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ENVIRONMENTAL LAW

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TABLE OF CONTENTS

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I. INTRODUCTION

THIS past year the Texas appellate courts addressed a number of unique and interesting issues involving solid waste, environmental tort actions, hazardous waste permitting decisions, and emissions from animal feeding lots. The most interesting may be those addressing property and the way property rights and duties have been affected by environmental statutes and regulations.[1]

II. SOLID WASTE

A. DEFINITION OF "PROPERTY" EXTENDS TO WASTE FOR PURPOSES OF TEXAS RAILROAD COMMISSION JURISDICTION OVER TRANSPORTATION OF SOLID WASTE

In a case presenting a fascinating review of the meaning of property in the age of environmental regulation, the Austin Court of Appeals reviewed the ability of the Texas Railroad Commission (TRR) to regulate the transportation of solid waste.

1. Background

The case was originally brought in Travis County District Court by Waste Management of Texas, Inc. (Waste Management), seeking a declaratory judgment, and was joined in by various amicus waste transport

1. Railroad Comm'n of Texas v. Waste Management of Texas, Inc. 880 S.W.2d 835 (Tex. App.—Austin 1994, n.w.h.).

parties to challenge the regulatory jurisdiction of the TRR.[2] At trial, Waste Management argued that the TRC did not have jurisdiction to regulate transporters of asbestos-containing solid waste because such actions did not constitute the transportation of "property" as that term was contemplated by sections 1(g) and 4(a)(1) of the Texas Motor Carrier Act (MCA).[3] Alternatively, Waste Management argued that the Texas Legislature's delegation of authority to the Texas Department of Health and the Texas Water Commission[4] of control over all aspects of the management of solid waste and hazardous waste under the Texas Solid Waste Disposal Act (SWDA)[5] indicated that the legislature had approved and ratified the holding in *Moore Industrial Disposal, Inc. v. City of Garland*.[6] *Moore* held that sludge was not property because it had been abandoned and had no value.[7]

After trial of this matter, the district court ruled asbestos-containing waste was not property under the MCA, and therefore, the TRC did not have jurisdiction to regulate the transportation of this material and that the Texas Water Commission (TWC) has exclusive jurisdiction over solid waste management. Accordingly, the district court ruled that certain TRC tariffs and regulations did not apply to the transportation of asbestos-containing solid waste.[8]

2. *Waste Constitutes Property under the Motor Carrier Act*

The first issue decided by the Austin Court of Appeals is perhaps the most interesting. The significance of this ruling is that the court concluded that a generator of waste is in essence the "owner" of that property and remains responsible for that waste through transport and ultimate disposal. The traditional common law and statutory notions of property were combined with the more recent regulatory requirements governing management of solid waste to reach this conclusion.[9]

In arguing that the asbestos-containing solid waste was not "property" under the MCA, Waste Management relied upon *Moore* for the proposition that waste is not property because it (1) has no economic value and

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2. Suit was brought under TEX. CIV. PRAC. & REM. CODE ANN. § 37.004a (Vernon 1986) and TEX. GOV'T CODE ANN. § 2001.038 (Vernon 1994).

3. TEX. REV. CIV. STAT. ANN. art. 911b (Vernon 1964 & Supp. 1994) [hereinafter MCA].

4. The authority to control all aspects of the management of both municipal and industrial solid waste was delegated to the Texas Natural Resource Conservation Commission, which succeeded to the Texas Water Commission. Act of July 30, 1991, 72d Leg., 1st C.S., ch. 3, art. 1, § 1.085, 1991 Tex. Gen. Laws 4, 42.

5. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.540 (Vernon 1992 & Supp. 1994) [hereinafter SWDA].

6. 587 S.W.2d 430 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

7. *Waste Management*, 880 S.W.2d at 838.

8. *Id.*

9. It should always be kept in mind that the relevant statutory and regulatory definitions of "solid waste" include *non-solid* wastes such as liquids and gases. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 361.003(37) (Vernon 1992).

(2) has been abandoned.[10] In *Moore* the Dallas Court of Appeals ruled the City of Garland did not require TRC authorization to transport sludge because the sludge was not property and thus was not regulated under the MCA.[11] The Austin Court of Appeals rejected what it called the Dallas Court of Appeals' "cursory review" of the case law from various states on this same topic.[12] In performing its own evaluation, the Austin Court of Appeals determined that it was required (1) to consider the entire act and (2) to construe it in order to carry out the intent of the legislature.[13] The first step of this process involved the review of the plain meaning of the language of the statute. However, the court found the term "property" to be unclear and certainly not defined under the Act.[14] Having so concluded, the court sought to evaluate its general definition.

