prior to the enactment of the statute, in so far as it attempts to take from the grantees their rights to surface waters and to make them public waters subject to appropriation. Whether or not the Article in this respect could be applied under our Constitution to grants made subsequent to the passage of the law is not before us in this case, and no opinion is expressed relative thereto. There is no contention here that the surface waters alleged to have been polluted were on lands granted by the State subsequent to the enactment of Article 7467.

Article 7467 has no application to the facts of this case, and the surface waters involved were not public waters, the pollution of which was prohibited by express statutory enactment.

Revised Statutes, article 7589a, relating to the diversion or impounding of surface waters, has no application to this case. We do not understand from the pleadings that the suit was brought for the wrongful diversion or impounding of surface waters to another's injury.

The judgments of the Court of Civil Appeals and of the District Court are affirmed.
Opinion delivered July 15, 1936.

Rehearing overruled October 21, 1936.

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Turner v. Big Lake Oil Co.

Notes and Discussion

1. Based on these facts, why is there no negligence per se based on Texas Railroad Statewide Rule 20? Did the court just fail to address this issue?

2. How did the Turner court distinguish the Rylands decision?

3. Why did the court not apply laws addressing the pollution of streams or waters of the State? Would a court likely use that rationale today?

4. If the doctrine of strict liability applies, does the level of care exercised by the operator matter?

5. Is this decision limited to oil and gas production activities, or does it also apply to transportation (pipeline) and refining activities?

6. This is the majority and Texas rule. For another interpretation, the minority view with regard to strict liability is set out in Berry v. Shell Petroleum Co., 33 P.2d 953 (KS 1934).

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Humble Pipe Line Co. v. Anderson
Court of Civil Appeals of Texas, Waco
339 S.W.2d 259; 13 Oil & Gas Rep. 635
July 29, 1960; Rehearing Denied October 13, 1960

This is a suit for injuries to land alleged to have resulted from the pollution of a water well by crude oil. Appellees specifically alleged that the oil came from a leak in defendant's pipe line, and that the oil penetrated the soil and the water bearing formation of appellees' land.

Originally two separate suits were filed, and they were consolidated by order of the court prior to trial because there was only one water well involved, it being a boundary line well in which the appellees owned equal rights. The well in question is a shallow, hand-dug well approximately 18 feet deep. It was shown to be the only present source of water on the Anderson 235 acre farm but was only one of three wells on the Westerfield 115 1/2 acre farm.

Plaintiffs claimed the oil in this well had reduced the value of their entire farms by fifty percent. Oil first appeared in the well in the middle of April, 1959. Shortly thereafter a representative of Humble offered to clean out the well at no expense to appellees. This permission was at first granted, but when Humble work gang arrived to do the job, they were refused permission to do it. Thereafter, on May 1, 1959, both suits were filed. Trial was had and judgment entered in October, 1959. Neither of the plaintiffs made any attempt to clean out the well or to replace it with another well.

Testimony was tendered to the effect that the only source of oil from the pipe line that could have gotten into the well was a leak found 4290 feet from the well, and almost that far from the nearest part of appellees' land.

Plaintiffs contended that oil from this leak had reached the well by percolating underground. Plaintiffs grounded their suits alternatively on nuisance, negligence and trespass. The jury in its verdict found:

> (1, 2, 3 and 4) That the crude oil escaping from the pipe line permeated the underground structure of each farm; that it polluted the water flowing into the well and rendered it unfit for human consumption, and that such pollution is permanent; . . . .
>
> (11, 12, 13 and 14) That defendant had notice of the leaky condition of its pipe line, but did not answer No. 12, which was: "Do you find from a preponderance of the evidence, if any, that Humble Pipe Line Company was negligent in its maintenance of the pipe line in question?" and did not answer No. 13, which was: "Do you find from a preponderance of the evidence, if any, that such negligence, if any, was a proximate cause of the pollution of plaintiffs Anderson and Westerfield's water well?"
>
> No. 14 is: "Do you find from a preponderance of the evidence, if any, that the pollution of plaintiffs Anderson and Westerfield's water well, if you have found it was polluted, is temporary?" to which the jury answered "Yes."

Plaintiffs seasonably filed their joint motion for judgments on the verdict of the jury, but in such motion alleged that the Court erred in submitting Issues Nos. 4 and 14, and asked the court to disregard the jury's answers to them.

It further alleged that the court erroneously submitted Issues 12 and 13, with reference to negligence and proximate cause, and that since the jury failed to answer each of these issues, that the court base its judgment on the jury's answers to Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. The court granted this motion and awarded judgment accordingly in behalf of each plaintiff.

The award in favor of Anderson was in the sum of $9400, and that in favor of the Westerfields was for $4042.52, with legal interest on each sum from the 9th day of October, 1959, with all costs. In the decree we find this recital:

> "And it appearing to the court from the uncontradicted evidence and the special findings of the jury that crude oil escaped from the defendant's pipe line and permeated and polluted the underground structures of plaintiffs, Andersons' and Westerfields' farms in and about the well therein and polluted the water flowing into said well and in the water-bearing structure leading thereto, rendering the water unfit for human consumption, and creating a permanent nuisance, thereby reducing the market value of plaintiffs said farms as found by the jury; and
>
> "It further appearing to the court that Special Issues Numbers 4 and 14, submitted by the court to the jury, and the jury's answers thereto, are immaterial and do not affect the rights of the parties plaintiff and defendant herein, said issues Numbers 4 and 14 and the jury's answers thereto are hereby in all things set aside; and
>
> "It further appearing to the court that the court finds that Special Issues Numbers 12 and 13 submitted by the court to the jury, which were not answered by the jury, are immaterial and should be disregarded, the same are hereby in all things set aside and disregarded; and
>
> "It further appearing to the court from the uncontradicted evidence and the special verdict and findings of the jury that the plaintiff, W. C. Anderson and wife, Jessie Anderson, by reason of the escape of crude oil from defendant's pipe line and the permeation of the underground waterbearing structure of said plaintiffs' land with crude oil, polluting the underground structure thereof and the water flowing therein and into said plaintiffs' well, rendering the same unfit for human consumption, the market value of their 235 acres of land has been reduced to the extent and amount of $40.00 per acre; and
>
> "It further appearing to the court from the uncontradicted evidence and the special verdict and findings of the jury that the escape of crude oil from defendant's pipe line, which permeated the underground waterbearing structure of plaintiffs, Ira H. Westerfield and wife, Florence Westerfield's 115 1/2 acres of land, polluting the water flowing therein and into their well, rendering the waters therein and in said structure, unfit for human consumption, has reduced the market value of said land to the extent and amount of $35.00 per acre."

The decree is assailed on four points. They are substantially to the effect:

. . . . (3) The court erred in rendering judgment in the absence of a finding of negligence, because a pipe line is not a nuisance per se, and negligence is an essential element of a cause of action for nuisance resulting from the escape of oil from a pipe line.

(4) The leaking of oil from the pipe line and its percolation underground to the land of appellees was, as a matter of law, insufficient to constitute a trespass. . . . .

But appellees contend that the trial court correctly held that the injury to appellees' land was permanent, as a matter of law, and that a finding of negligence was not essential to appellees' cause of action. They rely on the following cases: Burlington-Rock Island R. Co. v. Newsom, Tex.Civ.App., 239 S.W.2d 734 (no writ hist.); City of Abilene v. Walker, Tex.Civ.App., 309 S.W.2d 494, 495, 496 (no writ hist.); Columbian Carbon Co. v. Tholen, Tex.Civ.App., 199 S.W.2d 825 (er. ref.); Continental Oil Co. v. Berry, Tex.Civ.App., 52 S.W.2d 953 (er. ref.); Ft. Worth & Denver City Ry. Co. v. Muncy, Tex.Civ.App., 31 S.W.2d 491; Gulf Pipe Line Co. v. Hurst, Tex.Civ.App., 230 S.W. 1024 (no writ hist.); Hauck v. Tidewater Pipe Line Co., 153 Pa. 366, 26 A. 644; Morton Salt Co. v. Lybrand, Tex.Civ.App., 292 S.W. 264 (writ dis.); Rule 279 Texas Rules of Civil Procedure; Texas Co. v. Giddings, Tex.Civ.App., 148 S.W. 1142 (no writ hist.); Texas Co. v. Earles, Tex.Civ.App., 164 S.W. 28 (no writ hist.); Texas & P.R. Co. v. O'Mahoney, 24 Tex.Civ.App. 631, 60 S.W. 902 (writ ref.); and Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221.

We have given careful consideration to each of the cases cited by appellees and do not believe that they sustain their contention, in view of the decision of our Supreme Court in Turner v. Big Lake Oil Co., supra.

We think the opinion of the Supreme Court settles this question adversely to appellees' contention. The opinion reviews at great length the decisions of the courts of Texas, and other decisions, relative to these questions, and discusses at length the O'Mahoney case, supra, and Texas & Pacific Ry. Co. v. Frazer, Tex.Civ.App., 182 S.W. 1161.

Each of these cases have writs or error refused outright prior to our present rule, which became effective in June, 1927. The opinion points out that at the time that court refused these writs, it was compelled by its jurisdictional statutes either to grant or refuse the applications; that because the court was of the view that the judgments entered in each case were correct, it was their duty to refuse the writs, and said [128 Tex. 155, 96 S.W.2d 221]: "Such refusals are not to be construed as an approval of all the reasons assigned by the Courts of Civil Appeals for their legal conclusions."

We think a careful reading of the O'Mahoney case, supra, and the Frazer case, supra, shows a very different factual situation than we have before us in the case at bar. As we understand the O'Mahoney and Frazer cases, they were dealing with damages to the entire tract of land. Here, we are dealing with damage to land that results from the pollution of the water well, and the allegation that such pollution of the well has resulted in damage to the land as to market value. We think the opinion in The Texas Co. v. Giddings, supra, and Texas & Pacific v. Earles, supra, are in conflict with the rule in Turner v. Big Lake Oil Co., supra.

A careful reading of each of the foregoing cases will show that the rule of law applied to the factual situation there existing was the doctrine announced in the O'Mahoney case, supra. Nor do we believe that the opinion of the Supreme Court of Pennsylvania in Hauck v. Tidewater Pipe Line, Ltd., supra, supports appellees' contention. In that opinion we find this statement [153 Pa. 366, 26 A. 644]:

"The railroad companies in those cases were clothed with the right of eminent domain, and were expressly authorized by law to construct their roads and operate them. It was held, therefore, that any injury resulting from such operation, without negligence and without malice, was damnum absque injuria. In the case at hand the company was clothed with no such powers."

It is obvious, therefore, that the Pennsylvania rule is not contra to the rule announced by our Supreme Court in the Big Lake Oil Case, supra. We think it is important here to say that the Supreme Court in the Big Lake Oil case, supra, strongly approved and quoted from the opinion of the Eastland court in Cosden Oil Co. v. Sides, Tex.Civ.App., 35 S.W.2d 815, (no writ hist.), which opinion dealt specifically with the nuisance question in a case, in all essential respects, very similar to the case before us.

In the Cosden case, the court held that no right of recovery was shown independently of the existence of negligence. That statement is in accord with the statement of our Supreme Court in the Big Lake Oil case, supra, wherein the court said [128 Tex. 155, 96 S.W.2d 221]:

> "Nor are we prepared to say that the conveyance of oil by pipe lines is an unnatural use of land, and that the rule of absolute liability should be applied to them."

As we understand our Texas courts, they hold in effect that if a business is of such a nature that it inevitably will do substantial injury to those around it, even though it is operated carefully and properly, then it is a nuisance per se, and those injured will have redress, regardless of negligence. If such a business is permitted to continue in spite of the injury to others, because of its utility to the public, then it must compensate those injured. But if a business is of such a nature and injury does not necessarily result from its operation, then it is not a nuisance per se, and liability depends upon negligence. This, we believe, is illustrated in the following cases: Columbian Carbon Co. v. Tholen, Tex.Civ.App., 199 S.W.2d 825, (er. ref.) and King v. Columbian Carbon Co., 5 Cir., 152 F.2d 636. See also East Texas Oil Refining Co. v. Mabee Consolidated Corp., Tex.Civ.App., 103 S.W.2d 795, writ dis. 133 Tex. 300, 127 S.W.2d 445. (We do not think the decision in Morton Salt Co. v. Lybrand is contra to the rule announced in Turner v. Big Lake Oil Co., supra.)

In the case of King v. Columbian Carbon Co., supra, we find this statement [152 F.2d 636]:

> "Without doubt the Supreme Court of Texas has refused to follow the strict rule announced in Fletcher v. Rylands, supra, and has announced the rule, in cases where substances that are harmless and unobnoxious within themselves are stored or impounded upon one's land, no liability would follow for damages claimed for the escape, overflow, or seepage of such substances in the absence of an allegation and proof of negligence in the storage, keeping, or impounding thereof."

Since the pipe line in this case was a common carrier and had the right, under our statutes, to condemn, maintain and operate its pipe line over its right-of-way or easement in the construction and maintenance of the pipe line, it is not a nuisance per se, because injury to adjoining land, or land nearby is not a necessary and inevitable consequence of the operation of such a line. We are of the further view that under the decisions here cited, the rule of absolute liability cannot be

applied to the factual situation here before us. As above pointed out, the court submitted the issue of negligence, but the jury was unable to agree on an answer thereto.

It is our view that negligence was an essential element of appellees' cause of action, and it was error for the trial court to render judgment against appellant in the absence of a jury finding of negligence. See Cosden Oil Co. v. Sides, supra. See also: Lone Star Gas Co. v. Hutton, Tex.Com.App., 58 S.W.2d 19; Galveston, H. & S. Railway Co. v. Currie, 100 Tex. 136, 96 S.W. 1073; Missouri-Pacific Ry. Co. v. Platzer, 73 Tex. 117, 11 S.W. 152 160, 3 L.R.A. 639; Gulf, C. & S.F. Railway Co. v. Oakes, 94 Tex. 155, 58 S.W. 999; and Continental Oil Co. v. Berry, Tex.Civ.App., 52 S.W.2d 953 (writ ref.).

We are of the further view that the leaking of oil from appellant's pipe line, and its percolation underground to the land of appellees was, as a matter of law, insufficient to constitute a trespass. See 41A, Tex.Jur.,Trespass, Sec. 3.

Accordingly, appellant's Points 1, 2, 3, and 4 are each sustained, and this cause is reversed and remanded.

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Humble Pipe Line Co. v. Anderson

Notes and Discussion

1. Is the doctrine of strict liability applicable to environmental damage caused by leaks in oil pipelines in Texas? How about the nuisance per se cause of action?

2. Does it matter that the pipeline had been granted the right of eminent domain under state statues?

3. What problems does this case cause for landowners seeking to prove environmental contamination from buried pipelines located on their property?

4. As more natural gas is being produced in Texas, natural gas pipelines are becoming more common than crude oil pipelines. Aside from the safety aspects, leaks from a natural gas pipeline generally cause less environmental damage than liquids pipelines as the natural gas dissipates in the air and does not cause lingering soil and water pollution problems.

On the other hand leaks from natural gas lines can lead to massive explosions if the natural gas ignites. In 2010 a massive explosion in a California city destroyed dozens of homes and killed a number of residents (an investigation revealed that ‘faulty welds’ was a cause for the leak in the 50 year old line):

***Cause of Fatal Northern California Natural Gas Explosion and Fire Still Unknown***

*Posted by Josh Garrett on September 15, 2010 at 3:29 pm*

*Emergency responders and local residents struggled to contain the inferno sparked by a natural gas explosion in San Bruno, CA on Thursday. (image: AP via gulfnews.com)*

*On Thursday evening, a natural gas pipeline explosion in the San Francisco suburb of San Bruno ignited a massive fire that killed at least four people, injured dozens of others, and leveled 37 homes. Six days later, the exact cause of the explosion is still unclear . . . [source: heatingoil.com website]*

5. It is common for hydrocarbons that leak from underground storage tanks at, for example, gasoline service stations to "follow the utility lines" to nearby buildings. This occurs because the soil around the utility lines may be less compact than the native soil, and the contaminants move along the path of greatest permeability. Would a utility be liable for contamination of a nearby building because contaminants spilled by others migrated along its utility easement?

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Robin Ray DODDY; Jeanette W. Doddy, Plaintiffs-Appellants, v. OXY USA, INC.; Occidental Petroleum Corporation; et al.
No. 95-21023 Summary Calendar
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
101 F.3d 448; 1996 U.S. App. LEXIS 33117; 45 Fed. R. Evid. Serv. (Callaghan) 1447; 36 Fed. R. Serv. 3d (Callaghan) 1531; 11 Tex. Bankr. Ct. Rep. 12
December 18, 1996, Decided

Opinion: Plaintiffs Robin Ray Doddy and Jeanette W. Doddy sued a number of defendants n1 whom they claimed owned, operated, or maintained an active oil and gas well--the McKinley "E" Lease Well No. 14 ("the well")--located near their home. The Doddys alleged that they had suffered property damage and personal injuries from toxic chemicals emanating from the well.

The district court disposed of all the claims against the defendants either through summary judgment or dismissal for lack of personal jurisdiction. The Doddys appeal the district court's denial of their motions to remand, its decision to strike portions of one of their affidavits, and its grant of motions for summary judgment or to dismiss made by the defendants. The Doddys also appeal the district court judge's decision to vacate her previous determination to recuse herself. We affirm.

I

In 1983, the Doddys bought a home in the East Texas Oil Field. The house is near the well and various connecting pipes. The well was drilled in 1936, and the home was built by a developer in 1979.

After living in the house, the Doddys allegedly suffered various injuries and illnesses, including joint and muscle aches, sinus infections, coughing, and fatigue. They believed that these injuries and illnesses stemmed from toxic chemicals used in or generated by the well and its adjoining structures. The Doddys then filed a complaint in Texas state court against almost 30 defendants. Supposedly, these defendants included the owners and operators of the well, the companies that serviced the well, and [**3] the individuals responsible for developing and selling the home. The Doddys asserted claims of strict liability, negligence, gross negligence, and products liability.

Western removed the case to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1452(a). Western was in bankruptcy proceedings at the time, and it maintained that the Doddys' action related to these proceedings. The Doddys then moved to remand, which motion the district court denied.

After the district court granted summary judgment to Western, the Doddys again moved to remand. They argued that the court now lacked subject matter jurisdiction over the lawsuit. The court denied the motion. . . .

VII

The Doddys claim that the district court wrongly granted summary judgment on their claims that the defendants were strictly liable for engaging in abnormally dangerous activities. In addition, they allege that the district court erred in granting summary judgment for various defendants, namely, Central, Trident, Petrolite, Baker, Halliburton, Pool, Nalco, Bolt, Pride, Ancor, and Oxy.

We [HN17] review a district court's grant of summary judgment de novo. New York Life Ins. Co. v. The Travelers Ins. Co., 92 F.3d 336, 338 (5th Cir.1996). In doing so, we employ the same criteria as the district court, and construe all facts and inferences in the light most favorable to the non-moving party. LeJeune v. Shell Oil Co., 950 F.2d 267, 268 [*461] (5th Cir.1992). Summary [**25] judgment is appropriate where the moving party establishes that "there is no genuine issue of material fact and that [it] is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. Celotex v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986).

[HN18] Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citations omitted). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. FED. R. CIV. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

A

While the Doddys apparently concede that the lower Texas courts have not recognized strict liability for [**26] abnormally dangerous activities, n9 they assert that the district court erred by assuming that the Texas Supreme Court has explicitly refused to adopt such a tort. Moreover, they speculate that, if squarely faced with this question, the supreme court would permit them to pursue their abnormally dangerous strict liability
claims.

The Doddys argue that the Texas Court of Appeals recognizes strict liability for abnormally dangerous activities as long as it is accompanied by proof of negligence. Needless to say, though, strict liability that requires proof of negligence is not strict liability.

Under Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), [HN19] a federal court applying state law must decide how the state supreme court would rule if faced with the particular facts of the case. Hanley v. Forester, 903 F.2d 1030, 1032 (5th Cir.1990). We review de novo a district court's determination of state law. Salve Regina College v. Russell, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, [**27] 113 L. Ed. 2d 190 (1991).

Courts often cite Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936), for the proposition that the Texas Supreme Court has rejected strict liability for abnormally dangerous activities. See, e.g., Hall v. Amoco Oil Co., 617 F. Supp. 111, 112 (S.D.Tex.1984) (citing Turner as rejecting this tort). In Turner, the Texas Supreme Court faced the question of whether to impose strict liability for damages resulting from the escape of saltwater from ponds constructed to store runoff from oil wells. In doing so, it declined to follow the landmark English case of Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

Rylands established the doctrine of strict liability for property owners for the "non-natural" (i.e., extraordinary, exceptional, or abnormal) use of their land. n10 It was also the basis for the development of the modern abnormally dangerous activity doctrine, which is famously "restated"

in § § 519 and 520 of the Restatement (Second) of Torts. n11 See KEETON, supra, at 544-54. n10 See W.PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS 546 (5th ed.1984). [**28] n11 Section 519 of the second Restatement provides [HN20] the general rule for liability for engaging in an abnormally dangerous activity. It states:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Section 520 then provides guidance on what an "abnormally dangerous" activity actually is. It states:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

It is somewhat unclear whether Turner can be read broadly to reject strict liability for abnormally dangerous activities. For one thing, Turner relied heavily on an earlier case, Gulf, C. & S.F. Ry. Co. v. Oakes, 94 Tex. 155, 58 S.W. 999 (1900), which involved the spread of the defendant's Bermuda grass to the plaintiff's land. It is doubtful that the escape of (apparently oil-contaminated) saltwater or the spread of Bermuda grass are "abnormally dangerous," at least as contemplated by the classic formulation in $S 520 of the second Restatement of Torts. n12

Discussing Turner and Gulf, this court has stated that without doubt the Supreme Court of Texas has refused to follow the strict rule announced in Fletcher v. Rylands ..., and has announced the rule, in cases where substances that are harmless and unobnoxious within themselves are stored or impounded upon one's land, no liability would follow for damages claimed for the escape, overflow, or seepage of such substances in the absence of an allegation and proof of negligence in the storage, keeping, or impounding thereof. King v. Columbian Carbon Co., 152 F.2d 636, 639-40 (5th Cir.1945) (emphasis added).

Moreover, this court has characterized the Texas Supreme Court's holding in Turner as repudiating the Rylands "doctrine of strict liability for damages from impounded waters." Ford Motor Co. v. Dallas Power & Light Co., 499 F.2d 400, 408 (5th Cir. 1974).

However, an examination of Turner and Gulf in the context of other Texas Supreme Court opinions suggests that, in fact, [HN22] the court has rejected the abnormally dangerous strict liability tort. In Galveston, H. & S.A. Ry. Co. v. Currie, 100 Tex. 136, 96 S.W. 1073 (1906), for

instance, the court raised the question whether the introduction of compressed air into a railroad roundhouse was so dangerous that a person of ordinary prudence using it would have adopted special precautions to prevent injury to others.

The court noted that while "some of the older cases in England seem to assert the absolute liability of an insurer, ... it is settled in this state that the question is one of negligence." Id. 96 S.W. at 1077 (citing Gulf, 58 S.W. 999). In Kelly v. McKay, 149 Tex. 343, 233 S.W.2d 121 (1950), the court applied negligence principles in the context of the use of explosives. Id. at 122.

Lastly, in Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948), the court suggested that with regard to "the nature of oil and gas and the risks involved in their production [such as the possibility of an oil well "blowout"]," "in the conduct of one's [**31] business or in the use and exploitation of one's property, the law imposes upon all persons the duty to exercise ordinary care to avoid injury or damage to the property of others." Id. 210 S.W.2d at 584. n13

We also note that the lower state courts have consistently refused to create strict liability for abnormally dangerous activities. Barras v. Monsanto Co., 831 S.W.2d 859, 865 (Tex.App.1992); Robertson v. Grogan Investment Co., 710 S.W.2d 678, 679-80 (Tex.App.1986); Day & Zimmermann v. Strickland, 483 S.W.2d 541, 548 (Tex.Civ.App.1972); Roskey v. Gulf Oil Corp., 387 S.W.2d 915, 919 (Tex.Civ.App.1965); Klostermann v. Houston Geophysical Co., 315 S.W.2d 664, 665 (Tex.Civ.App.); Dellinger v. Skelly Oil Co., 236 S.W.2d 675, 677 (Tex.Civ.App.1951); Stanolind Oil & Gas Co. v. Lambert, 222 S.W.2d 125, 126 (Tex.Civ.App.1949).

As the Texas Court of Appeals held in Barras, for example, "our courts have rejected the doctrine of abnormally dangerous activities as a basis for strict liability. In the absence of some other showing, such as negligence, there is no basis for recovery." Barras, 831 S.W.2d at 865 (citations omitted).

We determine, then, that the Texas Supreme Court has clearly rejected strict liability for abnormally dangerous activities. Moreover, we do not believe that the court would adopt such a tort in this case. See Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 396-98 (5th Cir.1986) (en banc), cert. denied, 478 U.S. 1022, 106 S. Ct. 3339, 92 L. Ed. 2d 743 (1986) (stating that our task under Erie is to apply existing state law, not to adopt innovative theories for the state); Pittman v. Dow Jones & Company, Inc., 834 F.2d 1171, 1171 (5th Cir.1987) ("We are not free to fashion new theories of recovery under Louisiana law."). Therefore, we affirm the district court's grant of summary judgment on this ground. . . .

VIII

For the foregoing reasons, we AFFIRM the judgment of the district court.

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Doddy v. Oxy USA Inc.
Notes and Discussion

1. With regard to the treatment of abnormally dangerous activity, what does the court say with regard how the Texas Supreme Court would treat a strict liability claim? Are oil and gas production activities an abnormally dangerous activity?

i. Private Nuisance

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BRISCOE v. HARPER OIL CO.
Supreme Court of Oklahoma
702 P.2d 33; 86 Oil & Gas Rep. 361
May 28, 1985

Lester and Myrtle Briscoe own and reside on a 146 acre farm in Grady County. A portion of the farm is devoted to wheat and alfalfa. The Briscoes [appellees] also maintain a small cattle operation on their farm. Grazing areas include love, bermuda and native grasses.

On January 23, 1976, the appellees executed an oil and gas lease to the appellant, Harper Oil Company [Harper]. Pursuant to the terms of the lease, Harper made entry upon the appellees' farm in January, 1980. Harper commenced taking surveys for the location of a drilling site, and shortly thereafter unilaterally selected the site. The well drilled by Harper on the site proved to be a dry hole and Harper abandoned drilling operations in July of 1980. The dry hole was plugged some eight months later.

Closure of the reserve pit and further clean up operations on the drilling site were commenced by Harper in May, 1981, one month after appellees instituted this action.
On April 17, 1981, the appellees filed their petition, setting forth three separate causes of action. The first cause of action is founded on contract. The appellees asserted that pursuant to the terms of the oil and gas lease under which Harper entered the subject premises, Harper contracted to pay for damages caused by their operation to growing crops, and that Harper caused damages to growing crops.

The appellees' second cause of action is couched in terms of nuisance. They alleged that by reason of the unreasonable acts of Harper in conducting its oil and gas operations on their land they have been subjected to unreasonable inconvenience, annoyance and interference with the enjoyment of their land for agricultural, grazing and residential purposes. They also alleged subsequent loss of portions of the farm for agricultural and grazing use. Their prayer for relief on this cause of action encompasses damages for both temporary (abatable) and permanent (unabatable) injury.

In their third cause of action, the appellees sought punitive damages by reason of Harper's alleged willful, oppressive and grossly negligent acts in disregard of the fertility and productivity of the soil.

The case was tried to a jury. After hearing all the evidence over a period of several days, the jury was permitted to personally view the premises in question. The jury returned a verdict for the appellee landowners in the aggregate sum of $42,975. Categorically, the jury awarded $1,600 for damage to growing crops resulting from Harper's drilling operations; $10,500 as damages for annoyance and inconvenience or using more land than reasonably necessary for a longer time

than necessary during drilling operations; $24,500 the cost of restoring abatable areas around the well site; and, $6,375.00 as damages for permanent injury to the appellees' farmland.

The trial court entered the jury verdict and awarded the appellees an attorney's fee. Harper appealed. In a divided opinion, the Court of Appeals reversed the jury verdict and remanded the case for a new trial on the theory that appellees' recovery of both permanent and temporary damages constitutes a double recovery. We now [*36] review, by certiorari, the opinion of the Court of Appeals.

The sole issue challenged on certiorari concerns the propriety of the trial court's instructions permitting the jury to return a verdict for damages to include the cost of repairing temporary abatable injuries to the drilling well site, as well as damages for permanent unabatable injury to appellees' farmland. We find no error that would require reversal of the jury verdict.

The damages in controversy relate exclusively to appellees' second cause of action brought on the theory of private nuisance created or maintained by Harper. It is well established that damages resulting from an oil and gas operation can be recovered in an action brought on a nuisance theory. Sunray D-X Oil Company v. Brown, 477 P.2d 67 (Okl.1970); Tenneco Oil Company v. Allen, 515 P.2d 1391 (Okl.1973).

Nuisance, as defined at 50 O.S. 1981 @ 1, consists in unlawfully doing an act, or omitting to perform a duty, which act or omission annoys, injures, or endangers the comfort, repose, health or safety of others; or, in any way renders other persons insecure in life, or in the use of property. Thus, the term "nuisance" signifies in law such a use of property or such a course of conduct irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which the proximity of other persons or property imposes. It is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person or entity of property lawfully possessed, but which works an obstruction or injury to the right of another.

"Damage" or "injury", as ordinarily used in nuisance cases is the result of the nuisance and permanent, as well as temporary damages, may be recovered for the maintenance of a temporary nuisance. City of Holdenville v. Kiser, 195 Okl. 189, 156 P.2d 363 (1945). The rule of damages in any given case brought on the theory of nuisance is determined by whether the injury suffered is permanent or temporary, rather than whether the cause of injury is permanent or temporary. Sunray D-X, supra. Accordingly, damages adjudged in an action predicated on a nuisance theory may include temporary and permanent injury to land. Tenneco, supra. Temporary damages in the context of an oil and gas nuisance are by definition abatable. Damages reasonably incapable of abatement are permanent.

According to the evidence in the present case, the jury could reasonably determine that the acts complained of by the appellees constituted a private nuisance. The fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance. The reasonableness or necessity of the acts complained of are for the jury to decide.

Likewise, evidence reasonably tending to prove essential damage directly or indirectly by permissible inference is sufficient to sustain a jury verdict. Peppers Refining Co. v. Spivey, 285 P.2d 228 (Okl.1955).

In this respect, the appellees presented evidence tending to show that the entrance unilaterally chosen by Harper unnecessarily encompassed passage through a large portion of the farm, thereby cutting the grazing area and precluding the use of approximately 25 acres for grazing and agricultural purposes; that Harper's employees drove and parked their heavy equipment and vehicles off the roadways and location; and, caused to be drained from the well head and reserve pit oil and other deleterious substances, and allowed these substances to drain in to the appellees' terraces and creeks.

The appellees further testified that Harper created unnecessary noise, annoyance and inconvenience; that Harper refused to fence the well site area causing the appellees to erect a fence around the well site and road area at their own expense for the sake of keeping cattle off the road and out of the drilling area; that appellees were forced to build another roadway to reach their pasture behind the well site; that Harper cut the terraces of the appellees and did not repair them, causing flooding and erosion; and appellees had to sell cattle early due to loss of pasture. Finally, appellees testified that after the completion of drilling activities, Harper refused and failed to timely empty and close the reserve pit; failed to remove the drilling pad and roadway area; failed to reclaim the pit, pad and roadway areas for agricultural and grazing purposes, and failed to properly dispose of or properly bury drilling mud, trash debris and other substances.

Appellees' soil and conservation expert testified concerning resultant drainage problems and erosion of the soil, permanently damaging the productivity and fertility of the land. In his opinion, it would cost some $91,000 to completely restore the land, but that for approximately $34,000 the excess area taken could be cleaned up to the point that appellees could perhaps use it. Three different witnesses testified that the value of the farm had decreased as a result of the oil and gas activities of Harper. The testimony reflected that the value of the farm had decreased by $36,500, $29,282, and $20,433 respectively.

We find the evidence reasonably tends to prove essential damage to sustain the jury verdict. While the instructions failed to state that in no event shall the combined award of temporary and permanent damages for injury to the land exceed the decreased fair market value of the land, such error, if that it be, was here harmless in nature. The jury awarded the sum of $24,500 for costs of restoring the temporary abatable injury to the well site, plus the sum of $6,375 for permanent unabatable injury to the farm. The combined sum of the temporary and permanent damages, $30,875, does not exceed the evidence reflecting that the value of the farm had decreased up to $36,500.

We likewise find that the trial court committed no error in awarding attorney's fees to the appellees pursuant to 12 O.S. 1981 @ 940A:

"In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action."

The action now on review was founded upon the civil theory of nuisance. The appellees sought to recover damages for unreasonable injury to their land by reason of Harper's unintentional negligent acts and/or Harper's intentional willful acts. Likewise, it is clear that the appellees prevailed below. Finally, the trial court followed established guidelines in assessing the amount of the award. See Oliver's Sports Center, Inc. v. National Standard Insurance Company, 615 P.2d 291 (Okl.1980); State ex rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Okl.1979). Testimony by an experienced oil and gas attorney established that a reasonable attorney's fee in cases similar to the case at bar would be approximately $21,800. The evidence further established that a total of 165 1/2 attorney hours were expended on the case; that the hourly rate normally charged by counsel was $100 per hour incourt and $75 per hour out-of court; that the customary fee arrangement in a case of this type would amount to 50% of the recovery.

Based upon the hourly compensation computed at $12,175 plus a 50% bonus calculated upon the hourly rate, See Oliver Sports, supra, the trial court awarded an attorney's fee in the amount of $18,262.00. We find no error.

The opinion of the Court of Appeals is vacated and the trial court's entry of judgment on jury verdict for
landowners is reinstated.
DOOLIN, V.C.J., LAVENDER, HARGRAVE, KAUGER, JJ., concur.
DISSENTBY: SUMMERS

DISSENT: SUMMERS, J., dissenting.
[the dissenting discussion is omitted] . . . . .
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Briscoe v. Harper Oil Co.
Notes and Discussion

1. If the operator had the right to use a reasonable amount of the surface to develop the property for oil and gas, can a nuisance or negligence claim be successfully asserted by the landowner?

2. Was the operator's activity legal? Can a legal activity or business be a nuisance?

3. Was the operator's activities in the instant case a public or private nuisance?

4. In Marrs v. The City of Oxford, 32 F.2d 134 (8th Cir. 1929) the court noted:

> While oil and gas wells are not nuisances per se, and the business of drilling and operating them is ordinarily legitimate and harmless, it is conceivable that they may become detrimental in a high degree. The greed for mineral in a rich field becomes insatiate.

Note that the case mentions that the oil company ‘unilaterally selected the [drilling] site’. Does the developing party need to get the surface owner’s permission or otherwise involve them in the decision with regard to the location of the exploration activities?

5. The distinction between a public and private nuisance have been described by one court as follows:

> Defendant contends that plaintiffs have not alleged that they suffered harm different in kind from that suffered by the public in general, a necessary element of a private action for public nuisance under both New York and Vermont common law. Roy v. Farr, 128 Vt. 30, 37, 258 A.2d 799, 803 (1969); Gibbons v. Hoffman, 203 Misc. 26, 115 N.Y.S.2d 632 (1952); Restatement (Second) of Torts @ 821C at 94 (1979). Plaintiffs allege in their complaint, however, that the discharges from defendant's mill "interfere with Plaintiffs' use and enjoyment of their property and have decreased the market value and rental value of their property." Such an allegation is sufficient to state a private cause of action for a "nuisance" which might generally be classified as "public." See Hazen v. Perkins, 92 Vt. 414, 421-22, 105 A. 249 (1918) (where variations in lake depth caused by defendant's dam "accentuated" adverse effects upon plaintiffs' shore properties, injury was "special and distinct", though injury was not substantial); see also W. Prosser, The Law of Torts @ 88, at 588 (4th ed. 1971); 58 Am. Jur. 2d, Nuisance @ 111, at 675 (1971) ("Interference with the enjoyment and value of a person's private property rights is a special injury [allowing] recovery from a public nuisance . . ."); Restatement (Second) of Torts @ 821C, comments d and e (1979) ("When the public nuisance causes . . . physical harm to [plaintiff's] land . . ., the harm is normally different in kind from that suffered by other members of the public . . .").See: Ouellette v. International Paper Co., 602 F. Supp. 264; 22 ERC (BNA) 1682; (U.S.D.C.
> Vermont 1985).

7. The surface owner is awarded attorneys fees in this case. Is that normal?

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LONE STAR PRODUCING CO. v. JURY
Supreme Court of Oklahoma
445 P.2d 284; 32 Oil & Gas Rep. 29
September 10, 1968

This is an appeal from a judgment upon a jury verdict in favor of plaintiff Richard L. Jury and Rosie Pauline Jury against the defendant Lone Star Producing Company, a Texas Corporation. Money judgment was rendered for damages to plaintiffs' home resulting from vibrations created by defendant's operation of a power pumping station which abutted plaintiffs' property.

The plaintiffs are the owners of a house within the corporate limits of the City of Moore. The lot of the plaintiffs was purchased subject to an existing oil and gas lease covering a much larger tract of land consisting of 154 acres.

Later, but prior to plaintiffs' purchase of their lot, the oil and gas lease was amended to permit the lessee, at its option, to pool and combine the acreage covered by the lease with other land in the immediate vicinity, for conservation purposes and for proper development and operation of the leased premises. It is stipulated by the parties that the lease, as amended, is, remains and has been at all times pertinent in full force and effect.

Subsequent to construction of plaintiffs' home, a pooling and operating Order, unitizing approximately 1360 acres, including the leased premises, was entered by the Corporation Commission authorizing a plan for secondary recovery of oil from the 1360 acres. Defendant was selected unit operator for the plan.

As unit operator, defendant installed a power pumping station to accomplish secondary recovery of the oil products underlying the unit. The pumps used to effect the secondary recovery were powere by eight internal combustion engines. The pumping station was located, not on the leased 154 acres which covers plaintiffs' property, but on three acres within the unit that abutted the plaintiffs' premises.

Both the pumping station and plaintiffs' property are located within the corporate limits of the City of Moore. Plaintiffs alleged in their petition that the engines from the pumping station operated continuously night and day, causing vibrations which permanently damaged the home of the plaintiffs. The plaintiffs further alleged that the acts of the defendant operating the pumping station was in violation of the "nuisance" ordinances of the City of Moore.

After the defendant's demurrer was overruled, the defendants answered that the operation of the pumping station was necessary for the recovery and production of the oil, gas and other minerals lying under the property of the plaintiffs and other lands covered by the lease, as well as all the other lands included within the Plan of Unitization; that the operation was conducted with due care and in a reasonable, careful and prudent manner; and denied any willful or negligent acts causing damage to plaintiffs' property. In the alternative, the defendants further answered that if vibrations were transmitted to the plaintiffs' property that they were reasonably necessary or unavoidable, and that the recovery operations, of which the plaintiffs complain, were authorized and consented to by their predecessor in title under the provisions of a prior oil and gas lease, and that the plaintiffs are bound by the terms of the lease.

The trial court instructed the jury that before they could return a verdict for the [*286] plaintiffs, they must find that the defendant was guilty of negligence in conducting the operation of the pumping station.

In this connection, however, the trial court submitted to the jury the city ordinances of Moore defining nuisances. The jury was then instructed as follows:

> "It is the duty of a persons or corporations doing business in this State to observe the state laws and city ordinances with reference thereto, as set out in these Instructions. A violation of a state law or city ordinance in the operation of a business or occupation, which violation constitutes a nuisance is negligence per se, that is, negligence in and of itself."

The defendant argues that the trial court's concept of nonliability in the absence of negligence is correct, but contends the court erred in admitting in evidence the city ordinances defining nuisances and instructing the jury that a violation of these city ordinances is negligence per se.

The plaintiffs theory of their action is two fold. First, they contend that no private property can be damaged without compensation, unless by consent of the owner, and in this case the use need not be of an unreasonable, careless or negligent nature to entitle plaintiffs to recover. Second, they contend that where a lawful business is being conducted in such a manner as to constitute a nuisance, causing substantial injury to property, the defendant is required to respond for damages.

The defendant argues that as the holder of a prior oil and gas lease covering the property of the plaintiffs that even assuming the activities of the defendant in the operation of the pumping station caused some damage to the plaintiffs' property or that such activities are prohibited by the city ordinances of Moore, in the absence of negligence, the plaintiffs cannot recover. The defendant asserts that the plaintiffs purchased their property subject to the oil and gas lease and have thereby in effect consented to the activities carried on by the defendant.

An operator of an oil and gas lease has the right to use as much of the surface of the land, and to use it in such a manner, as is reasonably necessary to effectuate the purposes of the lease. In Cities Service Oil Co. v. Dacus, Okl., 325 P.2d 1035, we held that where a surface owner purchased his property subject to a valid oil and gas lease his right to any recovery in the absence of negligence, had to be predicated upon proof that the lessee used more land than it was entitled to use under the terms of the lease. In Wilcox Oil Co. v. Lawson, Okl., 341 P.2d 591, we held:

> "The holder of a valid oil and gas lease has the right and privilege to go on the land and do all those things necessary and incidental to the drilling of wells, including the right to the use of the surface and in the absence of a provision that lessee would be liable for growing crops, the only basis for recovery of damages is proof of wanton or negligent destruction, or that damages were to portion of land not reasonably necessary for oil and gas development."

The plaintiffs strongly urged our holding in British-American Oil Producing Co. v. McClain, 191 Okl. 40, 126 P.2d 530, as controlling in this case. There we upheld a judgment for damages caused by vibrations from drilling operations on adjacent lands.

The trial court had instructed the jury to the effect that the defendant lessees had a legal right to carry on the drilling operations, but no one had a right to operate a business, though a lawful one, in such a manner to do substantial physical damage to another person's property; that if there had been vibrations as alleged, and they had affected plaintiff's property in a substantial physical manner, then the defendants would be liable.

The defendants objected to this instruction and argued that where property is being used in a lawful manner there can be no liability for damages in the absence of carelessness or unwarranted conduct or an unreasonable use of the property.

In rejecting this argument, we stated:

> "Section 23, Article 2, Bill of Rights, O.S. 1941, provides that no private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner. In a case of this character the use need not be a careless or negligent nature or unreasonable or unwarrantable to entitle the injured party to recover. If the use causes a substantial injury to the property of another he may recover as for a private nuisance."

The distinguishing feature of the British-American case is that there was no relationship of lessor and lessee. The drilling activities of the defendant caused damages on adjacent property and without the consent of the plaintiffs.

In the present case the plaintiffs purchased their property subject to a valid and existing oil and gas lease. Thus the rights and obligations of the parties are governed by the terms of the lease. The plaintiffs are bound by its provisions. The lease granted to the lessee the right to pool and combine the lease property with other property under an unitization order. The plaintiffs' lessor has given authorization and consent for drilling operations under a unitized plan. When the plaintiffs purchased their property they must be presumed to have known of this consent and servitude on the property.

The plaintiffs are in a similar position to the surface owner in the case of Grimes v. Goodman Drilling Co., Tex. Civ. App., 216 S.W. 202. There the plaintiff bought a lot subject to an oil and gas lease. The lessee commenced drilling operations on the lot. The court in denying the plaintiff's request for injunctive relief stated:

> "As appellant purchased the premises burdened with the terms of the lease, he is in no position to complain of conditions produced by appellees, such as are usual and customary during the drilling of an oil well."

In Mary Oil and Gas Co. v. Raines, 108 Okl. 222, 235 P. 1085, we said:

> "When plaintiffs purchased the surface rights to their lots, they are presumed to have known that the lessees had a right to drill a well on the lots, and that in so doing they and their families would be subjected to more or less inconvenience, discomfort and annoyance, such as are incidental to and such as would naturally arise in the drilling of oil wells, but, having bought the premises so burdened, they have no just grounds for complaint by reason of the drilling of the wells by the Mary Oil and Gas Company, providing the drilling of the same is done in the usual and ordinary manner and the usual and

ordinary precautions taken to prevent injury and annoyance, which, according to the record, was done in this case. * * * *"

The plaintiffs make no contention that the pumping station is not reasonably necessary and incidental to the development of the lease. They do not assert the activities of the defendant to be unusual or beyond the customary standards of the oil industry, which could not have been contemplated by the parties on execution of the lease. There is no allegation that the defendant is using more surface than is reasonably necessary. There is no complaint that the unit operations have placed an unequal burden on the plaintiffs' property.

The plaintiffs have made no effort to show that the defendant could have with equal convenience and advantage selected another location within the unit for the pumping station. Also, the petition of the plaintiffs does not allege any negligence on the part of the defendant in the operation of the pumping station, nor does the evidence disclose any proof of negligence. There is no showing that the defendant failed to use due care or failed to take ordinary precautions to prevent injury or damage.

Instead, we have a bare assertion of damages. Under such circumstances, the principles of law applicable to a lessor and lessee relationship govern and must be applied to the facts in this case.

We also are of the opinion that the trial court erred in admitting the nuisance ordinances of the City of Moore into evidence and instructing the jury that a violation of the city ordinance is negligence per se.

In Stanolind Oil & Gas Co. v. Phillips, 195 Okla. 377, 157 P.2d 751, an agricultural lessee had constructive notice of an easement granted by his lessor to the operators of oil wells to flow pollutive substances on the land. The plaintiff alleged that the Oklahoma statutes prohibited oil and gas operators from allowing pollutive substances to flow on the plaintiffs' land and therefore the easement given by his lessor was void. The court held that the plaintiff could not recover damages to crops against the oil operators caused by the pollution. The court stated that even though the acts of the oil operators were in violation of a pollution statute, that as between the plaintiff and the oil operators, the granting of the easement was not, and that the plaintiff was bound by its terms.

In the present case the property of the plaintiff was burdened with the lease that justified the activities of the defendant. The plaintiffs having purchased the property subject to this lease, they are in no position to now assert the prohibition of the city ordinances as between themselves and the defendant. The plaintiffs' lessor, in effect, has consented and extended a license to the defendant to maintain the alleged nuisance of which the plaintiffs complain. Since the lease authorized the activities of the defendant, the plaintiffs are estopped to complain of a condition necessarily incident to the development of the lease, whether the condition be located on their property or property adjacent thereto within the unit.

In this jurisdiction we have held that the drilling and operations of an oil and gas lessee is a lawful business and is not a nuisance per se. Powell Briscoe, Inc. v. Peters, Okl., 269 P.2d 787. Such a business, however, may become a nuisance, depending upon the facts and circumstances of the particular situation.

In the present case, the plaintiffs have failed to show sufficient facts and circumstances to justify the judgment.

Judgment reversed with directions to enter judgment for defendant.
JACKSON, C.J., IRWIN, V.C.J., DAVISON, WILLIAMS, BERRY, LAVENDER, and McINERNEY,JJ., concur.

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Lone Star v. Jury

Notes and Discussion

1. Are oil and gas operations considered a nuisance per se?

2. Did the landowner need to show that the defendant intended to interfere with the use of the surface to recover under a nuisance theory?

3. How did the instant court distinguish British American Oil v. McClain from the instant case?

4. The court in Buddy v. Department of Natural Resources, 229 N.W.2d 865 (Ct. App. Mich. 1975) noted:

> As to what constitutes a nuisance per se, Bluemer v Saginaw Central Oil & Gas Service, Inc, 356 Mich 399, 411; 97 NW2d 90, 95-96 (1959), quotes 66 CJS, Nuisances, @ 3, 733-734 as follows:
>
> "From the point of view of their nature, nuisances are sometimes classified as nuisances per se or at law, and nuisances per accidens or in fact. A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Nuisances in fact or per accidens are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property. The number of nuisances per se is necessarily limited, and by far the greater number of nuisances are nuisances per accidens. For this reason whether or not a particular thing or act is a nuisance is generally a question of fact, as discussed infra @ 8, to be determined in the first instance before the term 'nuisance' can be applied to it. * * *
>
> "The difference between a nuisance per se and one in fact is not in the remedy but only in the proof of it. In the one case the wrong is established by proof of the [*601] mere act and becomes a nuisance as a matter of law, in the other by proof of the act and its consequences."
>
> Moreover, a nuisance per se "arises when one so uses his land as to cause unreasonable interference with the use and enjoyment of the land of another". Young v Groenendal, 10 Mich App 112, 116; 159 NW2d 158, 159 (1968), affirmed by an equally divided court, 382 Mich 456; 169 NW2d 920 (1969).

In Brown v Nichols, 337 Mich 684, 689; 60 NW2d 907 (1953) the Court approved the following:

"The question as to what constitutes a nuisance is one of law for the court; but it is for the jury to decide whether a particular act or structure or use of property, which is not a nuisance per se, is a nuisance in fact." . . . .

Would an activity that is a nuisance in a city necessary be a nuisance if located on ranch land in West Texas?

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ii. Actual Physical Harm

McGINNIS v. TENNESSEE GAS PIPELINE CO.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
1994 U.S. App. LEXIS 12781
May 31, 1994, Filed

JUDGES: BEFORE: NELSON, SUHRHEINRICH, and BATCHELDER, Circuit Judges.
OPINION BY: PER CURIAM

This is an appeal from a summary judgment in favor of the defendant in a nuisance action. The plaintiff occupies a home on property adjacent to an industrial tract, owned by the defendant, that is contaminated with polychlorinated biphenyls (PCBs). The plaintiff has no evidence that her property has been contaminated, but she says that it may be contaminated and that the defendant's conduct in releasing PCBs on its land has reduced the value of her property and caused her emotional distress.

Under Kentucky law, which is controlling here, the plaintiff cannot prevail without establishing physical harm to or interference with her property. Concluding, upon de novo review, that the plaintiff has not made out a triable issue of fact in this regard, we shall affirm the judgment for the defendant.

