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SUPREME COURT OF TEXAS
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No. 15-0270

IN THE SUPREME COURT OF TEXAS

EXXONMOBIL CORPORATION,
Petitioner,
v.

LAZY R RANCH, LP; HELEN A. MCDANIEL, IND., AND AS TRUSTEE OF THE HELEN WILLIAMS INTERVIVOS TRUST, AND AS GENERAL PARTNER OF LAZY R RANCH, LP; AND JOSEPH WILLIAMS, IND., AND AS TRUSTEE OF THE HELEN WILLIAMS INTERVIVOS TRUST,

Respondents.

FROM THE EIGHTH DISTRICT COURT OF APPEALS

BRIEF OF *AMICI CURIAE* TEXAS AND SOUTHWESTERN CATTLE RAISERS ASSOCIATION AND TEXAS LAND & MINERAL OWNERS ASSOCIATION IN SUPPORT OF RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF INTERESTS

The Texas and Southwestern Cattle Raisers Association ("TSCRA") is a 139-year-old trade association and is the largest and oldest livestock organization based in Texas. TSCRA has more than 17,000 beef cattle operations, ranching families and businesses as members. These members represent approximately 50,000 individuals directly involved in ranching and beef production who manage 4,000,000 head of cattle on 76,000,000 acres of ranch and pasture land primarily in Texas and Oklahoma, but throughout the Southwest.

The Texas Land & Mineral Owners Association ("TLMA") is a statewide advocacy association whose members are farmers, ranchers, and royalty owners. TLMA advocates for a business and legal environment that promotes the production of oil and natural gas in a manner that respects the property rights of landowners.

TSCRA and TLMA ("*Amici*") have an interest in the affirmation of the Court of Appeals' opinion because this case will have a significant impact on Texas landowners and the environment. Petitioner seeks to create new law that would severely limit the long-established right of landowners to abate continuing pollution that threatens groundwater resources. Pursuant to Texas Rule of Appellate Procedure 11, *Amici* respectfully submit this brief

in support of Respondents' Brief on the Merits and urge this Court to affirm the ruling of the Eighth Court of Appeals.

Amici have paid for the preparation of this brief, and a copy has been served on all parties.

INTRODUCTION

Oil and gas development has been a great boon for the state of Texas, but it sometimes comes at a great cost to the natural resources of our state—our water, our land and our air. Respondents experienced these negative consequences firsthand when their surface and groundwater was contaminated by the negligent operations of Petitioner. After conducting an environmental audit, Respondents learned that oil and gas wastes and other pollutants released by Petitioner years earlier had penetrated the soil and percolated into Respondents' groundwater. Respondents also learned that additional groundwater contamination would continue to occur unless immediate measures were taken. When Petitioner refused to take any protective action, Respondents brought this suit and requested, as their sole relief, an injunction requiring Petitioner to prevent further groundwater contamination.

Petitioner was granted summary judgment in the trial court on the basis of limitations and the common law rules governing damages for injury to real property. The court of appeals reversed, remarking that Respondents sought injunctive relief, not damages, and that various issues of fact remained.

Petitioner then petitioned this Court for review. Petitioner and Amicus Curiae Texas Oil & Gas Association ("TXOGA") argue that the Court of Appeals should have affirmed the trial court's ruling and that Respondents' claim for equitable relief is barred by the two-year statute of limitations and the "economic feasibility rule"—the same rules governing legal damages for injury to real property.

Petitioner and TXOGA's position is not consistent with Texas law. If Respondents can prove that the contamination of their property constitutes a continuing nuisance, Respondents are entitled to seek an injunction to abate the nuisance. Moreover, the propriety of an injunction is not determined by the economic feasibility rule, but by balancing the equities of the parties in conformity with long-established case law. Limitations is not a viable defense for Petitioner, as a nuisance cannot be acquired by prescription. In effect, Petitioner and TXOGA argue for the complete foreclosure of equitable relief in suits to prevent continued environmental contamination, and the creation of new law that raises serious public policy concerns.

