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Who Owns Groundwater?

BY JUDON FAMBROUGH

The January 2000 issue of *Tierra Grande* contained an article by Center Research Economist Charles Gilliland on marketing and selling groundwater. Gilliland pointed out that Texas still adheres to the rule of capture regarding groundwater ownership, citing the recent Texas Supreme Court decision of *Sipriano v. Great Spring Waters of America, Inc., 42 Tex. Sup. Ct. J. 629 (1999).*

While landowners may have heard of the rule of capture, not all understand its legal implications. Most landowners believe they **own** the water beneath their property, but nothing could be further from the truth.

The *Sipriano* case gives a comprehensive overview of the rule of capture and the reasons the high court continues to follow it. The court summarized the rule by stating, "The rule of capture essentially allows, with some exceptions, a landowner to pump as much groundwater as the landowner chooses, without liability to neighbors who claim that the pumping has depleted their wells."

This sometimes is referred to as the Big Pump Theory. That is, the landowner with the biggest pump gets most of the water without liability for draining the neighbors' water supply.

But what are the exceptions? According to the court, a landowner may not maliciously take water for the sole purpose of injuring a neighbor or wantonly and willfully wasting it. In 1978, the high court added another exception in *Friendswood Development Co. v. Smith-Southwest Industries, Inc., 576 S.W. 2d 21.* Specifically, a landowner is liable for the subsidence on another's land caused by the negligent withdrawal of groundwater.

Why did the court refuse to overturn the rule of capture? After the droughts in 1910 and 1917, the citizens of Texas enacted Section 59, Article 16 of the Texas Constitution, which states, "The conservation and development of all the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the **Legislature shall pass all such laws as may be appropriate thereto.**" (Emphasis added). Section 59, Article 16, along with Texas Water Code Section 36.116, grants authority to districts created in the state to "provide for the spacing of water wells" and "regulate the production of water wells."

Thus, water regulation is essentially a legislative function. The 1917 constitutional amendment imposed on the legislature, not the courts, the duty to regulate groundwater. The high court followed this rationale in *Barshop v. Medina County Underground Water Conservation District, 925 S.W. 2d 618 (1996),* which upheld the constitutionality of the Edwards Aquifer Act. More recently, Texas voters approved Senate Bill 1, which represents, among other things, another legislative effort to manage groundwater by streamlining the process for creating groundwater conservation districts.

Texas property owners do not own the water beneath their land. They own the right to search (drill) and to produce (capture) if found. Borrowing from the rules governing oil and gas production, there may be other limitations to drilling and production rights as well.

To avoid liability for drainage, oil companies must drill from a legal location based on spacing rules set by the Texas Railroad Commission (TRC). Effective December 18, 1996, Title 30 of the Texas Administrative Code, Section 238.44, sets state-wide spacing requirements for water wells. See *Letter of the Law,* Volume 12, No. 2, for details. In all probability, these state-wide rules will either be superseded or augmented by spacing requirements set by groundwater conservation districts.

Oil companies also must produce within the allowed withdrawal rates set by the TRC for each well. While statewide rules currently do not limit withdrawals from water wells, groundwater conservation districts have the authority to impose such limits.

The establishment of groundwater conservation districts and the imposition of spacing requirements and pumping limits on water wells may clash with a long-established rule allowing oil companies to use as much water as is reasonably necessary to explore for and produce oil and gas, especially where water is used for waterflood projects. Two public policies, one to enhance oil and gas production, the other to conserve the state's natural resources, will collide.

Groundwater and groundwater conservation districts are important to Texas. Justice Nathan L. Hecht, in a concurring opinion with Justice Harriet O'Neil in the *Sipriano* case, points out that in the 50 years since the legislature authorized the creation of groundwater conservation districts, only 42 such districts have been created. The reason is not lack of groundwater, for 29 acquifers underlie 81 percent of the state. In 1992, groundwater supplied 56 percent of all water used in the state, meeting 69 percent of agricultural needs and 41 percent of municipal needs.

For now, the Texas Supreme Court feels it would be improper to intercede by changing the common-law framework that includes the rule of capture. The more prudent approach, according to the court, is to wait and see if Senate Bill 1 has its desired effect.

Environmentalists and Landowners Unite

UPDATE UPDATE UPDATE

Apparently environmentalists and landowners have joined in a common cause against low-flying aircraft. In a suit filed in January 2000, a coalition of environmentalists, outdoorsmen and rural landowners sued the Air Force, seeking to suspend low-level training flights. The coalition wants the Air Force to complete a broad environmental study of the impact training flights have on wildlife, tourism and other economic activities.