The definition of "property" is largely a definition of a legal right. The court was particularly influenced by the definition from *Black's Law Dictionary*: "the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it."[15] The court recognized that generators of waste may spend considerable time attempting to get rid of waste, but still retain the right to exclude others from the waste and to direct its disposition. In fact, the court noted that federal and state environmental laws attempt to force these generators to responsibly direct its disposal. The court cited both the federal Superfund laws and the SWDA as examples, concluding that the underlying assumption of these laws is that generators have the legal right to direct its disposal.[16]

The somewhat conflicting definitions convinced the court that waste could be property because it is "an object that one can possess, dispose of, and exclude others from using; yet the narrower definition, based on value, does not include waste because it has no economic worth."[17] The court decided that rather than struggle with an unclear definition, it would look to the intent and purpose of the Act. In the court's view, the policy basis for creating the MCA was to enhance public safety, to protect the highways from excess wear and tear, and to limit uneconomic and discriminatory practices in the trucking industry, regardless of the value of the material being transported.[18] Ultimately, the conclusion was that the legislature did not intend the narrow reading suggested by Waste Management. Instead, the court reviewed older statutes and court deci-

10. 880 S.W.2d at 838; *see Moore*, 587 S.W.2d at 431.
11. 587 S.W.2d at 432.
12. *Waste Management*, 880 S.W.2d at 839.
13. 880 S.W.2d at 839 (citing Citizens Bank v. First State Bank, 580 S.W.2d 344, 348 (Tex. 1979).
14. *Id.*
15. *Id.* (citing BLACK'S LAW DICTIONARY 1216 (6th ed. 1990)).
16. *Id.* at 840 n.6 (citing 42 U.S.C. § 9607(a) (1988)).
17. 880 S.W.2d at 839-40.
18. *Id.* at 840.

sions, concluding that the legislature used the term "property" to differentiate carriers of *property* from carriers of *people*.[19]

The court sought the meaning of property in the context of the purposes and policies underlying the Act. The Act's declaration of policy identified three major goals: (1) enhancing public safety; (2) reducing excess wear on the highways; and (3) limiting improper practices in the trucking industry.[20] Based on these policies, a precise definition of property appeared irrelevant; any material that is shipped, regardless of its value, could affect or interfere with these stated goals of the MCA.

This conclusion was bolstered by the court's analysis of the regulatory scheme in place when the MCA was enacted. Under this scheme, the term property was used to distinguish carriers of people.[21]

Having concluded that the definition of property includes waste regardless of its value, the court turned to the question of whether the legislature acknowledged and ratified the *Moore* decision in the 1981 and 1991 amendments to the Solid Waste Disposal Act. In 1981, the Legislature empowered the then-existing Texas Department of Water Resources to "control all aspects" of solid waste management,[22] and defined management to include "transportation."[23] In 1991, the Legislature empowered the TRC to regulate the transportation of recyclable materials.[24]

In reviewing these amendments to the SWDA and associated legislative history, the court was not convinced that the legislature ratified the *Moore* decision. No reference was ever made to *Moore*. The court believed the purpose of the 1981 amendments was to allow delegation of the federal hazardous waste program to Texas.[25] Moreover, the court concluded that the legislature was assigning the state's environmental agency jurisdiction to regulate the *environmental* aspects of waste transportation.[26] This environmental regulatory authority was not seen by the court as excluding the TRC's power to regulate the *economic* and *safety* aspects of solid waste transportation.[27]

Finally, the court supported this conclusion by the Texas Natural Resource Conservation Commission's and TRC's conclusions that the TRC could regulate solid waste transportation for hire.[28] The court deferred to the two agencies' interpretations of their respective enabling statutes, holding that the agencies' interpretations were more than reasonable.[29]

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19. *Id.* at 841.
20. *Id.* at 840 (citing MCA § 22b).
21. *Id.* at 840-41.
22. Act of June 1, 1981, 67th Leg., R.S., ch. 831, § 3, 1981 Tex. Gen. Laws 3170, 3172-73 (codified as amended at SWDA §§ 361.011, .017).
23. *Id.* § 2, 1981 Tex. Gen. Laws 3170, 3171 (codified at SWDA § 361.003(21)).
24. Act of May 26, 1991, 72d Leg., R.S., ch. 303, § 1, 1991 Tex. Gen. Laws 1267, 1272 (codified at SWDA § 361.431).
25. 880 S.W.2d at 842.
26. *Id.* at 842-43.
27. *Id.* at 843.
28. *Id.*
29. *Id.* (relying upon *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)).

An alternative argument presented by Waste Management was that the generators of waste *abandoned* the waste and therefore the property ownership was transferred to Waste Management. On this basis, Waste Management asserted it could not be transporting property "for compensation or hire."[30] It is with this analysis that the traditional, common law definition of property and property rights conflicted with modern environmental regulation. The court refused to accept that asbestos-containing waste could *ever be abandoned* — "a generator has a continuing duty to see that the waste is disposed of in accordance with the SWDA."[31] The court did not reach this issue specifically in this case, however, because the contractor called for Waste Management to transport the waste for the generators. Thus, the court's conclusion can be considered dicta.

3. *Analysis*

On its face this case appears to only address the mundane issue of whether TRC tariffs and regulation apply to waste transportation. The conclusion of the court comports with the federal system in which both the Environmental Protection Agency and the Department of Transportation have certain concurrent jurisdiction over waste transportation.

