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Environmental Law

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ENVIRONMENTAL LAW

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TABLE OF CONTENTS

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I. INTRODUCTION

DURING the Survey period, a large number of environmental cases were decided and significant environmental legislation was enacted in Texas. In the courts, a variety of interesting opinions were issued by Texas appellate courts from criminal prosecutions to suits for property damages, personal injury, and clean-up costs for environmental emissions and contamination. Several criminal cases revealed important issues of statutory interpretation such as the meaning of what water falls within the criminal provisions of the water code. One of the more interesting cases was one of first impression. This case revealed an apparently little used statutory provision under the Water Code that allows parties who feel aggrieved by inaction by the Texas Natural Resource Conservation Commission ("TNRCC") to file suit to require the agency to take action. As for environmental litigation for contaminated property, parties involved in such litigation will find that the cases decided in published and unpublished opinions provide good lessons for prosecuting and defending these claims. Two cost recovery actions under the Texas Solid Waste Disposal Act were decided, which provide insight into contribution protection for settling parties and what constitutes "arranging for disposal" under the Act that could result in liability for contamination at a site. These cases provide insights into important aspects of environmental law.

On the legislative side, the Texas Legislature passed significant environmental legislation, particularly with passage of the TNRCC Sunset legislation. The Legislature once again is changing the name of the agency to the Texas Commission on Environmental Quality. The new legislation makes a variety of other changes to Texas environmental law and the operations of the agency. One important change is that the Legislature has directed the TNRCC to use environmental compliance histories in permitting, inspection, and enforcement actions. This change has already created controversy and concern within the regulated community as the regulations are being developed to address this new process for considering whether a company has a poor compliance record and what the impact will be on such a company. Compliance efforts may be a further focus of the agency with the legislation that now requires the agency to create an incentive program for parties that implement environmental management systems. The life of the Petroleum Storage Tank Remediation Fund has been extended out to 2006, and new deadlines have been imposed to maintain one's eligibility for reimbursement under the fund. Water rights and water management were once again the subject of legislation. Numerous other changes were made that have significant implications for regulated parties.

The environmental practitioner will find important information and many issues to review in this year's Survey. The courts and the Legislature were very active this year in the environmental arena.

II. JUDICIAL DEVELOPMENTS

A. AGENCY ACTIONS AND ENFORCEMENT

1. Citizens Can Compel the TNRCC or its Executive Director to Show Why the Agency Should Not Take Immediate Action When It Fails to Act in a Reasonable Time

One of the most intriguing cases during the Survey period is *Larry Koch, Inc. v. TNRCC*.[1] In this case, a party was attempting to force the Texas Natural Resource Conservation Commission to take action to investigate a benzene release to groundwater and require remediation by a responsible party. Frustrated by the alleged inaction by the agency, Koch filed suit against the TNRCC to compel the agency to explain why it should not take immediate action when it failed to investigate the release under the State Superfund provisions of the Texas Solid Waste Disposal Act. While the trial court dismissed the action, the appellate court ruled that Section 5.352 of the Water Code provides an exception to the doctrines of primary and exclusive jurisdiction and rejected the agency's other defenses to this provision.[2]

As background, the matter arose as a result of the Texas Department of Health's requesting that the TNRCC investigate the detection of benzene in several wells drilled within the jurisdictional area, the Three Lakes Municipal District No. 1. The levels in samples collected from the wells apparently exceeded the Safe Drinking Water Act level for benzene. According to the opinion, the TNRCC investigated the release but did not determine the source of the benzene release. As a result of the presence of benzene in groundwater, the federal Department of Housing and Urban Development refused to provide mortgage insurance in the Three Lakes Subdivision located near Tomball, Texas. The plaintiff Larry Koch owned property in this subdivision.

Koch filed suit against certain oil field operators who had conducted drilling and production of oil in the area of the subdivision. Koch claimed that their activities caused the release of benzene to the groundwater. He also sued the TNRCC under Section 5.352 of the Water Code to compel action by the TNRCC. The suit against the TNRCC was severed from the claims against the oil companies. It is the claim against the TNRCC that the court addressed in this case.

The suit against the TNRCC focused on the procedure by which the agency publishes the state registry for hazardous substance sites that pose an imminent and substantial danger to public health or the environment, sometimes referred to as the "State Superfund list," how the agency determines which sites should be listed on the registry, and when and how to investigate such sites.[3] The suit also raised the issue of when the TNRCC is required under Section 5.236(a)(2) to give notice to persons

1. 52 S.W.3d 833 (Tex. App.—Austin 2001, pet. denied).
2. *See id.* at 841-42.
3. TEX. HEALTH & SAFETY CODE §§ 361.181-.184 (Vernon 2001).

who are suspected of contributing to contamination at a particular site.[4]

Koch alleged that the TNRCC and its executive director failed to meet their statutory duties by failing to list the area around Tomball where benzene and other toxic substances had contaminated the groundwater as one of the state superfund sites and by failing to give notice to the parties suspected of contributing to this condition. Koch alleged that the TNRCC had been allowed a reasonable time to take these actions.

To better understand this case, it is important to review Section 5.352 of the Water Code. This section provides as follows:

> A person affected by the failure of the commission or the executive director to act in a reasonable time on an application to appropriate water or to perform any other duty with reasonable promptness may file a petition to compel the commission or the executive director to show cause why it should not be directed to take immediate action.[5]

In attempting to utilize this provision to force agency action, Koch asked in his pleading that the TNRCC be required to list the contaminated area on the State Registry or investigate the area and consider it for listing, and that the TNRCC be ordered to provide the notice as required under Section 5.236 of the Water Code to those persons who are suspected of contributing to the contamination of the aquifer. The TNRCC challenged Koch's cause of action on several grounds and the trial court dismissed all of Koch's claims without stating the basis for its action.

On appeal, the TNRCC raised several defenses to the Section 5.352 claim. First, the agency asserted sovereign immunity. The agency interpreted this provision to apply as a mandamus-like process that applies to a duty that is ministerial, plain, and clearly defined, not where agency discretion is involved. The agency cited various statutes allowing agency discretion under the listing process of the State Registry.

The court did not agree with this construction of Section 5.352. In a case of first impression, the Austin Court of Appeals read this provision to waive the State's sovereign immunity where a party is affected by the TNRCC's failure to act timely. The provision also provides a remedy for the aggrieved party in the form of a suit filed in the Travis County District Court. The court pointed out that this provision is similar to Section 706(1) of the federal Administrative Procedure Act (APA).[6] The court noted that Section 706(1) of the federal APA allows parties to require governmental agency action based typically on a court imposed timetable.

The second argument that the provision does not apply to the State Registry listing, which is governed by the Health and Safety Code, was that the provision only applies to duties arising under the Water Code. The court rejected this argument on the basis that the Water Code describes the agency duties under the Water Code and the Health and

4. 52 S.W.2d at 836.
5. TEX. WATER CODE § 5.352 (Vernon 2001).
6. 5 U.S.C. § 706(1) (2001).

Safety Code.[7] Thus, the court concluded, the legislature brought the duties of the TNRCC under the Health and Safety Code under the scope of Section 5.352 of the Water Code.

The agency then turned to the defense that Koch failed to exhaust his administrative remedies. The agency, however, did not identify any administrative remedy Koch could pursue. Moreover, the court determined that the principles behind the requirement of exhaustion of administrative remedies do not apply where the agency purports to act outside its statutory powers, nor where the agency fails to perform a statutory duty with reasonable promptness.[8] In that case, the court wisely observed that only a judicial remedy would apply where the agency is refusing to take action; an administrative appeal would appear futile.

The next approach by the agency was to plead that Koch lacked standing to seek relief for failure of the TNRCC to provide notice to parties who may have contributed to the contamination. Here the agency's argument is somewhat humorous. The agency takes the position that no standing exists, because Koch is not among the parties to whom notice would be made and, therefore, is not prejudiced by such failure to receive notice. However, the court ruled that Koch was prejudiced because the notice was not sent to the persons suspected of contributing to the pollution, which is a necessary step in the process of remediating the problem. The court ruled that Koch had been prejudiced by the agency's delay in carrying out its duty to provide notice, since no action had been taken by the TNRCC to address the contamination.

The agency also challenged Koch's course of action under the doctrines of exclusive and primary jurisdiction of the agency. The TNRCC's position was that it is the agency's, rather than the court's, role to determine whether a site should be listed on the State Registry. In response, the court ruled that the legislature specifically gave the Austin courts the power to review the agency's exercise of a duty, whether under its primary or exclusive jurisdiction, and to determine whether it should be compelled to take immediate action in instances of unreasonable delay. Thus, the agency's arguments were rejected, because specific statutory authority provided for the Austin courts to address these issues.

Finally, the TNRCC argued the matter was moot in that the agency was considering listing the site on the State Registry as requested by Koch. The court ruled that the controversy was still alive, because the question was whether the TNRCC should be compelled to take action as a result of its unreasonable delay.

For these reasons, the court remanded the matter back to the trial court for review of the cause of action under Section 5.352. In so doing, an interesting power, apparently previously untapped in a case that reached the court of appeals, is revealed to parties aggrieved by TNRCC delay in exercising its duties. In this case, the plaintiff was a party com-

7. 52 S.W.3d at 839 (citing TEX. WATER CODE § 5.012(a)(12)).
8. *See id.* at 839-40.

plaining of an industrial activity and the TNRCC's alleged failure to timely address and remedy the condition. In other cases, industrial plaintiffs may be able to use this provision to compel the agency to issue or process permits, to issue Voluntary Cleanup Program certificates of completion, or to compel other agency action that is being unreasonably delayed by the TNRCC. Thus, this case and Section 5.352 may provide a newly discovered avenue for making the agency act timely in those cases where, for whatever reason, it fails or refuses to fulfill its duties without unreasonable delay.

2. Criminal Prosecution under State Environmental Statutes

Three criminal cases were considered in the two Houston Courts of Appeals during the Survey period.[9] All three involved allegations of criminal violation of the Texas Water Code for water pollution or disposal that could lead to water pollution. Two of the cases involved discharges of domestic sewage at a residence, and one involved the discharge of oil to land.

a. Waters in the State

One of the issues that arose in *Watts v. State*,[10] was the meaning of "adjacent to waters of the State" in the criminal provision of the Texas Water Code. In this case, the defendant allegedly, in addition to leaving trash and debris around his trailer home, had allowed the discharge of sewage to his yard from a broken sewage pipe. After several warnings and visits by the Harris County Health Department and the Sheriff's Deputies, John Watts was arrested and prosecuted for violation of Section 7.145 of the Texas Water Code. This provision provides for criminal prosecution for intentional and knowing unauthorized discharges of waste or a pollutant "into or adjacent to water in the state" that causes or threatens to cause pollution unless discharged within the parameters of a permit, order, or regulation.[11] The issue of whether the discharge was adjacent to waters of the state first involved whether a drainage ditch fit within the statutory definition of "waters in the state." The trial court took judicial notice of a Court of Criminal Appeals decision that a "'drainage ditch' is a watercourse that falls within the scope of the Water Code's statutory definition of 'water' and 'waters in the state.'"[12] The Houston Fourteenth District Court of Appeals upheld the trial court's taking judicial notice of the Court of Criminal Appeals' holding and instruction to the jury that the drainage ditch was a water in the state.

9. Landry v. State of Texas, 60 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.); Watts v. State, 56 S.W.3d 694 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.); B & B Iron & Metal Co., Inc. v. State, No. 01-00-009650-CR, 2001 Tex. App. LEXIS 1363 (Tex. App.—Houston [1st Dist.] Feb. 26, 2001, pet. ref'd).

10. 56 S.W.3d 694.

11. TEX. WATER CODE § 7.145(a) (Vernon 2001).

12. *Watts*, 56 S.W.3d at 702 (citing Am. Plant Food Corp. v. State, 587 S.W.2d 679 (Tex. Crim. App. 1979)).

b. Adjacent to Waters in the State

Having addressed that issue, the question of whether the discharge was "adjacent" to water in the state could be addressed. The defendant's position was that the conclusion that a discharge 50 yards away from a watercourse is adjacent to water in the state defies common sense and stretches the term "adjacent." Since the term is not defined in the Water Code, the appellate court looked to the common definition of adjacent. The court cited a dictionary for the definition of "adjacent" as "not distant or far off" and "nearby but not touching."[13] The court deferred to the fact finder and concluded that the discharge of sewage within one hundred and fifty feet of water in the state "falls within the plain, ordinary meaning of the term 'adjacent' and is sufficient evidence to support the jury's determination that appellant discharged a waste or a pollutant into or adjacent to water in the state."[14] In addition, one officer testified that he saw sewage in a trench that flows away from the trailers and saw discharge in the "ditch area."[15] Thus, the court concluded there was sufficient evidence to support the jury's conclusion that sewage was discharged "adjacent" to waters in the state.[16]

The appellant also challenged the constitutionality of the use of the term "adjacent" in the criminal provision. He argued that the term is unconstitutionally vague and impermissibly broad. Thus, the term did not provide the appellant notice as to what conduct was prohibited. Citing a prior opinion of the court, it set the standard for providing sufficient information regarding what behavior is prohibited, not as a mathematical precision, but only as "fair warning of the conduct proscribed and . . . guidelines for law enforcement."[17] Using this test, the court in *Watts* concluded that the term "'adjacent' is a simple word with a plain meaning that clearly conveys to the public the legislature's intent to criminalize the discharge of a waste or pollutant into or near water in the state."[18]

This court did not take a very close look at the term "adjacent." A distance of 150 feet from a watercourse hardly would seem to meet a common sense definition of adjacent, particularly where a person is facing incarceration and substantial fines. While the factual question of whether the distance of a discharge to a water course should be determined by a jury, or judge if acting as fact finder, the definition of the term would appear to be a legal question. The court should have set some parameters for judging what adjacent means under these criminal provisions of the Water Code. Deferring to the jury's judgment of what "adjacent" means would appear to abdicate the court's role in construing statutory terms.

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13. *Id.* at 703 (citing Webster's Third New International Dictionary, 26 (1993)).
14. *Id.*
15. *Watts*, 56 S.W.3d at 703.
16. *Id.*
17. *Id.* (citing Weyandt v. State, 35 S.W.3d 144, 155 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.)).
18. *Id.* at 704.

This is particularly true where the appellant is challenging the vagueness of the term at issue. In order to avoid the potential for various juries to interpret the term differently, and thereby not providing "fair warning of the conduct proscribed," the court should have addressed the hard question of what "adjacent" means. This case provides insight into how this court of appeals will view discharges on land and the potential criminal liability such discharges may create under the penal provisions of the Water Code.

