UNCOMFORTABLE NEIGHBORS: OPERATIONS IN THE NEIGHBORHOOD – THAT'S NOT A NUISANCE, RIGHT?

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Gene Nettles extensive litigation practice focuses on all types of energy disputes, ranging from gas purchase contract interpretation, preferential rights issues, removal of operators, interpretation over joint operating agreements and exploration agreements, gas plant accounting issues, royalty disputes, take or pay disputes, and more.

As lead counsel in civil and criminal matters, Gene has tried more than 125 jury trials representing the State of Texas, corporations (publicly and closely held) and individuals in complex litigation in the state and federal district courts in Texas and elsewhere in the United States, as well as representing clients in arbitration, mediation and other forms of alternative dispute resolution. Throughout his career Gene has also handled appeals to the Texas Courts of Appeals and the Texas Supreme Court.

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TABLE OF CONTENTS

UNCOMFORTABLE NEIGHBORS: OPERATIONS IN THE NEIGHBORHOOD – THAT'S NOT A NUISANCE, RIGHT?

The oilfield has always been marked by tension – tension between competing operators; tension between mineral and surface estate owners; and, recently, tension with nearby homeowners and landowners. An operator must carefully balance its own interest in exploring and producing minerals with the interests of these uncomfortable neighbors. Failure to do so may lead to expensive lawsuits where the operator faces claims for nuisance, unreasonable use of the surface, negligence, and trespass, among others. This paper deals with these issues in the context of three larger topics: (i) nuisance, (ii) surface use, and (iii) subsurface trespass claims. It aims to provide operators a reference for relevant Texas case law as well as a basic guide to defending against such claims.

I. NUISANCE CLAIMS IN OIL AND GAS CASES

A. Introduction and a Case Study

The already confusing history of nuisance law in Texas fares no better in cases involving oil and gas operations in proximity to residential areas. Given the increase in shale drilling and population, more and more scenarios arise wherein oil and gas operations abut residential homes and even entire neighborhoods. The technical nature of oil and gas operations, the public policy favoring oil and gas exploration in Texas, and the legal quagmire surrounding nuisance law come together to create even more uncertainty. This section addresses both the elements needed to establish a nuisance claim and areas of debate over the application of nuisance law to oil and gas operations.

Recently, this Author represented an oil and gas exploration and production company in a lawsuit entitled *Gonzalez v. Fidelity Exploration and Production*, in federal court, in McAllen, Texas, where several of these issues were in dispute. In that case, the plaintiffs were individuals occupying 79 households in a subdivision in Penitas, Texas. From 2010 to 2012, the defendant drilled and completed several wells on two of its leases, one which sat directly west of the subdivision and one upon which the plaintiffs' homes were actually situated. The plaintiffs filed suit complaining that the oil and gas operations caused dust, odors, lights, noise, and vibrations that interfered with their use and enjoyment of their homes. Their claims sounded in nuisance and negligence theories.

The case led to a flurry of motion practice. For example, the court granted the defendant's motion to strike the plaintiffs' complaint with respect to unidentified individuals mentioned generally as household occupants but not by name. Additionally the defendant filed two motions for summary judgment on issues of causation. The case resolved through settlement prior to trial. These and other related concepts are discussed herein.

B. *Crosstex* – Where We are Today

In 2016, the Texas Supreme Court attempted to clarify nuisance law relative to oil and gas operations, in *Crosstex North Pipeline, L.P. v. Gardiner*. 505 S.W.3d 580 (Tex. 2016). The Supreme Court, recognizing the near impossible task of providing a clear standard for the wide array of nuisance cases, echoed that the word nuisance "has meant all things to all people[,]" which led Dean Prosser "to declare nuisance as the law's 'garbage can.'" *Id*. at 587. In an attempt to clean up this garbage can, the Texas Supreme Court defined "nuisance" not as a reference to a defendant's conduct, a legal claim, or cause of action, but rather as a type of legal injury involving interference with the use and enjoyment of one's property. *Id.* at 588. It further clarified that a defendant can be liable for causing a nuisance if it intentionally or negligently causes it or, under limited circumstances, causes it by engaging in abnormally dangerous or ultra-hazardous activities. *Id.*

Crosstex presented the Court with a case wherein the plaintiffs brought a private nuisance claim against Crosstex, who operated a compressor station adjacent to their ranch. *Id.* The plaintiffs complained of "injuries" such as vibrations and noise emanating from the station. *Id.* at 589. The jury agreed with the plaintiffs that the station constituted a nuisance and awarded them over $2 million in damages. *Id.* at 590. On appeal to the Texas Supreme Court, the Court took up the task of providing clarity to Texas nuisance law. *Id.* at 587-88.

First, the Supreme Court noted its previous holding that a nuisance can include such things as "water, stones, rubbish, filth, smoke, dust, odors, gases, noises, vibrations and the like." *Id.* at 592 (quoting *Gulf, C. & S.F. Ry. Co. v. Oakes*, 58 S.W. 999, 1001 (Tex. 1900). Such conditions are uniformly present at any oil and gas drilling site, which begs the question of whether every drilling site, if observed by private landowners, constitutes a nuisance. Relying on prior precedent, the Court held that "[a] 'nuisance' is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it." *Id.* at 593-94.

The Court clarified the elements of a successful nuisance claim, which requires proof that:

(1) the plaintiff had an interest in the land;
(2) the defendant interfered with or invaded the plaintiff's interest by conduct that was

negligent, intentional, or abnormal and out of place in its surroundings;

(3) the defendant's conduct resulted in a condition that substantially interfered with the plaintiff's use and enjoyment of his land; and

(4) the nuisance caused injury to the plaintiff.

Id.

1. Standing

To bring a nuisance claim against adjacent oil and gas operations, in Texas, a plaintiff must first demonstrate that he has the requisite standing. A dispute over standing generally centers on whether those without legal title to property can still assert a nuisance claim. The right to sue for a nuisance based on injury to property is a personal right that belongs to the person who owns the property at the time of the injury. *Brinston v. Koppers Inds., Inc.*, 538 F.Supp.2d 969 (W.D. Tex. 2008). Standing to sue for nuisance does not pass to a subsequent purchaser unless it is expressly signed. *Id.*

However, other occupants of a residence, who are not owners, may have standing to sue. Generally, "any interest sufficient to be dignified as a property right will support the action." W. Prosser & W. Keeton, Law of Torts § 87, at 621 (5th ed. 1985). In Texas, the critical inquiry in determining whether a party is a possessor of land is whether the party has control over the premises. *Gunn v. Harris Methodist Affiliated Hosp.*, 887 S.W.2d 248, 251 (Tex. App.—Fort Worth 1994, writ denied). A party controls the premises when he has "the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." *Id.* at 252. There is authority to suggest that mere occupants of a property may maintain a nuisance cause of action if they exercise a certain level of "control." *See New v. Khojal*, No. 04-98-00768-CV, 1999 WL 675448, at *3 (Tex. App.—San Antonio Aug. 31, 1999, no pet.) (not designated for publication) (holding that non-owner occupant had standing because he paid the taxes on the house, paid for and made repairs to the house, and believed himself to be the owner of the house.).

What about renters of a home? The Texas Supreme Court holds that a non-owner tenant has standing to assert a nuisance claim. *See Holubec v. Brandenberger*, 111 S.W.3d 32, 34–35 (Tex. 2003); *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, fn. 2 (Tex. 2004). However, a tenant lacks standing to sue a property owner for nuisance. *See Brooks v. Chevron USA Inc.*, No. 13-05-029-CV, 2006 WL 1431227, at *7 (Tex. App.—Corpus Christi-Edinburg May 25, 2006, pet. denied) (mem. op.).

Another question arises with multi-generational households where grandparents, aunts and uncles, cousins and children may all live under one roof. What rights do these occupants have to sue in nuisance? The Restatement (Second) of Torts states, "members of the family of the possessor of a dwelling who occupy it along with him may properly be regarded as sharing occupancy with intent to control the land and hence as possessors." This is the rule in Texas, where "an occupancy interest in land is sufficient to vest a person with the right to assert a nuisance claim." *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 791 (Tex. App.—Waco 2009, pet. denied).

Some jurisdictions liken adult children, as well as other non-owners residing with relatives, to lodgers and guests who lack the requisite possession or ownership to maintain a nuisance claim. *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795 (1991) (applying Kentucky law). Other jurisdictions allow a property owner's children to maintain an action for nuisance. *King v. Western Club, Inc.*, 587 So. 2d 122 (La. Ct. App. 2d Cir. 1991). Other jurisdictions declare that minor children lack the legally protected ownership interest in property. *See Swearingen v. Long*, 889 F. Supp. 587 (N.D. N.Y. 1995).

In jurisdictions, such as Texas, where mere occupants can maintain nuisance claims, an oil and gas operator's exposure to such claims increases in areas with significant multi-generational households.

a. Lessons from *Gonzalez*:

In the *Gonzalez* case, the court granted the defendant's Motion to Strike portions of the plaintiffs' Complaint on issues of standing and pleading requirements. In the plaintiffs' Amended Complaint, they named 138 individuals and one trust as plaintiffs. For many of the named plaintiffs, the "Parties" section also included "spouse, and their minor children and individuals" but never named these persons or even the number of persons referenced by the general statement. The defendant moved to strike the Amended Complaint under Rule 10 of the Federal Rules of Civil Procedure, which requires that a complaint name all parties.

Furthermore, the defendant moved to dismiss the minor children's claims on the basis of the Amended Complaint's failure to conform to Rule 17(c) of the Federal Rules of Civil Procedure, which states that only a general guardian, a committee, a conservator, a like fiduciary, a next of friend, or a guardian ad litem may sue on a child's behalf. Nothing in the plaintiffs' Amended Complaint suggested that any named plaintiff was pursuing the action on behalf of a minor. The court granted the motion.

2. The Requisite Fault of the Defendant

To maintain a claim for nuisance, a plaintiff must demonstrate conduct by the defendant that is "negligent, intentional, or abnormal and out of place in its surroundings."

a. Negligent Nuisance

To prove a negligence-based nuisance claim, a plaintiff must show that the defendant created or maintained a condition negligently. *Crosstex*, 505 S.W.3d at 607. In bringing a negligence-based nuisance claim, plaintiffs must prove the elements of actionable negligence: (1) a legal duty owed to the plaintiff; (2) a breach of that duty by the defendant; and, (3) damage proximately resulting from the breach. *Id*.

In cases such as these, the plaintiffs must establish the appropriate standard of care through expert testimony. *See 3D/I + Perspectiva v. Castner Palms, Ltd.*, 310 S.W.3d 27, 29 (Tex. App.—El Paso 2010, no pet.) ("In determining whether expert testimony is necessary to establish negligence, we consider whether the conduct at issue involved the use of specialized equipment and techniques unfamiliar to the ordinary person. In such a case, the expert testimony must establish both the standard of care and the violation of that standard.") (internal citations omitted). Courts have held that the standard of care applicable to an oil and gas operator is an area of specialized knowledge that requires expert opinion to establish the standard of care. *Bonn Op. v. Devon Energy. Prod. Co., LPI*, No. 4:06-CV-734-Y, 2009 WL 484218, at *15 (N.D. Tex. Feb. 26, 2009).

b. Intentional Nuisance

With respect to proving intentional nuisance, plaintiffs must prove that a defendant intentionally caused a nuisance based on proof that the defendant intentionally created or maintained a condition that substantially interferes with the plaintiffs' use and enjoyment of land. *Crosstex*, 505 S.W.3d at 604-05. To prove intent, a plaintiff must show that a defendant caused a nuisance by: (1) acting for the purpose of causing the interference; or, (2) knew that the interference was resulting or was substantially certain to result from its conduct. *Id*. at 605. This is measured with a subjective standard. In other words, "the defendant must have actually desired or intended to create the interference or must have actually known or believed that the interference would result." *Id*. It is not enough that the defendant should have known that the interference would result. *Id*. It must be shown that the defendant intentionally caused the interference, "not just that the defendant intentionally engaged in the conduct that caused the interference." *Id.*

A finding of intentional nuisance often hinges on whether the defendant is aware that the condition is creating a nuisance, as opposed to mere knowledge of the condition itself. A clear example of this is illustrated in *City of Princeton v. Abbott*, where the court found the defendant liable for intentional nuisance based on the fact that a city allowed continued flooding of a neighborhood after being alerted to the fact by the neighbors. 792 S.W.2d 161, 166 (Tex. App.—Dallas 1990, writ denied).

In contrast, the recent case of *Aruba Petroleum, Inc. v. Parr* illustrates evidence that falls short of establishing intentional nuisance. In that case, the plaintiffs brought evidence that the oil and gas operator "was aware that its operations at the well sites result in noise, odors, ground vibrations, and significant light at night from burning off excess gas through 'flaring.'" No. 05-14-01285-CV, 2017 WL 462340, at *7 (Tex. App.—Dallas Feb. 1, 2017, no pet.) (mem. op.). Furthermore, they introduced testimony from Aruba employees that the conditions "probably" were a nuisance and caused complaints. *Id.* Finally, they introduced evidence that the plaintiffs made calls to Aruba and its public relations firm. *Id.* Nevertheless, the court found that there was insufficient evidence to support an intentional nuisance claim, reasoning that "the issue before us is not whether there is evidence in the record that Aruba created a nuisance but whether Aruba intentionally did so as to the [plaintiffs]." *Id.* Further, there was no evidence that "Aruba knew who placed [the] calls and made [the] complaints or that they were specific to the [plaintiffs]. *Id.* This case demonstrates the high evidentiary hurdle to proving intent.

C. Issues in Causation

In *Crosstex*, the Texas Supreme Court made clear that the focus in nuisance claims relative to oil and gas operations should be placed on the causation and injury elements, rather than the nature of the defendant's conduct. Courts have since struggled to create a clear standard for deciding these elements.

1. <u>What Standard of Causation Applies?</u>

With respect to a nuisance claim, a plaintiff must prove causation in fact, which requires the defendant's conduct be a "substantial factor" in bringing about the plaintiff's injury. *Ford Motor Co. Ledesma*, 242 S.W.2d 31, 46 (Tex. 2007). One particular area of disagreement in oil and gas nuisance cases is whether ordinary principles of causation apply or whether scientific, expert testimony is required. More specifically, is expert testimony required when plaintiffs allege exposure to typical elements involved in oil and gas operations, such as light, noise, dust, and vibrations?

In a normal context, plaintiffs claiming nuisance can rely on lay testimony to prove causation. When "both the occurrence and conditions complained of are of such that the general experience and common sense of laypersons [is] sufficient to evaluate the conditions and whether they were probably caused by the occurrence." *Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007).

2. The Elevated *Havner* Causation Requirements

In contrast, Texas Supreme Court precedent makes clear "that expert testimony is necessary to establish causation as to *medical conditions* outside the common knowledge and experience of jurors." *See Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007) (emphasis added). Such cases typically involve "medically complex diseases and causal ambiguities" that "compound the need for expert testimony." *Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 36 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

In toxic tort cases, Texas law requires that plaintiffs claiming *physical ailments* based on nuisance and negligence theories prove direct causation, or if no direct causation exists, general causation. *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Direct evidence is generally not available in toxic tort cases unless there is direct human experimentation. *Cano v. Everest Mineral Corp.*, 362 F. Supp. 2d 814, 820 (W.D. Tex. 2005). To prove general causation, it must be shown that the exposure "more likely than not" caused injury by pointing to two or more epidemiological studies demonstrating a statistically significant "doubling of the risk" (the "*Havner* requirements"). *Havner*, 953 S.W.2d at 717; s*ee also Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 193 (5th Cir. 2011) (applying the *Havner* requirements in federal court). This elevated requirement is referred to as the *Havner* causation requirement herein.

Importantly, *Havner* requires scientifically reliable expert testimony that includes proof that the plaintiffs are similar to the subjects in those studies, "proof that the injured person was exposed to the same substance [addressed by two or more epidemiological studies], that the exposure or dose levels were comparable to or greater than those studies, [and] that the exposure occurred before the onset of injury." *Id.* at 720; *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 349-50 (Tex. 2014). An epidemiological study examines existing populations to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition. *Id.* at 717. Needless to say, if *Havner* applies to nuisance claims in an oil and gas context, plaintiffs bear a hefty burden to prove causation.

a. When does *Havner* Apply to Nuisance Claims?

The question thus arises whether nuisance claims resulting from adjacent oil and gas operations are subject to the *Havner* causation standards and require expert medical testimony. Recently, this question has been up for debate. At the center of this debate is whether the examples of nuisance set forth in *Crosstex*, such as exposure to oil and gas operations that produce filth, smoke, dust, odors, gases, noises, vibrations are "physical ailments" to which the *Havner* causation standard applies.

The San Antonio Court of Appeals took up this very question in *Cerny v. Marathon Oil Co.* 480 S.W.3d 612 (Tex. App.—San Antonio 2015, pet. denied). There the court held that the *Havner* requirements applied to a homeowner's nuisance claims alleging harm from emissions from oil and gas operations, including drilling, on an adjacent property. *Id.* The plaintiffs alleged "that, by early 2012, their property was 'completely surrounded' by Marathon's wells and Plains' production facilities which emitted noxious odors and chemicals and created constant traffic, dust, and noise, all of which radically altered their previously peaceful, rural lifestyle." *Id.* at 615.

In an attempt to avoid the application of *Havner*, the plaintiffs specifically disclaimed any and all claims seeking recovery for a particular or diagnosed "disease." *Id.* at 618. Instead, the plaintiffs sought "recovery for their symptoms which are typical of discomfort rather than disease... [such as] fear, apprehension, offense, discomfort, annoyance, sickness, injury to health, exacerbation of physical health or preexisting condition, harm from assault on plaintiffs' senses, nausea, loss of peace of mind, emotional harm or distress, inconvenience, and deprivation of enjoyment of their property." *Id.* at 616.

Despite disavowing all personal injury damages, the court held that the plaintiffs must still satisfy the *Havner* requirements to prove causation. *Id.* at 618. The court noted that in determining whether expert testimony was necessary, it must consider whether the alleged conduct involves the use of specialized equipment or techniques unfamiliar to the ordinary person. *Id.* The court found that the plaintiffs sought damages arising out of their exposure to emissions of "noxious gases and chemicals... from oil well sites and production" and concluded that "Plaintiffs seeking relief for ***injuries of any nature*** caused by exposure to or migration of a toxic substance must meet the stringent proof requirements imposed by the Texas Supreme Court in *Havner*." *Id.* at 620 (emphasis added). Because the plaintiffs could not prove the *Havner* requirements through scientifically reliable expert testimony, the court granted summary judgment in the defendants' favor. *Id.* at 622.

The *Cerny* court relied upon a plethora of cases in which the plaintiffs alleged nuisance as a result of exposure to harmful materials. *See Martinez v. City of San Antonio*, 40 S.W.3d 587, 593-95 (Tex. App.—San Antonio 2001, pet. denied) (applying the *Havner* standard to claims of negligence and nuisance arising from lead contamination); *Baker v. Energy Trans. Co.*, No. 10-09-00214-CV, 2011 WL 4978287, at * 5-7 (Tex. App.—Waco Oct. 19, 2011, pet. denied) (mem. op.) (applying the *Havner* standard to nuisance claims arising from venting of hydrogen sulfide from nearby oil

and gas operations and finding that there was "no evidence in the form of expert testimony that [the defendant] caused the alleged harm from the nuisance.").