The more interesting aspects of the case, however, involve the meaning of property and the rights and *responsibilities* of property ownership. Traditionally, a property right meant nearly unlimited power to use and dispose of property. As the *Waste Management* court recognized, at least with respect to waste, modern environmental regulation imposes a set of *responsibilities* in addition to those rights associated with property ownership. In many ways, a generator or "owner" of waste has a continuing duty to ensure safe disposal and liability for environmental consequences of that disposal. The Federal Comprehensive Environmental Response, Compensation and Liability Act,[32] the Resource Conservation and Recovery Act (RCRA),[33] and similar state acts like the Texas SWDA impose certain duties and liabilities on waste generators. The "cradle to grave" regulatory system of RCRA and the TSWDA are designed to ensure that waste is disposed of in an environmentally responsible manner. Such duties may result in liability many years after the waste is transported many miles from the "owner" of that "property."

30. 880 S.W.2d at 843.
31. *Id.*
32. 42 U.S.C. § 9620(h) (1980).
33. 42 U.S.C. § 6901 *et seq.* (1976).

B. Agency Decision to Issue a Permit to Construct a Commercial Hazardous and Solid Waste Incinerator Upheld, Even Though the Agency Itself Asked That the Decision Be Invalidated by the Trial Court and Other Contestants Raised 458 Points of Error on Appeal

An appeal of a permit issued to allow the construction and operation of a commercial hazardous waste and solid waste incinerator survived numerous challenges, even by the agency that issued the permit.

1. Background

In *Smith v. Houston Chemical Services, Inc.*[34] the Texas Water Commission (TWC) (now the Texas Natural Resource Conservation Commission) issued a permit under the Texas Solid Waste Disposal Act[35] to Houston Chemical Services, Inc. (Houston Chemical Services) to construct and operate a hazardous and solid waste incineration facility in Harris County, Texas near the City of Laporte. The permitting process was somewhat schizophrenic from the agency's perspective. Initially, the hearings examiner recommended that the TWC deny the permit, but the Commissioners disagreed and decided to issue it. After trial, on appeal to the district court, the TWC changed its mind and sought leave to amend its pleadings to allow the district court to deny the permit.[36] The trial court denied the agency's motion and upheld the granting of the permit.

As with most permitting procedures for hazardous waste incinerators, this permitting process apparently created tremendous controversy in the local community. Harris County, the City of Laporte, a local legislator, and local citizens all contested the permit and filed suit to appeal the permitting decision. After the trial court affirmed the decision to issue the permit, the parties filed an appeal in the court of appeals in Austin.

2. Summary of Decision

a. TWC's Request That Its Own Permitting Decisions Be Overturned

The first item that the court of appeals reviewed was the TWC's claim that the district court abused its discretion in denying the agency leave to file its third amended complaint, which conceded certain of the contesting parties' claims and asked that the court reverse the permitting decision. Certain of the contesting parties filed similar points of error.

In addressing this issue, the court ruled that the granting or denying of a permit is committed to the agency's exclusive executive function, and such power is not given to the district court on review.[37] The reviewing

34. 872 S.W.2d 252 (Tex. App.—Austin 1994, writ granted).
35. SWDA § 361.001-.510.
36. 872 S.W.2d at 258.
37. *Id.*

court may remand that decision if it finds sufficient fault with it. Moreover, because the agency did not explain its failure to concede the relevant points before trial, the permitting decision is presumed valid absent the TWC's explanation of its unusual action to argue it was not valid.[38] Thus, the court denied this point of error.

b. Absence of Analysis of Effects of Emissions From a Heat Surge Vent That Would Operate Only on an Emergency Basis

The agency did not require Houston Chemical Services to submit information on potential effects of an emergency heat surge vent that was to be located on the rotary kiln where wastes were to be burned. The relevant regulation requires that the owner or operator demonstrate the facility or unit will not cause air pollution, as defined under the Texas Clean Air Act, based on "waste characteristics, emissions estimates, and dispersion modelling."[39] The TWC concluded that the "fugitive" emissions would not pose a threat to human health or the environment because the likelihood of the vent actually opening was so low. Thus, modeling or other submissions on air emissions was unnecessary. Nonetheless, continuous monitoring, and twenty-four-hour oral notice and fifteen-day written notice were required.