A more appropriate set of facts for showing that the discharge of a pollutant was adjacent to waters in the state was *Landry v. State*,[19] decided by this same appellate court in another criminal conviction for water pollution. In *Landry*, the defendant and later appellant, had been discharging sewage from his septic tank that he claimed had become clogged. A plastic pipe from his backyard ran four or five feet from a bayou.[20] He was convicted and fined $50,000.[21]

On appeal, one of the issues the court reviewed was whether the discharge was into or adjacent to waters in the state.[22] The evidence introduced at trial consisted of a picture showing a V-shaped wet area narrowing as it approached the bayou and testimony of a Houston police officer that the dampness went down to the bayou.[23] The court concluded this was sufficient evidence to support the jury's finding that the discharge occurred "adjacent" to waters in the state. The defendant was apparently arguing that the discharge did not flow directly into the bayou but was on private property away from the bayou. However, the court did not provide, or perhaps counsel for the defendant did not provide, a clear articulation of the defendant's position or legal argument. Thus, the court did not find it difficult to conclude a discharge a few feet from the bayou met the definition of "adjacent."

A few feet from waters in the state, rather than 150 feet, would better define the parameters of the term "adjacent" for purposes of the penal provisions of the Water Code. The Houston appellate court did not apply a common sense definition of the term when it concluded a distance of 150 feet was "close enough" to allow a criminal conviction. It is not clear how far away a discharge would have to be from a water course to prevent the government from obtaining a conviction of a defendant under the Water Code.

c. Mens Rea

Another issue involved in the *Waters* case was mens rea. Section 7.145 of the Water Code requires that the person act intentionally or knowingly

19. 60 S.W.3d 263.
20. *Id.* at 264.
21. *Id.*
22. *Id.* at 265.
23. *Id.*

to discharge or allow a discharge.[24] The defendant claimed he did not intentionally discharge the sewage. The defendant claimed he simply "failed to timely clean-up an unavoidable discharge."[25] He argued a pipe was broken in the rear of his property, and the release occurred without any affirmative action on his part. However, the court rejected this claim based upon testimony that the defendant was repeatedly warned by the county health inspectors to stop the discharge and did nothing to do so. The court concluded that he either intentionally or knowingly discharged the sewage or at least allowed it to continue.

d. Collateral Estoppel

In *B & B Iron and Metal Co. v. Bazarsky*,[26] the defendant was convicted of knowingly disposing of used oil on land under Section 7.176(a)(2) of the Water Code. The defendant challenged this conviction on appeal, because he had been acquitted on another felony water pollution charge three years before. The prior trial had been based upon what is now Section 7.145(a) of the Water Code. The defendants asserted that the conviction was barred under the doctrine of collateral estoppel embodied in the Fifth Amendment of the U.S. Constitution and the double jeopardy prohibition under article I, section 14 of the Texas Constitution. The court focused on the collateral estoppel issue, because appellant failed to cite any authority for the double jeopardy provision of the Texas Constitution and failed to show how it materially differed from the federal constitutional challenge.

The test for collateral estoppel and how the court applied this test is quite interesting. The test is whether a rational jury in the first proceeding could have based its verdict on a factual matter other than that which the defendant seeks to foreclose from consideration by the second jury.[27]

The defendant took the position that both verdicts were based on the question of the identity of the party who disposed of the oil. However, the court looked at the original defense to see if the acquittal could have been based on the conclusion that the prosecution failed to prove an element of the first offense that is not an element of the second prosecution.[28] The court identified the issue of whether the oil was placed adjacent to water in the state as the first offense on which the jury could have based its acquittal. The court concluded that the jury could have concluded that 300 feet was not "adjacent" to the storm sewer. Thus, the identity issue was not the only issue on which the jury could have based its decision.

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24. TEX. WATER CODE § 7.145 (Vernon 2001).

25. *Watts*, 56 S.W.3d at 702.

26. No. 01-00-00965-CR, 2001 Tex. App. LEXIS 1363 (Tex. App.—Houston [1st Dist.] Feb. 26, 2001, pet. ref'd).

27. *Id.* at *5 (citing Ashe v. Swenson, 397 U.S. 436 (1970)).

28. *Id.* at **5-6 (citing Ladner v. State, 780 S.W.2d 247, 255 (Tex. Crim. App. 1989)).

The court noted in a footnote that, while it agreed with the State on the legal authority that required the decision, "this panel cannot help but regard this result as unfair."[29] In fact it does seem extremely unfair that a prosecutor can try a party who is found innocent in the first trial and then file another case against the same party for the same alleged wrongdoing. The prosecutor can simply assert a similar offense, but with one different element, and re-try the defendant. This would allow a persistent, or vindictive, prosecutor to put a person through a sort of judicial gauntlet of several trials over many years.

e. Does the Texas Whistleblower Act Protect an Employee from His Own Criminal Act?

The case of *Gold v. City of College Station*[30] poses the provocative question of whether the Texas Whistleblower Act protects an employee from his own criminal act. Here, the appellant, Gold, challenged a summary judgment against his claim of wrongful discharge based upon the Texas Whistleblower Act (the "Whistleblower Act").[31]

Gold, was one of the two top managerial employees of the Rock Prairie Landfill in College Station and worked at the landfill for more than twelve years. Gold and his supervisor had carried on an acrimonious relationship for many years, and both had been warned they would be fired if they could not learn to get along and work together. Following receipt of a written reprimand from his supervisor putting him on six months' probation for spilling leachate, Gold scheduled a meeting with the executive director of the Brazos Valley Solid Waste Management Agency ("BVSWMA"), which operated the landfill for the cities of College Station and Bryan.[32] At the meeting, which his supervisor attended, Gold told the executive director that the reprimand was unfair because his supervisor knew of prior leachate spills, had tacitly encouraged the spills, and that other, more egregious violations had occurred than spilling leachate.[33] Gold reported past violations, including discharging contaminated water into a nearby creek and improperly disposing of waste outside of the lined landfill. The supervisor denied Gold's allegation that he knew about these violations.

Following an investigation, which included excavation that confirmed Gold's report of improper disposal, the BVSWMA fired Gold. The supervisor resigned, having been presented the choice of resignation or termination. Gold then brought suit against the City of College Station,

29. *Id.* at *11 n.6.

30. 40 S.W.3d 637 (Tex. App.—Houston [1st Dist.] 2001, pet. granted, cause dism'd).

31. *See* TEX. GOV'T CODE ANN. §§ 554.001-.009 (Vernon Supp. 2001). The Act prohibits a governmental entity from terminating an employee who reports a violation of law by the governmental entity to another public employee or to an appropriate law enforcement authority.

32. 40 S.W.3d at 641-42.

33. *Id.* at 642.

City of Bryan and BVSWMA ("governmental entities"), claiming violation of the Whistleblower Act.

At trial, the governmental entities sought summary judgment on the grounds that Gold's report of his own illegal activity is not protected, Gold's illegal conduct provided a legitimate, non-retaliatory reason to terminate him, and Gold had no evidence to prove he was discharged because he had reported a violation. The trial court granted the governmental entities' motion without stating the grounds for its decision. On appeal, the court reversed and remanded the case, holding that a public employee can still benefit from the protection of the Act even if he participated in the unlawful conduct he reported, so as long as he can establish the requisite elements for a whistleblower claim.[34] However, the Texas Supreme Court granted the governmental entities' petition for review, following which the parties settled, and the cause was dismissed.[35] Therefore, whether the Whistleblower Act protects an employee who participated in the unlawful conduct he reported remains unsettled because of the final disposition of their case.

B. Environmental Torts

1. Government Agencies Do Not Necessarily Have Exclusive Jurisdiction of Pollution Issues Raised in Environmental Suits

In environmental suits where soil or groundwater contamination is alleged, it is common for a governmental agency to be involved in reviewing the investigation and remediation of the contamination involved in the suit. While the Amarillo Court of Appeals ruled, in an unpublished opinion, that no exclusive or primary jurisdiction applied, other courts, as in *Z.A.O. Inc. v. Yarbrough Drive Center Joint Venture*,[36] ruled that the agency's decision as to the issue of what clean-up level applies is dispositive of the case. Thus, the question is whether a court should abate a case until the agency makes that decision. To add another complication, the TNRCC has generally applied a policy, included in its new Texas Risk Reduction Rules, that a landowner must approve a clean-up approach before the agency reaches its decision. If that landowner is in litigation with the responsible party, approval by the landowner is unlikely to be forthcoming. Thus, the interplay between the regulations, the regulatory agency, the litigants, and the courts often prove challenging to parties litigating environmental suits.

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34. *Id.* at 649.

35. City of College Station v. Gold, No. 01-0200, 2001 Tex. LEXIS 123 (Tex. Dec. 13, 2001).

36. 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet. h.) (discussed *infra*).

a. Jurisdiction of the Railroad Commission over Suits for Property Damage by Pollution from Oil and Gas Production

In the case *In re Apache Corp.*,[37] the Amarillo Court of Appeals denied Apache's petition for mandamus to order the trial judge to abate a property damage suit pending disposition of administrative proceedings relating to the pollution at issue in the lawsuit before the Texas Railroad Commission ("TRC"). The plaintiff, Ray Marion, sought damages against Apache under multiple tort theories for destruction of crops and groundwater contamination caused by water pollution from leaking oil and gas wells.[38] However, before this suit was filed, the TRC began proceedings to abate the pollution based upon Marion's earlier complaint to the agency.[39] Apache claimed that the doctrines of exclusive and primary jurisdiction compelled the trial court to abate the case pending the completion of the TRC's proceeding to abate the pollution.[40] Apache founded its position on section 26.131 of the Water Code, which provides that the TRC is "solely responsible" for the control and disposition of waste and the abatement of pollution of subsurface water from oil and gas exploration and production. Apache argued that this section granted exclusive jurisdiction to the TRC over such matters, mandating abatement of the case until the TRC had completed its proceeding.[41]

The court reviewed the many grants of agency jurisdiction in Chapter 26 of the Water Code, and reasoned that the Legislature promulgated section 26.131 to avoid jurisdictional disputes between the TRC and the TNRCC over the control and disposition of waste and the abatement of water pollution associated with oil and gas exploration and production activities.[42] However, the court concluded that the question presented in this case did not involve TNRCC-TRC jurisdiction. The issue before the court dealt with the jurisdiction between the TRC and *the courts* over relief for damages from water pollution associated with oil and gas production activities.

The court focused on three statutes in the Natural Resource Code, noting that each authorizes causes of action for damages and/or other relief.[43] In section 85.321, the court found unmistakable legislative intent to allow property owners injured due to a violation of a TRC rule or order to sue for and recover damages and other relief. In section 85.322, the

37. 61 S.W.3d 432 (Tex. App.—Amarillo 2001, no pet. h.).

38. Plaintiff sought relief on grounds of trespass, negligence, negligence per se, nuisance, negligent and intentional infliction of emotional distress, and strict liability. *Id.* at 10.

39. *Id.* at 2.

40. *Id.*

41. *Id.*

42. *In re Apache Corp.*, 61 S.W.3d at 5.

43. *Id.* at *6-7. Section 85.321 provides, in part, that one "who owns an interest in property . . . that may be damaged by another violating . . . another law of this state prohibiting waste or a valid rule or order of the Commission may sue for and recover damages and have any other relief to which he may be entitled at law or in equity." TEX. NAT. RES. CODE ANN. § 85.321 (Vernon 2001).

court found legislative intent that such suits proceed without delay.[44] Finally, through section 91.003[45] the court found legislative intent that the TRC's authority to abate pollution through section 26.131 of the Water Code or section 91.131 of the Natural Resources Code is expressly subject to the provisions in Chapter 85, including sections 85.321 and 85.322.

The court was satisfied that these provisions clearly indicate that the TRC does not have exclusive jurisdiction over the abatement of or payment of damages associated with groundwater contamination caused by oil and gas production.[46] Further, because there is no statute vesting the TRC with exclusive authority over common law actions to abate or remedy such contamination, the court concluded that the doctrine of primary jurisdiction was not applicable in this case.[47]

2. *No-Evidence Motions for Summary Judgment*

The no-evidence motions for summary judgment have grown, as a defendant's weapon in environmental litigation. In environmental cases, the issues from a regulatory and scientific basis can be complicated and may require several experts to prove a plaintiff's case. The published and unpublished decisions from the courts of appeals provide good lessons for both plaintiffs and defendants in these types of cases to prepare to prosecute or defend them.

a. Trial Court Properly Granted No-Evidence Summary Judgment When Expert Testimony Was Appropriately Struck and No Evidence of Causation Was Provided

In *Martinez v. City of San Antonio*, the San Antonio Court of Appeals reviewed issues regarding the timing of considering a no-evidence motion for summary judgment, the admissibility of expert testimony, and what constitutes causation evidence.[48] The case involved a suit by 600 residents of a neighborhood surrounding San Antonio's Alamodome sports complex, who claimed that they were injured as a result of exposure to "fugitive dust" that contained lead and was disseminated throughout the neighborhood during construction of the Alamodome sports complex.[49] The residents sued the City of San Antonio, the developer of the Alamodome sports complex, and the prior owner of an iron foundry that

44. Section 85.322 provides, in part, that "no suit by or against the commission . . . or order of the commission shall impair or abridge or delay a cause of action for damages or other relief that an owner of land . . . may have or assert against any party violating any rule or order of the commission." *Id.* § 85.322.

45. This section provides that the TRC may enforce "this chapter or any rule, order or permit . . . in the manner and subject to the conditions provided in Chapters 81 and 85 of this code, including the authority to seek and obtain civil penalties and injunctive relief as provided by those chapters." *Id.* § 91.003.

46. *In re Apache*, 61 S.W.3d at 8.

47. *Id.* at 11.

48. 40 S.W.3d 587, 589-590 (Tex. App.—San Antonio 2001, pet. denied).