Negligence Per Se and Rental Property

The term *negligence per se* is not familiar to most real estate practitioners. However, the term and concept influence the liability of owners and managers of rental property, especially when the property is located within a municipality.

The concept (sometimes referred to as "negligence as a matter of law") originated in the English common law. A violation of a statute or ordinance results in a conclusive presumption of negligence if:

- the injury is the type the statute or ordinance seeks to prevent,
- the plaintiff is a member of the group or class the statute or ordinance seeks to protect and
- the violation of the statute or ordinance is the proximate cause (producing cause) of the injury.

In 1985, the Texas Supreme Court was asked to decide whether a violation of a city ordinance constituted *negligence per se* in a personal injury case *(Nixon v. Mr. Property Management Co., 690 S.W. 2d 546).* The defendant owned a vacant apartment complex. The plaintiff, a ten-year-old girl, was abducted outside another apartment building, dragged across the street and raped inside the defendant's vacant building.

The city ordinance required property owners to keep doors and windows of vacant structures securely closed to prevent unauthorized entry. The plaintiff (the rape victim) contended that violation of the ordinance resulted in a conclusive presumption of negligence that caused her injury.

The trial court agreed and granted her a summary judgment. The Texas Supreme Court, after listening to the appeal, ruled the defendant's act was *negligence per se*. However, the case was sent back to the trial court for a jury to decide whether the violation was the proximate cause of the rape.

On April 1, 1999, the Houston Court of Appeals decided another controversy involving rental property and the violation of a city ordinance (*Osti v. Saylors, 991 S.W. 2d 322).* Four members of a family died in a fire. The family lived on the third floor of an apartment. The survivors sued the owner for wrongful death alleging the violation of the city ordinance regarding fire escapes was *negligence per se*.

The apartment owner asked for and received a summary judgment. The court of appeals reversed and remanded the matter for trial.

In analyzing the case, the appellate court noted that lessors (apartment owners and landlords) generally have no duty to tenants or their invitees for dangerous conditions on the leased premises. However, the rule does not apply to portions controlled by the landlord. (See Restatement [Second] of Torts Section 361). The landlord remains responsible for "the maintenance of walls, roofs and foundation of an apartment house or office building . . . [and] to any other part of the land the careful maintenance of which is essential to the safe use of the rooms . . . ."

In this instance, the landlord retained control of the part of the premises necessary for a safe exit. The landlord "did not expect his tenants to build a safe fire escape" or jump 16 feet to escape a fire.

The court then examined whether the violation of the city's fire escape ordinance imposed a standard of conduct on the landlord creating *negligence per se*. The court held that it did, and the tenants fit in the class of persons the statute sought to protect.

Consequently, the plaintiffs could assert *negligence per se* in their lawsuit when the trial began. It would be up to a jury to decide whether the violation was the proximate cause of the deaths.

These cases are important because the violation of an ordinance may expose landlords and owners to greater liability than just municipal fines.

Case Notes and Comments

Delinquent Family Support Payments in Bankruptcy

Letter of the Law, Vol. 13, No. 2, reported the case of *In Re Lil' Things*. The Northern District Federal Bankruptcy Court in Texas held that the federal bankruptcy law pre-empted the Texas law prohibiting assigning or subleasing of premises without the landlord's prior consent.

Now, the Fifth U.S. Circuit Court of Appeals has been asked to resolve another contradiction between state and federal law.

A couple (the debtors) filed for bankruptcy in 1987. They claimed an exemption under Texas law for their homestead valued at $500,000.

The former wife obtained a judgment from the bankruptcy court for $250,000 for delinquent alimony, child support and maintenance payments, which are not dischargeable in bankruptcy (11 U.S.C. Section 523 [a][5]).

To enforce the judgment, the former wife sought to foreclose on the debtors' homestead. The bankruptcy court and the district courts would not allow foreclosure because the bankruptcy code (federal law) did not pre-empt Texas law on this question. The issue was brought to the Fifth U.S. Circuit Court of Appeals for resolution.