In *Aruba Petroleum, Inc. v. Parr*, the plaintiffs sued several oil and gas operators alleging that they created a nuisance through "air contamination, light pollution, and offensive noises and odors." No. 05-14-01285-CV, 2017 WL 462340, at *1 (Tex. App.—Dallas Feb. 1, 2017) (mem. op.). Prior to trial, and like the plaintiffs in the *Cerny* case, the plaintiffs disclaimed any personal injury damages that would invoke *Havner*. *Id.* at fn. 2. The trial court granted summary judgment, in part, for Aruba and ordered that the plaintiffs take nothing on damage or personal injury that would invoke the requirements of *Havner* and limited their damages to "symptoms typical of discomfort rather than disease" and personal injuries that were within the common knowledge and experience of a layperson and the sequence of events is such that a layperson may determine causation without the benefit of expert evidence. *Id.* The appellate court did not reach these causation issues.

b. Where Do We Stand after *Cerny*?

In determining that *Havner* applies to that particular set of facts, *Cerny* appears to shift the focus to the type of elements the plaintiff is exposed to, rather than the type of injury the plaintiff suffers. *See Cerny*, 480 S.W.3d at 620 (applying *Havner* to "injuries of any nature caused by exposure to or migration of a toxic substance.").

In contrast, nuisance cases that reject the application of *Havner* tend to rely upon the type of injury rather than the cause of the injury. For example, in *Scheidner Nat. Carriers, Inc. v. Bates*, the Texas Supreme Court considered lay testimony when the plaintiffs alleged nuisance from exposure to a trucking company, and painting and sandblasting area, and a manufacturer of bleach, wood preservatives, polyesters, and other chemical products along the Houston ship channel. 147 S.W.3d at 292. The plaintiffs' nuisance claims complained of foul odors, dirt, and black soot. Importantly, the plaintiffs alleged causation only as "to symptoms typical of discomfort rather than disease, and thus alleg[e] nuisance damages rather than personal injury." *Id.*

Relying on this principle, it is not surprising that courts sometimes refuse to apply *Havner* to cases where plaintiffs claim "annoyance" due to exposure to noise, smell, vibration, and light. These cases generally hold that lay testimony is sufficient to prove nuisance-type injuries caused by exposure to these elements. *See Pool v. River Bend Ranch*, LLC, 346 3.d 853, 858-59 (Tex. App.—Tyler 2011, pet denied) (determining the lay testimony was sufficient to overcome summary judgment with respect to claims for discomfort, annoyance, and loss of use and enjoyment of land due to a nearby ATV park); *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.], pet. denied) (lay evidence sufficient for nuisance claims alleging exposure to excessive light emanating from a cell tower.).

The case law reveals a blurred line between claims for exposure to toxic substances, to which *Havner* clearly applies, and claims for mere annoyance for which *Havner* causation may not apply. Courts routinely hold that claims for injury by exposure to oil and gas emissions and migrations of hazardous substances from nearby oil and gas operations must meet the *Havner* causation standard. Other claims alleging mere annoyance or disturbance from exposure to light, noise, smell, shaking are more likely to be within "the common knowledge and experience of lay persons" and, thus, do not require expert testimony on causation. Claims for loss of use and enjoyment are likewise exempt from the *Havner* requirements as they do not allege physical harm. What also remains uncertain in this analysis is whether the focus should be on the type of exposure or the type of injury. *Cerny* suggests that the type of exposure is paramount, while other precedent differentiates between nuisance damages and personal injury damages.

c. Lessons from *Gonzalez*:

The defendant asserted a Motion for Summary Judgment alleging that *Havner* applied to the plaintiffs' claims, relying heavily on *Cerny*. Like in the *Cerny* case, the *Gonzalez* plaintiffs disavowed any personal injuries to avoid the application of *Havner*. However, they alleged "obnoxious odors and gas fumes" and "unknown gaseous element" entered through one of the plaintiffs' homes. The defendant argued that these claims were akin to a toxic tort claim to which *Havner* applied.

In response, the plaintiffs contended that *Cerny* only applies to injuries caused by "exposure to or migration of a toxic substance." It further noted that *Cerny* relied on opinions applying *Havner* to "lead contamination, oil and gas emissions, and emissions and migration of hazardous substances"—none of which were alleged in the suit. The suit settled before the court ruled on the motion.

Plaintiffs seeking to avoid the heightened *Havner* requirements should plead injuries akin to annoyance and discomfort as well as the loss of the use and enjoyment of their homes. They should avoid reference to exposure to toxic substances. Defendants, on the other hand, should seize the argument that exposure to oil and gas operations are akin to toxic tort cases, to which *Havner* surely applies.

3. Sufficiency of Evidence Required for Causation

Even if exposure to light, sound, vibration, and noise do not require expert evidence, courts may still hold plaintiffs to a higher degree of proof of causation in making these allegations. If lay testimony is sufficient evidence without the application of *Havner*, the lay testimony must still establish proximate cause. Nuisance plaintiffs must prove causation in fact, which requires that the defendant's conduct be a "substantial factor" in bringing about the plaintiff's injury. *Ford Motor Co.*, 242 S.W.3d at 46. Proximate cause requires some evidence that the defendant's act or omission was the cause-in-fact of a plaintiff's injury. *Doe v. Boys Club of Greater Dallas*, 907 S.W.2d 472, 481 (Tex. 1995).

Importantly, in an oil and gas context where a multitude of contractors may be working on a site, a plaintiff must provide evidence identifying a particular defendant as the proximate cause of the conditions that substantially interfered with the plaintiff's use and enjoyment of their property. *Cerny*, 480 S.W.3d at 622; *Borg-Warner Corp v. Flores*, 232 S.W.3d 765, 773 (Tex. 2006) (requiring "Defendants specific" causation). It is without question that "causation cannot be established by mere speculation." *Martinez v. City of San Antonio*, 40 S.W.3d 587, 592 (Tex. App.—San Antonio 2001, pet. denied); *Natural Gas Pipeline Co. of Am. V. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012) (noting that opinion evidence offered by a law witness must not be based on guess work or conjecture, *i.e.*, be speculative, and must not simply state a conclusion without explanation, *i.e.*, be conclusory).

Here, again, the *Cerny* court hints at an elevated standard of causation to dismiss the plaintiffs' nuisance claims for loss of use and enjoyment (to which *Havner* did not apply). These are the only types of claims to which the court did not apply the *Havner* causation standard. Nevertheless, the court found that the lay testimony was insufficient to link any action by the defendants to the plaintiffs' harm. In finding that the plaintiffs failed to raise a scintilla of evidence on causation, the court noted the following:

> The affidavits by Mr. and Mrs. Cerny state that, "in early 2012, we found our property entirely surrounded by oilfield activities," with "wells or production facilities all around our home," and "we began to notice that lots of dust and noise had radically altered our home and our way of living"... Both state that big trucks and constant traffic "were always moving along FM 99 directly in front of our house," which created loud noise and was upsetting. Neither affidavit identifies the oilfield company to which the trucks belonged or which caused constant traffic, nor identifies a particular company as having caused the dust and noise.

Cerny, 480 S.W.3d at 623.

Further, the court was critical of the lay witness testimony that attempted to identify Plains and Marathon as causing the dust, noise, traffic, and foul odors. *Id.* at 624. For example, one plaintiff testified that the smell on their property was the same smell she experienced when she drove by the Plains facility. *Id.* The court rejected this type of evidence by holding that "to the extent that the lay affidavits attempt to establish a causal link to Plains and Marathon, we conclude that the evidence was too conclusory and speculative, and therefore constitutes no legal evidence of causal connection between the [plaintiffs'] alleged loss-of-use damages and these particular defendants." *Id.* at 625.

Should this standard be applied to other nuisance cases arising out of oil and gas drilling, it seemingly would require plaintiffs to affirmatively investigate ongoing operations and likely hire oil and gas experts to contemporaneously record these elements. This higher standard would likewise be difficult to meet in such cases. It presumes that plaintiffs must conduct some sort of investigation during the alleged nuisance to determine from whom and what the nuisance is emanating from.

a. Lessons from *Gonzalez*:

In the *Gonzalez* case, the defendant used this heightened standard in another motion for summary judgment to contend that the plaintiffs failed to meet their burden on causation. Nearly every plaintiff household testified that they could not identify a specific company that produced the dust, odors, lights, noise and vibrations. The plaintiffs could not even identify what actions the defendant performed.

The plaintiffs' liability expert also failed to detail any actions that the defendant specifically took to cause the nuisance. Instead, the expert merely opined on the type of effects that operations such as these *can* cause. Specifically, the expert was designated to testify regarding "the extent and nature of the drilling operations including the various phases of operation, the type and function of equipment involved, the degree of danger, and the laws and standards under which these drilling operations are conducted." In his deposition, the expert admitted that he "looked at it generally with respect to what it would have caused and not specifically with what it did cause."

In response, the plaintiffs argued that the mere fact that the defendant chose a drilling location close to their homes and that they allegedly failed to implement mitigation measures gave rise to direct liability. They asserted that these actions and inactions provided *some* evidence that they caused the plaintiffs' harm. The plaintiffs further argued that regardless of which contractor caused the disturbance, the defendant was in control of the drilling and other operations at each well location and thus it was vicariously liable for the acts

and omissions of the drilling companies it hired. Again, the case was resolved prior to the court ruling on the motion.

D. Damages

1. What Sort of Harm is Actionable?

Importantly, *Crosstex* notes that a nuisance does not refer to a cause of action "but instead to the particular type of *legal injury* that can support a claim or cause of action seeking legal relief." *Crosstex*, 505 S.W.3d at 594 (emphasis in original). "The law of nuisance recognizes that certain injuries to a person's right to the 'use and enjoyment of property'" can constitute a "form of legal injury for which a legal remedy will be granted." *Id.* at 595. Under this definition, it is no wonder that focus has shifted to the type of damages that are actionable, rather than the conduct of the defendant.

In this regard, to rise to the level of a nuisance, the interference must be "substantial in light of all of the circumstances" and the "discomfort or annoyance" must be objectively "unreasonable." *Id.* "Such interferences may cause physical damage to a plaintiff's property, economic harm to the property's market value, harm to the plaintiff's health, or psychological harm to the plaintiffs' 'peace of mind' in the use and enjoyment of their property." *Id.* In determining whether the interference is substantial, a court may review whether the use impairs the adjoining property's market value. *Id.* at 595. This includes a review of "the nature and extent of the interference, and how long the interference lasts or how often it recurs." *Id.* at 595-96.

a. Temporary vs. Permanent

Damages for nuisance claims against oil and gas operators depend on whether the nuisance is considered temporary or permanent. The Texas Supreme Court, in *Schneider Nat. Carriers, Inc. v. Bates*, 14 S.W.3d 264 (Tex. 2004), provided some clarity to this distinction. It stated that a temporary nuisance is one that is "so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty." *Id.* at 281. On the other hand, a nuisance is permanent "if it is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably evaluated." *Id.*

Conversely, "permanent nuisance may be established by showing that either the plaintiff's injuries or the defendant's operations are permanent. In most nuisance cases, a permanent source will result in permanent interference. The presumption of a connection between the two can be rebutted by evidence that a defendant's noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may ever occur again." *Jing Gao v. Blue Ridge Landfill TX, L.P.*, 783 F. App'x 409, 411 (5th Cir. 2019) (internal citations omitted).

More recently in *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, the Texas Supreme Court sought to better define the distinction through new rules and analysis. 449 S.W.3d 474, 478 (Tex. 2014). In doing so, the Court modified or superseded a significant body of case law. The Court focused on the ability to repair and stated:

> An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, or (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, and (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in a trespass) and to cases in which entry onto real property is not physical (as with a nuisance).

Id. at 480.

Generally, if "a nuisance is temporary, the landowner may recover only lost use and enjoyment... that has already accrued. Conversely, if a nuisance is permanent, the owner may recover lost market value—a figure that reflects all losses from the injury, including lost rents expected in the future." *Schneider*, 14 S.W.3d at 276.

This distinction between temporary and permanent nuisances in the context of oil and gas operations is highly dependent on the specific activity. For example, the compressor station that continually made noise was considered a permanent nuisance. However, drilling operations, which occur over a finite period of time, will likely be considered a temporary nuisance.

2. Limitations – Town of Dish v. Atmos Energy

Nuisance claims are subject to the two-year statute of limitations in Texas. A permanent nuisance claim accrues when the condition first "substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities." *Justiss*, 397 S.W.3d at 153. A temporary nuisance claim accrues *anew* upon each injury. *Schneider*, 147 S.W.3d at 270.

Even applying these rules, it is often difficult for courts to determine exactly when the injury is suffered

when a nuisance is continuous or varying in nature. In 2017, the Texas Supreme Court clarified this issue in *Town of Dish v. Atmos Energy Corp*. 519 S.W.3d 605 (Tex. 2017). In that case a town and its residents brought trespass and nuisance claims against energy companies that owned natural gas compressor stations and metering stations in the area. The plaintiffs began complaining about the stations in 2006, the compressors were online by May 2008, and the station was completely finished by summer 2009. Plaintiffs filed suit on February 28, 2011.

The plaintiffs further claimed that there was a "significant change in the noise being emitted" from September 2009 to early 2010. Before that, they stated the noises were sometimes loud but not rising to the level of a nuisance. They also claimed that they were unaware of dangerous substances emanating from the facilities until a report was completed in September 2009. The defendant alleged that the plaintiffs' causes of action accrued prior to February 28, 2009 and, thus, were time barred.

The Court noted that a cause of action accrues "when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." *Id.* at 609 (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003)). The Court further noted that claims for nuisance "normally do not accrue when a potential source is under construction," but "once operations begin and interference occurs." *Id.* at 609 (citing *Schneider*, 147 S.W.3d at 279. The Court further noted that "there would be no statute of limitations for permanent nuisance if a claim could be 'revived' by evidence that conditions worsened." Here, the Court found that the claims were time barred because the plaintiffs' mere subjective belief that the conditions worsened, without more, was insufficient to revive their limitations period.

In *Nat. Gas Pipeline of America v. Justiss*, 397 S.W.3d 150 9 (Tex. 2012), the Texas Supreme Court affirmed a jury's decision that the plaintiffs' nuisance claims were not time barred with respect to complaints of smell and noise that began more than two years before suit was filed but worsened within the two years before suit was filed. The Court noted that "[t]he point at which an odor moves from unpleasant to insufferable or when noise grows from annoying to intolerable 'might be difficult to ascertain, but the practical judgment of an intelligent jury [is] equal to the task.'" *Id.* at 155 (citing *Merrill v. Taylor*, 72 Tex. 293, 10 S.W. 532, 534 (1888)).

Accordingly, with respect to cases involving subjective complaints of noise and light, limitations may be a fact issue that is within the province of the jury, and not the court, to decide.

a. Reed v. LKQ Corporation

A Texas federal court recently addressed the proper measure of damages to a plaintiff bringing a nuisance claim for exposure to dust, debris, noise, and trash generated from the defendant's operation of its automobile reclamation and parts distribution. 436 F.Supp.3d 892 (N.D. Tex. 2020). These are generally the same types of complaints made by landowners that neighbor oil and gas operations.

The court found that the plaintiff was "entitled to monetary compensation for property damage and 'psychological harm to [his] peace of mind in the use and enjoyment of [his] property'' caused by dust, debris, and noise. *Id.* at 920. The court concluded that the nuisance was temporary in nature because it ultimate was remedied by the defendant. *Id.* As such, the court awarded the plaintiff "depreciation in the rental value or use value of the property, amounts for the cost of repair or restoration of his property caused by the dust and debris accumulating on his property from [the defendant's] construction and operation, as well as damages for his personal discomfort arising from the nuisance." *Id.*

The court awarded the plaintiff $2,775 in property damage and $175,000 for mental anguish damage, which the court described as "emotional harm" or "psychological harm to [his] 'peace of mind.'" *Id.* Interestingly, the court awarded this amount based on lay testimony from the plaintiff regarding his inability to enjoy his home and also precedent in past opinions. The plaintiff offered no expert testimony that he suffered psychological harm, yet the court found the lay evidence on the record showed a substantial disruption of the plaintiff's routine and a high degree of mental distress.

The *Reed* case presents an extremely low bar for the evidence required to prove damages. The plaintiff presented no evidence on repair damages and the court merely selected the defendants' calculations. Likewise, the plaintiff presented no evidence of damages caused by mental anguish, yet merely presented evidence of the type of disruptions that occurred to his day to day life as a result of the nuisance.

E. Available Defenses

1. Lone Pine Orders

Another tool oil and gas defendants utilize to negate causation is a *Lone Pine* order. A Lone Pine order is a "pre-discovery order[] designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). "The basic purpose of a *Lone Pine* order is to require the plaintiff to provide basic facts about his or her claims or risk having those claims dismissed." *Arnold v. BNSF Ry. Co.*, No. 3:18-CV-1931-L, 2019 WL 1493160, at *6 (N.D. Tex. Apr. 4, 2019). Thus, before further discovery

commences, plaintiffs must produce some evidence to support a credible claim. *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 fn. 2 (5th Cir. 2006).

In *Steering Comm. v. Exxon Mobil Corp.*, the Fifth Circuit entered a Lone Pine order with respect to a case wherein several plaintiffs brought mass tort claims against Exxon arising out of a fire at its chemical facility. 461 F.3d 598, 600 (5th Cir. 2006). Hundreds of suits were filed against Exxon alleging a wide variety of personal injury, personal discomfort and annoyance, emotional distress resulting from knowledge of exposure to hazardous substances, fear of future unauthorized exposures, and economic harm including damage to business and property. *Id.* The court entered a Lone Pine order requiring that the individual plaintiffs each produce, depending on the type of injury alleged, either an affidavit from a qualified treating or other physician, or an affidavit from a qualified real estate appraiser or other real estate expert. *Id*. at 604 n. 2.

As such, in addition to the *Havner* standard, nuisance defendants can request a Lone Pine order which effectively requires the plaintiffs to produce expert medical testimony even for claims of personal discomfort or annoyance.

F. Nuisance Conclusion

In Texas, where mere occupants can maintain nuisance claims, an oil and gas operators face increased exposure to claims based on noise, odor, annoyance, etc. This exposure increases in areas with significant multi-generational households, and when one considers the modern exploration and production techniques bringing operations progressively closer to residential areas.

Operators defending against such claims have a strong avenue for defense in arguing causation. Wherever possible, argue that the highest applicable standard for proof of causation should be used – the *Havner* standard. Even if the court rejects the argument, the plaintiff must still prove causation in fact, which requires a showing that the defendant's conduct was a "substantial factor" in bringing about the plaintiff's injury.

With nuisance law now "clarified" by the Texas Supreme Court, our next topic is surface use and access issues.