49. *Id.* at 589.

was operated at the Alamodome site from 1884 to 1989.[50] The residents had hired two expert witnesses, whose testimony was struck by the trial court.[51] The residents appealed the trial court's granting of no-evidence summary judgments, arguing that the summary judgment motions were prematurely considered and that the plaintiffs had presented sufficient evidence in their responses to defeat the summary judgment motions.[52]

i. Timing of Consideration of No-Evidence Motion for Summary Judgment

On appeal, the residents argued that they were not allowed adequate time for discovery before the trial court entered the no-evidence summary judgments.[53] Relying on notes and comments regarding Texas Rule of Civil Procedure 166a(i),[54] the residents complained that the trial court acted improperly by entering judgments before the expiration of the discovery period.[55] The court noted that in Texas, appellate courts have not overturned no-evidence summary judgments for failure to allow adequate time for discovery.[56] The court evaluated the circumstances of the case and concluded that the five years the case had been pending was an adequate time for the residents to conduct discovery.[57] In addition, the court presumed that the residents duly investigated the case before filing suit and noted that the residents had agreed to a motion setting the summary judgment hearings before expiration of the discovery period.[58] Consequently, the court held that the court's consideration of the no-evidence motion for summary judgment before the end of the discovery period did not deprive the residents of an adequate time for discovery.[59]

ii. Admissibility of Expert Testimony

The residents argued that the trial court erred in striking their experts' testimony that lead in soils originating from the Alamodome site was dispersed throughout their neighborhood during construction of the Alamodome sports complex.[60] The court recognized that it could not overturn the trial court's exclusion of expert testimony unless the trial court had abused its discretion by acting "arbitrarily, unreasonably, or

50. *Id.*
51. *Id.* at 589-90. The case was appealed from the 131st Judicial District Court, Bexar County, Texas, Honorable David Peeples, Judge Presiding.
52. *Id.* at 590-91.
53. *Id.*
54. "A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before." TEX. R. CIV. P. 166a(i) cmt.
55. *Martinez*, 40 S.W.3d at 591.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 592.
60. *Martinez*, 40 S.W.3d at 592.

without reference to guiding rules or principles."[61] The question of whether the testimony of the residents' experts was admissible turned on the reliability of that testimony.[62] The court reviewed the testimony of each expert individually to consider whether the trial court had abused its discretion.[63]

The court concluded that striking the testimony of Dr. Jack V. Matson was not an abuse of discretion because Dr. Matson employed his own independent methodology that was not sufficiently supported.[64] Dr. Matson had derived an "enrichment factor" to add to his calculations regarding the amount of lead present in the fugitive dust emitted during construction of the Alamodome sports complex.[65] Although Dr. Matson relied on a study regarding lead contamination from a New Mexico lead smelting facility in using the "enrichment factor," the court was troubled by the lack of demonstrated similarities between the facilities, soils, distribution of lead, and meteorology in New Mexico and San Antonio.[66] Moreover, the court found that Dr. Matson derived the "enrichment factor" before locating the New Mexico report to support his conclusion.[67]

Because Dr. Matson' calculations were unreliable, the court concluded that the testimony of Dr. Colin J. Baynes was also unreliable.[68] Dr. Baynes used Dr. Matson's calculations to arrive at conclusions regarding the amount of lead emitted during construction of the Alamodome sports complex.[69] The court stated that although Dr. Baynes's methodology may be accepted and reliable, his use of unreliable calculations renders his opinion unreliable.[70] Consequently, the court held that striking Dr. Baynes's testimony was not an abuse of discretion.[71]

iii. What Constitutes Causation Evidence

The residents argued that they presented sufficient causation evidence to defeat the no-evidence motion for summary judgment.[72] Although the residents presented evidence from several experts regarding the presence of lead in soils at the Alamodome site, the presence of lead in dust collected from residents' homes, elevated levels of lead in the blood of neighborhood children, symptoms of residents consistent with lead poisoning, and construction activities involving the movement of lead-contaminated soils, the court concluded that the expert testimony

61. *Id.* (citing W.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995)).
62. *Id.* at 593.
63. *Id.* at 593-94.
64. *Id.*
65. *Martinez*, 40 S.W.3d at 593-94.
66. *Id.*
67. *Id.*
68. *Id.* at 594.
69. *Id.*
70. *Martinez*, 40 S.W.3d at 594.
71. *Id.*
72. *Id.*

amounted to no evidence of causation.[73] The court discounted the testimony of a physician who examined 49 neighborhood children, concluding that the expert's report could not determine the source of the lead that was creating symptoms in many of those children.[74] Similarly, the court rejected the testimony of two medical experts whose testimony merely established that neighborhood children are at risk for lead poisoning.[75] An elevated risk of injury is not sufficient to raise a fact issue on causation or create a genuine issue of material fact.[76]

Finally, the court noted that the residents' expert testimony had not negated other plausible causes of injury with a reasonable degree of certainty.[77] A no-evidence motion may not be overcome with an expert's testimony that fails to rule out alternative causes of injury.[78] The court concluded that Dr. Matson's opinion did not constitute evidence, because he did not consider any sources of lead emissions other than the Alamodome site.[79] Accordingly, the court held that the residents presented no evidence demonstrating that their injuries were caused by the dissemination of lead associated with the Alamodome construction activities.[80] The court affirmed the trial court's no-evidence summary judgment.[81]

b. No Evidence of Causation

In *Hess. v. McLean Feedyard, Inc.*,[82] the appellate court affirmed the trial court's granting of a no-evidence summary judgment for the defendant feedyard on the basis that there was no evidence of causation. The landowners had sued the feedyard for damages allegedly caused by the contamination of their surface and groundwater. McLean Feedyard, Inc. owned 960 acres of land, and operated a commercial feedyard on approximately 101 of these acres. The McLean property was located upgradient and north of the landowners' properties. The feedyard collected and held waste from the cattle and accumulated surface water and cattle waste into a system of a series of lagoons. The discharge gates of the lagoons were located approximately one mile from the nearest property owned by a landowner. Over the course of several days of unprecedented heavy rain, there were three overflow discharges from the retention ponds. Water from the discharges passed the McLean property and entered a creek. The landowners contended that McLean had contaminated their fresh

73. *Id.* at 594-95.
74. *Id.* at 595.
75. *Martinez*, 40 S.W.3d at 595.
76. *Id.* at 594 (citing Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997)).
77. *Id.* at 595 (citing *Havner*, 953 S.W.2d at 720).
78. *Id.* (citing Weiss v. Mech. Associated Servs., 989 S.W.2d 120, 125 (Tex. App.—San Antonio 1999, pet. denied)).
79. *Id.*
80. *Martinez*, 40 S.W.3d at 594.
81. *Id.*
82. 59 S.W.3d 679 (Tex. App.—Amarillo 2002, pet. denied).

water to the point that their underground and surface water was no longer potable and was not suitable for consumption by man or livestock.[83] McLean contended that most of the discharge was rain water, and that any manure and byproducts in the creek would have been so diluted by the huge volume of water in the creek that no damages were caused to the landowners from the discharges.[84]

McLean filed a no-evidence motion for summary judgment asserting that there was no evidence of causation and contending that it was entitled to a traditional summary judgment under Rule 166a(c) of the Texas Rules of Civil Procedure, because it had established the absence of causation as a matter of law.[85] In response, the landowners submitted the affidavit of an expert witness who testified (1) that the feedyard had contaminated the landowners' surface water to the point that it was no longer potable, and was hazardous to humans, and (2) that the landowners' underground fresh water contained high levels of coliform bacteria which caused the underground fresh water to be non-potable, dangerous, and hazardous to humans who consumed it.[86] The feedyard objected and moved to strike the affidavit of the expert witness. The trial court sustained the feedyard's motion to strike the expert's affidavit and granted the feedyard's motion for summary judgment.

In upholding the trial court's striking of the expert witness affidavit, the appellate court held that the proponent of expert testimony by affidavit in a summary judgment proceeding has the burden to provide an affidavit which satisfies the requirements of summary judgment practice and the requirements of Texas Rules of Evidence 702, 703, 104, and 403.[87] The court found that the portions of the affidavit that constituted conclusions were not sufficient to raise an issue of fact. The affidavit failed to provide supporting facts, and the expert's bare conclusions were not evidence. The court held that under Rule of Evidence 703, an expert's opinion must be based upon facts or data perceived or reviewed during or before trial. An expert opinion regarding causation that is based completely upon speculation and surmise amounts to no evidence. Because the expert's opinion was based on his assumption of an unproved fact, the motion to strike the opinion was properly granted.[88]

In addition, the court held that the expert should have carefully considered and ruled out alternative causes of the contamination, and the failure to rule out such alternative causes resulted in speculation and conjecture and did not amount to any evidence of causation.[89] The court found that the expert's affidavit wholly failed to inform the reader of the quality of the water before the events made the basis of the underlying

83. *Hess*, 59 S.W.3d at 683.
84. *Id.*
85. *Id.*
86. *Id.*
87. *See* 59 S.W.3d 679, 685.
88. *Id.* at 686.
89. *Id.* at 687.

lawsuit.[90] Because the reasoning of the expert was not based on known or stated water quality before the heavy rains, the expert had reasoned from an end result in order to hypothesize what was needed to be known, but was not known or set out in his affidavit.[91] Accordingly, the opinion was based on conjecture or speculation about the water quality before the heavy rains and could not constitute evidence of causation.[92] Furthermore, even though the expert had attempted to rule out other potential causes, the failure to ascertain and consider the water quality before the heavy rain events made the effort to rule out other possible causes incomplete and, therefore, inconclusive. The court, therefore, concluded that the trial court's action in striking the affidavit was not an abuse of discretion.[93]

Next, the court considered whether the trial court's grant of the feedyard's no-evidence summary judgment was proper. The court held that a no-evidence summary judgment is essentially a pretrial directed verdict and, therefore, applied the same legal sufficiency standard as applied in reviewing a directed verdict.[94] Because the court had upheld the striking of the landowners' expert affidavit, the court found that the landowners had not produced any expert testimony on the element of causation. The court held that even if the expert's affidavit had been permitted, it still provided no evidence of the unproven essential fact that the water was potable before the heavy rains.[95] The court held that even if the quality of water could be the subject of non-expert testimony, a question not decided by the court, the non-expert summary judgment evidence did not discuss or establish the water quality before the events made the basis of the underlying suit.[96] The court found that this fact was essential to create a fact issue on causation.[97] The court, therefore, affirmed the trial court's judgment.

c. Plaintiffs Must Assert Evidence of Elements of Cause of Action to Defeat a No-Evidence Motion for Summary Judgment

In *Aguirre v. Phillips Properties Inc.*,[98] the defendant landowner, on whose land were located underground storage tanks, succeeded in obtaining a no-evidence motion for summary judgment under Rule 166a(i) of the Texas Rules of Civil Procedure. This rule provides that a party may move for a motion for summary judgment based upon the other side's lack of evidence on an element of a cause of action or defense after a reasonable time for discovery. The Corpus Christi Court of Appeals

90. *Id.*
91. *Id.*
92. *Hess*, 59 S.W.3d 679, 687.
93. *Id.*
94. *Id.*
95. *Id.* at 638.
96. *Id.*
97. *Hess*, 59 S.W.2d at 638.
98. No. 13-00-426-CV, 2001 Tex. App. LEXIS 5812 (Tex. App.—Corpus Christi Aug. 23, 2001, no pet.).

went through each of the plaintiffs' causes of action and provided insight as to what it believed would have to be shown by the plaintiffs to avoid summary judgment. This case in that regard provides good insight into one court's view regarding what is required to succeed with these motions.

i. Negligence

The defendant challenged the plaintiffs' evidence on the following elements of their negligence cause of action: 1) the standard of care that the owner of the property with the underground storage tanks would owe the plaintiffs with respect to operation of their tanks; 2) the breach of that standard of care; and 3) that the duty was in fact owed to the plaintiffs. The court ruled that in considering what it would take to provide proof on each of these elements the plaintiffs would have merely had to provide an affidavit from their expert witness, without the need for additional discovery.

Here, the court may have missed the point on one issue. An expert could have provided an affidavit that described the proper manner of operating an underground storage tank system, particularly in consideration of the applicable regulations governing such tanks. The fact the duty was owed to the adjoining property owner, whose groundwater was allegedly contaminated, would not be difficult to address. However, the issue of whether the defendant violated the standard of care could well have required discovery of the activities and documents of the defendant. Here the question is how had the defendant in fact operated its underground storage tank. How had fuel been monitored? How had the tanks been maintained? How had they been installed? These facts would not necessarily be known outside the use of discovery to find out what the defendant had actually done. Other possible sources would be government records, such as TNRCC records and perhaps city or county records. It is not clear the appellate court fully understood these issues.

ii. Trespass Claim

As for the trespass claim, the defendant asserted that the plaintiffs failed to provide proof of "the physical entry of contaminants onto their property."[99] This was the basis for their claim of subsurface contamination, apparently groundwater contamination. The court concluded this proof should have been readily available to the plaintiffs and should have been part of the investigation prior to filing suit against the defendant. The court was very pointed, "Without evidence of contamination on their properties, [plaintiffs] would have had no claim against [defendants]."[100] Here the court concluded that the plaintiffs and their expert could have submitted affidavits on the question of the physical entry of the contami-

99. *Id.* at *10.
100. *Id.*

nants on their property to defeat the no-evidence motion for summary judgment.[101]

iii. Causation

On the issue of causation, the court recognized that discovery would be necessary. Relying upon *Mitchell Energy Corp. v. Bartlett*,[102] the court held that the factual issues for environmental tort claims, like those of the plaintiffs, required them to prove the source of the release of contaminants originated with the defendant and that the released contaminants then migrated to the plaintiffs' property and caused their injury. The court observed that such evidence is usually expert testimony. Discovery necessary for the expert to reach his or her opinion, the court noted, would likely be physical discovery. One would assume the court means that the discovery would require testing on the defendant's property.

The plaintiffs in this case argued that the discovery that was needed was the ability to depose the defendants' experts and corporate representative. The court concluded this was not the type of physical evidence that would appear to be necessary in most cases to defeat a no-evidence motion for summary judgment. The court did not count this issue in favor of plaintiffs' attempt to overturn the summary judgment issued against them by the trial court.[103]

iv. Timing

The court looked as well at how long discovery had been possible. The case had been filed for about three years. Discovery had been taken in another related lawsuit. The court concluded this time period favored the granting of summary judgment. However, the fact the trial court stayed discovery one month before the judgment was granted favored denying the motion. Considering all of the factors and evidence before it, the Court of Appeals approved the granting of the summary judgment.[104]

d. Sufficiency of Evidence to Survive a No-Evidence Motion for Summary Judgment For Environmental Exposure Claims

Belasco v. Pennco, Inc.,[105] an unpublished opinion out of the Houston Court of Appeals, presents an overview of the environmental and exposure evidence necessary to sustain a no-evidence motion for summary judgment in an environmental property damage and personal injury suit. In this case, seven members of the Belasco family filed suit against Pennco, claiming they repeatedly detected noxious odors from Pennco's plant and suffered various injuries and ill health due to chemicals re-

101. *Id.*
102. 958 S.W.2d 430, 446 (Tex. App.—Fort Worth 1997, pet. denied).
103. *Id.* at *12.
104. *Aguirre*, No. 13-00-426-CV, 2001 Tex. App. LEXIS 5812 at **12-13.
105. No. 14-99-00832-CV, 2000 Tex. App. LEXIS 8172 (Tex. App.—Houston [14th Dist.] Dec. 7, 2000, pet. denied).

leased from the plant. The Pennco plant produces ferrous sulfate by combining carbon steel with sulfuric acid and water. Ferrous sulfate is a nontoxic but caustic material. Appellants, who lived three-fourths of a mile from the plant, brought claims of nuisance, trespass, negligence, negligence *per se* and gross negligence.