I

The defendant, Tennessee Gas Pipeline Company, owns and operates a natural gas pipeline system parts of which pass through eastern Kentucky. Compressor Station No. 200, one of a number of compressor stations used to push gas through the pipeline, is located in Greenup County, Kentucky, next to the plaintiff's property. During the 1950s the company began using Pydraul AC at Station 200. Pydraul AC is a fire-retardant lubricant containing PCBs. During the period when the company was using the product, some of it leaked through the seals in the air

compressor cylinders and mixed with moisture in the compressed air stream. The company disposed of this PCB-laden moisture in the soil of the drainage system at the station.

The company discontinued its use of Pydraul AC in 1974, but tests conducted in 1988 revealed the presence of PCBs in the soil around Station 200 and in an adjoining stream. The company notified the Commonwealth of Kentucky, which brought suit in state court for disposal of hazardous substances without a permit [*3] in violation of KRS Chapter 224. The company eventually signed an agreement with the Commonwealth in which it undertook to determine the precise extent of PCB contamination, abate any further releases of PCBs, and develop a plan to remedy the contamination. In testing to determine the extent of the contamination, the company discovered that PCBs had migrated off its property and onto the property of certain downstream landowners.

The plaintiff, Bernice McGinnis, owns approximately 800 acres of land adjacent to and upstream of the Station 200 tract. The company's environmental consultants collected 17 soil samples, 2 water samples, and 2 sediment samples from Ms. McGinnis' property and found no evidence of PCBs. Ms. McGinnis hired an environmental consultant, James Knauss, who conducted his own tests and worked with the company's consultants when they performed their tests. Mr. Knauss found no evidence of PCB contamination on the McGinnis property.

The Kentucky Natural Resources and Environmental Protection Cabinet sampled Ms. McGinnis' water and likewise found no evidence of PCBs. Ms. McGinnis and three other nearby property owners filed suit against the company in a Kentucky state court. The plaintiffs alleged that the defendant's release of PCBs had contaminated their land, reduced the value of their properties, and caused them severe emotional distress.

The company removed the case to the United States District Court for the Eastern District of Kentucky, where it moved for summary judgment as to Ms. McGinnis' claims for property damage and emotional distress. The district court initially granted summary judgment on the emotional distress claims alone. With respect to the property damage claim the court noted that although Ms. McGinnis had not yet produced evidence of PCBs on her property, she had offered an affidavit in which Mr. Knauss expressed the opinion that there was a high probability of contamination on the property. The court denied summary judgment to allow Ms. McGinnis to seek additional evidence of actual contamination.

Ms. McGinnis then filed a motion asking for appointment of an expert by the court. The company opposed the motion and renewed its motion for summary judgment.

In due course the district court denied the motion to appoint an expert, granted summary judgment to the defendant, and dismissed the complaint. A subsequent motion to alter or amend the judgment was denied, and Ms. McGinnis has filed a timely notice of appeal.

II

To prevail on a motion for summary judgment the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate against a party who, having been called upon to do so, fails to come forward with evidence tending to establish a

disputed element of that party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

The nonmoving party is not entitled to go to trial on the basis of allegations alone. Significant probative evidence must be presented in support of the complaint. Goins v. Clorox Co., 926 F.2d 559, 561 (6th Cir. 1991). This court reviews summary judgment proceedings de novo, making all reasonable inferences in favor of the nonmoving party. EEOC v. University of Detroit, 904 F.2d 331, 334 (6th Cir. 1990).

Under Kentucky, nuisances are "'that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.'" City of Somerset v. Sears, 313 Ky. 784, 786, 233 S.W.2d 530, 532 (Ky. 1950), quoting 39 Am.Jur., Nuisances. In deciding whether a nuisance exists, a court must balance the reasonableness of the defendant's use of his property against the gravity of harm to the plaintiff. Louisville Refining Co. v. Mudd, 339 S.W.2d 181, 186 (Ky. 1960). Neither factor alone can establish the existence of a nuisance. Id.

In order to establish a nuisance, Kentucky law requires an actual physical interference with or harm to the plaintiff's property. No Kentucky case has awarded damages for nuisance without some detectable physical interference with the property. Thus in Morgan v. Hightower's Adm'r, 291 Ky. 58, 59-60, 163 S.W.2d 21 (Ky. 1942), Kentucky's highest court held that damage to the reputation of property where a suicide had occurred, resulting in reduced property values, was not recoverable in a trespass action absent actual physical interference with the property.

In Louisville v. Munro, 475 S.W.2d 479 (Ky. 1971), the plaintiffs sought to recover for diminution in the value of their property after the city announced plans to build a zoo on adjacent property. The court stated that "the general rule . . . is that in order to be a nuisance the use of the property must disturb physical comfort or be offensive to physical senses." Id. at 482 (emphasis in original), citing 58 Am.Jur.2d, Nuisances, Sec. 42. In McCaw v. Harrison, 259 S.W.2d 457 (Ky. 1953), similarly, the court held that dairy farmers could not enjoin the construction of a cemetery on adjoining property. The plaintiffs claimed that the cemetery could contaminate their well water and would reduce their property values. The court held that the plaintiffs' fears were not actionable absent actual contamination. Id. at 458. See also Bartman v. Shobe, 353 S.W.2d 550, 555-556 (Ky. 1962) (reduced property value due to adjacent sewage plant not actionable in absence of actual harm to property).

Ms. McGinnis argues, however, that the Kentucky Legislature's recent (1991) enactment of KRS @ 411.500 et seq., governing nuisance, displaced existing case law and removed the requirement of a physical harm to the plaintiff's property. n1 The argument is not persuasive.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n1 She also maintains that the statute requires that a jury decide nuisance claims, precluding summary disposition. See id., @ 411.550 ("the judge or jury . . . shall consider all relevant facts and circumstances") (emphasis added). However, it is clear that the statute was not intended to preclude summary dispositions. It merely indicates that if the case should survive summary judgment and proceed to a trial, then the trier of fact is directed to consider certain factors.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The legislature made it clear that the statute was intended to codify and supplement existing case law, not to displace it. See K.R.S. @ 411.500 ("It is the intent of the General Assembly to restate and codify ... the common law of nuisance as existing in the Commonwealth [*9] . . . ."); @ 411.570 ("[nuisance statute] shall not be construed as repealing any of the statutes or common law of the Commonwealth relating to nuisance . . . but shall be held and construed as ancillary and supplemental thereto"). Ms. McGinnis has not identified any specific element of the statute that would alter the common law requirement of physical interference with the plaintiff's property.

As we read the record, it does not indicate any basis on which a trier of fact could find that there has been physical harm to the plaintiff's property. Although James Knauss' affidavit states that there is a high probability of contamination, it is undisputed that there is, as yet, no physical evidence of contamination. Kentucky law requires more than a risk of contamination before plaintiff can prevail in a nuisance action.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n2 Mr. Knauss states that Ms. McGinnis's property could become contaminated in the future through PCB-contaminated dirt being blown on to her property. If future tests reveal that contamination has occurred, Ms. McGinnis may, of course, renew her claim.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*10]

Ms. McGinnis claims that the defendant's actions have interfered with her ability to enjoy her property because she is fearful of eating the vegetables from her garden or allowing her grandchildren to play outside.

It is clear that under Kentucky law a plaintiff in a nuisance action may recover a loss in property value caused by the nuisance, but "no damages shall be awarded for annoyance, discomfort, sickness, emotional distress or similar claims." KRS @ 411.560(3). Accord, City of Somerset v. Sears, 233 S.W.2d 530, 532, 313 Ky. 784, 785 (Ky. 1950). In the absence of actual harm to her property, Ms. McGinnis is not entitled to recover damages.

Ms. McGinnis also maintains that because the defendant's actions violated state pollution laws, its conduct was clearly unreasonable and therefore constituted a nuisance as a matter of law. We find no support for this contention in Kentucky law. Although illegal activity on a property is a factor suggesting that the activity may be a nuisance, illegality, standing alone, does not establish the existence of a nuisance in the absence of interference with the plaintiff's property. Ms. McGinnis has not been able to point to any evidence tending to establish the threshold requirement of interference with her property.

Ms. McGinnis relies on a case in which a federal district court in Kentucky held Tenneco (the parent of the defendant in the case at bar) liable for PCB contamination caused by a leak in a compressor station.

See Fletcher v. Tenneco, Inc., 37 ERC (BNA) 1237 (E.D. Ky. 1993). In Fletcher, however, tests showed actual PCB contamination of the plaintiff's property. Fletcher is thus entirely consistent with well established nuisance law, and does not support the proposition that Ms. McGinnis may recover in the absence of actual contamination.

Ms. McGinnis was not entitled to have the court appoint an expert, at the defendant's expense, to conduct additional testing on her property. Rule 706, Fed. R. Evid., gives a trial court broad discretion to appoint an expert in a civil case and to apportion costs as necessary. A district court's decision on such a matter is subject to reversal only for abuse of discretion, and we see no abuse of discretion here. The McGinnis property has already been tested several times by three different experts, [*12] and Ms. McGinnis has established neither that she is unable to pay for additional testing nor that additional testing is likely to produce different results.

AFFIRMED.

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McGinnis v. Tennessee Gas Pipeline Co.

Notes and Discussion

1. PCB's are a common problem for pipeline operators. They are essentially indestructible contaminants unless incinerated at very high temperatures, and have adverse health effects if ingested. PCB's were used in large engines at pipeline compressor stations to lessen the possibility of explosion, and were used in electrical transformers.

The use of PCB's were discontinued in the 1970's, however such materials are still present as a contaminant in some pipelines due to their indestructibility. PCB's cannot be identified with the naked eye or by smell, but samples must be sent to a laboratory to determine the presence and concentration of this contaminant. "Screening kits" are also available to detect the presence of PCB's. Based on the physical nature of PCB's, what legal issues may arise from their presence?

2. In McGinnis, has there been an actual injury to the landowner? Is one required to recover under a nuisance theory? Is this more a claim for recovery for emotional distress?

3. If the court allowed recovery in McGinnis even though 21 samples indicated no contamination of her property, would this expand the liability of operators for environmental problems?

4. If an oil company takes environmental samples at a site, are they required to share the results with the surface owner? Regulatory agencies?

5. In Hero Lands Co. v. Texaco, Inc., 296 So. 2d 345 (Ct. App. La. 1974), the court noted:

> In our view, the law of Louisiana is that the construction, maintenance and operation of a gas pipeline is not a nuisance per se. See Hilliard v. Shuff, 260 La. 384, 256 So.2d 127 (1971); Jeansonne v. Cox, 233 La. 251, 96 So.2d 557 (1957); Galouye v. A. P. Blossman, Inc., 32 So.2d 90 (La.App. 1947). We recognize that a gas pipeline, a fuel storage tank or any similar structure can be operated in such a manner as to constitute a nuisance but there are no allegations to this effect in the petition.

6. Note that the company discontinued the use of Pydraul AC in 1974, but PCB’s were not discovered until 1988. Does this create additional legal issues for either party?

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iii. Degree of care

Wales Trucking Co. v. Stallcup
Court of Civil Appeals of Texas, Second District, Fort Worth
465 S.W.2d 444; 2 ERC (BNA) 1382
March 5, 1971

Louis Stallcup and wife initiated this suit against the Wales Trucking Company, a Texas corporation, for dust damages sustained by them as the result of an alleged nuisance created and maintained by Wales through its unreasonable use of the unimproved public county road which runs in front of their rural home. Based on a jury verdict, judgment was rendered for the Stallcups for damages in the amount of $5,000.00. Wales has appealed.

Wales was engaged in hauling heavy concrete water pipe from the Gifford-Hill plant located in the Fort Worth-Dallas area to the site of the right-of-way of the water pipeline being constructed to bring water from Lake Arrowhead in Clay County to the City of Wichita Falls. The limit of Wales' responsibility was to haul the water pipe. For a period of about four (4) months between April 15 to September 1 of 1968, Wales made commercial use of the roadway in front of the Stallcup home seven days per week by transporting about 825 truckloads of pipe over such road and returning an equal number of empty trucks over the same route. (Approximately 1650 truck trips during the 4 month period.)

The center of the roadway was 75 feet from the front wall of the Stallcup home. A majority of the loaded trucks weighed 58,000 pounds. A few grossed 72,000 pounds.

The loaded trucks traveled 25 to 30 miles per hour and the empty ones about 45 to 50 miles per hour. Because of weather conditions or the production schedule of the water pipe the deliveries thereof varied between zero and 20 during any one day.

Wales' commercial use of the roadway, as above indicated, was extensive and for the period of approximately four months converted the seldom used country road in front of the Stallcup home to a heavily traveled thoroughfare. ". . . they (Wales) were just beating the road up and it just got like ashes." Dust from the dirt and graveled surface drifted onto the Stallcups' premises and into their home causing discomfort and irritation.

On May 7, 1968, after a week or more of the dust Mr. Stallcup called the Grand Prairie office of Wales. He talked to its President. Stallcup complained to the President of Wales about the dust and its effect upon him and his family. In this connection he said, "'They have got our road just powdered up, . . . We just can't stand it. We just can't live with it.'" Later Mr. Stallcup talked with the supervisor of Wales who was on duty at the site of the pipeline.

A few days later the Wales' trucks commenced to use an alternate route. This lasted about a week or ten days. Because of complaints by a County Commissioner concerning use of the alternate route Wales again routed its trucks in front of the Stallcup home and continued its use of such road the remainder of the period. The roadway in question was used as access to the pipeline

right-of-way during about 5 miles of its construction. Most trucks hauled two joints of pipe which were each 16 feet long.

An average of six to eight loads per day were hauled. When Wales resumed its hauling in front of the Stallcup home after its brief use of the alternate access road it did so with notice and knowledge of the dust problems affecting the Stallcups which it had in the past and would again cause.

The Stallcups pleaded a cause of action based upon both nuisance and negligence, however, at the time of trial they abandoned any claim based upon negligence and no issues were submitted on this theory. The only relief sought was by way of damages for the nuisance.

In its charge to the jury the court defined "nuisance" in substantially the same words as the definition approved in Columbian Carbon Co. v. Tholen, 199 S.W. 2d 825 (Galveston Tex. Civ. App., 1947, writ ref.).

The word, "unreasonable," was substituted in lieu of the word "unusual". Other slight changes were made in the Tholen definition to adapt it to the use made of the public road. Substantially the same definition was approved in the more recent case of Collins Construction Company of Texas v. Tindall, 386 S.W. 2d 218 (Eastland Tex. Civ. App., 1965, ref. n.r.e.).

In the case at bar the jury in answering Special Issues 1 through 8, respectively found: (1) Wales' use of the roadway caused substantial amounts of dust to be deposited on Stallcup's property; (2) such depositing of dust was the result of a nuisance, i.e., the unreasonable and excessive use of the roadway; (3) as a proximate cause of such nuisance the Stallcups suffered damage for (a) the temporary loss of enjoyment of their dwelling house and (b) for temporary physical discomfort; (4) $2,500.00 in damages was awarded for (a) temporary loss of enjoyment and $2,500.00 for (b) temporary physical discomfort; (5) Wales had notice of damage resulting to the Stallcups from such nuisance; and (6) continued the nuisance after having such notice. (The matters involved in Special Issues 5 and 6 relating to notice were undisputed.)

By its first five points Wales contends that the court erred in overruling its motions for instructed verdict and for judgment non obstante veredicto because its use of the road was neither negligent nor unlawful, was not a nuisance as a matter of law and there was no finding of negligence in its use of the public road. By its points 6 and 7 Wales asserts the court erred in submitting Special Issues Nos. 2 and 3 and in failing to disregard the answers thereto because there was no evidence or insufficient evidence making its use of the public road a nuisance.

The seven points of error presented, briefed and argued by Wales on this appeal are singly and collectively based upon the sole proposition that there can be no right of recovery against it in the absence of pleadings, proof and findings of either negligent or unlawful conduct on its part.

Wales in its reply brief says: "The primary issues on appeal as highlighted by the two prior opposing briefs are whether either negligence or unlawful use must be plead and proven in establishing as a nuisance the use of a public roadway.

"Appellant contends that one or both of these elements must be present. Appellee contends that it is sufficient to establish that use of the roadway was 'unreasonable'."

Wales makes it clear that its no evidence and insufficient evidence points are based solely on the proposition that there is no evidence or that the evidence is insufficient to establish that it was guilty of either negligent or unlawful conduct and that therefore as a matter of law its conduct did not constitute a nuisance.

The Stallcups contend that an abutting property owner who sustains damage caused by a nuisance which is created by a member of the public in making an unreasonable use of a public road is liable to such abutting property owner for the damage caused him by such nuisance.

We have concluded from our analysis of Wales' briefs that it in effect admits that at common law and therefore in Texas that an abutting property owner does have a cause of action such as is described in the preceding paragraph. The only difference in the contentions of the parties to this appeal is that Wales contends that a showing of conduct of an unlawful or negligent nature is an essential element of such a cause of action.

Stallcups take the position that the elements of negligence and unlawful conduct are not essential elements of their cause of action. "As a general rule, proof of negligence is not essential to imposition of liability for the creation or maintenance of a nuisance. This is so though the nuisance complained of may be the consequence of negligence. A nuisance does not rest on the degree of care used, but on the degree of danger or annoyance existing even with the best of care. Consequently, if a nuisance exists, the fact that due care was exercised against its becoming a danger or annoyance is no excuse.

However, where the act or condition in question can become a nuisance only by reason of the negligent manner in which it is performed or permitted, no right of recovery is shown independently of the existence of negligence." 41 Tex. Jur. 2d 591, @ 17.

The general rule above enunciated is supported by Columbian Carbon Co. v. Tholen, supra; King v. Columbian Carbon Co., 152 Fed. 2d 636 (Cir. Ct. of App., 5th Cir., 1945); Collins Construction Company of Texas v. Tindall, supra; and a host of other cases cited in 41 Tex. Jur. 2d 591, @ 17 and pocket parts, supra. See also 46 C.J., "Nuisances", @ 28, "F. Negligence - 1. In General." Further, as a general rule, proof of unlawful conduct is not essential to the imposition of liability for the creation or maintenance of a nuisance. The fact that an act is lawful does not prevent it from being a nuisance. Generally nuisances arise from violation of the common law rather than violation of a statute. 39 Am. Jur., "Nuisances", p. 301, @ 20, "Lawful Acts. --", and @ 21, "Unlawful Acts. --." To the same effect see King v. Columbian Carbon Co., supra, at page 639 (5); 39 Am. Jur. 325, @ 44; 41 Tex. Jur. 2d 588; 46 C.J., @ 24, "2. Unlawful - a. In General"; and 46 C.J., @ 25, "b. Violation of Municipal Ordinance", and p. 675, @ 43, of same text.

In the King case, supra, the sole question presented was whether or not a landowner is without recourse for damages caused to his land in a case where the parties were agreed that defendant's operation was lawful, fulfilled a necessary public purpose, was not a nuisance per se, was not negligent and that damages would have resulted from defendant's operation without regard to the manner in which it was conducted.

While there is no agreement as to the facts in the present case, it is accurate to state that the elements above referred to in the King case are present here and are undisputed. We submit that

regardless of whether or not Wales' vehicles were properly licensed, did not exceed load limits, had proper permits from the Railroad Commission and were operated within permissive speed limits would not have altered the damages sustained by the Stallcups.

The law "does not allow anyone, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity." 39 Am. Jur. 327, @ 45, p. 328. This passage was quoted with approval in King, supra, at page 639 (6).

In applying the above stated general rules of law to the facts of this case we find and hold that pleadings and proof of either negligent or unlawful conduct or both are not necessary or essential elements of the cause of action here involved.

The Supreme Court of Iowa in Shannon v. Missouri Valley Limestone Company, 255 Iowa 528, 122 N.W. 2d 278 (1963) said: "We are compelled to agree with the trial court that a common law nuisance is created by the dust raised by the trucks hauling crushed rock from the quarry." See also Loosian v. Goudreault, 335 Mass. 253, 139 N.E. 2d 403 (1957); Gronn v. Rogers Construction, Inc., 221 Ore. 226, 350 P. 2d 1086 (1960); Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 63 N.W. 111, 113 (1895); Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268 (1926).

"Every person has the right to have the air diffused over his premises, whether located in the city or the country, in its natural state and free from artificial impurities. However, by air in its natural state [*448] and free from artificial impurities is meant pure air consistent with the locality and character of the community. The pollution of the air so far as is reasonably necessary to the enjoyment of life and indispensable to the progress of society is not actionable. But this right of pollution must not be exercised in an unreasonable manner so as to inflict injury on another unnecessarily. Any business, though in itself lawful, that necessarily impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter may become a nuisance to those occupying adjacent property, in case it is so near and the atmosphere is so contaminated as to substantially impair the comfort or enjoyment of adjacent occupants. Thus smoke, dust, noxious fumes or gases, or stenches or smells may constitute a nuisance under some circumstances." 41 Tex. Jur. 2d 608, @ 33, and pocket parts.

In our opinion the facts in the Collins case, supra, involving dust from a rock crushing operation near the Tindall home which continued for about three months are very similar to the facts here involved. The testimony concerning the problems arising from the dust was similar to the testimony received in the instant case. In Collins the court in applying the general rules above set forth held that the dust caused by the operation of the rock crusher created a nuisance regardless of the degree of care exercised by the operator and thus it was not necessary to plead and prove negligence on his part. The same rule is applicable here.

The dust caused by the operators of the trucks created a nuisance regardless of the care exercised by such operators and regardless of the lawful manner in which the trucks were operated. Thus it was unnecessary to plead and prove negligence or unlawful conduct on the part of such operators.

The Stallcups in the case at bar and the Tindalls in the Collins case were subjected to the same nuisance, i.e., dust. In varying degrees they sustained the same type of damages. In Collins the dust nuisance was caused by a rock crusher which apparently was in a fixed, immobile position on private property. Here the dust nuisance was caused by mobile equipment, i.e., moving trucks making unreasonable use of a public road.

Does the difference between mobile and immobile equipment operating on public or private property, respectively, require that different rules be applied in connection with responsibility for the creation of a nuisance? We think not. We so hold. The same general rules apply in both cases.

We have examined the entire record in this case. We have concluded the evidence was sufficient to support the answers of the jury to each of the special issues submitted to it.
All points of error are overruled. The judgment of the trial court is affirmed.
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Wales Trucking Co. v. Stallcup
Notes and Discussion

1. Does the nuisance cause of action require bad faith, breach or care, or an intentional act by the defendant?

2. Does the fact that a business is legally conducted preclude it from becoming a nuisance?

3. Is the degree of proof easier for nuisance or negligence, or are they equally difficult to prove?

4. Does the plaintiff generally need to prove negligence to establish a nuisance cause of action?

5. In light of the answer to question number four, note that in Humble Pipe Line Co. v. Anderson, Court of Civil Appeals of Texas, 339 S.W.2d 259; 13 Oil & Gas Rep. 635 (July 29, 1960), in finding that a pipeline was not a nuisance per se the court stated:

> As we understand our Texas courts, they hold in effect that if a business is of such a nature that it inevitably will do substantial injury to those around it, even though it is operated carefully and properly, then it is a nuisance per se, and those injured will have redress, regardless of negligence. If such a business is permitted to continue in spite of the injury to others, because of its utility to the public, then it must compensate those injured. But if a business is of such a nature and injury does not necessarily result from its operation, then it is not a nuisance per se, and liability depends upon negligence. This, we believe, is illustrated in the following cases: Columbian Carbon Co. v. Tholen, Tex.Civ.App., 199 S.W.2d 825, (er. ref.) and King v. Columbian Carbon Co., 5 Cir., 152 F.2d 636. See also East Texas Oil Refining Co. v. Mabee Consolidated Corp., Tex.Civ.App., 103 S.W.2d 795, writ dis. 133 Tex. 300, 127 S.W.2d 445. (We do not think the decision in Morton Salt Co. v. Lybrand is contra to the rule announced in Turner v. Big Lake Oil Co., supra.)

Does this court contradict the general rule regarding the necessity of proving negligence to establish a nuisance?

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iv. Public Nuisance

TRANSCONTINENTAL GAS PIPE LINE CORP. v. GAULT
UNITED STATES COURT OF APPEALS FOURTH CIRCUIT
198 F.2d 196; 1 Oil & Gas Rep. 1213
June 16, 1952, Argued
July 29, 1952, Decided

The owners and occupants of substantial residence and farm properties in Howard County, Maryland, situated about fifteen miles from Baltimore and five miles from Ellicott City, the county seat, sought an injunction in this case to restrain Transcontinental Gas Pipe Line Corporation from operating a compressor gas station located in the nearby country side in such a manner as to constitute a public nuisance. The corporation is a natural gas company engaged in the transmission of natural gas from Texas to New York and the compressor station with nineteen others of like character is necessary to secure the flow of the gas in its interstate journey. The station was erected with the authority of the Federal Power Commission at great cost on a twenty-four acre tract of land acquired for the purpose.

The complainants are owners of nearby residences of substantial character and cost, which were erected some years prior to the erection of the 'booster' plant; and the noise and vibration proceeding therefrom have greatly disturbed them in the enjoyment of their homes. The District Judge found after an extended hearing that their complaints were justified. See Gault v. Transcontinental Gas Pipe Line Corp., D.C.Md., 102 F.Supp. 187.

The company defended on the ground that the station was necessary to the performance of an important public service and that it had been designed and constructed under the direction of experienced and efficient engineers and that it was being operated in a prudent careful manner and without unnecessary noise and vibration. Nevertheless the corporation made a careful investigation of the complaints when they first arose and at some additional expense made certain changes in the plant which reduced somewhat the annoying effects of the operation.

The witnesses for the complainants testified from their personal experience as to the noise and vibration and they were corroborated to some extent by the testimony of an engineer who had had experience in testing air craft engines and in the erection of a super-sonic wind tunnel. The corporation, on its part, undertook to estimate the annoyance by the use of sound measuring instruments and depended in great part upon the readings of the instruments to support their contention that the noise from the plant was not of the intensity described. The corporation also offered testimony tending to show that the plant was constructed in the most approved manner and that no further improvement was possible with the expenditure of any reasonable sum of money.

After careful consideration of the evidence, the judge reached the conclusion that the personal experiences of the occupants of the neighboring properties were much more weighty and persuasive than the mechanical sound measuring devices, and also that further changes and improvements in the plant to eliminate the harmful effects could be made without undue expense.

Specifically, the judge made the following ultimate findings of fact:

'8. As an ultimate fact I find that the noise and vibration emanating from the defendant's plant has substantially and materially and prejudicially affected the plaintiffs' reasonable and comfortable enjoyment of their residence properties and has also materially diminished their marketable value.

'9. I also find from the evidence that there are additional improvements and changes which can reasonably and without comparatively undue cost, be made by the defendant which, considering the expert evidence as a whole both for the plaintiffs and the defendant, can reasonably be expected to result in a material diminution of the noise and vibration nuisance experienced by the plaintiffs.'

We are in accord with these findings of fact and approve of the judgment of the court that the complainants were entitled to an injunction on certain definite conditions, to wit: (1) that the injunction be not operative until June 1, 1952 on condition that the defendant promptly and with all due diligence make further improvements and changes in the plant in order to lessen the noise, vibration and other harmful effects; and (2) that if by May 1, 1952 the defendant should conclude that it had exhausted all reasonable efforts to accomplish these results, it could report to the court and ask for a hearing to determine the fact, and if the court should then find that the harmful effects could not be materially reduced and still constitute a substantial impairment of the complainants' rights, consideration could be given to a determination of what other relief, such as pecuniary damages, should be awarded in lieu of injunction.

From this judgment the present appeal was taken.

Upon the facts found by the District Judge this judgment was in accordance with the law of Maryland which in an ordinary case permits an injunction against noise, lights and other annoyances, but is subject to the important exception that a quasi public corporation cannot be subjected to an injunction for the performance of acts necessary to the exercise of its lawful authority, even though, in the absence of such authority, an injunction would lie. In such case, however, money damages may be awarded injured parties for the damages suffered by them from the continuance of the operations of the corporation. Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A.2d 656, Meadowbrook Swimming Club v. Albert, 173 Md. 641, 197 A. 146; Northern Central R. Co. v. Oldenburg & Kelley; 122 Md. 236, 89 A. 601.

The judgment of the District Court will therefore be affirmed; but in order that the public interest may not suffer, the operative effect of the injunction will be stayed and the case remanded for further proceedings, in which at such time and place as the District Judge may prescribe, the corporation may have an opportunity to present additional testimony to show that it has taken all reasonable steps to correct the annoyances resulting from the operation of its plant; and if it is shown that such steps have been taken, the injunction will be dissolved and the court shall proceed to take testimony to determine the actionable damages, if any, suffered by the complainants under the law of Maryland and render a judgment accordingly; but if the company fails to make the showing indicated, then the injunction shall be reinstated and made effective and in addition such damages may be awarded the complainants as may be proper under the law of Maryland.

Affirmed and remanded for further proceedings.

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Transcontinental Pipeline Corp. v. Gault

Notes and Discussion

1. The remedy for a public nuisance in many cases will include an injunction to abate the activity causing the nuisance. Is such an injunction allowed by this court?

2. If a party buys property on which a public nuisance exists (such as unplugged wells or leaking pits), does the purchaser have a duty to clean up or abate the nuisance even though they had no interest in the property at the time the nuisance was created? See: Nassr v. Commonwealth, Supreme Judicial Court of Massachusetts, 477 N.E.2d 987 (May 9, 1985):

> . . . . a. The plaintiffs' duty to abate the nuisance. The trial judge found that the unlicensed hazardous waste operation on the plaintiffs' land created a public nuisance. He also found that the plaintiffs did not create this nuisance. The plaintiffs assert ownership and control as of April, 1979, of the premises which previously had been let to Mathews. We assume, therefore, that Mathews's leasehold interest terminated in April, 1979. Thus, as of April, 1979, the plaintiffs had full ownership and control of the real estate. The judge's finding that the plaintiffs did not create this serious public nuisance does not insulate the plaintiffs from the duty to abate the nuisance.
>
> It is a well-established rule that "[i]t is the duty of the owner to guard against the danger to which the public is thus exposed, and he is liable for the consequences of having neglected to do so, whether the unsafe condition was caused by himself or another." Gray v. Boston Gas Light Co., 114 Mass. 149, 153 (1873). Put more succinctly, "[O]ne who continues a nuisance is liable as well as he who establishes it." Fuller v. Andrew, 230 Mass. 139, 146 (1918). Thus, even though the plaintiffs did not create the hazardous waste dump, the fact of their ownership of the land exposes them to potential liability for the hazardous conditions on their land, at least as of April, 1979. See Restatement (Second) of Torts @366 (1965); n7 2 F. Harper & F. James, Torts @@ 27.19, 27.20 (1956). n8 See also[*776] Hunt v. Lane Bros., 294 Mass. 582, 586-587 (1936) (landowner had duty to inspect premises after work done by independent contractor "to ascertain whether any objects of peril to persons on the street" were left by the independent contractor); Franchi v. Boulger, 12 Mass. App. Ct. 376, 378 (1981) (successors in title, "although they did notcreate the nuisance, are liable for knowingly allowing it to continue"). Cf. Maynard v. Carey Constr. Co., 302 Mass. 530, 533 (1939); Abruzzese v. Arlington, 7 Mass. App. Ct. 882 (1979).

In light of this rule, what legal advice might be given to a purchaser of real estate?

3. In some states, a public nuisance will toll the statute of limitations by statue. In Fischer v. Atlantic Richfield Co., 774 F. Supp. 616 (W.D. Okla. 1989), the court stated:

> ARCO also seeks summary judgment on the basis that plaintiffs' claims are barred by the 2 year statute of limitations in 12 O.S. 95(3). Summary judgment on this ground must be denied for several reasons. . . . Third, the statute of limitations does not run against a public nuisance. 50 O.S. 7 (1981). Pollution of waters of the state constitutes a public nuisance under Oklahoma law. 82 O.S. 926.2 (1981). Therefore, to the extent that ARCO's activities

have polluted state waters, ARCO may not plead the statute of limitations as a defense. Issues of fact are present as to whether ARCO has created a public nuisance.

4. In states without specific statutes, a public nuisance may still toll the statute of limitations:

One important advantage of the action grounded on the public nuisance is that prescriptive rights, the statute of limitations, and laches do not run against the public right, even when the action is brought by a private person for particular harm. Smejkal v. Empire Lite Rock, Inc., 547 P.2d 1363 (Ore. 1976) quoting Restatement of Torts 2d, §821C.

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GOLDSMITH & POWELL ET AL. v. STATE.
Court of Civil Appeals of Texas, Dallas
159 S.W.2d 534; 1942 Tex. App. LEXIS 85
Jan. 23, 1942, Decided

OPINION: This suit was instituted by the State of Texas, through its Attorney General, Gerald C. Mann, against one hundred and fifty-five separate defendants, to enjoin them from polluting the waters of the Neches River. It is alleged that the defendants are the owners of oil wells along the watershed of the river, and are permitting salt water to flow from their respective wells into the river, thus polluting it, destroying fish and vegetation, and rendering the water unfit for domestic purposes by individuals, and by the public generally.

The cause went to trial before a jury, as to ten of the defendants only, and, on specific finding that the Neches River was polluted by salt water, or chlorides, rendering the water injurious to fish and other aquatic life, unfit for agricultural, domestic and industrial use, and that each of said defendants was permitting salt water, or chlorides, to escape into the river and its tributaries, thus contributing to its polluted condition, judgment was [**2] entered perpetually enjoining each defendant from allowing salt water and other deleterious substances to flow from his tanks, pits, reservoirs, ditches, or other receptacles on his premises, into the Neches River or any of its tributaries. Only five of the ten defendants enjoined have appealed, namely: Goldsmith & Powell, H. W. Donnell, W. H. McMurray, McMurray Corporation, and the Overton Refining Company.

The primary questions involved in this appeal are: The rights of the State to maintain the suit, and the sufficiency of the evidence to sustain the findings of the jury, that appellants are contributing to the noxious condition of the waters of Neches River and its tributaries.

The waters of all natural streams of this State and of all fish and other aquatic life contained in fresh water rivers, creeks, streams and lakes, or sloughs subject to overflow from rivers or other streams within the borders of this State, are declared to be the property of the State; and the Game, Fish and Oyster Commissioner has jurisdiction over and control of such rivers and aquatic life. Arts. 4026 and 7467 R.C.S. The ownership is in trust for the people ( Hoefs v. Short, 114 Tex. 501, 273 S.W. [**3] 785, 40 A.L.R. 833); and pollution of streams and water courses is condemned by both the civil statutes. Art. 4444 and Vernon's Annotated Penal Code Arts. 697, 698 and Art. 698a. [HN1] The Constitution of Texas, Art. 16, § 59a, Vernon's Ann. St., designates rivers and streams as natural resources, declares that such belong to the State, and expressly invests the Legislature with the preservation and conservation of such resources.

The fact that the Legislature has provided punishment, by fine and imprisonment, for pollution of water courses, Art. 4444, R.C.S., and Art. 697 et seq. P.C., does not affect the power of the State to seek injunctive remedy when the provisions of law are inadequate to effect the purposes intended; nor is a conviction on a criminal charge a prerequisite to the issuance of an injunction ( Cardwell v. Austin, Tex. Civ. App., 168 S.W. 385); nor is the district court deprived of jurisdiction to enjoin a public nuisance, where such nuisance is an injury to the property or civil rights of the public at large. 31 Tex. Jur. 450, §37.

Pollution of a public water course is a public nuisance ( State v. Patterson, 14 Tex. Civ. App. 465, 37 S.W. 478; City of Corsicana v. King, [**4] Tex. Civ. App., 3 S.W.2d 857); and while the pollution of water courses in this State is expressly condemned by statute, yet, being a public nuisance, the right to abate such nuisance is lodged in the district courts, independent of any statute; and, where several persons contribute to the creation of such nuisance, they may be joined in a common action, an action in equity for injunction, against the defendants whose separate and individual acts resulted in the same general consequence of wrong. Sun Oil Co. v. Robicheaux, Tex. Com. App., 23 S.W.2d 713; Bartholomew v. Shipe, Tex. Com. App., 251 S.W. 1031.

In this case there has been a definite showing that a high degree of saline pollution has been attained in the waters of Neches River, that all aquatic life is extinct in the river, that near and adjacent lands are unfit for agricultural pursuits, individual enterprises and animal life; and that there is a definite threat that the present condition will become worse as the production of salt water increases in the East Texas field.

It is evident that as the oil reserve in the field is depleted, the production of salt water will increase, finally resulting in 90 or 100% salt water. [**5] There [*536] are approximately 4,336 wells in the East Texas field producing salt water, and about 1,445 of these are located on the watershed of the Neches River and its tributaries.

Appellants own a large number of these wells, many producing salt water, and the water therefrom is allowed to flow into earthen pits, seep into the ground and out onto the surrounding lands, to be washed by rainfall into the Neches River and its tributaries, thus contributing to the salinity of the water of the river and its injurious effect. The evidence is not clear as to how much of the salt water from appellants' wells seeps into the river, but it is evident that the manner of storing the salt water in earthen pits and the condition of the land about the pits and wells are calculated to, and evidently did, contribute to the pollution of the river, and this will continue unless abated.

The evidence is abundant, we think, to support the jury's findings that the wells, in their total combination, are polluting the waters, and that considerable quantity of salt water from appellants' wells had, in conjunction with other salt water, aided in the pollution, and that appellants' means of taking care [**6] of the salt water in earthen pits threatens further pollution of the public water course. There is no evidence that the defendants intend to do more in caring for the salt water produced from their wells than they have been doing in the past, thus injury to the State's property is imminent and should be prevented by injunction.

There are many trial errors assigned which we have considered and, finding no reversible error, they are overruled. The judgment of the court below is affirmed.

# Chapter 6: Trespass Cause of Action

i. ‘Continuing’ Trespass Causing Damage

GRAHAM OIL CO. v. BP OIL CO.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNS.
885 F. Supp. 716; 1994 U.S. Dist. LEXIS 14279; 39 ERC (BNA) 2107
September 1, 1994, Decided

Presently before the Court is defendant's motion to dismiss a portion of Counts I and II of plaintiff's amended complaint, and all of Counts III, VI, IX, X, XI, and XII of plaintiff's amended complaint. For the reasons stated in this opinion, the Court will deny defendant's motion to dismiss a portion of Counts I and II, and deny defendant's motion to dismiss Counts III, VI, IX and X. The Court will grant defendant's motion to dismiss Counts XI and XII of plaintiff's amended complaint.

I. Background

This action arises out of a dispute between plaintiff, Graham Oil Company (Graham), and defendant, BP Oil Company (BP). On or about April 13, 1994, Graham filed an amended complaint asserting twelve causes of action relating to alleged damage to its property caused by defendant.

Graham owns the property located at Midland Avenue and Tenth Street in the Borough of Midland, Beaver County, Pennsylvania. On April 25, 1966, Graham leased this property to Boron Oil Company (Boron) for a lease term beginning June 1, 1966 and ending November 30, 1968. Boron exercised its option to extend the lease term three times. On August 1, 1983, the lease was amended by a Lease Amendment signed by Graham and BP, Boron's successor. Subsequently, BP exercised its option to extend the lease term two times. At all times during the lease, the property was used as a gasoline station and service center.

On January 27, 1992, BP had three 10,000 gallon underground storage tanks removed from the leased premises. On February 4, 1992, BP notified Graham that it was not going to renew the lease, and would allow the lease to expire on November 30, 1992.

As required by Pennsylvania law, BP submitted a "Closure Report" to the Department of Environmental Regulations (DER) when it removed the three underground storage tanks from service.

The Closure Report, dated July 28, 1992, revealed contamination to the subsurface of Graham's property in the form of benzene, toluene, ethylbenzene, xylene, chlorobenzene, 1.2 dichlorobenzene, 1.3 dichlorobenzene, 1.4 dichlorobenzene, and petroleum waste. Subsequent to July 28, 1992, Graham obtained a copy of the Closure Report. Prior to July 28, 1992, however, Graham alleges that it did not have any knowledge of any contamination of its property. Graham has alleged in its amended complaint that: by causing or allowing petroleum products, hazardous substances, and other wastes, to be released as a result of its underground storage tank operations and other activities, BP has contaminated the Leased Premises, diminished the value of the Leased Premises, caused Graham to lose the use of the Leased Premises, and disrupted Graham's contractual relationships. (Plaintiff's amended complaint at P 23).

. . . . . [text omitted]

Count XI of the amended complaint asserts a state law claim for trespass and/or continuing trespass.

BP has moved to dismiss Count XI on the basis that it was legally in possession of the leased property when it was allegedly contaminated, and there was, therefore, no unprivileged, intentional intrusion onto land in the possession of another. BP further contends that Graham cannot maintain an action for continuing trespass because the alleged contamination constitutes a permanent injury and not a continuing trespass.

Count XII of the amended complaint asserts a common law claim for indemnification. BP has moved to dismiss Count XII on the basis that such a claim is not yet ripe for adjudication. After summarizing the appropriate standard of review, the Court will address each of defendant's arguments in turn.

II. Discussion

. . . . . [text omitted]

H. Motion to dismiss Count XI: trespass

Under Pennsylvania law, a trespass is defined as an unprivileged, intentional intrusion upon land in possession of another. Kopka v. Bell Telephone Co., 371 Pa. 444, 91 A.2d 232, 235 (Pa. 1952). BP moves to dismiss Count XI on the basis that BP was a tenant-in-possession of the premises at the time of the alleged contamination and its presence was, therefore, authorized.

In order to maintain a trespass action, a plaintiff must have had the right to exclusive use and possession of the property at issue. Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. 1300, 1311 (E.D. Pa. 1987). In the present case, Graham surrendered exclusive use and possession of the property when it leased the property to BP. Graham cannot, therefore, maintain an action in trespass based upon any of BP's alleged activities during the term of the lease. It is undisputed that the contamination of the property occurred during the lease term and, therefore, Graham should not be permitted to recover in its action for trespass against BP.

BP cites to several cases supporting this contention. See Potts Run Coal Co. v. Benjamin Coal Co., 285 Pa. Super. 128, 426 A.2d 1175, 1178 (Pa. Super. 1981); Gedekoh v. Peoples Natural Gas Co., 183 Pa. Super. 511, 133 A.2d 283 (Pa. Super. 1957) (holding that no trespass occurs where a wrong is committed subsequent to a rightful entry by permission of the owner of the property).

The Court in Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93 (D. Mass. 1990), addressed a similar situation as the one involved in this case. In Wellesley, the Court granted a motion to dismiss a trespass claim filed by a former gasoline service station owner who allegedly caused the release of oil and hazardous substances on the plaintiff's property while in possession of the site. Wellesley, 747 F. Supp. at 99.

Graham contends that it had constructive possession during the lease in that it had an ownership interest in its property and, therefore, it may bring an action in trespass against BP. The only case cited by Graham in support of this contention is Taylor v. Kaufhold, 368 Pa. 538, 84 A.2d 347 (Pa. 1951).

The Court in Taylor held that a dispossessed landlord could bring an action in trespass against a tenant only when he or she is a holdover tenant. Id. at 351. The Court reasoned that, in a case involving a holdover tenant, the tenant is actually committing a trespass because he or she is no longer authorized to be on the premises. Id. at 350-51. In contrast, when BP allegedly contaminated the leased property, it was lawfully authorized to be in possession of the premises.

In addition to asserting a trespass claim based upon the act of contamination, Graham has also alleged that BP's actions constitute a continuing trespass on the property. In its amended complaint, Graham alleges that "by causing or allowing releases of hazardous substances and other pollutants to contaminate the Leased Premises, BP interfered with, and continues [*27] to interfere with, Graham's possessory interest in the land." (Amended complaint at P 74) (emphasis added). BP moves to dismiss Count XI of the amended complaint on the basis that the alleged contamination of the property constitutes a permanent injury rather than a continuing trespass.

Pennsylvania courts have adopted the sections of the Restatement (Second) of Torts that deal with continuing trespass and permanent injury. Mancia v. Department of Transportation, 102 Pa. Commw. 279, 517 A.2d 1381, 1384 (Pa. Commw. 1986); County of Allegheny v. Merrit Construction Co., Inc., 309 Pa. Super. 1, 454 A.2d 1051 (Pa. Super. 1982). The Restatement (Second) of Torts defines acontinuing trespass as follows:

> Continuing trespass. The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously erected or placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and . . . confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as aggravation of the original trespass. Restatement (Second) of Torts @ 161, comment (b).

The Restatement (Second) of Torts also distinguishes a continuing trespass from a permanent injury as follows:

> Effect of a permanent change in the condition of the land. A continuing trespass must be distinguished from a trespass which permanently changes the physical condition of the land. Thus, if one, without a privilege to do so, enters land of which another is in possession and destroys or removes a structure standing upon the land, or digs a well or makes some other excavation, or removes earth or some other substance from the land, the fact that the harm thus occasioned on the land is a continuing harm does not subject the actor to liability for a continuing trespass. Since his conduct has once for all produced a permanent injury to the land, the possessor's right is to full redress in a single action for the trespass, and a subsequent transferee of the land, as such, acquires no cause of action for the alteration of the condition of the land. Restatement (Second) of Torts @ 162, comment (e).

The Pennsylvania Supreme Court clarified the distinction between a continuing trespass and a permanent injury in Sustrik v. Jones and Laughlin Steel Corp., 413 Pa. 324, 197 A.2d 44 (Pa. 1964). "[A] continuing trespass must be distinguished from a trespass that effects a permanent change in the condition of the land. [A permanent trespass], while resulting in a continuing harm, does not subject the actor to liability for a continuing trespass." Id. at 46.

The United States District Court for the Eastern District of Pennsylvania addressed this same issue in Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 996 (E.D. Pa. 1992).

Similar to this case, Tri-County was a case involving environmental contamination. The waste in Tri-County included resin-containing drums, parts, buckets and barrels of liquid, semisolid waste, resin blocks and gaskets. Id. at 987. The district court concluded that the defendant's depositing of drums and associated waste on the property did not constitute a continuing trespass because the depositing of waste was a completed [*30] act at the time that the property was conveyed. Id. at 996.

Applying this analysis to the present case, BP's depositing of hazardous substances on Graham's property does not constitute a continuing trespass because the contamination was a completed act at the time that Graham took possession of the property. The act of contamination was "completed" on January 27, 1992, when BP had three 10,000 gallon underground storage tanks removed from the leased premises. Because BP's lease did not expire until November 30, 1992, the act of contamination had been completed approximately ten months prior to Graham's repossession of the property.

Although Graham alleges in P 29 of its amended complaint that BP is "continuing to release petroleum and other hazardous substances on the Leased Premises," this is a legal conclusion which need not be accepted on a motion to dismiss. Kost, 1 F.3d at 183. Graham's amended complaint does not contain any factual allegations that BP caused the release of hazardous substances at any time after January 27, 1992. In order to maintain a claim for continuing trespass, a plaintiff must plead that the defendant [*31] committed and continues to commit harm-causing actions, not merely that the harm continues to result from actions which have ceased. See Hatco Corp. v. W. R. Grace & Co., 801 F. Supp. 1309, 1324 (D.N.J. 1992); PBN Associates v. Xerox Corp., 141 A.D.2d 807, 529 N.Y.S.2d 877 (N.Y. App. Div. 1988), order modified on reargument on other grounds, 575 N.Y.S.2d 451 (N.Y. App. Div. 1991).

Drawing all reasonable inferences from the facts alleged in Graham's amended complaint, the Court concludes that the contamination was a completed act at the time the underground storage tanks were removed and that the contamination is, therefore, a permanent injury rather than a continuing trespass.

Because the Court finds that the contamination constitutes a permanent injury rather than a continuing trespass, Graham's only right to redress in trespass is in "a single action for the [original] trespass." Restatement (Second) of Torts @ 162, comment (e).

The alleged contamination occurred while BP was in possession of the property and, therefore, any acts committed on the property by BP during the [*32] term of its lease occurred while it was

in lawful possession of the premises. Accordingly, because Graham may not maintain an action for the original trespass, the Court will grant BP's motion to dismiss Count XI of the amended complaint.

. . . . . .

IT IS HEREBY ORDERED that said Motion is GRANTED in part and DENIED in part, to wit:

1. Said Motion is GRANTED as to Counts XI and XII of plaintiff's amended complaint; and

2. Said Motion is DENIED in all other respects.

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Graham Oil Co. v. BP Oil Co.

Notes and Discussion

1. Graham claimed that BP's actions constituted a "continuing trespass" to the property. How did the court handle this issue?

2. Trespass is an interference with the right to possession of property. Why was BP not liable as a trespasser in the instant case? Could lease provisions be inserted to address this problem? Would similar issues face the lessor and lessee under an oil and gas lease?

3. Note that the court states that trespass is an "intentional" intrusion upon land in possession of another. Does this create problems for the landowner seeking redress for environmental damages using this theory?

ii. Tangible vs. Intangible Invasions

MOCK v. POTLATCH CORP.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO
786 F. Supp. 1545; 1992 U.S. Dist. LEXIS 3302
March 10, 1992, Decided
March 10, 1992, Filed

OPINION: ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

I. FACTS AND PROCEDURE

The plaintiffs, John M. Mock and Marjorie Mock, filed this action in the District Court of the State of Idaho, in and for the County of Nez Perce, on February 8, 1991. The defendant, Potlatch Corporation ("Potlatch"), filed a Notice of Removal to this court on March 11, 1992, and filed an Answer on March 18, 1991. The court has original jurisdiction over this action based on 28 U.S.C. @ 1332.

On September 30, 1991, the defendant filed a Motion for Partial Summary Judgment. The plaintiffs filed a response to this motion on October 11, 1991. The defendant then filed a reply memorandum on October 24, 1991. In addition, the court heard oral argument on this motion on March 5, 1992. Therefore, the defendant's Motion for Partial Summary Judgment is now ripe for decision.

Based on the record now before the court, the facts of this case are as follows. The plaintiffs reside on real property approximately 1800 feet directly north and across the Clearwater River from the Potlatch plant in Lewiston, Idaho. They have made their home on this property since 1971.