The court of appeals believed that the agency acted properly. It analyzed the relevant rule as having two parts: (1) a substantive requirement that the unit or facility will not cause air pollution and (2) a procedural requirement.[40] The court concluded that the procedural requirement was not created to benefit a party but to aid the TWC's decision-making on the substantive element.[41] Absent a showing of substantial prejudice to the complaining party, the agency could relax this procedural aspect of a rule.[42] The court held no prejudice occurred and overruled the relevant points of error.

c. Level of Detail for the Design and Engineering of the Facilities Submitted to the Agency

Another challenge of the permit involved the level of detail of the engineering and design plans submitted to the TWC. The relevant regulation requires construction and operations plans be "sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes."[43] The contesting parties challenged the agency's finding that this provision had

38. *Id.*
39. *Id.* at 258-59 (quoting 31 TEX. ADMIN. CODE §§ 120.31, 335.367(a)(2) (West 1989), recodified at TEX. HEALTH & SAFETY CODE ANN. § 382.001 (Vernon 1989)).
40. *Id.* at 259.
41. *Id.*
42. *Id.* at 259-60.
43. *Id.* at 263 (quoting 31 TEX. ADMIN. CODE § 305.50(2) (supp. 1993) (recodified at 30 TEX. ADMIN. CODE § 305.50(2) (West 1994)).

been met because the plans were not construction plans, and one was even marked "Not for Construction".[44]

The court took the contestants' position to be that the plans must meet the level of detail required for a private construction contract, with each party to the contract "having a contract right of performance according to the agreed plans."[45] The court rejected this view and accepted as reasonable the TWC's interpretation of the rule that preliminary plans could provide sufficient detail to determine if the facility will be constructed and operated in compliance with relevant statutes. The court further held that the agency did not interpret this rule to require plans that "would be sufficient for judging compliance with any contract under which the structures would be built."[46]

The court then rejected the contestants' claim that the Texas Engineering Practice Act[47] requires that the government "accept" only plans that meet the construction contract level of specificity and detail. The court did not believe that the term "accept" had a contractual meaning. Rather, the court believed that TWC would reserve the right to require changes in plans because they "are essentially conditional and tentative and [submitted] only for the purpose of initiating the application process."[48] The court held that the permit did not create a privilege or property right on behalf of the permit holder, and is subject to unilateral orders of the TWC.[49] Finally, the court concluded that the company must obtain an engineer's certification that the facility complies with the permit and any subsequent TWC orders after construction and performance of a "trial burn," in which wastes are burned and tests are conducted to measure air emissions and other parameters.[50]

In this author's opinion, the court focused too much on the property rights of the permittee and whether the plans and specifications created a binding agreement between the agency and the permittee. The question was really different. What the agency needs is a set of plans and specifications that will reflect how the plant will be built; absent some change, the permittee would arguably be bound to construct the facility or unit in accordance with those plans. At the same time, the permittee would arguably be protected from unilateral changes by the agency without following the procedures for a permit modification or issuing or obtaining an administrative or judicial order. Some level of certainty is necessary for both parties, as well as the public, as to what will be constructed. The court did not adequately address this issue to guide the state, a permit

44. 872 S.W.2d at 263.

45. *Id.* at 263-64.

46. *Id.* at 264.

47. TEX. REV. CIV. STAT. ANN. art 3271a, § 15(c) (Vernon Supp. 1994).

48. 872 S.W.2d at 264.

49. The court was apparently referring to the regulations now codified at 30 TEX. ADMIN. CODE §§ 305.122(b), .123 (West 1994).

50. 872 S.W.2d at 264; *see* 30 TEX. ADMIN. CODE § 305.571(2), (3) (West 1994).

applicant, or a contesting party as to what level of detail is sufficient to meet the regulatory requirements.

d. Allegation That the TWC Failed to Make Findings on All Requisite Statutory Criteria

The contestants' next most serious technical challenge was that the TWC failed to make findings on all relevant statutory criteria. The court recognized that the agency must reach an *ultimate* conclusion under the TSWDA that "the applicant has provided for the proper operation of the proposed hazardous waste management facility."[51] The Act also sets out several general objectives.[52] The contestants claimed that the TWC had failed to make requisite findings on both of these alleged necessary criteria.

The court rejected both claims. First, it held that the agency made numerous legal conclusions sufficient to demonstrate proper operation.[53] Second, it ruled that the general objectives of the statute are not required to be ruled upon in a permitting hearing, are not addressed in the permitting section of the statute, and that no factual issues were raised in the hearing process so the Agency could not be faulted for failure to make a finding.[54]

e. Claim That Part of the Facility Was Located in a Flood Plain

The contestants claimed part of the facility, a "Railcar Unloading Area," was located in a flood plain and that the agency had committed legal error by not addressing the associated risks. The court concluded that the only part of the property within the flood plain was a drainage ditch that the railroad track crossed at the property line.[55] The TWC nonetheless prohibited the use of the Railroad Unloading Area, unless the permittees submitted as part of a "major permit amendment" information that shows that the area is outside or can be protected from washout to the flood plain, that proper secondary containment is in place, and that it will meet federal location standards.[56]

The court ultimately held that the evidence showed that no operational equipment or activities would take place in the flood plain. Various dikes were in place to prohibit a release if a spill occurred or perhaps to reduce the chance of flooding. The agency also forbade the Railroad Unloading Facility until further information was submitted upon its location above the flood line.