To support their nuisance claim,[106] appellants offered their own affidavits asserting they were periodically subjected to noxious odors from the Pennco plant. Appellants also offered several investigatory reports filed by the TNRCC, in each of which the investigator reported he was unable to detect any odor at the perimeter of Pennco's property. However, in one of the reports, the TNRCC inspector noted that a Pennco supervisor told him that fumes sometimes travel beyond the property lines when the reactors are operating. The court found that this single admission by Pennco was sufficient to overcome the motion for summary judgment, in that it constituted more than a scintilla of proof to create a fact issue regarding the nuisance claim.[107]

For their trespass claim, appellants offered their own affidavits claiming they witnessed a plume of brownish-yellow steam rising from Pennco's plant and moving toward their property.[108] However, because none of the affidavits stated that the plume moved outside of the boundaries of Pennco's property, the court ruled this was not sufficient to overcome the summary judgment on the trespass claim.[109]

With respect to their claims for personal injury, negligence, negligence *per se*, and gross negligence, appellants offered the affidavit of a former Pennco employee to establish that Pennco contaminated adjacent property with chemicals that had an adverse effect on appellants' health and offered their own affidavits. In their own affidavits, appellants did not specifically identify the toxic agent allegedly responsible for their injuries but, instead, submitted a toxicologist's report on the harmful consequences of inhaling sulfuric acid vapors. That report discussed the potential harm to humans from chronic exposure and postulated that sulfuric acid fumes from the Pennco plant could harm respondents if Pennco was releasing sufficient quantities of fumes. However, there was no evidence in the record that harmful fumes ever migrated off Pennco's plant property. The court found that the Pennco admission to the TNRCC investigator that fumes sometimes travel beyond the property lines did not

106. The court advised that a nuisance occurs in one of three ways: (1) by physical harm to the property, such as by encroachment of a damaging substance or property destruction; (2) physical harm to a person on his property, such as by an assault on his senses or personal injury; and (3) by emotional harm to a person from the deprivation of the enjoyment of his property, such as by fear, apprehension, offense, or loss of peace of mind. *Id.* at *4. The court noted that polluting the atmosphere with noxious or offensive odors, gases or vapors can become a nuisance if it causes material discomfort and annoyance to one residing in the area or injures their health or property. *Id.*

107. *Id.* at *5.

108. *Id.* at *6.

109. *Id.*

establish that toxic contaminants traveled beyond the property lines.[110] The court further noted that the plume was composed primarily of steam, that ferrous sulfate is non-toxic, and that there was no evidence that the sulfuric acid vapors reached the appellants' property.[111]

With respect to appellants' personal injury claims, the court found that the appellants' evidence consisted merely of bald assertions that the sulfuric acid releases caused their injuries and illness.[112] The assertions were not supported by expert testimony or any empirical evidence, and the medical evidence indicated that the deceased's death was due to complications from diabetes and respiratory failure from the flu.[113] Finally, the court noted that the affidavit of the appellant who claimed he was hospitalized due to chemical exposure from the Pennco facility failed to identify his illness and offered no evidence to support that any illness was caused by toxic chemical exposure. The court noted that appellants had failed to meet their burden of establishing levels of exposure that are dangerous to humans generally, proving they were injured by such a level of exposure, and negating other plausible causes of their injuries or damages with reasonable certainty.[114] The court noted that, in fact, the TNRCC reports actually supported Pennco's assertion that there are other plausible sources for the chemical odors and fumes which were the basis of appellants' claims. On these bases, the court affirmed the trial court's judgment on all counts, other than nuisance, and reversed and remanded the nuisance claim to the trial court.[115]

3. *Interpretation of Contracts in Environmental Damage Litigation*

Another issue that is frequently litigated in environmental cases is the meaning of contractual provisions, which frequently include representations and warranties, indemnities, and covenants for one party to address a particular environmental condition.

a. Jury's Findings Regarding Terms of Purchase and Sale Agreement Will Not Be Disturbed When Key Provision of Agreement was Ambiguous

In *Trinity Industries, Inc. v. Ashland, Inc.*, the Austin Court of Appeals reviewed claims regarding the cleanup of contamination in connection with the purchase and sale of a subsidiary company.[116] The issues arose out of Trinity Industries, Inc.'s ("Trinity") purchase of Beaird Industries, Inc. ("Beaird"), a subsidiary of Ashland, Inc. ("Ashland"). The Purchase and Sale Agreement ("Agreement") related to that transaction required Ashland to conduct an environmental audit of the Beaird facility. Ash-

110. *Belasco*, 2000 Tex. App. LEXIS 8172, at **7-8.
111. *Id.* at *8.
112. *Id.*
113. *Id.* at **8-9
114. *Id.* at **9-10.
115. *Belasco*, 2000 Tex. App. LEXIS 8172, at *10.
116. 53 S.W.3d 852, 857-859 (Tex. App.—Austin 2001, no pet. h.).

land hired an environmental consulting firm to perform that audit, which identified two areas of possible environmental contamination on the property.[117] The environmental consulting firm later conducted a Phase II Environmental Assessment, during which it identified a soil-stained area and the presence of trichloroethene ("TCE") in the groundwater below the Beaird facility.

Following the Phase II Environmental Assessment, Ashland and Trinity executed a Second Amendment to the Purchase Amendment ("Second Amendment"), which defined the soil-stained area and groundwater contamination as the "Identified Contamination."[118]

The Purchase and Sale Agreement ("Agreement") related to that transaction contained the following key provisions:

> 3.12(e). All Environmental Costs or other costs and expenses of such Identified Contamination Remediation shall be paid by . . . Ashland . . . without limitation.[119]
>
> 3.12(m). Notwithstanding any other provision of this Agreement to the contrary, the obligations of Ashland . . . described in Sections 3.12(e) and 5.2(a)(10) shall be limited to a maximum amount of Five Hundred Thousand Dollars ($500,000).[120]
>
> 5.2(a)(10). Ashland [shall] indemnify and hold harmless Beaird and [Trinity] . . . against any loss, liability, claim, damage, costs, or expense (including, without limitation, . . . all Environmental Costs and all costs of any required or necessary . . . clean-up or detoxification of any Subject Property . . . remedial or other plans required by an Environmental Agency . . .) resulting from any such untrue statement, omission or breach of warranty.[121]

After the sale of Beaird closed, Ashland hired the environmental consulting firm to cleanup the Identified Contamination. After spending $500,000 on that cleanup, Ashland cited section 3.12(m) of the Second Amendment (above) and turned over remediation of the site to Trinity.[122] Trinity sued Ashland for breach of the Agreement and fraud. The jury found that Ashland's total obligation for cleanup of the Identified Contamination would not exceed $500,000 under any circumstances. The jury did not find Ashland liable for breach of contract or fraud. The trial court rendered judgment against Trinity, who appealed the trial court's judgment.[123]

On appeal, the Austin Court of Appeals reviewed issues relating to the submission of an issue to the jury, the sufficiency of evidence supporting the jury's finding, whether a jury question was conditional, denial of judg-

117. That audit was presumably a Phase I Environmental Assessment, although the court's opinion does not provide any details of that investigation.
118. *Id.*
119. *Id.* at 860.
120. *Id.* at 859.
121. *Trinity*, 53 S.W.3d at 860.
122. *Id.* at 859.
123. *Id.* The case was appealed from the District Court of Dallas County, 160th Judicial District, Honorable David C. Godbey, Judge Presiding.

ment notwithstanding the verdict, failure to render judgment on attorney's fees, and failure to grant a new trial.[124]

i. Submission of Issue to Jury

Trinity argued that the trial court's submission of the interpretation of section 3.12(m) to the jury constituted harmful error. Trinity maintained that section 3.12(m) is unambiguous as a matter of law and, consequently, its construction was a matter of law for the court. The court acknowledged that the trial court has broad discretion in submitting issues to the jury and those determinations will not be disturbed absent an abuse of discretion.[125] A trial court should only submit the meaning of a contract to the jury if the contract is ambiguous.[126] To determine if section 3.12(m) was ambiguous, the court analyzed section 3.12(m) in the context of sections 3.12(e) and 5.2(a)(10).[127] The court found that "when analyzing section 3.12(m) and the relevant provisions in their entirety, an ambiguity arises over the extent of Ashland's obligations to clean up the Beaird property and indemnify Trinity for costs relating to such cleanup."[128] The court also looked at testimony in the record, which indicated that the limitation in section 3.12(m) was a crucial element in the closing of the sale.[129] Because the court found that two contradictory meanings arose from section 3.12(m) and the related provisions, the court held that section 3.12(m) is ambiguous and the trial court did not err in submitting the issue regarding interpretation of that provision to the jury.[130] The court also instructed that, even if submitting the issue to the jury did constitute error, such error was not harmful, because there was no evidence that the jury's answer to a question regarding Ashland's failure to comply with the Agreement was affected by the jury's interpretation of section 3.12(m).[131]

ii. Sufficiency of Evidence Supporting Jury's Finding

In the alternative to its argument regarding the jury issue, Trinity argued that there was insufficient evidence to support the jury's interpretation of section 3.12(m). The court recognized that it is obligated to uphold the jury's finding if it is supported by a scintilla of evidence, meaning that the supporting evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.[132] The court cited evidence of two Ashland witnesses, which the court concluded

124. *Id.* at 859-869.
125. *Id.* (citing Lindgren v. Delta Invs., 936 S.W.2d 422, 426 (Tex. App.—Austin 1996, writ denied)).
126. *Id.* (citing Coker v. Coker, 650 S.W.2d 391, 393-394 (Tex. 1983)).
127. *Trinity*, 53 S.W.3d at 860.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 861.
132. *Trinity*, 53 S.W.3d at 862 (citing Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)).

enables reasonable and fair-minded people to differ in their conclusions about the parties' agreement in section 3.12(m).[133] Accordingly, the court found more than a scintilla of evidence supporting the jury's finding.[134] In addition, the court evaluated the testimony of Trinity's witnesses and concluded that it could not say that the jury's finding was supported by evidence so weak that the verdict was clearly wrong and unjust.[135] Because the jury verdict was grounded in sufficient evidence, the court upheld the jury's interpretation of section 3.12(m).[136]

iii. Conditional Jury Question

Trinity argued that because the jury found that Ashland did not fail to comply with the Agreement, the jury's finding that any failure of Ashland to comply with the Agreement was excused was immaterial and not supported by legally or factually sufficient evidence. The court determined that the third jury question, regarding an excuse for any Ashland noncompliance, did not have any conditional language.[137] In fact, the court indicated that the question gave the jury the option to find that, even if Ashland did fail to comply with the Agreement, Ashland was excused from that failure to comply.[138]

iv. Denial of Judgment Notwithstanding the Verdict

Trinity argued that the trial court erred in its failure to grant Trinity's motion for a judgment notwithstanding the verdict ("JNOV") regarding Ashland's liability for breach of contract and fraud. In its motion for JNOV, Trinity had contended that it conclusively proved Ashland was liable. A court may render JNOV when the evidence is conclusive and one party is entitled to judgment as a matter of law.[139] In reviewing the trial court's denial of JNOV, the court looked at the record to determine if there was more than a scintilla of evidence to support the jury's findings.[140] After reviewing evidence regarding breach of contract claims, including Ashland's representations regarding the presence of hazardous materials at the Beaird facility, environmental costs, ownership of necessary licenses and permits, and compliance with applicable laws, the court concluded that the evidence supported the jury's findings that Ashland had not breached the Agreement.[141] Similarly, the court reviewed evidence regarding fraud claims, concluding that the evidence supported the jury's finding that Ashland had not committed common law fraud or stat-

133. *Id.* at 862. The testimony of Ashland's witnesses supported Ashland's argument that the parties agreed Ashland's liability would be capped at $500,000. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 862-63.
137. *Trinity*, 53 S.W.3d at 862-63.
138. *Id.*
139. *Id.* at 863 (citing TEX. R. CIV. P. 301; Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227-228 (Tex. 1990)).
140. *Id.* (citing *Mancorp*, 802 S.W.2d at 228).
141. *Trinity*, 53 S.W.3d at 864-67.

utory fraud against Trinity.[142] Accordingly, the court held that the trial court properly denied Trinity's motion for JNOV.[143]

v. Failure to Render Judgment on Attorney's Fees

Trinity argued that the trial court erred by failing to render judgment in favor of Trinity for $250,000 in attorney's fees and expenses related to claims Ashland brought against Beaird for negligent misrepresentation and fraud. Trinity contended that it conclusively proved that Ashland breached section 6.2 of the Agreement, a release provision, by suing Beaird.[144] The court applied a *de novo* standard of review because the question of whether Ashland's conduct breached section 6.2 was a question of law for the court to decide.[145] Under that standard, the court evaluated whether Ashland's obligations under section 6.2 included an obligation to release Beaird from claims for negligent misrepresentation and fraud.[146] The court cited the express negligence doctrine, which mandates that a party seeking to be released from its own negligence must expressly state that intent in specific, unambiguous terms within the four corners of the document.[147] Because section 6.2 does not mention negligent misrepresentation or fraud claims, the court concluded that the Agreement did not release Beaird from such claims.[148] Therefore, the court agreed with the trial court that Ashland did not breach section 6.2 of the Agreement by suing Beaird.[149] The court also agreed with the trial court's decision not to award attorney's fees to Trinity because no statutory or contractual provision provided for recovery of attorney's fees.[150]

vi. Failure to Grant New Trial

Trinity argued that the trial court's denial of its motion for a new trial constituted error, because Trinity proved liability as a matter of law or, alternatively, because the jury's answers were against the great weight of the evidence. The court explained that under the correct standard of review, the court could not disturb the trial court's decision in the absence of an abuse of discretion.[151] The court rejected Trinity's argument because the evidence was sufficient to support the jury's findings that Ash-

142. *Id.* at 867.
143. *Id.*
144. Section 6.2 of the Agreement stated: "Ashland . . . shall have . . . released Beaird from any and all claims, demands, debts and liabilities of any nature whatsoever." *Id.* at 867.
145. *Trinity*, 53 S.W.3d at 867 (citing Callaway v. Overholt, 796 S.W.2d 828, 831 (Tex. App.—Austin 1990, writ denied); Tenet Health Ltd. v. Zamora, 13 S.W.3d 464, 468 (Tex. App.—Corpus Christi 2000, pet. dism'd w.o.j.)).
146. *Trinity*, 53 S.W.3d at 867.
147. *Id.* at 868-69 (citing Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993)).
148. *Id.* at 869.
149. *Id.*
150. *Id.*
151. *Trinity*, 53 S.W.3d at 869 (citing Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983)).

land complied with the Agreement and Ashland did not commit common law or statutory fraud against Trinity.[152] The court upheld the trial court's denial of Trinity's motion for new trial.[153]

b. Suits Between Landlord and Tenants and Construction of Lease Terms

In *Z.A.O. Inc. v. Yarbrough Drive Center Joint Venture*,[154] a landlord brought suit against a former tenant for alleged damages due to pollution of soil from a former underground storage tank used by the tenant in its operations of a gas station. This case involves many of the causes of actions and issues, ranging from interpretation of indemnities to the measure of damages, that are frequently seen in these cases that have become fairly common. The case provides good tools for counsel defending these types of cases as well as alerting prosecutors of potential pitfalls. One of the more important issues for counsel defending these cases is the apparent growing view among Texas Courts of Appeals that once the state agency determines the appropriate cleanup level for environmental media, such as soil or groundwater, then the tort claim of the plaintiff may be at an end. Thus, the state may set the floor by which damages are measured in environmental tort cases involving claims of property damage.

i. Proving Which Tenant Caused the Release

In many landlord-tenant environmental cases, multiple past tenants engaged in the activity that released or that could have released the contaminant or contaminants at issue. Defendant tenants challenge the landlord to prove which of the tenants discharged the contaminants. In *Z.A.O.*, the issue was whether tenant Z.A.O. was the source of the release of gasoline into the soil. The plaintiff, landlord Yarbrough, offered proof that a chemical known as MTBE (methyl tert-butyl ether) was added to gasoline beginning in the early to mid-1980s. Since Z.A.O. began its operations in 1981 and terminated its lease sometime in 1994 as the last gas station operator, the court concluded that it was sufficient proof that Z.A.O. was very likely the source of the release of gasoline, rather than a predecessor operator at the site.[155] This evidence overcame the no-evidence challenge as there was more than a scintilla of evidence to support the jury's factual determination. The fact that there was no testing when Z.A.O. took over the operations was not enough to show the evidence was insufficient to prove a prior operator had not caused the release but only that a prior operator could have contributed to the release. This, in the court's view, did not show the jury's conclusion was against the great

152. *Id.*
153. *Id.*
154. 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet.).
155. *Id.* at 539.

weight and preponderance of the evidence.[156]

ii. Meaning, Ambiguity, and Intent of the Relevant Contractual Indemnification Language

As is often the case where environmental coverage under a contract is at issue, the meaning of the carefully drafted language of lawyers is put under a microscope, and every word and phrase is parsed carefully by the litigants and the judge. Each side asserts that its interpretation is the only possible construction that makes any sense whatsoever, and the other side's interpretation is a terribly strained construction which defies common sense.