II. SURFACE ACCESS & USE ISSUES

A. Introduction

The purpose of this section is to provide guidance to mineral owners, lessees, and operators regarding surface access and use issues. The following part provides a general overview of the current law to give the reader a foundation to better understand the issues discussed in the remainder of the paper. Part III discusses case law on liability for a mineral owner for surface damages, focusing primarily on the concept of "reasonable use." This includes a detailed examination of the accommodation doctrine. Part IV briefly touches on surface damages legislation. Part V resumes the case law review, shifting focus to liability for negligence. Part VI highlights some special rules that may impact mineral owners' operations – for example, those governing injury to livestock. Finally, Part VII considers the potential remedies and damages available to a successful surface owner.

B. Overview of Current Law

Texas has long recognized the right of a landowner to sever the surface and mineral estates. *See Cowan v. Hardeman*, 26 Tex. 217 (1862). Where these estates have been severed, the mineral estate is the dominant estate and the surface estate is the servient estate. *Id.*; *Harris v. Currie*, 176 S.W.2d 302 (Tex. 1944). In *Harris v. Currie*, the Texas Supreme Court summarized the reasoning that compels the dominance of the mineral estate:

> [A] grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.

Id. at 305. However, a corollary to this logic is that the surface estate would also be worthless if the mineral owner could occupy and completely destroy the surface at his whim.

Recognizing the respective rights of each party, Texas courts have, over time, developed boundaries defining the mineral owner's right to use the surface:

> 1. The mineral owner may only use the surface as **reasonably necessary** to develop the underlying minerals.
> 2. In using the surface, the mineral owner must act with **due regard** for the rights of the surface owner.
> 3. The mineral owner must act **non-negligently** in the way and manner of use.

Brown v. Lundell, 344 S.W.2d 863, 866-67 (Tex. 1961); *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 671 (Tex. 1961); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

The first two limitations together can be understood as the "reasonable use" requirement. *See Gulf Production Co. v. Continental Oil Co.*, 164 S.W.2d 488 (Tex. 1942) (articulating the concepts of reasonable necessity and due regard). A failure to act as "reasonably necessary" or with "due regard" gives rise to a trespass cause of action, that is, use of the surface beyond the implied right needed to access the minerals. *See Gregg v. Caldwell-Guadalupe Pick-Up Stations*, 286 S.W. 1083, 1084-85 (Tex. 1926). Thus, reasonable

use centers on the *amount* of land used and the *type* of use. Although reasonable necessity and due regard are intertwined concepts, courts usually focus on one or the other based on the factual scenario presented. These factual situations can be divided into those involving *conflicting rights* and those involving *conflicting use*.[1]

Conflicting rights cases are situations where the surface is undeveloped. The concern, then, is a conflict between the respective rights of the mineral owner and the surface owner to use the surface. Because the surface owner has no existing use, these cases focus on the reasonableness of the mineral owner's surface operations; specifically, whether the operations are *reasonably necessary* to develop the minerals.

Conflicting use situations occur when the surface owner has an existing use and the mineral owner's use or proposed use interferes with the existing use. The analysis focuses on whether the mineral owner's use gives *due regard* to the surface owner's use. Here, reasonable use is determined by a judicially developed inquiry, known as the "accommodation doctrine."

Separately, a surface owner may claim negligence if the *way and manner* of the mineral owner's use is unreasonable. *Brown*, 344 S.W.2d at 867. Although courts sometimes conflate reasonable use and negligence, the distinction is important. Reasonable use considers the amount or type of use, while negligence considers the way and manner in which that use is carried out. As such, a mineral owner may be held liable to the surface owner for either or both. *Compare Brown*, 344 S.W.2d at 866-67 (holding surface use of slush pits was reasonably necessary but carried out negligently when pits polluted fresh groundwater) *with Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App.—Tyler 1996, no writ) (holding that salt water and oil spills supported jury finding of unreasonable use, without a finding of negligence). Note that, although the outer bounds of reasonable use and negligence use are set by law, they are each generally fact questions for the jury. *Texaco, Inc. v. Joffrion*, 363 S.W.2d 827, 831 (Tex. Civ. App.—Texarkana 1962); *Texaco, Inc. v. Parker*, 373 S.W.2d 870, 874 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.); *see also Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971) (impliedly accepting reasonable use is a fact question by affirming jury finding on the issue); *Brown*, 344 S.W.2d at 866-67 (affirming jury finding of negligence).

Despite these limitations, Texas courts have historically granted mineral owners wide latitude to utilize the surface. Mineral owners in Texas benefit from a number of other rules stemming from the dominance of the mineral estate. These rules often provide the basis for many of the courts' decisions in favor of mineral owners, and generally reflect the dominance with which mineral owners have operated in Texas:

- Inconvenience or nuisance to the surface owner caused by a mineral owner's use of the surface does not determine its reasonableness. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013) (holding that drilling operation did not unreasonably interfere with surface owner's once-a-year use of surface for cattle operations and surface owner had alternative methods for conducting his operation that were not impracticable or unreasonable even though they were less convenient for surface owner); *Getty Oil Co.* 470 S.W.2d at 618; *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967); *Ottis v. Haas*, 569 S.W.2d 508, 513-14 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Davis v. Devon Energy Prod. Co.*, 136 S.W.3d 419 (Tex. App.—Amarillo 2004, no pet.).
- Surface use that significantly diminishes the value of the surface estate may still be reasonable. *See Sun Oil Co.*, 483 S.W.2d at 808.
- As long as the mineral owner's use of the surface is reasonable and not negligent, it has no liability for any damages to the surface. *Humble Oil*, 420 S.W.2d at 134; *Ottis*, 569 S.W.2d at 513-14.
- A mineral owner has a right of ingress and egress upon the surface tract as is reasonably necessary for the exploration and production of oil and gas. *Key Operating & Equip., Inc. v. Hegar*, 435 S.W.3d 794, 800 (Tex. 2014); *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Davis*, 136 S.W.3d at 425-26; *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Phillips Petroleum Co. v. Cargill*, 340 S.W.2d 877, 880 (Tex. Civ. App.—Amarillo 1960, no writ).
- Moreover, if the lease covering a mineral lessee's tract contains a pooling clause and the surface owner takes subject to the lease, the mineral lessee can use a road on the tract for the benefit of other lands pooled with the tract. *Key Operating & Equip., Inc.*, 435 S.W.3d at 801.
- The mineral owner has no obligation to restore the surface to its pre-development condition. *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362, 363 (Tex. 1957).
- A co-tenant of the mineral estate has the right of reasonable use of the surface to develop the underlying minerals, subject to the obligation to

[1] The concepts of "conflicting rights" and "conflicting use" are taken directly from a great article on surface use, David E. Jackson, *Surface Use: The Dominant Estate, Reasonable Use and Due Regard*, State Bar of Texas, 24TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE (October 5, 2006).

account to co-tenants. *Cox v. Davison*, 397 S.W.2d 200, 203 (Tex. 1965); *TDC Eng'g, Inc. v. Dunlap*, 686 S.W.2d 346, 349 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.).

The force of these rules is fleshed out in the next part, which discusses the case law in detail.

Another important note is that these general rules are implied by law in the absence of contractual provisions governing the relationship between the mineral and surface estate owners. Provisions dealing with various operations by the mineral owner or lessee may be found in the lease, deed, or in some other contract between the mineral owner or lessee and the surface owner, such as a surface use agreement. Therefore, upon notice of a claim for surface damages, or even before the mineral owner or lessee commences surfaces operations, the first course of action should be to review the relevant documents to determine each party's rights. Absent any contractual provision, case law and statutes govern.

C. Case Law on Liability of Mineral Owners

As discussed in the previous part, Texas courts provide owners of the mineral estate great deference in their use of the surface, with certain limitations. A mineral owner's use of the surface must be reasonably necessary, with due regard for the surface owner's rights, and non-negligent.

1. Reasonable Use

A surface owner's cause of action for excessive use of the surface estate is rooted in trespass, as the plaintiff is alleging a use of land beyond the scope of an implied right. *Gregg*, 286 S.W. at 1084. However, because "unreasonable use" of the surface has evolved as a distinct variety of trespass, the plaintiff might not label his cause of action as "trespass," opting instead to specifically claim "unreasonable use" or "excessive use." In cases focusing specifically on conflicting use, a surface owner might frame her claim against the mineral owner as a "breach of the duty to accommodate" or "breach of the accommodation doctrine." In any case, the surface owner's claim is essentially for trespass, i.e. the use of the land beyond an implied right.

As noted, "reasonable use" is a general term used to encompass the two requirements that the mineral owner's surface use is 1) *reasonably necessary* to develop the minerals and 2) employed with *due regard* for the surface owner's rights. Disputes between mineral and surface owners can be roughly categorized into two types of cases: conflicting rights cases and conflicting use cases. These two scenarios are discussed in turn.

a. Conflicting Rights – Reasonable Necessity

Where the mineral owner's use of the surface does not conflict with an existing use by the surface owner, the only issue concerns the rights of each party to use the surface. This inquiry focuses on whether the use by the mineral owner is reasonably necessary to effectuate mineral development.

(i) Burden of Proof

The burden of proof is on the surface owner to prove that a mineral operator acted outside the scope of necessity to establish liability for excessive use of the surface. *Getty Oil Co.*, 470 S.W.2d at 618; *Humble Oil & Refining Co.*, 420 S.W.2d at 134; *Warren Petroleum Corp.*, 271 S.W.2d at 412-13. A mineral owner or lessee's operations are presumed to be reasonable unless proved otherwise. *See Williams*, 420 S.W.2d at 134-35; *Martin*, 271 S.W.2d at 412. As with any legal standard based on reasonableness, reasonable necessity is an amorphous concept that has no hard and fast rules. Although reasonable necessity is a legal concept, the necessity of an operation is a fact-question for a jury to decide considering the time, place, and circumstance. *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 855 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.)(citing *Martin*, 271 S.W.2d at 413). A court will only overturn a jury finding on reasonable necessity if no evidence supports it. *Compare Jergenson*, 453 S.W.2d at 855-56 (upholding a jury verdict of unreasonable use when some evidence supported the finding) *with Martin*, 271 S.W.2d at 412-13 (finding that mere fact oil escaped and pooled near wells was "no evidence" that mineral lessee use more surface than reasonably necessary).

(ii) Case Law

The basic method of developing oil and gas is similar from tract to tract, and has changed little over time. Certain operations have always been required: entry upon the land, drilling the well, disposal of waste. On the other hand, the necessity of operations may fluctuate with the changes in technology, costs, and the values of a society. For instance, what constitutes reasonably necessary waste disposal has changed over time as technological advancements make other options less costly and society has become less tolerant of visible pollution. Hypothetically, if it becomes possible and economical to extract minerals without entering any surface tract, drilling any well, or creating any waste, those operations may cease to be reasonably necessary. As it is, certain operations remain necessary and it is instructive to look to case law to see where juries and appeals courts have historically drawn the line of necessity. The following cases provide a cross-section of common situations of conflicting rights.

(1) Ingress and Egress

A mineral owner has a right of ingress and egress upon the surface tract as is reasonably necessary for the exploration and production of oil and gas. *Key Operating & Equip., Inc. v. Hegar*, 435 S.W.3d 794, 800 (Tex. 2014); *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Davis*, 136 S.W.3d at 425-26; *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Phillips Petroleum Co. v. Cargill*, 340 S.W.2d 877, 880 (Tex. Civ. App.—Amarillo 1960, no writ). A surface owner may not unreasonably interfere with that right. In *Ball*, the surface owner denied the mineral lessee access to the land by locking the gate. The Court enjoined the surface owner from denying ingress and egress and awarded the lessee consequential damages resulting from the delay caused by the surface owner. *See also Devon Energy*, 326 S.W.2d at 425-26 (affirming jury finding that surface owner unreasonably interfered with mineral operations and mineral lessee was entitled to damages); *Parker*, 326 S.W.2d at 582 (holding that mineral owner has right to enter surface as reasonably necessary to develop minerals); *Cargill*, 340 S.W.2d at 879-80 (denying surface owner recovery of surface damages where mineral owner's ingress and egress was reasonably necessary).

Moreover, at least one case has held that, absent a contractual provision to the contrary, the mineral owner need not provide the surface owner with notice of entry. *Parker*, 326 S.W.2d at 583. However, the Texas legislature has enacted a statute that requires a person who receives a permit to drill or re-enter a well to give notice to the surface owner of the tract within 15 days of the permit's issuance. TEX. NAT. RES. CODE ANN. § 91.753. Regardless, from a practical standpoint, it is probably wise to give notice to the surface owner of any planned use of the surface to avoid or reduce disputes.

Although a mineral owner may enter the surface estate as reasonably necessary, courts have allowed the surface owner to install fences or require the mineral owner to use a key to enter locked gates. *Getty Oil Co. v. Royal*, 422 S.W.2d 591, 593 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.) (holding that surface owner's installation of fences and unlocked gates did not unreasonably interfere with mineral lessee's right of entry); *Texaco, Inc. v. Parker*, 373 S.W.2d 870, 874 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.) (affirming jury's determination that surface owner's requiring mineral lessee to use a key to enter through locked gates did not unreasonably interfere with mineral lessee's right of ingress and egress).

(2) Roads

A mineral owner has the right to build, use, and maintain roads as reasonably necessary to develop the minerals. *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 262 (Tex. Civ. App.—El Paso 1958, no writ). In *Walton*, the surface owner sought an injunction to stop the construction of new roads at locations chosen by the mineral lessee. The surface owner presented evidence of old roads on the surface tract. The court found that these roads were apparently unsuitable for heavy machinery and did not reach all the well locations. The court held that, as a general rule, the mineral owner has the right to determine the location of the roads and to build, use, and maintain those roads as reasonably necessary for mineral development. *See also Humble Oil & Refining Co.*, 420 S.W.2d at 135 (applying reasonable use test to find that construction of a road authorized by lease was reasonably necessary to develop minerals); *Property Owners of Leisure Land, Inc. v. Wood & Magee, Inc.*, 786 S.W.2d 757, 760–61 (Tex. Civ. App.—Tyler 1990, no writ) (holding as reasonable use for mineral lessee to build emergency access road required by Railroad Commission even though subdivision restrictions prohibited such use). Moreover, if the lease covering a mineral lessee's tract contains a pooling clause and the surface owner takes subject to the lease, the mineral lessee can use a road on the tract for the benefit of other lands pooled with the tract. *Key Operating & Equip., Inc.*, 435 S.W.3d at 801.

An election by the mineral owner to use caliche, rather than dirt, in the construction of roads was found to be reasonably necessary, even though it inconvenienced the surface owner. *Devon Energy*, 136 S.W.3d at 419. In *Devon Energy*, the mineral lessee had initially used dirt roads to accommodate the surface owner's farming operations. However, when the dirt roads became unsuitable for the mineral lessee's use, it reinforced the roads with caliche, which made it more difficult for the surface owner to plow his fields. The appeals court affirmed the jury's finding that the use of caliche roads by the lessee was reasonably necessary, as well as the jury's determination that the lessee was entitled to damages for the surface owner's interference with those roads.

Additionally, a mineral lessee has the right to mine caliche from the surface estate to construct roads and pads for drill sites without being liable for damages, as long as such use is reasonably necessary. *B. L. McFarland Drilling Contractor v. Connell*, 344 S.W.2d 493, 497 (Tex. Civ. App.—El Paso 1961), *case dism'd as moot, sub. nom., Connell v. B. L. McFarland Drilling Contractor*, 347 S.W.2d 565 (Tex. 1961).

(3) Wells, Facilities, & Pipeline - Construction & Location

A mineral owner has the right to select the location for drill sites and facilities. *Ottis v. Haas*, 569 S.W.2d 508, 513 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 262 (Tex. Civ. App.—El Paso 1958, no writ); *Joyner v. R. H. Dearing & Sons*, 134 S.W.2d 757, 759 (Tex. Civ. App.—El Paso 1939, error dism'd judg. cor.); *Grimes v. Goodman Drilling Co.*, 216 S.W. 202, 204 (Tex. Civ.

App.—Fort Worth 1919, writ dism'd). In a 1919 case, the Fort Worth Court of Appeals provided an extreme example of this rule. In *Grimes*, the court held the surface owner could not compel the mineral lessee to move the well location from the front yard to the back yard when the lessee produced evidence that the front yard was a more effective location. *Grimes*, 216 S.W. at 204. Similarly, in *Walton*, the mineral lessee showed that the well locations it had selected were reasonably necessary to effectuate mineral recovery. *Walton*, 317 S.W.2d at 262.

The mineral lessee is also entitled to use so much of the land immediately surrounding the well as is reasonably necessary for his operations including the installations of tanks, other surface equipment, and slush pits. *Brown*, 344 S.W.2d at 866-67; *Ottis*, 569 S.W.2d at 513. Moreover, the mineral owner or lessee may construct production, storage, transportation, and housing facilities as reasonably necessary to develop the mineral estate. *Joyner*, 134 S.W.2d at 759-60. The *Joyner* court held that the housing facilities could be understood to be reasonably necessary to protect the production equipment at night. *Id.* at 760.

In contrast, at least one case illustrates a fact-finding that a well location was unreasonable. *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 855-56 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.). In *Jergenson*, a mineral lessee drilled a well on the edge of an ensilage pit used for cattle feeding purposes. The location also breached an express lease provision prohibiting drilling within 200 feet of existing structures, and was drilled despite the protests of the surface owner. The proximity to the pit and existing structures ruined the cattle feeding operation and devalued the surface estate. Not only did a jury find the well location to be unreasonable use, but it found the choice of location to be made "willfully and deliberately, over plaintiffs' protest, and in utter disregard of plaintiffs' property rights." *Id.* at 855-56. It awarded both economic and exemplary damages to the surface owner. As reasonableness of a surface use is a fact question, the appeals court found the trial evidence sufficient to affirm the jury finding.

Additionally, a number of cases specifically address the construction and use of pipelines across the surface, usually involving pooling situations. *Compare Delhi Gas Pipeline Corporation v. Dixon*, 737 S.W.2d 96 (Tex. App.—Eastland 1987, writ denied) and *Miller v. Crown Cent. Petroleum Corp.*, 309 S.W.2d 876 (Tex. Civ. App.—Eastland 1958, writ dism'd by agr.) (each holding that surface pipeline was reasonably necessary to develop mineral estate, even in pooling situations) *with Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867-68 (Tex. 1973) and *Cole v. Anadarko Petroleum Corp.*, 331 S.W.3d 30, 36 (Tex. App.—Eastland 2010, pet. denied) (each holding that to the extent pipeline benefited other pooled tracts, it was unreasonable use).