51. *Id.* at 269 (quoting TEX. HEALTH & SAFETY CODE § 361.109(a)(1) (Vernon 1992)).
52. *Id.* § 361.023.
53. 872 S.W.2d at 270.
54. *Id.*
55. *Id.* at 267.
56. *Id.* at 268; *see* 30 TEX. ADMIN. CODE § 335.152(a)(1) (West 1994).

f. Financial Assurance Concerns

Concerns with the financial assurance required of the permittee were raised with the court, but again the agency's action was upheld. For hazardous waste management facilities, an owner or operator must demonstrate the financial ability to close the facility after its active life and to monitor the facility after closure for thirty years as well as demonstrate financial coverage for third party property or personal bodily injury arising from the operation of the facility for both sudden and nonsudden accidental occurrences.[57] The court and apparently the contestants believed these requirements had been met.

The contestants claimed, however, that Houston Chemical Services failed to demonstrate that it had sufficient financial wherewithal to *operate* the facility. Section 361.085 of the SWDA in subsections (a) and (d) make statements the contestants cited in this regard. The court concluded that the statute distinguishes between *closure* and *operations* of the facility and that separate mechanisms could be used for each.[58] The court also stated that the closure cost estimate had to be based on the period during the active life of the facility when closing the facility would be most expensive, therefore taking into account operations.[59] The use of liability insurance also indicated financial ability to operate the plant properly.[60] This author notes that the ability to finance damages from *improper operations* would seem to be different from the ability to *properly operate* the facility to avoid those damages; the court seemed confused about the regulations and the financial requirements imposed upon facilities.

The contestants also complained that the TWC did not demonstrate the specific level of risk that financial assurance should cover, but used the standard regulatory amounts, and did not select the financial mechanisms from the list in the regulations that the permittee could utilize. The court found this approach reasonable.[61] The author contends this was appropriate. The ability to adjust the amount of financial assurance and to do so based on site-specific risk is a discretionary ability. EPA and state agencies can rely upon and generally do rely upon the standard amounts found in the federal regulations. With respect to the type of mechanism to meet these requirements, the court indicated that the agency had made a selection.[62] In this regard, the court may have erred by stating that the discretion lies with the agency in determining what financial mechanism may be used. The federal regulations adopted by

57. *Id.* at 260; *see* 40 C.F.R. § 264.142-.147 (1992); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976).

58. 872 S.W.2d at 262.

59. *Id.*

60. *Id.* at 262-63.

61. *Id.*

62. *Id.* at 263.

reference allow the owner or operator to choose from among the list of accepted mechanisms.[63]

g. Various Other Legal and Procedural Challenges to the Agency's Action

A variety of legal and procedural challenges were lodged in the numerous points of error filed with the court of appeals. The contestants believed, based on a Commissioner's statement that he needed to see the results of the "trial burn" to know if the incinerator would work properly, proper determinations had not been made on the record to support issuance of the permit. The court concluded that the findings of fact and conclusions of law were the basis for appellate review of the agency decision and that basis supported the permitting decision.[64] Also, questions asked by one of the commissioners to the staff were not deemed harmful or a denial of due process because they were not outside the evidentiary record and did not involve grounds for the decision.[65]

The court also rejected claims that the agency failed to make a decision based on the relevant statutory factors, to identify the legal criteria relied upon in its conclusions of law,[66] to adopt the hearing examiner's findings of fact and conclusions of law,[67] to provide proper notice,[68] and to base its decision on substantial evidence.[69] A variety of other points of error were denied, including the argument that the commission included post-hearing terms in the permit, and that the agency acted in excess of its authority.

3. Summary Analysis

When considering the 458 points of error raised by the contestants, the numerous points that the court actually reviewed, and the majority it summarily dismissed, it appears that the court was overwhelmed with both the number and complexity of the massive legal assault on the permit. In certain areas the court appeared to be looking for ways to uphold the permit, perhaps because it thought that the contesting parties were simply amassing a legal challenge because they did not want the incinerator in their area (the "NIMBY" or "Not In My Back Yard" syndrome). Furthermore, the agency had taken the bizarre and rare position that its own permitting decision should be overturned. Clearly, the hazardous waste incinerator was a highly controversial facility.

63. *See, e.g.*, 40 C.F.R. § 264.143 (1982) (the owner or operator "must choose from the options as specified in paragraphs (a) through (f) of this section").
64. 872 S.W.2d at 266-67.
65. *Id.* at 278.
66. *Id.* at 266-67.
67. *Id.* at 268-69.
68. *Id.* at 270-71.
69. *Id.* at 271-73.

Obviously, the motivations of the judges may be hard to discern. The court did, however, seem to take a rather deferential approach in reviewing the points of error that made up the challenge to the permit.

III. COMMON LAW ENVIRONMENTAL CLAIMS

A. Recovery for Environmental Damages under a Negligence Theory Requires Proof of Wrongful Inaction or Failure to Exercise Reasonable Care under Relevant Circumstances

Environmental litigation between current and former landowners, neighboring landowners, and landlords and tenants has grown dramatically. Last year's Survey reviewed a case in which a tenant sued a landlord for environmental costs incurred to remedy an environmental disposal site.[70] This year's article reviews a case in which the "table is turned" and the landlord, rather than a tenant, sued for costs of environmental remediation.