In this case, the contractual language at issue, which is often the case in environmental cases, was the meaning of the indemnification provision of the contract. The lease agreement contained an indemnity whereby the tenant would indemnify the landlord under certain circumstances and for certain losses or claims. The question raised by the tenant was whether it was required to bring the property to a "toxic-free condition." The question to the court was whether the relevant provision of the contract required contractual duties in addition to the duty to indemnify the landlord. The first part of the provision required indemnification of the landlord for certain claims, demands, and losses and the second part required the tenant to "hold Lessor harmless from any and all . . . expenses . . . suffered by Lessor as a result of any hazardous or toxic substances located in or under the soil of the leased premises."[157]

Interestingly enough, neither party raised the question of ambiguity in the trial of the case. The appellate court identified this issue on its own. The court reviewed the jury charge and other issues on this point. The court concluded that, although the issue of intent was not specifically put to the jury, the jury's damages conclusion and the fact the parties allowed the jury to decide the issue resulted in the conclusion that the issue of intent was tried by consent of the parties.[158]

The court attacked this issue in two steps. First, it considered whether the contract was ambiguous before moving to consider whether, if ambiguous, the parties' intent with respect to this provision was tried by consent. The question of ambiguity is a question of law and is decided by the court rather than the jury. It is not ambiguous if "it can be given a definite or certain meaning as a matter of law."[159] A contract or a portion thereof is ambiguous if the language in question can be given two reasonable interpretations after applying the relevant rules of contractual construction. The court ruled that assertion of differing interpretations does not create ambiguity; rather, the assertion of two reasonable construc-

156. *Id.*
157. *Id.*
158. *Id.*
159. *Z.A.O.*, 50 S.W.3d at 539

tions of the same language is what creates the fact issue of intent.[160]

The court then applied this reasonableness test to each party's construction of the indemnity provision. The court then gave a rather surprising and not convincing analysis of the defendant tenant's position. The language of the provision is as follows: "Lessee agrees to indemnify and hold lessor harmless from any and all claims, demands, losses or expenses asserted against or suffered by Lessor as a result of any hazardous or toxic substances located in or under the soil of the Leased Premises."[161]

The court concluded that the tenant's interpretation that it only included indemnification of claims asserted by third parties was reasonable, because the language included language of indemnification of claims asserted against the landlord.[162] But this seems like an abbreviated analysis. Just because a sentence with multiple portions stated in the disjunctive contains one concept, it does not appear "reasonable" to read it to exclude any other concepts listed in the sentence. Yet, that is exactly what the court did.

This is clear when the court's treatment of the landlord's interpretation is considered. The court looked to the following definition of "indemnify" from Black's Dictionary:

> To restore the victim of a loss, in whole or in part, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate; to make reimbursement to one of a loss already incurred by him.[163]

The court then selected certain language out of the indemnity provision to conclude that it could be read to reimburse any and all losses or expenses suffered by Lessor for any hazardous or toxic substances.[164] The court then concluded that the provision was ambiguous.[165]

The court's analysis may have been flawed when it assumed that, since a sentence can be read in the disjunctive, it is ambiguous. This is not necessarily the case. Indemnity provisions are almost always written in this way. Thus, under this court's analysis, almost every indemnity might be considered ambiguous. A better reading of the language may have been that the indemnity covers both claims or demands asserted by third parties or any losses suffered by the landlord, even if no third party claims were asserted. It is not clear why the court did not consider this possibility, which is what the language of the indemnity suggests when it lists "claims, demands, losses or expenses." Claims or demands are typically those asserted by a third party. Losses or expenses could be the

160. *Id.* (citing Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587 (Tex. 1996)).
161. *Id.*
162. *Id.*
163. *Id.* (citing Black's Law Dictionary 769 (6th Ed. 1990)).
164. *Z.A.O.*, 50 S.W.3d at 541.
165. *Id.*

result of a third party's actions or just those suffered by the landlord. The language "asserted against or suffered by" also suggests that both third party claims and losses suffered by the landlord in the absence of a third-party claim are covered by this provision.

In reaching this conclusion, the court did not appear to apply rules of contract construction or cases that have interpreted indemnities in Texas, despite its statement that the rules of construction should be applied before a decision on reasonableness is made.[166] The court held that because the jury ruled in favor of the landlord it must have agreed with the landlord's view of the parties' intent.[167] The court concluded that this interpretation led to the conclusion that both parties intended that the tenant be required to perform "complete removal of toxic substances."[168]

iii. Nuisance Claims

The tenant challenged the sufficiency of the evidence to sustain the jury's finding that the tenant committed a nuisance. The issue of who caused the release had already been addressed. The second challenge to the nuisance claim was that there was no evidence of a condition interfering with the use and enjoyment of the landlord's property. The landlord took the position that a nuisance was supported by evidence of the presence of MTBE and the releases over the years, by the tenant, of gasoline "caused the encroachment of dangerous substances on [landlord's] property."[169] The landlord further argued that the presence of the contaminants only allowed the use of the property as a parking lot, which, therefore, interfered with the use of the property.

The El Paso Court applied the test of nuisance cited by the tenant. The court reviewed prior Texas court opinions to set out the three ways a nuisance may occur:

> (1) physical harm to property, such as encroachment of a damaging substance or by the property's destruction;
> (2) physical harm to a person on his property, such as an assault to his or her senses or by other personal injury; and
> (3) emotional harm to a person from the deprivation of the enjoyment of his or her property, such as by fear, apprehension, offense, or loss of peace of mind.[170]

The court then set forth the three types of activity that a defendant can engage in to cause such a nuisance: (1) intentional invasion of another's interests; (2) negligent invasion of another's interest; or (3) "other conduct, culpable because abnormal and out of place in its surroundings, that it invades another's interests."[171]

166. *Id.* at 540.
167. *Id.*
168. *Id.* at 541.
169. *Z.A.O.*, 50 S.W.3d at 542.
170. *Id.*
171. *Id.* at 543.

In reviewing the evidence in the record, the court concluded that the landlord had not presented any evidence of any negligent or intentional encroachment. Thus, the claim of nuisance could not stand on either of those types of activity. Then, it looked to the question of whether the activities were abnormal or out of place in the relevant surroundings. Because the parties addressed the issue of spillage in the lease, the court did not believe spillage could thus be considered out of place or abnormal. The court ruled there was no evidence on which the jury could have based a claim of nuisance.[172]

The fault of the landlord or its counsel was in addressing the negligence question by factual evidence and expert testimony. In other cases reported from appellate courts in Texas, counsel has failed to present expert testimony of the negligence of the defendant in environmental cases. Many attorneys believe proving that the release or encroachment has occurred and who the responsible party was is sufficient. However, more than this must be proven. Counsel would be wise to research and attempt to prove all elements of nuisance or challenge the failure to do so, if defending such a case.

iv. Trespass

The tenant also challenged the factual and legal sufficiency of the trespass claim. In this regard, the El Paso court relied upon the San Antonio Court of Appeals' decision in *Taco Cabana, Inc. v. Exxon Corp.*[173] to address the question of whether a state agency's determination as to the appropriate cleanup level foreclosed a tort cause of action to require further clean up or to recover damages for failure to cleanup the property in question. In the *Z.A.O.* case, as in the *Taco Cabana* case, the court ruled that where the TNRCC as an agency of the State of Texas has "determined the level of contaminants to be not unreasonable, a private cause of action could not be maintained."[174] Where an action level is not exceeded, these two courts of appeal have concluded that no breach of duty may arise.

v. Malice

The other issue that was addressed was the question of the ability to recover punitive damages against the tenant. The test for obtaining such damages depends upon showing malice as defined by the Texas legislature. The test is one of intent to cause substantial injury or an act or omission that involves "an extreme degree of risk."[175] The court did not believe that any evidence that a severe injury occurred had been presented by the landlord.[176]

172. *Id.*
173. 5 S.W.3d 773 (Tex. App.—San Antonio 1999, pet. denied).
174. *Z.A.O.*, 50 S.W.3d at 544.
175. *Id.* at 542 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7) (Vernon 1997)).
176. *Id.*

4. Application of Statutes of Limitations

a. Temporary Damages to Property and Personal Injury Claims

In *Nugent v. Pilgrim's Pride Corp.*,[177] the court reviewed the statute of limitations for several causes of action. In this case, landowners Susan and Ray Nugent filed suit against Pilgrim's Pride Corporation and Patrick Pilgrim ("Pilgrim"), alleging trespass, temporary damage to their farm by negligence or gross negligence, nuisance and personal injuries from defendants' operation and dumping of noxious and toxic chemicals and chicken waste on an adjoining site known as the Carpenter Place. The Nugents alleged that rainfall and accompanying erosion carried the chicken waste and chemicals onto their farm. The Nugents also claimed that defendants' operation of a feedmill approximately a mile away from their property constituted a nuisance depriving them of the use and enjoyment of their property. The trial court granted summary judgment for Pilgrim. The appellate court reversed the trial court's granting of summary judgment on the temporary damage to land, personal injury, trespass and nuisance claims.[178]

The Nugents inherited their farm property in 1988, although they had operated the farm as part of larger ranching operations since at least 1984. Defendant Pilgrim operated an adjoining farm, the Carpenter Place. A creek flowed from the Carpenter Place onto the Nugent property. Defendant disposed of large amounts of chicken litter and hatchery waste on the Carpenter Place. Defendant also made heavy applications of chicken waste material on a steep hillside just above the creek and close by the Nugent property. Defendants tilled the hillside up and down the hill, a practice the Nugents claim contributed to erosion of the hillside. When torrential rains fell in May of 1991, the rains washed silt and chicken waste down the hill into the creek where it was carried onto the Nugents' bottomland pasture. During the Summer of 1991, several of the Nugents' cattle sickened and died. The Nugents had their land tested and elevated levels of arsenic and selenium were found. These metals are found in the waste from chicken production. Tests of two dead cattle also pointed to arsenic poisoning.

However, the evidence also showed that the Nugents themselves had agreed to spread chicken manure on their own land. Also, in September 1992, the Nugents saw a truck dump an oily substance in a pit uphill from their farm. The Nugents entered the Carpenter Place and obtained samples for testing. These tests also showed high concentrations of toxic chemicals, including toluene, arsenic, and fecal coliform bacteria. When heavy rains resumed, silt, chicken manure, and waste oil from the Carpenter Place washed onto the Nugents' land. In 1994, Susan Nugent was diagnosed with skin cancer and chronic inflammatory demyelinating polyneuropathy ("CIDP"). Ray Nugent also was diagnosed with CIDP and

177. 30 S.W.3d 562 (Tex. App.—Texarkana 2000, writ denied).
178. *Id.* at 565.

suffered other health problems.[179]

The Nugents appealed the trial court's grant of summary judgment to Pilgrim. On appeal, Pilgrim contended that all of the Nugents' causes of action were barred by the statute of limitations. In response, the Nugents argued that the discovery rule delayed the start of the limitations period.

b. Property Damage Claims

At issue with regard to the property damage claim was whether the damage to the Nugents' land was temporary or permanent. A suit for damage to land and for personal injury must be brought not later than two years after the cause of action accrues.[180] The accrual date depends upon whether the damage is characterized as permanent or temporary. An action for permanent damages to land accrues for limitations purposes upon discovery of the first actionable injury. Pilgrim argued that the damage to the Nugents' land was permanent beginning in May 1991 when the flooding of their land occurred. The Nugents argued that the damage to their land was temporary and, therefore, they could recover the damages sustained since the two years prior to filing suit.

In reviewing the distinction between permanent and temporary damages, the appellate court cited the Texas Supreme Court in *Bayouth v. Lion Oil Co.*[181] For permanent injury to land, the injury must be constant and continuous, not occasional, intermittent or recurrent. Temporary injuries are found where the injury is not continuous but is sporadic and contingent upon some irregular force such as rain.[182]

The court cited many Texas cases regarding the distinction between temporary and permanent injury. The court noted the often cited case of *Atlas Chemical Industries, Inc. v. Anderson.*[183] In the *Atlas* case, the plaintiff claimed temporary damages resulting from chemical deposits left by water on his sixty-acre farm. There was evidence that the damage to most of the sixty acres was not constant but occurred only during severe winter floods and, at most, three to four acres along the creek had been continuously affected by the polluted effluent. The court in *Atlas* found the injury to be temporary, since the flooding of the sixty acres had not been constant or continuous.