(4) Seismic & Geophysical Operations

The right to conduct seismic or geophysical operations is implied within the mineral owner's right to use the surface as reasonably necessary to develop the minerals. *Wilson v. Texas Co.*, 237 S.W.2d 649, 650 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.); *Yates v. Gulf Oil Corp.*, 182 F.2d 286, 289 (5th Cir. 1950); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 590 (5th Cir. 1957). When the estates are severed, the right to conduct seismic and geophysical exploration is solely that of the mineral estate and may not be conducted or transferred by the surface owner. *Wilson*, 237 S.W.2d at 650; *Phillips*, 241 F.2d at 590. The mineral owner may transfer the mineral estate and, by extension, the right to conduct seismic and geophysical exploration, but this transfer must be done through an instrument that transfers possession or title to said minerals, such as a lease. *N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598, 606 (Tex. 2016) (holding that an exclusive option contract to lease minerals does not transfer the requisite possessory or ownership interest to assert a trespass action for seismic survey, when no lease is executed.). Most modern leases contain provisions addressing seismic and geophysical operations; so, as always, it is important to review the documents to determine any contractual modifications to this right. *See, e.g.*, *Wilson*, 237 S.W.2d at 650.

(5) Timing & Notice of Drilling

Pursuant to the Texas Natural Resources Code, an operator must give the surface owner advance written notice of plans to drill or to re-enter a plugged and abandoned well. TEX. NAT. RES. CODE ANN. § 91.753(a). Upon receiving a drilling permit, the statute provides that the operator has 15 business days to notify the surface owner. *Id*. The statute does not require the operator to give notice when both parties have entered into an agreement that contains alternative provisions regarding notices or the surface owner has waived his right to notice. *Id*. at § 91.753(b). The failure to give notice does not affect the validity of operator's drilling permit or the right to develop the minerals. *Id*. at § 91.755.

In *Robinson Drilling Co. v. Moses*, a mineral lessee was not liable to the surface owner for damages caused by beginning drilling operations before the surface owner could harvest his crop. *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 652 (Tex. Civ. App.—Eastland 1953, no writ). Another court has also held that a mineral owner does not need to provide the surface owner with advanced notice of drilling operations. *Parker v. Texas Co.*, 326 S.W.2d 579, 583 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.). Of course, to

avoid disputes, it is advisable to notify the surface owner of any planned surface use.

(6) Use of Surface Water

A mineral owner has the right to take water as reasonably necessary to develop the mineral estate. *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649, 652 (Tex. Civ. App.—Amarillo 1941, error ref'd). Although reasonable use of surface water may include its use for secondary recovery, *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 812 (Tex. 1972), this right has been regulated by statute. *See* TEXAS WATER CODE ANN. § 27.0511. Moreover, the use of water to benefit the mineral estates of other tracts has been found unreasonable. *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867-68 (Tex. 1973).

(7) Salt Water/Waste Water Disposal

Reasonable use of the surface estate includes the right to dispose of salt water produced from a well on the land. *Brown*, 344 S.W.2d at 866-67 (finding that slush pits were reasonably necessary); *TDC Eng'g, Inc.*, 686 S.W.2d at 349 (finding that reinjection into a non-productive stratum was a reasonably necessary use of the surface); *Stephens v. Finley Res., Inc.*, No. 07-05-0023-CV, 2006 WL 768877, at *1 (Tex. App.—Amarillo Mar. 27, 2006, no pet.) (mem. op.) (citing *TDC* and *Brown* as well as the absence of a lease provision barring salt water injection as reasons the lessee could inject salt water); *but see Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App.—Tyler 1996, no writ) (holding that successive salt water and oil spills supported jury finding of unreasonable use). Although disposal of salt water on the property may be reasonable, the *negligent* disposal of salt water has provided the basis for a number of claims against lessees.

Similarly, operators that elect to obtain permits from the Texas Commission on Environmental Quality (TCEQ) for disposal wells may be subject to liability in tort for "the consequences of the permitted activity." *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 314 (Tex. 2011). In *FPL*, EPS sought and obtained a permit to drill two deep wastewater injection wells on property adjacent to FPL's rice farm. *Id*. at 307–08. FPL, who owned the surface but not the minerals on its tract, sued EPS in tort for damages caused to its land by migrating wastewater. *Id*. at 309. The jury found for EPS. *Id*.

On appeal, the Beaumont Court of Appeals did not address FPL's issues but, instead, decided the threshold issue of "whether EPS was shielded from civil tort liability merely because it received a permit to operate its deep subsurface wastewater injection well." *Id*. The court found in favor of EPS. *Id*. The Texas Supreme Court reversed and held that governmental permits "do not shield permit holders from civil tort liability that may result from actions governed by the permit. This is consistent with our common law rule that the mere fact that an administrative agency issues a permit to undertake an activity does not shield the permittee from third party tort liability stemming from consequences of the permitted activity." *Id*. at 314. The Court did not, however, decide "whether subsurface wastewater migration can constitute a trespass." *Id*. Thus, disposal operators are not protected from tort liability merely because they are engaging in a permitted activity.

Four years later, the Texas Supreme Court revisited *FPL Farming* and again declined to answer the trespass question. On remand from the first *FPL* opinion, the court of appeals reversed the trial court's take-nothing judgment, holding *inter alia* "(2) consent is an affirmative defense to trespass, on which EPS bore the burden of proof, and therefore the jury charge was improper; (3) FPL Farming was not entitled to a directed verdict because there was some evidence that it... impliedly consented to the subsurface entry...." *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 418 (Tex. 2015). Both parties appealed. *Id*.

The Texas Supreme Court felt answering the trespass question was unnecessary, stating, "If lack of consent is an element of a trespass cause of action as the jury charge instructed here, then we need not address whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration." *Id*. The jury had found in EPS's favor on all of FPL's claims. *Id*. Thus, any error would have been harmless. *Id*. The Court ultimately held that plaintiffs bear the burden of proving an entry was wrongful by establishing the entry was unauthorized or without consent. *Id*. at 425. The jury decided FPL failed to meet its burden of proof on the trespass claim. *Id*. Thus, the Court proceeded to the next issue, "without the need to decide whether Texas law recognizes a trespass cause of action for deep subsurface water migration...." *Id*.

It's uncertain when the Texas Supreme Court will issue a clear answer as to whether injected water constitutes a subsurface trespass. Regardless of what answer may come, operators must still follow existing state laws requiring injection permits. For example, Statewide Rule 46 requires any person who engages in fluid injection operations in reservoirs productive of oil, gas, or geothermal resources to obtain a permit from the Railroad Commission. Similarly, Statewide Rule 9 dictates the disposal of saltwater or other oil and gas waste requires application to and approval by the Commission. Additionally, operators must remember that these permits do not shield operators from tort liability arising from injecting or disposing of water.

(8) Release of Harmful Substances

A release of deleterious substances, such as oil or other runoff, may still be considered a reasonable use of the surface. The court in *Warren Petroleum Corp. v. Martin* held that the escape of oil and salt water from the

mineral lessee's wells did not necessarily constitute unreasonable use or negligence on the part of the lessee. *Warren Petroleum Corp.*, 271 S.W.2d at 410. Similarly, in *Jones v. Nafco Oil & Gas, Inc.*, the Texas Supreme Court held there was no evidence of negligence or excessive use when the escape of condensate from a pipe damages the surface. 380 S.W.2d 570 (Tex. 1964).

Thirty years later, a Texas court affirmed a jury verdict finding that repeated oil and salt water spills constituted excessive use of the surface. *Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App.—Tyler 1996, no writ). More recently, a prior lessee faced potential liability for trespass by salt water because its improperly plugged well failed to contain salt water injected under pressure by a new lessee. *See Ranchero Esperanza, Ltd. v. Marathon Oil Co.*, 488 S.W.3d 354, 363 (Tex. App.—El Paso 2015, no pet.). The injected salt water migrated through the subsurface to the prior lessee's plugged well, and salt water leaked to the surface. *Id.* The prior lessee only escaped liability for the surface owner's claims because they were barred by the statute of limitations. *Id.* at 365-66.

With the significant public interest in the substances used to facilitate fracing of wells and the concomitant concern over drinking water contamination, the use of such substances has become a topic for unreasonable surface use litigation. *See In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (involving claims by area residents alleging contamination of their water well as the result of a lessee's two negligently fraced gas wells, but deciding case on Anti-SLAPP grounds).

2. Unreasonable Use of the Surface

The following are cases that have found certain surface uses unreasonable in conflicting rights cases:

- Generally – *Texaco, Inc. v. Joffrion*, 363 S.W.2d 827 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (where mineral lessee laid circuitous pipelines, cut fences, allowed spillage of oil and salt water into creeks and water supply, and the leasehold was rendered useless for any agricultural purpose the court affirmed jury findings of unreasonable use and negligence).

- Contamination – *Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App.—Tyler 1996, no writ) (repeated salt water and oil spills were unreasonable use of the surface).
- Amount of Surface – *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941, error ref'd) (mineral lessee used 6 acres more than reasonably necessary).
- Water Usage – *Gulf Oil Corp. v. Whitaker*, 257 F.2d 157 (5th Cir. 1958) (holding that lessee used excessive surface water from tank on property); *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973) (holding that use of water to reinject wells was unreasonable to extent it benefited other tracts); *see also* TEXAS WATER CODE ANN. § 27.0511 (restricting right to use fresh water for secondary recovery when alternative substances on the premises may reasonably be used).
- Obstruction of Neighboring Leases – *Atlantic Refining Co. v. Bright & Schiff*, 321 S.W.2d 167 (Tex. Civ. App—San Antonio 1959, writ ref'd n.r.e.) (holding that mineral lessee's use of surface to obstruct, hamper, or prevent neighboring mineral development was unreasonable).

a. Conflicting Use – Due Regard

In scenarios where the surface owner has an existing use of the surface and the mineral owner's use or proposed use interferes with that existing use, the accommodation doctrine applies. In contrast to the focus on reasonable necessity in the conflicting rights cases, the accommodation doctrine cases emphasize the "due regard" aspect of reasonable use. This section is particularly relevant in the present litigation climate, as surface owners often claim an existing use or a planned existing use, regardless of whether an actual use of the surface exists.

(i) The Accommodation Doctrine

Cases dealing with conflicting use employ a particular, judicially created standard to determine reasonable use that goes beyond the simple reasonable use inquiry of conflicting rights cases. The accommodation doctrine, also known as the "alternative means" doctrine, places the burden of proof on the surface owners to demonstrate that: 1) their use preexisted the mineral owner's conflicting use; 2) the preexisting use is their only reasonable means of developing the surface; and 3) the mineral owner has other options that a) would not interfere with the surface owner's preexisting use, b) are reasonable (including economic reasonableness), c) are practiced in the industry on similar lands put to similar uses, and d) are available on the premises. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993). The following paragraphs outline the development of this test.

(ii) Case Law

The Texas Supreme Court first articulated the accommodation doctrine relatively recently in *Getty Oil*

Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971). Few cases dealing with conflicting use have been decided by the Texas Supreme Court since; therefore, it is instructive to examine these cases in detail, as well as certain cases at the appellate level.

(1) *Getty v. Jones*

In *Getty*, the Texas Supreme Court first articulated what is now known as the accommodation doctrine. *Getty*, 470 S.W.2d at 621, 628. Jones, the surface owner, purchased land subject to a mineral lease held by Getty. Jones installed a self-propelling irrigation system, which consisted of numerous pivot heads, to aid his surface use of farming the tract. These pivot heads could only clear surface obstructions at a height of seven feet. Four years later, Getty, which had been previously exploring a different area of the tract, drilled two wells and installed pumping units in the vicinity of Jones' farming operation. These units were 17 and 34 feet high, respectively, and blocked the trajectory of many of the irrigation pivot heads.

Jones sought an injunction barring Getty from its use of the pumping units, arguing that it was not reasonably necessary for Getty to use those types of units. Jones' tract was divided among mineral operators. He presented evidence that the other operators had either placed their pumping units in cellars below the surface of the land or had used hydraulic pumps. Each of these alternative methods allowed the irrigation system to operate without interference. Jones also showed that the incremental cost of installing and maintaining these alternative units was minimal, and that either alternative would allow him to use the irrigation system. Getty, in response, asserted its right to use the surface as the lessee of the dominant mineral estate.

In its reasoning, the Texas Supreme Court emphasized the concept of due regard for the rights of the surface owner. *Id.* at 622. The Court acknowledged that often "[t]here may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage." *Id.* However, the Court found that where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee. *Id.*

The Court then required Getty to replace the pumping units to accommodate Jones. *Id.* at 623. Notably, regarding the issue of remedies, the court held that: "Getty will have the right to install non-interfering pumping units; and in such event Getty will not be liable in damages beyond the decrease in the value of the use of the land from the time the interfering pumps were installed to the time of their removal." *Id.*

The opinion on rehearing included a "postscript" reaffirming the dominance of the mineral estate. After noting the fact intensive nature of the "reasonable use" inquiry, the Court clarified the accommodation doctrine test. *Id.* at 627-28. First, the surface owner must prove that his existing use is the only reasonable means of developing the tract. *Id.* at 628. Second, the surface owner must prove that reasonable, non-interfering alternatives are available to the mineral owner. *Id.* If the surface owner cannot prove each of these, the mineral owner is not required to accommodate surface owner's use. *Id.*

(2) *Sun Oil v. Whitaker*

Just one year after its decision in *Getty v. Jones*, the Texas Supreme Court further limited the scope of the accommodation doctrine. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972). In *Sun Oil*, the Court held that *only* alternatives available to the mineral owner or lessee *on the leased premises* could be considered reasonable for the purpose of accommodation. *Id.* at 812. There, Whitaker, the surface owner, used fresh water from an aquifer located on the premises to irrigate his farming operation. Sun Oil, in a secondary recovery effort from existing wells on the tract, used 100,000 gallons a day from the aquifer. It had previously attempted to use available salt water with no success. Sun Oil sought a declaration of its right to use the water and Whitaker sought to enjoin the use and recover monetary damages for the crops destroyed.

First, the Texas Supreme Court reaffirmed that a mineral owner has the implied right to use water from the surface estate as reasonably necessary to develop the mineral estate. *Id.* at 811 (citing *Guffey v. Stroud*, 16 S.W.2d 527 (Tex. Com. App. 1929)). This includes the right to use such water for secondary recovery. *Id.* Premised on this implied right, the Court held that Sun Oil had the right to use fresh water from the aquifer as reasonably necessary. *Id.* Dismissing Whitaker's argument that the accommodation doctrine required Sun Oil to import water from another source, the court read *Getty v. Jones* as "limited to situations in which there are reasonable alternative methods that may be employed by the lessee *on the leased premises* to accomplish the purposes of this lease." *Id.* at 812 (emphasis added). The decision limits the applicability of the accommodation doctrine and reaffirms the dominance of the mineral estate.

(3) The *Haupt* Cases

The Texas Supreme Court has also applied the accommodation doctrine where a governmental entity was the surface owner. *Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993) [*Haupt I*]. In *Haupt I*, the

county water district flooded a tract in order to construct a reservoir. The mineral owners brought an inverse condemnation action seeking compensation for the loss of the mineral estate. Although neither of the lower courts had considered it, the water district argued that the accommodation doctrine should apply because the reservoir was an existing surface use and the reservoir was the only reasonable means of developing the surface.

The Texas Supreme Court agreed, and remanded the case for the appeals court to determine whether an alternative reasonable means was available to the mineral owners to develop their estate. *Id.* at 912-13. On remand, the Waco Court of Appeals determined that, on the facts of that case, vertical surface drilling was the only reasonable means available to the mineral owners, and found that the water district had inversely condemned the property. *Tarrant County Water Control & Improvement District No. One v. Haupt, Inc.*, 870 S.W.2d 350 (Tex. App.—Waco 1994, no writ) [*Haupt II*]. The court's analysis of the reasonableness of the available alternative means primarily focused on the economic feasibility of those other options, which was supported by expert testimony and evidence of attempted directional drilling. *Id.* at 354.

The most important aspect of the appellate court's decision in *Haupt II*, is that it supports the notion that economic feasibility must be considered in determining the reasonableness of an alternative means. Notably, in performing an economic analysis of reasonableness, the court ultimately found for the mineral owner. The court's statement that an accommodation that reduces the value of the minerals by three-fourths "cannot logically or rationally" be reasonable apparently sets a legal baseline for reasonableness. Thus, pursuant to the *Haupt* cases, a 75% reduction in the value of minerals due to the increased costs of a proposed accommodation is unreasonable *as a matter of law*.

(4) The *Genco* Cases

(5) *Genco I*

The Waco Court of Appeals applied the test of economic reasonableness to determine a mineral owner's duty to accommodate by directional drilling. *Texas Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied) [*Genco I*]. In *Genco I*, the appeals court considered whether a mineral lessee was required to accommodate the existing surface use of landfill operations by an energy company. The energy company, Genco, had established a plan to use a tract of land, which it had divided into cells, as a landfill. Genco had filed the plan in the county deed records. *Id.* at 120-21. The mineral lessee, Valence, obtained a permit to drill a straight hole well on one of the cells from which Genco was mining clay and in which it was storing topsoil for the landfill operation. *Id.* Genco presented evidence that if Valence drilled in the cell, the remaining lifespan of the entire landfill operation would be reduced from 11 years to just 7 years. *Id.*

Genco argued that the mineral lessee should accommodate its surface use by directional drilling and had offered an alternative location outside the landfill site and also offered $400,000 to Valence as compensation for the incremental cost of directional drilling. *Id.* When Valence rejected this offer, Genco sought an injunction. *Id.*

At trial, the jury found that Genco had an existing use and Valence had a reasonable, industry-accepted alternative, but the jury did not find that the straight hole well proposed by Valence would be an unreasonable use. *Id.* The trial court entered judgment for Valence. *Id.*

The court of appeals reversed holding that the jury's affirmative answers as to an existing use and a reasonable alternative established a duty for the mineral owner to accommodate the existing surface use. *Id.* The court further found that, even though the cell in question was not being used as a landfill at that moment, because it was being used for mining and storage and was part of a recorded landfill plan, the jury could have considered it an existing use. *Id.*

More importantly, to determine that directional drilling was a reasonable alternative, the court looked to a number of factors, emphasizing economic reasonableness. *Id.* The court noted that directional drilling was a "generally established" method of production and found Genco's evidence that Valence's cost estimates for directional drilling were too high sufficiently supported the jury finding. *Id.* at 125. Finally, the court looked at the increased drilling *costs relative to the estimated value of the reserve* to support its opinion. *Id.* The court reversed the lower court and rendered judgment for Genco, the surface owner. *Id.*

(6) *Genco II*

Two years later, in 2008, the same court considered a similar appeal between the same parties based on the same underlying facts. *Valence Operating Co. v. Texas Genco, LP*, 255 S.W.3d 210 (Tex. App.—Waco 2008, no pet.) [*Genco II*]. Two points in *Genco II* are particularly notable. First, the court upheld the jury finding of a duty to accommodate Genco's "existing use" of a cell that was arguably not actually being used at the time of proposed drilling. *Id.* at 218-19. Genco had argued that if Valence drilled in this particular cell, it would be blocked in by wells with no room to expand. The jury apparently agreed, as did the appeals court. *Id.*

Second, Valence argued that the offered accommodations were off the premises and, pursuant to *Sun Oil*, were necessarily unreasonable. *Id.* at 216-17. The court declined to address this issue, finding instead that Genco had offered reasonable accommodation on the premises. *Id.* at 217. The court suggested in *dicta* that *Sun Oil* might be distinguishable where the question

concerned drilling off the premises, as opposed to importing water from off the premises. *Id.* at 217 n.7. If a court were to read *Sun Oil* as narrowly concerning the use of water, it would dangerously broaden the scope of the accommodation doctrine for mineral owners.