The federal appellate court agreed that federal law did not pre-empt Texas homestead law and that the former wife could not foreclose on the debtors' homestead. Exempt property is not liable for debts that survive bankruptcy. The former spouse must look to other collection rights under Texas law. *In the Matter of Davis, No. 95-11112, Fifth Circuit, 3/18/99.*

This case, involving Cullen Davis, is apt to be appealed to the U.S. Supreme Court. The First U.S. Circuit Court of Appeals held that Massachusetts' homestead law was pre-empted by the federal bankruptcy law in a similar situation.

Currently, Texas Republican Senator Kay Bailey Hutchison is battling a change to the federal bankruptcy code that would overturn the amount of Texas homestead property exempt in bankruptcy.

Texas debtors can claim as many as ten acres in an urban area or as many as 200 acres in rural areas but not both. The exemption is based on the amount of land, not value.

The proposed senate bill would base the amount on value, not area. The homestead exemption would be capped at $100,000. An earlier version of the bill passed by the house capped the homestead exemption at $250,000.

On February 2, 2000, the senate passed the proposal with the $100,000 cap. Critics termed the unlimited homestead exemption as an unfair loophole for wealthy deadbeats, citing actor Burt Reynolds, who kept his $2.5 million Florida estate after filing for bankruptcy, as an example.

Presently, Senator Hutchison seeks a compromise between the senate and house versions. She wants to give each state an option to drop the federal homestead cap, if the state passes a new law to do so. "I'm just going to make every

effort to protect Texas' Constitution. It's worked for 130 years, and there's no reason to change it."

Texas Republican Senator Phil Gramm favors a measure that disqualifies the homestead protection for anyone who buys a home within a year of filing for bankruptcy. "I am not in favor of somebody stopping by the real estate office and buying a $10 million house on their way to the lawyer to declare bankruptcy," he said.

Inspections and Property Disclosure Statements

Interaction between a sellers' disclosure statements and the liability of professional inspectors has sparked an ongoing controversy in Texas residential sales. Does an inspection supersede and supplant the sellers' duty to disclose known defects? What is the sellers' proper response once a problem is discovered by an inspection?

Decisions in four Texas cases involving residential sales fell into two categories. In the first, the sellers did not disclose a known defect, and the inspector found the problem. In the second, the sellers did not disclose a known defect, and the inspector failed to find the problem.

The leading case in the first category is *Dubow v. Dragon, 746 S.W. 2d 857 (1988).* A faulty foundation was discovered and analyzed by repeated inspections. The prospective buyers ultimately purchased the house after the sellers lowered the price and a new contract was negotiated.

The new contract contained the following language: "After careful inspection of the house, and based solely on that inspection, the buyers feel the house will need repairs or on-going maintenance as indicated by the attached inspection report. The buyers agree to take the home AS IS, WITH ALL CONTINGENCIES REMOVED." The appellate court held the agreement insulated the sellers from liability when later sued for the foundation problem.

In *McFarland v. Associated Brokers, 977 S.W. 2d 427 (1988),* a defective roof was discovered by an inspector. The sellers probably knew of the problem, because water had been leaking into light fixtures. The sellers agreed to repair the roof and include a one-year warranty on the workmanship. When the roof leaked six months after closing, the buyers sued.

The appellate court ruled the case should go to trial, distinguishing this case from *Dubow*. In *Dubow*, the buyer expressly agreed to rely solely on the inspection after renegotiating the contract and reducing the price. No contract renegotiation or price reduction occurred in *McFarland*.

In the second category, *Kessler v. Fanning, 953 S.W. 2d 515 (1997),* the sellers failed to disclose a chronic drainage problem. The inspector avoided liability by testifying that "the inspection did not include the surrounding yard and its drainage." The sellers were held liable, not the inspector.

In the most recent case, *Blackstock v. Dudley, Amarillo Court of Appeals, No. 07-99-0117-CV, 12/30/99,* the sellers (Blackstocks) failed to disclose a severe plumbing problem. The buyer's inspector failed to find the problem. After closing, the problem surfaced.

When sued, the sellers alleged that the inspection superseded any failure on their part to disclose, citing *Dubow*. The court distinguished the *Dubow* case primarily because the defect was discovered by the inspector in that case. That was not the case in *Blackstock*.

What can be gleaned from these cases?

- An inspection never relieves the seller of the obligation to disclose a known defect.
- So far, no cases have held the inspector solely liable for failing to discover a defect. (The deep-pocket theory may bear considerably on this observation.)
- Attempting to fix a problem discovered during an inspection does not relieve the seller of liability unless the property price is lowered and the contract modified using the language found in *Dubow.*

"For All Purposes"

Real estate practitioners may have read legal descriptions that reference prior deeds "for all purposes." Initially, attorneys did not want to retype a rather long, detailed legal description and simply referenced prior deeds "for the legal description only."