The court in the instant case against Pilgrim found the Nugents' injuries to their land from Pilgrim's use of the Carpenter Place even more "sporadic," "occasional," and "intermittent" than the plaintiff's injuries in *Atlas.*[184] As much as two years had passed between the flooding causing the first overflow of chicken manure until the next overflow. In addition, the court noted that another characteristic of a temporary injury is the ability

179. *Id.* at 565-67.
180. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a) (Vernon Supp. 2000).
181. 671 S.W.2d 867 (Tex. 1984).
182. *See Nugent*, 30 S.W.3d at 567-68.
183. 524 S.W.2d 681 (Tex. 1975).
184. *Nugent*, 30 S.W.3d at 571.

of a court of equity to enjoin the injury-causing activity. An injury that can be terminated cannot be a permanent injury. The court concluded that the Nugents had proven that their claim of damage to their farm resulted in temporary damage; therefore, the Nugents' damage to land claim was not barred by the statute of limitations.[185]

c. Nuisance Claim

The court held that a nuisance may arise by causing (1) physical harm to property, (2) physical harm to a person on his or her property from an assault on his or her senses or by other personal injury, and (3) emotional harm from the deprivation of the enjoyment of his or her property through fear, apprehension or loss of peace of mind.[186] To be actionable, the annoyance does not have to endanger health; it is sufficient if it is offensive to the senses and renders the enjoyment of life and property uncomfortable.[187] The court found that limitations will not bar a suit to abate a continuing nuisance. The Nugents produced summary judgment evidence that their property was damaged by successive overflows of chicken manure and other waste material onto their property during the two years immediately preceding the filing of their suit until the present time. There was further evidence that their health had been injured, and there was evidence to create a fact issue as to whether Pilgrim's conduct had caused a well-founded apprehension of danger or unreasonable discomfort or annoyance.[188]

d. Trespass Claim

The court held that a trespass to real property is the unauthorized and intentional entry on the land of another.[189] Intent can be shown by proof that, while the actor did not know his conduct would result in trespass, his actions were practically certain to have that effect. The court found evidence that Pilgrim dumped and spread unreasonably large amounts of chemical and bacteria-laden chicken manure on the hillside upstream from the Nugent farm and within a few hundred feet from the farm boundary. Pilgrim also tilled the soil in a manner that encouraged the erosion of the hillside and the migration of chicken manure and silt onto the Nugent farm. Pilgrim also released material into the atmosphere that contained contaminants which intermittently drifted onto the Nugent property. These facts were sufficient to raise a fact issue as to whether Pilgrim's actions amounted to trespass. The court also noted that the Nugents' claims for trespass occurring after August 30, 1992, were not time barred.[190]

185. *See id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Nugent*, 30 S.W.3d at 571.
190. *Id.* at 576.

e. Personal Injury Claims

The Nugents invoked the discovery rule with regard to their personal injury claims, insisting that their injuries were not traumatic but latent diseases that were inherently undiscoverable within the two years of the first massive contamination of their property in 1991. Susan Nugent's skin cancer was not diagnosed until 1994, but it was three years later before a doctor identified the pollution as a probable cause of her illnesses. Under Texas law, an action for personal injury must be brought not later than two years after the date the cause of action accrues.[191] Generally, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later or all resulting damages have not yet occurred. The discovery rule is an exception to the general rule.

Under the discovery rule, the accrual of the cause of action is delayed until the plaintiff knows or in the exercise of reasonable diligence should have known of the wrongful act and the resulting injury. In this case, Pilgrim contended that the Nugents' personal injury cause of action was barred since it was not brought within two years of the land's first being flooded. Pilgrim argued that the "single action" rule should apply. Under this rule, Pilgrim argued that the Nugents were required to file suit for all of their injuries, for personal injuries as well as for real property damage, within two years of May 1991. The single action rule provides that there is but one cause of action and that all damages arising out of defendant's wrongful action must be brought in one action.

The court, however, declined to apply the single action rule to nullify the discovery rule. The court found that, to the ordinary person, there is absolutely no relationship between a massive overflow of chicken manure into a pasture and the later development of skin cancer and CIDP to those who work on the land. The court ruled that these types of injuries are simply not part of the sequence of events that might be anticipated from the contamination arising from Pilgrim's alleged conduct. The court found that a diligent plaintiff's mere suspicion or subjective belief that a causal connection exists between his exposure and his symptoms is, standing alone, insufficient to establish accrual as a matter of law. Further, the court ruled that because the Nugents were not aware of any of their contamination-related illnesses before 1994, their suit was timely filed.[192]

5. Standing

a. A Claim for Property Damage Does Not Necessarily Transfer to a Subsequent Landowner Without a Written Conveyance

Senn v. Texaco, Inc.[193] involved claims by landowners, the Senns, against oil and gas companies for alleged damages to land. The Senns

191. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a).
192. *See* 30 S.W.3d at 574.
193. Senn v. Texaco, Inc., 55 S.W.3d 222 (Tex. App.—Eastland 2001, pet. denied).

alleged that the oil and gas drilling and production activities of the defendants caused both permanent and temporary injury to their land by contaminating the aquifer underlying the land. The trial court granted summary judgment to certain of the defendants. The Senns appealed the grant of summary judgment claiming that the trial court erred in granting summary judgment to the defendants, because (1) their causes of action accrued for purposes of standing and limitations when they discovered the contamination rather than when it occurred; (2) the issue of standing as to temporary injury was not addressed; and (3) the prior owners of the land conveyed their causes of action against the defendants for surface damages to the Senns. The appellate court disagreed with these arguments.

The facts showed that a revocable trust had conveyed the surface estate to the Senns in 1997. It was undisputed that the defendants' drilling and production activities had ceased before the trust conveyed the land to the Senns. In their summary judgment motion, the defendants asserted the rule in Texas that:

> Where injury to land results from a thing that the law regards as a permanent nuisance, the right of action for all the damages resulting from the injury accrues to the owner of the land at the time the thing that causes the injury commences to affect the land.[194]

The court rejected the Senns' argument that the nature of the injury called for the application of the discovery rule. The Senns contended that, because they discovered the injury to the aquifer, they owned the cause of action arising from the injury. The court found that the Senns could have bargained for an assignment of the prior owner's possible causes of action for injuries to the land that occurred before the purchase. Furthermore, they could have insisted that the trust give them warranties about the condition of the land and water in the deed. Also, the Senns could have performed a better inspection of the land and water before they purchased the property. The court found that the Senns lacked standing to bring suit for any type of injuries to the land that occurred prior to their purchase. Any injury to the land that the defendants might have caused, whether temporary or permanent, occurred prior to the Senns' purchase of the land. Therefore, the Senns did not own any causes of action. The court also rejected the Senns' argument that the trust had conveyed its rights against the defendants for surface damages. The court relied upon the plain language of the deed in finding that there had been no such conveyance.[195]

C. Cost Recovery Actions under the Texas Solid Waste Disposal Act

Another claim that frequently arises in environmental litigation between private parties is a contribution action under the Texas Solid Waste

194. *Id.*
195. *Id.*

Disposal Act. This cause of action has not been reviewed in many opinions issued by appellate courts in Texas. One of these opinions issued during the Survey period was published, while the other one was not. The question of contribution protection for settling parties was addressed in a case that may be relied upon, while defining when a party may be considered an arranger of disposal received interesting review but not any binding precedent.

1. Contribution Actions Barred by Settlement with State

Compton v. Texaco Inc.[196] was a case of first impression involving contribution protection for parties who settle environmental contamination claims with the State. The court decided whether Section 361.277(a) of the Texas Solid Waste Disposal Act barred Compton's claims for contribution and indemnity against Texaco. The court also decided whether Compton could assert common law indemnity claims against Texaco.

The asserted facts were as follows. From approximately 1929 to 1949, Texaco operated a refinery on approximately 40.6 acres of land near San Antonio, Texas (the "site"). WSI Properties, Inc. ("WSI") purportedly purchased the property from Texaco "as is" in 1977. WSI, in turn, sold the site to Winn's Stores, Inc. ("Winn's") for use as a corporate headquarters and distribution center. Environmental contamination was evidently discovered for the first time during the construction of Winn's corporate headquarters. Later, it was also learned that underground petroleum storage tanks installed by WSI for use at Winn's distribution center had leaked causing additional contamination at the site. Both Texaco and Winn's were identified by the TNRCC as potentially responsible parties for the site's contamination.

Winn's filed for bankruptcy in 1994, and, as part of that proceeding, the Liquidating Trust of Winn's Stores Inc. was formed with Compton as trustee. The trustee and two prospective purchasers ultimately entered into settlements with the State and received releases. Later, Texaco also entered into a settlement with the State and agreed to be responsible for remediating the site under the State's voluntary cleanup program. After the trustee's settlement with the State, he brought suit against Texaco for common law indemnity and statutory contribution under Section 344(a) of the Texas Solid Waste Disposal Act. The trustee sought to recover the costs necessary to discover the extent of the environmental damage allegedly caused by Texaco as well as the payments made to the State. Texaco filed a motion for summary judgment arguing that the trustee was not entitled to contribution or indemnity as a matter of law, because the Texas Solid Waste Disposal Act protects parties who settle with the State from those claims. Texaco also argued that the trustee's common law indemnity claims failed as a matter of law. The trial court granted Tex-

196. Compton v. Texaco Inc., 42 S.W.3d 354 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

aco's motion for summary judgment and ordered that Compton take nothing. The appellate court affirmed the trial court's judgment.

a. Effect of Settlement under the Texas Solid Waste Disposal Act

The threshold issue decided by the court was whether Texaco's settlement with the State barred Compton's claims for statutory contribution under the Texas Solid Waste Disposal Act (hereinafter the "Act"). Section 361.344(a) of the Act provides that "a person who conducts a removal or remedial action that is approved by the commission and is necessary to address a release or threatened release may bring suit in a district court to recover the reasonable and necessary costs of that action and other costs as the court, in its discretion, considers reasonable."[197] Texaco contended that the language in its settlement agreement and the language of Section 361.277(b) of the Act barred Compton's statutory contribution claims.

Section 361.277(b) provides that "a person who enters a settlement agreement with the state that resolves all liability of the person to the state for a site subject to Subchapter F is released from liability to a person described by Section 361.344(a) for cost recovery, contribution, or indemnity under Section 361.344 regarding a matter addressed in the settlement agreement."[198] Texaco argued that Compton's claims were barred as a matter of law under the plain language of Section 361.277(b). Compton countered that the State's covenant not to sue did not take effect until the voluntary cleanup program issued the final Certificate of Completion. Compton further argued that, because the release and covenant not to sue were subject to conditions subsequent, the settlement agreement did not resolve all of Texaco's liabilities for the site. The court determined the language "resolves all liability" in Section 361.277(b).

In applying Section 361.277(b) to the settlement agreement, the court found that the conditional nature of the covenant not to sue was not determinative, especially in light of the immediate effectiveness of the State's release of Texaco under the settlement agreement. The court rejected Compton's argument that Texaco's liability would not be resolved until Texaco had fully performed its obligations under the settlement agreement. This argument contradicted the plain language of the settlement agreement and of Section 361.277(b). The court found that, if Compton's interpretation were adopted, many settling parties would likely be deprived of the protections of Section 361.277(b). Making a party wait until a clean-up is fully completed before it is released from liability would remove an important incentive to settle environmental liability with the State. The court held that Section 361.277(b) barred Compton's claims against Texaco.[199]

197. *See* TEX. HEALTH & SAFETY CODE § 361.344(a) (Vernon Supp. 2000).
198. *See* TEX. HEALTH & SAFETY CODE § 361.277(b) (Vernon Supp. 2000).
199. *See* 42 S.W.3d at 360.

With regard to Compton's claim for common law indemnity, the court noted that the Texas Supreme Court has explained that the comparative negligence statute has abolished the common law doctrine of indemnity between joint tortfeasors even though the statute does not expressly mention that doctrine. The only remaining vestiges of common law indemnity involve purely vicarious liability or the innocent product retailer situation. The court disagreed with Compton's classification of himself as an "innocent retailer." Compton admitted that underground petroleum storage tanks installed by Winn's predecessor, WSI, contributed to contamination of the site. Compton further conceded that, as trustee, he was an owner in the chain of title of the contaminated land. The court found that while the trustee may not have caused any environmental pollution, nevertheless, the trustee was strictly liable for the contaminated property as a matter of law as an owner of the site.[200] The court found that the only defense to strict liability for an owner is as an "innocent purchaser" who takes title without knowledge of contamination.[201] Compton did not allege or show that he was entitled to this exception. Because Compton did not fall within either of the two categories available for non-contractual common law indemnity, his claim for common law indemnity failed as a matter of law.

2. *Contribution Actions for Releases from Dry Cleaners and Other Parties that Arrange for Disposal*

In a case of first impression, the First District Court of Appeals of Houston interpreted "arranger liability" under the Texas Solid Waste Disposal Act ("SWDA").[202] Using the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[203] as a model, the Texas Legislature defined four types of persons responsible for solid waste under the SWDA.[204] One type of responsible person is an "arranger." An arranger is any person who makes arrangements, by contract, agreement or otherwise, for processing, storing or disposing of solid waste that it owns or possesses at a solid waste facility, or for transporting such solid waste to a solid waste facility for processing, storing or disposing.[205]

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200. *See* TEX. HEALTH & SAFETY CODE § 361.271(a) (Vernon Supp. 2000) (providing that a party is "responsible for solid waste if the person: (1) is any owner . . . of a solid waste facility").

201. *See* TEX. HEALTH & SAFETY CODE § 361.275 (Vernon 1992).

202. R.R. Street & Co., Inc. v. Pilgrim Enterprises, Inc., No. 01-98-0142-CV, 2001 Tex. App. LEXIS 6349 (Tex. App.—Houston [1st Dist.] Aug. 31, 2001, no pet.). In the appeal by Pilgrim Enterprises, Inc. and related entities (collectively, "Pilgrim") and Jack J. Turk and related parties, they contended that the jury's failure to find R.R. Street & Co., Inc. ("Street") liable under various common law theories was against the great weight and preponderance of the evidence. In addition, Pilgrim contended that the trial court erred in granting Street's motion for directed verdict on Pilgrim's breach of fiduciary duty claim. The appellate court overruled both issues.

203. 42 U.S.C. §§ 9601-9675 (1997).

204. TEX. HEALTH & SAFETY CODE ANN. § 361.271(a) (Vernon 2001).

205. *Id.* § 361.271(a)(3).

In this case, Pilgrim Enterprises, Inc. and related entities (collectively, "Pilgrim") owned and operated several dry-cleaning plants at which the dry-cleaning solvent perchloroethylene had contaminated the soil and/or groundwater. R.R. Street & Co., Inc. ("Street") is a supplier of dry-cleaning products and services. During Pilgrim's ownership and operation of these dry-cleaning plants, Street sold dry-cleaning solvents, including perchloroethylene, and dry-cleaning equipment to Pilgrim. A Street service technician, Harold Corbin, provided technical assistance and advice to Pilgrim regarding, among other things, operation of the equipment, and waste management and disposal of the solvents. Pilgrim alleged that such technical advice and assistance from Mr. Corbin made Street liable as an "arranger" with respect to the perchloroethylene that was released into the environment at its dry-cleaning plants.

In addition to other causes of action, Pilgrim thus brought a cost recovery action under the SWDA[206] against Street requesting that the trial court apportion its environmental cleanup costs against Street. Pilgrim also brought similar causes of action against the other defendants with whom Pilgrim settled before trial. The trial court, not the jury, decided Pilgrim's SWDA claim against Street and in favor of Pilgrim.