Without the threat of equitable relief, oil and gas operators could pollute with impunity, their liability capped at the fair market value of the

affected acreage. Landowners would be without any remedy to prevent the millions of dollars of environmental contamination that would result.

Ultimately, the negative costs of oil and gas development must be borne by someone, either the responsible parties or by the landowners and the public. Respondents are entitled under long-established equitable principles to seek injunctive relief to prevent continuing spread of pollution into their groundwater, and should have the right to present the facts necessary to prove their case to the trial court. If, as Respondents allege, the contamination undisputedly caused by Petitioner continues to spread and threaten groundwater resources, barring Respondents from the opportunity to prove their allegations would grant Petitioner a license to pollute and would change decades of established law on equitable remedies for nuisance.

ARGUMENT

I. Respondents seek injunctive relief to abate a continuing nuisance, not damages.

A. Fact issues remain as to whether Respondents' injury constitutes a continuing nuisance, rendering summary judgment improper.

This Court has had recent opportunity to write extensively about common law actions seeking nuisance damages. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner* 59 Tex. Sup. J. 1455 (2016). The term "nuisance" refers to

"the legal injury—the interference with the use and enjoyment of property." *Id.* at 14. "To support a claim for private nuisance, the condition the defendant causes may interfere with a wide variety of the plaintiffs' interest in the use and enjoyment of their property. It may, for example, cause physical damage to the plaintiffs' property, economic harm to the property's market value, harm to the plaintiffs' health, or psychological harm to the plaintiffs' 'peace of mind' in the use and enjoyment of their property." *Id.* at 16. The interference with the use of the property must be "substantial" and "unreasonable."

Whether the conditions caused by Petitioner's operations, as alleged by Respondents, meet the requirements set by this Court to constitute an actionable nuisance requires development of facts. Likewise, whether those conditions constitute a continuing threat to Respondents' groundwater requires development of facts. As Respondents' have pled for injunctive relief to abate a nuisance, the trial court erred in granting summary judgment without developing the record on the nature of Respondents' injuries.

B. If Respondents' injuries constitute a continuing nuisance, Petitioner's limitations defense must fail.

Petitioner and TXOGA allege that "[Respondents'] claim for relief associated with groundwater contamination is barred" by limitations. TXOGA Br. at 6. Petitioner and TXOGA then expend great effort in their respective briefs arguing over when the injuries accrued, when Respondents became aware of the injuries, and whether the discovery rule applies. While Petitioner's and TXOGA's arguments might raise important questions about when and how the statute of limitations would apply to claims for damages arising out of Petitioner's negligent actions, Petitioner's and TXOGA's arguments do not apply to Respondents' claims. Lawsuits seeking injunctive relief to abate a continuing nuisance are not subject to limitations. *See City of Dallas v. Early,* 281 S.W. 883, 885 (Tex. Civ. App.—Austin 1926, writ dism'd) ("The doctrine in this state, thoroughly well established, is that the right to maintain nuisances cannot be acquired by prescription. It follows, therefore, that limitation is no defense to a proceeding instituted for the abatement of a continuing nuisance.") *See also, Jamail v. Stoneledge Condo. Owners Ass'n,* 970 S.W.2d 673 (Tex. App.—Austin 1998, no pet.); *Hughes v. Jones,* 94 S.W.3d 534 (Tex. Civ. App.—Eastland 1936, no writ); *Gose v. Coryell,* 59 Tex. Civ. App. 504, 126 S.W. 1164 (1910).

This long-recognized rule of law is based on important public policy. If, as Petitioner and TXOGA argue, limitations barred equitable relief to abate a continuing nuisance, then a party responsible for continuing groundwater pollution would be immune from all liability after two years as a matter of law, and would have no obligation to remediate the contamination or prevent its spread. The right to pollute groundwater could therefore be acquired by prescription in two years. Again, a nuisance cannot be acquired by prescription. *See Gose*, 126 S.W. at 1167 ("the right to maintain on one's property a nuisance injuring that of an adjoining proprietor is not acquired merely by its long continued maintenance without objection."); *Rhodes v. Whitehead*, 27 Tex. 304, 308 (1863); *Corsicana v. King*, 3 S.W.2d 857, 861 (Tex. Civ. App. 1928, writ ref.) ("It is said to be the rule universally recognized that prescription or lapse of time cannot be relied on to establish a right to maintain a public nuisance. By the weight of authority, where a water course is polluted to such extent as to create a nuisance therein, no right to continue same can be acquired by prescription."). Because a nuisance cannot be acquired by prescription, limitations is no defense to a suit seeking injunctive relief to abate a nuisance. This rule has been cited and approved by Texas courts for over one hundred years, and is settled law for good reason.