Finally, the *Genco* courts' deference to the *jury's* finding of an existing use suggested that juries would remain a part of at least some courts' accommodation doctrine analyses, and that courts are progressively expanding the scope of factual situations to which the accommodation doctrine applies.

(7) *Merriman v. XTO Energy, Inc.*

In 2013, the Texas Supreme Court revisited the accommodation doctrine in *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013). There, it restated the permissible scope of interactions between surface owners and lessees as follows:

1. A party possessing the dominant mineral estate has the right to go onto the surface of the land to extract the minerals, as well as those incidental rights reasonably necessary for the extraction.
2. The incidental rights include the right to use as much of the surface as is reasonably necessary to extract and produce the minerals.
3. If the mineral owner or lessee has only one method for developing and producing the minerals, that method may be used regardless of whether it precludes or substantially impairs an existing use of the surface.
4. On the other hand, if the mineral owner has reasonable alternatives for use of the surface, one of which permits the surface owner to continue to use the surface in the manner intended, and one of which would preclude that use by the surface owner, the mineral owner must use the alternative that allows continued use of the surface by the surface owner.

Id. at 248-49.

Merriman is helpful for two additional reasons: First, it clarified the correct considerations for courts performing an accommodation doctrine analysis; second, it further defined a surface owner's burden in such cases.

Homer Merriman owned the surface of a 40-acre tract, where he established a cattle operation. *Id*. at 247. The lessee, XTO, wanted to drill a gas well on the tract. *Id*. Merriman opposed the drilling, which he contended would interfere with the cattle operation. *Id*. XTO proceeded to drill the well anyway. *Id*. Merriman sued to enjoin XTO, but the trial court granted XTO's traditional and no-evidence motions for summary judgment, which attacked Merriman's ability to produce sufficient evidence that XTO failed to accommodate his use of the surface. *Id*.

The Texas Supreme Court held that the court of appeals had analyzed the case incorrectly. *Id*. at 249-50. The court of appeals improperly reviewed whether Merriman could make *any* alternative use of the surface for general agriculture that was not impracticable or unreasonable. *Id*. at 249 (emphasis added). It also improperly considered other tracts of land Merriman leased when deciding whether he presented evidence that he did not have reasonable, alternative methods of conducting his operation. *Id*. at 250. The Texas Supreme Court held that the correct scope was limited to the exact 40 acres at issue in the lawsuit. *Id*. at 251.

In the same vein, the Supreme Court rejected the court of appeals' reasoning that it could consider possible alternative uses of the property other than the existing cattle operation. *Id.* at 250. The correct inquiry was whether Merriman offered sufficient evidence to show he had no reasonable alternatives to conducting his cattle operations, not that he had no reasonable alternatives to general agricultural uses. *Id*. at 250-51.

As for Merriman's burden of proof, he lost because "[h]e did not produce evidence showing he had no reasonable method to conduct the sorting, working, and loading activities somewhere else on the subject tract." *Id*. at 251. He merely offered conclusory statements regarding the inconvenience and cost to him arising from XTO's actions. *Id*. Instead, Merriman should have offered evidence to show corrals and pens could not be constructed and used somewhere else on the tract. *See id*. at 251. He should have shown "that he had *no reasonable alternative means* of maintaining his cattle operations." *Id*. at 252 (emphasis added).

(8) *Coyote Lake Ranch, LLC v. City of Lubbock*

Three years after *Merriman*, the Texas Supreme Court applied the accommodation doctrine to groundwater operations in *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 55-56 (Tex. 2016). In 1953, during a severe drought, the City of Lubbock purchased Coyote Lake Ranch's groundwater. *Id*. The ranch deeded the groundwater to the City, reserving water for domestic use, ranching operations, oil and gas production, and agricultural irrigation. *Id*. In 2012, the City wished to increase its water-extraction efforts and planned to do so by drilling 20-80 additional wells on the ranch. *Id*. at 57. The ranch opposed this plan, and the City countered that it held an absolute right under the broad terms of the deed, which placed no express limit on the number of wells it could drill. *Id.*

The ranch eventually sued for an injunction, arguing that the city "has a contractual and common law responsibility to use only that amount of surface that is reasonably necessary to its operations" and "a duty to conduct its operations with due regard for the rights of the surface owner." *Id.* The trial court granted a

temporary injunction. *Id*. at 58. The court of appeals sided with the City, saying the ranch couldn't prevail unless the accommodation doctrine applied. *Id*. The ranch sought review. *Id.*

The Texas Supreme Court granted review and extended the accommodation doctrine to groundwater. It stated, "The paucity of reported cases applying the doctrine suggests that it is well-understood and not often disputed. We have applied the doctrine only when mineral interests are involved. But similarities between mineral and groundwater estates, as well as in their conflicts with surface estates, persuade us to extend the accommodation doctrine to groundwater interests." *Id.* at 63.

Moreover, the Court said the common law rules governing mineral and groundwater estates are not only similar but drawn from each other or from the same source. *Id*. at 64. The Court viewed the dispute over the City's right to use the Ranch as identical to "the disagreement between Getty Oil and Jones." *Id*. Resolution of both required an interpretation of the severed estate's implied right to use the surface. *Id.* "The accommodation doctrine has proved its worth in such cases." *Id*.

(9) *VirTex Operating Co., Inc v. Bauerle*

The San Antonio Court of Appeals applied *Merriman* to a surface use dispute with a twist – impact to the airspace above the land – in *VirTex Operating Co., Inc v. Bauerle*, No. 04-16-00549-CV, 2017 WL 5162546, *1 (Tex. App.— San Antonio Nov. 8, 2017, pet. denied) (mem. op.). In this case, Leon and Cyndi Bauerles owned Todos Santos Ranch and operated a commercial hunting business on the 8,500-acre property. The Bauerles sold hunting leases that allowed hunters to use helicopters for game operations, game surveys, deer captures as well as predator and brush control. *Id.* at *1-*2. The Bauerles owned 100% of the surface and a 2% royalty interest in the acreage. *Id*. at *1. ExxonMobil owned the full mineral fee estate underlying the property and executed the Mars Mclean Lease to VirTex, which covered 3,000 acres of the ranch. *Id*. at *2.

There had been no oil and gas activity when the Bauerles first acquired the property. *Id*. A VirTex landman informed Mr. Bauerle that VirTex wished to drill a well to determine whether there was oil and gas on the property. *Id*. The well was productive, and VirTex drilled several more wells, paying monthly royalties to the Bauerles. *Id*. By fall 2008, the Bauerles had entered into a surface use agreement with VirTex, allowing VirTex to install tank batteries. *Id*. VirTex operated nine wells on 2,000 acres of the 3,000 acres covered by the lease. *Id*. Four temporary generators powered each well because the ranch only had one power line. *Id*. VirTex sought an easement to build power lines across the ranch, but the Bauerles refused. *Id*. The Bauerles and VirTex ended up in a lawsuit. *Id.* VirTex argued the Bauerles' opposition to installing the power lines was an unreasonable interference with its right to extract the minerals. *Id*. The trial court returned a verdict in the Bauerles' favor. *Id*. at *3.

On appeal, the Bauerles highlighted evidence on the substantial impairment VirTex's powerlines would have on their preexisting use, arguing the power lines would make helicopter flying dangerous and more difficult. *Id*. at *5. The court of appeals concluded the evidence established substantial impairment. *Id.* VirTex argued that the substantial impairment prong can only be established by evidence showing the surface owner "has already been impaired." *Id*. at *6. However, the court of appeals rejected this argument, noting "the surface owner need only prove that his existing use *would be* substantially impaired or completely precluded by the mineral owner's proposed use of the surface." *Id* (emphasis added).

VirTex next argued the Bauerles could not establish that no reasonable alternative methods to the helicopter hunting existed. *Id*. at *7. It highlighted evidence that helicopters could continue to be used on the 5,500 acres of unleased property and four-wheelers could be used within the leased acreage, where the power lines were to be installed. *Id*. However, *Merriman* has already shown us the critical inquiry is not whether the surface owner can move operations, but rather the impact on the subject tract. Hunters testified that these alternative methods only worked on paper and, in practice, would make flying so difficult and dangerous that they would no longer lease from the Bauerles. *Id*. VirTex categorized this evidence as failing to carry the Bauerles' burden under the *Merriman* standard – that they only showed inconvenience and a reduction in economic benefit. *Id.* at *8. The court disagreed, saying that while the Bauerles' ample evidence exclusively dealt with inconvenience and diminished economic benefit, the evidence was so voluminous as to make the alternative method unreasonable. *Id.*

Finally, the Bauerles satisfied the final prong of the accommodation doctrine, showing an alternative reasonable, customary, and industry-accepted method was available to power the oil and gas wells—bury the power lines or use diesel or natural gas to fuel its pumpjacks, something VirTex had done for other projects. *Id*. They also highlighted the fact that natural gas lines were already installed across the ranch, and granted VirTex permission to use them. *Id*. at *9. The court held the Bauerles satisfied the final prong in spite of the fact that powering the wells with natural gas was the "next best alternative" not the cheapest. *Id.* at *10. An alternative method need not be the least costly method, and the Bauerles showed a reasonable, industry-accepted alternative. *Id*.

VirTex is important for multiple reasons. First, it's another case where a court largely left the accommodation doctrine analysis to the jury. Second, it expands the notion of what it means to have a preexisting use of the surface. The Bauerles were concerned about the use of the airspace immediately above their surface.

It's also important to note that while the parties in VirTex had a surface use agreement, none of its terms covered this situation. Operators should consider this and make sure their surface use agreements are expansive enough to provide for all things necessary to guaranty development.

(10) Other Cases

A few other cases have considered the scope and application of the accommodation doctrine. *See, e.g. Harrison v. Rosetta Res. Operating, LP*, 564 S.W.3d 68, 74 (Tex. App.—El Paso 2018, no pet.) (prior lessee's agreement to purchase water from the surface owner did not create a preexisting use of the service that the subsequent lessee assignee of prior lessee's interest was forced to maintain under the accommodation doctrine); *Redburn v. City of Victoria*, 898 F.3d 486, 494 (5th Cir. 2018) (impliedly holding the accommodation doctrine does not apply to easements); *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex. 1973) (holding that although salt water is part of the surface, based on *Sun Oil*, the mineral owner may use as much as reasonably necessary to develop the minerals on that tract); *Ottis v. Haas*, 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (rejecting the application of the accommodation doctrine where the surface owners sought to require the mineral lessee to move its tank batteries, reasoning that mere inconvenience does not invoke the doctrine); *Davis v. Devon Energy Prod. Co.*, 136 S.W.3d 419, 424-25 (Tex. App.—Amarillo 2004, no pet.) (refusing to apply the accommodation doctrine where the use of caliche in road construction did not substantially impair surface farming operation). Additionally, the existence of an agreement concerning surface use by the mineral owner may vitiate the duty to accommodate. *See Landreth v. Melendez*, 948 S.W.2d 76, 81 (Tex. App.—Amarillo 1997, no writ) (holding no duty to accommodate existed where the deed reserved for the mineral estate the right "to take all usual, necessary, and convenient means" to develop the minerals).

D. Surface Damages Legislation

Another longstanding concern for mineral owners in Texas is the potential for a Surface Damages Act to codify law on surface damages. Multiple states have adopted such statutes, including North Dakota, South Dakota, Oklahoma, Montana, West Virginia, Tennessee, Illinois, Indiana, and Kentucky. *See* Rick D. Davis, Jr., *Accommodation Doctrine*, UNIVERSITY OF TEXAS SCHOOL OF LAW'S 32ND ANNUAL ERNEST E. SMITH OIL, GAS & MINERAL LAW INSTITUTE CONFERENCE 44 (March 31, 2006). These statutes vary in their requirements, ranging from strict liability for surface damage to compelled negotiation with surface owners to set-back provisions and the posting of a bond by mineral owners in case of unreasonable surface damage. *Id.* at 44-46.

Texas legislators have made multiple attempts to pass such an act. To this day, Texas does not have a surface damages act. *See* Chance K. Decker and Niloufar Hafizi, *Executive Rights Jurisprudence in other States*, 2020 TXCLE-OGMTEC 20.2-V, 2020 WL 3978619.

E. Negligence

In addition to the reasonable use limitations, a mineral owner or lessee must conduct surface operations without negligence. *Brown*, 344 S.W.2d at 866-67. As discussed, a mineral owner's use of the surface must be reasonably necessary to develop the mineral estate and give due regard for the rights of the surface owner. However, even if the surface use is reasonable, the mineral owner may still be held liable for damages for conducting operations negligently. *See, e.g.*, *Brown*, 344 S.W.2d at 866-67; *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 670-71 (Tex. 1961). The cases in which a mineral owner has been found negligent most often deal with the negligent handling or disposal of harmful substances, such as salt water or oil.

1. Standard of Care

Mineral owners and lessees must conduct surface operations as reasonably prudent operators. *Brown*, 344 S.W.2d at 866-67; *Currey v. Ingram*, 397 S.W.2d 484, 486 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.). Reasonable operations are those conducted in a usual and customary way, consistent with the purpose for which the land was leased. *Sinclair Prairie Oil Co. v. Perry*, 191 S.W.2d 484, 486 (Tex. Civ. App.—Texarkana 1945, no writ) *Brown*, 344 S.W.2d at 866-67. However, as with negligence cases outside the mineral development context, evidence of compliance with industry customs and standards, while probative, does not conclusively establish non-negligence. *See Brown*, 344 S.W.2d at 867-8; *Texaco, Inc. v. Joffrion*, 363 S.W.2d 827, 832 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.). Moreover, as in any negligence case, surface owners must provide sufficient evidence of the mineral owners' breach of their duty to act reasonably, and also that the breach proximately caused the injury alleged. *Carter v. Simmons*, 178 S.W.2d 743, 746 (Tex. Civ. App.—Waco 1944, no writ) (holding that evidence that slush pits overflowed was not, by itself, enough to prove either negligent operations or proximate cause of injury to livestock); *Weaver v. Reed*, 303 S.W.2d 808, 810 (Tex. Civ. App.—Eastland 1957, no writ) (finding

lack of evidence to prove proximate causation); *Austin Road Co. v. Boston*, 292 S.W.2d 373, 375 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.) (finding no evidence that rock mining operations were conducted negligently).

2. Cases Finding Negligence in Surface Use

The seminal case regarding a mineral owner's negligent surface use is *Brown v. Lundell*, 344 S.W.2d 863, 866-67 (Tex. 1961). In that case, a mineral lessee disposed of salt water in an earthen pit on the surface estate. The Texas Supreme Court summarized the evidence as follows:

> Within the space of 15 months after production was obtained lessee poured some 3,000,000 gallons of salt water into this earthen tank. The analysis showed that this volume of water contained a total of nearly 4,000 tons of salt exclusive of other solids. It was undisputed that seepage of this salt water caused the pollution complained of. When complaint of this pollution was made by the landowner the petitioner promptly converted one of his smaller producing wells into an 'input' well and injected the salt water back into its original stratum. The petitioner himself testified that if he had thought seriously about the possibility of pollution he would have tried to devise another system of disposal. He knew or should have known of the amount of water that was being placed in the pit and of its salt content; that in an open, unsealed tank that some of the water would evaporate, some would normally percolate and seep into the ground. He knew that no salt deposits had ever been removed from the pit. There was testimony indicating that there had been complaint of salt water pollution from open disposal pits in other sections of this general area and other producers had switched to the reinjection method previously. Brown knew that a fresh water formation underlay this farm and that this water was used for irrigation and farming purposes.

Id. at 870. The Court affirmed the jury finding of negligence. *Id.* at 871.

Brown reflects the difference between reasonable use and negligence, while also illustrating the blurred line between the two. The Court found that the use of an earthen pit to dispose of salt water was a reasonable use, but the mineral lessee's failure to use reasonable care in the "way and manner" of disposal made him negligent. *Id.* at 867. Yet, even in *Brown* it appears that the use of an earthen pit on that particular tract in that particular situation could have constituted an unreasonable use of the surface. *Cf. Oryx Energy Co. v. Shelton*, 942 S.W.2d 637, 642 (Tex. App.—Tyler 1996, no writ) (holding that the repeated release of salt water and oil onto the surface supported jury finding of unreasonable use, rather than negligence).

Mineral owners and lessees have been found negligent in a number of other cases:

- In *Currey v. Ingram*, 397 S.W.2d 484, 486 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.), the mineral lessee was negligent in his disposal of salt water, which caused damage to the surface owner's land, livestock, and crops. The appeals court found the evidence, which included expert testimony regarding reasonably prudent operations, factually sufficient to affirm the lower court decision.
- *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 669-71 (Tex. 1961) is another negligent salt water disposal case. There, the mineral lessee negligently allowed salt water to escape, polluting a spring, and was liable to the surface owner for permanent damages to the property.
- Similarly, in *Ellis Drilling Corp. v. McGuire*, 321 S.W.2d 911, 914 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.), the court upheld a jury verdict which found that the mineral lessee had negligently drilled into air and salt water strata, causing a salt water blowout. The lessee was liable for damages to the surface estate for causing the blowout, failing to control the blowout, and allowing salt water to flow onto the surface for months.
- Mineral lessees have also been held liable for leaks from negligently maintained pipelines or other equipment. *See, e.g., Scurlock Oil Co. v. Harrell*, 443 S.W.2d 334, 337 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.); *see also Lone Star Gas Co. v. McGuire*, 570 S.W.2d 229, 231 (Tex. Civ. App.—Waco 1978, no writ) (lessee held liable for negligent drainage of pipeline resulting in spillage of oil, gas, chemicals and salt on land).

Finally, a textbook example of "what not to do" as a mineral lessee occurred in the case of *Texaco, Inc. v. Joffrion*, 363 S.W.2d 827, 830 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.). In that case, the mineral lessee was found liable for both negligence and unreasonable use of the surface.

> The following summary is the evidence in its *most favorable* aspect supporting the jury findings.... Oil and salt water pits were excavated that were not large enough to hold the oil, petroleum substances and salt water

> run into them in the course of production. The pits overflowed and these substances escaped onto the ground and into the creeks and water supply. Approximately 100,000 feet of pipe line was laid on the ground, the lines were 'scattered', crossed open fields and hay meadows, and did not follow the roads to the wells or any particular pattern. The fence enclosing the land was cut in six different places, but no gates or cattle guards were installed for approximately fifteen months. Roads to well sites were graded, abandoned, and new roads built in different locations. The entire tract was rendered useless for dairying, pasturing, cultivation of crops and harvesting of hay by Texaco's use of the surface.

Id (emphasis added). The lessee was held liable for the diminution in value of the surface estate.