This dispute first began when Potlatch installed a new steam-driven turbine electrical generator in late 1990 and early 1991. Potlatch maintains that because of the high speed of the turbine and its mechanical design, a particle of any size would cause substantial damage to the turbine blades. Consequently, the connection pipes which conduct steam to the turbine had to be cleaned by forcing high pressure steam through the pipes. This cleaning process was performed periodically in late 1990 and early 1991.

The cleaning process produced sound levels in excess of that allowed by a Lewiston ordinance. Therefore, Potlatch applied for and received a variance from the city effective from November 12, 1990, and extending to February 15, 1991. The plaintiffs complain that the noise level increased dramatically at the plant, to the point that they were being subjected to noise in excess of 100 decibels at times. The plaintiffs further allege that the increased noise levels still occur periodically, and that not all of the increased noise comes from the cleaning of the turbine pipes.

The plaintiffs brought suit based on two causes of action--private nuisance and trespass. The complaint alleges that the plaintiffs have suffered general damages, including depreciation or

diminution in the rental value or use of their property, and special damages in the form of personal discomfort, inconvenience, annoyance, injury to health, mental distress and mental anguish, and have incurred significant legal fees and costs in pursuing the present action against Potlatch. The plaintiffs seek to recover these damages, and they also seek a permanent injunction preventing Potlatch from creating noise levels in excess of 60 decibels as measured from the property of the plaintiffs.

II. ANALYSIS

A. The Summary Judgment Standard

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S.C.S. Court Rules, Rule 56(c), Federal Rules of Civil Procedure (Law. Co-op 1987).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the nonmoving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the non-moving party fails to make such a showing on any essential element of his case, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n1 See also Rule 56(e), which provides in part:
When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. U.S.C.S. Court Rules, Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1991).
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [**5]

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be both "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (quoting First Nat'l Bank v. Cities Serv. Co., Inc., 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)). The Ninth Circuit cases are in accord. See e.g., British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party: (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be

resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible. Id. at 374 (citation omitted).

B. Pending Motion for Partial Summary Judgment

In the motion now before the court, Potlatch seeks summary judgment on the plaintiffs' trespass claim. Potlatch argues that because plaintiffs' trespass claim is based upon noise alone, with no claim of actual or physical trespass, then Potlatch is entitled to judgment as a matter of law. Potlatch maintains that an action for trespass cannot be based upon an intangible invasion such as noise, smoke, or light. Potlatch insists that such complaints must be based upon a private nuisance theory.

The Idaho laws governing trespass were amended and augmented in 1976. See Idaho Code @@ 6-202 and 6-202A. Section 6-202 reads as follows:

> 6-202. Actions for Trespass. -- Any person who, without permission of the owner, or the owner's agent, enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property; or who cuts down or carries off any wood or underwood, tree or timber, or girdles, or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of or in any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor or fifty dollars ($ 50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails. Idaho Code @ 6-202 (1990).

Idaho Code @ 6-202A states that, "as used in section 6-202, Idaho Code, 'enters' and 'entry' mean going upon or over real property, either in person or by causing any object, substance or force to go upon or over real property." Idaho Code @ 6-202A (1990). The plaintiffs argue that these statutes override any and all common law with respect to trespass actions in Idaho, but they offer no authority for this assertion. In fact, this argument is contrary to the existing case law in Idaho.

For example, in Menasha Woodenware Co. v. Spokane Int'l. Ry., 19 Idaho 586, 115 P. 22 (1911), the Idaho Supreme Court held that the statute (now 6-202) does not apply when the trespass is not committed wilfully and intentionally. In ruling on the merits of that case, the Idaho Supreme Court declared: In our construction of the statute the complaint does not state facts sufficient to entitle it to treble damages. . . . "It contains no averment that the trespass was wilful, but (as in the case at bar) only that the entry and cutting was wrongful and without plaintiff's leave. The statute has no application to such a case, and though (the complaint is) good as an action at common law, entitling the plaintiff to recover his actual damages, the complaint does not state a case in which the damages can be trebled." Id. at 594 (citation omitted). See also Earl v. Fordice, 84 Idaho 542, 374 P.2d 713 (1962) (for a plaintiff to be entitled to recover statutory treble damages, instead of merely his actual damages, it is necessary to establish that the trespass was wilfully and intentionally committed).

Therefore, the Idaho statutes governing trespass only apply when the trespass is shown to have been wilful and intentional, and the wronged party seeks treble damages therefor, as authorized by Section 6-202. In all other circumstances, the common law principles relating to trespass actions apply. The court is unaware of any recent Idaho cases to the contrary, and the 1976 amendments to the statutes did nothing to alter this interpretation established in the cases cited above.

The Idaho Supreme Court has not addressed the question of whether intangible entries onto another's land in the form of noise, smoke, light or odor can give rise to an action for trespass. Therefore, the court must look to traditional common law principles and the cases decided in other jurisdictions.

The traditional common law requirements for recovery for trespass to land include (1) an invasion (2) which interferes with the right of exclusive possession of the land, and (3) which is a direct result of some act committed by the defendant. n2 Historically, an invasion must constitute an interference with possession in order to be actionable as a trespass. This requirement still persists today, and forms the basis of the distinction between the tort of trespass and the tort of private nuisance. n3 The tort of trespass applies to wrongful interference with the right of exclusive possession of real property, while the tort of private nuisance applies to wrongful interference with the use and enjoyment of real property.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n2 W. Page Keeton, et al., Prosser and Keeton on The Law of Torts @ 13, at 67 (5th ed. 1984).
n3 Id. at 70.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Generally, an interference with the exclusive right of possession involves an entry onto the land. An entry may take the form of the defendant personally intruding on the land, causing another to intrude upon the land, or causing some tangible thing to intrude upon the land. See Restatement (Second) of Torts @ 158(a) (1965). Thus, the discussion returns to the primary issue at hand--whether the noise created at the Potlatch plant in Lewiston and heard on the nearby property of the plaintiffs constitutes a wrongful "entry."

The court must consider whether the noise constitutes an entry as defined under Idaho Code @ 6-202A, and/or whether it constitutes an entry as it is generally defined at common law. "Entry" as defined in Section 6-202A means "going upon or over real property, either in person or by causing any object, substance or force to go upon or over real property." Idaho Code @ 6-202 (1990) (emphasis added).

The plaintiffs argue that the noise created by Potlatch constitutes a "force" entering upon the land. The plaintiffs offer no authority for their position. "Force" is not defined in the statute, and there are no Idaho cases interpreting the meaning of "force." Therefore, the court feels compelled to look elsewhere to determine if there is any support for the proposition that noise can constitute an "entry."

The court finds the following passage from Prosser and Keeton on The Law of Torts to be particularly instructive:

> While it is generally assumed and held that a personal entry is unnecessary for a trespass, the defendant's act must result in an invasion of tangible matter. Otherwise, there would be no use or interference with possession. Thus, it is not a trespass to project light, noise, or vibrations across or onto the land of another. These acts may give rise to liability because of a private nuisance resulting from intentional interference with the use and enjoyment of property, or because of harm attributable to negligence, or because of liability for harm caused by an abnormally dangerous activity. It is, however, reasonably clear that the mere intentional introduction onto the land of another of smoke, gas, noise, and the like, without reference to the amount thereof or other factors that are considered in connection with a private nuisance, is not actionable as a trespass. Id. @ 13, at 71 (5th ed. 1984) (emphasis added) (footnotes omitted).

Potlatch has cited Maddy v. Vulcan Materials Co., 737 F.Supp. 1528 (D.Kan. 1990). In this case, Vulcan Materials Co. was sued by a neighboring property owner for personal injuries, emotional distress, trespass, nuisance, and absolute liability based upon alleged emission and migration of airborne gases. The court held that the neighboring property owner could not recover for trespass in the absence of actual and substantial damage implicating the right to exclusive possession of the property. Id. at
1541.

Maddy provides an excellent discussion of the central issue involved in the instant Motion for Partial Summary Judgment. The court first cited the traditional rule relating to trespass which states that a defendant's actions must cause an invasion of the plaintiff's property by some tangible matter. Id. At 1539. The court then went on to note that smoke, gas, and noise are not generally actionable as a trespass because there is no actual physical invasion by some tangible matter. Id. The court then noted a recent trend in the law relating to trespass.

> However, a modern trend has emerged under which airborne pollution may constitute a trespass, where the plaintiff can demonstrate physical damage to his property. . . . The modern trend departs from the traditional rule by finding that intangible invasions of the plaintiff's property may constitute a trespass. However, the modern trend also departs from traditional trespass rules by refusing to infer damage as a matter of law, thereby eliminating the right to nominal damages. The plaintiff claiming trespass must prove that the intangible invasion resulted in substantial damages to the plaintiff's land. Id. (citations omitted) (emphasis added).

The court then cited Borland v. Sanders Lead Co., 369 So.2d 523 (Ala. 1979), as a leading case in this area. In Borland, the alleged trespass was based on the intrusion of lead particulates and sulfoxide gases onto the plaintiff's property. The trial court in Borland dismissed the case under the traditional rules of trespass. The Alabama Supreme Court reversed based on the following analysis.

> Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance. In order to recover in trespass for this type of invasion [i.e., the asphalt piled in such a way as to run onto plaintiff's property, or the pollution emitting from a defendant's smoke stack, such as in the present case], a plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3)

reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the res. Maddy v. Vulcan Materials Co., 737 F.Supp. at 1540 (quoting Borland v. Sanders Lead Co., 369 So.2d at 529) (brackets in original).

The court in Maddy also noted that the Washington Supreme Court reached that same conclusion in Bradley v. American Smelting & Refining Co., 104 Wash.2d 677, 709 P.2d 782 (1985), a case which also involved intangible airborne particles: While at common law any trespass entitled a land owner to recover nominal or punitive damages for the invasion of his property, such a rule is not appropriate under the circumstances before us. No useful purpose would be served by sanctioning actions in trespass by every land owner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and a litigious few would cause the escalation of costs to the detriment of the many. The plaintiff who cannot show that actual and substantial damages have been suffered should be subject to dismissal of his cause upon a motion for summary judgment. Maddy v. Vulcan Materials Co., 737 F.Supp. at 1540 (quoting Bradley v. American Smelting & Refining Co. 709 P.2d at 791.

The Washington Supreme Court rejected the distinction between trespass and nuisance based on whether an invasion to land is tangible or intangible, or direct or indirect. Yet the court did retain the distinction based on the nature of the interest infringed upon by the invasion. "If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment to property, the law of nuisance applies." Id. at 790.

The decision of the Washington Supreme Court was later applied in Bradley v. American Smelting & Refining Co., 635 F. Supp. 1154 (W.D.Wash. 1986), a subsequent proceeding involving the same case.

In this later proceeding, the United States District Court for the Western District of Washington addressed the question of whether an alleged decrease in value of the plaintiff's property is sufficient to satisfy the requirement that the plaintiff's property must suffer actual and substantial damage. The court held that such an allegation alone is not sufficient.

Plaintiffs assert that the value of their property has diminished as a result of the arsenic and cadmium in the soil. This assertion carries no weight because the record contains no evidence of any such diminishment. Moreover, this sort of evidence can serve only to quantify the magnitude of injury otherwise proven.

As the undisputed evidence indicates that any arsenic or cadmium in plaintiffs' soil has not damaged plaintiffs' property, the court concludes that plaintiffs are unable to establish a necessary element of their trespass claim and that, therefore, defendant's motion for summary judgment should be granted as to plaintiffs' trespass claim. Id. at 1157.

III. CONCLUSION

The modern trend relating to actions in trespass can be summarized as follows. If there is a direct and tangible invasion of another's property, there is an infringement of the right of exclusive possession, and the law will presume damages. On the other hand, if the invasion is indirect and intangible (such as noise, odors, light, smoke, etc.), the proper remedy lies in an action for

nuisance, based on interference with the right of use and enjoyment of the land. However, if the intangible invasion causes substantial damage to the plaintiff's property, this damage will be considered to be an infringement on the plaintiff's right to exclusive possession, and an action for trespass may be brought.

Based on the preceding discussion, the court finds that the defendant's Motion for Partial Summary Judgment should be granted. Clearly, the plaintiffs in the case at hand cannot maintain an action for trespass under the traditional rule regarding intangible invasions. In addition, in order to take advantage of the modern trend, the plaintiffs must show that the noise emitted from the Potlatch plant inflicted actual substantial damage on their property.

The plaintiffs have not shown actual damage to their property caused by the noise. The plaintiffs have merely alleged that the value of their property has been diminished because of the noise. This court agrees with Bradley v. American Smelting & Refining Co., 635 F. Supp. 1154 (W.D.Wash. 1986), that the mere allegation of diminished property value is not sufficient to meet the requirement of showing actual and substantial damage to the property itself. Therefore, the plaintiffs, as the non-moving party, have failed to make a showing sufficient to establish the existence of an element which is essential to their case and upon which they would bear the burden of proof at trial. Under the circumstances, the plaintiffs' remedy, if any, must come under the auspices of the tort of private nuisance.

IV. ORDER

Based on the foregoing, and the court being fully advised in the premises, IT IS HEREBY ORDERED that the defendant's Motion for Partial Summary Judgment, filed September 30, 1991, should be, and ishereby, GRANTED.

DATED this 10 day of March, 1992.

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Mock v. Potlatch Corp.
Notes and Discussion

1. How does the court distinguish between a nuisance cause of action and a trespass cause of action? In Schwartzmand v. Atchison, Topeka & Santa Fe RR Co., 857 F. Supp. 838; 1994 U.S. Dist. LEXIS 9530; 25 ELR 20073 (N.Mex. 1994), the court noted:

> Count II of Plaintiff's complaint alleges trespass. Trespass is defined as a direct infringement of another's right of possession. Pacheco v. Martinez, 97 N.M. 37, 41, 636 P.2d 308 (Ct. App. 1981). See also Restatement (Second) of Torts @ 158 ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm. . . , if he intentionally (a) enters land [of another or] causes a thing or third person to do so . . . ."). A trespass may be committed on or beneath the surface of the earth. Restatement (Second) of Torts @ 159 (1977).
>
> Count III avers maintenance of a private nuisance. A private nuisance is defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts @ 821D (1977). Defendant asserts that these claims

should be dismissed because no genuine issue of material fact exists to support Plaintiff's contention that contamination has migrated on Plaintiff's property.

The theoretical differences between trespass and nuisance are important in this case. A claim of trespass contemplates actual physical entry or invasion, whereas nuisance liability arises merely by virtue of activity which falls short of tangible, concrete invasion, so as not to interfere with possession, but nevertheless interferes with the use and enjoyment of the land. Id. at cmt. d (distinguishing trespass and nuisance; "[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. A nuisance is an interference with the . . . private use and enjoyment of the land, and does not require interference with possession."). In Padilla v. Lawrence, 101 N.M. 556, 685 P.2d 964 (Ct. App. 1984), the New Mexico Court of Appeals explained this "traditionally accepted distinction between nuisance and trespass." Id. at 562. The Court wrote:

A trespass is a direct infringement of another's right of possession. Where there is no physical invasion of property, as with intangible intrusions [**18] such as noise and odor, the cause of action is for nuisance rather than for trespass. . . . The entrance onto property of blowing particulate matter also is not actionable as trespass in the absence of a finding that the matter settled upon and damaged plaintiffs' property. Id. at 563 (citations omitted) (emphasis added). The italicized language demonstrates that for the groundwater contamination to be actionable under trespass, the contamination must have reached Plaintiff's property and damaged it.

2. What are the common law elements required to establish a trespass according to the court?

3. Can noise, smoke, or gas constitute a trespass under the modern court interpretations of this tort? If so, what must be shown by the plaintiff?

4. In Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) the surface owner’s cattle were poisoned due to fluoride contamination from an aluminum refinery. Fluoride particles are invisible to the naked eye, and without laboratory testing a landowner is unable to tell if the surface is contaminated. Using s traditional trespass analysis the court found that a physical invasion had occurred by microscopic particles unseen by the naked eye, hence the surface owner could pursue a trespass claim and request damages for the livestock loss.

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MONA ELAINE SATTERFIELD, et al. VERSUS J.M. HUBER CORPORATION
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION
888 F. Supp. 1567; 1995 U.S. Dist. LEXIS 12240
May 11, 1995, Decided
May 11, 1995, FILED; May 12, 1995, ENTERED

ORDER. The captioned case is before the court on defendant's motion for summary judgment. Plaintiffs have responded in opposition to defendant's motion. The court considers the motion below.

Factual Background

Defendant Huber operates an oriented strand board ("OSB") plant in Commerce, Georgia. From 1982 through October, 1994, plaintiffs resided in a home located at 220 Rob Belue Road, Commerce, Georgia. Further, plaintiff Elaine Satterfield owns sole title to the residence located at 220 Rob Belue Road and to approximately seventy (70) acres of land on which her residence is located. Defendant's plant and plaintiffs' residence are located approximately 4,800 feet (over 9/10 of a mile) apart.

In this action, plaintiffs originally alleged two citizen claims under the federal Clean Air Act along [**2] with common law claims of trespass, nuisance, negligence and negligence per se. Plaintiffs Clean Air Act claims were dismissed by this court's order of August 23, 1994. In their remaining common law claims, plaintiffs allege that defendant's plant has caused them personal injuries, damaged plaintiff Elaine Satterfield's real property and damaged their personal property. Plaintiffs seek compensatory damages, punitive damages and attorneys' fees.

Now, defendant has moved this court for a grant of summary judgment on plaintiffs' remaining claims. Defendant's primary argument is that plaintiffs have not shown sufficient causation as to their tort claims on behalf of defendant so as to meet their burden on summary judgment. Defendant also argues that plaintiffs' trespass and nuisance claims fail as a matter of law based on evidentiary shortcomings. Finally, defendant argues that plaintiffs' negligence and negligence per se claims fail on statute of limitations and evidentiary grounds. In response, plaintiff has argued that it has met its burden and that numerous issues of material fact remain in dispute. Therefore, plaintiffs argue, defendant's motion should be denied. The court considers [**3] defendant's motion below. . . .

LEGAL ANALYSIS

Defendant has moved the court for a grant of summary judgment on all of plaintiffs' remaining claims. Plaintiffs have now responded in opposition to the motion. . . . Plaintiffs' Trespass Claims Defendant has moved the court for a grant of summary judgment as to plaintiffs' claims of trespass.

Defendant argues that allegations of indirect invasions of property alone should not be actionable in trespass as a [*1572] matter of law. n1 Further, in jurisdictions that have allowed such actions, defendants argue that in order to prevail, a plaintiff must show actual and substantial damage. In

response, plaintiffs appear to argue that there has been a direct invasion in this case and that there has been actual and substantial damage to plaintiffs' property. After careful consideration and review of the record, the court agrees with defendant. [**12]

n1 Defendant points out to the court that no Georgia court has directly addressed whether or not an action for trespass can be maintained solely for indirect invasions such as dust, odor or noise. In their response, plaintiffs have not rebutted this argument, nor have they pointed the court to authority holding otherwise.

Even in jurisdictions where indirect invasions such as dust, smoke and noise have been held actionable in trespass, the plaintiff must prove actual and substantial physical damage to their property. See, e.g., Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1539 (D. Kan. 1990); Borland v. Sanders Lead Co., 369 So. 2d 523, 529 (Ala. 1979) (distinguishing between trespass and nuisance by requiring substantial damages in trespass actions).

In this action, plaintiffs have first failed to introduce any form of expert testimony or scientific evidence that any invasions on their property originate with defendant's plant. Beyond this failure, plaintiff's have failed to introduce credible [**13] testimony as to any damages suffered to their personal and real property. As discussed above, no expert testimony has been offered to support the sheer speculation of lay witnesses that defendant's plant is causing damage to plaintiffs' property.

Although plaintiff Elaine Satterfield alleges that her real property was damaged because she has been unable to sell it, this argument fails as a matter of law with respect to her trespass claim.

Diminished property value without evidence of physical harm is not considered "actual or substantial damage" for trespass claims predicated on indirect invasions. See, e.g., Mock v. Potlatch Corp., 786 F. Supp. 1545, 1551 (D. Idaho 1992) (noise claim; holding that mere allegation of diminished property value not sufficient to show actual and substantial damage); Bradley v. American Smelting and Refining Co., 635 F. Supp. 1154, 1155 (W.D. Wash. 1986) (airborne pollutants; holding that mere assertion of diminished value carried no weight where there was no evidence of physical damage). Therefore, defendant's motion for summary judgment as to plaintiffs' trespass claims is hereby GRANTED. . . .

Conclusion

In the above analysis, the court finds that there are no genuine issues as to the material facts of this case. Therefore, the court hereby GRANTS defendant's motion for summary judgment in its entirety. IT IS SO ORDERED this 11th day of May, 1995.

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Notes and Discussion

1. Note the discussion of direct versus indirect invasions, and the trend of some courts to allow recovery for indirect invasions. What is required to be shown to assert an indirect invasion? Is a decline in market value evidence enough for such a claim?

iii. “Intentional” Nature of Tort

HALL v. AMOCO
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION
617 F. Supp. 111
September 6, 1984

Before the Court is plaintiffs' motion for leave to amend their complaint. Plaintiffs seek to include in their complaint a cause of action based on ultra-hazardous activity, nuisance, trespass; and a claim for punitive damages.

Plaintiffs, Juanita Hall and Jerry Hall, sue defendant Amoco Oil Company, a Maryland corporation, for personal injury and property damage as a result of an explosion which occurred on or about November 5, 1982, at an Amoco refinery in Texas City. Jurisdiction is based on diversity of citizenship, and therefore, Texas tort law will apply.

In order to consider plaintiffs' motion to amend their complaint, the Court must determine whether plaintiffs' allegations support a cause of action based on trespass, nuisance, ultrahazardous activity, or gross negligence for the purpose of claiming punitive damages.

I. TRESPASS

Plaintiffs alleged that a cause of action for trespass exists by means of the concussion and gases that entered their home. This Court finds no basis for such claim. In explosion and blasting cases, with regard to all other damages except those caused by actual physical trespass, the Courts of Texas are committed to the rule that liability must be predicated upon negligence. Hood v. Laning 415 S.W.2d 953 (Tex. Civ. App. -- San Antonio 1967), no writ, citing Turner v. Big Lake Oil Co., 128 Tex. 155 96 S.W.2d 221 (1936); Klostermann v. Houston Geophysical Co., Tex.Civ.App. 315 S.W.2d 664, (1958) writ ref'd; Stanolind Oil & Gas Co. v. Lambert, Tex.Civ.App., 222 S.W.2d 125, (1949), no writ.

. . . . . [text omitted]

DONE at Galveston, Texas, this the 6th day of September, 1984.

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Notes and Discussion

1. Trespass is an intentional tort. How would this fact assist the defendants in the instant case?

2. In General Telephone Company Of the Southwest, v. Bi-Co Pavers, Inc., Court of Civil Appeals of Texas, Fifth District, Dallas, 514 S.W.2d 168 (1974), a telephone company filed suit against a paving contractor for severing a telephone cable buried in conduit under a public street, claiming trespass and negligence:

> Plaintiff insists that a trespass is established because operation of the "pulvamixer" was an intentional act which resulted in violation of plaintiff's property right. Even though defendant intended to operate the machine, its operation as intended would not necessarily have violated plaintiff's right. A trespass is usually regarded as an intentional tort in the sense that it involves an intent to commit an act which violates a property right, or would be practically certain to have that effect, although the actor may not know that the act he intends to commit is such a violation. [cites omitted]
>
> If the act intended would necessarily violate a property right, whether or not the actor knows it to be a violation, he is nevertheless liable, and that liability may extend to unintended consequences. [cites omitted] However, unless the intended act would violate a property right, the actor's liability for unintended consequences ordinarily depends upon proof of negligence. [cites omitted] Otherwise, the defense of contributory negligence could be avoided in any case of an intentional act with unintended consequences by treating the act as an intentional tort.
>
> Since the present case contains no finding and no evidence that defendant's employee intended to operate the "pulvamixer" at the depth where he severed the cable, it is not like the case of the innocent trespasser who intends to make excavations on certain land in the mistaken belief that he has a right to do so, and is liable without proof of negligence. [cites omitted] It is more like the case of a motorist who intends to keep on the road and inadvertently runs over adjacent land. In such a case, liability depends on proof of negligence. [cites omitted] Consequently we hold that no trespass, in the sense of an intentional tort is established.

3. In Malouf v. Dallas Athletic Country Club, 837 S.W.2d 674, (1992 Tex. App.) 691, homeowners across for hole number six sued for damages from golf ball striking their property. The court noted:

> A trespass is usually regarded as an intentional tort in the sense that it involves an intent to commit an act which violates a property right, or would be practically certain to have that effect, although the actor may not know that the act he intends to commit is such a violation. [cites omitted] Unless the intended act would violate a property right, the actor's liability for unintended consequences ordinarily depends upon proof of negligence. . . . .
>
> [T]he record reflects neither legal nor factual evidence that either DAC or the individual golfers intended to commit an act which violated a property right. Id. During a game of golf, on the Gold course, the individual golfers intend to hit golf balls toward hole number six. This does not violate a property right. The fact that the ball may "slice" or "hook" onto appellants' properties is an unintended consequence. Appellants had the burden of proof at trial and on appeal of showing that the evidence conclusively established the elements of trespass. Because appellants failed to demonstrate that DAC or the individual golfers intentionally caused the golf balls to damage appellants' personal property, we cannot say that the trial court's conclusion of law that the DAC did not trespass is erroneous.

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i. Measure of Permanent, Temporary & Nuisance Damages

THOMPSON v. ANDOVER OIL CO.
Court of Appeals of Oklahoma, Division Two
691 P.2d 77; 83 Oil & Gas Rep. 141
October 30, 1984

The Thompsons, as surface owners, brought this action against Andover Oil Company, an oil and gas lessee, for the recovery of surface damages resulting from oil and gas operations. Andover and its subsidiary Honeymon Drilling, appeal from a jury verdict and award of attorney's fees in this action based on nuisance. Having reviewed the record and applicable law, we affirm in part and modify in part.

Andover held a number of oil and gas leases for the land on which the Thompsons owned the surface. In August 1981, in order to preserve its leases, Andover approached Thompson about drilling on his farm. At that time Andover stressed that it needed to begin work immediately, and it began preparations for drilling the day after its agent spoke to Thompson. An area of approximately six acres was utilized in preparation for drilling. This preparation included construction of a road, pad, and pit site.

On the day prior to the actual spudding of the well, Andover abandoned this location in favor of a site on the opposite side of the farm. At the time it began preparations of the initial site Andover did not have access to certain geological data which later became available. When this information was released it moved operations to a site where the possibility of successful drilling was greater. As a reasonable prudent operator Andover was required to drill in an area where recovery of oil and gas was more likely to occur.

Andover cited the immediate availability of a drilling rig as the reason for its haste in preparing the first site and then abandoning it hurriedly and moving to another location. The location of the initial site was not used for any purpose toward Andover's oil and gas operations, and was substantially restored to its former condition the next summer.

The preparation of the second well site was similar to the first. Andover utilized an area of a little more than eight acres in the construction of a road, a reserve pit, and a pad. However, this second site was on sloping terrain and construction of the pad necessitated moving a large quantity of earth in order to create a level area. Andover restored the area surrounding the site and at the time of trial was using a total of 2.2 acres for the life of the well.

Prior to its restoration efforts, Andover consulted with the Soil Conservation Service and followed its recommendations. Andover also had discussions with Thompson concerning the restoration efforts at both sites. At the abandoned site, Andover removed most of the gravel used for the pad and road but was unable to remove all of the substance. In grading the abandoned location, the

grade was changed slightly so that water occasionally stands in this particular area, thus making it unsuitable for certain crops, such as alfalfa.

After restoration attempts were completed the Thompsons brought suit against Andover and Honeymon for permanent and temporary injury to their land and the maintenance of a nuisance as a result of drilling operations. The Thompsons alleged that Andover had abused their rights by using more of their property than was reasonably necessary. They further alleged that Andover failed to restore the property to its original condition. The Thompsons asked for actual damages and punitive damages, contending that Andover's actions were willful and done in wanton disregard of their property rights.

At trial the jury heard conflicting evidence concerning the extent of the damage to the Thompsons' farm. The Thompsons' evidence of damage included the gravel which remained on the land, erosion, burial of drilling muds, and irregular grading. Although Thompson could place no monetary value on his nuisance claims, he also asserted that damage had occurred due to annoyance and inconvenience of drilling operations. This included the fact that he was sometimes required to remove his cattle from certain fields.

After viewing the property, the jury awarded the Thompsons $50,000 in actual damages, but awarded no punitive damages. At the hearing on attorney's fees, the Thompsons were awarded $15,750. Andover had appealed both the jury verdict and the attorney's fee award.

As its propositions of error, Andover argues that (1) the award is not supported by competent evidence, (2) the court erred in refusing to admit certain oil and gas leases into evidence, (3) the court erred in instructing the jury on punitive damages, and (4) the award of attorney's fees is not supported by the evidence.

I

In cases involving alleged damages to the surface, the legal principle which this court must use as a starting point for the determination of the appropriate remedy is that an oil and gas lease creates and vests certain rights and responsibilities. In Oklahoma, the surface estate is servient to the dominant mineral estate for the purposes of the oil and gas lease. Wellsville Oil Co. v. Carver, 206 Okla. 181, 183, 242 P.2d 151, 154 (1952). An ordinary or conventional oil and gas lease carries with it the incidental or implied right to enter, possess, and use the surface to the extent and in such a manner as is reasonably necessary to enable the lessee to perform all the legitimate obligations imposed upon him by the lease, and to effectuate the purpose of the lease. As stated in Wilcox Oil Co. v. Lawson, 341 P.2d 591, 594 (Okla. 1959) (emphasis added):

[*82] The holder of a valid oil and gas lease has the right and privilege to go on the land and do all those things necessary and incidental to the drilling of wells, including the right to the use of the surface, and in the absence of a provision that lessee would be liable for growing crops, the only basis for recovery of damages is proof of wanton or negligent destruction, or that damages were to portion of land not reasonably necessary for oil and gas development.

Underlying the question of what constitutes reasonable use of the surface in the development of oil and gas is the concept that the right of an oil and gas lessee to reasonably necessary surface use must be exercised with due regard to the right of the owner of the surface. Consequently, a

lessee has the duty to protect the surface as to those areas where an implied incidental necessity does not exist. Pulaski Oil Co. v. Conner, 62 Okla. 211, 214, 162 P. 464, 466 (1916).

Thus, it is clear that the only basis for recovery of damages by the Thompsons is proof of wanton or negligent destruction of the surface, or that damages were to a portion of the land not reasonably necessary in the drilling operations. Cities Service Oil Co. v. Dacus, 325 P.2d 1035, 1036 (Okla. 1958). Where a surface owner purchases his property subject to a valid oil and gas lease his right to any recovery, in the absence of negligence, must be predicated upon proof that the lessee used more land than it was entitled to use under the terms of the lease. Lone Star Producing Co. v. Jury, 445 P.2d 284, 286 (Okla. 1968).

Of course, the surface owners cannot recover damages due to the mere presence of oil and gas operations on their land, but must prove either Andover's negligence, or that Andover used more of the surface than was reasonably necessary. The Thompsons neither alleged nor proved negligence, nor was the jury instructed on negligence theories, and the case below was tried on the contention that Andover used more of the surface than was reasonably necessary for operations. We note that the burden of proving unreasonableness, that Andover used more of the surface than was necessary, was on the Thompsons as plaintiffs. Davon Drilling Co. v. Ginder, 467 P.2d 470, 473 (Okla. 1970).

The extent to which the use of the surface is reasonably necessary for oil and gas operations is a question of fact for the jury. Davon Oil Co. v. Steele, 186 Okla. 380, 383, 98 P.2d 618, 621 (1940).

Normally, the plaintiff is required to prove the unreasonable use before he can recover. However, at the trial below, Andover conceded that it was responsible for some extent of damage to the Thompson farm. Thus, the only issue to be determined by the jury was the amount of damages.

II

On appeal Andover asserts that the award of $50,000 is excessive and contrary to law. In examining the award, this court must look to the record to determine if there is any evidence reasonably tending to support the verdict. First National Bank of Amarillo v. LaJoie, 537 P.2d 1207, 1211 (Okla. 1975).

In cases involving surface damages, the alleged damages will normally be either permanent damage, temporary damage, or damage caused from the maintenance of a nuisance. Although all three are related somewhat, the measure of damage is calculated differently for each.

Permanent injury to property occurs when it "may not be successfully repaired so that it will be substantially in as good a condition as it was before the injury." Keck v. Bruster, 368 P.2d 1003, 1005 (Okla. 1962). The court in Keck established the standard for measuring damages as:

"Where damages are of a permanent nature, the measure of damage is the difference between the actual value immediately before and immediately after the damage is sustained." It has been consistently held that the diminished value is the diminished value of the entire unit and not the difference in the value of the specific land which is harmed. Sunray DX Oil Co. v. Brown, 477 P.2d 67, 69-70 (Okla. 1970).

A temporary injury to property is one which can be cured or repaired by restoration. The Keck court defined it as: "Where property can be repaired and substantially restored to its former condition, the measure of damage is the reasonable cost of repairing the damage and restoring it to its former condition." Keck v. Bruster, 368 P.2d at 1004. However, the cost of restoration cannot exceed the depreciated value of the land itself. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 114 (Okla. 1962), cert. denied, 375 U.S. 906, 11 L. Ed. 2d 145, 84 S. Ct. 196 (1963).

The final theory of recovery found in cases of this type is based on the private nuisance concept. Title 50 O.S. 1981 @ 1, defines "nuisance" as "unlawfully doing an act, or omitting to perform a duty, which . . . . annoys, injures or endangers the comfort, repose, health, or safety of others; or . . . . in any way renders other persons insecure in life, or in the use of property." Generally, liability does not depend upon the negligence of a defendant and may exist although there was no negligence.

Negligence is not an essential element of a cause of action for nuisance and need not be proved. Cities Service Oil Co. v. Merritt, 332 P.2d 677, 684 (Okla. 1958). Thus, in order to maintain a cause of action for nuisance, the plaintiff must prove an unlawful act or omission of duty which either injured or endangered his use of his property.

The personal inconvenience, annoyance, and discomfort to a property owner caused by the maintenance of a nuisance is a separate and distinct element of damage. The measure of damage is the reasonable compensation for the injury. Phillips Petroleum Co. v. Ruble, 191 Okla. 37, 38, 126 P.2d 526, 527 (1942). A cause of action based on nuisance may include both permanent and temporary injury to property as well as damages for annoyance. The appropriate measure of damage in a nuisance action was stated in Tenneco Oil Co. v. Allen, 515 P.2d 1391, 1392 (Okla. 1973), as:

Damages adjudged in an action predicated on a nuisance theory may include clean-up costs of oil and gas lessee's surface impediments not necessary for its operation, damages for use of land by lessee for more than a reasonably necessary period of time for its operations, for lessee's unnecessary use of land area in its operations, and for temporary and permanent injury to the land.

As the case was submitted to the jury on nuisance theories, this court must examine the record to see if the award "reasonably compensates" for the injury. The Thompsons presented evidence of permanent injury caused by Andover's burial of drilling muds on the land. Although Andover disputed both the harmful effects of this practice and the reasonableness of its action, there was other testimony before the jury to show that the land had been permanently damaged.

The Thompsons' evidence of temporary injury included erosion, silting of their pond, and irregular grading. Although all can be corrected by restoration, there was considerable difference in the testimony presented by both sides as to the cost. Thompson could not put a value on his claims for annoyance and inconvenience, but noted that he had numerous difficulties caused by Andover's leaving gates open and other acts.

Thompson testified that the difference in the fair market value of his property before and after the injury was $50,000. Andover attacks this as being incompetent evidence, pointing out that Thompson's own expert witness testified that the difference in value was only $24,330.

Thompson asserts that a property owner is competent to testify as to the value of his land, citing H. D. Youngman Contractors v. Girdner, 262 P.2d 693, 696 (Okla. 1953), where the court held that the owner of the property is competent to testify as to the value of his land regardless of his expertise concerning property values. In Cities Service Oil Co. v. Merritt, 332 P.2d 677 (Okla. 1958), the plaintiff's testimony was that she thought her land had depreciated by $40,000 while her own expert testified that it had been harmed only to the extent of $28,000. The court upheld the jury's verdict of more than $30,000, finding that it was within the bounds of the evidence.

Here, we note also that the testimony concerning the costs of restoration was as high as $70,000. While the award for damages for restoration cannot exceed the depreciated value of the land, the $50,000 award is clearly within the bounds of the evidence presented. The award is supported by competent evidence and is affirmed. Cities Service Oil Co. v. Merritt, 332 P.2d at 679.

III

Andover asserts that the court erred in failing to admit into evidence the oil and gas leases covering the property in question. However, these leases were executed with the mineral owners after the Thompsons had purchased their land, and the Thompsons were not a party to any of the leases.

Andover contends that the leases limit its liability to payment for destruction of growing crops. Neither the terms of the leases, nor the law limits such liability. Wilcox Oil Co. v. Lawson, 341 P.2d 591, 594 (Okla. 1959), stated that if the lease contained a provision for damage to growing crops, the plaintiff could recover damages for his crop, as well as damage for unreasonable use of the surface.

Such a provision in a lease thus allows the surface owner to recover for damage to growing crops even when the lessee's actions and use are reasonable. In the absence of such a provision, the surface owner can only recover if the use is unreasonable or negligent. As the Thompsons did not ask for damages to their growing crops, but merely contended unreasonable use of the surface, the leases were totally irrelevant.

IV

Andover also contends that the court erred in giving instructions on punitive damages. However, as the jury returned no punitive damage award the instruction is not reversible error. Errors in the admission of evidence or in the giving or refusing to give instructions will not be cause for reversal if the jury was not misled by them. Missouri-Kansas-Texas R.R. v. Harper, 468 P.2d 1014, 1017-18 (Okla. 1970).

V

As its final proposition of error, Andover asserts that the court erred in awarding an attorney's fee of $15,750. This court agrees. In State ex rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Okla.

1979), the court set forth factors to be considered in determining the amount of attorney's fees. The Burk court determined that an attorney seeking compensation over that amount necessary to compensate him on an hourly basis must justify the excess by establishing several factors. Among these are the difficulty of the case, the expertise of counsel, the risks involved, and the results achieved.

Thompsons' counsel testified that he had completed forty hours of work in this case and that he normally charged $75 per hour for legal work outside of trial time and $150 per hour for time in court.

He stated that the case was "not too much different from others." There were no unique factual issues nor research problems. According to his own testimony, he would be entitled to $4,200 based on his hourly fee schedule. However, the trial court awarded a "bonus" of $11,500. It is quite possible that the court awarded this "bonus" because counsel testified that he had an arrangement with his clients whereby any attorney's fee would be added to the jury verdict and the contingency fee would be one half of the combined total. Thus, based on the award of $15,700, counsel would receive a fee of $32,875 rather than $25,000.

We note that the presence of a contingency fee is a matter between the client and his attorney and is not binding on the court in awarding an appropriate fee. Burk established that after arriving at a figure for the hourly rate, the court must consider if it is appropriate to award additional compensation.

Among the factors to consider in determining this "incentive fee or bonus" are the benefits conferred on the prevailing party, the difficulty of the issues, and the attorney's expertise in dealing with them. Burk, 598 P.2d at 661.

Here, counsel for the Thompsons testified that he spent forty hours on the case and that he did not consider the case difficult. He made reference to the issue of punitive damages; however, as we have previously stated, he was unsuccessful in this endeavor. He indicated that there were no complicated legal issues and did not hold himself out to be an expert in this type of litigation.

Furthermore, the award of $50,000 which the jury returned for his clients is less than twenty percent of the amount which the Thompsons prayed for. None of these factors justify an incentive bonus of nearly three times the amount of hourly compensation.

Based on the evidence presented at the hearing on attorney's fees, this court finds that a reasonable fee for the work done in this case is the hourly compensation of $4,200 plus an incentive bonus of $5,800 for a total of $10,000. The attorney's fee is thus modified to bear a reasonable relationship to the pertinent standards used in determining such fees.

REIF, J., concurs, and BACON, J., concurs in part and dissents in part.

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Thompson v. Andover Drilling Co.

Notes and Discussion

1. What is the general goal of awarding damages to the plaintiff in a contract case? Tort action? Does the goal when bringing a tort claim depend on what type of tort action was alleged?

2. Does the oil and gas lease limit Andover's liability to damages to "growing crops"?

3. How are temporary damages to land measured according to the court? Permanent damages?

4. Is there a cap on temporary damages? Why? Does this cap essentially let the developer "condemn" the property paying only the decline in market value?

5. Did Andover have the right to use the surface in this case without compensating the landowner?

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ii. ‘Continuing’ Abatable Environmental Damage

MILLER v. CUDAHY CO.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
203
858 F.2d 1449; 1988 U.S. App. LEXIS 13159; 28 ERC (BNA) 1344; 19 ELR 20177
September 28, 1988, Filed

In this diversity action, plaintiffs-appellees claimed that the American Salt Company's (American Salt) salt mining operations caused the pollution of an underground aquifer passing under their farms, resulting in their inability to utilize the water in the aquifer for irrigation. At the time appellees filed their complaint, American Salt was an operating division of defendant-appellant Cudahy Company (Cudahy), which is a wholly-owned subsidiary of defendant-appellant General Host Corporation (General Host).

The district court concluded that the pollution emanating from the salt plant constituted a continuing, abatable nuisance causing temporary damages and found appellants liable for $ 3.06 million in actual damages and $ 10 million in punitive damages. The court then held the punitive damages award in abeyance and retained jurisdiction over the award pending the presentation of a remedial plan to clean the aquifer. Subsequently, the court abandoned the remedial plan, entered final judgment on the punitive damages award and assessed as costs to appellants certain post-trial expert witness fees.

In this consolidated appeal, appellants contend that 1) appellees' claims are barred by the statute of limitations, 2) the district court's method of calculating actual damages was erroneous as a matter of Kansas law, 3) the court erred in awarding punitive damages, 4) General Host cannot be held liable in the absence of evidence that Cudahy was its alter ego, and 5) the court erred in

assessing post-trial expert witness fees in excess of the statutory limit. We affirm in part and reverse in part.

The complex historical and factual background surrounding this litigation has been exhaustively detailed by the district court. See Miller v. Cudahy Co., 567 F. Supp. 892, 894-95 (D. Kan. 1983) (Miller I); Miller v. Cudahy Co., 592 F. Supp. 976, 981-1003 (D. Kan. 1984) (Miller II). As a consequence, we will provide only a brief overview of the factual setting. We note at the outset that we have carefully reviewed the voluminous trial transcript in its entirety and conclude that the district court's comprehensive factual findings, Miller II, 592 F. Supp. at 981-1003, are amply supported by the record.

Appellees are owners and lessees of real property located in Rice County, Kansas. The land is used primarily for agricultural production. American Salt, along with its predecessor, has operated a salt manufacturing plant near Lyons, Kansas since 1908.

Located two miles south of Lyons is Cow Creek, which flows in a southeasterly direction and is a minor tributary of the Arkansas River. Below Cow Creek is the Cow Creek Valley Aquifer (the aquifer), an underground fresh-water stratum which occupies a width of one to two miles and lies at depths of between approximately ten and seventy feet. The aquifer also flows in a southeasterly direction, at a rate of between one-and-a-half and five feet per day. The water [**4] in the aquifer passes under the land owned or leased by appellees after it has passed under American Salt's brine fields and plant.

Salt concentrations of over 30,000 parts per million have been recorded in water samples drawn from the aquifer. Concentrations of 250 parts per million are sufficient to render water unfit for domestic or irrigation use. As found by the district court, the salt present in the aquifer escaped from the property and control of American Salt. The majority of the salt escaped through subsurface leaks, while the remainder percolated downward from surface spills.

Due to insufficient rainfall, farmers in Rice County are unable to grow corn without irrigating their land. Appellees alleged that because of the salt pollution of the aquifer, they are unable to irrigate and therefore can grow only dryland crops such as wheat and milo, which do not produce the revenues generated by corn crops.

The district court, in commenting on the more than half-century of disputes between American Salt and area farmers, described the historical background of this case as "Dickensian" in nature. Miller v. Cudahy Co., 656 F. Supp. 316, 319 (D. Kan. 1987) (Miller III). Final resolution of this lawsuit itself required nearly a decade. On May 31, 1977, appellees filed their complaint seeking injunctive relief and actual and punitive damages. Following a protracted discovery period, the final pretrial order was filed on March 9, 1982.

The district court denied appellants' motion for summary judgment, n1 which was predicated on their contention that appellees' claims were barred by the statute of limitations. The court concluded that appellees' showing was sufficient to categorize the American Salt operation as a continuing, abatable nuisance causing temporary damages and giving rise to a continuing series of causes of action. Miller I, 567 F. Supp. at 906-08. The court also concluded that the two-year statute of limitations did operate to preclude appellees from recovering for injuries sustained more than two years prior to the filing of their complaint. Id. at 909. The court stated that appellees were

entitled to attempt to prove and recover their damages accruing between a date two years before the complaint was filed (May 31, 1975) and the date of judgment. Id. at 909.

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n1 The court did enter summary judgment against several plaintiffs whose land was either completely outside the boundaries of the aquifer or had not yet been affected by the salt pollution of the aquifer. Miller I, 567 F. Supp. at 897-98.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [**6]

Following a bench trial, the court found appellants liable for temporary damages to annual crops and awarded appellees $ 3.06 million in actual damages for the period of 1975 through 1983. n2 Miller II, 592 F. Supp. at 1005. The court arrived at the amount of lost crop profits by calculating the difference between the net value of corn crops and the net value of the wheat and milo crops which were actually grown. Id. at 990-92.

The court also awarded $ 10 million in punitive damages; however, it retained jurisdiction over the award and held final judgment in abeyance, pending appellants' "good-faith efforts to define and remedy the pollution they have caused." Id. at 1007-08. Pursuant to Fed. R. Civ. P. 54(b), the court entered final judgment on the issues of liability and actual damages. Id. at 1008-09. Appellants filed a timely notice of appeal, but this court dismissed their appeal as premature. Miller v. Cudahy Co., No. 85-1450, slip op. at 6 (10th Cir. Jan. 31, 1986).

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n2 The district court also concluded that appellants were liable to several individual plaintiffs for the following actual damages: approximately $ 8,000 for brine trespasses; nominal damages of $ 1 for pipeline trespass; consequential damages of $ 7,000 for damage to three domestic water wells; and consequential damages of $ 42,500 for damage to a dairy operation. Miller II, 592 F. Supp. at 1005-06. 205
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [**7]

Three years later, the district court rejected a court-ordered cleanup plan, because no feasible plan had been presented, and declined to remit any of the punitive damages award. Miller III, 656 F. Supp. at 356-57. The court also denied as untimely appellant General Host's motion to dismiss, in which General Host had argued that the court had incorrectly applied the doctrine of piercing the corporate veil in finding General Host liable for the salt pollution of the aquifer. Id. at 322-24. Finally, the court taxed as costs to appellants the expert witness fees of appellees' trial expert for his participation in the post-trial remedial action phase. Id. at 339.

I.
. . . . . [text omitted]

II.

Arguing that the district court's method of calculating actual damages was erroneous as a matter of law, appellants assert that the amount of temporary damages awarded cannot exceed the potential recovery for permanent damages. They alternatively contend that, assuming the propriety of an award of temporary damages, the proper measure of such damages is the reduced rental value of appellees' land.

The district court's calculation of the amount of actual damages is reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a). We are not constrained by the clearly erroneous standard, however, if the court's computation of damages is predicated upon a misconception of the governing rule of law. Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d 1286, 1289 (10th Cir. 1988) (addressing proper legal standard for damages resulting from the wrongful repudiation of a contract).

The temporary-permanent distinction which is determinative in regard to the running of the statute of limitations is also relevant to the question of the proper measure of damages resulting from an actionable nuisance. See McAlister v. Atlantic Richfield Co., 662 P.2d at 1211; F. Harper, F. James & O. Gray, The Law of Torts at @ 1.30. In Kansas, the measure of damages for permanent injury to real property is the difference in the fair market value of the land before and after the injury. Williams v. Amoco Production Co., 734 P.2d at 1120; Kiser v. Phillips Pipe Line Co., 141 Kan. 333, 41 P.2d 1010, 1011-12 (1935). [**19]

Diminished fair market value is not used as the measure of recovery, however, if an injury to real property is temporary in nature. Temporary damages represent the reasonable cost of repairing the property, "which may include the value of the use thereof during the period covered by the suit, or it may be the diminution in the rental value of the property, together with such special damages to crops, improvements, [*1457] etc." Kiser v. Phillips Pipe Line Co., 41 P.2d at 1012; accord Alexander v. Arkansas City, 193 Kan. 575, 396 P.2d 311, 315 (1964).

Appellants' assertion that temporary damages may not exceed the value of the property injured, or essentially that there must be a "cap" on an award of temporary damages, is unsupported by pertinent Kansas authority. Their alternative contention, that the sole measure of such damages is reduced rental value, is likewise unsupported. While reduced rental value of the property injured is indeed one measure of temporary damages, the value of the use of the property is also a proper measure of damages. The Kansas Supreme Court has treated the value of the use of property and the diminution of rental value as separate and distinct bases for awarding [**20] temporary damages. See Alexander v. Arkansas City, 396 P.2d at 315; Kiser v. Phillips Pipeline Co., 41 P.2d at 1012; see also D. Dobbs, Remedies @ 5.3 (1973) (noting difference between rental value and use value).