C. If Respondents' injury constitutes a continuing nuisance, the propriety of injunctive relief is determined by balancing the equities, not the economic feasibility rule.

Petitioner and TXOGA argue that the economic feasibility rule should govern whether injunctive relief is available to abate a nuisance. TXOGA Br. at 11-12. They argue that, if the cost of injunctive relief exceeds the diminution in market value of the affected acreage to a disproportionately high degree, injunctive relief would be barred as a matter of law. However, this is the rule for suits seeking monetary damages. It would be a significant departure from settled Texas law if the standard for monetary damages was applied to suits seeking injunctive relief for the abatement of a continuing nuisance.

The correct standard the trial court must use when determining the propriety of injunctive relief is the equitable balancing test. *See, generally, Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004); *Hot Rod Hill Motor Park v. Triolo*, 276 S.W.3d 565 (Tex. App.—Waco 2008, no pet.); *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217, 218 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.). Under this test, the trial court must weigh the probable harm to the Respondents and the public if an injunction is erroneously denied against the probable harm to the Petitioner if an injunction is erroneously granted. *Storey v. Central Hide &*

Rendering Co., 148 Tex. 509, 226 S.W.2d 615, 618-19 (Tex. 1950). The result of this exercise can be the award of complete or limited injunctive relief. This test was applied in *Speedman Oil Co. v. Duval County Ranch Co.*,[1] a case with facts similar to the facts in this case. Substantively, a trial court's injunction will be upheld unless, after searching the record, it is clear that the trial court's decision was arbitrary and unreasonable. *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987). But procedurally, the trial court must indicate that it weighted the competing equities; if the record does not affirmatively indicate the trial court did so, then this failure is a departure from guiding principles and amounts to an abuse of discretion. *See Nath v. Tex. Children's Hosp.* 446 S.W.3d 355, 372 (Tex. 2014) (remanding for trial court to assess an omitted but relevant element for determining the amount of sanctions). In such cases, a remand is appropriate to enable the trial court to demonstrate that it weighed the competing equities. *Id.* The facts necessary for the trial court to apply the equitable balancing test in this case have not yet been developed. How far has the contamination spread? Is it still spreading? What will it cost to stop it from spreading? What is the risk to the public? These unanswered questions mandate remand to the trial court for further development of the facts.

[1] 504 S.W.2d 923, 931 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

II. Respondents' claim for injunctive relief will not open the "floodgates of litigation" nor overcompensate Respondents.

TXOGA warns that this case is a harbinger of runaway litigation, and cites several cases from Louisiana, beginning with *Corbello v. Iowa Production*[2]. TXOGA Br. at 17. It claims that, by seeking injunctive relief, Respondents are seeking to make an "end run" around traditional limits on property damages, that Respondents are really seeking an award of damages "under the guise of equitable or injunctive relief" and that Respondents' requested injunctive relief "inappropriately overcompensates Respondents." *See* TXOGA Br. pp. 12-14. It is difficult to see how this could be so. *Respondents seek no damages.* This is not a matter of semantics. The relief requested is substantively different. Injunctive relief to prevent the spread of contamination into Respondents' groundwater cannot "inappropriately overcompensate" Respondents because Respondents are entitled to demand abatement of a continuing nuisance. Additionally, Respondents do not argue that a landowner should be entitled to an injunction as a matter of law. Respondents only argue that injunctive relief is a valid remedy, subject to all equitable defenses. The mere fact that plaintiffs may seek injunctive relief does not mean they will receive it—the trial court must decide only after balancing all the equities of the parties.