With respect to the contribution claim, Street raised two issues on appeal. First, Street contended that it was denied its constitutional right to a jury trial when the trial court refused to submit Pilgrim's SWDA claim to the jury.[207] In its second issue, Street argued that it was not liable under the SWDA, as a matter of law, because it is not a responsible person under the act.[208]

In analyzing the first issue, the court made several findings. Pilgrim's cost recovery action for an equitable share of its costs is a statutory contribution action,[209] and the right to contribution is based in equity.[210] Although common law does not ensure a right to a jury trial in equity,[211] one provision of the Texas Constitution does ensure such a right. This provision is contained in the Judiciary Article, Article V, Section 10.[212] The Judiciary Article protects the right to a jury trial in all causes brought in the district courts.[213] Thus, the question became whether Pilgrim's SWDA claim is a "cause" under the Judiciary Article. Applying the

206. *Id.* § 361.344.
207. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at *7.
208. *Id.*
209. *Id.* at *9 (citing Compton v. Texaco, Inc. 42 S.W.3d 354, 362 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).
210. *Id.* (citing U.S. Fid. & Guar. Co. v. Century Indem. Co., 78 S.W.2d 737, 738 (Tex. App.—El Paso 1935, writ dism'd); Brown & Root v. United States, 92 F. Supp. 257, 261 (D.C. Tex. 1950) (applying Texas law, court stated origin of contribution "lies in the ancient doctrine of equity courts, now enforced at law, that those who are jointly liable will share the burden equally").
211. *Id.* at *10 (citing Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d 709, 715 (Tex. App.—Houston [14th Dist.] 1996, writ dism'd by agr.); Trapnell v. Sysco Food Servs., Inc. 850 S.W.2d 529, 543 (Tex. App.—Corpus Christi 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994).
212. Tex. Const. art. V, § 10.
213. *Id.*

broad meaning of "cause" adopted by the Texas Supreme Court in *State v. Credit Bureau of Laredo, Inc.*,[214] the court concluded that "a SWDA cost recovery action, such as the one in this case, is a 'cause' for purposes of the Judiciary Article."[215] The court, therefore, held that "there exists a right to have a jury determine any fact issues that must be resolved with regard to Pilgrim's entitlement to recover its cleanup costs from Street under SWDA."[216]

The court began its analysis of Street's second issue regarding Street's liability under the SWDA as a responsible person by setting forth the prima facie case for a cost recovery action under the SWDA. A plaintiff must show that:

(1) the defendant is a "person responsible for solid waste" as provided in section 361.271;
(2) the TNRCC[217] approved the remedial or removal action taken by the plaintiff to clean up the property;
(3) the remedial or removal action is "necessary to address a release or threatened release" of a solid waste into the environment;
(4) the costs of the remedial or removal action are "reasonable and necessary;" and
(5) the plaintiff made reasonable attempts to notify the defendant of the existence of the release and that it intended to take steps to eliminate the release.[218]

After these elements have been established, the court apportions the costs of the remedial or removal action among the persons responsible for solid waste by applying the equitable factors listed in Section 361.343 of the SWDA.[219]

The court applied this test to determine whether Pilgrim had established all the elements of a cost recovery action under the SWDA or whether such a determination required factual determinations to be made by the jury. The court ruled that if Pilgrim conclusively established these elements as a matter of law, then the trial court did not err in failing to submit them to the jury.[220] With respect to all elements, the court found

214. 530 S.W.2d 288, 292-293 (Tex. 1975) (broad meanings of "cause" include "any question, civil or criminal, litigated or contested before a court or justice . . ." and "any legal process which a party institutes to obtain his demand or by which he seeks his right") (internal quotations omitted).

215. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at **12-13.

216. *Id.* at *13 (citing State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979) (stating that in an equitable proceeding, "ultimate issues of fact are submitted for jury determination.").

217. "TNRCC" means the Texas Natural Resource Conservation Commission.

218. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at **14-15 (interpreting TEX. HEALTH & SAFETY CODE ANN. §§ 361.271, .344 (Vernon 2001)).

219. *Id.* at *15 (citing TEX. HEALTH & SAFETY CODE ANN. §§ 361.343, .344 (Vernon 2001)).

220. *Id.* at *47 (citing TEX. R. CIV. PROC. 279; Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222-23 (Tex. 1992)); European Crossroads' Shopping Ctr., Ltd. v. Criswell, 910 S.W.2d 45, 56 (Tex. App.—Dallas 1995, writ denied) ("When a party conclusively proves a vital fact . . . its effect is a question of law and there is no issue for the jury.").

that Pilgrim had conclusively established them as a matter of law.[221]

The main challenge was whether Street was an arranger under the SWDA and thereby a person responsible for solid waste. This decision, although an unpublished opinion, is the first judicial guidance on how to interpret this provision of the act. Considering that the wording of the relevant provision of the SWDA is substantially similar to the wording of comparable provision in the CERCLA, the court presumed that "the [Texas Legislature] intended to adopt the construction placed on that wording by the federal courts," and indicated that it would "look to federal cases as a guide in interpreting the state statute."[222]

In reviewing these cases, federal courts have refused to apply a bright-line test in determining arranger status.[223] Rather, the federal courts have made case-by-case determinations, taking the "totality of circumstances" into consideration.[224] At a minimum, however, the federal courts agree that a nexus must exist between the potentially responsible party and the disposal of a hazardous substance that is based on the *conduct* of the potentially responsible party.[225] The common factors used by federal courts in determining whether a sufficient nexus exists between a potentially responsible party and the disposal of a hazardous substance, for CERCLA arranger status to attach to the party, include whether the potentially responsible party:

(1) had some actual involvement in the decision to dispose of the waste or, alternatively, had an obligation to control the disposal of the waste,
(2) engaged in the transaction for the purpose of waste disposal,
(3) owned or possessed the waste, or
(4) controlled the waste's disposal regardless of whether it owned or possessed it.[226]

In determining CERCLA arranger status, a court may also consider whether the potentially responsible party possessed the intent to dispose of a hazardous substance at the time of a transaction. The Sixth Circuit in *United States v. Cello-Foil Products, Inc.*[227] concluded that the terms "contract, agreement or otherwise arranged" indicate that a court must "inquire into what transpired between the parties and what the parties had in mind with regard to disposition of the hazardous substance."[228]

221. *Id.* at **38, 48, 49, 57, 58, 59.
222. *Id.* at *21.
223. *Id.* at *24 (citing Freeman Assocs., L.P. v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999)); Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co., 142 F.3d 769, 775 (4th Cir. 1998); *see also* United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1232 (6th Cir. 1996).
224. *R.R. Street & Co., Inc.*, No. 01-98-0142-CV, 2001 Tex. App. LEXIS 6349, at *24 (citing Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 929 (5th Cir. 2001)).
225. *Id.* at *25 (citing *Geraghty & Miller, Inc.*, 234 F.3d at 929; General Elec. Co. v. AAMCO Transmission, Inc., 962 F.2d 281, 286 (2d Cir. 1992)).
226. *Id.* at *29 (citing Sea Lion, Inc. v. Wall Chem. Corp., 974 F. Supp. 589, 595 (S.D. Tex. 1996)).
227. 100 F.3d 1227 (6th Cir. 1996).
228. *Id.* at 1231.

The Sixth Circuit does not believe that this intent inquiry undermines the strict liability nature of CERCLA, because it is directed towards determining whether a party is a potentially responsible party, not whether a party intended the damages caused by the disposal.[229]

To determine whether Street was an arranger under the SWDA, the court considered the non-exclusive factors that the federal courts have considered in making a similar determination under CERCLA.[230] Using these factors, the court found that neither Street's knowledge that perchloroethylene would be generated and possibly spilled at Pilgrim's plants nor Street's role as a liaison between Pilgrim and the waste disposal company made it an arranger.[231] However, the court concluded that "Street, through Corbin, 'arranged' to dispose of solid waste by (1) instructing Pilgrim to pour its separator water into the sewer and (2) pouring the [perchloroethylene]-mixture into Pilgrim's sinks and commodes."[232] Mr. Corbin's actions satisfied the factors for determining arranger status. The court found that "Corbin (1) took an active role in the disposal of [perchloroethylene], (2) intended to dispose of the [perchloroethylene], (3) 'possessed' the perchloroethylene, and (4) controlled the method and manner of the disposal."[233]

Street argued that, for arranger status to attach to it, the SWDA also requires that Street's conduct "caused" Pilgrim to incur environmental cleanup costs.[234] Identifying a potentially critical difference in the state and federal statutes, the court observed that although CERCLA appears to have such a causation requirement, the SWDA does not have a similar requirement for determining whether a plaintiff can sustain a cost recovery action against a defendant.[235] Under the SWDA, a causation-like factor, however, is taken into consideration by a trial court in apportioning costs after a defendant has been found to be a responsible person.[236]

Street further argued that the pouring of a perchloroethylene-mixture into the sinks and commodes did not constitute disposal of a solid waste.[237] Street based its argument on the SWDA definition of solid waste being subject to the limitations of the federal domestic sewage exclusions found in the Resource Conservation and Recovery Act and in an Environmental Protection Agency regulation.[238] The court concluded that "neither the statutory nor the regulatory domestic sewage exclusion applies to the [perchloroethylene]-wastes discarded by Corbin into the

229. *Id.* at 1232.
230. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at *30.
231. *Id.* at **31, 33, 34.
232. *Id.* at *38.
233. *Id.*
234. *Id.* at *45.
235. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at *45 (citing 42 U.S.C. § 9607(a)(4) (1997); TEX. HEALTH & SAFETY CODE ANN. §§ 361.271, .344 (Vernon 2001)).
236. *Id.* at *46 (citing TEX. HEALTH & SAFETY CODE ANN. § 361.343 (Vernon 2001)).
237. *Id.* at *39.
238. *Id.* (citing 42 U.S.C. § 6903(27) (1997); 40 C.F.R. § 261.4(a); TEX. HEALTH & SAFETY CODE ANN. § 361.003(34)).

sewer and that such conduct constituted 'disposal of solid waste.'"[239] The court based its conclusion primarily on the following findings: (1) domestic sewage means sewage from a domestic source, not domestic sewage from an industrial source;[240] (2) "to allow industrial waste-generators to avoid the reach of a cost recovery action by disposing of [their] waste down the sewer, would, not only frustrate SWDA's statutory scheme, but defeat the act's remedial purpose;"[241] and (3) the perchloroethylene-waste found in the soil and groundwater at the Pilgrim sites was, at that point, not mixed with domestic sewage and would never reach a publicly owned treatment works.[242] Based on the court's analysis, Pilgrim had shown that Street is a responsible person for solid waste and established the other elements of a SWDA cost recovery action. The next step for the trial court was to determine the amount of Pilgrim's cost recovery by applying the equitable criteria listed in Section 361.343 of the SWDA.[243] However, any factual disputes relating to such equitable criteria should be determined by a jury. Street contests (1) whether a causal relationship exists between the perchloroethylene-wastes that Street arranged to be disposed of at Pilgrim's facilities and the remedial actions conducted at the sites, and (2) the volume of such wastes at the sites attributable to Street.[244] The court held that "the trial court erred in failing to submit these issues to the jury and that the error probably did cause the rendition of an improper judgment."[245] The court, therefore, reversed the trial court's judgment awarding Pilgrim damages under the SWDA and remanded the cause for the jury to determine the factual disputes and the trial judge to determine the amount of damages.[246]

III. LEGISLATIVE DEVELOPMENTS

The 77th Texas legislative session met in regular session during the Survey period. Unlike last session, which was relatively uneventful with regard to environmental laws, this legislature enacted several major pieces of environmental legislation. The key environmental legislation this session is House Bill 2912, also known as the "TNRCC Sunset Bill." Among other things, that bill renews the Texas Natural Resource Conservation Commission ("TNRCC") for another twelve years until September 1, 2013. It also contains many substantive provisions, discussed below, that will affect the scope of the TNRCC's authority, as well as its internal administration. Several other environmental agencies were also subject to sunset review during the session. For example, the Coastal Coordina-

239. *Id.* at *45.
240. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at *42 (citing *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180, 184 (1st Cir. 1989)).
241. *Id.* at *43.
242. *Id.* at *44 (citing 40 C.F.R. § 261.4(a)(1)(ii)).
243. TEX. HEALTH & SAFETY CODE ANN. § 361.343 (Vernon 2001).
244. *R.R. Street & Co., Inc.*, 2001 Tex. App. LEXIS 6349, at *65.
245. *Id.*
246. *Id.* at *128.

tion Council[247] and the State Soil and Water Conservation Board[248] were also renewed until September 1, 2013.

The following summary discusses the highlights of the Sunset Bill and the major environmental legislation enacted during the 77th Texas legislative session. Unless otherwise noted, all statutes became effective on September 1, 2001.

A. THE TNRCC SUNSET BILL

Although the key component of the Sunset Bill is the renewal of the TNRCC, there are many other important substantive parts of House Bill 2912. Below is a list of some of the most important provisions in the Sunset Bill:

1. Name Change

Section 18.01 renames the TNRCC, as of January 1, 2004, the Texas Commission on Environmental Quality.

2. Cumulative Risk

Section 1.12 requires the TNRCC to develop policies to protect the public from cumulative risk in the media, including consideration of cumulative impacts when issuing new permits or expansion permits, and to give priority in enforcement and monitoring to areas in which regulated facilities are concentrated.[249]

3. Website Information

Section 1.13 directs the TNRCC to post public information on the web, including minutes of advisory committee meetings, permit and enforcement action information, compliance histories, and emissions inventories by county and account.[250]

4. Public Complaints

This provision requires the TNRCC to establish a process for educating the public about the TNRCC's complaint policies and procedures (Section 1.14);[251] requires the TNRCC to provide a complainant with notice at least quarterly regarding the status of the TNRCC's investigation (Section 1.15);[252] requires the TNRCC to coordinate complaint investigations with local enforcement officials (Section 1.16);[253] and requires the

247. TEX. NAT. RES. CODE ANN. § 33.211 (Vernon Supp. 2002) (House Bill 906 continued the Coastal Coordination Council until September 1, 2013).
248. TEX. AGRIC. CODE ANN. § 201.025 (Vernon Supp. 2002) (House Bill 2310 continued the State Soil and Water Conservation Board until September 1, 2013).
249. TEX. WATER CODE ANN. §§ 5.127-5.131 (Vernon Supp. 2002).
250. *Id.* at § 5.1733.
251. *Id.* at § 5.1765.
252. *Id.* at § 5.177.
253. *Id.* at § 5.1771.