The district court found that because irrigated corn crops would be more profitable than the dryland crops appellees were forced to grow because of the salt pollution of the aquifer, appellees "have been damaged by the pollution to the extent of these lost crop profits." Miller II, 592 F. Supp. at 991. In so finding, the court applied the proper legal standard under Kansas law for measuring temporary damages. See Kiser v. Phillips Pipe Line Co., 41 P.2d at 1012. The court's calculation of actual damages, made upon consideration of the similar formulas presented by the various expert witnesses, was based upon the difference between the net value of the lost corn production and the net value of the wheat and milo crops actually grown. Miller II, 592 F. Supp. at 991-92. That calculation is supported by the evidence and is not clearly erroneous.

III.

Appellants next contend that the $ 10 million punitive damages award is not supported by the evidence. They further contend that the district court abused its discretion by refusing to eliminate

or substantially reduce the "contingent" award at the close of the post-trial remedial phase and that the Kansas law of punitive damages is unconstitutional as applied to the facts of this case.

A.

The issue of whether there is sufficient evidence to justify an award of punitive damages is a question of law. Alley v. Gubser Development Co., 785 F.2d 849, 855 (10th Cir.), cert. denied, 479 U.S. 961, 107 S. Ct. 457, 93 L. Ed. 2d 403 (1986) (applying Colorado exemplary damages statute). In a diversity case, the circumstances under which punitive damages are available are governed by state law, as are the substantive elements upon which such an award may be based. O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1448 (10th Cir. 1987), cert. denied, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 601 (1988) (addressing remittitur of punitive damages award). "Thus, an assessment of the propriety of awarding punitive damages and the sufficiency of the evidence to support the award must necessarily be made by reference to the factors that the state has deemed relevant in determining whether punitive damages are appropriate." Id.

Under Kansas law, punitive damages may be imposed for a willful and wanton invasion of an injured party's rights, the purpose being to restrain and deter others from committing like wrongs. Id. at 1446; Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038, 1061, cert. denied, 469 U.S. 965, 83 L. Ed. 2d 301, 105 S. Ct. 365 (1984). "Wantonness is characterized by a realization of the imminence of damage to others and a restraint from doing what is necessary to prevent the damage because of indifference as to whether it occurs." n9 Boehm v. Fox, 473 F.2d 445, 447 [*1458] (10th Cir. 1973). A punitive damages award "must be viewed in light of the actual damages sustained, the actual damage award, the circumstances of the case, the evidence presented, the relative positions of the plaintiff and the defendant, and the defendant's financial worth." Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d at 1064.

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n9 In Newman v. Nelson, 350 F.2d 602 (10th Cir. 1965), a diversity case in which the jury awarded actual and punitive damages for the pollution of the plaintiff's stock pond by crude oil escaping from the defendant's oil lease operations, this court noted that there was "no reason to doubt that Kansas courts would embrace the nuisance theory for punitive damages." Id. at 604. As explained by Chief Judge Murrah, "to be liable for actual damages one need only create or commit a nuisance, but to be punished for it he must create and persistently maintain it with a reckless disregard for the rights of others." Id. at 604-05 (emphasis added). Based on that legal premise, the panel concluded that "the proof falls far short of showing an indifferent maintenance of a nuisance" and reversed the judgment as to punitive damages. Id. at 605-06.
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In the instant case, the award of punitive damages is clearly supported by the evidence, in particular the testimony of three former American Salt employees. It is readily apparent that appellants created the nuisance and "persistently maintain[ed] it with a reckless disregard for the rights of others." Newman v. Nelson, 350 F.2d 602, 604-05 (10th Cir. 1965). Appellants' conduct was deliberate, with full knowledge of the consequences and with a marked indifference thereto.

B.

Contending that the district court abused its discretion by refusing to remit the punitive damages award at the close of the post-trial remedial phase, appellants characterize the court's award as "contingent." That characterization is premised on the court's retention of jurisdiction over the award "to evaluate a potential cleanup to be implemented in lieu of some or all of the punitive damages award." Miller III, 656 F. Supp. at 324.

The court stated that, because appellants' post-trial conduct would be "extremely relevant" to their "state of mind" at the time of the occurrences, punitive damages would be eliminated or substantially reduced if the defendants undertook a "conscientious, good-faith, and realistic effort to address and remedy, within a reasonable time, the pollution presently existing in the aquifer." Miller II, 592 F. Supp. at 1007-08. Appellants now argue that their post-trial conduct "is further proof of their good intent" and that the court abused its discretion by belatedly imposing new conditions for establishing good intent.

Federal law governs the decision whether a remittitur should be granted, the decision being tested on appellate review by an abuse of discretion standard. K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1162 (10th Cir. 1985). In O'Gilvie, which was handed down some three months after the district court's final opinion, this court held that a trial court is without authority under either state or federal law to reduce a punitive damages award on the basis of post-trial conduct. n10 O'Gilvie v.International Playtex, Inc., 821 F.2d at 1449-50. Thus the district court would have been without discretion to reduce or eliminate the punitive damages on the basis of events occurring after the trial. See id. at 1449.

While the district court did not have the benefit of this court's opinion in O'Gilvie upon entering final judgment on the punitive damages award, any reduction, or elimination, of the award would have been highly questionable, given our perception that there is no relationship between appellants' post-trial conduct and their state of mind at the time of the tortious acts.

Even assuming that appellants' post-trial conduct was relevant, and that the district court had the power to remit the punitive damages award on the basis of that conduct, we would be unable to find the court would have abused its discretion in not doing so. See Miller III, 656 F. Supp. at 354-356 (discussing appellants' lack of good faith in the post-trial remedial phase).

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n10 In O'Gilvie, the plaintiff alleged that his wife's use of the defendant's super-absorbent tampons caused her death from toxic shock syndrome. The jury awarded the plaintiff $ 10 million in punitive damages. Upon the defendant's post-trial representation that it was discontinuing the sale of some of its products, instituting a program of alerting the public to the dangers of toxic shock syndrome and modifying its product warning, the district court ordered the punitive damage award reduced to $1,350,000. O'Gilvie v. International Playtex, Inc., 821 F.2d at 1440-41.

After reviewing the bases for remitting a punitive damage award, this court concluded that because the post-trial conduct upon which the trial court relied in ordering remittitur in this case had no relevance to the injurious conduct underlying the claim for punitive damages, the court was without authority under either state or federal law to reduce the award on that basis. In addition,

we are compelled to point out that the court's order subverts the goals of punishment and deterrence that underlie the assessment of punitive damages in Kansas. Id. at 1450.

n11 The district court apparently recognized that limitation on its power to remit the punitive damages award. As stated by the court, "an elementary aspect of punitive damages seems to have been forgotten in this case: they are awarded on account of past behavior." Miller III, 656 F. Supp. at 354 (emphasis in original).
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Regarding the court's retention of jurisdiction over the punitive damages award, this case points up some of the problems inherent in trial courts using their equitable jurisdiction to attempt to oversee solutions to problems such as the cleanup of the aquifer.

The court's attempt to fashion an equitable remedy which would result in the cleansing of the aquifer was well-intentioned, and we have no reason to question the court's statements that "the actions proposed went to the nature of relief [appellees] were seeking, and were consistent with the relief requested" and that the court was attempting "to fashion a remedy which truly rectified the wrong, not merely compensated for it." Miller III, 656 F. Supp. at 351. However, during the post-trial phase the parties addressed other matters only tangentially related to the cleanup plans, id., and [**27] as the court candidly admitted, see id. at 342, 351-57, a court-supervised remedial program was simply not feasible.

C.

Finally, appellants assert that the Kansas law of punitive damages is unconstitutional because it places no limits on the amount of such awards. They argue that because punitive damage awards are essentially penal in nature, they mandate the procedural protections afforded by the eighth and fourteenth amendments to the United States Constitution.

Appellants have cited no persuasive federal constitutional authority to support their argument. The Kansas appellate courts have addressed similar arguments in varying contexts and have concluded that the imposition of punitive damages under Kansas law neither demands the same safeguards afforded in criminal prosecutions nor violates the due process clause. See, e.g., Tetuan v. A.H. Robins Co., 241 Kan. 441, 738 P.2d 1210, 1245-46 (1987); McDermott v. Kansas Pub. Serv. Co., 238 Kan. 462, 712 P.2d 1199, 1203 (1986); Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 629 P.2d 196, 206 (1981).

IV.

Appellants next argue that the district court erred in imposing liability on General Host, absent a finding of piercing the corporate veil. The crux of its argument is that the record is devoid of evidence sufficient to conclude that Cudahy is General Host's alter ego.

As discussed above, appellant General Host filed a motion to dismiss several years after the +completion of the trial, arguing that the district court applied the wrong legal analysis in considering General Host's liability. The court denied the motion as untimely pled. Miller III, 656 F. Supp. at 324.

Countering appellees' assertion that its piercing the corporate veil argument is not properly before this court, General Host contends that it preserved the issue by moving for a directed verdict at the close of appellees' case and by later submitting requested findings of fact and conclusions of law on that point.

Brief for Defendants-Appellants (No. 87-1502) at 52 n.56. It further points to appellants' Fed. R. Civ. P. 59 motion in which it argued that it could not be held liable under any theory of liability. Id. We agree with appellees that this issue is not properly before us, and decline to address the merits of an issue upon which the district court did not rule and for which appellees were not compelled to produce any refuting evidence.

General Host's oral motion for a directed verdict simply stated that appellants would reserve argument and comment on appellees' evidence at the close of the case. Rec. vol. 45 at 2602-03. In its motion to amend findings and judgment or, in the alternative, for a new trial, General Host argued on several grounds that it could not be held liable for damages but did not argue that it should be dismissed as a defendant. n12 Rec. vol. 2, doc. 462 at 28-30. On appeal, General Host does not assign error to the denial of its motion to dismiss, but rather argues that the district court applied the wrong legal theory in imposing liability. It has not specified the manner in which this issue was preserved for appeal.

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n12 In its motion, General Host stated that for the district court to hold it "liable for damages, which were suffered by most of the plaintiffs as a result of occurrences many years prior to 1973, is without precedent." Rec. vol. 2, doc. 462 at 28. The motion further states that "it would be one thing to require General Host to pay for damages caused by American Salt since 1973; it is quite another to use the events transpiring since May 31, 1975, to make General Host liable for all damages suffered by plaintiffs, regardless of when they occurred." Id. (emphasis added). That statement undercuts General Host's argument on appeal that no liability whatsoever can be imposed on it on the basis of a parent subsidiary relationship.
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In considering the procedural basis on which General Host sought dismissal, the district court determined that the motion was based on Fed. R. Civ. P. 12(b)(6). Miller III, 656 F. Supp. at 322-23.

The court noted that while General Host alluded to the theory in its answer, it did not move for dismissal at that time, did not move for dismissal on such grounds in any motion for judgment on the pleadings under Fed. R. Civ. P. 12(h)(2), and did not move for dismissal at trial. Id. at 323. The court concluded that a mere recital of the defense of failure to state a claim upon which relief can be granted in the answer was insufficient to preserve the issue for belated consideration. Id. at 324.

Appellant General Host delayed far too long in seeking dismissal claiming the alter ego theory did not apply. Except in cases involving subject matter jurisdiction, an appellate court is most reluctant to consider grounds raised for reversal not adequately developed by a party before or at trial. To be sure, there are exceptions, but adherence to this principle encourages a single and complete presentation of issues before trial and at trial. National Advertising Co. v. City of Rolling Meadows, 789 F.2d 571, 574 (7th Cir. 1986).

It also encourages sufficient factual development of those issues presented and respects tactical decisions made by both sides. A district court is not obligated to develop offhand references to legal terms into workable theories. National Metalcrafters v. McNeil, 784 F.2d 817, 825 (7th Cir. 1986). Nor must an appellate court perform this task. This case does not present extraordinary circumstances which would warrant consideration of the merits of the motion to dismiss.

To the contrary, the alter ego issue is largely a factual one and the record is not fully developed. Moreover, the trial court's decision to hold General Host liable based on its domination of Cudahy and American Salt, see Miller II, 592 F. Supp. at 997-98, is supportable on factual and legal grounds. See H. Henn & R. Alexander, Laws of Corporations and Other Business Enterprises @ 148 at 354-56 (1983) ("Where one corporation is under the domination of another, the separate corporate entities or personalities might be recognized, treating the latter as principal and the former as agent, thus making the acts of the latter in effect the acts of the former."). [**32] For these reasons, we decline to address the substance of General Host's untimely motion to dismiss.

V.

The final issue raised by appellants is whether the district court erred in awarding expert witness fees in excess of the statutory limit. They contest the court's decision to tax as costs nearly $ 40,000 in fees and expenses incurred by appellees' trial expert during the post-trial remedial investigation.

Absent express statutory or contractual authorization for the taxation as costs the fees of a party's expert witness, federal courts are bound by the limitations set out in 28 U.S.C. @@ 1821 and 1920. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 2498-99, 96 L. Ed. 2d 385 (1987); Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d at 1292. A party's expert witness fees are recoverable only up to the $ 30-per-day statutory limit applicable to any witness. Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d at 1292; Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987).

The district court found that certain fees and expenses of Dr. Dan Raviv, a geohydrologist and appellees' trial expert, were properly taxable to appellants. Miller III, 656 F. Supp. at 339. These fees and expenses were incurred in connection with the post-trial remedial action phase of the case. Id.

Initially citing to a number of pre-Crawford cases which indicated that such an award would be a justifiable exercise of its equitable discretion, id. at 337-39, the court found that such a basis for the taxation of Dr. Raviv's fees was unnecessary, Id. at 339. Rather, the court stated that because its initial opinion required appellants to consult an expert designated by appellees during the remedial phase, "it should come as no surprise now that [appellants] are responsible to pay for the expert consultations which they received." Id.

As we interpret the district court's reasoning, Dr. Raviv's fees were assessed as costs because the court had ordered the development of a remedial plan, thus making Dr. Raviv a "quasi" court appointed expert. Indeed, the court did order appellants to consult with an expert chosen by appellees in formulating a remedial action plan. Miller II, 592 F. Supp. at 1007, 1009.

While the court's logic is easily followed, the record indicates that the court refused to appoint an expert witness to assist in the formulation of a remedial plan. n13 See, e.g., Rec. vol. 3, doc. 624 at 1. Although the court could have properly taxed Dr. Raviv's fees had he been appointed by the court, Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2498, Dr. Raviv was not so appointed. While we are cognizant of the unusual circumstances presented by the court's retention of jurisdiction pending the presentation of a viable cleanup plan, this case does not come within any of the exceptions to the established rule that expert witness fees are assessable only up to the statutory limit.

Nor could the court have assessed the fees as an exercise of its equitable discretion under Fed. R. Civ. P. 54(d). That discretion is constrained by the fee statutes. Id. at 2499; Chaparral, 849 F.2d at 1292. We conclude that the district court erred in awarding the post-trial expert witness fees of Dr. Raviv.

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n13 In Miller III, the district court explained that in denying appellees' motion for a court-appointed expert, what it declined to do was to select an additional independent expert. Miller III, 656 F. Supp. At 338. The court stated that the expert designated by the plaintiffs [appellees], Dr. Raviv, was involved in the remedial action phase by specific order of this Court, and his involvement was not affected by the Court's later order. In this context, it is apparent that Dr. Raviv was not only a court appointed expert, but he was no longer 'plaintiffs' expert.' Defendants were required by this Court to work with him in developing their plan.

Id. The court then concluded that Dr. Raviv was in actuality appellant's expert. "Therefore, as Dr. Raviv was in reality 'defendants' expert' for the purpose of the remedial action phase of this case – that is, he was an expert defendants were required to and did consult in their plan development - it is not only equitable to require them to pay his fees, but it is to be expected." Id. at 338-39.

We cannot agree that Dr. Raviv was a court-appointed expert. As discussed above, he was merely working on the court-ordered remedial plan. If Dr. Raviv was appellants' expert, then we have the rather anomalous situation of the court ordering a party to pay its own expert witness fees. We agree with appellants that such is a mischaracterization based on Dr. Raviv's use by the appellees. See Brief for Defendants-Appellants (No. 87-2283) at 15-20.
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We affirm the district court's judgment in its entirety with the exception of the assessment of the post-trial expert witness fees of Dr. Raviv. We reverse the award of the expert witness fees and remand for recalculation of costs in compliance with 28 U.S.C. @@ 1821 and 1920.

AFFIRMED IN PART and REVERSED IN PART and REMANDED.
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Miller v. Cudahy Co.

Notes and Discussion

1. Is there are clear rule on how a court should make the determination whether damages are temporary or permanent? What factors does the court look to?

2. If land is damaged in a permanent way, how long does the landowner have to bring suit in Kansas for a nuisance claim?

3. If permanent damages are awarded, for what time period(s) will damages be allowed?

4. If temporary damages are awarded, for what time period(s) will damages be allowed?

5. How are temporary damages measured? In Kansas, is there a cap on temporary damages? What is the policy argument for a cap on damages?
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iii. “Cap” on Damages & Public Policy

ROCK ISLAND IMPROVEMENT CO. v. HELMERICH & PAYNE, INC.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
698 F.2d 1075
January 21, 1983

In this diversity case Helmerich & Payne, Inc. appeals a jury verdict in favor of Rock Island Improvement Company for breach of contract and appeals the trial court's denial of its motions for judgment notwithstanding the verdict and for a new trial or amendment of the judgment. From 1968 to 1977 Helmerich & Payne leased two tracts of land in Oklahoma from Rock Island for coal mining purposes. These tracts are referred to as the "Rees-Heavener" and "Rees-Petros" mines.

The lease contained a reclamation clause that stated: "Upon the abandonment or completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation. . . ." Helmerich & Payne subleased the land to Sam Sexton, Jr., who used strip-mining techniques to remove substantial amounts of coal. When the lease period ended, the tracts were left with two strip pits and were not otherwise reclaimed to Rock Island's satisfaction. Rock Island sued Helmerich & Payne for breach of the lease's reclamation provision, seeking damages equal to the amount necessary to reclaim the land. Helmerich & Payne filed a third party complaint against Sexton, who agreed to pay any judgment won by Rock Island. The jury awarded Rock Island $375,000.

On appeal the issues may be classified under the following headings: (1) the applicable Oklahoma damages law, (2) the admissibility of testimony by Rock Island's experts, (3) the excessiveness of the damages, (4) the fairness of the trial, (5) the assessment of damages for land that the State of

Oklahoma had condemned, and (6) the crediting against the judgment, as stipulated by the parties, of $50,000 that Sexton had forfeited to Oklahoma.

I

Helmerich & Payne contends that the trial court improperly applied Oklahoma damages law. In instructing the jury on damages, n1 the trial court relied on Peevyhouse v. Garland Coal & Mining Company, 382 P.2d 109 (Okl.), cert. denied, 375 U.S. 906, 84 S. Ct. 196, 11 L. Ed. 2d 145 (1963). In Peevyhouse the Oklahoma Supreme Court examined a coal mining lease requiring the lessee to reclaim any land it strip-mined. At issue was whether the proper measure of damages for the lessee's failure to reclaim was the cost of performance ($29,000) or the diminution in the fair market value of the land ($300). The court held that the proper measure of damages was the reasonable cost of reclamation, unless the reclamation requirement was incidental to the lease's main purpose and the cost of reclamation would be grossly disproportionate to the diminution in the land's fair market value. In the latter case, the lessor's damages were limited to the diminution in value. Id. at 114.

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n1 The trial court instructed the jury as follows:

"The measure of damages is the reasonable cost of performing the contract, or in this case, restoring the land to the same condition it was in before strip-mining, unless you find:

1. That the lease provision requiring restoration of Plaintiff's land to the same condition it was in before strip-mining was merely incidental to the main purpose of the lease; and

2. That the economic benefit to the Plaintiff by restoring the land would be grossly disproportionate to the cost of restoring the land.

"Then, if you so find, the amount of damages to which Plaintiff is entitled is the reduced value of Plaintiff's land, that is, the difference between the present fair market value of the land as it is, and the present fair market value of the land restored to the same condition it was in before the strip-mining."
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In the instant case the trial court submitted the issue of the reclamation clause's importance to the jury. We have held that a trial court must submit this issue to the jury when the parties have introduced extrinsic evidence of their intent, Hitchcock v. Peter Kiewit & Sons Co., 479 F.2d 1257 (10th Cir.1973); otherwise, the trial court should treat interpretation of the contract clause as a matter of law. See Walker v. Telex Corp., 583 P.2d 482, 485 (Okl.1978). Neither Rock Island nor Helmerich & Payne introduced evidence establishing the parties' intent in including the restoration clause. n2 Therefore, the trial court should not have submitted interpretation of the contract to the jury.

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n2 Helmerich & Payne attempted to introduce a letter it had received from an agent of Rock Island's parent corporation one year before the lease became effective, as relating to the issue of Rock Island's understanding of the meaning of the reclamation clause. The trial court excluded the

letter as not clearly relating to the contract in question and as being potentially confusing to the jury. Helmerich & Payne asserts that the trial court erred in excluding this letter as extrinsic evidence. Rulings regarding the admission of evidence fall within the trial court's discretion and will not be disturbed on appeal unless clearly erroneous. Keen v. Detroit Diesel Allison, 569 F.2d 547, 549 (10th Cir.1978). We have read the letter and have determined that the trial court did not abuse its discretion.
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Helmerich & Payne asserts the trial court should have held that the lease unambiguously focused upon coal mining as its main purpose and that reclamation was merely an incidental purpose. Furthermore, Helmerich & Payne argues that because the parties stipulated the diminution in value of the land was $6,797, and the evidence [*1078] presented showed that restoring the land would cost $375,000, the court should have held the cost of reclamation was disproportionate to the diminution in land value. Thus, following Peevyhouse, the proper measure of damages would be diminution in market value, an amount the parties stipulated, and thus not a jury issue. Rock Island's response is that Peevyhouse no longer represents Oklahoma law on damages for breach of mining contracts because of subsequent developments in that state's policy toward reclamation.

At the time the parties in Peevyhouse entered into their lease, Oklahoma had no stated policy concerning land reclamation after mining operations. Thus, in Peevyhouse the court considered only the economic benefits to the parties of a situation the court termed "artificial," "unreasonable," and "unrealistic": that a property owner would agree to pay a great deal for "improvements" that would increase the property's value by only a small amount. The court was concerned that if the landowner did not spend the large amount to reclaim the land, he would receive a windfall by recovering the amount from the lessee. 382 P.2d at 112.

However, after the decision in Peevyhouse but before Rock Island leased the tracts to Helmerich & Payne, Oklahoma enacted the Open Cut Land Reclamation Act. 1967 Okla.Sess.Laws Ch. 186 (current version at Okla.Stat.Ann. tit 45, @@ 721-729). The Act stated in part:

"It is hereby declared to be the policy of this State to provide, after mining operations are completed, for the reclamation and conservation of land subjected to surface disturbance by open cut mining and thereby to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, and to protect and promote the health, safety and general welfare of the people of this State."

Id. at @ 2 (current version at Okla.Stat. Ann. tit 45, @ 722).

The statute declares today, as it did in 1967, that the operator of a strip mine has a duty to reclaim the land and that the state may contract for the work to be done if the operator defaults. The statute makes no exception for cases in which the expenditures for reclamation are disproportionate to the resulting increase in value of the land. To be sure the statute looks to the operator as the party responsible for reclamation, and limits the state's recovery to the amount of the bond it has required. n3 Nevertheless, there are many reasons a landowner in Rock Island's position would want a reclamation provision in the lease -- to enhance its image in the community, to protect against possible tort liability for conditions on its premises, and to allay any fear that under the recently enacted law it might somehow be held responsible for defaults of the operator.

There are reasons a lessee might readily accept such a provision -- it already has a duty to reclaim under the state statute.

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n3 At the time of the Rock Island-Helmerich & Payne contract the maximum bond required was $50 per acre. Today there is no maximum; the bond must cover the estimated reclamation costs. Okla.Stat.Ann. tit. 45, @ 728(B).
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We are convinced that the Oklahoma Supreme Court would no longer apply the rule it established in Peevyhouse in 1963 if it had the instant dispute before it. Peevyhouse was a 4-5 decision with a strong dissent. n4 More importantly, the public policy of the state has changed, as expressed in its statutes. Although we are bound by decisions of a state supreme court in diversity cases, we need not adhere to a decision if we think it no longer would be followed.

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n4 Peevyhouse has been cited in only two Oklahoma Supreme Court cases. In Western Natural Gas Co. v. Cities Service Gas Co., 507 P.2d 1236, 1249 (Okl.), cert. denied, 409 U.S. 1052, 93 S. Ct. 559, 34 L. Ed. 2d 506 (1972), it was held to be inapplicable to the facts before the court. In State ex rel. Cartwright v. Dunbar, 618 P.2d 900, 911 (Okl.1980), its supplemental opinion on rehearing was cited for an unrelated point of constitutional law.
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"An accurate forecast of [a state's] law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state's law in order to isolate those factors that would inform its decision. . . . It is important to note, however, that our prediction 'cannot be the product of a mere recitation of previously decided cases. ' In determining state law, a federal tribunal should be careful to avoid the 'danger ' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances. ' Rather, relevant state precedents must be scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince." McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662 (3d Cir.), cert. denied, 449 U.S. 976, 101 S. Ct. 387, 66 L. Ed. 2d 237 (1980). Accord Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 31 (5th Cir.1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d (1974) Warner v. Gregory, 415 F.2d 1345 (7th Cir. Ill 1969), cert. dismissed, 397 U.S. 930, 24 L.Ed 2d 112 (1970); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967).

When the parties negotiated the contract in question, they expressly included a reclamation clause and required the lessee to bear the cost of reclamation. Given the attention focused by Oklahoma on the importance of reclaiming strip-mined lands, it is more logical to assume that the parties meant what they said, calculated their costs and benefits under the contract accordingly, and intended the provision to insure proper reclamation of the land, than it is to assume that they expected the reclamation clause to have no force. n5

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n5 In Peevyhouse the court relied in part on Oklahoma damages statutes requiring that a party receive no more in damages than it would have gained by full performance. See 382 P.2d at 113 (citing Okla.Stat.Ann. tit 23, @@ 96, 97). Helmerich & Payne contends that these statutes limit the amount of its damages. Because the anticipated cost of reclamation may have affected the

contract price, these damages statutes do not preclude use of the cost-of-performance measure of damages.
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Even though the trial court should not have submitted the issue of the reclamation clause's importance to the jury, we need not reverse. Because we hold that cost of performance is the proper measure of damages, and the jury used this measure in calculating damages, the court's error is harmless.

II

The trial court denied Helmerich & Payne's motion to strike Rock Island's expert witness' testimony that the cost of restoring the land as nearly as possible to its original condition would be $375,000.

Helmerich & Payne claims that the expert's testimony should have been disregarded because on cross examination the expert inadequately disclosed the underlying facts for his opinion. See Fed.R.Evid. 705. Specifically, it complains that the expert did not know how many acres would be reclaimed under his estimate. Although the expert admitted he could only guess the number of acres to be reclaimed, he testified that he had measured the strip pits in feet to calculate his estimate and that when the pits were filled the spoils areas (hills of surface material that had been removed to gain access to the coal) would have been graded and leveled.

Since the bulk of the expert's estimate concerned filling the pits, the total number of acres involved was a minor element in figuring the cost of reclamation. He testified that his reclamation estimate included filling in the pits, grading and leveling the spoils, and revegetating. The expert also testified about his prior experience in reclaiming mined lands. Based upon these disclosures, we cannot find that the trial court erred in denying the motion to strike.

Helmerich & Payne also maintains that the expert's estimate cannot support the verdict because it included work that was not required by the lease: filling the pit on the Rees-Heavener tract and grading and leveling the Rees-Petros tract. n6 Helmerich & Payne asserts that the lease did not require filling the pit on the Rees-Heavener tract because Sexton had fulfilled Helmerich & Payne's duty to restore the surface by reclaiming another pit and spoils area on the same tract that had been left over from previous mining. Furthermore, Helmerich & Payne maintains that Sexton had already graded and leveled the Rees-Petros tract as nearly as possible to its prior condition.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n6 Additionally, Helmerich & Payne asserts that the expert included this work in his estimate because of an erroneous interpretation of state law given him by the Oklahoma Deputy Chief Mine Inspector. Because Rock Island sought recovery only for breach of the lease reclamation clause, the state law requirements are irrelevant here. We have read the expert's testimony and find that it is consistent with the scope of the lease reclamation clause.
- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In assessing damages the jury could properly consider Rock Island's expert's estimate, which included filling and grading the new pit on the Rees-Heavener tract and restoring the Rees-Petros tract.

The lease stated, "The surface shall be restored as nearly as possible to its condition prior to [the] mining operation." The extent and cost of restoration required by the lease was the heart of this litigation, and the lease arguably required the work Rock Island's expert included in his estimate.

Although Helmerich & Payne had no duty under the lease to reclaim the previously mined area, nothing in the lease indicates that it could fulfill its duty to reclaim the surface area it disturbed on a tract by reclaiming a different part of the tract. Helmerich & Payne neither sought restitution for reclaiming the previously mined area nor submitted evidence of the cost of that reclamation. Similarly, the expert's opinion that $25,000 would pay for leveling and grading the Rees-Petros tract related to the parties' dispute over how much restoration that tract required.

III

Helmerich & Payne contends that reasonable damages fall in the range of $40,000 to $65,000 for regrading the spoils area and that the $375,000 verdict, which included regrading and filling the strip pits, was excessive. Helmerich & Payne argues that in these circumstances the court should have ordered a new trial. In reviewing a trial court's refusal to grant a motion for a new trial because of an excessive verdict, we apply the abuse of discretion standard. Garrick v. City and County of Denver, 652 F.2d 969, 971 (10th Cir.1981). We cannot say that the jury or trial court erred by interpreting the reclamation clause to include filling the pits. Furthermore, because testimony of Rock Island's expert witness supports the $375,000 verdict, the trial court did not abuse its discretion in denying the motion.

IV

Helmerich & Payne raises a number of complaints concerning evidentiary rulings and instructions that it contends rendered the trial unfair. It claims that the court improperly instructed the jury on Helmerich & Payne's obligation to reclaim the land under the lease. The trial court instructed the jury that the lease required Helmerich & Payne to restore the surface of Rock Island's land "to the same condition it was in before the coal was strip mined." The lease required restoration of the surface "as nearly as possible to its condition prior to [the] mining operation." The pretrial order included as an issue for trial, "Is it reasonably possible to restore the surface of subject real property to the condition it was on April 8, 1968, and the cost thereof." Helmerich & Payne claims error in the instruction's omissions of the lease language "as nearly as possible" and of the pretrial language of a "reasonable" possibility of restoration.

Helmerich & Payne concedes that restoration is possible, but asserts that it agreed to restore the land only as nearly as possible or as reasonably possible and that spending $375,000 to restore land whose value will thereby be increased by less than $7,000 is not reasonably possible. Helmerich & Payne is merely rearguing the proper measure of damages, an issue we have already resolved against it.

Helmerich & Payne correctly argues that the trial court erred in instructing the jury on the diminution in value of the land by focusing on the land's value at the time the jury was deciding the

issue, rather than on its value at the end of the lease term. However, the error was harmless because we have already determined that the cost of reclaiming the land was the proper measure of damages.

Helmerich & Payne also alleges that the trial court erred (1) in excluding extrinsic evidence of the reclamation clause's meaning, testimony concerning lease payments to Rock Island, land records whereby Rock Island acquired the land it leased to Helmerich & Payne, and evidence of the land's present condition; (2) in admitting the sublease reclamation provision and Sexton's applications to the Oklahoma Department of Mines for mining permits; (3) in instructing the jury on the Oklahoma reclamation statutes and on waiver and estoppel; and (4) in permitting certain testimony of witnesses and certain statements of counsel. Finally, Helmerich & Payne maintains that the errors collectively deprived it of a fair trial. After reading the record and considering Helmerich & Payne's contentions separately and collectively, we conclude that the trial was fair and that the trial court committed no error justifying reversal.

V

Helmerich & Payne contends that the trial court should have granted its motion to amend the pretrial order to permit adding the issue whether Rock Island could recover damages for land condemned by Oklahoma. Helmerich & Payne sought to add this issue less than one month before trial. From the record it appears that Oklahoma filed an action on February 22, 1974 to condemn 13.35 acres of the land at issue in this lawsuit. By the time of trial the state apparently had not taken possession, although on May 1, 1974, the state paid into court an amount covering assessed value and costs.

The Helmerich & Payne attorney who signed the motion and supporting memorandum stated he had had no knowledge of the condemnation action before October 10, 1980. Sexton did not indicate whether he was aware of the condemnation, but he supported the motion, claiming Rock Island should not recover for damage to land it did not own. Rock Island opposed the motion asserting that the motion raised a new issue on the eve of trial, that both Helmerich & Payne and Sexton were aware of the condemnation proceedings and were involved in negotiations with the condemnor, and that the condemnation proceedings were irrelevant because they had never been completed, negotiations were ongoing, and Rock Island still held legal title to the land. The trial judge gave no reason for denying the motion to amend.

A pretrial order controls the subsequent course of the suit unless the trial court modifies it to prevent manifest injustice. See Seneca Nursing Home v. Secretary of Social and Rehabilitation Services of Kansas, 604 F.2d 1309, 1314 (10th Cir.1979); Fed.R.Civ.P. 16. Here the trial court's refusal to modify the pretrial order did not create manifest injustice. In Epperson v. Johnson, 190 Okl. 1, 119 P.2d 818 (1941), an Oklahoma condemnor filed condemnation proceedings and paid the commissioners' assessment into court. Applying constitutional and statutory provisions substantially similar to those applicable to the condemnation of the Rock Island property, the Oklahoma Supreme Court found that the condemnor did not take title to the property simply by paying the commissioners' award into court. 119 P.2d at 823; accord Board of Commissioners v. Rayburn, 192 Okl. 624, 138 P.2d 820, 822 (1943); State ex rel. Department of Highways v. Waters, 376 P.2d 288, 290-91 (Okl.1962); Oklahoma Turnpike Authority v. Dye, 208 Okl. 396, 256 P.2d 438, 441-42 (1953).

In the case before us, Helmerich & Payne does not contend that the state took possession of the land. To the contrary, after the condemnation was filed, Helmerich & Payne subleased this [*1082] land, received royalties from the sublessee for mining coal on the land, and paid Rock Island royalties for coal. Accordingly, the trial judge did not prejudice Helmerich & Payne by denying its motion to amend the pretrial order.

VI

Finally, Helmerich & Payne contends that the trial court erred in failing to amend the judgment to give credit for Sexton's forfeiture to Oklahoma of $50,000 in performance bonds. The parties stipulated at pretrial that Helmerich & Payne would be credited in this amount and reaffirmed the stipulation in the briefs on appeal and at oral argument. The trial court should have amended the judgment to reflect the stipulation.
Subject to the modification of $50,000 credited to Helmerich & Payne as stipulated by the parties, the judgment is AFFIRMED.
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Rock Island Improvement Co. v. Helmerich & Payne

Notes and Discussion

1. Is there a reclamation clause in most oil and gas leases? Does that distinguish the instant cases from most oil and gas development cases?

2. Under the Peevyhouse decision, why did the court limit recovery?

3. Why did the court allow the cost of repair versus the diminution of market value in this case?
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i. Permanent v. Temporary Damage & Statute of Limitations

McAlister v. Atlantic Richfield Co.
Supreme Court of Kansas
233 Kan. 252; 662 P.2d 1203; 77 Oil & Gas Rep. 241
April 29, 1983, Opinion Filed

This is an action for damages caused by alleged violations of the Oil Well Pollution Act, K.S.A. 55-121. The issues of liability and damages were bifurcated and the matter proceeded on the issue of liability only. Summary judgments were entered for each defendant; from the trial court's ruling this appeal results.

This is an appeal from an order granting summary judgment in case No. 54,357, and a motion to dismiss in case No. 54,358. Both cases arise out of the same factual situation and were filed by plaintiff McAlister, against various oil companies who had conducted or were conducting oil operations on or near plaintiff's land.

McAlister is the owner of three tracts of land in Harvey County, Kansas. Plaintiff purchased a two acre tract of land in 1966 where the old Willis School is located; in 1967 he purchased an additional 80-acre tract adjacent to the Willis School tract; and in 1968 an additional 40 acres adjacent to the Willis School tract was purchased by the plaintiff. McAlister purchased the land to form a new agriculture business and to conduct experiments, knowing the area was situated in an oil-producing area.

When the land was purchased there was an existing fresh water well on the Willis School tract that produced good water. McAlister determined that the existing well did not produce the volume of fresh water to supply his increasing needs. In February of 1970, McAlister had a new well drilled to the depth of 120 feet outside the schoolhouse. In the early part of 1974, McAlister noticed that the water in this well suddenly had developed an "extremely high chloride and salt content" which rendered the water unfit for any use. Plaintiff filed his first action in case No. 54,357.

During discovery, plaintiff determined that additional oil companies may have contributed to the pollution of his fresh water well; therefore, he filed the second action. At a hearing conducted by the district court, the judge sustained the defendants' motion for summary judgment in case No. 54,357 and motion to dismiss in case No. 54,358. Plaintiff has appealed both orders.

August 29, 1975, plaintiff filed his petition against five oil companies, Atlantic Richfield Company, successor to Sinclair Prairie Oil Company (Atlantic Richfield); Mobil Oil Corporation, successor to Magnolia Petroleum Corporation (Mobil); Aladdin Petroleum Corporation (Aladdin); Westrans Petroleum, Inc. (Westrans); J. S. Kantor d/b/a Kantor Oil Company (Kantor); and filed an amended petition on May 24, 1976, adding Southern States Oil Corporation (Southern). For some reason, plaintiff and his attorney had a parting of the way shortly after the petition was filed and

plaintiff proceeded pro se. For the next several years, the parties conducted discovery. During 1981, each of the defendants filed motions for summary judgment which the trial court sustained.

When sustaining each defendant's motion for summary judgment, the trial court found (1) there was no genuine issue as to any material fact and the party was entitled to judgment as a matter of law (K.S.A. 60-256[c]); (2) plaintiff had not established a causal connection to any of the defendants and the claims were based on nothing more than speculation and conjecture; and (3) K.S.A. 55-140 was not appropriate or applicable to the case. Other findings were made by the court in each order of summary judgment but will not be stated in the opinion since they are not material to the finding.

Plaintiff listed witnesses who were local residents that would testify to various salt water or oil tank leaks, leadline leaks, well leaks, tank battery leaks, breaks, surface spills, and various disposal ponds now existing or which had existed in the past and were now covered over. None of the local witnesses could testify which defendant or if any defendants' acts caused pollution to the plaintiff's water well.

Depositions were taken from four expert witnesses listed by the plaintiff. (1) Ralph E. O'Connor, district geologist for the Kansas Department of Health and Environment: Mr. O'Connor had conducted extensive investigation of water wells within a several mile radius of plaintiff's Willis School well.

From the investigation, O'Connor concluded that the salt water pollution was a result of the plaintiff's drilling his water well too deep, thereby penetrating the salt laden waters present in the Permian zone underlying the equus beds. Other wells less than 120 feet in depth in the area produced fresh water. O'Connor also stated chemical analysis of the water from plaintiff's well indicated that the pollution of the well water was oil field derived.

(2) Dr. Ronald L. Wells, a consulting engineer and Director of General Laboratories in Hutchinson, and a graduate engineer from Colorado School of Mines, with training and past experience in engineering, chemistry and physics, and having taken college courses in geology, historical geology, crystallography, and mineralogy, conducted two analyses of plaintiff's well water. Dr. Wells was of the opinion that the contamination of plaintiff's water well was salt water brine from oil field production.

Dr. Wells admitted he had no specific evidence of who contributed to the pollution of the plaintiff's water well. Dr. Wells was of the opinion that, if salt water brine was allowed to escape on the surface of sandy soil over the equus beds, it would percolate down into the equus bed. The escaping salt water brine would generally flow in one direction but also would fan out in several directions in the equus beds, contaminating the beds.

(3) John S. Fryberger, hydrogeologist and Vice President of Engineering Enterprises, Inc., and Richard Lewis, project hydrogeologist, filed a report. Based on tests of plaintiff's well water, they concluded that the salt water pollution in the water was from oil field production.

A field investigation encompassing an area of 25 square miles in the vicinity of the McAlister Willis School well determined the source of pollution of plaintiff's water well. The investigation, using Kansas Corporation Commission records and unpublished data, also involved interviewing local

residents, measuring private wells, determining the configuration of the surface of the equus beds, and using aerial maps to determine the source of pollution of plaintiff's water well. The source of pollution was leachate from unlined ponds, seepage from improperly plugged wells, injection into shallow zones, poor maintenance of brine ponds, and leakage from leadlines and tanks conveying or holding brine water.

Based on the time of operation, size of ponds, and length of salt water pipelines, they concluded the percentage of damage contributed by each defendant. Some of the information contained in the report indicated the defendants' pollution, if any, could not yet affect plaintiff's water well due to the time necessary for the escaping pollutant to travel and affect plaintiff's well water.

(4) Robert Hecht-Nielsen: Hecht-Nielsen has a doctorate degree in mathematics and a bachelor of science degree from Arizona State University. Based on information supplied by the plaintiff, he prepared a report dated October 22, 1979. Using the information supplied, he devised a mathematical formula to determine the percentage of pollution contributed by each of the defendants. He admitted he was not prepared to prove the results of his determination.

Plaintiff brought the action for damages for the pollution of his fresh water well claiming defendants violated K.S.A. 55-121 and that there is evidence that the defendants allowed salt water brine to escape from their oil drilling operations.

Judgment was granted the defendants pursuant to K.S.A. 60-256(c), which provides in part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Emphasis supplied.

A motion for summary judgment may be granted only if the record before the court conclusively shows there remains no genuine issue of a material fact unresolved. Hanks v. Riffe Constr. Co., 232Kan. 800, 658 P.2d 1030 (1983); Motors Insurance Corporation v. Richardson, 220 Kan. 288, 552 P.2d 894 (1976); Brown v. Wichita State University, P.E.C., Inc., 217 Kan. 661, 538 P.2d 713 (1975); Kern v. Miller, 216 Kan. 724, 533 P.2d 1244 (1975); State Bank of Burden v. Augusta State Bank, 207 Kan. 116, 483 P.2d 1068 (1971); Lawrence v. Deemy, 204 Kan. 299, 461 P.2d 770 (1969); Brick v. City of Wichita, 195 Kan. 206, 403 P.2d 964 (1965).

"A summary judgment proceeding is not a trial by affidavits, and the parties must always be afforded a trial when there is a good faith dispute over the facts. . . . "A mere surmise or belief, no matter how reasonably entertained, that a party cannot prevail upon a trial, will not justify refusing him his day in court." Brick v. City of Wichita, 195 Kan. at 211.

"Petitioner next complains that a question of material fact exists which precludes summary judgment. If a question of material fact remains, then to grant [*258] summary judgment is error." Hall v. Twin Caney Watershed Joint Dist. No. 34, 4 Kan. App. 2d 202, 204, 604 P.2d 63 (1979). Emphasis supplied.

The sole fact issue in this case is whether any or all of the defendants allowed salt water brine to seep from their oil field operations into plaintiff's water well. If there is a question remaining as to

whether the seepage into the plaintiff's water well did occur as to a defendant, then, as to that defendant, summary judgment is in error. This action was initiated with plaintiff alleging that defendants violated K.S.A. 55-121.

K.S.A. 55-121, first enacted in 1921, provides in pertinent part:

> "It shall be unlawful for any person, having possession or control of any well drilled, or being drilled for oil or gas, either as contractor, owner, lessee, agent or manager, or in any other capacity, to permit salt water . . . from any such well, to escape by overflow, seepage or otherwise from the vicinity of such well, and it shall be the duty of any such person to keep such salt water . . . confined in tanks, pipe lines or ponds, so as to prevent the escape thereof."

The statute goes on to provide that such escape of salt water does not violate the statute if it is because of circumstances beyond the operator's control or could not have been reasonably anticipated or guarded against; but that issue has not been raised by the defendants, and none of them have presented any evidence by experts or otherwise as to that issue.

If any of the defendants violated K.S.A. 55-121 and caused plaintiff's pollution, they are civilly liable to plaintiff. In Rusch v. Phillips Petroleum Co., 163 Kan. 11, 180 P.2d 270 (1947), the plaintiff, a farmer, sued Phillips, Cities Service, Gulf, and Phil-Han, claiming pollution of his fresh water because of seepage from salt water disposal ponds. The court held, largely on the basis of chemical analysis showing that the salt water polluting plaintiff's water carried defendant's oil-bearing strata, that plaintiff's case should be submitted to the jury on circumstantial evidence. Further, the court held not only is the issue a jury question but that plaintiff need not disprove other oil operations did not cause his pollution.

"The pollution damages, if any, resulted from seepage from appellants' ponds into the substrata of the soil and through such strata into the springs and natural ponds located on appellee's land." 163 Kan. at 14.

The surface drainage in the Rusch case suggested that the water would drain toward plaintiff, but the subsurface contours were not known. There was another party who had not been sued but who had a disposal pond that very well could have caused the pollution complained of by the plaintiff; however, the court held that the case should be submitted to a jury, stating:

"'It may also be noted that appellees were not obliged to exclude every other possible source of pollution after establishing facts from which it reasonably could be inferred that appellants had polluted the stream. The fact that appellants polluted the stream could, of course, be shown by circumstantial evidence. Such evidence in a civil case in order to be sufficient to sustain a verdict need not rise to that degree of certainty which will exclude every reasonable conclusion other than that reached by the jury. . . . [I]t was thereafter not a prerequisite to recovery that it be shown appellants were the sole cause of the pollution.'" 163 Kan. at 16."It is not imperative there should be proof of pollution by chemical analysis . . . ." 163 Kan.. 11, Syl. para. 2.

"G.S. 1935, 55-121, commonly referred to as the oil well pollution statute, does not prohibit merely the flow of salt water, oil or refuse from oil and gas wells over the surface and away from the

immediate vicinity of such wells but, subject to the proviso therein contained, requires such substances to be safely confined, in the manner designated, to prevent their escape." 163 Kan. 11, Syl. para. 4.

The plaintiff in this case need not show negligence, nor need he pinpoint what a particular defendant did or did not do to cause his pollution; this is not an issue. All he need prove is a violation of K.S.A. 55-121. In Polzin v. National Cooperative Refinery Ass'n, 175 Kan. 531, 266 P.2d 293 (1954), a case involving pollution of fresh water caused by escape of salt water from a well in which salt water was forced, the court held that:

> "The evidence disclosed community of wrongdoing and concurrent negligence. In fact the burden did not rest on appellee to prove appellants' negligence. The statute makes it unlawful to permit saltwater, oil or refuse to escape. Appellants' only defense was to prove the escape thereof was beyond their control or that it could not have been reasonably anticipated and guarded against. (G.S. 1949, 55-121.)" 175 Kan. at 536. Emphasis supplied.

All of the summary judgments granted in this case reflect in the journal entry filed March 11, 1982, that they are based upon a finding that plaintiff could not pinpoint what each defendant did wrong. Such a finding is not a proper or material basis for summary judgment in this case. Such a finding and conclusion is immaterial where plaintiff has pled and offered substantive proof of a violation of K.S.A. 55-121 by each of the defendants.

In Reiserer v. Murfin, 183 Kan. 597, 331 P.2d 313 (1958), a case that involved an alleged pollution of plaintiff's fresh water well by salt water seeping through substrata, the court approved the ruling in Rusch v. Phillips Petroleum Co., 163 Kan. 11, holding that whether the defendant caused plaintiff's pollution is a jury question and affirming that negligence of defendant need not be proved.

"Defendant's obligation, or duty, is set out in the statutes above quoted [K.S.A. 55-118, -121] and in a damage action under these statutes negligence does not have to be alleged as an element of the petition. In Martin v. Shell Petroleum Corp., 133 Kan. 124, 299 Pac. 261, this court held that negligence did not have to be proved as an element in a damage action under 55-118. It would therefore be a useless thing to require plaintiff to plead something in his petition that he did not have to prove by his evidence." Reiserer v. Murfin, 183 Kan. at 600. Emphasis supplied.

The case was bifurcated and, therefore, issues as to damages have not and should not now be of concern in the appeal. The only issue is whether there is any controverted evidence as to the defendants' violation of K.S.A. 55-121 by allowing salt water brine to seep into the ground and escape their control and whether the escape of the brine caused plaintiff's pollution.

There is eyewitness and aerial photographic evidence that brine escaped the control of each defendant. There is also evidence that the salt water that escaped polluted plaintiff's well. Dr. Wells was firmly of the opinion that the salt water in plaintiff's well, in August, 1974, tested over 5,000 parts per million sodium chloride, was from the oil field production.

The witness O'Connor related that a sodium chloride ratio below six was indicative of oil field salt water and that plaintiff's water well tested 0.40, which was less than six. Dr. Wells was also of the

opinion that all of the defendants caused plaintiff's pollution. Lewis and Fryberger concluded on the basis of field investigations, interviews with witnesses, and state documents and aerial photographs that each defendant had caused plaintiff's pollution. These facts and the locations of defendants' oil field operations relative to plaintiff's fresh water well require that the matter be submitted to a jury.

The trial court has weighed the testimony of the plaintiff's witnesses and determined their observations were of little value or were pure speculation and conjecture. In considering a motion for summary judgment, a trial court must give to a litigant against whom judgment is sought the benefit of all inferences that may be drawn from the admitted facts under consideration. Bowen v. Westerhaus, 224 Kan. 42, 578 P.2d 1102 (1978). The court erred in granting defendants' motions for summary judgment.

The judgment of the district court in case No. 54,357 is reversed and remanded for a trial of the issues.

During discovery plaintiff determined that two additional oil companies, Marathon Oil Company, Inc., successor to Ohio Oil Company, Inc. (Marathon), and Skelly Oil Company, Inc., now merged into Getty Oil Company (Getty), have contributed to the pollution of his fresh water well. Marathon and Skelly had conducted oil operations in the 1930's and 1940's near the present water well. On May 20, 1981, plaintiff filed a motion to amend his petition in McAlister v. Atlantic Richfield Co., by adding Marathon and Getty. The trial court ruled that the plaintiff could not amend because of the late date, but allowed the plaintiff to file a separate suit. On July 1, 1981, plaintiff filed his claim against Marathon and Getty, stating the same facts alleged in the original case. Getty filed an answer September 8, 1981, and a motion to dismiss on September 15, 1981. Marathon, prior to filing an answer, filed a motion to dismiss on September 8, 1981. Marathon and Getty each claimed that the statute of limitations, K.S.A. 60-515(a), barred plaintiff's action.