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[2] 850 So.2d 686 (La. 2003).

It should also be mentioned that Louisiana law is not the law in Texas. Under *Corbello*, a plaintiff may seek damages for contamination of its property measured by the cost of remediation, regardless of the value of the property and regardless of whether the money awarded is used for remediation of the property. In Texas, damages for contamination may not exceed the value of the property under the economic feasibility rule discussed in TXOGA's brief. But Respondents' claims are not subject to the economic feasibility rule. They are seeking merely to obtain protection from further spread of existing contamination. In the context of this suit for equitable relief, the counterpart of the economic feasibility rule is the balancing test that the trial court must apply in determining whether to grant equitable relief. *Storey v. Central Hide & Rendering Co.*, 222 S.W.2d 615 (Tex. 1950). Both rules are intended to avoid an unjust result.

III. A ruling in favor of Petitioner would have negative effects for landowners and the general public.

A. A ruling in favor of Petitioner would create perverse economic incentives to pollute.

Amici do not seek a ruling from this Court on the merits of Respondents' environmental claims. Respondents must still prove their case in the trial court. *Amici* simply argue that (1) injunctive relief is available to abate a continuing nuisance, (2) injunctive relief to abate a

continuing nuisance is not subject to limitations, and (3) the propriety of injunctive relief is determined by balancing the equities, not the economic feasibility rule. The appellate court correctly remanded this case for further fact finding on these issues. If this Court rules that the injunctive relief sought by Respondents is subject to the common law rules for damages, not only will injunctive relief to abate a continuing nuisance be subject to a two-year statute of limitations, but injunctive relief will be foreclosed if the cost of complying with an injunction disproportionately exceeds the diminution in fair market value of the affected acreage. This, in effect, rewards pollution. The more egregious the contamination and the more costly the remediation, the more the operator benefits from being immune from injunctive relief. What incentive would an operator have to prevent or mitigate pollution when their potential liability is lessened by *widening* the gap between the cost of remediation and the value of the property?

B. A ruling in favor of Petitioner would unfairly shift the costs of pollution to the landowner and the public.

Petitioner and TXOGA suggest that damages for diminution in fair market value will make a landowner "whole" regardless of the severity of the environmental contamination and regardless of whether the contamination is continuing. However, *Amici* do not believe that fair market value damages adequately address the problem of environmental

contamination. It is not just the landowner who suffers, it is the general public—the farmers, ranchers and businesses who rely upon clean groundwater—who suffer from environmental contamination. This Court should not extend the economic feasibility rule to lawsuits seeking injunctive relief, as the economic feasibility rule is applicable to suits for damages and does not apply to suits to abate a nuisance. If injunctive relief is foreclosed by the economic feasibility rule, a landowner may be able to recover fair market value damages, but *the land and groundwater would continue to be contaminated.* The landowner would have to expend vast sums of its own money—costs ironically deemed "economically unreasonable" for the operator who caused the contamination—to remediate the pollution and prevent further harm to groundwater. The vast majority of landowners simply do not have the means to do so. The result is contaminated soil and contaminated groundwater that could spread to adjoining properties over time. Groundwater pollution has costs that must be paid, in one way or another, now or in the future. If the negligent operator cannot be compelled to clean up their mess, the cost of such pollution will be paid with interest by the landowners and the public. These considerations should be weighed by the trial court in deciding whether to grant injunctive relief.

C. Landowners cannot rely on the Railroad Commission of Texas to prevent pollution.

TXOGA argues that allowing the trial court to grant injunctive relief in this case would interfere with the regulatory jurisdiction of the Railroad Commission of Texas (the "Commission") over groundwater contamination. But the Legislature has expressly granted a private cause of action to landowners injured by the violation of Commission statutes and regulations. TEX. NAT. RES. CODE § 85.321; TEX. CIV. PRAC. & REM. CODE § 65.011(5). These rights are important to landowners because they cannot rely on the Commission to adequately enforce clean-up of pollution on their lands.