In *Sullivan v. Booker*[71] the First District Court of Appeals in Houston upheld denial of relief to the landlord. The decision hinged upon the plaintiffs' failure to establish the defendants' breach of duty to exercise reasonable care.

1. Background

The landlords brought suit to recover, among other things, environmental costs of $260,000 incurred by the landlords because of leaking underground storage tanks.[72] The tenants had purchased a lease and improvements on the landlords' land from the original tenant through a lease assignment and bill of sale. This tenant thereby became the substitute tenant and owner of a closed car wash and two associated underground storage tanks. The tenant vacated the property before the term of the lease expired, and pursuant to the lease, the landlords became the owners of the underground storage tanks. Only after the defendants had vacated the property did the landlords discover that the tanks were leaking.

After trial before a jury, the trial court granted the tenants' motion for judgment notwithstanding the verdict for two reasons: (1) the landlords failed to submit a jury issue on whether the tenant failed to use reasonable care to protect the leased premises, and (2) the tenant did not present evidence to show that the tenant failed to exercise reasonable care.[73]

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70. Scott Deatherage, Caroline M. LeGette and Lisa K. Bork, *Environmental Law, Annual Survey of Texas Law*, 47 SMU L. Rev. 1131 (1994) [hereinafter Deatherage, *1994 Annual Survey*].

71. 877 S.W.2d 370 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

72. *Id.* at 371.

73. *Id.* at 372.

2. Summary of Decision

The appellate court found the first issue to not be fatal. Rule 279 of the Texas Rules of Civil Procedure provides that where issues are omitted they are deemed found by the jury if supported by some evidence.[74] In addition, when the only issue submitted to the jury is damages, omitted elements are deemed found where the damages relate to only one cause of action.[75] Reviewing the landlords' submissions, the appellate court concluded that the issue submitted to the jury only related to negligence; thus, omitted issues could be deemed found if sufficient evidence was presented to support those issues.[76]

The appellate court concluded that the question of sufficiency of evidence was the fatal flaw in the landlords' case.[77] The cause of action against the tenant for failure to use reasonable care to protect the premises constituted a claim for negligent waste.[78] The appellate court found no evidence in the record to show that the tenant's "inaction was wrongful or what actions would constitute reasonable care by a lessee to protect leased premises in a situation such as this."[79]

The evidence on the record only demonstrated what the tenant did not do and that the contamination of groundwater arose from the underground tanks. The tenant testified that he

1) did not feel it necessary to conduct an environmental study to find out the status of the underground tanks,
2) did not take any action to remove the tanks,
3) did not take any action to test the soil or underground water,
4) did not do any testing to determine if the tanks had leaked, and
5) did not take any action at all to protect the environment in regards to the underground storage tanks.[80]

The landlords offered expert testimony on the cause of the contamination. The landlords' expert testified that testing had been performed on the premises, that leaks existed in the tanks, and that, in their opinion, the groundwater contamination originated from those tanks.[81]

In short, the appeals court ruled that no evidence had been submitted that the tenant's "inaction was wrongful or what actions would constitute reasonable care by a lessee to protect leased premises *in a situation such as this*."[82] Without such evidence, the appeals court held that the trial court could not deem the omitted elements of negligence found by the jury under Rule 279 of the Texas Rules of Civil Procedure.[83]

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74. TEX. R. CIV. P. 279.
75. 877 S.W.2d at 372 (citing Ramos v. Frito-Lay, 784 S.W.2d 667, 668 (Tex. 1990)).
76. *Id.*
77. *Id.*
78. 877 S.W.2d at 372.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* (emphasis added).
83. 877 S.W.2d at 372.

3. Analysis

Sullivan presents an ambiguous holding. The ambiguity arises because of the somewhat unique facts of the case and the terse rationale for the opinion. The facts are unique in that the tenant took possession of the real property with the tanks *in place* and *out of use*. Thus, the question of what reasonable care should have been exercised may have been limited to a person, in the court's words, "in such a situation."[84] This could be contrasted with a different case in which the tenant operated the tanks. The ambiguity could have been removed if the court would have elucidated its opinion. The court, however, only stated that evidence was not presented on what care should have been exercised without clarifying whether the duty would differ if the defendant had actually used the underground tanks. Based on the ambiguity, the precedential value of the case is unclear.

In recent years, the Environmental Protection Agency created regulations governing underground storage tanks. In Texas, this program has been delegated to the Texas National Resource Conservation Commission, which has promulgated its own underground storage tank regulations.[85] Failure to comply with such regulations may have subjected the second tenant in the *Sullivan* case to a negligence per se claim. At the same time, the landlords would have to have proven the tenant failed to comply with the applicable regulations. The failure to remove the tanks and monitor or remedy groundwater contamination may have violated the regulations since the underground tanks became the property of the second tenant.

This case demonstrates again how the common law responsibilities for owning property, here underground storage tanks as opposed to asbestos-containing waste, have been significantly changed through the enactment of environmental legislation and the promulgation of environmental regulations.