December 16, 1981, Marathon's and Getty's motions were heard by the court. The court ruled that more than two years after plaintiff was first damaged (1974), plaintiff filed his petition alleging that the damages were permanent in nature, and therefore plaintiff was barred by the two-year statute of limitations, K.S.A. 60-513(a); that Marathon's and Getty's last act that could have damaged plaintiff occurred more than ten years before plaintiff commenced this action; that assuming plaintiff's claims were true, his claims against Marathon and Getty are barred by the statute of limitations, K.S.A. 60-513(a) and (b).

Plaintiff, on January 8, 1982, filed a motion for a new trial. January 18, 1982, plaintiff filed a motion to amend his petition to claim the oil pollution damages were temporary in nature, therefore not barred by any statute of limitations.

March 11, 1982, the court heard motions in both cases filed by the plaintiff. At the hearing on the motions, all plaintiff's motions were overruled. April 7, 1982, plaintiff filed his notice of appeal [*262] of the overruling of his motions for a new trial, for leave to amend his petition, for consolidation, and the court's order dismissing plaintiff's petition.
No discovery was conducted in this case. All parties to this action were familiar with discovery conducted in the companion case.

Plaintiff contends that his claim should not have been dismissed as barred by the statute of limitations where the action was filed for more than two years after plaintiff was first damaged but where plaintiff claimed temporary repeated damage to his business.

Temporary damages or continuing damages limit recovery for injury that is intermittent and occasional and the cause of the damages remediable, removable, or abatable. Damages are awarded on the theory that the cause of the injury may and will be terminated. Temporary damages are defined as damages to real estate which are recoverable from time to time as they occur from injury. 25 C.J.S., Damages @ 2, p. 626.

Permanent damages are given on the theory that the cause of injury is fixed and that the property will always remain subject to that injury. Permanent damages are damages for the entire injury done -- past, present and prospective -- and generally speaking those which are practically irremediable. 25 C.J.S., Damages @ 2, pp. 622-23. If an injury is permanent in character, all the damages caused thereby, whether past, present, or prospective, must be recovered in a single action.

Plaintiff claims a continuing wrong each time the salt water pollutants trespass onto his subsurface water. Marathon and Getty maintained oil operations that continue to allow salt brine into the equus beds, which brine continues to slowly move onto and under his land, injuring and reinjuring his land and personal business daily.

Plaintiff cites Peterson v. Texas Co., 163 Kan. 671, 186 P.2d 259 (1947), as authority. Peterson filed his first case against defendant in 1942, for damage to fresh water under plaintiff's land, damage to his basement and house foundation and his cattle, abandonment of his pasture, loss of chickens, and loss of egg production. Plaintiff was also compelled to hand carry water. Defendant operated an oil lease and allowed waste water to escape from a pond he maintained. The escaping waste water caused plaintiff's injuries. In 1943 the parties settled the case. Peterson brought a second action in 1945 against the same defendant. Peterson's second action was for damages incurred by defendant's operation of the oil lease which caused damage to the strata lying underneath his property. His well water became polluted causing him to rebuild it; he had to pump water out of his basement; additional damage was done to his farm animals; and additional loss of egg production occurred.

The court determined that each action was separate: (1) escaping surface pollution, and (2) pollution of the strata underneath Peterson's property. The second action was not barred by the statute of limitations or res judicata. In Gowing v. McCandless, 219 Kan. 140, 547 P.2d 338 (1976), an upper landowner brought an action for damages to crops caused by the defendant's obstruction of a watercourse. The obstruction caused occasional flooding of the plaintiff's land. Schroeder, J. (now Chief Justice) stated the Kansas law on temporary damages:

"When this case went to trial the plaintiffs were not seeking to recover permanent damages to their land occasioned by the obstructions placed in the watercourse on the defendants' land. The posture of the case here presented is one in which the plaintiffs seek to recover temporary damages arising from the maintenance of obstructions in the watercourse on the defendants' land (alleged in the petition to be a continuing nuisance), and limit the recovery they seek to damages to their crops, sustained within two years prior to the filing of their petition, and punitive damages.

"Where the injury or wrong is classified by the courts not as original or permanent, but as temporary, transient, recurring, continuing or consequential in nature, it has been held that the limitation period starts to run only when the plaintiffs' land or crops are actually harmed by overflow, and for purposes of the statute of limitations, each injury causes a new cause of action to accrue, at least until the injury becomes permanent. [Citations omitted.] This rule is especially applicable if the situation involves other elements of uncertainty, such as the possibility or likelihood of the alteration or abatement of the causative condition, or uncertainty in regard to the future use or improvement of the land, so as to prevent a reasonably accurate estimate of future damages. [Citation omitted.]

"A number of our cases have permitted relief for damages caused by overflowing waters if brought within two years of the overflowing. [Citations omitted.]

"In the instant case the evidence does not show the cause of the injury to be permanent. In many cases injuries have been classified as temporary or recurring in nature when caused by an abatable nuisance or condition, or by defects which can be repaired or remedied at reasonable expense.

Successive injuries of this nature have been held to give rise to separate and distinct causes of action. [Citation omitted.] "It has frequently been said the principle upon which one is charged as a continuing wrongdoer is that he has a legal right, and is under a legal duty, to terminate the cause of the injury. [Citations omitted.] "Under this rule the owner of land injured by overflows and poor drainage caused by an abatable condition or nuisance has the right to assume the condition or nuisance will be abated.

Here the appellees presented evidence that the obstructions were not 'permanent.' That is to say, the obstructions could be removed from the drainage ditch. In a legal sense these obstructions were not 'permanent' because they were not approved by the state." 219 Kan. at 144-45.

Plaintiff's well has been polluted and undrinkable since 1974. Plaintiff alleges in his amended petition, seeking damages for a temporary injury, that not less than 150 years nor more than 400 years will pass before the well water will be once again fit for drinking. For all practical purposes plaintiff's damage is permanent and capable of being determined.

Correctly determining that plaintiff's action was for permanent damages as alleged in the petition, the court concluded that such claim was barred by the statute of limitations. K.S.A. 60-513(a) states in part:

"(a) The following actions shall be brought within two (2) years:
. . . .
"(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated."

Plaintiff's final contention is that the court erred when plaintiff was denied, by the court, leave to file an amended petition after defendants' motion to dismiss was sustained. Plaintiff filed his petition against Marathon and Getty July 1, 1981, claiming permanent damages. Getty filed its answer September 8, 1981, and a motion to dismiss on September 15, 1981. Marathon filed a motion to dismiss September 8, 1981, and never was required to file an answer because plaintiff's

action was dismissed by the court December 16, 1981, his claim for permanent injury being barred by the two year statute of limitations. K.S.A. 60-513(a). January 18, 1982, plaintiff moved to amend his petition to claim temporary damages, which amendment the trial court denied.

[discussion of procedural rules and cases omitted] . . .

Allowing plaintiff to replead his claim against Marathon could not correct the defects in his claim.

The trial court did not abuse its discretion in refusing to allow plaintiff to amend his petition against Getty or Marathon.

The judgment is affirmed as to Marathon and Getty in case No. 54,358.

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McAlester v. Atlantic Richfield Co.
Notes & Discussion

1. Did the court find that the damage was permanent or temporary in the instant case? Based on what evidence?

2. What impact on the statute of limitations did the distinction between permanent and temporary damages have in this case?

3. In the original petition, for what period of time can the plaintiff recover damages for?

4. What theories or strategies can a plaintiff use to attempt to avoid the statute of limitations in pollution suits?

5. In Fischer v. Atlantic Richfield Co., 774 F. Supp. 616; 116 Oil & Gas Rep. 616 (1989),the court noted that the defendant:

> . . . . also seeks summary judgment on the basis that plaintiffs' claims are barred by the 2 year statute of limitations in 12 O.S. 95(3). Summary judgment on this ground must be denied for several reasons. First, the statute of limitations does not bar an action for temporary pollution of groundwater. [cite] Second, to the extent that ARCO has made unfulfilled promises to plaintiffs to clean up the pollution, it is estopped to plead the statute of limitations as a defense. [cite] Third, the statute of limitations does not run against a public nuisance. 50 O.S. 7 (1981).
>
> Pollution of waters of the state constitutes a public nuisance under Oklahoma law. 82 O.S. 926.2 (1981). Therefore, to the extent that ARCO's activities have polluted state waters, ARCO may not plead the statute of limitations as a defense. Issues of fact are present as to whether ARCO has created a public nuisance.
>
> The parties are in agreement that if the injury to the land is temporary and abatable by clean-up operations, plaintiffs' damages are limited to those occurring within the two years preceding the commencement of this action, i.e., subsequent to October 6, 1985. [cite] In addition, however, plaintiffs are entitled to abatement of a continuing nuisance, regardless

of whether the activity constituting the nuisance began within the 2-year statutory period. [cite] Either a mandatory injunction can issue, requiring the defendant to abate the nuisance, or plaintiff can be awarded the costs of abatement. . . .

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Atlas Chem. Indus. v. Anderson
Supreme Court of Texas
524 S.W.2d 681; 18 Tex. Sup. J. 359; 51 Oil & Gas Rep. 74
April 9, 1975

A jury awarded M. P. Anderson compensatory and exemplary damages for pollution to his land caused by the industrial discharge of Atlas Chemical Industries, Inc. The Court of Civil Appeals reduced the amount of compensatory damages and affirmed. 514 S.W.2d 309. We affirm the reduced award of compensatory damages but reverse and render with respect to the award of exemplary damages.

M. P. Anderson instituted this suit in June of 1968. He initially alleged that Atlas intentionally and continuously polluted Darco, Coldwater and Potter's Creeks causing damages to his land; and that such acts of Atlas were willful and called for an award of exemplary damages. In 1970, Anderson amended his petition to seek damages for pollution occurring within the two years prior to institution of the suit.

At the conclusion of the evidence, the court allowed Anderson a trial amendment seeking recovery on the basis of allegations of negligence.

The principal problem as the case reaches us is the application of the two year Statute of Limitations, Art. 5526, @ 1. n1 In resolving this, as well as the other questions presented in the appeal under established precedents, we do not reach, and express no opinion on, other considerations upon which the Court of Civil Appeals wrote at some length.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n1 The reference is to TEX. REV. CIV. STAT. ANN.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In answers to Special Issues, the jury found that Atlas discharged excessive quantities of polluted effluent into Darco and Potter's Creeks after July 1, 1966; that said discharge was the producing cause of the damage to Anderson's land; that Atlas was negligent in so doing which was proximate cause of the damage; that Atlas failed to provide proper purification equipment or construct settling basins after July 1, 1966, which was negligence and proximate cause; that the damage to Anderson's property was temporary in nature; that sixty acres of Anderson's land had decreased $10,500 in market value; that the restoration cost of the land was $45,000; that the loss of the use of the land between 1964 and 1966 was $1,500, and between 1966 and 1968 was

$2,500; that Atlas acted "willfully" in polluting Anderson's land for which he is entitled to exemplary damages in the amount of $25,000.

The trial court judgment for Anderson was in the sum of $61,375. n2 The Court of Civil Appeals reformed this judgment so as to award Anderson actual damages in the sum of $10,500 and exemplary damages in the sum of $25,000.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n2 The trial court made additional findings in the judgment and reduced the damages as found by the jury.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As indicated, the point of error of major concern urged by Atlas is that the lower court erred in holding that the cause of action asserted by Anderson was not barred by Article 5526 that prescribes a limitations period of two years for the commencement and prosecution of an accrued cause of action for injury done to the property of another. The facts as to this will be briefly stated.

In 1922, Atlas commenced the operation of a plant in Marshall, Texas, for the purpose of manufacturing activated carbon, a purifying agent used extensively in industry. The around-the-clock process consisted of heating lignite, a species of bituminous coal, in rotary kilns and washing it down with a hydrochloric and sulphuric acid solution. The resulting dark washwater of acid, fly ash, carbon and lignite particles was discharged as waste into Darco Creek, a tributary of Coldwater Creek which in turn runs into Potter's Creek. The three streams converge on a tract of 185 acres acquired by Anderson in 1964 by gift from his father, Paul W. Anderson. The resulting deposit of the carbon washwater on sixty acres of the tract represents the damage claim of Anderson.

Since 1961, Atlas has been under the jurisdiction of the Texas Water Quality Control Board and was issued an industrial discharge permit in May 1963, setting out the maximum water pollution allowable.

In conjunction with and as a condition of the 1963 permit, Atlas began a process whereby the acidity of the washwater would be reduced and the suspended solids -- fly ash, carbon and lignite -- would be eliminated. Neutralization of the acid was to be of top priority and to that end calcium hydroxide, lime, was added to the washwater sometime in 1964 or 1965. Although this procedure had a neutralizing effect on the acid content, it blackened the washwater even more and increased the amount of suspended solids. As a result of the failure or inability of Atlas to meet the permit requirements, Atlas and the Texas Water Quality Board had several meetings in 1966 and 1967 that resulted in an increase in efforts to reduce the acidic content of the effluent. This had not been entirely successful by the time of trial in 1970.

Prior to submission of the case to the jury, and over the objection of Atlas, Anderson was permitted to file a trial amendment alleging negligence and recovery on the basis of these allegations was embodied in the issues submitted to the jury. We overrule the contention of Atlas that the trial court abused its discretion in allowing the trial amendment. There was substantial testimony offered without objection pertaining to the duty of Atlas to minimize the pollution in the washwater and its failure to do so. Further, Atlas offered detailed testimony concerning the complexities involved in purifying the effluent, the difficulty of the problems with which it was

confronted, together with its diligence in seeking a solution. In our view, Atlas was not prejudiced in maintaining its defense upon the merits of the case by the action of the trial court in allowing the trial amendment. Cf. Moulton v. Alamo Ambulance Service, Inc., 414 S.W.2d 444 (Tex. 1967). Texas Employers' Ins. Ass'n. v. Dillingham, 262 S.W.2d 748 (Tex. Civ. App. 1953, writ ref'd, n.r.e.) cited by Atlas is not in point; there the party asserting prejudice had objected during trial to the evidence in question as without basis in the pleadings.

So we reach the question of whether Anderson's asserted cause of action in negligence was barred by the two year Statute of Limitations, and this is determined by whether the injury for which he sought damages was permanent or temporary.

The question of the temporary or permanent character of injury to land was initially conceived as an aspect of damages. At common law, a plaintiff suing for a continuing invasion of his land could recover for only those damages accrued by the time of trial. Uline v. New York Cent. & H. R.R. Co., 101 N.Y. 98, 4 N.E. 536 (1886). To relieve the burden placed upon an aggrieved landowner to bring successive suits, the courts developed the concept of permanent injury to permit the recovery of past and future damages. Town of Troy v. Cheshire R. Co., 23 N.H. 83, 55 Am. Dec. 177 (1851); McCormick on Damages @ 127, at 505.

Coactive with the advantage of a future damage award was the disadvantage of bringing the action within the limitation period as measured from the first injury; i.e., the cause of action accrued for limitations purposes at the time of the first actionable injury. As Professor McCormick stated, "the plaintiff, who ought certainly to be given a continuing possibility of redress against a continuing wrong, finds himself blocked by a plea of limitations based on the claim that the only cause of action arose when the nuisance was first established." McCormick on Damages, @ 127, at 513. See Prosser, Handbook on the Law of Torts, @ 13 at 75 (4th Ed. 1971). Missouri-Pacific Ry. Co. v. Davis, 186 Ark. 401, 53 S.W.2d 851 (1932); Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921); McDaniel v. City of Cherryvale, 91 Kan. 40, 136 P. 899 (1913); 21 Ill.L.Rev. 629 (1927); 27 Ill.L.Rev. 953 (1933); 21 Minn.L.Rev. 334 (1936).

In Texas, it is settled that an action for permanent damages to land accrues for limitations purposes upon the first actionable injury. Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954); City of Athens v. Evans, 63 S.W.2d 379 (Tex. Comm. App. 1933, holding approved). Permanent damages result from an activity which is "of such a character and existing under such circumstances that it will be presumed to continue indefinitely"; "the injury must be constant and continuous, not occasional, intermittent or recurrent." 58 AM. JUR. 2d, Nuisance @ 117 at 683.

In Tennessee Gas Transmission Co. v. Fromme, supra, we held that the damage resulting from a continuous flow of polluted water on the plaintiff's land for four years was permanent, as a matter of law, and that the cause of action for damages therefrom arose at its beginning. Likewise, in Vann v. Bowie Sewerage Co., 127 Tex. 97, 90 S.W.2d 561 (1936), the court stated the facts as showing conclusively that water in a polluted condition had been continually discharged since a septic tank had been placed in operation many years before; that the polluted water had found its way upon the land in question; and that the damage caused thereby was permanent.

Temporary damages, however, have been found where the injury is not continuous but is sporadic and contingent upon some irregular force such as rain, Baker v. City of Fort Worth, 146 Tex. 600,

210 S.W.2d 564 (1948); Austin & N.W. Ry. Co. v. Anderson, 79 Tex. 427, 15 S.W. 484 (1891), and wind, Youngblood's Inc. v. Goebel, 404 S.W.2d 617 (Tex. Civ. App. 1966, writ ref'd, n.r.e.). An explication of the type of circumstance that gives rise to a finding of temporary damage, and the result of such a finding on the limitations defense, was written in Austin & N.W. Ry. Co. v. Anderson, supra:

. . . We conclude from the authorities that, where a nuisance is permanent and continuing, the damages resulting from it should all be estimated in one suit, but where it is not permanent, but depends on accidents and contingencies so that it is of a transient character, successive actions may be brought for injury as it occurs; and that an action for such injury would not be barred by the statute of limitations, unless the full period of the statute had run against the special injury before suit. (Emphasis added.)

Accordingly, limitations commences in such instances at the time the special injury became actionable.

In the case at bar, the jury found that Atlas discharged excessive quantities of polluted effluent into the creek waters after 1966, and that the property damage in question was temporary in nature. Atlas attacks these findings as without any support in the evidence; it urges that there has been continuous pollution and consequent damage to Anderson's land from the inception of plant operations in 1922; that the damage was permanent, as a matter of law; and that the cause of action arose at the first injury long years ago. Atlas cites as in point Tennessee Gas Transmission Co. v. Fromme, supra, in which it
was stated:

A careful reading of respondent's pleadings and the evidence introduced in the case conclusively reveals that respondent's legal rights were invaded the moment water from the petitioner's plant began to flow upon her land. Water was wrongfully discharged from petitioner's plant onto respondent's land as early as February, 1948, and continuously flowed thereon until it was diverted by acts of petitioner some time in September, 1950. Respondent's cause of action accrued at the time petitioner began wrongfully discharging the water on the land, and not on the date when the extent of the damages to the land were fully ascertainable.

In invoking the Fromme rationale, Atlas argues that the only change in the discharge in the recent past occurred when lime was added to the effluent to neutralize the acid in 1964 and that even if this change could be the basis of a new cause of action, it arose four years prior to the suit and is barred.

We disagree and hold there was evidence to support the findings of temporary damage. Paul Anderson, M. P. Anderson's [*686] father, testified in effect that prior to 1967 damage to the sixty acres in question had not been constant and that at the most only a four-acre area around the creek could be said to have been continuously affected by the polluted effluent. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n3 Q. For purposes of the record, it is difficult to introduce this as an exhibit, can you describe the color of it?
A. I'd say it's coal black, such as lignite or coal.
Q. Is it a solid?

A. This is a solid.
Q. And, over what portion of your meadowland did this material cover or is it found?
A. The entire sixty acres was covered to some degree, but it is in varying degrees, it's not ten inches all over it, and it's not one inch all over it, but it is found in sufficient quantities to restrict and in some areas prohibit the growth of grass.
Q. Now, did that condition exist to any appreciable degree on this sixty-acre tract prior to 1967?
A. Only as I before stated on about four acres.
Q. Was there some of that on the four acres?
A. Not very much.
. . .
Q. All right, Now what do you see in there with reference to the damage to the land?
A. I see this black carbonaceous, lignite, Darco, whatever it is. Q. Did that condition exist on that land prior to 1966?
A. No. It was in the stream, the creek, but not on the land.
- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

We recognize that this and the other evidence is not very satisfactory with respect to the times and nature of unusual flooding conditions; but viewing the evidence as a whole, it can be said that the flooding from a normal rain would not overflow and cover the sixty acres in question, whereas a three or four inch rainfall would; that the winter rains are generally the cause of the flooding; that the creeks did overflow and cover the sixty acres in 1968, as they had at times in the past; that an abnormally dense accumulation of the black lignite sediment, at some points ten inches in depth, occurred in the winter of 1967 and 1968, prior to which time the damage was principally to the creek and creekbed; and that the damaging deposits were greater and different from prior years.

In addition, testimony was elicited from Mr. Van Reenan and Mr. Briggs, the plant managers at Atlas for the relevant time periods, that Atlas began using lime to neutralize the acid in 1964 and 1965; that the lime increased the solid content of the effluent; and that in 1966 they intensified their neutralization in order to bring the acidic content of the effluent under control. Mr. Wittington, acting director of Field Operations Division of the Texas Water Quality Board testified that the maximum amount of suspended solids as set by the Board was 30 parts per million, that in August 1966, tests showed the effluent had 8410 parts per million, that in March of 1968, there were 1445 parts per million and that in September 1969, there were 449 parts per million.

These are circumstances that call for application of the rule stated by this Court in Rosenthal v. Taylor, 79 Tex. 325, 15 S.W. 268 (1891), under which it is doubtful, at the least, that Anderson could have recovered for his whole and future damage had he sought to do so. This Court there said:

. . . The controlling rule in actions for injuries resulting from similar nuisances would seem to be to adopt in each case that measure of damages which is calculated to ascertain in the most certain and satisfactory manner the compensation to which the plaintiff is entitled. When the injury is liable to occur only at long intervals, or when the nuisance is likely to be removed by any agency, the damages which have accrued only up to the time of the action will be allowed; but if the nuisance is permanent, and the injury constantly and regularly recurs, then the whole damage may be recovered at once.

This crucial element of permanence and continuity in the classification of damages for which a cause of action arises at inception, see also Austin & N.W. Ry. Co. v. Anderson, supra, distinguishes Fromme, supra, where it was expressly stated that the cause of the injury there, i.e., the water discharge from the plant, "continuously flowed" onto the land in question.

The trial court awarded Anderson total damages, actual and exemplary, in the sum of $61,375 for the period of two years prior to the filing of suit. The Court of Civil Appeals reformed this judgment so as to reduce the award of actual damages to the sum of $10,500. The actual damage award of $10,500 was held to represent the correct measure in the case, i.e., the diminution in the fair market value of the land found by the jury to be $175 per acre for sixty acres. The jury found the value of the sixty acres before July 1, 1966 to be $225 per acre and that its value was $50 per acre on or about December 1, 1969.

Atlas does not here attack the measure of the actual damages as improper; its point of error is that there is no evidence of probative force to establish the value of the damaged land at $225 per acre immediately before July 1, 1966. It is argued as to this that the appraisal witness presented by Anderson testified that the highest value of the entire tract, of which the sixty acres is a part, was $200 per acre. However, there was appraisal evidence that the sixty acres claimed to be specially damaged by the deposits left after intermittent flooding was more valuable as bottom land and had a value of from $250 to $300 an acre in an undamaged condition.

The jury finding in question related to this sixty acres and, as previously indicated, the testimony of Anderson, Sr., was that the pre-1966 pollution was "in the stream, the creek, but not on the land." There was factual basis for the jury finding in question that the sixty acres found by the jury to have been damaged by deposits of lignite and waste after July 1, 1966 had a cash market value of $225 prior to such time.

We agree with Atlas, however, in its points of error attacking the award of exemplary damages in the sum of $25,000 that was affirmed by the Court of Civil Appeals. The jury was asked to find if Atlas acted willfully toward Anderson by the pollution of the creek waters subsequent to July 1, 1966. The jury was instructed that the fact that an act is unlawful is not of itself ground for an award of exemplary damages, but it must be of a willful nature; and that by the term "willfully" is meant the intentional and purposeful disregard of the known rights of another.

Negligence or the want of ordinary care will not expose the actor to exemplary damages. Bennett v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943); Missouri Pac. Ry. Co. v. Shuford, 72 Tex. 165, 10 S.W. 408 (1888). Nor does a mere unlawful act suffice. Ogle v. Craig, 464 S.W.2d 95 (Tex. 1971); Dennis v. Dial Finance & Thrift Co., 401 S.W.2d 803 (Tex. 1966); Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962); Jones v. Ross, 141 Tex. 415, 173 S.W.2d 1022 (1943). Instead, it is settled that there must be a showing of "gross negligence" in order to obtain exemplary damages in a negligence case. Sheffield [*688] Division, Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964).

Gross negligence as defined in Shuford, supra, has been frequently cited:

Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. (Emphasis added.)

We will assume, without approving, that the definition of "willfully" in the charge to the jury as an intentional and purposeful disregard of the known rights of others comports in effect with the gross negligence requirement of Shuford, supra, that Atlas acted with such an entire want of care as to constitute a conscious indifference to the rights of Anderson. We agree with Atlas, however, that there is no support in the evidence for the findings of the jury to such effect.

The activities of Atlas were of course intentional as a part of its manufacture of industrial carbon. But there were efforts on its part to reduce the harmful quality of the effluents by accepted control devices, and to reduce and eventually eliminate the suspended solids. Atlas was under the jurisdiction of the Texas Water Quality Control Board during the period in question and had altered its procedures to neutralize the harmful acid as required under its permit.

As before stated, it was also shown that from August 1966 until September 1969, Atlas had reduced the amount of suspended solids from 8410 parts per million to 449 parts per million. The fact that Atlas was not immediately successful in eliminating the harmful elements in the washwater, or that it could have done more than it did under the circumstances, does not constitute gross negligence as required for the assessment of punitive damages.

The judgment of the Court of Civil Appeals reforming the judgment of the trial court so as to award M. P. Anderson the sum of $10,500 for actual damages is affirmed; but its judgment awarding Anderson the further sum of $25,000 for exemplary damages is reversed and judgment is here rendered that Anderson take nothing as to this. Costs will be assessed one-half to each of the parties.

ON MOTION FOR REHEARING
PER CURIAM, June 4, 1975.

On rehearing and reconsideration of the record, we have determined that there is evidence to support the jury finding of willful, i.e. intentional and purposeful, disregard of the rights of others and to support the award of exemplary damages.

Atlas, through its responsible agents, knew that the plant was discharging large quantities of black sediment into Potter's Creek. It chose to operate the plant and continue that discharge.

At some point and under all the circumstances, the failure to make any correction to save downstream property owners from damage finally warrants a decision by the trier of fact that the managerial decision for this operation was made wholly without regard, and with conscious indifference, to the rights of the property owners.

In 1963 Atlas obtained a permit from the Texas Water Quality Board to discharge waste. The Board held a hearing in August of 1966 to consider the failure of Atlas to comply with the limits of suspended solids allowable in its permit. In January of 1967 the permit was amended and Atlas was given one year in which to comply with the Board's requirements. When this case was tried in [*689] 1970 Board requirements had never been met. Instead, there is evidence that the discharge of black lignite sediment was greater in 1967 and 1968 than at any time.

In 1968 an Atlas engineer reported to the Board on operations and plans with regard to permit compliance, and the Director of Central Operations for the Board wrote a letter in response which included this paragraph:

We appreciate the fact that you have difficult problems to solve. However, we note from past reports that these problems were recognized in 1958 and by 1960, designs were being drawn up and submitted with similar reports. Over this period of years (1960-1968) there have been no apparent additional facilities for waste treatment at the Marshall plant. We are concerned that the results obtained to date are not commensurate with the eminence of your research staff.

Another hearing was held by the Board on this matter in November of 1969, at which time the Board Chairman told the Atlas people: "We don't want any more shilly-shallying."

Conceivably the pollution of Potter's Creek could have continued despite efforts to correct it which, though not meeting the standard of reasonableness, would have demonstrated that Atlas acted with at least some concern for the consequences to downstream property owners. If efforts were made, this record is silent about them. For years Atlas was in violation of its state permit and doing harm to the public waters and the property of others. Atlas shows no explanation or justification and apparently did nothing of any significance to meet the problem. The jury was entitled to conclude that Atlas made the business decision to continue the discharge of its waste and did so with conscious indifference to the rights of others. Therefore we have a proper basis for an award to this plaintiff of exemplary damages.

The motion for rehearing of M. P. Anderson is granted; the motion for rehearing of Atlas Chemical Industries, Inc. is overruled. The judgment of this Court of April 9, 1975, is set aside.

The judgment of the Court of Civil Appeals is affirmed.
Associate Justices Steakley and Denton, note their dissent.

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Atlas Chemical Industries, Inc. v. Anderson
Notes & Discussion

1. The defendant in this case discharged pollutants into a creek since 1922. How did the plaintiff avoid summary judgment under the statute of limitations argument?

2. What is the general rule with regard to the measure of damages when the damage is temporary? What is the measure of damages in this case?

3. How did the temporary/permanent distinction evolve at common law according to the court?

4. What degree of negligence must be shown to collect punitive damages? Since what is considered acceptable behavior towards the environment has changed over the decades could a situation occur where a company is held to current norms for events that occurred decades ago?

5. Do you think the potential for punitive damages would be an incentive for the defendant to settle environmental claims before trial?

ii. Continuing nuisance

MILLER v. CUDAHY COMPANY, a Delaware Corporation, and General Host Corporation
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
567 F. Supp. 892; 19 ERC (BNA) 1667
June 21, 1983

THEIS, Senior District Judge.
This saltwater pollution case, which has been bogged down in an extraordinarily contentious discovery phase for nearly six years, is currently before the Court on the plaintiffs' motion for review of an order filed in this case by United States Magistrate John B. Wooley, and on the defendants' motion for partial summary judgment. These two motions, fairly routine in other cases, have been pending for some time because of the avalanche of paperwork accompanying them.

The corpulent documents pertinent to these motions comprise nearly four hundred and fifty pages, and are accompanied by three unpaginated bound volumes of appendices numbering over one hundred.

Giving these documents, and the arguments made in them, the consideration to which they are due has been a time-consuming adventure for the Court, and has generated an Opinion substantially longer than the ideal. The task has nevertheless been completed, and, for the reasons that follow, the Court must deny both the plaintiffs' motion and the majority of the defendants' motion.

A. Brief Factual Background

The very numerous plaintiffs in the present lawsuit are owners and lessees of realty in Rice County, Kansas. To the northwest of this realty is the manufacturing plant of the American Salt Company [American Salt]. American Salt is a division of the defendant Cudahy Company [Cudahy], a Delaware corporation with its principal place of business in Arizona. Cudahy is, in turn, a wholly-owned subsidiary of the defendant General Host Corporation, a New York corporation with its principal place of business in Connecticut. For convenience, the defendants will hereafter be collectively referred to as American Salt. American Salt is engaged in the business of producing salt and salt products, and this business has been carried on continuously at American Salt's present location since 1908.

The natural salt formation exploited by American Salt lies approximately 725 feet below the ground surface in a stratum 280 feet thick. Two methods are used to bring this salt to the surface. The first method utilizes a shaft mine and involves physically removing solid salt to the surface. The second method utilizes a matrix of brine wells and involves dissolving the salt in injected high pressure water, retrieving the saturated liquid brine at the surface, and evaporating the brine to leave solid salt. This latter method is called solution mining and is the only one pertinent to the issues in this lawsuit.

The water required by the solution mining process is obtained by American Salt from a natural aquifer that underlies the area at a depth of thirty to sixty feet. The aquifer flows in a southeasterly direction, and consequently passes under the lands owned or leased by the plaintiffs after it has

passed under the lands occupied by American Salt and its solution mining field. As the existence of this lawsuit suggests, the aquifer has become heavily polluted with salt and can be used neither for irrigation nor for domestic purposes over a large area southeast of American Salt's plant. Salt concentrations approaching 30,000 parts per million [p.p.m.] have been recorded in water drawn from this aquifer. The gravity of these concentrations can best be appreciated when it is realized that concentrations as low as 250 p.p.m. are sufficient to make water taste salty and to render it unfit for domestic use. Saturated brine, that is, water holding in solution the maximum amount of salt possible, has a salt concentration of approximately 165,000 p.p.m.

The contentions of the parties are outlined in the Pre-Trial Order, Dk. No. 309, which was filed on March 9, 1982 and supercedes the pleadings in the case pursuant to Rule 16 of the Federal Rules of Civil Procedure. The plaintiffs essentially lay the blame for the saltwater pollution of the aquifer on American Salt, allege "that the defendants' actions constitute a continuing nuisance, trespass, and damages," Pre Trial Order at 4, and demand a variety of relief, including per-acre damages, an injunction, and punitive damages. American Salt denies all liability in a complex and many-faceted argument that will be explicated shortly.

B. Motion To Review

On May 19, 1982 the plaintiffs moved to supplement their pleadings pursuant to Rule 15(d) of the Federal Rules of Civil Procedure. In connection with this motion, the plaintiffs designated a new expert witness, Curtis Miller. On June 1, 1982, American Salt moved to strike Miller and two other expert witnesses from the plaintiffs' designation of experts. Magistrate Wooley, in a seven-page opinion filed October 20, 1982, construed the plaintiffs' motion as a motion to amend pursuant to Rule 15(a) and, as such, overruled it. The Magistrate also granted American Salt's motion to strike expert Miller, but overruled its motion to strike the other two experts. The plaintiffs have appealed the Magistrate's order to this Court, the eighth time that such n appeal has been perfected during the discovery in this case.

The plaintiffs sought to supplement their pleadings pursuant to Rule 15(d) with allegations that the salt dissolved in the aquifer is rising to the surface by capillary action and threatening to turn the entire area into a desert devoid of all plant life. Magistrate Wooley concluded "that if such capillary action exists at all, it has been occurring for a long period of time prior to the filing of this motion," thus rendering Rule 15(d) inapplicable and transforming the motion into one for an amendment under Rule 15(a).

In determining whether justice required the amendment, Magistrate Wooley considered the feasibility of a separate suit on the capillary action theory, the motive of the plaintiffs in waiting until such a late date to assert the claim, and the glacial pace of the discovery completed up to that time.

The Magistrate concluded that a separate suit was feasible, that there was a "distinct probability of improper motives on the part of the plaintiffs," that additional delay of up to two years in the trial of this matter could result, and that allowing the amendment would grant an "undeserved tactical advantage to the plaintiffs" in regard to American Salt's motion for partial summary judgment that is dealt with in the next section of this Opinion. For these reasons, Magistrate Wooley overruled the motion. Finally, because the amendment was not permitted, American Salt's motion to strike

expert Miller, whose testimony would have concerned only the capillary action theory, was granted.

It is well-established that the orders of a United States Magistrate must stand unless they are clearly erroneous or contrary to law, 28 U.S.C. @ 636(b)(1)(A); Devore & Sons, Inc. v. Aurora Pacific Cattle Co., 560 F. Supp. 236, 239 (D.Kan.1983). Although this Court would have approached these motions from a different conceptual basis had they been presented here in the first instance, the Court is unable to conclude that the result reached by the Magistrate is either clearly erroneous or contrary to law. The disputed order must, therefore, be sustained.

The short answer to the plaintiffs' motion to amend is that it is fatally defective [*896] in failing to allege any damage resulting from the capillary action. Had the salt actually arrived on the surface and killed the vegetation, a far different case would be presented -- and if the salt actually arrives on the surface at some future time, the Court has no doubt that a different case will be presented by the individuals damaged by such an arrival. At this point in time, however, justice simply does not require this Court to grant leave to the plaintiffs to amend their complaint in a way that alleges no damage and can lead to no recovery. When and if damage occurs, justice can be served by a separate lawsuit seeking recovery for that damage. Collateral estoppel and res judicata will not impede such a suit, as both Magistrate Wooley and this Court have concluded that the capillary action theory cannot be raised in this proceeding. The plaintiffs' motion to review the Magistrate's order is, therefore, overruled.

C. Motion for Partial Summary Judgment

1. American Salt's Argument

American Salt provides an analytical framework for its motion for partial summary judgment by dividing the plaintiffs into four distinct classes, as follows:

> (a) Plaintiffs who "have sued for damages to property where there is no evidence of any significant pollution to the groundwater and, in some cases, where the groundwater does not even exist in sufficient quantity to support irrigation."
>
> (b) Plaintiffs who "have sued for damages to property [that] admittedly lies outside the area of possible influence of the American Salt Company."
>
> (c) Plaintiffs who "have sued for damages to property [that] they purchased with the knowledge or on the assumption that the groundwater was already polluted with chlorides.
>
> (d) "All of those plaintiffs (or their predecessors in title) who do not fall into one or more of the three categories listed above knew or assumed or could have easily discovered that their groundwater was polluted with chlorides and believed that American Salt was responsible for such pollution more than two years before the date (May 31, 1977) this suit was filed."

Dk. No. 335, at 1. Because this analytical framework appears adequate to deal with the issues raised by American Salt's motion for partial summary judgment, it will generally be used as the organizational framework for this section of this Opinion as well.

2. Preliminary Geography

American Salt's manufacturing plant is located approximately one-half mile southeast of Lyons, Kansas and approximately four miles northwest of Saxman, Kansas. Two miles south of Lyons is Cow Creek, a minor tributary of the Arkansas River, which runs in a generally southeasterly direction. Cow Creek is located above the Cow Creek Valley Aquifer, which is the subject aquifer of this lawsuit and also runs in a southeasterly direction.

American Salt has provided the Court with two handsome multicolor maps, each approximately two by three feet in size and marked as exhibits A and 3, as well as numerous smaller geological maps incorporated into its so-called brief. Exhibit A shows the location of the lands owned or leased by each plaintiff, the boundaries of the Cow Creek Valley Aquifer, and the location of American Salt's properties, and is color coded to correspond to the four categories of plaintiffs established as American Salt's analytical framework. Exhibit 3 shows the extent, location, and severity of the salt pollution of the aquifer. The small illustration maps provide various other details. Reference to these maps has been extremely helpful to the Court, but, as might be expected, their impact is somewhat lessened when the information they contain is translated into words.

An examination of these documents shows that the area of the Cow Creek Valley Aquifer that could possibly be affected by American Salt's operations is somewhat limited. The geological makeup of the area apparently causes Cow Creek to operate as a southern boundary for the spread of groundwater contamination emanating from the location of American Salt's plant. Another natural boundary line exists between one and a half to three miles northeast of Cow Creek, running southeast and essentially paralleling Cow Creek. This northern boundary separates the Cow Creek Valley Aquifer, which contains a large quantity of groundwater, from the Upland Loess Area, which contains a much smaller quantity of groundwater. The area described by these two boundaries is a corridor between one and two miles wide in which most of the plaintiffs' property and most of the saltwater pollution can be found.

3. No Significant Pollution or Insufficient Groundwater

This category comprises ten groups of plaintiffs whose properties are situated either partially to the north of the north boundary of the Cow Creek Valley Aquifer or partially or wholly to the south of Cow Creek. Some parts of these properties therefore lie outside the aquifer and the area of salt pollution. American Salt claims that "it is unnecessary to cite any authority in support of the proposition that plaintiffs who have suffered no measurable harm to their groundwater cannot recover damages in this action," Dk. No. 337 at 150. Although the Court is inclined to agree concerning those properties completely outside the aquifer, the argument is specious as applied to those properties that overlie the aquifer even slightly. Any access to the aquifer would allow a well to be drilled, bringing the benefits of domestic and irrigation water to the whole tract, regardless of whether the entire tract overlies the aquifer.

Because American Salt has failed to carry its burden of proving beyond a reasonable doubt that it is entitled to summary judgment through a demonstration that no triable issue of material fact exists as to those properties partially overlying the aquifer, Cayce v. Carter Oil Co., 618 F.2d 669, 672 (10th Cir.1980); Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir.1978), its motion

for partial summary judgment as to those tracts in category (a) and more precisely detailed on page 2 of Dk. No. 335 must be overruled except for the following tracts that are completely outside the boundaries of the aquifer:

Owner Tract

Wilmor H. Oden 400 acres in Sections 1 & 2, Township 21 South, Range 8 West of the 6th Principal Meridian.

Edris Edwards 160 acres in Section 26, Township 20 South, Range 8 West of the 6th Principal Meridian.

Joleen Ottlinger 80 acres in Section 31, Township 20 South, Range 7 West of the 6th Principal Meridian.

Because the property described above belonging to Joleen Ottlinger is the only property belonging to that person involved in this lawsuit, complete summary judgment against Joleen Ottlinger must be entered.

4. Outside the Influence of American Salt

This category comprises seven groups of plaintiffs whose properties are located southeast of Saxman, Kansas. The contentions of the parties show no parallelism with regard to these tracts.

American Salt appears to claim that an adjacent oil field "which has been in existence for many years and which would be a contributing (if not the original and exclusive) source of any chlorides found in the groundwater in the area" makes proof of causation impossible, Dk. No. 337 at 151.

The plaintiffs, on the other hand, appear to be arguing that the leading edge of the heavily polluted groundwater, which moves as the water in the aquifer flows southeasterly at the rate of approximately five feet per day, has not yet reached these properties but is certain to do so in the near future. The plaintiffs thus argue that these landowners "may reduce their future claims for permanent injury [*898] to a present claim for monetary damages," Dk. No. 351, Vol. 1, at 41.

Part of the difficulty with these properties is traceable to the unwillingness of the plaintiffs' expert witnesses to opine about the source of the salt pollution, if any, currently present in the aquifer in this locale. This unwillingness has resulted in a bizarre straight-line cut-off at the southeastern corner of Exhibit 3, which is the map showing the location and severity of the salt pollution of the aquifer. The Court is, therefore, left with no evidence tending even to suggest that pollution placed in the aquifer by American Salt has reached these properties.

The situation is the same as that discussed in section B of this Opinion concerning the capillary action theory: this land may be damaged in the future, but apparently is undamaged now. Because the plaintiffs have failed to present any evidence of presently existing injury, American Salt is entitled to summary judgment as a matter of law because no triable issue of material fact exists, Ando v. Great Western Sugar Co., 475 F.2d 531, 535 (10th Cir.1973); American Empire Ins. Co. v. Nugent, No. 77-1466 (10th Cir., unpub., Jan. 22, 1979), as to the following tracts:

Owner Tract

Robert A. Johannsen Southeast Quarter of Section 29, Township 20 South, Range 7 West of the 6th Principal Meridian.

Harry Zwick West Half of Section 33, Township 20 South, Range 7 West of the 6th Principal Meridian.

Gary Zwick Southeast Quarter of Section 32, Township 20 South, Range 7 West of the 6th Principal Meridian.

Harvey Willhaus 320 acres in Sections 4 & 5, Township 21 South, Range 7 West of the 6th Principal Meridian; 160 acres in the Northwest Quarter of Section 28, Township 20 South, Range 7 West of the 6th Principal Meridian.

Lester Cole 180 acres in Section 4, Township 21 South, Range 7 West of the 6th Principal Meridian, and in Sections 33 & 34, Township 20 South, Range 7 West of the 6th Principal Meridian.

Wilmor Oden Two lots in the Southeast Quarter of Section 2, Township 21 South, Range 7 West of the 6th Principal Meridian.

Jay Brothers 10 acres in the Northwest Quarter of the Southwest Quarter of Section 29, Township 20 South, Range 7 West of the 6th Principal Meridian; Lots in Saxman, Kansas.

Because all of the property involved in this lawsuit belonging to Robert Johannsen, Gary Zwick, Harvey Willhaus, and Lester Colle is included in the preceding list, complete summary judgment against those individuals and in favor of American Salt must be entered. This entry of summary judgment is, of course, without prejudice to the right of these individuals to file new lawsuits unencumbered by the doctrines of res judicata and collateral estoppel when, if ever, the leading edge of the pollution in the aquifer crosses their property lines.

5. Property Purchased With Knowledge of Pollution

This category comprises six groups of plaintiffs whose properties are located deep within the area of the most severe salt pollution of the aquifer. American Salt relies on two parallel arguments to assert its entitlement to partial summary judgment. First, American Salt argues that these plaintiffs purchased their land with the knowledge that the groundwater was polluted, that the plaintiffs therefore paid a dry land price for the properties, and that the plaintiffs therefore have not been injured by the pollution.

Alternatively, American Salt cites the cases of Roberts v. Pacific Northern Railroad Co., 158 U.S. 1, 15 S. Ct. 756, 39 L. Ed. 873 (1895) and Taylor Investment Co. v. Kansas City Power & Light Co., 182 Kan. 511, 322 P.2d 817 (1958) for the proposition that these plaintiffs must suffer an adverse summary judgment because of their failure, at this stage in the litigation, to affirmatively prove that their grantors and predecessors in title specifically assigned a chose in action against

American Salt for the aquifer pollution in the deeds to the properties. Neither of these arguments is persuasive.

As for the transactions allegedly completed at a dry land price, the plaintiffs correctly point out that the polluted condition of the aquifer is hardly the only possible reason for the transactions to be made at that price. For example, a dry land price may have been paid because the state of irrigation technology extant at the time of the transaction was simply inadequate to take advantage of any water under the property, whether polluted or not, or because the topography of the particular parcel rendered it unsuitable for extant irrigation techniques. If the state of irrigation technology has now improved to the point where the salt pollution is the only factor depressing the land values to dry land price, then these plaintiffs have suffered a compensable injury because of the pollution.

This area of contention is, furthermore, rife with material factual disputes, such as the prices actually paid for the land, the prevailing dry land price at the time of the transactions, the exploitability of the groundwater resources at various times, and the knowledge and assumptions of the grantors and grantees.

The alternative case law argument founders on legal grounds. Even ignoring the easy distinguishability of Roberts and Taylor, which both dealt with open, visible, and notorious surface infringements on the right to quiet possession, American Salt has failed to carry its burden of proof because of its erroneous conception of where that burden lies. Although American Salt's statement that the "plaintiffs have the burden of establishing their right to sue by virtue of assignments of choses of action in their deeds," Dk. No. 356 at 17, may be correct in the context of a trial, it is clearly erroneous in the context of a summary judgment motion.

The burden is on American Salt to prove every element of its entitlement to summary judgment beyond a reasonable doubt, and all inferences must be indulged in favor of the plaintiffs who oppose the motion, Madison, supra; Frey v. Frankel, 361 F.2d 437, 442 (10th Cir.1966). Because American Salt has failed to carry this burden, its motion for partial summary judgment as to those plaintiffs in category (c) and their properties, as more precisely detailed on page 5 of Dk. No. 335, must be overruled.

6. Plaintiffs Barred by the Two-Year Statute of Limitations

This catch-all category comprises twelve groups of plaintiffs whose properties, like those in the preceding subsection, lie within the zone of the most acutely polluted groundwater. American Salt advances a tripartite argument to support its motion for partial summary judgment against this final category of plaintiffs: (a) the damage to the aquifer wrought by the immense quantity of salt dissolved in it is permanent damage; (b) the plaintiffs in this category knew of the permanent damage more than two years before this suit was filed; and (c) the plaintiffs are therefore barred by the two-year statute of limitations found in K.S.A. @ 60-513. The Court has completed a very substantial amount of its own research on this subject to supplement the arguments and analysis provided by the parties, and believes that each part of this tripartite argument deserves individual discussion.

a. Salt Damage to the Aquifer as Permanent Damage

A foray into the Kansas case law to determine the significance and validity of this assertion has revealed a rather muddled state of affairs. The Kansas Supreme Court itself, in the case of McComb v. Stanolind Oil and Gas Co., 164 Kan. 1, 186 P.2d 574 (1947), has candidly admitted that "there seems to be some contrariety in the decisions" dealing with when a cause of action for damages to realty accrues, id. at 5. It appears to this Court that the contrariety is, in large part, due to the unprincipled and inconsistent use of the terms "temporary" and "permanent" in these cases.

As a preliminary matter, it should be noted that, when realty is damaged by pollution, the terms "temporary" and "permanent" can be applied to three quite distinct facets of the situation. First, the pollution itself, or the causal chemistry of the injury to the land, may be either temporary or [*900] permanent. Second, the damage or loss caused by the injury may be temporary or permanent. Last, the source or origin of the pollution, be it a sewage plant, an oil well, or a salt mine, may be temporary or permanent. The possibilities for inconsistencies are, of course, multiplied when different labels are applied to these facets, such as, for example, calling the source of the pollution a nuisance and then characterizing the nuisance as temporary or permanent.

Some of the Kansas cases focus on one of these facets, and some focus on another. In those cases where an explicit "temporary" or "permanent" distinction is drawn, it is determinative of when the cause of action accrued and, consequently, of when the cause of action became barred by the applicable statute of limitations. Because of the wide diversity displayed by these cases, a chronological survey of them is, unfortunately, a necessity, and so such a chronology follows.

1. Cases Prior to 1930

In the venerable case of Kansas Pacific Railway v. Mihlman, 17 Kan. 224 (1876), the Railroad trespassed on Mihlman's land and constructed a culvert and ditch, partially encroaching on Mihlman's land, that caused flood damage more than two years later. The Kansas Supreme Court concluded that the unlawful nature of the original trespass, actionable in itself, caused the statute of limitations to start running at the time of the trespass, and found Mihlman's suit barred. The Court, in an effort to highlight by contrast, went on to hold that where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury. Id. at 231.

In McDaniel v. City of Cherryvale, 91 Kan. 40, 136 P. 899 (1913), the first explicit decision of a temporary/permanent question is found. The City of Cherryvale constructed a sewer system in 1905 that discharged into Drum Creek, a small stream that ran through McDaniel's property.