The Commission has stated that the protection of groundwater is one of its "greatest responsibilities." However, the Commission's enforcement of environmental rules has been repeatedly criticized,[3] and its enforcement process for violations is inefficient. *See* Tex. Sunset Advisory Comm'n, Tex. Railroad Comm'n: Staff Report 85th Legislature (April 2016) (available at Legislative Reference Library). The Sunset Advisory Commission noted in its 2016 report that the Commission's "inspection

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3 Ross Ramsay, Analysis: When We Doesn't Include You, THE TEXAS TRIBUNE (September 2015) https://www.texastribune.org/2015/09/23/analysis-texas-railroad-commission-letter/; Asher Price, At Texas oil and gas regulator, close ties to industry, AUSTIN AMERICAN STATESMAN (March 2016) http://www.mystatesman.com/news/news/state-regional-govt-politics/at-texas-oil-and-gas-regulator-close-ties-to-indus/nqsPB/.

priority system does not consider basic risk factors . . . such as operators' compliance history, how long a well or lease has gone without an inspection, if a lease is severed, or if an operation is near homes. Not considering these factors may result in repeatedly overlooked violations, as two-thirds of leases have gone more than two years without an inspection." *Id.* at 38.

The Commission's current enforcement policies do not effectively deter pollution violations, as the following quotes from the Sunset report illustrate:

> In the 2011 Sunset review, staff found that the Commission referred just 4 percent of total violations for legal enforcement. A direct comparison indicates that violations referred for legal enforcement action decreased from 4 percent in 2010 to ***2 percent in 2015.*** *Id.* 36. (emphasis added).
>
> While the enforcement tools set in statute are designed to ensure sound regulation, the Railroad Commission's effective use of those tools has been called into question repeatedly in the past. *Id.* at 35.
>
> Certain violations pose such a threat to public safety or the environment that requiring operators to come into compliance is not enough. *Id.* at 36.

The Commission has also failed to implement Safe Drinking Water Act protections: "The Railroad Commission effectively prioritized the

concerns of the oil and gas industry over the long term drinking needs of Texas residents."[4]

Commissioner Craddick has recently announced the "Texas Oilfield Relief Initiative," which has received "broad praise from industry-related members."[5] This initiative would reduce or eliminate certain reporting requirements, allow operators to avoid plugging inactive wells by changing the definition of "active wells," reduce Commission inspection of drilling and fracing operations, ease casing requirements designed to protect fresh groundwater by "averaging" groundwater levels over large areas. *Id.*

Landowners have learned through hard experience that they will not receive adequate assistance from the regulatory agency purportedly empowered to protect them and must fight for the protection of their property alone. This Court must assure that the fight is a fair one.

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[4]John Noel, Texas Aquifer Exemptions: Ignoring Federal Law to Fast Track Oil & Gas Drilling, Clean Water Action (August 2016) http://www.cleanwater.org/sites/default/files/docs/publications/Texas%20Aquifer%20Exemptions%20%20Clean%20Water%20Action%20August%202016.pdf

[5] Railroad Commissioner Christi Craddick Announces Texas Oilfield Relief Initiative, RAILROAD COMMISSION OF TEXAS (August 2016) http://www.rrc.state.tx.us/all-news/080916a/.

CONCLUSION

As a group composed of ranchers, farmers, surface and minerals owners, *Amici* have a vested interest in the responsible stewardship and protection of private property and groundwater. If oil and gas operators create conditions of continuing groundwater pollution on privately owned land, Texas law is clear that landowners have the equitable right to seek injunctive relief, and that such injunctive relief is not subject to limitations or the economic feasibility rule. Without this right, landowners would be powerless to limit the spread and severity of environmental contamination. This would be an unjust and dangerous result, completely at odds with established Texas law. For these, and the foregoing reasons, *Amici* urge this Court to grant Respondents' Prayer and affirm the Court of Appeals' decision.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In compliance of Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 3,253 words, excluding the portions of the brief exempted by Rule 9.4(i)(1). The brief was prepared in 14-point Georgia font.

/s/ Robert M. Park
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CERTIFICATE OF SERVICE

On November 4, 2016, this *Amici Curiae* Brief was served via the Court's CM/ECF service on:

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