B. Environmental Trespass and Temporary Injunctions

Another case decided by the courts of appeals in Texas addressed environmental torts. In *City of Arlington v. City of Fort Worth*[86] the two cities became engaged in litigation over sludge from a drinking water treatment plant. The main issue in the case was whether the City of Fort Worth (Fort Worth) could obtain an injunction to prevent what it contended was the wrongful action of the City of Arlington (Arlington).

1. Background

The basis of the action was Arlington's continued discharge of water treatment sludge into Fort Worth's wastewater treatment plant.

84. *Id.*
85. 30 Tex. Admin. Code §§ 334.1 - . 510 (West 1994).
86. 873 S.W.2d 765 (Tex. App.—Fort Worth 1994, writ dism'd w.o.j.).

The history of Arlington's discharge is long. The only permitted wastewater treatment plant in the relevant region, which includes western Arlington, is operated by Fort Worth. In 1966, Fort Worth and Arlington entered into an agreement whereby Fort Worth would accept the sewage from Arlington into its lines and treat that sewage in Fort Worth's treatment plant. From 1966 until 1972, Arlington discharged its treatment sludge into a creek, at which time the Federal Clean Water Act made that action illegal. Subsequent amendments to the 1966 contract between the two cities allowed Arlington to discharge this sludge instead to the Fort Worth sewage system.

The last decade has not been one of warm relations between the two cities. Fort Worth attempted to negotiate higher fees for sewage treatment. These negotiations ultimately broke down and Fort Worth notified its neighboring city that it would not extend the treatment contract beyond its term that ends in the year 2001. Arlington responded by filing a declaratory judgment action, which it ultimately lost.[87] At about that time, Fort Worth terminated by notice, as allowed under the amendments to the treatment contract, Arlington's ability to discharge the treatment sludge. Arlington continued to discharge and report the amount to Fort Worth, which continued to bill for the discharge. In 1992, Arlington ceased reporting, but Fort Worth discovered a few months later that Arlington was continuing to discharge the sludge.

The result was this case. Fort Worth filed suit to enjoin Arlington's discharge and to recover damages for treatment services unwillingly provided and for payment not received. Fort Worth claimed that Arlington's discharge of sludge constituted a trespass. The trial court issued an injunction to prohibit Arlington from continuing the discharge.[88]

2. *Summary of Decision*

In reviewing the standard for granting a temporary injunction, the court of appeals in Fort Worth stated that such a remedy is extraordinary and should be carefully granted.[89] As an appellate court, it determined that the trial court's issuance of the injunction is an abuse of discretion unless the applicant clearly establishes that it would be threatened with an actual, irreparable harm if the temporary injunction were not granted.[90] On the other hand, the appeals court resolved that it could only overrule the trial court's decision if it constituted a clear abuse of discretion.[91]

Having established the proper standard of review, the appeals court turned to the facts of the case before it. The point of error addressed was

87. City of Arlington v. City of Fort Worth, 844 S.W.2d 875, 877 (Tex. App.—Fort Worth 1990, writ denied).
88. 873 S.W.2d at 767.
89. *Id.* at 768.
90. *Id.*
91. *Id.*

whether the temporary injunction maintained or altered the status quo. The court ruled that the status quo to be maintained is "the last, actual, peaceable, noncontested status which preceded the suit."[92] The court identified this status to be the discharge by Arlington before the amendments to the discharge agreement were terminated by Fort Worth.[93] Fort Worth contended that the discharge was illegal, but the court concluded that the question of legality was the central issue of the suit. Thus, if a temporary injunction were proper, this would be the status that should be maintained by the trial court.

Turning to the issue of actual, irreparable harm, the appeals court reviewed Fort Worth's assertions. Fort Worth claimed that (1) it was not receiving treatment fees for the sludge, (2) its ability to borrow was reduced, and (3) its sludge drying beds were filling up. As to the first assertion, the court ruled that this matter could be addressed by monetary relief.[94] The second issue was held to be too speculative.[95] Finally, the court determined that based on the fact that Arlington's sludge accounted for only 1.2% of the system's total sludge intake, the irreparable harm issue could not be proved, at least during the pendency of the trial.[96]

Fort Worth argued, however, that a continuing trespass may be enjoined even *absent* an actual, irreparable harm. The appellate court agreed that a trespass may occur through allowing something to cross relevant property boundaries on, beneath, or above the surface of the earth.[97] While agreeing that a permanent injunction may ultimately be appropriate, the court held that a *temporary* injunction could only be issued where an actual, irreparable harm is shown.[98] The court ruled that Fort Worth could be made whole through the award of monetary damages for any injury occurring during the pendency of the trial.[99] Thus, the court reversed the trial court, dissolved the temporary injunction, and remanded the action to the trial court.