An oil refinery constructed in 1905 also discharged into the creek. Plentiful rains diluted the sewage and prevented McDaniel from noticing any problem. In 1909, a dry spell concentrated the sewage to such an extent that the water was rendered unfit for any purpose. The Kansas Supreme Court held that as the sewer system constructed by the city and the refinery constructed by the oil company were permanent in their nature and as the flow of the sewage and refuse from them was designed to continue indefinitely in the future a cause of action for permanent damages arose when the sewage and other impurities were first emptied into the stream. Id. at 43, 136 P. 899 (emphasis added). The Court refined its perception of the sewer system and refinery as

"permanent in their nature" by holding that the sewer system and refinery are, in their nature, design, and use permanent structures, the operation of which will necessarily be injurious to plaintiff's land and must continue permanently to affect and depreciate the value of his land. Id. at 46, 136 P. 899 (emphasis added). Because the first dumping had occurred more than two years before McDaniel's suit was filed, he was barred.

2. 1930s Cases

Six cases of particular significance were decided in the 1930s, when the production of Kansas petroleum increased substantially. In Lackey v. Prairie Oil & Gas Co., 132 Kan. 754, 297 P. 679 (1931), the single oil well drilled by the defendant in 1925 had been joined by eleven to thirteen new ones whose combined output of waste and refuse injured Lackey's pasture. The Kansas Supreme Court noted that the oil wells were permanent structures, designed to continue indefinitely. The conditions under which they were operated were such that the injury was constant as well as progressive. Id. at 757, 297 P. 679 (emphasis added), and that in this instance the bringing in of the first oil well in 1925 caused injury to plaintiff's land, and the permanent nature of the injury was demonstrated more than two years before he sued for damages. Id. at 758, 297 P. 679 (emphasis added). Lackey's suit was, therefore, held to be barred.

In Berry v. Shell Petroleum Co., 140 Kan. 94, 33 P.2d 953 (1934), the question of whether salt pollution of underground water is temporary or permanent injury was argued to the Kansas Supreme Court. At trial, the plaintiff claimed and recovered permanent damages. The jury also expressly found that the groundwater, like the aquifer in this case, had a definite direction of flow. This finding was leapt on by the polluting oil company, which argued that the damage to the plaintiff's groundwater could only be temporary because the natural flow would eventually carry the pollutants away, and that the award of permanent damages should, therefore, be reversed. The Court held that this Court is not prepared to say that when the substrata has once become saturated with salt from an oil well the water moving through it will cleanse it so that the water in the well will become pure again.

The evidence on this point is too vague. We doubt if anyone knows. We think the instructions correctly state the law. Id. at 105, 33 P.2d 953. Despite the contentions of the parties and the obvious precedential weakness of this statement, American Salt has nevertheless cited it as binding authority for the proposition that salt pollution of an aquifer is a permanent injury, Dk. No. 337 at 155.

The next year, contrariety appeared in the case of Gardenhire v. Sinclair-Prairie Oil Co., 141 Kan. 865, 44 P.2d 280 (1935). The facts were somewhat similar to those in Lackey; 1926 oil wells that had previously caused some pollution were deepened in 1931 and thereafter caused substantially more pollution. Instead of focusing on the permanent nature of the oil wells themselves, however, the Kansas Supreme Court appears to have focused on the nature of the injury caused by them: the defendants had no right to pollute a stream or natural watercourse by prescription.

Timber Creek and the ravine leading into it were natural watercourses. The pollution of the stream was wrongful and therefore no permanent right can be acquired. "The pollution of the stream being a wrongful act, no permanent right to continue it can be acquired; and, therefore, the damages to be awarded must be merely for the temporary injuries which have occurred to the time of trial or to the time of bringing the action, if, under the local practice, that is the time fixed for

the computation of damages to be recovered in the action." Id. at 870, 44 P.2d 280 (citations omitted). The court went on to examine an instruction given by the trial court to the effect that any injury occurring more than two years prior to the filing of the suit and traceable to the pollution would cause the suit to be barred. The Court opined that "the given instruction was more favorable to the defendants than the law warrants," id. at 871, 44 P.2d 280.

The next year, in Fulmer v. Skelly Oil Co., 143 Kan. 55, 53 P.2d 825 (1936), the Kansas Supreme Court explicitly recognized that there is a confusion involved in the discussion of the law of the case as to the damages being permanent or temporary, and also as to the liability for damages for pollution being dated from the permanent structure of the plants, which by common knowledge may be positively expected to cause pollution and damage, or from the date of the first serious injury from pollution. Id. at 56, 53 P.2d 825.

The Court labeled the injury as permanent because the plaintiff had asked only for permanent damages, id. at 57, 53 P.2d 825, performed a survey of prior cases to determine when the permanent damage began, id. at 59-61, 53 P.2d 825, and held that the plaintiff's cause of action accrued when the stream was first polluted in 1917, and not when a drought caused the pollution to become so concentrated for the first time as to prevent the plaintiff's cattle from drinking it and thereby substantially injure the plaintiff.

An entirely new field of potential confusion was introduced by Jeakins v. City of ElDorado, 143 Kan. 206, 53 P.2d 798 (1936). As in McDaniel, supra, the plaintiffs in Jeakins were injured by the operation of a municipal sewer system. Two distinct claims were made: one for a decrease in the value of the plaintiffs' land and a second for psychological and health injuries to the plaintiffs.

The Court construed the first of these claims to be one for permanent damages, and the second to be one for temporary damages, id. at 210, 53 P.2d 798. McDaniel was then cited for the proposition that the sewer system, as a permanent structure whose "operation was necessarily a constant and continuous use," created a cause of action for permanent damages when the sewage was first placed in the stream, Jeakins, 143 Kan. at 210, 53 P.2d 798. Although this holding barred the claim for permanent damages, the Court nevertheless allowed the plaintiffs to proceed on their claim for temporary damages, apparently because the negligent operation of the sewer system by the city made that system a nuisance.

This new distinction was picked up by Seglem v. Skelly Oil Co., 145 Kan. 216, 65 P.2d 553 (1937), where the Kansas Supreme Court, in a holding very similar to that in Fulmer, took special care to point out "that this was an action for permanent damages to the farm, not for recurring damages, nor for the abatement of a recurring or continuing nuisance," Seglem, 145 Kan. at 221, 65 P.2d 553 (emphasis added). No attempt is made, however, to explain why the negligent operation of a sewer system leading to pollution creates a continuing nuisance, while the negligent operation of an oil field leading to pollution does not.

3. 1940s Cases

Four cases of significance to the present inquiry were handed down by the Kansas Supreme Court in the 1940s. The first, Donley v. Amerada Petroleum Corp., 152 Kan. 518, 106 P.2d 652 (1940), involved the now-familiar pollution of surface waters by an oil company. With nary a word written about the nature of the oil wells as permanent structures, the Court affirmed a judgment in

favor of the plaintiffs, including both actual and punitive damages, based on a theory of temporary damage to a stock farm. The plaintiffs apparently made a simple election to sue for temporary instead of permanent damages, phrased their measure of recovery in the decreased rental value of the farm after the pollution, and sought that level of recovery for the two years preceding their filing of suit. The Court voiced no quarrel with this procedure.

The next year, in Eyman v. National Union Oil & Gas Co., 153 Kan. 45, 109 P.2d 477 (1941), the Kansas Supreme Court demonstrated an unwillingness to perform a Donley-type analysis when all of the items of claimed damage had occurred more than two years before suit had been brought. The petition alleged permanent damages to the premises, including the destruction of trees, but made clear that all of these damages were complete more than two years before. The plaintiff's argument that the oil wells constituted an abatable nuisance did not carry the day, but the Court simply ignored the nuisance component of the argument and focused on the permanent nature of the damage already done, Eyman, 153 Kan. at 47-48, 109 P.2d 477.

Peterson v. Texas Co., 163 Kan. 671, 186 P.2d 259 (1947), is yet another case of salt-water pollution from an oil field causing damage to an adjacent farming operation. Instead of the more usual surface pollution, however, this case dealt with salt pollution of the fresh-water strata beneath the plaintiff's farm. The plaintiff phrased his petition in terms of temporary damages, even though the temporary nature of the death of heifers, chickens, and large tracts of prairie grass is open to some dispute, and elected to sue to recover these temporary damages on a bi-annual basis. The reported case is, in fact, the second one brought by the plaintiff against the oil company. The court stated that there can be no doubt but that plaintiff did have knowledge as early as 1941 that oil-field refuse from defendant's wells was flowing onto his farm in substantial amount, id. at 677-78, 186 P.2d 259, but then went on to distinguish McDaniel, Lackey, Fulmer, and Eyman solely on the basis that those cases were for permanent damages. The judgment below in favor of the plaintiff was affirmed.

4. Cases After 1950

As previously mentioned, it was the 1947 McComb case that first took explicit notice of the contrariety in the Kansas cases. Cases after 1950 concerning the time of accrual of a cause of action and the temporary/permanent question take frequent notice of the conflict. See, e.g., Henderson v. Talbott, 175 Kan. 615, 266 P.2d 273 (1954) ("The question when a cause of action for damages because of overflow of land accrues is one beset with difficulties, on which the authorities are in great conflict and exhibit considerable confusion. This is true even in our own jurisdiction where it must be admitted there is some contrariety in our own decisions," id. at 620, 266 P.2d 273); Gowing v. McCandless, 219 Kan. 140, 547 P.2d 338 (1976) ("The [statute of limitations question] involved on this appeal is one normally encountered where damages occur when water overflows agricultural land.

On this general subject our decisions are conflicting," id. at 143-44, 547 P.2d 338); Dougan v. Rossville Drainage District, 2 Kan.App.2d 125, 575 P.2d 1316 (1978) ("The question of when a cause of action accrues as a result of a party causing another's land to be flooded has been extensively litigated in Kansas. Not all of the Kansas authority is in harmony," id. at 127, 575 P.2d 1316). As the quotations indicate, these cases deal with the flooding of one person's land because of another person's acts. The legal analysis as to the time of accrual of the cause of action, the significance of the temporary/permanent distinction, and the explication of nuisance doctrine

performed by these recent cases, however, is fully applicable and very helpful to the present inquiry.

In Henderson, the defendant had constructed a dam on his property that backed up water on the plaintiff's property. The trial court ruled that the plaintiff could recover for all injuries accruing within two years of the filing of the suit, and the jury returned a verdict favorable to the plaintiff.

The Kansas Supreme Court quoted the following passage from 56 Am.Jur. Waters, @@ 45, 443 (now 78 Am.Jur.2d Waters, @@ 35, 39, 122, 123, 128, and 367): In actions by riparian owners for damages for interference with the flow of a stream, the scope of recovery is usually held to depend on whether the injury is permanent or continuing. The weight of authority is to the effect that whenever the structure or obstruction impeding the flow of water is of a permanent character, and its construction and continuance are necessarily an injury, the damage is considered original, to be recovered in one action, and not continuous in character, and the statute of limitations begins to run from the completion of the obstruction, or at least from the time of the first injury. But when the construction and continuance of the structure are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive [*904] recoveries as there are successive injuries. In such cases the statute of limitations begins to run from the happening of the injury complained of.
. . .
The determination of the question whether the flooding of land gives rise to a single right or successive rights of action depends ordinarily upon whether the injury or the causative condition is permanent or temporary. The rule prevailing in most jurisdictions is that if the injury is permanent, or if the causative structure or condition is of such a character that injury will inevitably result and the amount of damage can be determined or estimated, a single action may and should be brought for the entire damages, both past and prospective. But if the overflow is merely temporary, occasional, or recurrent, causing no permanent injury to the land, or if the situation involves other elements of uncertainty, such as the possibility or likelihood of the alteration or abatement of the causative conditions, or uncertainty in regard to the future use or improvement of the land, so as to prevent a reasonably accurate estimate of future damages, it is generally held that each reptition (repetition) of the overflow gives rise to a new cause of action for which successive actions may be brought.

Henderson, 175 Kan. at 621, 266 P.2d 273. This language was then supplemented by the quotation from the Mihlman case concerning nuisance and previously set about above, supra slip op. p. 16, and a quotation from McDaniel indicating that the plaintiffs in that case "could have elected to have sued for temporary damages sustained within the statutory period preceding the bringing of the action," Henderson, 175 Kan. at 623, 266 P.2d 273 (quoting McDaniel, 91 Kan. at 43, 136 P. 899) (emphasis added). This authority was sufficient to cause the Court to affirm the plaintiff's judgment.

Of particular significance to the present inquiry is the following language, found at the end of the statute of limitations discussion:

In reaching the conclusion just announced we have not attempted to distinguish and are not disposed to labor the divers cases cited by appellant in support of his position. It suffices to say that some of them can be distinguished because the structure involved was located on the land of the person seeking to recover damages; some are distinguishable because the action was to

recover for permanent injuries to the real estate in question; others are not comparable for the reason, that exactly contrary to the situation in the case at bar, the nuisance created by the structure in question was not abatable and the injuries resulting therefrom were continuous and permanent; and still others are not in point because of wholly dissimilar factual situations. And it should be added that if there is language in any of such decisions indicating views contrary to those herein expressed under prevailing conditions and circumstances it no longer entitled to weight and should be disregarded. Henderson, 175 Kan. at 624, 266 P.2d 273 (emphasis added). The notion that plaintiffs enjoy an election as to whether to pursue temporary or permanent damages was reinforced in the case of Augustine v. Hinnen, 201 Kan. 710, 443 P.2d 354 (1968).

The plaintiffs there sought actual and punitive damages for saltwater pollution of their fresh water wells by the defendant oil leasehold owners and operators. The pollution had begun nine years before the suit was filed at the earliest, and five years before at the latest. In its recital of the facts, the Kansas Supreme Court stated that "at the pretrial hearing plaintiffs elected to pursue their case on the theory of temporary damages for the two-year period beginning in the fall of 1962," id. at 711, 443 P.2d 354.

Although the opinion leaves something to be desired in terms of clarity, it appears that the jury found that the defendants had allowed the escape of deleterious substances within two years of the filing of the suit and that the jury awarded actual and punitive damages. The verdict for actual damages was affirmed.

In Gowing v. McCandless, 219 Kan. 140, 547 P.2d 338 (1976), upper landowners sought actual and punitive damages from a lower landowner whose obstruction of a watercourse seven years before suit was filed had caused damage to the plaintiffs' crops in later years by backing up water over the plaintiffs' fields. The Kansas Supreme Court noted that the plaintiffs had elected to seek temporary damages and then focused on the nature of the obstruction: In the instant case the evidence does not show the cause of the injury to be permanent. In many cases injuries have been classified as temporary or recurring in nature when caused by an abatable nuisance or condition, or by defects which can be repaired or remedied at reasonable expense. Successive injuries of this nature have been held to give rise to separate and distinct causes of action.Id. at 145, 547 P.2d 338. The judgment for the plaintiff was affirmed.

This general trend was followed in the recent case of Bowen v. City of Kansas City, 231 Kan. 450, 646 P.2d 484 (1982), where the plaintiffs sought to recover damages for flooding resulting from the defendant's creation and maintenance of a nuisance. The Kansas Supreme Court stated that Plaintiffs rely upon our decisions which state that where there is a nuisance which is a temporary condition that is abatable, a new cause of action arises each time damage occurs. This is undoubtedly the law insofar as a person who maintains an abatable nuisance is concerned. This court has considered numerous cases where periodic flooding resulted from the acts of another and we have held that the statute of limitations begins to run at the time each loss resulting from the maintenance of the nuisance occurs and not from the time the nuisance was first created. Gowing . . . . However, the rule of Gowing and its predecessors is predicated upon the defendant's ability and duty to abate the existing conditions which constitute the nuisance.Bowen, 231 Kan. at 454, 646 P.2d 484 (emphasis in original).

The final case to be considered in this section of this Opinion is McAlister v. Atlantic Richfield Co., 233 Kan. 252, 662 P.2d 1203 (1983), in which the plaintiff was seeking the recovery of damages

caused by alleged violations of the Oil Well Pollution Act, K.S.A. @ 55-121. The plaintiff filed case number 54,357 some seven years after his well water became undrinkable, naming as defendants two oil companies that had last conducted operations in the area in the 1930s and 1940s. The plaintiff also alleged "that not less than 150 nor more than 400 years will pass before the well water will be once again fit for drinking," 662 P.2d at 1212. Justice Lockett held the claim to be barred by the two-year statute of limitations after making the following statements on the temporary/permanent question:

Temporary damages or continuing damages limit recovery for injury that is intermittent and occasional and the cause of the damages remediable, removable, or abatable. Damages are awarded on the theory that [the] cause of the injury may and will be terminated. Temporary damages are defined as damages to real estate which are recoverable from time to time as they occur from injury. 25 C.J.S. Damages, @23 , p. 626. Permanent damages are given on the theory that the cause of injury is fixed and that the property will always remain subject to that injury. Permanent damages are damages for the entire injury done -- past, present, and prospective -- and generally speaking those which are practically irremediable. 25 C.J.S. Damages, @ 2, pp. 622-23. If an injury is permanent in character, all the damages caused thereby, whether past, present, or prospective, must be recovered in a single action. 662 P.2d at 1211.

5. Proper Doctrinal Course For This Case

The proper approach to sorting out the preceding precedents and setting a course for this litigation to follow was suggested by the Kansas Supreme Court in Gowing. In a decision that has come to appear increasingly wise to this Court, that Court summarily decided that no attempt will be made in this opinion to venture into the thicket of Kansas cases beginning from statehood. Our recent cases establish a trend in the law which controls our decision herein. Gowing, 219 Kan. at 144, 547 P.2d 338.

The first principle that will be relied on, therefore, is that the recent trends in Kansas law should be given relatively greater regard than the trends expressed in the cases that are now between fifty and one hundred years old.

A second bit of guidance comes from the oft-repeated assertion of the Kansas courts that it is to be borne in mind that each [prior] decision has been rendered upon the particular facts of that case, and when that is borne in mind some of the difficulty disappears. McComb, 164 Kan. at 5-6, 186 P.2d 574. See also Dougan, 2 Kan.App.2d at 127, 575 P.2d 1316 ("Obviously, each case must be decided on its own facts, giving due regard to established law."). The second principle, therefore, is that those elements of this case that present a case of first impression in this jurisdiction and that serve to distinguish this case from the cases discussed above -- such as the pollution originating from a solution salt mining operation, the egregiousness of the pollution in this case, the large area and number of people affected, and the continuous nature of the enterprise (and perhaps the pollution itself) over such a protracted period -- are entitled to full weight and consideration.

The third principle is that the dynamic and evolving nature of tort law must be accorded its proper significance. In 1931, the Kansas Supreme Court, in the Lackey opinion, discounted a prior case with the statement that "the opinion was written nearly fifty years ago, and the writer of the opinion did not have the benefit of the searching analysis of tort liability which has been made in recent

years," Lackey, 132 Kan. at 758, 297 P. 679. Of course, the same criticism can now be made of Lackey itself, which is presently fifty-two years of age.

A fourth principle can be derived from the indeterminate overruling of prior inconsistent cases accomplished in 1954 in the Henderson opinion. Although the scope of this overruling and the exact cases affected are uncertain to some degree, the existence of such language in the opinion is sufficient to case doubt on the validity of some of the harsher cases that preceded Henderson.

With these four principles firmly in mind, an examination of the cases surveyed in the preceding subsection of this Opinion convinces this Court that the Kansas Supreme Court, if presented with American Salt's statute of limitations argument, would find that argument unpersuasive.

The recent trend in the Kansas cases, traceable to Mihlman, Gardenhire, and Jeakins and most recently affirmed in Gowing and Bowen is to consider the damage resulting from an abatable nuisance that causes pollution to be temporary damage, giving rise over and over again to causes of action to recover for the injuries sustained in the statutory period immediately preceding the filing of the suit, at least so long as some acts of pollution continue. Several auxiliary points strongly support this conclusion.

First among these auxiliary points is the dispute between the plaintiffs and American Salt as to whether pollution is continuing. American Salt, as might be expected, asserts that its plant has caused no significant pollution since 1965, see, e.g., Dk. No. 356 at 73, No. 2. If one indulges the assumption that the salt now polluting the aquifer originally escaped from American Salt's control, and further indulges the assumption that American Salt's statement that no pollution is now occurring is true, then American Salt has, in essence, admitted to abating a polluting nuisance. Certainly American Salt would be hard-pressed to argue that its plant is a "permanent structure, the operation of which will necessarily be injurious to plaintiffs' land," McDaniel, 91 Kan. at 46, 136 P. 899, inasmuch as such an argument would be tantamount to an admission that the plant is still polluting, and uncontrollably so at that. The salt plant is not designed to pollute the aquifer, and should not do so in the absence of negligence. If the plant does pollute the aquifer, it does so because of "defects which may be repaired or remedied," Gowing, 219 Kan. at 145, 547 P.2d 338.

The polluting plant would, therefore, constitute an abatable nuisance that would support an endless series of separate and independent actions, at least until all pollution was halted and the nuisance thereby abated, id. Because the cause of the injury – the loss of salt into the aquifer -- is not fixed, an award of temporary damages "on the theory that [the] cause of the injury may and will be terminated," McAlister, 662 P.2d at 1211, is clearly appropriate.

The second auxiliary point is closely related to the first, and centers on an apparently admitted occurrence of aquifer pollution in 1979. The plaintiffs have alleged that one of the old brine wells was discovered to be communicating with both the aquifer and the high-pressure solution mining field in November of 1979, but that the shutdown of the solution mining field required to repair this defect was not undertaken until the losses of brine from the solution mining operation became so acute as to interfere with the desired production levels at the plant. See Dk. No. 351, Vol. 1 at 27-28; Vol. 2, App. 3 at 53-56. American Salt has cavalierly responded to this serious charge with the statement that the paragraph "is the only paragraph in the plaintiffs' entire summary which contains any evidence that one of the brine wells may have caused some pollution for a short period of time," Dk. No. 356 at 62 (emphasis in original).

The reason for such aloofness should be apparent. Were American Salt's statute of limitations argument accepted by this Court, American Salt would be absolutely immune from any damage claim by any of the present plaintiffs in perpetuity, even if those claims were based on recent or future wrongful acts of pollution that were part of a pattern of continuing or escalating pollution.

Accepting the statute of limitations argument would be the functional equivalent of granting American Salt a license to pollute as appears profitable or expedient to American Salt at any particular time, a result clearly in conflict with the previously quoted language from the Gardenhire case to the effect that "the pollution . . . being a wrongful act, no permanent right to continue it can be acquired," Gardenhire, 141 Kan. at 870, 44 P.2d 280. Of course, these anserous results of American Salt's argument are nowhere mentioned in its documents. This Court's conscience would be shocked by the insulation of a continuing wrongdoer from liability for his wrongful acts.

The third auxiliary point involves the rapid change in attitudes towards pollution of the natural environment witnessed in the last two decades. Justice Smith's observation that "the water supply of the people is of greater importance than the operation of a business at reduced cost," Berry, 140 Kan. at 102, 33 P.2d 953, has been vindicated by state statutes that prohibit the pollution of surface and subsurface waters by, among others, operators of salt water injection wells, K.S.A. @ 65-171d, and that expressly declare each day of polluting activity to be a separate offense, K.S.A. @ 65-171f. The Kansas Legislature has expressed a clear intention to heavily discourage the pollution of the state's water resources, and this Court is loath to thwart this goal with broad and ill-defined grants of immunity to continuing polluters for both past and future acts of pollution.

Last, it should not be forgotten what the plaintiffs have pleaded. Rather than claiming permanent damages for permanent injuries resulting from a permanent structure constituting a permanent nuisance, the [*908] plaintiffs have alleged "a continuing nuisance, trespass, and damages," Pre-Trial Order, Dk. No. 309, at 4. This Court can only construe such language as reflecting an election by the present plaintiffs to pursue the remedy of temporary damages.

The Court has, on its own initiative, done some cursory research on the question of how these temporary damages should be measured. Even a brief examination of the Kansas cases on this issue shows them to be suffering from the imprecise and unpredictable use of "temporary" and "permanent," see, e.g., Adams v. City of Arkansas City, 188 Kan. 391, 362 P.2d 829 (1961); Alexander v. City of Arkansas City, 193 Kan. 575, 396 P.2d 311 (1964). This already overburdened opinion cannot support an analysis of this question: the issue shall be saved for another day.

It may be remembered by the now-fatigued reader that this subsection deals with the first part of American Salt's tripartite argument in support of its statute of limitations argument, namely, whether salt pollution of the aquifer is permanent damage. See supra p. 14. The preceding discussion and analysis compels this Court to conclude that the plaintiffs' allegations are sufficient to categorize the American Salt operation as a continuing nuisance if it is responsible for the pollution now present in the aquifer; that the nuisance represented by the operation is abatable because the defects, if any, causing pollution may be repaired or remedied; and that the injury suffered by the plaintiffs because of American Salt's continuing pollution, if any, is temporary in nature. See generally City of Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334, 340-41, 53 S.

Ct. 602, 604-05, 77 L. Ed. 1208 (1933); Hilton v. Duke Power Co., 254 F.2d 118, 122 (4th Cir.1958); Conestee Mills v. City of Greenville, 160 S.C. 10, 158 S.E. 113 (1931).

b. Notice of Damage More Than Two Years Ago

Although the holding in the previous subsection tends to make American Salt's argument concerning notice irrelevant, the section of American Salt's brief devoted to this argument is so remarkable that it nevertheless deserves some comment. American Salt prefaces the argument with the statement that for the purposes of this Memorandum and the Motion [that] it supports, it is assumed that the American Salt Company caused the pollution [that] now exists in all the groundwater "downstream" from the plant -- the entire area [that] could have possibly been influenced by the activities of the company since its inception in approximately 1908. Thus, the issue of causation is not addressed herein.

Dk. No. 337, at 1-2. American Salt then follows this disclaimer with a detailed recital, comprising nearly one hundred and fifty pages, of the convincing evidence that American Salt's operations are directly responsible for the salt presently dissolved in the aquifer. This recital covers the entire period of the facility's existence and is exceptionally detailed for the period since 1933.

In order to support the argument that the present plaintiffs knew of the salt pollution damage to the aquifer more than two years before this suit was filed, American Salt was compelled to demonstrate both that the level of pollution was severe and that American Salt was discoverable as the cause of the pollution. The documentary and deposition evidence assembled by American Salt on these points is, to say the least, very persuasive, and should serve to save time at the trial of this matter.

Additionally, this Court notes that the impressive quantity of evidence dredged up by American Salt tends, by its very completeness, to remove this case from the class of cases that statutes of limitations were originally designed to control. The conceptual basis for statutes of limitations has often been explained. The United States Supreme Court has written that statutes of limitations are designed to promote justice by preventing surprises through the revival of [*909] claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944).

Likewise, the Rhode Island Supreme Court has written that statutes of limitations were intended to prevent the unexpected enforcement of stale claims concerning which persons have been thrown off their guard for want of seasonable prosecution . . . . They afford parties needed protection against the necessity of defending claims [that], because of their antiquity, would place the defendant at a grave disadvantage.

In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Wilkinson v.Harrington, 104 R.I. 224, 243 A.2d 745 (1968).

Although this Court would never ignore a clear statute of limitations bar solely because the defendant appeared ready and able to defend himself, the existence of clear memories, cited records, and deposed witnesses is certainly a factor to weigh in the balance in a case such as this.

c. The Plaintiffs Are Barred by K.S.A. @ 60-513

K.S.A. @ 60-513 provides, in pertinent part, that

> (a) The following actions shall be brought within two years: . . .
>
> > (4) an action for injury to the rights of another, not arising on contract, and not herein enumerated.
>
> (b) . . . the cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury . . . .

Because this Court has concluded that the plaintiffs' allegations in this case entitle them to attempt to show at trial that the American Salt facility constitutes an abatable nuisance causing temporary damages through salt pollution of the aquifer, the assertion that K.S.A. @ 60-513 bars the plaintiffs' claims in their entirety is without merit. This does not mean, however, that the section is irrelevant to this case. K.S.A. @ 60-513 does operate to preclude the plaintiffs from recovering for injuries sustained more than two years prior to May 31, 1977, the day this suit was filed. American Salt's motion for partial summary judgment must therefore be overruled in all particulars not expressly granted above, and the plaintiffs are entitled to attempt to prove and recover their damages that have accrued between May 31, 1975 and the date of judgment in this case.

IT IS THEREFORE ORDERED that the plaintiffs' motion for review of the Magistrate's order filed October 20, 1982 is overruled.

IT IS FURTHER ORDERED that the defendants' motion for partial summary judgment is sustained as to plaintiffs Joleen Ottlinger, Robert Johannsen, Gary Zwick, Harvey Willhaus, and Lester Colle.

IT IS FURTHER ORDERED that the defendants' motion for partial summary judgment is sustained as to the individual parcels of land listed below:

Owner Tract

> Wilmor H. Oden 400 acres in Sections 1 & 2, Township 21 South, Range 8 West of the 6th Principal Meridian; 2 lots in the Southeast Quarter of Section 2, Township 21 South, Range 7 West of the 6th Principal Meridian.
>
> Edris Edwards 160 acres in Section 26, Township 20 South, Range 8 West of the 6th Principal Meridian.
>
> Harry Zwick West Half of Section 33, Township 20 South, Range 7 West of the 6th Principal Meridian.

> Jay Brothers 10 acres in the Northwest Quarter of the Southwest Quarter of Section 29, Township 20 South, Range 7 West of the 6th Principal Meridian; Lots in Saxman, Kansas.

IT IS FURTHER ORDERED that the defendants' motion for partial summary judgment is denied in all respects not sustained above. IT IS FURTHER ORDERED that the Clerk of this Court notify the parties to this lawsuit that, as one of the Court's oldest cases, it will be set down on the trial docket at the earliest possible date after August 1, 1983 that the availability of courtroom facilities and the Court's commitments make feasible.

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Miller v. Cudahy Co.
Notes and Discussion

1. The landowner makes four major arguments to avoid summary judgment on statute of limitations issues. What are they?

2. How has the analysis of the statute of limitations changed over the years according to the court?

3. What reasons does the court use to find that the damages are temporary?

4. What problems does the defendant have showing that the landowner knew or should have known that its land was being polluted?

5. In Chevron U.S.A. Inc. v. Superior Court, 31 Cal. App. 4th 1; 1994 Cal. App. LEXIS 1285; 36 Cal. Rptr. 2d 783 (1994) the court consider the statute of limitations in an action alleging diesel fuel pollution caused by defects in the installation of an underground storage tank:

> At an undetermined time between November 1967 and June 1970, Standard Oil Company of California, predecessor to Chevron U.S.A. Inc. (Chevron), sold to DiSalvo Trucking Co. (DiSalvo) and installed on DiSalvo's property underground fuel storage tanks. Nineteen or more years later, when the tanks were removed in 1989, DiSalvo discovered contamination of the soil.
>
> At the direction of Alameda County, implementing California's Underground Storage Tank Local Oversight Program, DiSalvo spent several hundred thousand dollars partially removing the contaminants. In 1993, DiSalvo sued Chevron for reimbursement of money already spent and to be spent to complete the cleanup. DiSalvo alleged causes of action for negligence, breach of contract, continuing nuisance, continuing trespass, and indemnity. . .
>
> . . . Case law provides, however, that an action alleging a continuing nuisance or trespass may be brought at any time before the nuisance or trespass has been discontinued or abated or within three years afterward. (See Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal.App.4th 732, 744-745 [24 Cal.Rptr.2d 562] [hereafter Wilshire Westwood].) . . .

The court went on to discuss the relationship between a continuing nuisance or trespass, a public nuisance, and the statute of limitations:

> CONTINUING NUISANCE STATUTE OF LIMITATIONS
>
> Civil Code section 3490 provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." This has been "construed to mean that the statute of limitations is no defense to an action brought by a public entity to abate a public nuisance. [Citations.]
>
> However, where private citizens have sued for damages for special injury based on public nuisance, our Supreme Court has characterized the nuisance as either 'continuing' or 'permanent' and has used the characterization to determine whether the suit is subject to the statute of limitations....
>
> [W]here a private citizen sues for damage from [**7] a permanent nuisance, the statute of limitations begins to run upon creation of the nuisance. Where a continuing nuisance is alleged, every continuation of the nuisance gives rise to a separate claim for damages caused by the nuisance." (Mangini v. Aerojet-General Corp. (1991) 230 Cal.App.3d 1125, 1142-1143 [281 Cal.Rptr. 827] [hereafter Mangini], original italics.)
>
> "[W]here the nuisance involves a use which may be discontinued at any time, it is characterized as a continuing nuisance, and persons harmed by it may bring successive actions for damages until the nuisance is abated. [Citation.] The crucial test of a continuing nuisance is whether the offensive condition can be discontinued or abated at any time. [Citations.] 'In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing.' [Citation.]" (Wilshire Westwood, supra, 20 Cal.App.4th at p. 744.). The same principles apply to continuing trespass. (Mangini, supra, 230 Cal.App.3d at p. 1148.)
>
> Recent decisions have confirmed an owner's right to sue over a nuisance on the owner's own land and a subsequent owner's right to sue a prior possessor of property for creating the continuing nuisance. (Wilshire Westwood, supra, 20 Cal.App.4th at pp. 745-746; Mangini, supra, 230 Cal.App.3d at pp. 1134-1137; accord KFC Western, Inc. v. Meghrig (1994) 23 Cal.App.4th 1167, 1178-1179 [28 Cal.Rptr.2d 676] [hereafter KFC]; Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal.App.4th 334, 342-345 [23 Cal.Rptr.2d 377] [hereafter Newhall].) . . .

It is difficult without drilling test wells to determine if a UST is leaking. Is there an argument, based on this fact, that may toll the statute of limitations?

Also, the EPA has estimated that around 25% of underground storage tanks (UST's) exhibit some type of leak. In most cases it is not the UST itself that leaks, but the associated piping due to freezing and thawing or due to overfilling or spills. Based on this, can it be argued that it is common knowledge that many UST's leak therefore a landowner cannot claim to "discover" a pollution problem for statute of limitations purposes if the leak occurred a some point in the past?

6. The Resource Conservation and Recovery Act (RCRA) was amended in 1984 to address the problem of leaking UST's. Currently, UST's must meet certain construction standards and must be monitored for leaks after a designated phase in schedule. Leaks after these standards have been adopted are rare.

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# CHAPTER 9 – Common Law Claims

# DUTY TO PLUG & RESTORE SURFACE

**Introduction**

Texas Statewide Rule 14 - Plugging. Rule 14 addresses the plugging of wells, and the technical and reporting requirements associated with such plugging.

Under Rule 14(b)(2) a well must be plugged if it has been inactive over one year. An exception to the plugging requirement can be obtained for good cause, and a bond or statement of financial security must be posted in order to get such an exception.

An exception to plugging will not be granted unless a completion report is on file with the TRRC, and the well must be in compliance with all TRRC rules and must not constitute a pollution hazard. The exception to plugging is good for a one year period, and no more than four one year exceptions can be granted without a written application and a showing that the well poses no pollution threat.

All wells over 25 years old that have been inactive for over a year must be tested annually for pollution potential in order to qualify for an exception to plugging. Normally a fluid level measurement will suffice for this test.

A well will be considered active, after being considered inactive, only after three consecutive months of production.

An intent to plug form must be filed with the TRRC at least 5 days prior to plugging (Form W-3A). The operator must use an approved cementer and must give notice to the landowner, and must call the TRRC's District Office at least 4 hours prior to plugging.

The plugs must be set to protect or isolate all productive zones and all useable water zones. Prior to setting plugs the hole must be in static condition and must be full of mud.

After plugging the casing should be cut off 3 feet below ground level, and the location should be cleared. Plugging is the responsibility of the operator of the well. For purposes of plugging responsibility, the TRRC will presume that the operator identified in its records is the operator responsible for plugging (even if the well had been sold to a third party). For this reason, when selling a well the seller should insure the TRRC's records reflect the change of operator.

| RAILROAD COMMISSION OF TEXAS<br>OIL AND GAS DIVISION | APPLICATION OF LANDOWNER<br>TO CONDITION AN ABANDONED WELL<br>FOR FRESH WATER PRODUCTION | FORM P-13<br>EFF 10/04 |
|---|---|---|

| | | | |
|---|---|---|---|
| 1. Field Name (as per RRC Records or Wildcat): | | 2. Field No.: | 3. RRC District No.: |
| 4. Operator Name (as shown on P-5): | | 5. Operator P-5 No.: | 6. County: |
| 7. Lease Name: | 8. RRC Lease/Gas ID No.: | 9. API No.:<br>42- | 10. Well No.: |
| 11. Location (Section, Block, and Survey): | | | |
| 12. If the Operator has changed within the last 60 days, provide the name, the P-5 No., and the address of the former Operator: | | | |
| 13. If the well has been worked over, provide the former Field name (and reservoir name) and number: | | | |
| 14. Is this an Abandoned Producer or a Dry Hole? ☐ YES ☐ NO If this is a Dry Hole, or if the Operator did not file current completion data, *ATTACH* casing and cement data for casings penetrating groundwater depths. | | | |
| 15. Type of Electric or other Log run: | 16. Completion date of the well: | | |
| 17. Proposed Plug-Back Depth of well for fresh water production (ft): | 18. Base of Usable Quality Water (ft.): | 19. Date of TCEQ letter:<br>TCEQ File No.: SC- | |

20. FOR COMPLETION BY LANDOWNER: *Information concerning groundwater conservation districts may be found at www.texasgroundwater.org.*

- ☐ I have permitted the well as a water well with the _____ Groundwater Conservation District.
- ☐ I have registered the water well with the _____ Groundwater Conservation District.
- ☐ The _____ Groundwater Conservation District does not require that the water well be permitted or registered.
- ☐ There is no groundwater conservation district for the area in which the well is located.

The undersigned Operator and Landowner hereby make application for the Operator to be authorized to plug the above well in such a manner that the well bore be left open to the above depth so that the Landowner may condition and equip such well bore to that depth for production of fresh water.

The undersigned Landowner further obligates himself, his heirs, successors, and assignees, as a condition to the Commission's approval of this application, to complete the plugging of the well if and when it is abandoned as a fresh water well, or when, because of the condition of the well is found to constitute a menace to any oil, gas, or fresh water strata in that area, such plugging is ordered by the Commission.

Under §89.011, Tex. Nat. Res. Code, the duty to properly plug the well ends only when the well has been properly plugged in accordance with Commission requirements up to the base of usable quality water stratum; the Commission has approved the application to condition the well for usable quality water production operations; and the landowner has registered the well with, or has obtained a permit for the well from, the groundwater conservation district, if applicable.

The authority to complete this well in the manner prescribed shall not be construed as authority for any party to produce fresh water from the well.

*CERTIFICATION*

*I declare under penalties prescribed in §91.143, Tex. Nat. Res. Code, that I am authorized to make this report, that this report was prepared by me or under my supervision and direction, and that data and facts stated therein are true, correct, and complete, to the best of my knowledge.*

| LANDOWNER | OPERATOR |
|---|---|
| Date: | Date: |
| Signature of Landowner: | Signature of Operator or<br>Authorized Representative: |
| Name of Landowner:<br>(type or print) | Name of Person and Title:<br>(type or print) |
| Street Address or P. O. Box: | Street Address or P. O. Box: |
| City, State, Zip Code: | City, State, Zip Code: |
| Telephone ( ) | Telephone ( ) |

FILING INSTRUCTIONS

1. The completed original of this form must be recorded in the county in which the well is located. SEE the back of this form.
2. Form P-13 showing the recording data, along with the Notice of Intent to Plug and Abandon (Form W-3A) must be filed in the appropriate Commission District Office, along with a copy of the TNRCC/TCEQ Surface Casing MC 151 letter (or other acceptable equivalent letter).
3. After plugging back the well, the Operator shall file one copy of the Commission-approved Form P-13 with the original and one copy of Form W-3 (Plugging Record), in the appropriate Commission District Office.

**RAILROAD COMMISSION APPROVAL:** _____ **DATE OF APPROVAL:** _____

**(Signature of RRC Representative)**

DISTRIBUTION:
The Commission will mail a copy of the approved form to the: (1) Landowner; (2) Operator; (3) Texas Commission on Environmental Quality (TCEQ); (4) Ground Water Conservation District, if applicable; (5) Texas Department of Licensing and Regulation (TDLR); and (5) Commission District Office.

# GANNON v. MOBIL OIL CO.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
573 F.2d 1158; 61 Oil & Gas Rep. 191
January 26, 1978, Submitted
March 30, 1978, Decided

Appellant, plaintiff below, Fayetta Gilbough Gannon, individually and as Executrix and Trustee of the Estate of Clair H. Gannon, Deceased (Gannon), appeals from a Directed Verdict awarded appellee, defendant below, Mobil Oil Company, a Division of Socony Oil Company, Inc., a corporation (Mobil). Jurisdiction is based on diversity.

Gannon sued Mobil for both compensatory and exemplary damages predicated upon Mobil's alleged torts of trespass and intentional interference with Gannon's contractual rights under an oil and gas lease granted January 7, 1972, arising by reason of the plugging of certain abandoned oil wells on the Gannon property by Mobil. The trial court entered a detailed memorandum of findings and conclusions concurrent with the judgment granting the directed verdict.

On October 14, 1959, Gannon executed an oil and gas lease to Mobil covering 570 acres situate in Murray County, Oklahoma, for a primary term of ten years or so long as oil, gas or other hydrocarbons were produced therefrom. There were six nonproducing oil wells located on the lands at that time, completed in the Second Bromide Sand.

Mobil or its assignee-agent reentered five of the six wells and, in addition, drilled and completed one more well to the Bromide Sand. Mobil also undertook an extensive "fireflood" operation in an effort to obtain commercial production of the low gravity oil in the reservoir, but terminated the uneconomic operation in October, 1966.

On August 3, 1967, Mobil "farmed out" the wells by partial assignment of its leasehold rights for a term of three (3) years to Nelson I. Geyer (Geyer), d/b/a Thermo-Dyne, Inc. Geyer undertook an injection of oil condensate commencing in April of 1968 in an effort to revive production from the lease at a total cost of about $200,000.00. His efforts, just as those of Mobil, were unsuccessful in terms of realizing commercial production. Geyer produced a total of 9,982.35 barrels of oil and condensate, most of which, however, had been injected in the wells. Geyer's right under the partial assignment expired December 24, 1970, at which time he terminated all efforts to obtain commercial or "economic" production.

Thus, the basic lease also terminated, at the latest possible date, on December 24, 1970. Mobil determined to abandon the Gannon lease and to plug the wells. Thereafter, it commenced plugging and abandonment operations in July, 1971. Geyer by letter of August, 1971, offered to relieve Mobil of any obligations relating to the plugging of the wells.

Geyer informed Mobil of his desire to assume the responsibility of plugging the wells and purchasing Mobil's equipment at a "nominal" fee and then pursuing attempts to obtain a new oil and gas lease from Gannon. Mobil, however, declined the Geyer offer both because Mobil had been advised that it could not make any assurances as to whether its lease from Gannon was then valid and because ". . . it would be difficult for Thermo-Dyne [Geyer] to indemnify Mobil against all liability as the result of sale of equipment and assumption of plugging and abandoning

the wells." [Pl. Exh. #11, R., Vol. III, p. 513.] Mobil continued with the plugging process and notified Geyer to remove the equipment from the wells which belonged to him.

On November 1, 1971, Gannon wrote to Mobil inquiring about Mobil's intentions relative to the property. Mobil informed Gannon that it was then in the process of plugging [and abandoning] the wells. Gannon's attorney then spoke by telephone with a Mobil representative, advising that Gannon was then negotiating with Geyer for a new oil and gas lease on the property and that Gannon was the owner of the wells rather than Mobil. He demanded that Mobil not plug the wells. [R., Vol. I, pp. 36-38.]

Mobil's landman, one C. H. Bland, did receive a telephone call from Gannon's attorney relative to the plugging operation. Bland did not recollect the specifics of the conversation except that it did deal with the plugging operation. Bland testified that he informed Gannon's attorney that he was not familiar with well plugging matters.

Gannon's attorney, however, testified that Bland [whom he seems to equate as Mobil] stated that the wells would not be plugged. In any event, the record reflects that even though Mobil proceeded with the plugging operations by pouring hundreds of sacks of cement into the oil producing formation, cementing steel tubing and iron into each well and filling each well from top to bottom with cement that neither Gannon, her attorney or any person on her behalf undertook action, steps or threats to prevent Mobil from proceeding with the plugging operations until the instant lawsuit was filed on October 11, 1973.

Mobil filed its Notice of Intention to Plug the subject wells with the Oklahoma Corporation Commission prior to commencement of the plugging operations in July, 1971. The record reflects that Geyer's efforts under the three year partial assignment of December 29, 1967, realized only limited production from the wells for April, 1968, through February, 1969. Some production was last sold from the lease by Geyer in September, 1971. Mobil had, of course, assigned only the right to production from the Second Bromide Sand to Geyer for the three (3) year term, reserving all other leasehold rights, together with all of the attendant duties, obligations and responsibilities imposed by virtue of such ownership.

Mobil completed the plugging operations on December 8, 1971. Geyer, who had obtained a new oil and gas lease from Gannon on the property for a three-year term commencing January 7, 1972, attempted to re-enter one of the wells plugged by Mobil but was unable to drill out the steel and iron which had been cemented into the hole. Geyer also completed a new well in the Second Bromide Sand in August, 1974, and thereafter re-entered one of the wells plugged by Mobil, but gave up that effort.

Geyer testified that in his opinion it would cost between $40,000.00 and $50,000.00 to re-enter the plugged wells because of the tail pipe and iron in the holes but that a prudent operator would prefer to spend $100,000.00 per well in drilling new wells rather than attempting to overcome the hazards of reentry of the abandoned wells. [R., Vol. I, pp. 137, 141-144.]

Gannon acknowledges that it was not economically feasible for Mobil to produce the low gravity oil in 1966. However she contends that when Mobil commenced the plugging operation in 1971 the oil from the wells could have been produced in paying quantities because of the rapid increase in

the price of crude oil. The trial court excluded evidence of the economics prevailing at the time of trial in June of 1976.

On appeal, Gannon contends that the trial court erred in granting the directed verdict by finding that:

> (1), (2) and (3), Gannon could not amend her complaint and the pre-trial order; Gannon had to plead and prove affirmative defenses to justify torts; Mobil's lease did not terminate until December 8, 1971, (4) Mobil was the "owner" and "operator" of the subject wells at the time it plugged same as such terms are defined by the rules and regulations of the Oklahoma Corporation Commission, (5) the wells were not prospect holes and the law applicable to the destruction of same did not apply, (6) the wells could not be produced in paying quantities at the time of the plugging operations, and thus erred in excluding evidence of the economics of producing the wells subsequent thereto and up to the time of trial, (7) the assignment of the wells and lease insofar as it covered the oil sand in which the wells were completed did not relieve Mobil of whatever duty, if any, it may ever have had to plug the wells, (8) Mobil had a duty to plug the wells in view of the facts prevailing at the time of plugging and Rule 3-401(c), (9) certain facts controlled, (10) certain conclusions of law applied, (11) evidence pertinent to exemplary damages be excluded, and (12) Gannon's motion for directed verdict should be denied.

Geyer's testimony was most pertinent to the trial court's decision. He stated that in October or November of 1971 the type of sour crude being produced from the Gannon lease would sell for about $2.50 per barrel, after blending; that in order to render it marketable it would have cost much more than the sale price; and that his company lost about $400,000.00 in the process of the two operations conducted on the Gannon property. Even so, Geyer said that he was ". . . ready to lose a couple of hundred [thousand] more." [R., Vol. I Supp., p. 134-136.]

As to the question of the validity of Mobil's lease after Geyer's unsuccessful efforts, Geyer acknowledged that on August 23, 1971, his efforts had been unsuccessful in producing from the Gannon lease "to the point of economics." He further stated that while he would like to continue "with a research program" on the property, his attorneys advised that there was a question about the validity of the Mobil lease in that although Geyer had produced a "limited amount" of oil during 1970 and 1971, still this was "perhaps not enough to hold the lease by production." [R., Pl. Ex. #10, Vol. III, p. 512.]

Following trial and oral arguments, the trial court considered the respective motions for directed verdict. The court found that as a result of the partial assignment from Mobil to Geyer and the attendant contractual arrangement between them, that the work ". . . performed by the farm-out agreement of Geyer was in truth and in fact the work and services trying to produce oil for . . . Mobil . . . they were associates and partners to the degree set out in their agreement." [R., Vol. I, pp. 315, 316.]

Thus, the court recognized Mobil's continuing obligation to plug abandoned wells on the Gannon leasehold property. Reaching over to the "significant" period of September 3, 1971, the court observed that while Geyer had contacted Mobil regarding his desire to continue operations on the Gannon lease, Mobil rejected this request both because Mobil could make no assurances that its lease was still valid and because Mobil did not believe that Thermo-Dyne [Geyer] was financially

capable of indemnifying Mobil against all liability with respect to the obligation of plugging and abandoning the wells and purchasing Mobil's equipment. [R., Vol. I, p. 317.]

When it became clear, as the trial court found it to be as a matter of law, that Mobil was obligated to plug and abandon the wells (and when Mobil had in fact commenced those operations) Gannon did nothing to stop those operations in order ". . . to save himself from damages he now claims [to have] suffered." [R., Vol. I, pp. 317-319.]

In regard to Mobil's lease termination, the trial court pointedly referred to a letter directed to Mobil by Gannon's attorney after Gannon was informed of Mobil's intention to plug and abandon the subject wells wherein it was stated that, "It is our understanding that this property has been dormant.

However, during the months of August, 1971, and September, 1971, small royalties were paid and apparently sold from the lease." [R., Vol. I, pp. 318, 319.] The trial court concluded therefrom that the receipt and retention of the royalty payments aforesaid were recognition by Gannon that such proceeds were then paid from operation of the lease and thus that the lease was then viable in the name of Mobil. [R., Vol. I, pp. 318, 319.]