However, some attorneys for unknown reasons began referencing the prior deeds "for all purposes," not just for the legal description. Texas courts noted the difference and decided some cases that drastically curtailed the practice. Today, the only attorneys who reference prior deeds "for all purposes" are either smart and want to use the case law to their advantage or totally ignorant of the problems created by the wording.

The leading case is *Harris v. Windsor, 294 S.W. 2d 798,* decided by the Texas Supreme Court in 1956. Windsor sold land to Harris and reserved three-eighths of the minerals. The legal description cited a prior deed from the Federal Land Bank and stated that references were made "for all purposes."

That deed, in turn, referenced yet another deed "for all purposes" where the seller in the chain of title reserved one-half the minerals. Thus, at the time of sale, Windsor owned all the surface and one-half the minerals.

Harris contends that the references "for all purposes" were limited to the legal description, not the entire deed. Furthermore, the wording of the deed entitled Harris to five-eighths of the minerals, leaving Windsor liable for breach of warranty for the remaining one-eighth.

The Texas Supreme Court disagreed, stating the reference "for all purposes" is not limited to the legal description. Furthermore, by referencing the prior deed in which one-half the minerals were reserved "for all purposes," Windsor placed Harris on notice of the extent of Windsor's mineral ownership. Thus, Harris received the difference between half the minerals owned by Windsor prior to the conveyance and the three-eighths reserved by Windsor in the conveyance.

Based on this and other Texas cases, references to prior deeds "for all purposes" must be taken literally and not limited to descriptive purposes only. The grantee must examine the referenced deeds to determine the extent of their present interests and limits of ownership.

Buyers should be wary when the reference appears in deeds.

Waiving the Implied Warranty of Habitability to Buy a Home?

A San Antonio attorney, Bryan Woods, is pursuing a class action against a homebuilder. He says the builder is forcing buyers to waive the implied warranties of good workmanlike construction and habitability in an effort to save millions in repair costs.

"New builders try to convince people that their one-year warranty is it. And after that . . . they have to seek another warranty. And, of course those companies try to deny coverage. Untold thousands of homeowners are going out of pocket and fixing things they shouldn't be fixing."

On November 17, 1999, the San Antonio Court of Appeals held the practice unenforceable. A builder cannot cause a homeowner to waive the implied warranty of habitability and workmanlike construction, *Buecher v. Centex Homes, (04-99-00337-CV).*

In the case of *Humber v. Morton, 426 S.W. 2d 554 (1968),* the Texas Supreme Court ruled that new homes carry these implied warranties. Furthermore, in *Melody Home Mfg. Co. v. Barnes, 741 S.W. 2d 349 (1987),* another Texas Supreme Court case, the court held that a waiver of the implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is against public policy. In the present case, the appellate court applied the non-waiver rationale to new construction. The court also held that the Residential Construction Liability Act found in Chapter 27 of the Texas Property Code, initially drafted to be the sole means of recovery for a construction defect, did not supplant these implied warranties.

Noise: a Nuisance?

A unique thing about noise is that it is rarely recoverable in condemnation. In *Felts v. Harris County, 915 S.W. 2d 482 (1996),* reported in Volume 10, No. 3, of *Letter of the Law*, the landowners were unable to recover damages because noise is common to the community, not special to a particular landowner. However, the Fifth U.S. Circuit Court of Appeals may have forged an independent avenue of recovery apart from condemnation in *Rushing v. K.C. Southern Railway Co., 185 F. 3rd 496 (1999).*

The plaintiffs purchased a home along the K.C. Railway Company line. Years later, a switchyard (a hub for attaching and detaching railcars) was built 50 feet from their property. The plaintiffs sued, alleging a nuisance because of the noise and vibrations from the coupling and decoupling of cars and the whistling from locomotives.

The lower court dismissed the complaint because the noise levels were within the federal Noise Control Act, 42 U.S.C. Section 4901 requirements. Compliance with this and the Federal Rail Safety Act of 1970, 49 U.S.C. Section 20101, pre-empted the plaintiffs' nuisance claim.

On appeal, the Fifth Circuit Court reversed and remanded the case, ruling that unless the federal noise statutes established specific standards for railway cars and locomotives, there is no preemption. The plaintiffs' claim for vibrations could, therefore, proceed in the absence of a showing that the noise control statute directly correlates vibrations and decibels.