IV. TEXAS CLEAN AIR ACT

A. Trial Court's Decision that the Odors from a Concentrated Animal Feeding Lot Met the Local Normality Test was Held to be Supported by Sufficient Evidence

After several years of litigation and appeals, the F/R Cattle Company, Inc. (F/R Cattle Company) has won decisions holding that the air emis-

92. *Id.*
93. 873 S.W.2d at 767.
94. *Id.* at 770.
95. *Id.*
96. *Id.* at 769.
97. *Id.*
98. *Id.* at 770.
99. *Id.*

sions from its concentrated animal feeding lot are not subject to air emissions permitting under the Texas Clean Air Act (TCAA).[100]

1. *Background*

The trial court originally ruled that the lot was normal, usual, and natural for the area and locality and thereby fit within the exception from the definition of pollutant under the TCAA for "natural processes."[101] The appeals court in Eastland reversed the district court, holding such a concentration of animals was abnormal, but the Texas Supreme Court reversed that decision and adopted the legal test utilized by the trial court.[102]

2. *Summary of Decision*

The issue on remand from the supreme court to the appeals court was whether sufficient evidence had been presented by F/R Cattle Company to demonstrate whether (1) the cattle feeding operation was "normal, usual, and natural for the 'area and locality' " and (2) whether "the odor produced by the facility was normal and usual for the vicinity."[103]

In reviewing the record, the appeals court noted that the facility was the only one of its kind in Texas, but that it was located near surrounding dairies and in Erath County where numerous dairies are found. In fact, these dairies were the source of the calves at the feeding lot and were returned to the dairies after achieving a given size.

The remainder of the evidence was directed to the similarity and degree of offensiveness of the odor produced by the feeding lot versus the dairies, and the relative amount of manure produced by the two types of operations.

The Texas Air Control Board representative and local residents testified that the feed lot produced a much worse smell while the operating manager of the feed lot testified that the smell from both was equally bad. A consulting engineer testified that the relative amount of manure *produced by calves* at the feeding lot would be about the same as that produced by *full-grown cows* at an average size dairy in the area.

The court of appeals on remand was constrained by the supreme court's decision. The court of appeals had to apply the local vicinity rule. In applying that legal rule the court was also constrained by the sufficiency of evidence level of review of the trial court's evidentiary decision. Having reviewed the evidence, the court determined that it was compelled to sustain the trial court's ruling that the odor was consistent with other odors in the area from dairy operations.[104]

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100. State v. F/R Cattle Co., 875 S.W.2d 736 (Tex. App.—Eastland 1994, n.w.h.).
101. TEX. HEALTH & SAFETY CODE ANN. § 382.003(2) (Vernon 1992).
102. 875 S.W.2d at 736 (citing F/R Cattle Company, Inc. v. State, 866 S.W.2d 200 (Tex. 1993); *see* Deatherage, *1994 Annual Survey*, *supra* note 70, at 1138-39.
103. *Id.* at 736.
104. *Id.* at 738.

3. Analysis

The ultimate result defies logic. As I discussed in last year's environmental Survey, the result of the interpretation of the term "natural processes" in the Texas Clean Air Act is that the more human activity interferes with natural processes, the less likely it will be considered "unnatural" and the less likely the State may be able to regulate the associated emissions or odors under the Texas Clean Air Act.[105] The ability of the State to assist persons aggrieved by odors emanating from dairies, feeding lots, and similar operations may be very limited. Perhaps, the ability to bring nuisance actions will allow such persons at least some legal recourse against the parties responsible for the odors.

V. CONCLUSION

The cases discussed in this year's Survey raise various interesting points interpreting both statutory and common law issues governing protection of the environment. The most interesting is perhaps the discussion of the definition of property in the *Moore* case as it relates to the regulatory jurisdiction of the Texas Railroad Commission.[106] The outcome of the court's discussion of this issue demonstrates that property in a modern society connotes not just "property rights" but also "property responsibilities." This is particularly interesting at a time when public commentators and politicians speak of the "Property Rights Movement." The reality may well be that rights associated with property must be protected, yet the responsibilities associated with that ownership must be enforced.

This conflict is most clearly illustrated by the *Houston Chemical Services* case and the *F/R Cattle Company* case.[107] In the former case, residents and local cities were fighting the permitting of a solid and hazardous waste incinerator. In the latter case, the Texas Air Control Board was attempting to regulate the odors of a cattle feeding lot and its impact on the local residents. The other two cases discussed in this year's Survey involve common law claims by parties who claim others have violated duties to protect them from environmental harm.[108]

These cases demonstrate how environmental protection is not just protection of nature itself, but the economic interests of others. They also illustrate that the conflict between protection of one's own rights and freedoms to use and dispose of property and the duty to ensure that such action does not adversely affect other individuals or society more broadly will no doubt continue apace. How this conflict is resolved in particular cases will provide interesting discussion in this and future Surveys of environmental law in Texas.

105. TEX. HEALTH & SAFETY CODE ANN. § 382.001 *et seq.* (Vernon 1992 & Supp. 1994).
106. *See* Part II.A.1., *supra.*
107. *See* Parts II.B. & IV.A., *supra.*
108. *See* Parts III.A. & III.B., *supra.*