3. Negligence Per Se

A violation of a statute, ordinance, or rule is negligence per se if the damage was the type the rule was intended to prevent. *Peterson v. Grayce Oil Co.*, 37 S.W.2d 367, 371 (Tex. Civ. App.—Fort Worth 1931), *affirmed by* 98 S.W.2d 781 (Tex. 1936). Texas courts have applied negligence per se in oil and gas surface damage cases. *Id.*; *Mieth v. Ranchquest, Inc.*, 177 S.W.3d 296, 305 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (finding that it was error for the trial court not to submit an instruction of negligence per se for the violation of RAILROAD COMMISSION STATEWIDE RULE 8 regarding water pollution); *Gulf Oil Corp. v. Alexander*, 291 S.W.2d 792, 794 (Tex. Civ. App.—Amarillo, *writ ref'd n.r.e. per curiam*, 295 S.W.2d 901 (Tex. 1956)) (holding that no proof of negligence was required to hold a mineral lessee liable to the surface owner for damages caused by pollution of fresh water, which violated RAILROAD COMMISSION STATEWIDE RULE 20). *But see Murphee v. Phillips Petroleum Co.*, 492 S.W.2d 667, 674 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (rejecting negligence per se application of RULE 20 and instead required a specific finding of negligence to hold mineral lessee liable); *Brown*, 344 S.W.2d at 866-67 (Smith, J., dissenting) (Judge Smith dissented based, in part, on the admission of evidence of the violation of RULE 20 as unfairly prejudicing the jury towards a finding of negligence, and opined that negligence per se based on RULE 20 should not apply in surface damage cases). Thus, if a mineral owner has been found liable for breaking a rule or statute, the surface owner will likely be permitted a jury instruction regarding negligence per se.

F. Special Rules

1. Injury to Livestock

In cases dealing with injury to livestock, rather than injury to land, Texas courts employ a standard that combines reasonable use, negligence, and intentional tort. *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 671 (Tex. 1961); *Amerada-Hess Corp. v. Iparrea*, 495 S.W.2d 60, 61 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.); *Satanta Oil Co. v. Henderson*, 855 S.W.2d 888, 889 (Tex. App.—El Paso 1993, no writ). In those cases, absent a contractual provision to the contrary, if the mineral owner or lessee is making reasonable use of the surface, the only duty owed to the surface owner is to not "intentionally, willfully, or wantonly" injure the livestock. *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410, 413 (Tex. 1954); *Satanta*, 855 S.W.2d at 890. Hence, the mineral owner has no duty to put fences around any mineral operations. *Warren*, 271 S.W.2d at 411; *Aiken*, 344 S.W.2d at 671; *Satanta*, 855 S.W.2d at 890.

On the other hand, if the mineral owner uses more of the surface than is reasonably necessary, the standard reduces to negligence. Thus, the surface owner must first prove unreasonable use and then show that the mineral owner was negligent in some way. *Warren*, 271 S.W.2d at 413; *Satanta*, 855 S.W.2d at 890. Often at issue on appeal is whether the plaintiff proved that the negligence proximately caused the injury to the livestock. *See, e.g.*, *Warren*, 271 S.W.2d at 413; *Satanta*, 855 S.W.2d at 890; *Weaver v. Reed*, 303 S.W.2d 808, 809 (Tex. Civ. App.—Eastland 1957, no writ); *Carter v. Simmons*, 178 S.W.2d 743, 746 (Tex. Civ. App.—Waco 1944, no writ).

In summary, to receive damages in livestock cases, the surface owner must show either: 1) the mineral owner acted intentionally, willfully, or wantonly to injure livestock or 2) unreasonable use *and* negligence (including proximate causation).

2. The Executive Right and the Duty of Utmost Good Faith - *Texas Outfitters Ltd, LLC v. Nicholson*

In instances where a holder of the executive right shares ownership or possession of the minerals with other parties, he must remember his duty to develop the minerals.

Dora Carter owned the surface estate of a 1,082-acre tract in Frio County known as Derby Ranch. She and her two children collectively owned an undivided 50% interest in the mineral estate. The Hindes family owned the other 50% mineral interest. 572 S.W.3d 647, 649 (Tex. 2019). The Carters sold the surface, a 4.16% mineral interest, and the executive right to their retained 45.84% mineral interest to Texas Outfitters. *Id*. Frank Fackovec, owner of Texas Outfitters, wanted to use the surface to develop his hunting operation. *Id*. The Hindes family eventually leased their minerals, and the

Carters wanted Fackovec to do the same. *Id*. at 649-50. He refused. *Id*. at 650.

The Carters sued Fackovec on the grounds that he "as holder of the executive rights to the Carters' mineral interests, breached the duty of utmost good faith and fair dealing by refusing to enter into the lease [at issue]." *Id*. The trial court found that Fackovec, "By refusing to lease," gained "unfettered use of the surface for [his] hunting operation, which was always the plan for the property," as well as "the ability to sell its land at a large profit free of any oil and gas lease." *Id*. at 651. The court of appeals affirmed. *Id*. at 652.

The Texas Supreme Court ultimately affirmed the court of appeals, saying that "Texas Outfitters engaged in acts of self-dealing that unfairly diminished the value of the Carters' non-executive interest," and, therefore, "breach[ed] its executive [duties of utmost good faith and fair dealing]." *Id*. at 657-58.

G. Remedies and Damages

Historically, the most difficult aspect of surface damage litigation was the potential damage assessment. The unclear case law regarding damages to real property and the numerous fact questions for the jury regarding both liability and damages made accurate risk evaluation difficult. As a result, mineral owners and lessees often settled with surface owners, sometimes at too high a price, rather than face the uncertainty of litigation.

A surface owner has two types of remedies available in surface damages cases: injunctive relief and monetary damages.

1. Injunction

Generally, where a mineral owner's operations are imminent or ongoing, the surface owner's first objective is to enjoin operations they consider unreasonable or negligent. In accommodation doctrine cases, an injunction is the primary remedy, as surface owners seek to prevent interference with their existing use. A permanent injunction issues only if a party does not have an adequate legal remedy (usually monetary damages). *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 284 (Tex. 2004), *holding modified by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474 (Tex. 2014); *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001) (per curiam). An injunction has the effect of a decree of specific performance restraining any breach that would otherwise cause damage. *Schneider*, 147 S.W.3d at 284. As such, generally a surface owner cannot receive both an injunction for the mineral owner to cease operations and monetary damages for future injury to the property. *Id*. at 284-85.

2. Monetary Damages

If any damage to the surface has already occurred, with or without enjoinable operations, the surface owner is likely to seek monetary damages. Damages to real property are calculated based on the nature of the injury, rather than the cause of action asserted.[2] In an accommodation doctrine context, the surface owner will also likely seek damages to her preexisting use, assuming interference occurred before the issuance of an injunction. If the surface owner lost livestock or other personal property, she will seek damages for injury to personal property in addition to real property.

As mentioned above, in the nuisance section of this article the Texas Supreme Court sought to clarify the pertinent rules for monetary damages in the 2014 case *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.* As part of this clarification, it addressed the historically vexing determination of whether a harm is temporary or permanent. *See Gilbert Wheeler*, 449 S.W.3d at 478. To briefly recap, the Court stated:

> An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, or (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, and (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in a trespass) and to cases in which entry onto real property is not physical (as with a nuisance).
>
> [T]he proper measure of damages is the cost to restore or replace, plus loss of use for temporary injury, and loss in fair market value for permanent injury. However, we apply this rule with some flexibility, considering the circumstances of each case to ensure that an award of damages neither over– nor under-compensates a landowner for damage to his property.

[2] Of course, if the injury arises out of a breach of contract, the terms of the contract control damages which may be liquidated or limited by agreement.

Id. at 480-81.

a. Exceptions to the *Gilbert Wheeler* Damages Rule

A critical piece of the *Gilbert Wheeler* opinion as regards surface damages is the Texas Supreme Court's recognition of two exceptions.

b. The Economic Feasibility Exception

This exception applies when the cost of required repairs or restoration of a temporary injury exceeds the diminution in the property's market value to such a disproportionately high degree that the repairs are no longer economically feasible. In those circumstances a temporary injury is deemed permanent, and damages are instead awarded for the loss in fair market value. *Gilbert Wheeler*, 449 S.W.3d at 481; *see also N. Ridge Corp. v. Walraven*, 957 S.W.2d 116, 119 (Tex. App.—Eastland 1997, pet. denied) (Holding that a surface repair amount six times greater than the value of the land was not economically feasible as a matter of law, and awarding damages based on the loss of the property's fair market value.). The exception may also be applied where the diminution of the land's fair market value far exceeds the cost of repairs to the surface. *See Gilbert Wheeler*, 449 S.W.3d at 482 (citing *Coastal Transport Co. v. Crown Central Petroleum*, 136 S.W.3d 227, 235 (Tex. 2004)).

c. The Intrinsic Value of Trees Exception

This exception applies in cases where the injury to the real property involves the destruction of trees. Specifically, when a landowner can show that the destruction of trees on real property resulted in no diminishment of the property's fair market value, or so little diminishment of that value that the loss is essentially nominal, the landowner may recover the intrinsic value of the trees lost. *Id*. at 483. This exception was intended to compensate landowners for the ornamental and utilitarian value of the trees. *Id*.

3. The Effect of the Characterization of Damages on Defenses

Whether damages are temporary or permanent affects the accrual date for the cause of action, which in turn affects the defenses of limitations and standing. A cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). A permanent injury claim accrues when injury first occurs or is discovered; a temporary injury claim accrues anew upon each injury. *Schneider*, 147 S.W.3d at 270.

4. Exemplary Damages

Section 41 of the Texas Civil Practice & Remedies Code governs the availability and limits of an award of exemplary damages. Such damages may be awarded in any cause of action, provided the claimant "proves by clear and convincing evidence" that the injury results from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.002(a), 41.003(a); *see also Oryx v. Shelton*, 942 S.W.2d 637, 642-43 (Tex. App.—Tyler 1996, no writ) (applying the statute to find that the evidence did not support an award of exemplary damages where the surface owner did not write a letter to defendants or present testimony that he had expressed repeated concern regarding defendants' surface use). *Cf. Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 855-56 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (affirming a jury award of exemplary damages, before the enactment of Section 41, where the jury found the mineral lessee acted "wilfully and deliberately, over plaintiffs' protest, and in utter disregard of plaintiffs' property rights"). It's important to note exemplary damages are capped as follows:

> (b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
>
> (1) (A) two times the amount of economic damages; plus
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
>
> (2) $200,000.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b).

H. Surface Access & Use Conclusion

As the most recent example of conflicting use, it is impossible not to turn back to the *Merriman* and *Virtex* cases. They represent the most recent trends operators must contend with in this context.

The definition of a "preexisting use of the surface" is simultaneously expanding and being applied more stringently. In *Virtex*, the plaintiffs sued based on a preexisting use of the ***airspace*** immediately over the surface. Their more traditional use of the surface land, driving all-terrain vehicles and hunting, seemed like the kind of use that wouldn't warrant an operator's accommodation. However, the court disagreed. *Merriman* shows that a Texas court must evaluate such a use over the exact section of land at issue in the case. Therefore, an argument that the *Virtex* plaintiffs could have used a different section of the surface would have failed.

Now that the operator is versed in nuisance issues and surface use and access issues, the last concern to address is subsurface trespass.

III. SUBSURFACE TRESPASS

Texas case law on subsurface trespass is relatively sparse. A frustrating number of courts have declined to address the topic substantively, instead opting to rule on ancillary issues. Others have articulated what constitutes a subsurface trespass and maintained that stance for decades, only to recently and completely change position. This has left oil and gas operators and their counsel lacking clear answers to guide their operating decisions. Nonetheless, it's important to understand existing precedent. Newer drilling and completion techniques, like fracing and directional drilling, make up an ever-growing percentage of today's exploration and production of oil and gas. These techniques are employed across significant subsurface distances and depths, be it by drill bit or fracture. They will necessarily lead to an increasing number of subsurface trespass claims. A strong command of the relevant cases is vital to an operator's ability defend against, or even assert, such claims.

The following sections provide an overview of the legal doctrines and cases relevant to subsurface trespass. Section I briefly reviews the black letter rules of trespass. Section II touches on the Texas Supreme Court's recent "reformulation" of the rules for classifying injury to real property as permanent or temporary. Section III details relevant subsurface trespass cases, further broken down into sections on fracing, subsurface migration of water, and directional drilling. Section IV addresses defensive strategies when facing subsurface trespass claims. Finally, Section V discusses damages for subsurface trespass claims.

A. Trespass

The definition of a common law trespass has remained constant and has become a well-established rule relating to property rights. *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 422 (Tex. 2015). Trespass to real property is an unauthorized entry on the land of another, and may occur when one enters—or causes something to enter—another's property. *Lightning Oil Co. v. Anadarko E&P Onshore*, LLC, 520 S.W.3d 39, 46 (Tex. 2017); *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011). "[E]very unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight." *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 n. 36 (Tex. 2008). To state a trespass claim, a plaintiff must show it owned the property or had a right to exclude others from the property. *N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598, 605 (Tex. 2016) (citing *Envtl. Processing Sys.*, 457 S.W.3d at 424 (recognizing in trespass context that owners of real property have right to exclude others from that property)).

B. Temporary vs. Permanent Harm to Real Property

The classification of harm to real property as temporary or permanent is also pertinent to trespass claims. The prior sections of this article contain more detail on the Texas Supreme Court's new rules on the topic, issued in the case *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.* The core rules state:

> An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, or (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, and (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in a trespass) and to cases in which entry onto real property is not physical (as with a nuisance).

Gilbert Wheeler, 449 S.W.3d at 480.

C. Subsurface Trespass

1. Hydraulic Fracturing: Pre- and Post-*Garza*

Fracing has been key to reaching low permeability reservoirs and making the associated wells economical. The long fractures serve as high speed expressways for oil and gas to reach the well. However, operators have historically faced subsurface trespass claims when fractures extend outward from the well and cross lease lines.

Texas courts addressing trespass by fracing initially applied traditional trespass law notions. These courts often compared fracing to drilling slant wells (slant wells drilled across lease lines and bottomed on another's property were held to be a textbook trespass.). At the heart of this view, was the desire to protect a lessee's right to produce the minerals from his portion of the reservoir. As such, Texas courts regarded fracing as a trespass for decades. *See Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411 (Tex. 1961) (holding that trespass by fracing occurs if cracks or veins extend into another's land and trespasser produces hydrocarbons from neighbor's portion of reservoir.); *Amarillo Oil v. Energy-Agri Products*, 794 S.W.2d 20, 27 (Tex. 1990) ("[T]he sand-fracturing technique that would extend cracks into adjacent landowners' property [is] a legal 'trespass.'"); *Geo Viking, Inc. v. Tex-Lee Operating Co.*,

No. D-1678, 1992 WL 80263, *2 (Tex. Apr. 22, 1992), *opinion withdrawn and superseded on overruling of reh'g*, 839 S.W.2d 797 (Tex. 1992) ("Fracing under the surface of another's land constitutes a subsurface trespass."); *Gifford Operating v. Indrex*, No. 2:89-CV-0189, 1992 US Dist. LEXIS 22505, *13 (N.D. Tex. Aug. 7, 1992) ("[S]and fracing under the surface of another's land constitutes subsurface trespass."); *Mission Res., Inc. v. Garza Energy Tr.*, 166 S.W.3d 301, 311 (Tex. App.—Corpus Christi 2005), *rev'd sub nom. Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1 (Tex. 2008).

This continued until the 2008 Texas Supreme Court case *Coastal Oil & Gas Corp. v. Garza Energy Trust*. *Garza* is the latest seminal decision on trespass by fracing. In it, the Texas Supreme Court made a surprising departure from longstanding opinions on fracing, and held that subsurface drainage of mineral resources due to injected substances will not support a trespass claim. *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11-17 (Tex. 2008). This holding, in effect, may have eliminated claims for subsurface trespass by fracing. Before discussing *Garza*, the following cases should be reviewed.

a. Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411 (Tex. 1961)

In *Gregg v. Delhi-Taylor Oil Corp.*, Gregg sought to fracture his well. *Id*. at 412. However, Gregg's lease was only 75 feet wide, and he had located his well a mere 37.5 feet from the adjacent Delhi-Taylor lease line. Delhi sued to enjoin Gregg's planned fracturing, arguing that the fractures would extend into its lease, causing a subsurface trespass. At the trial court level, Gregg argued that the Railroad Commission had "primary jurisdiction" over the dispute. The trial court agreed and dismissed the suit. The Court of Civil Appeals reversed.

On review by the Texas Supreme Court, the essential questions were whether Texas courts have the power to hear such cases, instead of the Railroad Commission, and whether they could grant injunctive relief. The Court held that they do possess this authority. The dispute was "inherently judicial," and Texas courts are not barred from deciding such cases.

More importantly, dicta by the Court examined whether Gregg's fracturing constituted a trespass. *Id*. at 416. The Texas Supreme Court reasoned that the fracing would cause a trespass, saying:

> The invasion alleged is direct and the action taken is intentional. Gregg's well would be, for practical purposes, extended to and partially completed in Delhi-Taylor's land. The pleadings allege a physical entrance into Delhi-Taylor's leasehold. While the drilling bit of Gregg's well is not alleged to have extended into Delhi-Taylor's land, *the same result is reached if in fact the cracks or veins extend into its land and gas is produced therefrom by Gregg.* To constitute a trespass, entry upon another's land need not be in person, but may be made by causing or permitting a thing to cross the boundary of the premises.

Id (emphasis added). Interestingly, the Court conceded points by both Gregg and an amicus curiae that the Railroad Commission had promulgated orders which might have authorized such an invasion of the subsurface of other's land. *Id*. at 419. This led the Court to subsequently and periodically refer to fracing as a "legal trespass." *Amarillo Oil Co.*, 794 S.W.2d at 27. However, the Court pointed out that the Railroad Commission's potential authorization of fracing was not at issue. *Gregg*, 344 S.W.2d at 419. They key takeaway for the purposes of this article is that fracing was viewed as a trespass.

Nearly thirty years after the *Gregg* case, the Texas Supreme Court reiterated this position in *Amarillo Oil v. Energy-Agri Products*.

b. Amarillo Oil v. Energy-Agri Products, 794 S.W.2d 20 (Tex. 1990)

In *Amarillo Oil*, both parties owned mineral rights in the same acreage. *Id*. at 21. Amarillo Oil owned the gas. Energy-Agri Products owned the oil and casinghead gas. Energy-Agri Products penetrated Amarillo Oil's gas zone and produced some of the gas, leading Amarillo Oil to sue for an injunction and damages. The court of appeals held that the Railroad Commission possessed exclusive jurisdiction over the dispute.

The Texas Supreme Court took up the case. First, it held that Amarillo Oil held title to the gas produced by Energy-Agri Products. In spite of this holding, the Court proceeded to hold that Amarillo Oil wasn't entitled to an injunction. The Court emphasized that the Railroad Commission's approval of the operation granted Energy-Agri Products a right of possession of the gas as a function of its right to produce. *Id*. at 27. However, this right of possession is distinct from a right of ownership. The Court drove home its point by comparing the case to *Gregg*, where it had stated, "[T]he sand-fracturing technique that would extend cracks into adjacent landowners' property [is] a legal 'trespass.'" Energy-Agri Products' trespass infringed on Amarillo Oil's right to produce the minerals from its portion of the reservoir and, thus, was actionable. *Id*. at 28.