In its formal findings of fact and conclusions of law, the trial court reviewed the factual background together with the statutory and regulatory laws of Oklahoma relating to the right and duty to plug abandoned oil wells. The court specially found that Mobil was the owner and operator of the wells on the lease at the end of the Geyer farm-out and that Mobil had the duty, liability and responsibility to plug the wells and that the partial assignment to Geyer did not relieve Mobil of this responsibility. [R., Vol. II, pp. 480, 481.] The court concluded, having considered the evidence in the light most favorable to Gannon, that ". . . the evidence supported but one conclusion with which reasonable men could not disagree." [R., Vol. II, pp. 484, 485.] We agree.

I.

The critical, dispositive issue, found as controlling by the trial court, is: that Mobil [*1162] was, at all times involved, the owner and operator of the wells on the Gannon lease and that at the end of the Geyer farm-out operations Mobil had the duty, liability and responsibility to plug the wells which hadthen been abandoned. We agree with the trial court's analysis of the facts and the applicable law.

Oklahoma law provides that upon abandonment of an oil well the owner or operator is obligated, responsible and liable for plugging the well in accordance with the applicable rules of the Corporation Commission. 17 Okla.Stat.Ann. 1971, @ 53; 52 Okla.Stat.Ann. 1971, @@ 862, 273, 309 and 310; OCC-OGR @ 3-401(a); Loriaux v. Corporation Commission, 514 P.2d 941 (Okla. 1973); United States v. 79.95 Acres of Land, etc., Rogers Co., Okl., 459 F.2d 185 (10th Cir. 1972); Bryan v. State, 133 Okla. 213, 271 P. 1020 (1928).

The Oklahoma Corporation Commission was created by Art. IX of the Oklahoma Constitution in 1907. Under present day statutes, the Commission has broad power to prescribe rules and regulations governing the plugging of all abandoned oil and gas wells.

Such rules and regulations provide, interalia, that:

> Each well in which production casing has been run, but which has not been operated for six months and each well in which no production casing has been run, but for which drilling operations have ceased for thirty consecutive days shall be immediately plugged, OCC-OGR @ 3-401(b);
>
> each well must be plugged in a manner recognized as good and accepted practices and standards in the industry, OCC-OGR @ 3-404(b);
>
> any person who drills or operates any well for exploration, development, or production of oil or gas is required to furnish, on forms approved by the Commission, an agreement in writing to drill, operate, and plug wells in compliance with the rules and regulations and to submit a semiannual financial statement showing that his net worth (in Oklahoma) is not less than $10,000.00;
>
> the owner and operator of any oil or gas well, whether cased or uncased, is jointly and severally liable and responsible for the plugging thereof in accordance with the rules and regulations as to abandonment and plugging prescribed by the Oil and Gas Conservation Division, OCC-OGR @ 3-401(a).

The authority of the Oklahoma Corporation Commission, under the governing statutes, has been consistently recognized in the rule making area to be that of promulgating rules requiring adequate and proper plugging and abandonment of an oil and gas well under the state's police power in order to prevent waste and pollution and to provide for the safety of the public generally. Wakefield v. State, 306 P.2d 305 (Okla. 1957); Sheridan Oil Company v. Wall, 187 Okla. 398, 103 P.2d 507 (1940); Magnolia Petroleum v. Witcher, 141 Okla. 175, 284 P. 297 (1930).

Thus, the duty and liability to plug arises when an oil and gas well is abandoned or taken out of production. The essence of the concept of abandonment is aimed principally at preventing fugacious materials in the various strata pierced by the well from entering the bore so as to permit its movement into other strata or onto the surface. Significantly, Oklahoma has recognized a common-law duty to plug. Sheridan Oil Company v. Wall, supra.

We view it as significant that OCC-OGR @ 3-407 is the only regulation relating directly to the landowner's utilization of an abandoned oil or gas well. It provides that if such a well may safely be used to provide fresh water and such utilization is desired by the landowners, the cement plug, extending 50 feet into the surface casing, shall be set, except that the top thirty foot plug need not be set, provided that written authority for such use is secured from the landowner and filed with the Commission's plugging record. This relieves the operator only of the responsibility above the thirty foot plug. OCC-OGR @ 3-407.

Sheridan Oil Co. v. Wall, supra, holds that a lessee who abandons an oil well without proper plugging stands in the position of a tenant who surrenders the premises without making the necessary repairs. The court there awarded the landowner recovery against the lessee for the costs of re-plugging the abandoned oil well in order to prevent pollution.

Loriaux v. Corporation Commission, supra, holds that the owner and operator of oil and gas leases upon which wells had been drilled is obligated to plug abandoned wells, despite an assignment of the leases, where the wells were found to have been abandoned prior thereto. And, in an action to recover damages resulting from an alleged improperly plugged well, it has been held that the causal connection can be established from circumstantial evidence and that the question of negligence and proximate cause of the injury or damage is one for jury determination. Sunray Mid-Continent Oil Co. v. Tisdale, 366 P.2d 614 (Okla. 1961). See also: Salmon Corporation v. Forest Oil Corporation, 536 P.2d 909 (Okla. 1974).

Thus, just as the trial court found, the Oklahoma authorities above cited, when considered in the light of the facts reflected in the record before us, fully support these conclusions: that all operators are responsible for proper plugging of abandoned oil and gas wells for the protection of the surface and sub-surface strata; that cessation of production with no intent to continue operations evidences abandonment; that Mobil was the owner and operator of the wells on the Gannon lease when Geyer's rights expired under his partial assignment contract and that Mobil was, as such owner and operator, obligated by law to plug the wells.

A decision of particular relevance, we believe, is that of Amax Petroleum Corporation v. Corporation Commission, 552 P.2d 387 (Okla. 1976), involving an action brought against Amax to require it to plug certain gas wells. By various assignments, Amax became the owner of an oil and gas lease upon which several gas wells had been previously drilled, developed and operated. In 1957 or 1958, Amax determined to abandon these wells and the field of which they were a part. No production had been realized from the wells after 1957. On July 28, 1959, about two years after the gas wells were shut in, Amax assigned the oil and gas lease upon which the wells were drilled back to the landowners, an elderly couple, neither of whom had been engaged in the oil and gas industry (or had at any time operated oil or gas wells). The landowners died within one year following re-assignment. Their daughter became the owner of the property. The Commission ordered that Amax plug the wells.

Amax refused, contending that the Commission order was invalid because, (a) the Commission had no authority to require the plugging of any oil or gas well which has not been abandoned or permanently abandoned and (b) that there was no evidence that the wells had been abandoned or permanently abandoned prior to the date Amax assigned the lease back to the original landowners-lessors. The Court held that the re-assignment from Amax to the landowners did not have the legal effect contended by Amax. In 1973 the Commission's field inspector found some of the wells had not been properly plugged since their abandonment in 1959. In pertinent part, the Court held that the re-assignment of the lease from Amax to the original landowners did not relieve Amax of its duty to plug the wells:

> While the statute could be more specific, the things about which it could be more specific are certainly implicit in the statute. Thus, the person to plug the well is the lease operator, not a stranger to the operation; and the time to plug is when the well is abandoned and certainly not before. We would assume that a definition of abandonment would add little to resolving specific fact situations where, as here, a question is raised as to whether abandonment has occurred or not.
>
> In the case at bar there can be no dispute that Mobil clearly announced its intention to relinquish the wells and the lease premises. Thus, Mobil's intention was affirmatively

declared. Such acts constitute a relinquishment of the premises. See: Dow v. Worley, 126 Okla. 175, 256 P. 56 (1926); Carter Oil Co. v. Mitchell, 100 F.2d 945 (10th Cir. 1939); 1 Am.Jur. 2d @@ 1, 39 and 40.

Under Oklahoma decisions, the "abandonment" of an oil and gas lease comes about [*1164] with a concurrence of an intention to abandon and the act of physical relinquishment. Magnolia Petroleum Co. v. St. Louis-San Francisco Ry. Co., 194 Okla. 435, 152 P.2d 367 (1944).

While cessation of operations under an oil and gas lease is not alone sufficient to establish abandonment [Fisher v. Dixon, 188 Okla. 7, 105 P.2d 776 (1940)], it has been held that an unreasonable delay by the lessee in undertaking further exploration coupled with the lessee's declaration that further drilling would be unprofitable is sufficient evidence to establish abandonment. Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 P. 33 (1926). See also; Doss Oil Royalty Company v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1943); Dow v. Worley, supra. Both elements were clearly established on the part of Mobil in the instant case.

II.

We have carefully considered the additional allegations of trial court error urged by Gannon. We hold that they are individually and collectively without merit. For the most part they have been effectively disposed of adversely to Gannon in our discussion of the facts, contentions and legal principles.

At the time that Mobil determined to abandon the wells there was no evidence that further operations would prove economically feasible. It matters not that a change in the market value of the crude oil at some future time (here, as alleged, at the time of trial) may have then dictated additional operations rather than abandonment. Gannon's own expert, Geyer, acknowledged that the wells and the operations had proven uneconomic at the time Mobil declared its intention to plug the wells and abandon the property.

Furthermore, Geyer testified that the method and technique employed by Mobil in plugging was well done. There were others, of course, who testified otherwise. No reference is made that the Oklahoma Corporation Commission has at any time or in anywise challenged Mobil's method of plugging the wells on the Gannon property. We are puzzled by Gannon's allegation that Mobil was a "trespasser" when it entered upon the premises to plug the wells because the lease had terminated. Gannon contends that Mobil had no right to enter upon the premises after the oil and gas lease terminated and then to "destroy . . . wells to which it had no right." [Brief of Appellant, p. 50.]

Even though the trial court found - with substantial support in the record - that Mobil's lease had not terminated when it commenced plugging operations, we believe that if Gannon's contention were to prevail it could very likely render Oklahoma's statutory and regulatory mandates requiring plugging of abandoned wells in order to protect the public interest ambiguous to the extent that an operator such as Mobil might contend, following simple termination of the lease, that it has been relieved of the statutory, regulatory and common law obligation and responsibility to plug the wells.

Such a result is not countenanced under Oklahoma law. It would not serve the public interest.

WE AFFIRM.

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Gannon v. Mobil Oil Corp.
Notes & Discussion

1. If an oil and gas lease expires the contractual provisions contained in it will no longer be applicable. Does the oil and gas well operator whose lease has expired still have a duty to plug the well?

2. The duty to plug is established at what point in the life of a well? What implications does this have for the seller of a depleted well?

3. How is abandonment established or defined by this court?

4. What if a well is shut in waiting for a better gas price. Is it abandoned?

5. If a well is abandoned, can the landowner claim ownership to the equipment left on the property?

6. If an operator assigns leases to a third party does it relieve them of plugging liability? (see Amax Petroleum Co. and Loriaux cases)

Railroad Commn. of Texas v. American Petrofina Co.
Court of Civil Appeals of Texas, Ninth District, Beaumont
576 S.W.2d 658; 62 Oil & Gas Rep. 421
December 28, 1978

We review a judgment of the District Court of Travis County which struck down a Railroad Commission (appellant) order directing American Petrofina Company of Texas (appellee) to plug a well. The facts are not in dispute. The well here involved was originally completed by Tenneco Oil Company in 1962 and operated as a dual completion until 1966 under a lease from the surface owner, Lentz.

In December 1969, Tenneco assigned its interest in the Lentz lease to L & F Drilling Co. This assignment transferred title to the equipment on the lease to L & F Drilling Co. Thereafter, the surface owner Lentz leased the tract to Meeker & Co., which in January 1970 purchased the equipment in the Lentz lease from L & F Drilling Co. In June 1970, the Railroad Commission authorized the well involved to be used as a salt water disposal well, but there is no evidence it was ever so used.

Early in 1973, Meeker completed a gas well on the Lentz lease which is still in operation. In May 1973, Meeker assigned its interest in the lease to two other companies, one of which assigned its interest to appellee on October 29, 1973. After three hearings, the appellant (RRC) ordered appellee to plug the well involved, which then precipitated appellee's lawsuit, from which the Railroad Commission brings this appeal.

The authority for appellant's order to plug the well is found in Tex.Nat.Resources Code Ann. @ 89.011 (1978):

> "The operator of a well shall properly plug the well when required and in accordance with the commission's rules that are in effect at the time of plugging" (formerly Tex.Rev.Civ.Stat.Ann. art. 6005 @ 2 ).

"Operator" is defined in Tex.Nat.Resources Code Ann. @ 89.002(a)(2) (1978) as "a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation" (formerly Tex.Rev.Civ.Stat.Ann. art. 6005 @ 1 ).

At the time appellee acquired the Lentz lease, the well involved had long ceased producing and had been abandoned by its operator. Appellee has never used this well, has no intention of doing so, and in fact did not even know it was on the Lentz lease at the time of acquisition. It would strain the English language as well as the statute defining an operator to conclude that appellee is the operator of this well.

In Humble Oil & Refining Co. v. Cook, 215 S.W.2d 383, 387 (Tex.Civ.App. Austin 1948, writ ref'd n. r. e.), the court had before it the situation where the owners of a well had damaged the well and failed to repair and operate it. In refusing to hold that the owners had abandoned the well the court said: "An intention to abandon involves an intention not to return and reoccupy the property." Here appellee never "occupied" the well; so it could not "abandon" it. Or as stated in Labbe v. Carr, 385 S.W.2d 592, 597 (Tex.Civ.App. Eastland 1964, writ ref'd n. r. e.). "It is held that to constitute

abandonment of an oil and gas lease there must be both intention to abandon and actual relinquishment of the enterprise."

Appellee most certainly was not the "person . . . responsible for the physical operation and control (of the well involved) . . . at the time the well (was) about to be abandoned or (ceased) operation," Tex.Nat.Resources Code Ann. @ 89.002(a)(2) (1978).

We hold that appellee is not the operator of the well involved. This makes it unnecessary to address appellant's other points. All of appellant's points are overruled.

The judgment of the trial court is affirmed.

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Railroad Commn. of Texas v. American Petrofina Co.
Notes and Discussion

1. If an oil and gas lease is obtained and there are unplugged wells located on the lease, if the operator does not utilize such unplugged wells are they liable for plugging such wells?

2. Pursuant to this case, should an oil and gas lessee be concerned about unplugged oil and gas wells on the lease if they were present at the time the lease was taken?

3. Note the Texas statute on plugging. If a party fails to plug a well, is this negligence per se if such and unplugged well causes environmental problems?

4. If you check the real estate records to find ownership information at the country clerk’s office, can you tell if any unplugged wells are located on the lands?

5. If a party goes ‘non-consent’ under a Joint Operating Agreement is it liable for plugging costs? See Texas Railroad Commission v. Olin Corp., 690 S.W.2d 628:

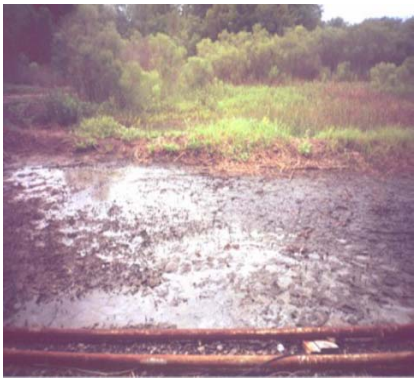
> Texas Nat. Res. Code Ann. @ 89.042 (Supp. 1985) reads:
>
> (a) If the Commission finds that the well was not properly plugged, it shall order the operator to plug the well according to the rules of the Commission in effect at the time the order is issued.
>
> (b) If the operator cannot be found or is no longer in existence or has no assets with which to properly plug the well, the Commission shall order the nonoperator to plug the well according to the rules of the Commission in effect at the time the order is issued.
>
> Section 89.042, therefore, specifically authorizes the Commission to order certain operators and nonoperators to plug a well. Appellants never asserted that appellees were operators of the well.
>
> "Nonoperator" is defined in Tex. Nat. Res. Code. Ann. @ 89.002(a)(3) as "a person who owns a working interest in a well at the time the well is about to be abandoned or ceases operation and is not an operator as defined in . . . this Subsection."

Section 89.002(b) goes on to state, "The terms operator and nonoperator as defined in this section do not mean a royalty interest owner or an overriding royalty interest owner."

6. If a party owns 1% of a well and it costs $250,000 to plug such a well, could the fractional owner be liable for all of the plugging costs? Is this fair to the small owner who has no control over how the well is operated?

ii. DUTY TO RESTORE UNDER REASONABLE USE DOCTRINE

The following production related equipment may be on a lease when it ceases production. How would you advise the operator with regard to their responsibility to the surface owner?


Over years of operations, many times an area will have dozens of pipelines buried – or on the surface. What responsibility does the operator have? What if the pipes are NORM contaminated? (mildly radioactive)

Generally an operator will remove the pumpjack and take it to another location, but the cement base the equipment sits on remains at the site.

If the surface is used for agricultural purposes these cement bases can damage plows, and interfere with agricultural activities.

Wellhead equipment, even storage tanks, might be left by the operator. Note the berm around the tanks.

Does an operator have to remove this equipment, and do they have a duty to contour the land to remove berms and any drainage ditches or roads they might have built?

What about underground pits? Do they need to be dug up and emptied? Or can you “plow them under” and cover them with dirt?

Warren Petroleum Corp. v. Monzingo
Supreme Court of Texas
157 Tex. 479; 304 S.W.2d 362; 65 A.L.R.2d 1352; 7 Oil & Gas Rep. 1108
July 24, 1957, Decided

The sole question here is whether after drilling operations for oil and gas have been terminated and the premises abandoned, the lessee is under an implied duty to restore the surface of the land to the condition it was in prior to the commencement of the work. We answer this question in the negative.

Respondents, Mrs. Monzingo et al., charged the petitioner, Warren Petroleum Corporation, after abandonment of its operations, with failing to restore the surface, and leaving slush pits unfilled, ruts made by the moving of heavy equipment and a gravel road across the property constructed by lessee to the drilling site.

They also plead that petitioner used more of the surface than was reasonably necessary. This latter ground of recovery was determined adversely to the respondents by the jury.

The jury did find, however, that petitioner failed to restore the surface, that such failure was negligence and that the negligence was the proximate cause of the damage. The judgment of the trial court in favor of respondents was affirmed by the Court of Civil Appeals for the reason, it said:

"Because of the favorable findings by the jury upon the issue of the negligent exercise of its rights in performance of the exploratory operations by appellant." 299 S.W. 2d 398, 401.

But as we read the record no right of action was either plead or proved by respondents on account of any negligence on the part of the company in the performance of the drilling and exploratory operations. To the contrary the pleading and the proof and issues submitted to the jury only concerned and referred to the failure of petitioner to restore the surface of the land to "as reasonably good condition as it was immediately prior to the time the well was drilled."

If there was an obligation resting upon the lessee to restore the surface either expressed by some provision in the lease or by necessary implication, negligence would be an unnecessary averment because negligence would not be essential to recovery. The action would be one on contract and not in tort. Admittedly the lease contained no such provision and one is not to be read into the contract by implication.

The oil and gas lessee had the right to use so much of the premises and in such a manner as was reasonably necessary to comply with the terms of the lease and effectuate its purpose. Warren Petroleum Co. v. Martin, 153 Texas 465, 271 S.W. 2d 410; Meyer v. Cox, 252 S.W. 2d 207, wr. ref. In the latter case plaintiff was allowed recovery for damages claimed similar to those sought here, but for the reason that the provisions contained in the lease expressly obligated the lessee to restore the surface of the land to its prior condition. Judge Norvell in his opinion points out that although the lessee has the right to use as much of the surface and in such manner as is reasonably necessary, nevertheless the parties may by contract provide that the lessee shall pay for the damage done to the land by the necessary drililing operations.

He further points out that textbook authors have suggested that surface damage clause be included in oil and gas leases, and particularly where unitization is effected, for the reason that otherwise the surface damage would bear more heavily on some lessees than on others. See also Gregg v. Caldwell-Guadalupe Pickup Stations et al, (Texas Com. App.), 286 S.W. 1083. In LeCroy v. Barney, 12 Fed. 2d 363 (8th Cir.), the lessee was held not responsible in damages to the owner in constructing earthen tanks and in removing trees necessary and incidental in prospecting for oil and gas pursuant to the terms of a lease.

None of the cases relied upon by respondents bear out their contention of implied duty. In Austin Road Co. v. Boston, Texas Civ. App., 292 S.W. 2d 373, 375, n.r.e., where the plaintiff sued for damages to the premises, the Court held that there was no finding that Austin used more of the land or did anything that was unnecessary to the conduct of the operations authorized by the option and lease.

Under the terms of the contract Austin was authorized to explore the plaintiff's land to determine whether it contained rock suitable for certain purposes and in doing so it was necessary that some excavation work be undertaken. In order for the plaintiff to recover it was necessary that he show that Austin performed the exploratory work in a negligent manner.

Respondents cite the following language in that opinion: "To sustain the judgment, plaintiffs were required to prove that the damages recovered were caused by the negligence of Austin or that it used more of plaintiff's land than was reasonably necessary to do the things authorized by the contracts." We agree entirely with that statement of the law. However, just as in the Austin Road Company case the plaintiff here has failed to prove that Warren Pertoleum Company conducted its exploratory operations in a negligent manner or used more of the surface of plaintiff's land than was reasonably necessary.

In Smith v. Schuster, 66 So. 2d 430, 431, Louisiana Court of Appeal, so far as the plaintiff's cause of action was concerned, the Court says that the only question presented for consideration is whether the plaintiff presented sufficient evidence of damages. The Court goes on to say, however, that "He (the mineral lessee) should maintain and restore the premises in the condition he found them subject to his rightful use, * * *."

We do not think this statement of law supports respondent's contention of implied duty to repair the damage done to the land caused by rightful and necessary use. In the case of Oceana Oil Producers, Inc. v. Portland Silo Co., 1951, 229 Ind. 656, 100 N.E. 2d 895, the Court merely held that it was lessee's duty after [*364] abandonment to put the premises in as good condition for tilling as it found them when it went into possession under the lease because the contract expressly entailed
that obligation on the lessee.

The judgment in favor of respondents is reversed and here rendered in favor of petitioner.

Opinion delivered July 24, 1957.
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Warren Petroleum Corp. v. Monzingo
Notes and Discussion

1. Does the oil and gas lessee have a duty to restore the surface at the end of the oil and gas lease term?

2. In Oklahoma the oil and gas regulatory agency has adopted the following regulations with regard to surface restoration:

> 165:10-3-17. Well site and surface facilities
> . . . .
> (c) Removal of surface trash. All surface trash, debris, junk, and scrap or discarded material connected with the operations of the property shall be removed from the premises. With written permission from the surface owner, the operator may, without applying for an exception to 165:10-3-17(b), bury all nonhazardous material at a minimum depth of three feet; cement bases are included.
> . . . .
> (k) Well site cleared. Within 90 days after a well is plugged and abandoned, the well site shall be cleared of all equipment, trash, and debris. Any foreign surface material is to be removed and the location site restored to as near to its natural state as reasonably possible, except by written agreement with the surface owner to leave the surface in some other condition. If the location site is restored but the vegetative cover is destroyed or significantly damaged, a bona fide effort shall be made to restore or reestablish the vegetative cover within 180 days after abandonment of the well.
>
> (l) Restored surface. Within 90 days after a lease has been abandoned, surface equipment such as stock tanks, heater, separators, and other related items shall be removed from the premises. The surface shall be restored to as near to its natural state as reasonably possible, except by written agreement with the surface owner to leave the surface in some other condition. If the surface is restored but the vegetative cover is destroyed or significantly damaged, a bona fide effort shall be made to restore or reestablish the vegetative cover within 180 days after abandonment of the lease.
>
> (m) Leasehold roads. All leasehold roads shall be kept in a passable condition and shall be made accessible at all times for representatives and field inspectors of the Commission. At the time of abandonment of the property, the area of the road shall be restored to as near to its natural state as reasonably possible, except by written agreement with the surface owner to leave the surface in some other condition. If the road area is restored but the vegetative cover is destroyed or significantly damaged, a bona fide effort shall be made to restore or re-establish the vegetative cover within 180 days after abandonment of the property.
>
> (n) Extension of time.
>
> (1) An operator may request an extension of time required in (k), (l), and (m) of this Section for not more than six months by applying to the District Office and showing that there is no imminent danger to the environment and that one of the following conditions exists:

(A) That an agreement with the surface owners is not possible.
(B) That adverse weather conditions exist or existed.
(C) That the equipment needed to conform to (k), (l), and (m) of this Section was not or is not available.

(2) If approved by the District Manager, the extension shall be granted and the surface owner shall be notified by the operator. Any extension beyond six months shall require application, notice and hearing pursuant to OAC 165:5-7-41.

BONDS v. SANCHEZ-O'BRIEN OIL & GAS CO.
Supreme Court of Arkansas
289 Ark. 582; 715 S.W.2d 444; 62 A.L.R.4th 1147; 91 Oil & Gas Rep. 11
September 15, 1986, Opinion delivered

The sole issue in this case is whether the lessee of an oil and gas lease has an implied duty upon termination of production, or upon the drilling of a dry hole, to restore the surface of the land, as nearly as practicable, to the same condition as it was prior to drilling. We hold that the lessee has such a duty.

Eddie Smith, the predecessor in title to appellant, Bobbye Bonds, executed an oil and gas lease in July 1977. In 1979, a well was drilled and completed as a producer on the land. At that time the Cotton Petroleum Corporation, the owner of the lease, paid Smith for all location damages and took a release from liability for those damages. In January 1981, Smith executed a warranty deed for the surface to appellant [**445] Bonds. In December 1984, the operator of the well, appellee Sanchez-O'Brien Oil and Gas Company, plugged and abandoned the well, but left water pits, concrete slabs, dams, and winrock stone on the surface.

There is no need to recite all of the other facts or the pleadings since the parties agree that the issue before this court is whether the operator has a duty to restore the surface. The issue is a matter of first impression in this State. Some states have adopted reclamation statutes. For example, the Kansas statute requires an operator to remove all equipment, structures and obstacles placed upon the land and to grade the surface, so as to leave the land, as nearly as practicable, in the same condition as it was before the operation, unless the parties have entered into a contract providing otherwise. Kan. Gen. Stat. Ann. @ 55-132a (Supp. 1961). The State of Arkansas has no such reclamation statute.

Only a limited number of courts have decided this issue, but the rule adopted by the majority of those that have decided it is that a lessee is under no implied duty to restore the surface of the land to the condition prior to commencement of the drilling. 1 H. Williams & C. Meyers, Oil and Gas Law @ 218.12 (1985).

Commentators are divided in their writings. Davis, in "Selected Problems regarding Lessee's Rights and Obligations to the Surface Owner," 8 Rocky Mt. Min. L. Inst. 315, 374 (1963), writes:

The conflicting positions taken by the courts in the cited cases have been both justified and condemned by legal writers. Williams and Meyers prefer the rule that refuses to imply the obligation.

They reason:

> It is well known that some surface damage inevitably results from oil and gas operations on the premises, e.g., from the building of roads and slush pits. The parties to the deed or lease severing minerals must be viewed as having this fact in mind. Their deed or lease contemplates reasonable surface user by the mineral owner or lessee. If a restriction on the surface easements of the latter is intended, it is reasonable to require that such intent be explicit in the instrument; otherwise the risk of injury resulting from reasonable surface user is properly upon the surface owner. If this view is adopted, the liability of a mineral owner or

> lessee to the surface owner by reason of change of conditions of the premises as a result of drilling and related operations should be limited to those cases involving negligence, willful misconduct, excessive user, breach of duty imposed by statute or valid regulatory order, or breach of an express contractual duty. 1 Oil and Gas Law 239-240 (1959).

Dean Sullivan, on the other hand, expresses a contrary view:

> An analysis of the relationship of the parties and the underlying purpose of the lease would indicate that the lessee should be obligated to restore the surface, reasonable wear and tear excepted, even in the absence of an express provision to that effect. Sullivan, Oil and Gas Law 91 (1959).

Davis concludes by suggesting that it is the modern practice of prudent operators to clean up and restore the surface and he urges that:

The failure or refusal to do so would, in fact, constitute an unreasonable surface use that was not contemplated as being included in the rights granted to the lessee. Williams and Meyers argue that if the landowner wants to have his premises cleaned up after operations are completed, he should be required to spell out such requirement in the lease. I would put the shoe on the other foot and require the lessee to negate this obligation expressly or suffer the judicial implication of the duty.

Davis, "Selected Problems Regarding Lessee's Rights and Obligations to the Surface [**446] Owner," 8 Rocky Mt. Min. L. Inst. 315, [*585] 349 (1963). Cole, in "Oil & Gas: Does the Oil and Gas Lessee Have a Duty to Restore the Surface?," 25 Okla. L. Rev. 572, 573 (1972) states: "Until recently most courts which had considered the question held that a duty to restore would not be implied. Legislative initiative and changes in the viewpoint of courts, however, have now established a definite trend toward placing the burden of restoration on the lessee."

[1] We are persuaded that the current trend toward placing the burden of restoration on the lessee is the better view. This viewpoint recognizes a legitimate legal concern for the environment. In recognition of this concept, many responsible members of the oil industry have already voluntarily begun to clean up their abandoned sites, and we must base decisions upon current concepts of what is right and just. To hold otherwise would allow the lessee to continue to occupy the surface, without change, after the lease has ended. This would constitute an unreasonable surface use, and no rule is more firmly established in oil and gas law than the rule that the lessee is limited to a use of the surface which is reasonable. Accordingly, we hold that the duty to restore the surface, as nearly as practicable, to the same condition as it was before drilling is implied in the lease agreement.

Reversed and remanded for proceedings consistent with this opinion.

DISSENT: John I. Purtle, Justice, concurring in part and dissenting in part.

I concur in that part of the majority opinion which holds that restoration is the responsibility of the lessee. However, it is a matter which is subject to contract. I would hold that the appellant in the present case purchased this property with knowledge of the existence of these structures and therefore waived the right to have the appellee remove them.

David Newbern, Justice, dissenting.

The appellant describes herself as an oil well operator who is very experienced in the oil business. She testified she had $ 400 per acre invested in the two acres which are the subject of this action. She acknowledged she is asking the appellee to spend over $ 10,000 to repair the two acres despite the payment of $ 1,700 to her predecessor in title for [*586] damages to the land in question. Her position, apparently accepted by the appellee, is that she is not bound by the release given by her predecessor because she was unaware of it when she purchased the land.

The majority opinion cites no case holding that a lease of mineral rights carries an implied obligation of the lessee to restore the leasehold, as nearly as practicable, to the condition it was in before drilling. There may be one such case. In Smith v. Schuster, 66 So. 2d 430 (La. App. 1953), the court found such a duty. The basis of the duty was not discussed, and no authority for it was cited.

That case was overruled by implication in Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1958). In the latter case, the mineral lease expressly required the lessee to pay for damages to crops and timber.

The court allowed damages for lost corn and watermelons but refused to go further, stating there was no duty beyond the duty not to be negligent in the use of the land. More recently the Louisiana Court of Appeals has found an implied duty to restore the surface, but it has been based on the Louisiana Mineral Code rather than the lease between the parties. See Broussard v. Waterbury, 346 So. 2d 1342 (La. App. 1977).

I agree with the scholarly articles cited in the majority opinion that there has been a trend to enact legislation imposing the duty to restore upon mineral lessees. Montana (Mont. Code Ann. @ 82-10-501 to @ 82-10-511 (1983); Illinois (Ill. Rev. Stat. Ch. 100 1/2 @ 26 (1983); Kansas (Kan. Stat. Ann. @ 55-132(a) (1983); Oklahoma (Okla. Stats. Ann. tit. 52 @ 318.2 to @ 318.9 (West Supp. 1984-85); and South Dakota (S.D. Cent. Code @ 38-11.1-01 to @ 38-11.1-10 (1980 and Supp. 1983) have such statutes.

Before the enactment of its statute, Oklahoma allowed the lessor to recover under a nuisance theory, Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973), or negligence theory, Nichols v. Burk Royalty Co., 576 P.2d 317 (Okla. 1977), for surface damages, but I find no Oklahoma case imposing an implied restoration duty in a [**447] mineral lease. Likewise, in Kansas, prior to legislation, there was no implied duty. Duvanel v. Sinclair Refining Co., 227 P.2d 88 (Kan. 1951); McLeod v. Cities Service Gas Co., 131 F.Supp. 449 (D.C. Kan. 1955).

Other jurisdictions having no legislation covering the matter hold there is no implied duty upon the mineral lessee to restore the surface. Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362 (Texas 1957); Amoco Production Co. v. Carter Farms, 703 P.2d 894 (N.M. 1985).

I find no evidence whatever of the "changes in the viewpoint of courts." While I find some evidence of the legislative trend, I find the judicial one exists only in the hopes and dreams of the authors cited in the majority opinion. In my view we have no business making a blatant change in

the law of mineral leases. Rather, I agree with the conclusion of the author of one article cited by the majority:

The best solution to this problem seems to be the adoption of a statute, similar to the Kansas and Illinois statutes, requiring restoration of the premises upon completion of operations.

L. Davis, Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner, 8 Rocky Mtn. Min. L. Inst. at 349 (1963).

I respectfully dissent.

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Bonds v. Sanchez-O'Brien Oil and Gas Co.
Notes and Discussion

1. What does this court say with regard to the trend regarding the issue of whether an oil and gas lessee has a duty to restore the surface at the end of the lease?

Chapter 10: DUTY TO WARN & DUTY TO DISCLOSE

i. Historical rule: Duty to Disclose & Caveat Emptor

PHILADELPHIA ELECTRIC COMPANY v. HERCULES, INC. and GOULD, INC., Hercules, Inc., Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
762 F.2d 303; 1985 U.S. App. LEXIS 31294; 22 ERC (BNA) 1865; 15 ELR 20554

May 28, 1985, Decided

This is an appeal from a final judgment of the district court in favor of Philadelphia Electric Company ("PECO") and against Hercules, Inc. ("Hercules") in the amount of $394,910.14, and further ordering Hercules to take all appropriate action to eliminate pollution on a property owned by PECO in Chester, [**2] Pennsylvania. The case was tried to a jury on theories of public and private nuisance. For the reasons set forth in the opinion that follows, we will reverse the judgment against Hercules on PECO's claims, and vacate the injunction.

I.

Prior to October of 1971, the Pennsylvania Industrial Chemical Corporation ("PICCO") owned a tract of land abutting the Delaware River in Chester, Pennsylvania where it operated a hydrocarbon resin manufacturing plant. At the time PICCO acquired the property ("the Chester site") there was an inlet located at the southern end that opened into the Delaware River. Sometime later PICCO filled in the shoreline at the inlet and thereby created a lake ("the PICCO pond"). During the period it conducted operations on the Chester site, the evidence tended to show, PICCO deposited or buried various resins and their by-products in the PICCO pond and possibly other locations.

In 1971 PICCO ceased operations on the Chester site and sold the facility to Gould, Inc. ("Gould"). Gould did not conduct any operations on the Chester site, other than leasing certain tanks to ABM Disposal Services Company ("ABM"), which used them to store large quantities of various [**3] waste materials, though apparently not resins or resinous by-products.

In mid-1973, PECO -- which operated a plant on an adjoining piece of land -- obtained an option to purchase the Chester site from Gould. Prior to exercising its option, a PECO representative inspected the site on more than one occasion, including walking tours along the banks of the Delaware River and the banks of the PICCO pond. PECO learned that Gould's tenant, ABM, had caused a number of spills on the site, including oil spills in the pond area, and was informed that ABM was a "sloppy tenant". ABM was unable to clean up the Chester site in time to meet Gould's original deadline for vacating the premises, a condition of the PECO purchase agreement. PECO exercised its option and acquired [*307] the property in March of 1974. PECO has conducted no operations on the Chester site, but has leased a portion of the land to American Refining Group, Inc.

In 1980 the Pennsylvania Department of Environmental Resources ("DER") discovered that resinous materials similar to those once produced by PICCO were seeping from the banks of the Delaware River at the Chester site, and that the PICCO pond was contaminated with [**4] the same material. On August 22, 1980 PECO received the following letter from a DER Water Quality Specialist:

> This is to confirm the results of an inspection conducted on July 15, 1980 . . . which revealed that a resinous material was leaching from the bank of the Delaware River from PECO property located between Jeffrey and Ward Streets. Such condition is in violation of Title 25, Chapter 101, Section 2 of the Rules and Regulations of the Department of Environmental Resources regarding Special Water Pollution Regulations. 1
>
> During our preliminary survey of the site you stated that the property was once owned by Pennsylvania Industrial Chemical Company which operated a resin disposal lagoon on site. You mentioned that core samples had been taken of this site, that the contents of the lagoon had been pumped to a storage tank and samples of this material were being analyzed. In order that we may evaluate the impact of this material on the Delaware River we request that a copy of the core sampling results and a copy of chemical analysis of the substance be submitted to the Department. If the core sampling does not provide sufficient data, additional monitoring may be required. [**5]
>
> It was also noted that a remnant of the resin lagoon remains on site. During our inspection you indicated that this lagoon was going to be cleaned out and abandoned. Please indicate how and when this work will be accomplished.

In response, PECO developed a plan whereby the remaining pond resin would be removed to a landfill, and the PICCO pond area would be backfilled and regraded. DER approved this plan on November 21, 1980. PECO produced evidence indicating that it incurred expenses of $338,328.69 in implementing the clean-up, and an additional $7,578 in collecting and carting away resinous material that continued to leach to the surface at various places around the Chester site during the summers of 1981-1983. PECO also introduced evidence of $67,500 in lost rentals from American Refining due to the continuing leaching.

In a letter dated [**6] March 10, 1981, DER expressed satisfaction with the clean-up of the pond area, but reported that a February 27, 1981 inspection revealed resins still on the Delaware River bank and continued leaching of resins into the River. PECO was asked to "submit in writing . . . Philadelphia Electric's position on the control or clean-up of the resin material remaining on the bank." After PECO expressed reluctance to spend any additional money on clean-up of the Chester site, DER wrote PECO again, on May 28, 1981:

> Leachate analysis of the resin on the river bank indicates that there is a leaching problem from the resin. Such discharge constitutes an unpermitted discharge to the waters of the Commonwealth and is a violation of the Clean Streams Law, subject to the penalties provided therein. It is therefore required that the resin material on the river bank be removed.

The record does not reveal that DER or PECO has taken any further action regarding the resinous material on the river bank, and PECO's witness testified at trial that the condition still existed.

On February 16, 1982, PECO instituted suit against Gould and Hercules, which had acquired the remaining assets of [**7] PICCO in 1973, in exchange for Hercules stock. (PICCO was dissolved on January 9, 1976.) Hercules cross-claimed against Gould. On [*308] cross-motions for summary judgment the district court ruled that Hercules was liable as PICCO's corporate successor under the express terms of the Agreement and Plan of Reorganization ("the Agreement") it entered into with PICCO, and because the transaction was a de facto merger. A jury trial was held in July of 1983. PECO, stating that discovery had shown no wrongdoing on the part of Gould, offered no evidence against Gould. 2 At trial Hercules attempted to show that the pollution was not consistent with PICCO's operations on the Chester site, but was consistent with the operations of ABM and other industrial plants in the area. At the close of evidence, the jury was instructed on principles of public and private nuisance. The jury's verdict was rendered in the form of answers to special interrogatories:

1. Do you find by a preponderance of the evidence that PICCO caused the contamination of the property now owned by Philadelphia Electric Company? YES.

2. Do you find by a preponderance of the evidence that the contamination [**8] on the property now owned by Philadelphia Electric Company continues to pollute the groundwater or the Delaware River? YES.

3. In what amount do you award damages? $345,906.69.

4. Do you find by a preponderance of the evidence that ABM's activities contributed to the contamination of the Philadelphia Electric Company property? YES.

5. Was Gould aware of ABM's activities and permitted them to continue? NO.

Based on these answers, the district court moulded a verdict and entered judgment for PECO against Hercules in the amount of $394,910.14, which included delay damages of $49,003.45 pursuant to Pennsylvania Rule of Civil Procedure 238, entered judgment for Gould on Hercules' cross-claim, and issued an injunction as follows:

> IT IS FURTHER [**9] ORDERED and DECREED that Hercules, Inc. shall forthwith take all appropriate action to abate and eliminate the contamination on the property of the Philadelphia Electric Company located at the Chester site and abate the further pollution of the groundwater and the Delaware River adjacent to the property by collecting and removing all pollutants in accordance with all applicable rules and regulations of the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, and any other appropriate state or federal regulatory agency.

In this appeal Hercules contends, inter alia, that the district court erred in ruling that it was liable as PICCO's successor, and that PECO had no cause of action against it for public or private nuisance. The parties are agreed that the substantive law of Pennsylvania governs this diversity case.

II.

HN1"As a general rule," under Pennsylvania common law, "when one company sells or transfers all its assets to another, the successor company does not embrace the liabilities of the predecessor simply because it succeeded to the predecessor's assets." McClinton v. Rockford Punch Press & Manufacturing Company, 549 F. Supp. 835, 837 (E.D. Pa. 1982). [**10]

Four exceptions to the general rule of nonliability are widely recognized, in Pennsylvania and elsewhere. Thus, where (1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferor; (2) the transaction amounts to a consolidation or de facto merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability, a successor corporation may be [*309] held responsible for the debts and liabilities of its predecessor. See Shane v. Hobam, Inc., 332 F. Supp. 526 (E.D. Pa. 1971); Granthum v. Textile Machine Works, 230 Pa. Super. 199, 326 A.2d 449 (1974). See generally 15 W. Fletcher, Cyclopedia of the Law of Private Corporations § 7122 (rev. perm. ed. 1983). "A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor." Husak v. Berkel, Inc., 234 Pa. Super. 452, 457, 341 A.2d 174, 176 (1975). In addition, Pennsylvania has recently adopted the more controversial [**11] "product-line" exception in products liability cases. See Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, 434 A.2d 106 (1981); Savini v. Kent Machine Works, 525 F. Supp. 711 (E.D. Pa. 1981). See generally Comment, Expanding the Products Liability of Successor Corporations, 27 Hast. L. Rev. 1305 (1976). In the instant case the district court found, as a matter of law, that Hercules had expressly assumed PICCO's liabilities and that the transaction amounted to a de facto merger. We agree with the district court as to both theories of successor liability. . . .

III.

Having determined that Hercules may be liable as PICCO's successor for unknown and contingent liabilities, we must analyze the relationship between Hercules and PECO as that of a vendor and remote vendee of land. Hercules argues that this relationship is governed by the rule of caveat emptor, subject to limited exceptions not applicable here, and that a vendee has no cause of action against a vendor sounding in private nuisance for conditions existing on the land transferred. After carefully considering this question of first impression, we are persuaded that under Pennsylvania law Hercules cannot, as a matter of law, be held liable to PECO on a private nuisance theory. The Reporter's Note to [**23] Restatement (Second) of Torts § 352 (1965) sums up the prevailing view regarding the liability of a vendor of land:

> HN4Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.

See also M. Friedman, Contracts and Conveyances of Real Property § 1.2(n), at 37 (4th ed. 1984) ("In the sale of realty this doctrine [caveat emptor] not only applies, [**24] it flourishes.").

As the Pennsylvania Supreme Court has said:

> "*Generally speaking, the rule is HN5that in the absence of fraud or misrepresentation a vendor is responsible for the quality of property being sold by him only to the extent for which he expressly agrees to be responsible. . . . The theory of the doctrine is that the buyer and seller deal at arm's length, each with an equal means of knowledge concerning the subject of the sale, and that therefore the buyer should be afforded only those protections for which he specifically contracts*." Elderkin v. Gaster, 447 Pa. 118, 124, 288 A.2d 771, 774-75 (1972) (footnote omitted).

In Elderkin the court abolished the rule of caveat emptor as to the sale of new homes by a builder-vendor and, in accordance with a national trend, adopted a theory of implied warranties. See generally 6A Powell on Real Property chap. 84A (1984). But [*313] the reasoning of the Elderkin opinion 4 leaves us with no doubt that where, [**25] as here, corporations of roughly equal resources contract for the sale of an industrial property, and especially where the dispute is over a condition on the land rather than a structure, caveat emptor remains the rule.

A number of general exceptions to the rule of caveat emptor, mostly dealing with liability for personal injuries or property damage resulting from latent dangerous conditions, have been recognized. See Quashnock v. Frost, 299 Pa. Super. 9, 445 A.2d 121 (1982); Shane v. Hoffmann, 227 Pa. Super. 176, 324 A.2d 532 (1974); Restatement (Second) of Torts § 353; Annot., 18 A.L.R. 4th 1168 (1982); Annot., 48 A.L.R. 3d 1027 (1973).

PECO concedes that these exceptions do not apply in this case. (Indeed, PECO appears to argue that because the exceptions do not apply, neither does the rule. This, of course, does not follow.) PECO's tack has been to cast its cause of action for the condition of the Chester site as one for private nuisance. We, however, do not believe that PECO can escape the rule of caveat emptor by this route.

Restatement (Second) of Torts § 821D defines HN6a "private nuisance" as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." The briefs and arguments, as well [**27] as the district court's opinion, 587 F. Supp. at 152-54, give much attention to the questions of whether the condition created by Hercules on the Chester site amounted to a nuisance, and whether Hercules remains liable for the nuisance even after vacating the land. For the purposes of our decision, we may assume that Hercules created a nuisance, and that it remains liable for this condition. See Restatement (Second) of Torts § 840A. The crucial and difficult question for us is to whom Hercules may be liable.

The parties have cited no case from Pennsylvania or any other jurisdiction, and we have found none, that permits a purchaser of real property to recover from the seller on a private nuisance theory for conditions existing on the very land transferred, and thereby to circumvent limitations on vendor liability inherent in the rule of caveat emptor. In a somewhat analogous circumstance, courts have not permitted tenants to circumvent traditional limitations on the liability of lessors by the expedient of casting their cause of action for defective conditions existing on premises (over which they have assumed control) as one for private nuisance. [**28] See Collette v. Piela, 141

Conn. 382, 106 A.2d 473 (1954); Clerken v. Cohen, 315 Ill. App. 222, 42 N.E.2d 846 (1942). In Harris v. Lewistown Trust Co., 326 Pa. 145, 191 A. 34 (1937), overruled in part on other grounds, Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968), the Supreme Court of Pennsylvania held that HN7the doctrine that a landlord not in possession may be liable for injuries resulting from a "condition amounting to a nuisance" is confined to "the owners or occupants of near-by property, persons temporarily on such property, or persons on a neighboring highway or other places." 326 Pa. at 153, 191 A. at 38. 6 Recovery on this theory was not available to tenants or their invitees: HN8"A breach of duty owed to one class of persons cannot create a cause of action in favor of a person not within the [*314] class. A plaintiff must show that as to him there was a breach of duty." 326 Pa. at 152, 191 A. at 38. [**29] 7 Similarly, under the doctrine of caveat emptor Hercules owed only a limited duty to Gould and, in turn, to PECO. PECO concedes that this duty was not violated. PECO cannot recover in private nuisance for the violation of a duty Hercules may have owed to others -- namely, its neighbors.

We believe that this result is consonant with the historical role of private nuisance law as a means of efficiently resolving conflicts between neighboring, contemporaneous land uses. See Essick v. Shillam, 347 Pa. 373, 376, 32 A.2d 416, 418 (1943) (HN9"An owner has a right, barring malice and negligence, to any use of his property, unless by its continuous use he prevents his neighbors from enjoying the use of their property to their damage.") (emphasis added).

All of the very useful and sophisticated economic analyses of private nuisance remedies published in recent years proceed on the basis that the goal of nuisance law is to achieve efficient and equitable solutions to problems created by discordant [**31] land uses. 10 In this light nuisance law can be seen as a complement to zoning regulations, see Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440, 452 ("The state in nuisance cases is exercising, through the judicial arm, the same basic power of the sovereign that it exercises through the legislative arm in zoning."), and not as an additional type of consumer protection for purchasers of realty. Neighbors, unlike the purchasers of the land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation.

The record shows that PECO acted as a sophisticated and responsible purchaser -- inquiring into the past use of the Chester site, and inspecting it carefully. We find it inconceivable that the price it offered Gould did not reflect the possibility of environmental risks, even if the exact condition giving rise to this suit was not discovered.

Where, as here, the rule of caveat emptor applies, allowing a vendee a cause of action for private nuisance for conditions existing on the land transferred -- where there has been no fraudulent concealment -- would in effect negate the market's allocations of resources and risks, and subject [*315] vendors who may have originally sold their land at appropriately discounted prices to unbargained-for liability to [**33] remote vendees. To so extend private nuisance beyond its historical role would render it little more than an epithet, "and an epithet does not make out a cause of action." Miller v. Morse, 9 A.D.2d 188, 192 N.Y.S.2d 571, 576 (1959).

Such an extension of common law doctrine is particularly hazardous in an area, such as environmental pollution, where Congress and the state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities. We conclude that PECO did not have a cause of action against Hercules sounding in private nuisance.

IV.

The doctrine of public nuisance protects interests quite different from those implicated in actions for private nuisance, and PECO's claim for public nuisance requires separate consideration. Whereas private nuisance requires an invasion of another's interest in the private use and enjoyment of land, HN10a public nuisance is "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1). An action for public nuisance may lie even though neither [**34] the plaintiff nor the defendant acts in the exercise of private property rights. 11 As William Prosser once wrote:

> There are, then, two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law. HN11A private nuisance is narrowly restricted to the invasion of interests in the use and enjoyment of land. It is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed. A public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure. Although as in the case of other crimes, the normal remedy is in the hands of the state, a public nuisance may also be a private one, when it interferes with private land. The seeds of confusion were sown when courts began to hold that [**35] a tort action would lie even for a purely public nuisance if the plaintiff had suffered "particular damage."

Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 999 (1966) (footnotes omitted). In analyzing the public nuisance claim, we are not concerned with the happenstance that PECO now occupies the very land PICCO occupied when it allegedly created the condition that has polluted the Delaware River waters, 12 or that the continuing source of that pollution is located on that land. 13 The question before us is whether PECO has standing to bring an individual action for damages or injunctive relief for interference with a public right.