> ***". . . if a matter is not specifically and literally addressed by federal statute, the court will allow the state claim to proceed."*** **—Texas Environmental Compliance Update**

The following is the *Texas Environmental Compliance Update*'s analysis of the case. "Under the Fifth Circuit's reasoning, if a matter is not specifically and literally addressed by federal statute, the court will allow the state claim to proceed. This should be considered in those situations in which regulated facilities seek to use compliance with a permit as a defense to common-law claims for negligence or nuisance pollution conditions."

Letter of the Law, Volume 13, No. 2, reported a similar case in which a cell phone tower was found to be a nuisance even though it complied with all laws and ordinances.

In another lawsuit against the K.C. Southern Railway, *Crowson v. Kansas City Southern Railway Co., Eastland Court of Appeals, No. 11-98-00236-CV, 12/8/99,* an employee sued for personal injuries. During deliberations, a juror brought in a textbook formula for determining discounted cash flows. The jury wanted to know the discounted value of the plaintiff's lost future wages.

K.C. Southern Railway asked for a new trial because of jury misconduct. The trial court denied the motion. On appeal, the denial was affirmed.

In *Bobbie Brooks, Inc. v. Goldstein, 567 S.W. 2d 902*, the Eastland Court of Appeals held that the use of a calculator was not misconduct justifying a new trial. By the same token, the use of the discount formula did not constitute an outside influence necessitating a new trial either.

A Licensed Witness Update

Letter of the Law, Volume 13, No. 4, contained a synopsis of the current law addressing qualifications needed to testify as an expert witness in a real-estate-related case. No real estate license is required under the current law. However, the witness must be qualified and possess relevant and reliable evidence.

A statute passed by the 76th Legislature, HB 2617, effective September 1, 1999, may have changed the rule. The house bill amends the Texas Private Security Act, Article 4413 (29bb) of the Texas Civil Statutes. It provides "any person who . . . accepts employment to obtain or furnish information with reference to . . . the cause or responsibility for fires, libel, losses, accidents, *damages*, or injuries to persons or *to property*, or securing evidence to be used before any court . . . is . . . required to be licensed as a private investigator."

While the Texas Commission on Private Security states that the new law does not apply to real estate appraisers, the issue has not been resolved by a court.

Title Company's Versus Abstractor's Offices?

Effective November 4, 1997, Texas voters approved the constitutional amendment authorizing home equity loans and making procedural changes to home improvement loans. (See Center publication No. 1200 for more details.) For both types of loan, the contract for the work and material must be signed in the lender's, attorney's or title company's office.

Recently, the Austin Court of Appeals was asked to decide if there was a difference between an abstractor's office and a title company's office for closing on a home improvement loan (*Room With a View v. Private National Mortgage Assn., Inc. [03-99-00231-CV]).* The primary difference between an abstractor's office and a title company is that an abstractor's office cannot issue a title policy.

The appellate court held that an abstractor's office did not meet the constitutional requirement. The court also held that the amendment was not unconstitutionally void for vagueness and did not violate a person's right to travel or not to travel.

Good Samaritans and Premise Liability

Texas passed The Good Samaritan Act (Sections 74.001 and 74.002 of the Texas Civil Practice and Remedies Code) in 1985. In part, the law protects non-medical personnel from civil liability for rendering medical care at the scene of an emergency. It does not extend protection to those who render care in a willfully or wantonly negligent manner.

Unfortunately for the Texas Parks and Wildlife Department (the department), a similar statute does not extend protection to premise liability.

Two people drowned on a stretch of the Pedernales River during a flash flood. The victims' beneficiaries sued the department for wrongful death even though the department did not occupy or control that section of the river. Apparently, the department undertook the installation of an early flood warning system along the river in response to prior drownings. Posted signs told visitors to leave when the siren sounded.

On the day of the drownings, the siren malfunctioned and did not sound.

The plaintiffs contend that the posted signs encouraged visitors to rely on the siren for early warning of a dangerous condition. The reliance caused their deaths.

Because of improper jury instructions, the case was remanded for trial. However, the appellate court ruled that when a party does not own, occupy or control premises, the party may nevertheless owe a duty of care to visitors if it attempts to make the premises safe. On retrial, the jury can be instructed concerning the department's attempt to make the area safe for park visitors.

The case serves to warn individuals or organizations that may undertake similar projects.

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