Two years later, the Texas Supreme Court took this reasoning a step further, in *Geo Viking, Inc. v. Tex-Lee Operating Co.*

c. Geo Viking, Inc. v. Tex-Lee Operating Co., No. D-1678, 1992 WL 80263 (Tex. Apr. 22, 1992), opinion withdrawn and superseded on overruling of reh'g, 839 S.W.2d 797 (Tex. 1992)

In *Geo Viking*, lessee Tex-Lee Operating Company brought a Deceptive Trade Practices Act claim against Geo Viking, its contractor, for improperly fracing an oil well. *Id*. at *1. Tex-Lee sought damages for the expected production from its leasehold as well as what it would have recovered by virtue of the fractures extending into its neighbor's subsurface. *Id*. at *2. Geo Viking requested a jury instruction that Tex-Lee's damages should be limited to the 80-acre unit covered by Tex-Lee's lease. *Id*. at *1. The trial court refused this instruction, and the court of appeals affirmed, arguing the rule of capture insulated Tex-Lee from liability for drainage of adjacent landowners. *Id*. at *2.

The Texas Supreme Court reversed, holding that Tex-Lee was not entitled to damages for unrecovered minerals that would have been drained from the neighbor's estate as a product of Geo Viking's fracing. *Id*. at *2-3. Citing *Gregg* and *Amarillo Oil*, the Court said, "Fracing under the surface of another's land constitutes a trespass." *Id*. at *2 (citations omitted). Therefore, the rule of capture would not permit Tex-Lee to recover for a loss of oil and gas that might have been produced as a result of fracing beyond the boundaries of its lease.

The Texas Supreme Court ultimately withdrew its *Geo Viking* opinion and denied review. The replacement opinion states "we should not be understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture or trespass as they apply to hydraulic fracturing." 839 S.W.2d at 798. The withdrawn *Geo Viking* opinion is helpful in illustrating the trend of deeming fracing a trespass before *Garza*. Conversely, the Texas Supreme Court's decision to withdraw the opinion might be the first evidence of its changing stance on fracing that was eventually displayed in *Garza*.

d. *Gifford Operating v. Indrex*, No. 2:89-CV-0189, 1992 US Dist. LEXIS 22505 (N.D. Tex. Aug. 7, 1992)

The Northern District of Texas analyzed the same issue before the Texas Supreme Court withdrew its *Geo Viking* opinion. Gifford fractured a well 1,340 feet from the lease line and 2,640 feet from a second well. *Id*. at *7. The second well stopped producing and only resumed production after the operator removed approximately 42,000 gallons of frac fluid and 5,500 pounds of proppant. *Id*. at *2, *10. However, the well's production rate was "drastically decreased." *Id*. at *11.

The Northern District of Texas applied Texas law and held that a trespass had occurred. *Id*. at *13. It cited *Gregg* and *Geo Viking*, before its withdrawal, for the proposition that "sand fracing under the surface of another's land constitutes subsurface trespass." *Id* (citations omitted).

e. *Mission Res., Inc. v. Garza Energy Tr.*, 166 S.W.3d 301 (Tex. App.—Corpus Christi 2005)

Before the Texas Supreme Court delivered its opinion in *Garza*, the appellate court recognized a cause of action for subsurface trespass by fracing. Notably, the appellate court also made the first ever award of damages for a trespass by fracing. The Garza Energy Trust owned the surface of a tract of land known as "Share 13" and, through its lease with Coastal, a nonpossessory royalty interest in the Share 13 mineral estate. *Mission Res., Inc. v. Garza Energy Tr.*, 166 S.W.3d 301, 310 (Tex. App.—Corpus Christi 2005), *rev'd sub nom. Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1 (Tex. 2008). Coastal owned both the surface and minerals of Share 12, and had located The Coastal Fee No. 1 well on Share 12, very near to the lease line with Share 13. The Trust argued that Coastal committed a subsurface trespass by executing a massive fracing operation that created a two-mile-long crack into Share 13's subsurface, and drained the gas and gas condensate therein. The trial court held for the Trust on multiple grounds and awarded nearly $14 million in total damages. Coastal raised 14 issues on appeal. *Id*. at 309. In its first issue, Coastal argued Texas did not recognize a cause of action for subsurface trespass by fracing.

The Corpus Christi Court of Appeals rejected this argument and overruled Coastal's first issue. It cited *Gregg* for the proposition that the Texas Supreme Court had in fact recognized subsurface trespass by fracing. *Id*. at 310. Furthermore, the court of appeals rejected the assertion that *Gregg* should be discounted as dictum.

A concerning aspect of the court's opinion was its review of the evidence as it related to Coastal acting with malice as well as committing felony theft. *Id*. at 313-16. The court of appeals examined whether Coastal had acted with the requisite specific intent. The court exclusively relied on testimony by the Trust's expert, Dr. Economides, about Coastal's well stimulation proposals. *Id*. at 315. Dr. Economides testified that his calculations and Coastal's proposals indicated an intent by Coastal to create cracks extending 1,100 feet or more – a distance more than sufficient to reach the minerals under Share 13. It never evaluated whether any drainage had actually occurred or examined the size of the actual cracks. Fortunately for operators, the Texas Supreme Court reversed course in *Garza*.

f. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008)

In 2008, the Texas Supreme Court took up the issue. The Trust's representative, Salinas, maintained that the court of appeals correctly held that an incursion of hydraulic fracturing fluid and proppants into a

mineral owner's subsurface constitutes a trespass compensable by damages equal to the value of the royalty on the gas drained from the land. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 9 (Tex. 2008). Coastal argued Salinas had no standing to assert an action for trespass, and even if he did, hydraulic fracturing was not an actionable trespass. *Id*.

The Texas Supreme Court first addressed the standing challenge. Salinas only held a nonpossessory royalty interest and possibility of reverter in the subsurface. *Id*. at 10. Coastal argued these interests did not confer standing to assert a trespass claim. *Id*. at 9. However, the Court disagreed. *Id*. at 10. Common law trespass includes several actions for several types of wrongs, including trespass on the case, which is meant to remedy harm to nonpossessory interests. The Court held Salinas could assert a claim for trespass on the case. However, he was required to prove actual damage to his interests in order to maintain the claim.

The Court conceded that under historical precedent, Salinas might have been able to do so. If Coastal had deposited proppants on the surface, Salinas could recover in trespass under the ad coelum doctrine—the principle that land ownership extends to the sky above and the earth's center below. However, the Court quickly stated, "that maxim…has no place in the modem world." *Id*. at 11. It does not properly account for modern circumstances, like an airplane flying through the airspace two miles above one's property, or an intrusion two miles below the surface.

The Court continued, stating it had never answered the substantive question of whether or not fracing into another's property constitutes a subsurface trespass. Based on this author and many Texas courts' readings of the pre-*Garza* cases, this statement came as a shock. As discussed above, it seemed that for decades the Texas Supreme Court had, in fact, held fracing could give rise to a claim for subsurface trespass. However, the Supreme Court unequivocally stated that its holding in *Gregg* should not be read to label fracing a subsurface trespass. *Id*. at 11-12. Instead, *Gregg* should be read as the Texas Supreme Court "specifically indicat[ing] no view on whether [Railroad] Commission rules could authorize secondary recovery operations that crossed property lines." *Id*. at 12. The Court also emphasized that it had withdrawn its *Geo Viking* opinion, the only opinion where it had expressly acknowledged the potential for subsurface trespass by fracing. Curiously, the Court made no mention of *Amarillo Oil*. In doing so, the Texas Supreme Court effectively did away with claims for subsurface trespass by fracing.

The Court cemented this result by expressly declining to decide the issue in *Garza*. It felt it unnecessary to answer the question because the rule of capture entirely precluded Salinas's recovery. *Id*. at 13. The rule of capture provides mineral rights owners take title to the oil and gas produced from a lawful well bottomed on their property, even if the oil and gas flowed to the well from beneath another owner's tract. It is the cornerstone of the oil and gas industry and fundamental to property rights and state regulation. Salinas did not allege that the fraced well violated any statute or regulation. Thus, as the Court phrased it, "the gas he claim[ed] to have lost simply [did] not belong to him." Salinas had not claimed any recoverable damages.

Salinas countered, arguing that the rule of capture was inapplicable because it was "unnatural." The Court rejected this argument on multiple fronts. If by "unnatural" Salinas meant due to human intervention, such activity was the very basis for the rule, and not a reason to suspend it. If by "unnatural" Salinas meant unusual, the Court quickly pointed out that fracing had long been commonplace throughout the industry as well as necessary for commercial production in many formations. And if by "unnatural" Salinas meant unfair, the rule of capture offered him ample relief. Nothing prevented him from using fracing to stimulate production from his own wells and drain the gas to his own property.

Salinas also argued that fracing was similar to bottoming a well on another's property – a classic example of trespass. However, the Court distinguished the two acts. The gas produced through a deviated well does not migrate to the wellbore from another's property, as it can with fracing. *Id*. at 14. The gas is already on another's property. The rule of capture adequately deals with fracing because a landowner can protect himself from drainage by drilling his own well. One cannot protect against drainage from a deviated well by drilling his own well; the deviated well will continue to produce his gas.

The Texas Supreme Court offered four reasons the rule of capture should not be changed to allow claims for subsurface trespass by fracing. First, the law already adequately protects a mineral owner from drainage. He may drill an offset well or seek intervention from the Railroad Commission where an offset well is insufficient to protect his interest. Second, labeling fracing a trespass would "usurp[] to courts and juries the lawful and preferable authority of the Railroad Commission." *Id*. at 14-15. Third, judges and juries are not equipped to determine the value of oil and gas drained by fracing because "the material facts are hidden below miles of rock, making it difficult to ascertain what might have happened." *Id*. at 16. Finally, the Court noted, "no one in the industry appears to want or need" fracing to constitute a trespass. *Id*.

g. *Stone v. Chesapeake Appalachia, LLC*, 2013 US Dist. LEXIS 71121 (N.D. W.Va. Apr. 10, 2013), *vacated*, 2013 U.S. Dist. LEXIS 71121 (N.D. W.Va. July 30, 2013)

The *Stone* opinion exemplifies various courts' criticism of *Garza*. In *Stone*, the plaintiffs owned a 217.77 acre tract of real property in Brooke County, West Virginia, subject to a five-year mineral lease. *Id*. at *2. The original lessee, Phillips Production Company, assigned the associated rights to Chesapeake and the other defendants. Chesapeake drilled a horizontal well on the neighboring property, near the plaintiffs' property line. *Id*. at *3. The vertical wellbore on the neighboring property sat approximately 200 feet from the plaintiffs' property, with the horizontal aspect of the bore within tens of feet of the property line. Chesapeake fraced the well, and the plaintiffs sued for subsurface trespass. *Id*. at *2.

The defendants argued that the plaintiffs' claims were barred by the rule of capture, and urged the West Virginia Northern District Court to grant summary judgment in the defendants' favor. *Id*. at *5. West Virginia had adopted the rule of capture in the early 1990s. However, it was still undecided whether fracing constituted a trespass. The defendants urged the court to adopt the reasoning of *Garza*. *Id*. at *11.

However, the court declined, harshly criticizing the majority opinion in *Garza* for "giv[ing] oil and gas operators a blank check to steal from the small landowner." *Id*. at *16. It further stated that "'the common law rule of capture is not a license to plunder.'" *Id*. at *18 (quoting *Young v. Ethyl Corp.*, 521 F.2d 771, 774 (8th Cir. 1975)).

Stone was undermined when the parties reached a settlement and filed a joint motion to vacate the opinion.

h. Briggs v. Sw. Energy Prod. Co., 224 A.3d 334 (Pa. 2020)

Briggs falls more in line with *Garza* and its application of the rule of capture. In *Briggs*, the Supreme Court of Pennsylvania reviewed claims for trespass and conversion. *Id*. at 339. Southwestern Energy Production Company leased the minerals adjacent to the plaintiffs' tract of land. Southwestern fraced the formation sitting directly under the surface of its lease. The plaintiffs contended this caused drainage of the natural gas underlying their lands, into the subsurface space under Southwestern's lease, wherein Southwestern converted the gas.

They key issue as it pertained to the plaintiffs' trespass claim was whether the rule of capture governed the plaintiffs' recovery. *Id*. at 338. Interestingly, both parties agreed that the rule of capture should govern claims for trespass to real property. *Id*. at 339. However, the plaintiffs argued that injury and recovery for drainage by fracing should not be governed by the rule of capture, because fracing is an unnatural method of recovering minerals. *Id*. at 339. The appellate court agreed with the plaintiffs' argument and ruled in their favor.

The Supreme Court of Pennsylvania rejected this argument and challenged the appellate court's reasoning. First, it emphasized that *all* drilling for subsurface minerals involves artificial stimulation of a reservoir. *Id*. at 347-48. The rule of capture had previously been applied to more traditional drilling as long as no physical intrusion into another's property had occurred, and the Court felt that the rule was no less applicable to fracing. *Id*. at 348. Second, the Court rejected the appellate court's rationale that the high cost to a landowner of drilling his own offset well was reason to for the judiciary to get rid of the rule of capture. *Id*. The Court emphasized that the power to make such a rule belonged exclusively to the legislature, not the judiciary. For these reasons, the Court rejected as a matter of law the argument that the rule of capture does not apply to fracing.

The case was remanded so that the appellate court could use the ruling in deciding the plaintiffs' remaining argument: drainage from under a plaintiff's parcel can only occur if the driller first physically invades that property. At the time of this article's writing the appellate court has not issued an opinion on the matter.

Garza superseded multiple prior cases, which means fracing operators can breathe easily regarding subsurface trespass…for now. There remains significant debate around fracing. The cases that immediately bookend *Garza* - *Geo Viking*, *Stone*, and *Gifford* - prove the notion that "fracing is a trespass" isn't dead or some outdated idea. Conversely, *Briggs* represents another state's highest court that is satisfied with the status quo, i.e. letting the rule of capture govern fracing disputes. Operators should stay current with Texas case law on fracing, keeping an eye out for decisions that might change *Garza*.

2. Subsurface Migration of Water

Migration of water is another way an operator may be subject to subsurface trespass allegations. Though the Texas Supreme Court seems open to such a claim, it still has not issued any opinion directly recognizing the cause of action.

a. Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560 (Tex. 1962)

In *Manziel*, the Texas Railroad Commission issued an order permitting the defendant lessees to inject water into the plaintiffs' well in an effort to enhance mineral recovery. *Id*. at 561-62. The plaintiffs argued injecting water into their leasehold would harm the formation, and the Texas Supreme Court admitted as much. *Id*. at 564 ("Water injected into an oil reservoir generally spreads out radially from the injection well bore…it is impossible to restrict the advance of the water to lease

lines…and will 'drown out' neighboring oil wells."). More importantly, the plaintiffs argued that the Railroad Commission couldn't "authorize…a trespass by injected water that will result in the premature destruction of their well." *Id*. at 565.

The Texas Supreme Court set out to answer whether "injected water that crosses lease lines from an authorized secondary project [is] the type of 'thing' that may be said to render the adjoining operator guilty of trespass?" *Id*. at 567. Unfortunately, the *Manziel* Court didn't directly answer this question.

Instead, it held that injecting the water was not a trespass in this instance because the Railroad Commission had authorized the operation. *Id*. at 568-69 ("[If] to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis."). It also offered additional policy justifications, emphasizing that secondary recovery operations, like pressure maintenance projects, result in more recovery than initially obtained by the primary method. *Id*. at 568. Further, as the pressure behind the primary production dissipates, there is a greater public necessity for applying secondary recovery forces. *Id*. "The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources." *Id.*

The Texas Supreme Court's refusal to categorize subsurface water migration as a trespass or not would start a long-lasting trend.

b. FPL Farming Ltd. v. Environmental Processing Sys., L.C., 351 S.W.3d 306 (Tex. 2011)

Pursuant to the Injection Well Act, the Texas Commission on Environmental Quality granted Environmental Processing Systems, L.C. ("EPS") a deep subsurface-injection permit for wastewater. *Id*. at 307. FPL, the owner of the neighboring land, sued EPS for "tort damages for physical trespass based on alleged subsurface migration of water injected in the permitted well." *Id*. The court of appeals held that FPL couldn't recover in tort for trespass damages because of EPS's permit. *Id*. at 308.

However, the Texas Supreme Court quickly countered that the Injection Well Act does not immunize permit holders from tort liability and neither did existing case law. *Id*. Permits are "a 'negative pronouncement' that 'grants no affirmative rights to the permittee.'" *Id.* at 310 (quoting *Magnolia Petroleum Co. v. R.R. Comm'n*, 170 S.W.2d 189, 191 (Tex. 1943)). Further, a permit only "removes the government imposed barrier to the particular activity requiring a permit." *Id*. at 310-11. Distinguishing *Manziel*, the Court wrote that it had never held that an injection permit from the Railroad Commission shields an injection operator from liability. *Id*. at 313. Rather, it had only held that "Railroad Commission authorizations of secondary recovery projects are not subject to injunctive relief based on trespass claims." *Id*.

In spite of this distinction, it's important to note the Texas Supreme Court once again deferred the question of whether "subsurface wastewater migration can constitute a trespass, or whether it did so in this case." *Id*. at 314–15.

c. Environmental Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414 (Tex. 2015)

Four years later, the Texas Supreme Court revisited *FPL Farming* and again declined to answer the trespass question. On remand from the first *FPL* opinion, the court of appeals reversed the trial court's take-nothing judgment, holding:

> (1) Texas recognizes a common law trespass cause of action for deep subsurface water migration; (2) consent is an affirmative defense to trespass, on which EPS bore the burden of proof, and therefore the jury charge was improper; (3) FPL Farming was not entitled to a directed verdict because there was some evidence that it…impliedly consented to the subsurface entry….

Id. at 418. Both parties appealed. *Id.*

The Texas Supreme Court felt answering the trespass question was unnecessary, choosing to instead analyze whether consent was an element of a trespass claim. *Id*. It reasoned, "If lack of consent is an element of a trespass cause of action as the jury charge instructed here, then we need not address whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration." *Id*. The jury had found in EPS's favor on all of FPL's claims. *Id*. Thus, any error would have been harmless. *Id.* The Court ultimately held a lack of consent is one of the elements of a trespass claim, and that plaintiffs bear the burden of proving an entry was wrongful by establishing the entry was unauthorized or without consent. *Id*. at 425. The jury held FPL failed to meet its burden of proof on the trespass claim. *Id*. Thus, the Court proceeded to the next issue, "without the need to decide whether Texas law recognizes a trespass cause of action for deep subsurface water migration…." *Id*.