Restatement (Second) of Torts § 821C(1) provides:

> HN12In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

The same requirements apply to individual plaintiffs seeking injunctive relief. Restatement (Second) of Torts § 821C(2); Prosser, supra, 52 Va. L. Rev. at 1006. PECO argues that the expense it incurred in cleaning up the offending condition constituted the harm requisite for standing to sue for public nuisance. We disagree. [**37] Though pecuniary harm certainly may be harm of a different kind from that suffered by the general public, see Restatement (Second) of Torts § 821C comment h, 14 we find in this case no allegation or evidence that PECO suffered this harm "exercising the right common to the general public that was the subject of interference."

The public right that was interfered with was the right to "pure water". See Commonwealth v. Barnes & Tucker Company, 455 Pa. 392, 412-13, 319 A.2d 871, 882 (1974); Pa. Const. art. I, § 27. PECO does not allege that it used the waters of the Delaware River itself, or that it was

directly harmed in any way by the pollution of those waters. Thus, this is not a case "where an established business made commercial use of the public right with which the defendant interfered." Prosser, supra, 52 Va. L. Rev. at 1013-14 (footnote omitted). If PECO -- as a riparian landowner -- had suffered damage to its land or its operations as a result of the pollution of the Delaware, it would possibly have a claim for public nuisance. But the condition of the Chester site was not the result of the pollution, it was the cause of it. [**38] DER required PECO, as owner of the Chester site, to remove the sources of the pollution. PECO has been specially harmed only in the exercise of its private property rights over the Chester site. PECO has suffered no "particular damage" in the exercise of a right common to the general public, and it lacks standing to sue for public nuisance. . . .

[text omitted]

We emphasize that our decision today should not be interpreted as standing for the general proposition that a party that contaminates land, or the successors to its assets, can escape liability by the expedient of selling the land. To the contrary, it would seem that there are many avenues by which such a party may be held accountable. 20 We hold only that in this case the [*319] purchaser of that land, PECO -- though we recognize that it acted as a responsible corporate citizen -- had no cause of action against the vendor's [**48] successor, Hercules, for private nuisance, public nuisance, or common law indemnity.

CONCLUSION

For the foregoing reasons, the injunction requiring Hercules to clean up the Chester site will be vacated, and the judgment of the district court on PECO's claims against Hercules will be reversed.

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PECO v. Hercules Inc.

Questions:

1. When a property with environmental contamination is acquired, does the acquiring party automatically assume liability for the pre-existing comtamination?

Note the PECO court discussion:

> HN1 As a general rule, under Pennsylvania common law, when one company sells or transfers all its assets to another, the successor company does not embrace the liabilities of the predecessor simply because it succeeded to the predecessor's assets.
>
> Four exceptions to the general rule of nonliability are widely recognized, in Pennsylvania and elsewhere. Thus, where (1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferor; (2) the transaction amounts to a consolidation or de facto merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability, a successor corporation may be held responsible for the debts and liabilities of its predecessor. A fifth circumstance, sometimes included as an exception to the general rule,

> is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor. More Like This Headnote | Shepardize: Restrict By Headnote

2. What does this court say with regard to the traditional rule with regard to the duty to disclose defect when transferring property?

With regard to obligations or duty, the PECO court notes as follows:

> HN4 Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer.
>
> As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities.
>
> The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.

3. Under the doctrine of caveat emptor, the buyer could not recover from the seller for defects on the property that rendered the property unfit for ordinary purposes. The only exception was if the seller actively concealed latent defects or otherwise made material misrepresentations amounting to fraud. Caveat venditor is Latin for "let the seller beware". The PECO court notes the caveat emptor theory still applies in certain situations:

> . . . the reasoning of the Elderkin opinion leaves us with no doubt that where, as here, corporations of roughly equal resources contract for the sale of an industrial property, and especially where the dispute is over a condition on the land rather than a structure, caveat emptor remains the rule. . .

ii. Allocation of risk & liability by contract

Gopher Oil Co. v. Union Oil Co.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
955 F.2d 519; 1992 U.S. App. LEXIS 1076; 34 ERC (BNA) 1709; 22 ELR 21005
October 16, 1991, Submitted
January 28, 1992, Filed

These appeals arise from an action brought by Gopher Oil Company (Gopher) to recover damages, environmental cleanup costs and attorney fees from the defendant [*522] Union Oil Company of California (Union) based on common law fraud under Minnesota state law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, @@ 107, 113, 42 U.S.C. @@ 9607, 9613 (1988) and the Minnesota Environmental Response and Liability Act (MERLA), Minn. Stat. @@ 115B.04, 115B.08 (1991). n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
n1 State and federal "Superfund Acts."
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

After a trial by jury and the adoption and modification of the jury verdict, which the trial judge considered as advisory, on the MERLA and CERCLA claims, the district court entered the following orders and judgments:

1. Order and judgment, under Fed. R. Civ. P. 54(b), dated November 20, 1990 that Gopher recover cleanup costs in the sum of $ 423,272.81 plus prejudgment interest ($ 93,572.34) and postjudgment interest ($ 4,794.00) against Union: declaring Union further liable for 100% of necessary response and removal costs and retaining jurisdiction over the fraud claim for future determination of damages after substantial cleanup of the site.

2. Order dated February 19, 1991 granting attorney fees and other expenses to Gopher, under CERCLA and MERLA, in the sum of $ 559,380.52. That order also:

a) provided for denial of Union's motion for a new trial.

b) granted Gopher's motion for a 28 U.S.C. @ 1292(b) (1988) certification for interlocutory appeal of that part of the judgment retaining jurisdiction to award future damages on the fraud claim, rather than entering total damages pursuant to the jury's verdict.

Union appeals from the damage award, the attorney fee award and the declaration of 100% liability against Union (Case Nos. 91-1159 and 91-1430). Gopher appeals under 28 U.S.C. @ 1292(b), with the permission of this court, contesting the trial court's deferral in awarding final judgment on the fraud claim (Case No. 91-1854).

We have appellate jurisdiction over Union's appeals under 28 U.S.C. @ 1291 (1988), as appeals from final orders and judgments. We have jurisdiction over Gopher's appeal under 28 U.S.C. @ 1292(b). Federal jurisdiction over plaintiff's claims rests on 28 U.S.C. @ 1332 (diversity of citizenship), 28 U.S.C. @ 1331 (federal question) and 42 U.S.C. @ 9613 (CERCLA).

On these appeals, Union challenges: (1) the district court's denial of Union's motion for a new trial on the fraud issue, alleging erroneous jury instructions and lack of evidentiary support for the jury verdict; (2) the district court's order holding Union one-hundred percent responsible for cleanup costs under both CERCLA and MERLA; and (3) the district court's award of attorney fees to Gopher.

Gopher asserts error in the trial court's refusal to award Gopher full damages on the fraud claim pursuant to the jury verdict.

We affirm on all appeals, but remand for reconsideration of attorney fees and suggest calculation of fraud damages as expeditiously as possible.

I. BACKGROUND

From the early 1900s to 1980, W.H. Barber Company (Barber) owned and operated a bulk oil and chemical facility on a five-acre site located in Minneapolis, Minnesota. Barber operated as a subsidiary of the Pure Oil Company (Pure Oil). Upon the merger of Pure Oil and Union in 1965, Barber became a wholly-owned subsidiary of Union. Barber primarily blended petroleum products and packaged them for resale. From the early 1960s to 1980, American Mineral Spirits Company (AMSCO), a division of Union, shared the site with Barber and utilized Barber employees for the blending and packaging of industrial chemicals.

Prior to 1980, the Barber and AMSCO operations resulted in numerous leaks, spills and intentional dumpings of oil and industrial chemicals. In preparing the Barber site for sale, Union took steps to conceal the evidence of years of accumulated [*523] deposits of oil and chemicals on the site. It removed contaminated ground and replaced it with landscaping gravel. Other contaminated areas were simply covered over with the gravel.

Gopher, a Minnesota petroleum products processing company, expressed an interest in purchasing the site in late 1980. Union representatives informed Gopher of a 1977 spill of 10,000 gallons of turpentine and another spill of approximately 300 gallons of lubricating oil. Union did not inform Gopher that Barber and AMSCO's normal operating procedures, particularly prior to 1970, resulted in continual minor leaks and dumpings on the site. Further, Gopher asserts that Union assured Gopher on three occasions that no pollution problems existed with the site. A Union internal memorandum, however, noted the need for pollution control and recommended sale of the site rather than a substantial investment in environmental and safety concerns.

Gopher knew of a September 1980 letter, addressed to Barber, containing a request from the City of Minneapolis that Barber conduct soil borings on the site in relation to the 1977 turpentine spill. Union representatives suggested that the request resulted from political pressure. Gopher was able to have the request revoked.

Representatives of Gopher visited the site twice before the purchase and during a guided tour viewed the storage tanks, buildings and a tunnel. They noticed some minor soil discoloration from oil spills, but gravel obscured much of the contaminated ground and any chemical spills would have been primarily colorless. Gopher had free access to Union's records for investigation, but did not utilize the opportunity.

Fred Bame (Bame), president of Gopher, contacted officials from the Minnesota Department of Inspections and the Minnesota Pollution Control Authority (MPCA) to inquire about any pollution problems at the site. These officials informed Bame about the two major spills and the tunnel filled with oil-contaminated water. They did not indicate any other major problems with the site.

Gopher completed the purchase in November of 1980. The purchase agreement contained a clause purporting to transfer the land and facilities in an "as is" condition n2 and a clause stating that none of the warranties made in the agreement contained any untrue statement of material facts or omitted any material fact, the omission of which would be misleading. n3 At the time of closure, CERCLA was not in force and CERCLA liability could not have been contemplated by either party.

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n2 Article VII of the purchase agreement provides:

The land; building, tanks, fixtures, machinery, equipment and vehicles sold under this agreement are being sold in an "as is" condition, excluding all other warranties, specifically excluding warranties of merchantability and fitness for any particular purchase [sic].

n3 Article XX of the purchase agreement provides:

None of the representations or warranties made by BARBER, in this Agreement or to be furnished to GOPHER at time of closing, shall contain any untrue statement of material fact, or omit any material fact, the omission of which would be misleading.
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

After the sale, Gopher fixed up the plant and replaced leaky valves and tanks. It continued the operations for approximately three years. Gopher asserts that it ran a clean operation, controlling any leaks and confining any spills to concrete floors for immediate cleanup.

In late 1983 and early 1984, the MPCA inspected the site and ordered Gopher to investigate. Soil borings and other tests revealed that the site contained substantial pollution. Gopher spent $423,272.81 on cleanup costs, pursuant to a 1986 compliance agreement with the MPCA.

II. THE PROCEEDINGS

In January of 1988, Gopher filed suit against Union, seeking damages for Union's fraud and for recovery of its cleanup costs. The trial before the district court and a jury took place between June 25, 1990 and July 11, 1990. Union did not move for a directed verdict at the close of all the evidence.

The district court utilized the Minnesota Jury Instruction Guide (3d Ed.) in instructing [*524] the jury. It also incorporated Union's requested instructions on the elements of fraud and the standard of proof for fraud. Union not only failed to object to the instructions, but indicated to the district court that they were "error free." The jury found that Union had made material misrepresentations to Gopher about the condition of the site to induce Gopher to purchase the site. It also issued an

advisory verdict finding Union one hundred percent responsible for the cost of environmental cleanup. n4

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n4 At the conclusion of the trial the jury returned a Special Verdict which read:

We, the jury in the above entitled action, return the following answers to the questions of fact presented to us.

PART I - MISREPRESENTATION

1. Before plaintiff Gopher Oil purchased the site, did defendant Union Oil misrepresent material facts to Gopher Oil about the condition of the site?
Yes
. . . .
2. Did plaintiff Gopher Oil know, or by the exercise of reasonable care should it have known, before January 11, 1982, that defendant Union Oil misrepresented facts about the condition of the site?
No
. . . .
3. When defendant Union Oil misrepresented facts to plaintiff Gopher Oil, did Union Oil know those facts were false or assert those facts without knowing whether they were true or false?
Yes
. . . .
4. Did plaintiff Gopher Oil rely on defendant Union Oil's misrepresentation about the condition of the site?
Yes
. . . .
5. Did defendant Union Oil make the misrepresentation about the condition of the site (1) with the intent to induce plaintiff Gopher Oil to act in reliance upon it, or (2) was plaintiff Gopher Oil justified in relying on defendant Union Oil's misrepresentation about the condition of the site? If you find either (1) or (2) is true, your answer to Question No. 5 is "Yes," if you find neither (1) nor (2) is true, your answer to Question No. 5 is "No."
Yes
. . . .
6. Did defendant Union Oil's misrepresentations about the condition of the site directly cause plaintiff Gopher Oil to suffer damages:
Yes
. . . .
7. What amount of money will fairly compensate plaintiff Gopher Oil for the damages it suffered as a direct result of defendant Union Oil's misrepresentation regarding the condition of the site?
$ 1,823,272.81

PART II - CLEAN-UP RESPONSIBILITY

8. As part of its purchase of the Thornton Avenue site in 1980, did Gopher Oil Company agree to assume the risk of environmental clean-up obligations and to hold W. H. Barber (Union Oil) Company harmless for the cost of any such clean-up?

No.

Please answer Question No. 9.

9. Taking all of the responsibility for response costs to be incurred in the future to be 100%, what percentage of responsibility for those response costs do you attribute to:
0% Gopher Oil
100% Union Oil
0% Barber Oil
100%

Order of Oct. 12, 1990 at 1-4.
- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

The district court adopted the jury's determination that Union had defrauded Gopher and retained jurisdiction over the fraud claim in order to assess the correct measure of out-of-pocket expenses after cleanup was completed and the property was revalued. After making detailed findings, the district court also allocated to Union one hundred percent of the liability for cleanup costs under CERCLA and MERLA and awarded Gopher $ 423,272.81 in past cleanup costs plus interest. The district court also entered judgment in Gopher's favor on the CERCLA and MERLA claims in the order and judgment dated November 20, 1991. In an order dated February 15, 1991, the district court awarded $559,380.52 in attorney fees to Gopher and denied Union's motion for a new trial and amendment of the November 20, 1990 judgment.

Union filed appeals from the November 20 judgment and the February 15 order. The February 15 order also permitted Gopher to petition this court for interlocutory appeal, under 28 U.S.C. @ 1292(b).

As we have observed, we consented to hear the interlocutory appeal of the district court's deferral of damages on the fraud claim. The appeals, Nos. 91-1159 (Union's appeal of the November 20 judgment imposing liability on Union), 91-1430 (Union's appeal of the February 15 judgment awarding attorney [*525] fees to Gopher and denying Union's motion for a new trial) and 91-1854 (Gopher's interlocutory appeal of the certified question) have been consolidated.

III. DISCUSSION

A. The Fraud Claim

Union asserts that the district court abused its discretion in denying Union's motion for a new trial. It contends that the district court erred in giving jury instructions and submitting a special verdict form, which erroneously omitted a requirement that the jury find justified reliance by Gopher on Union's misrepresentations. Union also contends that the instructions erroneously required proof by a preponderance of the evidence rather than by clear and convincing evidence, as required under Minnesota law. As we have observed, Union failed to object to, and actually expressly acquiesced on the record to, the correctness of the jury instructions. n5 Union's proposed jury instructions and special verdict form did not include a requirement that the jury find justifiable reliance, and expressly called for proof by a preponderance of the evidence, which Union now asserts is an erroneous standard. n6

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n5 The transcript of the July 10, 1990 proceedings before United States District Judge David S. Doty states in part:

THE COURT: And was any instruction that should be given that was not given or hasn't been ruled on?

[Attorney for Union]: You can say your instructions are error free. Tr., vol. VIII at 120-21. n6 Union Oil's proposed Jury Instructions, Request No. 8, Elements of Fraudulent Concealment, required that:

To establish fraud based upon concealment of a fact or facts, Gopher must show each of the following by a preponderance of the evidence:
. . .
FIFTH, that Gopher must have been unaware of the fact and would not have acted as it did if it had known of the concealed or suppressed fact; . . . . Union Oil's Special Verdict Form, Question No. 7, states in part: "was Gopher unaware of the fact and would Gopher not have acted as it did if it had known of the concealed of [sic] suppressed fact?"
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Union's failure to make a timely objection to the instructions limits the appellate court to correcting only plain errors as necessary to avoid a miscarriage of justice. See Lusby v. T.G. & Y. Stores, Inc., 796 F.2d 1307, 1311-12 (10th Cir.), cert. denied, 479 U.S. 884, 107 S. Ct. 275, 93 L. Ed. 2d 251 (1986) (citing United States v. Young, 470 U.S. 1, 6, 14-15, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985)).

The instruction and special verdict form stated that the jury must find justified reliance on the misrepresentation or that the misrepresentation was made with intent to induce reliance n7 (thus, justifiable reliance may be inferred from actual reliance upon misrepresentations made with intent to induce reliance). Nave v. Dovolos, 395 N.W.2d 393, 397-98 (Minn. Ct. App. 1986); Weise v. Red Owl Stores, Inc., 286 Minn. 199, 175 N.W.2d 184, 187 (Minn. 1970); see also Berryman v. Riegert, 286 Minn. 270, 175 N.W.2d 438, 442 (Minn. 1970); Estate of Jones v. Kvamme, 430 N.W.2d 188, 195 (Minn. Ct. App. 1988), aff'd in relevant part, 449 N.W.2d 428 (Minn. 1989); St. Croix Printing Equip., Inc. v. Rockwell Int'l Corp., 428 N.W.2d 877, 881-82 (Minn. Ct. App. 1988). Also, the preponderance of the evidence standard of proof is sufficient in this case, where Gopher seeks damages for fraud, not rescission of a written agreement. Martin v. Guarantee Reserve Life Ins. Co., 279 Minn. 129, 155 N.W.2d 744, 748 (Minn. 1968); Sievert v. La Marca, 367 N.W.2d 580, 588-89 (Minn. Ct. App. 1985).

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n7 Jury Instruction No. 15 states in part:
Plaintiff's claim against the defendant has five essential elements, as follows:
. . . .
FOURTH, that the misrepresentation was made with the intent to induce the plaintiff to act in reliance upon it, or, that the plaintiff was justified in relying on the misrepresentation, . . . .
Special Verdict Form, Question No. 5, states in part:

Did defendant Union Oil make the misrepresentation about the condition of the site (1) with the intent to induce plaintiff Gopher Oil to act in reliance upon it, or (2) was plaintiff Gopher Oil justified in relying on defendant Union Oil's misrepresentation about the condition of the site?
- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The circumstances of this case do not rise to the level of plain error. The district [*526] court based its instructions on the Minnesota Jury Instruction Guide (3d ed.) and incorporated Union's requested instructions on the elements of fraud and the standard of proof for fraud. Union's proposed jury instructions and special verdict form contained the language it now contends is erroneous. The instructions did not mislead the jury. Accordingly, we reject the claims of plain error. See Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411, 416 (8th Cir. 1985); Federal Crop Ins. Corp. v. Hester, 765
F.2d 723, 727 (8th Cir. 1985).

Union also alleges that the verdict was against the clear weight of the evidence because, the "as is" clause in the purchase agreement and Gopher's experience in the oil processing industry conferred upon Gopher a duty to investigate the property for contamination prior to purchase. Also, the only evidence of Union's alleged fraud came from the testimony of Gopher's owner regarding assurances that the property was pollution free, allegedly made by Union's representatives prior to the sale.

Union's failure to move for a directed verdict or judgment notwithstanding the verdict operated as a waiver of Union's right to challenge the jury's findings as unsupported by substantial evidence. Thus, this court's review is limited to whether the district court abused its discretion in denying Union's motion for a new trial or whether the denial was erroneous as a matter of law because there was an absolute absence of evidence to support the jury's verdict. Smith v. Ferrel, 852 F.2d 1074, 1075-76 (8th Cir. 1988); Harris v. Zurich Ins. Co., 527 F.2d 528, 529-30, 530 n.1 (8th Cir. 1975).

Although the purchase agreement expressly foreclosed reliance upon prior representations, the parole evidence rule does not operate to preclude a showing of fraudulent inducement to enter the agreement. See Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U.S. 308, 330, 46 L. Ed. 213, 22 S. Ct. 133 (1902); Walden v. Skinner, 101 U.S. 577, 585, 25 L. Ed. 963 (1879); Union Mut. Life Ins. Co. v. Wilkinson, 80 U.S. (13 Wall.) 222, 231-36, 20 L. Ed. 617 (1871); Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 178-79 (8th Cir. 1971); National Equip. Corp. v. Volden, 190 Minn. 596, 252 N.W. 444 (Minn. 1934); Ganley Bros., Inc. v. Butler Bros. Bldg. Co., 170 Minn. 373, 212 N.W. 602 (Minn. 1927).

Here, Gopher presented evidence that Union knew of the site contamination, that Union attempted to conceal the contamination and affirmatively misrepresented the material fact of contamination to Gopher, and that Gopher relied upon that misrepresentation in entering the transaction. The substantiality of the evidence is not in question, and we cannot say that the district court abused its discretion in denying the new trial or that, as a matter of law, there was a complete absence of evidence to support the jury verdict. Accordingly, we affirm the district court's denial of Union's motion for a new trial.

B. Allocation of Liability

Union contends that the district court erred in apportioning one hundred percent of the liability for cleanup expenses under CERCLA and MERLA to Union. It argues that the apportionment was inequitable because CERCLA allows for joint and several liability between responsible parties, 42 U.S.C. @ 9613(f)(1), the "as is" clause in the purchase agreement transferred liability from Union to Gopher, and CERCLA preempts the claim under MERLA.

Allocation of liability under CERCLA and MERLA is an equitable determination, in which the district court must make its own factual findings and legal conclusions. See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986), cert. denied, 484 U.S. 848, 98 L. Ed. 2d 102, 108 S. Ct. 146 (1987). We review the district court's factual findings under a clearly erroneous standard and its applications of law de novo. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 550-51 (8th Cir. 1990), cert. denied, 114 L. Ed. 2d 78, 111 S. Ct. 1683 (1991).

The district court found that:

> Union Oil knew of and is responsible for the leaking, spilling and dumping of oil and industrial chemicals resulting in contamination of the site. Gopher Oil did not materially contribute to the contamination and did not have specific knowledge of the contamination until investigations and testing were conducted in 1985. The contamination Union Oil caused is extensive and of a toxic nature. The contamination Union Oil caused evidences a lack of care exercised in the blending, packaging and disposing of oil and industrial chemicals by Union Oil.

Order of Oct. 12, 1990 at 12-13.

Based upon these factual findings, the district court held Union one hundred percent liable for future cleanup expenses and ordered Union to reimburse Gopher for the $ 423,272.81 in reasonable and necessary cleanup expenses that it had expended, plus prejudgment and postjudgment interest and attorney fees totaling $ 559,380.52. Order of Nov. 20, 1990 at 2, Order of Feb. 15, 1991 at 16, 18.

In light of the evidence submitted by Gopher to show that Union was responsible for the contamination, the district court's finding that Union Oil knew of and was responsible for the contamination must be sustained. Consequently, the district court's allocation, based on its own factual findings and the advisory jury verdict, to Union of one hundred percent of the liability for cleanup expenses under CERCLA and/or MERLA will stand.
We reach this result without deciding the effect of the "as is" clause in the purchase agreement on the apportionment of liability. Because Union fraudulently induced Gopher to enter into the purchase agreement, that agreement is ineffective to transfer Union's liability for environmental cleanup expenses to Gopher.

We also reach this result without deciding whether an action brought under CERCLA section 107, 42 U.S.C. @ 9607, preempts a contribution claim under MERLA. See CERCLA section 113(f)(1), 42 U.S.C. @ 9613(f)(1). The district court's allocation of liability rested alternatively on CERCLA

and/or MERLA. A decision that the claim under MERLA is preempted would reduce neither the extent nor the amount of Union's liability.

C. Award of Attorney Fees

Union contends that the district court erred in awarding attorney fees to Gopher under CERCLA and MERLA for both the statutory claims and the common law fraud claim.
CERCLA section 107(a)(4)(B), 42 U.S.C. @ 9607(a)(4)(B), authorizes the award of attorney fees and expenses to a prevailing private party in a response cost recovery action. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421-22 (8th Cir.), cert. denied, 113 L. Ed. 2d 446, 111 S. Ct. 1390 (1991). MERLA section 115B.14 expressly allows the award of "costs, disbursements and reasonable attorney fees and witness fees" to the prevailing party in a contribution action. Minn. Stat. @ 115B.14 (1990). Thus, an award of attorney fees incurred in pursuing the CERCLA and MERLA claims is appropriate.

Union questions the propriety of the award of attorney fees incurred in pursuing the fraud claim because, absent statutory authorization, the prevailing party is not entitled to recover attorney fees.

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). In this case, the successful pursuit of the fraud claim served a purpose overriding the CERCLA and MERLA claims by insulating plaintiff from contribution and making the "as is" clause inapplicable and irrelevant.

Under these circumstances, the defendant should not incur liability for fees related to the fraud claim, notwithstanding the interrelationship of that legal work with the environmental claims. Accordingly, we remand for a redetermination or an apportionment of attorney fees to exclude work related to the fraud litigation. Such determination will rest with the discretion of the trial court. See Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985), cert. denied, 474 U.S. 1060, 88 L. Ed. 2d 781, 106 S. Ct. [*528] 805 (1986). The fee award otherwise seems reasonable.

D. Retention of Jurisdiction over the Fraud Damages Award

This court granted permission for Gopher to take an interlocutory appeal of a certified question, pursuant to 28 U.S.C. @ 1292(b), n8 concerning the district court's retention of jurisdiction over Gopher's fraud claim. Gopher Oil Co. v. Union Oil Co. of Cal., Inc., 955 F.2d 519 (8th Cir. 1991) (order granting permission to appeal). The district court certified the following question:

whether it is proper for the court to retain jurisdiction over the fraud claim and determine damages due thereunder at some future date, or whether this court should have immediately awarded Gopher Oil damages in accordance with the jury's verdict. Order of Feb. 15, 1991 at 7-8.

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n8 28 U.S.C. @ 1292(b) provides in pertinent part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order

may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.
- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The jury awarded Gopher $ 1,823,272.81 as compensation for the loss occasioned by Union's fraudulent misrepresentation. Of this sum, $ 1,400,000 represented the purchase price of the site and $423,272.81 represented the cleanup costs incurred by Gopher. The district court did not enter judgment on this amount. Instead, it retained jurisdiction in order to adjust the award to compensate for the increased value of the land after completion of cleanup. Order of Nov. 20, 1990 at 2.

The substantive law of the place where the wrongful act occurred governs the measure of damages in a fraud action. Lowrey v. Dingmann, 251 Minn. 124, 86 N.W.2d 499, 501-02 (Minn. 1957). Minnesota law allows the recovery of "out-of-pocket" damages in a fraud action. Johnson Bldg. Co. v. River Bluff Dev., 374 N.W.2d 187, 195 (Minn. Ct. App. 1985) (citing Lewis v. Citizens Agency of Madelia, Inc., 306 Minn. 194, 235 N.W.2d 831, 835 (Minn. 1975)). The "out-of-pocket" loss is the difference between what the injured party parted with and what was received in the transaction. Id. (citing Strouth v. Wilkison, 302 Minn. 297, 224 N.W.2d 511, 514 (Minn. 1974)). Thus, the measure of damages amounts to the difference between the actual value of the property received and the purchase price paid for it, together with any damages naturally and proximately caused by the fraud. See Peterson v. Johnston, 254 N.W.2d 360, 362 (Minn. 1977); Nave, 395 N.W.2d at 398.

The Minnesota Supreme Court has recognized an exception to the general rule when out-of-pocket damages fail to return the parties to the status quo. Hughes v. Sinclair Mktg., Inc., 389 N.W.2d 194, 199 (Minn. 1986) (citing Lewis v. Citizens Agency of Madelia, Inc., 306 Minn. 194, 235 N.W.2d 831, 835 (Minn. 1975)). It has also considered circumstances occurring after the sale in computing out-of-pocket damages suffered in a fraudulent misrepresentation action. Strouth v. Wilkison, 302 Minn. 297, 224 N.W.2d 511, 514 (Minn. 1974) (action to recover damages from contractor who abandoned construction project, which was subsequently completed by another contractor).

Gopher, in its appeal, contends that the district court's retention of jurisdiction and failure to enter judgment on the jury's damage award was erroneous under Minnesota law and in contravention of its seventh amendment right to a jury trial on the issue of damages.

The appropriate time to value contaminated property in order to calculate out-of-pocket damages incurred by the fraudulently induced purchaser, when the property is awaiting cleanup pursuant to a CERCLA or MERLA compliance plan, represents an issue of first impression under Minnesota law. See Order of Oct. 12, 1990 at 16. The jury awarded damages based upon the value of the site at the time of purchase, $ 0 because of the contamination. The district court considered that assessment to be erroneous, in light of the effect that the [*529] cleanup activities, dictated by CERCLA and MERLA, will have in increasing the value of the property. An assessment of value at the time of purchase would allow a windfall to Gopher because it would receive the full purchase price of the site and also retain title to the decontaminated piece of land. Thus, the district court decided to calculate the out-of-pocket damages by determining the difference between the purchase price and the value of the site after completion of cleanup. Order of Oct. 12, 1990 at 20;

Order of Nov. 20, 1990 at 2. Calculation of damages pursuant to this formula necessitated retention of jurisdiction until completion of cleanup. Id.

This court must undertake de novo review of a district court's determination of state law. Salve Regina College v. Russell, 113 L. Ed. 2d 190, 111 S. Ct. 1217, 1221, mot. denied, 111 S. Ct. 2794, 115 L. Ed. 2d 969 (1991). We hold that, in consideration of the novel circumstances of this case, the district court properly adapted Minnesota's out-of-pocket fraud damages rule to a case where the value of contaminated property may be increased subsequent to the sale by mandatory cleanup activities pursuant to CERCLA or MERLA. Accordingly, the calculation of out-of-pocket damages correctly may be based upon the difference between the purchase price of the contaminated site and the value of the site after completion of cleanup.

A district court may exercise its discretion to cure a verdict that is against the weight of evidence, or will result in the miscarriage of justice, without impinging on the right to a trial by jury. Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 508 (8th Cir. 1974), cert. denied, 421 U.S. 931, 44 L. Ed. 2d 88, 95 S. Ct. 1657 (1975); Altrichter v. Shell Oil Co., 263 F.2d 377, 380 (8th Cir. 1959).

Thus, the district court may properly withhold judgment on the jury verdict and substitute a figure based upon the above formula. It would be undesirable, however, to retain jurisdiction for the amount of time necessary to complete the cleanup.

The district court and the parties need not await the substantial completion of cleanup in the assessment of damages. The award should be made as promptly as possible. We presume that expert testimony presented by the parties, or an expert witness called by the court, see Fed. R. Evid. 706, may assist the court by estimating the site value on completion of the cleanup and other matters relating to this damage calculation.

Accordingly, we remand for calculation of the fraud damages to which Gopher is entitled, taking into account the projected value of the site after the projected cleanup and any other matters appropriate to the final assessment of fraud damages. Valuation of the property will be based upon the record, supplemented by additional expert testimony if necessary.

IV. CONCLUSION

We affirm the district court's determination that Union fraudulently induced Gopher into the purchase of the contaminated site and that Union is one hundred percent liable for cleanup costs incurred pursuant to CERCLA and MERLA. We remand for reassessment of attorney fees. We affirm the order relating to deferral of computation of fraud damages and remand that issue for calculation of fraud damages consistent with this opinion.

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Gopher Oil Co. v. Union Oil Co.
Notes and Discussion

1. In general, is there a duty imposed in the seller to disclose pollution problems to a purchaser?

2. What impact did the fact that the property was sold "as is" make in this case?

3, What does the decision in this court say about the power of parties to allocate environmental risk by contract?

4. As a sophisticated purchaser, should Gopher had known that the site could be contaminated, especially since it had been used for storing chemicals since the early 1900's?

5. Union attempted to remediate the surface – yet the court found the clean up constituted ‘concealment’. Could this case stand for the proposition that a part should not remediate a site before a sale?

6. Note the claim based on fraudulent inducement. What elements are generally present to utilize this argument?

iii. Duty to Warn

AMERICAN CYANAMID COMPANY Appellant, v. M. G. SPARTO et al., Appellees
UNITED STATES COURT OF APPEALS FIFTH CIRCUIT
267 F.2d 425; 1959 U.S. App. LEXIS 3852
May 19, 1959

In 1935 the appellees, all members of the same family and all residents of Texas, purchased a 57-acre tract of land in the City of Fort Worth, Tarrant County, Texas. They have engaged in truck farming on 46.22 acres of this tract since 1936. The tract is bounded on the south and west by the Trinity River. The appellees, with the aid of three centrifugal pumps, have used the river's waters for irrigation whenever it was needed.

In 1942 the appellant's plant was erected as a part of the war effort for the purpose of producing a catalyst used by oil refineries in making high octane aviation gasoline. This plant is also located on the Trinity River, upstream from the appellees' farm. In its manufacturing process the appellant uses some 1,640,000 gallons of water daily. Approximately 90% of this water is emptied into the Trinity River. This process water contains several chemical compounds which are primarily [**2] ammonium sulphate and sodium sulphate.

In September, 1953, the appellees began noticing that the crops on their land, which had theretofore been normal and healthy, showed a slow growth and were 'stunted'. Despite the efforts of the appellees to improve the quality of the plants by fertilizing the land, the crops in 1954 and 1955 were also stunted and the yield per acre was substantially less than it had been before 1953.

In 1956 the appellees began using a new 'overhead' irrigation system, but the crops did not respond. By February, 1955, it was observed that the top of the soil was turning white and that it was, 'crusty and hard, just -- it is just growed together; it don't pulverize like it used to.' Soil tests made after the commencement of this litigation revealed that the appellees' land contained a high concentration of sodium sulphate as compared to other lands in the vicinity which had not been irrigated from the river.

The appellees brought this suit in the state court to recover damages for injury to their land and crops resulting from the appellant's alleged wrongful pollution of the Trinity River. Their complaint sought to enjoin the appellant from emptying the contaminated water into the river. The case was removed to the United States District Court for the Northern District of Texas by reason of diversity of citizenship.

The case was tried to a jury and special issues were submitted. The jury found that the defendant was negligent in discharging the process water into the river and failing to warn the appellees, and that its negligence was a proximate cause of the injury to the appellees' land and crops; that the appellant had created a nuisance by discharging its process waters into the river, and that this also was a proximate cause of the appellees' injury; that the appellees were not contributorily negligent, that the injury to the appellees' land was temporary, and that the appellees should recover damages fixed at $ 34,431. The court overruled the appellant's motions for judgment notwithstanding the verdict and a new trial and entered judgment on the verdict. This appeal followed.

The appellant first specifies as error the court's overruling of its motions for directed verdict and for judgment notwithstanding the verdict based on the ground that the appellees' evidence failed to show that any land owned [**4] by the appellees, which was riparian in character, was injured by the effluent from the appellant's plant. The land of which the appellees asserted ownership and which is here involved is described in their complaint as 'the West 46.22 acres of land and being all of the land situated on the West side of the Oakhurst Scenic Drive in the City of Fort Worth, Tarrant County, Texas,' and described by metes and bounds.

There is an exception from the tract, also described by metes and bounds, of a 2.66-acre tract. The appellant asserts that the excepted tract was not located, hence it may have been a part of the cultivated land for which, the appellees [*428] not owning it, there could be no recovery. Plats of the land and adjacent properties, a photographic map, and abstracts of title, were introduced in evidence. M. G. Sparto was a witness and testified as to the location of the land owned and farmed by him and the other members of the Sparto family. Without objection he testified that the land was situated between the Trinity River on the west and Oakhurst Scenic Drive on the east. We think the location of the 46.22-acre tract was established and that no part of [**5] it was separated from the Trinity River by the 2.66-acre parcel.

The appellant points out that while the most of the land involved is in the W. H. Little Survey, through which the Trinity River runs, a portion is in the John Little Survey. This being so, it is said, the John Little Survey land is not riparian in character and no damages are recoverable with respect to it. Riparian rights do not extend beyond the original survey as granted by the Government, but it seems that only a lower riparian owner can complain of the diversion of water by an upper riparian owner to non-riparian land. The evidence is not clear as to whether the portion of the Sparto lands situate in the John Little Survey were included in the 46.22 acres, but if so, it constituted such a small portion of the whole that it should be ignored under the de minimis rule. The question was not raised in the trial court and will not be further considered here.

In 1952 the appellees granted to Tarrant County Water Control and Improvement District No. 1 an easement over 25.67 acres along the Trinity River 'For the purpose of constructing, reconstructing, widening, straightening, improving and perpecually [**6] maintaining a channel or channels, levee or levees, for flood control and flood prevention along the Trinity River. * * *' In the instrument granting the easement it was recited that it was 'understood that grantors expect to continue to use that portion of the property upon which an easement is herein granted after the construction of such channel or channels, levee or levees, for truck garden purposes, using water from the river for irrigation and expect to continue to use, own, hold and enjoy such premises for any and all other purposes desired by such grantors or their assigns so long as such use does not interfere with or decrease the rights of the grantee to its easement and rights herein granted.'

The appellant asserts that the extent of rights granted by this conveyance is tantamount to a grant of a fee title and therefore all land east of the easement was cut off from the river and ceased to be riparian land. Appellant further argues that the appellees have no cause of action for damages to non-riparian lands resulting from pollution of the river and therefore, since the amount of the damages was not limited to the easement lands, the verdict and judgment cannot [**7] stand. We cannot adopt the appellant's construction of the easement. The grant did not divest the appellees of the possession nor, except for the purposes specified, of the use of the land. The recitals in the instrument show an intention that the lands described should be used for truck

farming under irrigation from the river. The granting of the easement was no such severance of the tract, subject to the easement as to deprive the rest of the area of its riparian character. 56 Am.Jur. 733, Waters § 280.

The appellant contended that substantially all of the water in the Trinity River as it flowed past the appellees' land originated in the discharge from the appellant's plant and was not riparian, and that there was not enough riparian water to permit the appellees to irrigate their lands. The appellant requested a series of special interrogatories to be submitted to the jury as to whether there was any riparian water in the stream opposite the Sparto lands. The court refused to make the submission and error is claimed. While the only waters of a flowing stream which are available for riparian uses are those of the ordinary flow and underflow, we think it would be incorrect to hold that the riparian nature of water in a flowing stream and the right of a riparian owner to use it may depend upon the source of the water. We are aware of no authority so holding. The trial court was correct in refusing to submit the requested questions to the jury.

The district court submitted to the jury a special issue in this form:

> 'Do you find from a preponderance of the evidence that defendant discharged soluble salts in its process water into the Trinity River and that defendant failed to warn plaintiffs that it was discharging the same into the Trinity River, and that such conduct was negligence, and that such negligence if any you have found, was a proximate cause of damage to plaintiffs' land involved in this suit.'

To this question the jury returned an affirmative answer. The submission of the issue is specified as an error. The appellant says that it had the right to discharge its process water, with its soluble salt content, into the Trinity River without being under a duty to warn the appellees that it was doing so.

The right of the appellant to make a reasonable use of the river for the disposal of its process water is not questioned. 56 Am.Jur. 808, Waters § 384. The right of the appellees to make a reasonable use of the waters of the stream for irrigating riparian lands must also be conceded. The right of each to make use of the water is qualified by the right of the other. This doctrine has been thus stated:

> 'As between individual riparian owners, it is an established principle that one may make no use of the stream that will result to the injury of the other, * * * This is but the application of the doctrine embodied in the ancient maxim, that one must enjoy his own rights so as not to injure those of another; or, as elsewhere well expressed 'the necessities of one man's business cannot be made the standard of another man's rights in that which belongs equally to both', which, of course, includes that in which both have an equal usufructuary interest, the extent of the right of riparian owners in the waters of a stream. It is but the rule of universal right and common justice, and stands in need of no sanction to give it authoritative force.' Ft. Worth Improvement Dist. v. City of Ft. Worth, 106 Tex. 148, 158 S.W. 164, 167, 48 L.R.A.,N.S., 994.

Since then, the appellant's right was not an unlimited one, it follows that if the exercising of that right created a risk of injury to the appellees which might have been averted by a warning, there was a duty to warn and the failure so to do would constitute actionable negligence. Missouri Iron &

Metal Co. v. Cartwright, Tex.Civ.App., 207 S.W. 397; Buchanan v. Rose, 138 Tex. 390, 159 S.W.2d 109; San Antonio Hermann Sons Home Ass'n v. Harvey, Tex.Civ.App., 256 S.W.2d 906; Restatement, Torts, § 301, 65 C.J.S. Negligence § 89, p. 598. The special issue was proper and there was no error in submitting it. The affirmative response of the jury to the interrogatory established the negligence of the appellant and its liability to respond in damages.

In its charge to the jury the court defined 'nuisance' and no exception is taken to the accuracy or sufficiency of the definition. It submitted to the jury a special interrogatory based on nuisance in this form, 'Do you find from a preponderance of the evidence that the defendant created a nuisance, as that term has been defined herein, by discharging process water containing soluble salts into the Trinity River, and that such nuisance, if any you have found, was a proximate cause of damage to the plaintiffs' land?' The jury answered 'Yes.' To this question the appellant objected and the asking of it is assigned as error. The appellant in its requested charges, included interrogatories on nuisance which were the same in substance and not materially different in form from that which was propounded by the court. Having requested the submission of the issues the appellant cannot now put the court in error for having done so. Capital Traction Co. v. Brown, 1907, 29 App.D.C. 473, 12 L.R.A.,N.S., 831, 10 Ann.Cas. 813; 89 C.J.S. Trial § 572, p. 350. Cf. De Fonce Construction Co. v. City of Miami, 5 Cir., 1958, 256 F.2d 425, certiorari denied 358 U.S. 875, 79 S.Ct. 115, 3 L.Ed.2d 105.

In any event, we think the nuisance issue was properly submitted. Physical discomfort to the occupant of property is not, we think, an essential incidence of a nuisance as claimed by the appellant and as is stated in Boyd v. Schreiner, Tex.Civ.App., 116 S.W. 100. 5 Acts which damage property [**12] may also be a nuisance. City of River Oaks v. Moore, Tex.Civ.App., 272 S.W.2d 389; Continental Oil Co. v. Berry, Tex.Civ.App., 52 S.W.2d 953; King v. Columbian Carbon Co., 5 Cir., 1945, 152 F.2d 636. Cf. Burns v. Lamb, Tex.Civ.App., 312 S.W.2d 730. The finding of negligence is not inconsistent with a finding of nuisance. A nuisance may be caused by negligence and may exist irrespective of negligence. King v. Columbian Carbon Co., supra; Missouri-Kansas-Texas R. Co. v. Williams, Tex.Civ.App., 5 S.W.2d 575.

The appellant's liability for negligence and for maintenance of a nuisance have both been established. We find no error upon which to predicate a reversal of the district court's judgment.

Affirmed.

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American Cyanamid v. Sparto
Notes and Discussion

1. In Texas, is there a general duty to warn third parties if one's activities create an environmental hazard? Note the Sparto court’s comments:

> Since then, the appellant's right was not an unlimited one, it follows that if the exercising of that right created a risk of injury to the appellees which might have been averted by a warning, there was a duty to warn and the failure so to do would constitute actionable negligence.

2. Did American Cyanamid have the right to discharge the salts into the river?

3. What significance is the fact that the court found that the lands were riparian in nature?

4. With regard to Texas law, the court in Ford Motor Co. v. Dallas Power & Light, 499 F.2d 400 (1974), stated:

> Texas law does recognize a duty to warn on the part of the person who creates a dangerous situation, although without negligence on his part. Buchanan v. Rose, 138 Tex. 390, 159 S.W.2d 109, 110 (1942). The Supreme Court in Buchanan stated:
>
> > We think it may also be said that if one by his own acts, although without negligence on his part, creates a dangerous situation * * * the one creating the same must give warning of the danger or be responsible for the consequences.

The Supreme Court did not find liability in Buchanan since the defendant had not created the dangerous situation but was merely aware of the danger and failed to warn.

Texas is among those jurisdictions which recognize a duty to warn only on the part of the person who has some operational responsibility for the existence of the situation having dangerous potentialities. Mere knowledge of a dangerous situation or helpless condition of another person only imposes a moral duty to warn or render aid but not a legal duty. Boyer v. Gulf, Colorado & Santa Fe Ry., 306 S.W.2d 215, 220 (Tex.Civ.App.1957, writ ref'd n.r.e.). This rule has been acknowledged in subsequent Texas cases. E.g., Henderson v. Willmon, 407 S.W.2d 24, 27 (Tex.Civ.App.1966, writ dism'd); Courville v. Home Transportation Co., 497 S.W.2d 788, 791 (Tex.Civ.App.1973); Page v. Scaramozi, 288 S.W.2d 909, 911 (Tex.Civ.App.1956, writ ref'd n.r.e.); City of Austin v. Schmedes, 270 S.W.2d 442, 446 (Tex.Civ.App.1954), aff'd in part, rev'd in part, 1955, 154 Tex. 416, 279 S.W.2d 326.

# Appendix:

# Historical Oil & Gas Exam

# OIL & GAS ENVIRONMENTAL LAW
# SMU SCHOOL OF LAW - PROF. DANCY
# FINAL EXAM - APRIL 2003

Facts:

Mary Turco is a homeowner with property located in Tyler, Texas. She has a three bedroom ranch house located on 40 acres, with attached garage and a small barn that she uses to store lawn equipment and her 25 foot motorboat. The property is located near the city line, and her property has city water connections and sanitary sewer service hookup.

Turco is only the owner of the surface estate, having bought the house and property from Mike Madano in 1989 pursuant to a "deed" that conveys only the surface rights and the surface buildings and improvements. The deed has been recorded in the real estate records of the county where the property is located. Madano owned both the surface and mineral rights at the time of the conveyance, having inherited the property from his dad in 1965.

In 1979 Madano entered into an oil and gas lease with Swine Oil, allowing Swine to explore for oil or gas on the property for a term of three years and as long thereafter as oil or gas is produced. The oil and gas lease was recorded in the deed records in the county where the property is located.

In 1980 Swine discovered oil on the property, and the company has produced oil in paying quantities from that property since that date. Five oil wells were located on the 40 acres at the time Madano conveyed to Turco, as well as pipelines, one tank to hold salt water and one tank to hold crude oil, and a short gravel road has been built by Swine to the tanks so they can be emptied.

After several years of oil production the "reservoir drive" weakened considerably, and Swine decided it needs to inject produced salt water back into the ground and producing formation to enhance production. Swine installs a 400 horse power engine to run a pump to inject the water on the 40 acres in 1992, converts two of the wells to "injection wells," and runs the engine 24 hours a day to maximize oil production.

Twice a day Swine's field personnel visit the site in their pickup, generating dust from the gravel road to the well equipment. The dust tends to settle on Turco's Dodge pickup truck and making it impossible to keep clean. In addition, the vibration and noise from the water injection engine constantly shake her house and "make her lose sleep," a fact she says has adversely impacted her health. She also says that her pet cat, nicknamed "Tiger," has been very agitated by the vibration and no longer will catch mice or other rodents common to the area.

In addition to the engine and wells on the 40 acres, Swine has several small pits they use for the producing wells, several cement bases that they use to mount their equipment, have graded the surface for their road and put gravel on the road so they can access the wells after a heavy rain, and have run an electric power line onto the property to run their equipment.

Turco paid $50,000 for the property when she bought it in 1989, but claims it is worth much more

today since the area is quite a bit more developed. A realtor told her she could sell the property "as is" for around $100,000 - and if she repairs and paints the house the realtor said maybe she could get $110,000 or so today.

Turco has complained about the noise, dust, and vibrations to the Texas Railroad Commission. The inspector visited a year or so ago and said he saw no clear rule violations, but he did request Swine pick up some scrap metal that they had left on the property. Swine complied with this request. Turco's complaints to the Railroad Commission in the last six months have been ignored, she says.

In response to Turco's recent complaints in 2000 Swine installed a better muffler for the water injection pump engine, and enclosed it in a shed that helps reduce the noise to some extent, at a cost
of $7,500. Swine claims this is state of the art noise reduction technology, better than most other well operators usually use. To reduce the noise and vibrations further would cost Swine at least $25,000. But Turco still claims the noise and vibration are a problem.

Turco has some questions for you regarding this matter:

15 points:

1. Turco wants to file a trespass or nuisance claim against Swine. Discuss these options with her, and the chance they will be successful.

15 points:

2. Discuss the statue of limitations, and whether that would be a bar to an action against Swine. If so, why? If not, why not?

15 points:

3. If Turco files an action against Swine, discuss the measure of damages that she can expect to recover if she succeeded.

10 points:

4. Smith, the next-door neighbor, wants to acquire the rights to the gravel and sand and fresh water under the 40 acres owned by Turco (surface owner) and Madano (mineral owner). Swine holds the oil and gas lease on the property. Who should Smith approach on this matter? Would it make a difference if Smith wanted to use these materials to develop oil and gas production on his offsetting tract?

15 points:

5. Turco wants to pursue an action against Swine in one forum or another to either stop or reduce the noise and vibration and dust. Ignoring the strengths and weaknesses of her case, discuss the advantages and disadvantages of proceeding in court or before a state or federal agency.

15 points:

6. Turco wants to know if Swine or Madano has a duty to restore the surface, fill in the pits, plug the wells, and re-seed areas where the vegetation has been killed once Swine is done with operations and the production permanently ceases. Explain Swine's and Madano's obligations, if any.

15 points:

7. Turco signed a "release of liability" form back in 1995 when a small amount of oil leaked on the surface from Swine's operations. The company (Swine) paid Turco $250 for the release, and the document, drafted by Swine, states that "Turco hereby holds Swine innocent of any damages that have or will occur on the property." The document then goes on to identify the subject 40 acre property and was signed by Turco. Would this change the ability of Turco to bring suit for trespass or nuisance, or impact the damages she might recover?