TNRCC to establish policies to allow for a timely response to after-hours complaints (Section 1.16).[254]

5. Executive Director and Contested Case Hearings

Section 1.20 requires the TNRCC to adopt criteria for contested case hearings in which the Executive Director may participate, and clarifies that the purpose of the Executive Director's participation in hearings is to complete the record.[255]

6. Performance-Based Regulation

Section 4.01 requires the agency by February 1, 2002, to develop a uniform definition of compliance history and a uniform standard for its use; and it requires the agency by September 1, 2002, to develop a system for enforcement actions, issuance of permits and development of innovative programs that is based on a party's compliance history.[256]

7. Emission Events

Section 5.01 requires the development of a central database for tracking upset, maintenance, startup and shutdown emissions and establishes a program for addressing excessive emission events at a facility through permitting or corrective action.[257]

8. Grandfathered Facilities

Section 5.03 requires the permitting of grandfathered facilities; permit applications must be submitted by September 1, 2003 if the facility is in East Texas, or by September 1, 2004 if the facility is in West Texas; and facilities in East Texas must be in full compliance with new permits by March 1, 2007, or March 1, 2008 if the facility is in West Texas.[258]

9. Remediation

Section 11.01 provides that the TNRCC may not name a person as a responsible party for an enforcement action or require a person to reimburse remediation costs for the site if the TNRCC has investigated the site owned or operated by the person and has determined that 1) the contaminants originate from an up-gradient, off-site source not owned or operated by the person; 2) additional corrective action is not necessary at the site; and 3) the TNRCC will not undertake formal enforcement action regarding the site.[259]

254. *Id.* at § 5.1772.
255. TEX. WATER CODE ANN. § 5.228 (Vernon Supp. 2002).
256. *Id.* at §§ 5.751-5.757.
257. TEX. HEALTH & SAFETY CODE ANN. §§ 382.0215, 382.0216 (Vernon Supp. 2002).
258. *Id.* at §§ 382.05181-382.05186.
259. *Id.* at § 382.1875.

10. PST Remediation

Section 14.10 continues the Petroleum Storage Tank cleanup program and fund until September 1, 2006 if certain deadlines are met by the party seeking reimbursement.[260]

11. Texas Environmental Health Institute

Section 19.01 creates the Texas Environmental Health Institute, which is to be created jointly by TNRCC and Texas Department of Health with the responsibility of investigating and providing treatment for illnesses caused by Superfund contamination.[261]

12. Recycling Facilities

Section 9.03 clarifies the TNRCC's authority to require record-keeping and reporting by recycling facilities.[262]

13. Sewage Sludge

Section 9.05 requires a permit issued on or after September 1, 2003 for the land application of Class B sludge.[263]

14. Commissioner Qualifications

Sections 1.04, 1.05, 1.06 provide revised qualifications, training requirements, and removal procedures for Commissioners.[264]

15. Advisory Committees

Section 1.10 provides that the composition of TNRCC-created or executive director-created advisory committees should have balanced representation from interested groups.[265]

16. Research Plan

Section 1.11 requires the TNRCC to establish a long-term plan for the research needs of the agency and to use that plan in contracting or providing grants for research.[266]

17. Accredited Labs

Section 1.12 allows the TNRCC to use only data from accredited labs in most TNRCC decisions. Section 6.01 gives the TNRCC responsibility for accrediting labs in accordance with the National Laboratory Accredi-

260. TEX. WATER CODE ANN. § 26.361 (Vernon Supp. 2002).
261. TEX. HEALTH & SAFETY CODE ANN. §§ 427.001- 427.006 (Vernon Supp. 2002).
262. *Id.* at § 361.119.
263. *Id.* at § 361.121.
264. TEX. WATER CODE ANN. §§ 5.052-5.054 (Vernon Supp. 2002).
265. *Id.* at § 5.107.
266. *Id.* at §§ 5.1191-5.1193.

tation Program.[267]

B. AIR

1. *Senate Bill 5—Incentive Programs for Encouraging Emissions Reductions*

Under the federal Clean Air Act, the United States Environmental Protection Agency ("EPA") is authorized to establish the maximum allowable concentrations of pollutants that can endanger human health, harm the environment, and cause property damage. Because much of Texas does not satisfy the EPA's standards, Senate Bill 5 establishes several incentive programs to encourage voluntary emissions reductions above and beyond the reductions proposed in the State Implementation Plan.

Senate Bill 5 establishes several programs that target diesel-engine and motor vehicle sources. To address diesel-engine sources, the bill establishes the Diesel Emissions Reduction Incentive Program.[268] That program provides grant funding to eligible projects that reduce emissions from high-emitting sources, such as large trucks and construction equipment, in nonattainment and near-nonattainment areas in Texas. The bill also establishes the On-Road Diesel Purchase or Lease Incentive Program, designed to encourage the purchase of large vehicles that meet cleaner emission standards than otherwise required.[269] Similarly, the new Motor Vehicle Purchase or Lease Incentive Program provides grants for the purchase of cleaner light-duty vehicles.[270] To fund these incentives, Senate Bill 5 establishes the Texas Emissions Reduction Plan Fund.[271] The funds are raised from various sources, including surcharges on construction equipment and certain on-road diesels and the registration of truck-tractor or commercial motor vehicles.

In addition, Senate Bill 5 creates several other programs designed to reduce emissions in Texas. The bill requires the Pubic Utility Commission ("PUC") to develop the Energy Efficient Grant Program to provide for the retirement, replacement, and recycling of materials and appliances that contribute to peak energy demand.[272] The bill authorizes the Texas Council of Environmental Technology to implement a new technology research and development program.[273] The bill also establishes the Texas Building Energy Performance Standards for construction in Texas.[274]

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267. *Id.* at §§ 5.801-5.807.
268. TEX. HEALTH & SAFETY CODE ANN. §§ 386.101-.113 (Vernon Supp. 2002).
269. *Id.* at § 386.112.
270. *Id.* at §§ 386.151-386.161.
271. *Id.* at §§ 386.251, 386.252.
272. *Id.* at §§ 386.201-386.207.
273. *Id.* at §§ 387.001-387.010.
274. TEX. HEALTH & SAFETY CODE ANN. §§ 388.001-388.008 (Vernon Supp. 2002).

2. *House Bill 2518—Hearing Notice Exclusion for De Minimus Emissions Increases*

House Bill 2518 amends the Health and Safety Code to provide an exclusion for certain permit amendments from the standard public notice and hearing requirements. To qualify for the exclusion, the total emissions increase from all facilities authorized under the amended permit 1) must meet the de minimus criteria defined by TNRCC rule and 2) must not change in character.[275] The bill also provides a similar notice and hearing exclusion for applicants of agricultural plant permit amendments, provided the total emissions increase from all facilities authorized under the permit amendment 1) is not "significant" and 2) does not change in character. Finally, the bill requires the agency, when considering a permit amendment, to consider any adjudicated decision or compliance proceeding within the five years prior to the application filing date that addresses the applicant's air compliance history.[276]

3. *Senate Bill 1390—Concrete Plant Emissions*

Senate Bill 1390 requires the TNRCC to issue an emergency order suspending operations of any concrete plant that performs wet batching, dry batching, or central mixing that is operating without the necessary air permit.[277] The statute provides a $10,000 penalty for each day that a violation continues.[278]

4. *Senate Bill 1561—Emissions Reductions in Mexico*

Senate Bill 1561 authorizes the TNRCC to allow the use of emissions reductions achieved outside the United States to satisfy otherwise applicable emissions reduction requirements provided certain conditions are met.[279]

C. WATER

1. *Senate Bill 2—State Water Rights*

Senate Bill 2 builds upon the major pieces of legislation over the past two sessions, beginning with Senate Bill 1 in 1997, that have rewritten the state's water rights law. Senate Bill 2 addresses the implementation and financing of the water strategies and recommendations identified since 1997 by the sixteen regional water planning groups in Texas. One of the primary purposes of the bill is the creation of the Texas Water Policy Council to provide focus and recommendations on state water policy initiatives and the state's river authorities.[280] Senate Bill 2 also requires the

275. *Id.* at § 382.0516.
276. *Id.*
277. TEX. WATER CODE ANN. § 5.5145 (Vernon Supp. 2002).
278. *Id.* § 7.052.
279. TEX. HEALTH & SAFETY CODE ANN. § 382.0172 (Vernon Supp. 2002).
280. TEX. WATER CODE ANN. §§ 9.001-9.017 (Vernon Supp. 2002).

Texas Water Development Board to complete groundwater availability models for the major aquifers by October 1, 2004.[281] The bill also ratifies the creation of groundwater conservation districts and strengthens their role in conserving groundwater resources by amending provisions regarding the authority of such districts to adopt and enforce certain rules.

2. *Senate Bill 687—Enhanced Penalties for Intentional Point Source Discharges*

Previously, the same penalties applied to intentional and unintentional unauthorized point source discharges. Senate Bill 687 enhances the penalties for intentional or knowingly unauthorized discharges of a waste or pollutant into or adjacent to water in the state that causes or threatens to cause water pollution.[282] The bill took effect on June 14, 2001.

3. *Senate Bill 3023—CAFO Permitting*

Since the last legislative session, the Water Code has subjected an application for a confined animal feeding operation ("CAFO") to a contested case hearing if the CAFO is "sufficiently close" to a sole-source surface drinking water supply. On the other hand, a permit application for a CAFO that is not "sufficiently close" is generally subject to a less stringent permitting process. Senate Bill 3023 addresses concerns regarding the ambiguity of the term "sufficiently close" by requiring the TNRCC to designate a protection zone around a water supply.[283]

D. REMEDIATION

1. *House Bill 1027—Brownfields Initiatives*

The legislature passed House Bill 1027 to encourage the cleanup of contaminated "brownfields" sites. The bill promotes brownfields programs by eliminating legal barriers preventing the use of property tax breaks for contaminated sites, and by encouraging supplemental environmental projects that involve the cleanup of such sites.[284] The bill authorizes the Texas Department of Economic Development to encourage the cleanup of brownfields by certain industrial development corporations through the use of sales and use tax proceeds.[285] In addition, the bill authorizes the General Services Commission and other state agencies to give preference, under certain circumstances, to goods produced at facilities located on property remediated under the voluntary cleanup program.[286]

281. *Id.* at § 16.012.
282. TEX. WATER CODE ANN. § 7.145 (Vernon Supp. 2002).
283. *Id.* at § 26.0286(c).
284. *Id.* at § 7.067(a).
285. TEX. REV. CIV. STAT. ANN. art. 5190.6 § 4B(p) (Vernon Supp. 2002).
286. TEX. GOV'T CODE ANN. § 2155.449 (Vernon Supp. 2002).

E. Petroleum Storage Tanks

1. *House Bill 2687—Extension and Modification of PST Program*

House Bill 2687 makes several changes to the state's petroleum storage tank ("PST") program. First and foremost, the bill ensures the continuation of the PST program by extending the program's expiration date from September 1, 2003 to the same date in 2006. The bill establishes certain deadlines for persons performing corrective action under the program and prohibits the use of account funds to reimburse an owner or operator who misses a deadline.[287] House Bill 2687 also modifies the definition of "owner" to include a person who owns an aboveground storage tank.[288]

F. Miscellaneous

1. *House Bill 3121—Modifications to the "Prop 2" Program*

House Bill 3121 revises the TNRCC's "Prop 2" program that provides a mechanism whereby a person may claim an exemption from ad valorem taxation for all or part of real or personal property used to control pollution.[289] House Bill 3121 requires the TNRCC to adopt specific standards for considering applications to ensure uniform determinations regarding whether property is used for pollution control. Some dispute has arisen over the reasonable percentage to be exempted due to changes to or the addition of new production equipment that results in an environmental improvement. The new legislation provides that property used for the production of goods and services shall not be exempt. It also establishes an appeals process whereby either the applicant or the chief appraiser for the appraisal district for the property's county may appeal an applicability determination by the TNRCC.[290]

2. *Senate Bill 1146—Website Consolidation*

Senate Bill 1146 requires all state agencies that have jurisdiction over matters related to environmental protection, quality, development, conservation, or preservation to cooperate with the Department of Information Resources to develop a single information link through the Texas Online portal.[291] That effort will result in a single website that links all available environmental and natural resources information.

3. *Senate Bill 688—Direct Referral of Permit Applications to SOAH*

Senate Bill 688 amends the permitting procedures created by House Bill 801 from the 1999 legislature. Under the new bill, immediately after the executive director issues a preliminary decision on a permit application, either the permit applicant or the executive director may request

287. Tex. Water Code Ann. §§ 26.351, 26.3571 (Vernon Supp. 2002).
288. *Id.* at § 26.342.
289. Tex. Tax Code Ann. § 11.31 (Vernon Supp. 2002).
290. *Id.*
291. Tex. Gov't Code Ann. § 2054.127 (Vernon Supp. 2002).

that the TNRCC refer the application directly to the State Office of Administrative Hearings for a contested case hearing on whether the application complies with all applicable statutory and regulatory requirements.[292] The bill also provides that a permit applicant is responsible for publishing and paying for public notices of standard and multiple plant permits for air emissions.[293] The bill became effective on June 14, 2001.

4. House Bill 2997—Environmental Management Systems

House Bill 2997 requires the TNRCC to establish a comprehensive program that provides regulatory incentives to encourage the implementation of environmental management systems ("EMS") by regulated entities, state agencies, local governments, and others. The term "environmental management system" is defined broadly to include all major EMS protocol such as ISO 14001.[294] In addition, the commission must integrate the use of EMS into its regulatory programs, develop EMS for small businesses and local governments, and establish environmental performance indicators to measure the program's performance. Finally, the legislation requires that the commission consider the use of an EMS in an applicant's compliance history for an applicant's facility for demonstration of compliance and potential use of an EMS to improve compliance history.[295] The TNRCC adopted rules implementing this program in November 2001.

5. Senate Bill 356—Performance Measures for Innovative Programs

Over the past several sessions, the legislature has enacted many pieces of legislation requiring the TNRCC to develop innovative programs that encourage a broader approach to addressing environmental issues. Concerns have been raised regarding the difficulty in determining whether the innovative programs are achieving improvements in environmental quality. Senate Bill 356 requires the TNRCC and the Legislative Budget Board to work together to create adequate performance measures for all TNRCC innovative environmental programs.[296]

6. Senate Bill 509—Asbestos Surveys

During the session, the Texas legislature amended the Texas Asbestos Health Protection Act. That Act generally requires a survey for asbestos containing building materials to be completed and any existing asbestos to be abated before any demolition or renovation of a public or commercial building. To address concerns about the general non-compliance with this requirement the legislature passed Senate Bill 509.

292. TEX. HEALTH & SAFETY CODE ANN. § 382.05197 (Vernon Supp. 2002).
293. TEX. WATER CODE ANN. § 5.557 (Vernon Supp. 2002).
294. *Id.* at § 5.127.
295. *Id.* at § 26.028.
296. *Id.* at § 5.127.

Under the new law, a municipality may not issue a renovation or demolition permit for a public or commercial building unless (1) the applicant provides acceptable evidence that an asbestos survey of the affected parts of the building has been completed by a licensed asbestos surveyor or (2) an engineer or architect has certified the lack of asbestos in the affected parts of the building.[297] Building permit applications submitted after January 1, 2002 will be subject to the new requirements of Senate Bill 509.

297. TEX. REV. CIV. STAT. ANN. Art. 4477-3a, § 13(b) (Vernon 2002).