As previously mentioned, it's uncertain when operators will see a clear answer on whether the migration of injected or wastewater support a claim for subsurface trespass. Nonetheless, operators must maintain compliance with existing state permitting rules for such activities. Statewide Rule 46 requires any person who engages in fluid injection operations in reservoirs productive of oil, gas, or geothermal

resources to obtain a permit from the Railroad Commission. Similarly, Statewide Rule 9 dictates the disposal of saltwater or other oil and gas waste requires application to and approval by the Commission. Additionally, operators must remember that these permits do not shield them from tort liability arising from injecting or disposing of water.

3. Directional Drilling

Directional drilling is a classic basis for a claim for trespass. It usually involves a physical entry by a wellbore onto the subsurface of a neighboring property.

a. Hastings Oil Co. v. Texas Co., 234 S.W.2d 389 (Tex. 1950)

In *Hastings Oil*, two neighboring leasehold-estate owners shared a common pool of minerals. *Id*. at 390. The Texas Company alleged that its neighbor, Hastings, intentionally deviated its wellbore across their shared property line and into the Texas Company's leasehold. *Id*. at 390-91. It further argued Hastings did so to survey two formations initially found by the Texas Company, and to determine whether production in paying quantities was possible from said formations. *Id*. at 391. The Texas Company sought an injunction barring Hastings from further drilling until such time that an expert could conduct a directional survey of the hole and determined whether Hastings had, in fact, intentionally deviated its wellbore for the alleged purpose. *Id*. The trial court granted the injunction and ordered the directional survey. *Id*. at 393. The court of appeals affirmed the decision. *Id*.

The Texas Supreme Court held the Texas Company's allegations supported a trespass claim. *Id.* at 396. Hastings argued the Texas Company suffered no injury because no minerals had been produced and the only possible damage was a penetration of the subsurface. *Id*. at 397. However, the Court rejected this argument, writing:

> [I]n instances of trespass to mining property[,] greater latitude is allowed courts of equity than in restraining ordinary trespasses to realty, "since the injury goes to the immediate destruction of the minerals which constitute the chief value of this species of property." Trespasses of this character are irreparable because they subtract from the very substance of the estate, hence equity is quick to restrain them.

Id. at 398. As such, the Court held equity allows courts to prevent a trespass by directional drilling, with an injunction. *Id*.

b. *Chevron Oil Co. v. Howell*, 407 S.W.2d 525 (Tex. App.—Dallas 1966, writ ref'd n.r.e)

Chevron began drilling a well from Grayson County, Texas, on the west bank of Lake Texoma that slanted and would eventually bottom in an area under the lake, in Oklahoma. *Id*. at 526. Vernon Howell held a five-year agriculture and grazing lease, granted to him by the Secretary of the Army, which included the 189 acres of from which Chevron drilled. Magna Oil Corporation leased the minerals under Howell's 189 acres. Neither Howell nor Magna had granted Chevron permission to enter the surface and drill its well through the 189 acres of minerals. Chevron argued it held a license for the drilling from the United States Corps of Engineers. *Id*. at 527. The trial court enjoined Chevron. On appeal, Chevron asserted multiple arguments, including the claim that its drilling did not interfere with Magna's lease rights or otherwise damage the mineral formation. *Id.* at 527-28.

The court of appeals rejected this argument and held Chevron's drilling was a trespass. *Id*. at 528. Chevron's own witness actually testified that any time someone drills into something there will be damage. Citing *Hastings*, the court stated that the trespass created by drilling through Magna's mineral estate was irreparable and, therefore, required an injunction.

4. Ownership of the Subsurface

Starting in the mid-2000s, Texas courts began emphasizing an important dynamic to severed surface and mineral estates – ownership of the subsurface pore space. As a rule, a "Mineral owner does not own the specific molecules below the ground but only a fair chance to recover them or their equivalents." *Garza*, 268 S.W.3d at 15; *Springer Ranch, LTD v. Jones*, 421 S.W.3d 273, 283-84 (Tex. App.—San Antonio 2013) (holding that where contract between multiple surface estate owners provided royalties to each owner whose surface land housed portion of horizontal well, and royalties had previously only been paid to owner whose surface land contained wellhead, surface owners' ownership of earth around severed minerals entitled them all to royalties.). The Fifth Circuit has also recognized this ownership split. *See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431 (5th Cir. 2011) (holding that subsurface beneath national park was included in surface owner's property despite fact that mineral estate was severed and owned by private party).

This recognition of surface owners' title to the pore space wasn't particularly problematic for operators until *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*.

a. Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39 (Tex. 2017)

Lightning Oil Company leased minerals under the Briscoe Ranch in Dimmit and LaSalle counties, and had

three producing wells located on the ranch. *Id*. at 43. Anadarko leased minerals underlying the adjacent tract, the surface of which was home to the Chaparral Wildlife Management, a conservation area controlled by the Texas Parks and Wildlife Department. *Id*. Anadarko's lease required it to drill wells "off of the Chaparral…when prudent and feasible." *Id*. As such, Anadarko entered into an agreement with the Briscoe Ranch to locate a drilling site on the ranch and drill directionally to reach the minerals under the Chaparral. *Id*. Lightning opposed Anadarko doing so and sued for trespass on its mineral estate as well as tortious interference with contract, and sought an order restraining Anadarko's proposed drilling activity. *Id*.

The trial court denied Lightning's request for injunctive relief and the San Antonio Court of Appeals affirmed. *Id*. at 44. It stated that "absent the grant [to the contrary] the mineral estate owner does not control the subsurface mass." *Id*. Thus, the Ranch could grant Anadarko permission to begin its drilling from the Ranch surface and directionally alter its wellbore to reach the Chaparral. *Id*.

The Texas Supreme Court took up the case to answer a critical question: Does a lessee's rights in the mineral estate include the right to preclude a surface owner or an adjacent lessee's activities that are not intended to capture the lessee's minerals, but instead are intended only to traverse, or bore through, the formations in which the lessee's minerals are located? *Id*. at 46.

Lightning argued Anadarko's drilling would "indisputably extract a portion of the subsurface roughly equivalent to the volume of the wellbore—i.e., the cuttings pushed to the surface during the drilling process—and that material…contains minerals." *Id*. at 47. It further argued that the drilling would create permanent structures in and through the subsurface that would interfere with its dominant mineral estate and its exclusive right to produce the minerals. *Id*.

The Texas Supreme Court rejected these arguments. In a suprising move, it held Lightning's rights as a lessee did not authorize preventing Anadarko's proposed drilling. The Court stated, "While the mineral estate is dominant…the rights of a surface owner are in many ways more extensive than those of the mineral lessee." *Id*. at 48. Mineral lessees have five rights: (1) the right to develop, (2) the right to lease, (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments. *Id*. at 49. These rights "do not include the right to possess the specific place or space where the minerals are located. Thus, an unauthorized interference with the place where the minerals are located constitutes a trespass…only if the interference infringes on the mineral lessee's ability to exercise its rights." *Id*.

Adding insult to injury, the Court held that Lightning's potential loss of minerals was not great enough to warrant the Court intervening. *Id*. at 50 ("Anadarko's proposed drilling activities will inevitably remove some of the minerals Lightning holds under its lease, even though that amount will be small."). Lightning had no rights to the materials surrounding the minerals—only the minerals themselves. *Id*. In fact, the Court explained that public policy favored allowing Anadarko to drill from the surface of the Ranch. *Id*. It felt that the entire industry would share these feelings, saying, "We have no doubt that individual interests in the oil and gas lost through being brought to the surface as part of drilling a well are outweighed by the interests of the industry as a whole and society in maximizing oil and gas recovery." *Id*. at 51.

The Texas Supreme Court's refusal to enjoin Anadarko is cause for concern from operators. If a surface owner can authorize a third party to drill through a mineral leasehold, the mineral estate is less "dominant." Practically, the minerals removed by such drilling may negatively affect operators' profits. Lightning Oil attempts to minimize the impact of this damage, but the case only dealt with one third-party drilling through the minerals. Nothing in the case discusses limits on a surface owner to authorize drilling by multiple third parties. The aggregate effect of multiple Anadarkos might seriously hurt an operator's bottom line.

While the holding of *Lightning Oil* was disappointing for many operators, it's important to note that the Texas Supreme Court didn't eliminate claims for subsurface trespass by directional drilling. *XTO Energy Inc. v. Goodwin* exemplifies this fact.

b. *XTO Energy Inc. v. Goodwin*, 584 S.W.3d 481 (Tex. App.—Tyler 2017, pet. denied)

Goodwin leased his share of minerals to CS Platinum. *Id*. at 485. After receiving a bonus check, Goodwin believed he owned a larger share of the leased minerals than previously thought and, in turn, was owed a larger bonus. XTO subsequently acquired the lease. Goodwin argued that the lease was void for underpayment of the bonus, but XTO disagreed.

XTO formed a unit next to Goodwin's property and proceeded to drill a number of wells, including the Terrapins 1HB. *Id*. at 486. The drill bit drifted horizontally during the vertical drilling phase, moving toward Goodwin's property. A survey confirmed the wellbore sat within 60 feet of the boundary into Goodwin's subsurface. Aware of this, XTO continued drilling. Another survey revealed the wellbore had crossed 126 feet into Goodwin's tract at an approximate depth of 10,000 feet. XTO turned the wellbore, exiting the boundary plane of Goodwin's tract at a depth of 13,200 feet. The approximate length of the trespass path into Goodwin's subsurface was 2,900 linear feet. XTO

informed Goodwin of the intrusion, and the two parties were unable to resolve the issue. Goodwin filed suit.

At trial, XTO admitted its wellbore crossed into Goodwin's subsurface property without authorization and that the cased wellbore represented a permanent subsurface intrusion onto Goodwin's property. *Id*. at 487. Goodwin presented no evidence that the subsurface intrusion negatively impacted the surface or that the cased wellbore would interfere with his ability to develop the minerals under his property.

XTO asserted two arguments against Goodwin's trespass claims. First, it argued Goodwin did not have a legally protected interest in the subsurface and, therefore, couldn't support a trespass cause of action. *Id*. at 486. Second, it argued Goodwin applied the improper measure of damages to his trespass claim. *Id*. at 489.

With respect to the first argument, XTO cited *Garza* and emphasized the Texas Supreme Court's declaration that the ad coelum doctrine no longer applied in the modern day. *Id*. at 488.

The Tyler Court of Appeals rejected this argument, citing *Lightning Oil*'s discussion of a surface owner's interest. *Id*. at 488-89 ("[T]he surface owner, not the mineral owner, 'owns all non-mineral "molecules" of the land, i.e., the mass that undergirds the surface' estate…[and] 'ownership of the hydrocarbons does not give the mineral owner ownership of the earth surrounding those substances.'" *Id*. at 488 (citations omitted). Goodwin's ownership of the subsurface pore space meant he could support a trespass action, regardless of the depth. *Id*. at 488-89.

The court never issued an official holding on XTO's second argument regarding the correct measure of damages. It instead focused on another of XTO's issues on appeal, in holding that testimony by White, Goodwin's expert, was unreliable and constituted no evidence to support the trespass award.

XTO v. Goodwin is nonetheless critical to operators' and practitioners' understanding of subsurface trespass by directional drilling in a post-*Lightning Oil* world. As previously mentioned, the Texas Supreme Court didn't eliminate claims for subsurface trespass by directional drilling. Mineral owners may lack the power to prevent others with surface owner consent from drilling through the subsurface. However, unauthorized drilling into another's subsurface remains an actionable trespass.

5. Miscellaneous

Plaintiffs have attempted to use other theories to support a trespass claim. Among those are "geophysical trespass" and "Kishi trespass."

a. Geophysical Trespass

Entry upon the subsurface by seismic activity will not support an action for trespass by itself. *Kennedy v. Gen. Geophysical Co.*, 213 S.W.2d 707, 711 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.) ("Trespass may also be committed by shooting onto or over the land, by explosions, by throwing inflammable substances, by blasting operations, by discharging soot and carbon, but not by mere vibrations."); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 593 (5th Cir. 1957) (*Cowden I*) ("[T]he mere obtaining of information by extrapolation of data relating to one site does not constitute an invasion of other sites."); *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 269-70 (Tex. App.—San Antonio 2004, pet. denied) (Stating that geophysical trespass is not actionable in and of itself.).

There must be a physical entry upon or injury to the surface overlaying the minerals. *Kennedy*, 213 S.W.2d at 711 ("[W]ithout physical entry or injury upon the Kennedy's surface estate, there was no geophysical trespass."); *Cowden I*, 241 F.2d at 593 ("Appellees may properly be compensated only for the use of that part of their property that was 'occupied' by the exploration…"); *Phillips Petroleum Co. v. Cowden*, 256 F.2d 408, 409 (5th Cir. 1958) (*Cowden II*) (finding geophysical trespass after finding physical invasion of at least some of surface estate); *Villarreal*, 136 S.W.3d at 269-70 (holding that to recover damages, plaintiff needed to demonstrate that surveyors trespassed upon surface estate above minerals). Furthermore, a prospective plaintiff must have a sufficient possessory interest in the minerals to maintain a cause of action based for trespass by geophysical survey. *See N. Shore Energy, L.L.C.*, 501 S.W.3d at 606 (holding that holder of the exclusive option to lease minerals who never executed a lease lacked sufficient possessory or ownership interest to assert a trespass action for seismic survey.).

b. "Kishi" Trespass

A less common type of trespass is what's known as a "Kishi" trespass. A Kishi trespass occurs when a mineral lease expires or is disputed, and an operator nonetheless enters the land and drills an unsuccessful well that diminishes the market value of the leasehold interest. *Humble Oil & Ref. Co. v. Kishi*, 276 S.W. 190, 191 (Tex. Comm'n App. 1925), *judgment set aside on reh'g*, 291 S.W. 538 (Tex. Comm'n App. 1927). To recover for a Kishi trespass, the plaintiff must show the defendant's wrongful exploration of the land "proximately resulted in the loss of the market value of his property." *Id*. (citing *Thomas v. Tex. Co.*, 12 S.W.2d 597, 598 (Tex. Civ. App.—Beaumont 1928, no writ)). This change in the property's market value is also the measure of damages. *See id*.

D. Defensive Strategies

The defensive strategies employed against subsurface trespass claims are largely the same as those discussed above, in the context of surface disputes.

However, the small number and changing character of subsurface trespass rules means that many of these strategies have only been analyzed once or twice, or not at all.

1. Limitations

The limitations period for a trespass claim is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). "Causes of action accrue and statutes of limitations begin to run when facts come into existence that authorize a claimant to seek a judicial remedy." *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011) (op. on reh'g).

As it relates to subsurface trespass claims, "an unauthorized interference with the place where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee's ability to exercise its rights." *Lightning Oil*, 520 S.W.3d at 49; *Swift Energy Operating, LLC v. Regency Field Services LLC*, No. 04-17-00638-CV, 2019 WL 2272900, at *5 (Tex. App.—San Antonio May 29, 2019, pet. filed) (mem. op.). Furthermore, accrual depends on whether the trespass is permanent or temporary. *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 270 (Tex. 2004), *holding modified by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474 (Tex. 2014). A permanent trespass claim accrues when the injury first occurs or is discovered, and a temporary trespass claim accrues anew upon each injury. *Id*.

Thus, the mineral owner or lessee should frame the alleged injury from the earliest date possible to ensure limitations apply. If the surface owner asserts the discovery rule exception to limitations, the mineral owner should attempt to discover evidence of the surface owner's actual knowledge of the injury more than two years before suit. *See Swift Energy Operating, LLC*, 2019 WL 2272900 at *4 (holding that email telling plaintiff of likely subsurface trespass to its wells, more than two years before lawsuit was sufficient notice of injury to prove defendant's statute of limitations defense.). If no such evidence exists, a defendant should use discovery to frame the surface owner's failure to discover the alleged injury as unreasonable.

2. Standing

A court has no jurisdiction over a claim made by a plaintiff who lacks standing. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008). Texas courts have occasionally stated that "[t]he gist of an action of trespass to realty is the injury to the right of possession." *Garza*, 268 S.W.3d at 9. As a result, parties defending against subsurface trespass claims have attempted to argue a plaintiff's ownership of a nonpossessory interest in the subsurface, like a royalty interest or a possibility of reverter, to plead a standing defense. *Id*.

However, operators considering this defense should be aware that the Texas Supreme Court has said this rule has been stated too broadly. *Id*. At common law, trespass included several actions for several different wrongs. *Id*. at 9-10. This includes trespass on the case, which will support a claim for trespass to a plaintiff's nonpossessory interests. *Id*. The plaintiff will have the higher burden of proving actual damages to properly state their trespass claim, but they will nonetheless have the opportunity to make the claim. *Id*. at 10.

E. Remedies & Damages

It's difficult to review remedies and damages arising from a subsurface trespass claims. As previously mentioned, there are few cases that address the topic of subsurface trespass, and even fewer where injunctive relief or damages were awarded.

1. Injunction

Injunctive relief may only be granted on a showing of (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law. *Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 849 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Beathard Joint Venture v. W. Houston Airport Corp.*, 72 S.W.3d 426, 432 (Tex. App.—Texarkana 2002, no pet.). The Texas Supreme Court has held that continuous trespasses to mining property, like that which occurs from directional drilling, is irreparable and the legal remedy is inadequate, hence equity is quick to restrain the trespass. *Hastings Oil Co.*, 234 S.W.2d at 398.

Texas courts are unlikely to grant injunctive relief for trespass claims based on fracing. Under *Garza*, the Texas Supreme Court indirectly declared fracing is not a subsurface trespass. Furthermore, the Court emphasized that the proper method for a plaintiff to protect himself from subsurface drainage is to frac his own well. Texas courts are similarly unlikely to grant injunctive relief for subsurface migration of water, as there is no clear answer on whether such migration is even a trespass.

Conversely, Texas courts are likely to enjoin an operator whose directional drilling breaches the subsurface of another. *See Hastings Oil Co.*, 234 S.W.2d at 398 (granting injunction against operator who allegedly drilled into plaintiff's subsurface to survey two formations initially found by plaintiff); *see also Howell*, 407 S.W.2d at 526. The exception to this rule is where a surface owner grants a third party permission to drill through the subsurface pore space, even over the protests of the mineral owner. *See Lightning Oil*, 520 S.W.3d at 51 (holding that surface owner may authorize third party's drilling through subsurface and that individual mineral owner's interest and loss of minerals

from that drill are outweighed by interests of industry, and, therefore, injunctive relief is inappropriate).

Adjoining landowners also have statutory authority to obtain an injunction of drilling or mining operations under Texas Civil Practice and Remedies Code § 65.012(a). It provides:

> A court may issue an injunction or temporary restraining order prohibiting subsurface drilling or mining operations only if an adjacent landowner filing an application claims that a wrongful act caused injury to his surface or improvements or loss of or injury to his minerals and if the party against whom the injunction is sought is unable to respond in damages for the resulting injuries.

TEX. CIV. PRAC. & REM. CODE ANN. § 65.012(a). The party seeking an injunction must prove the other party is unable to respond in damages.

Section 65.012 was recently analyzed in *Ring Energy v. Trey Resources, Inc.* In *Ring*, the defendant, Trey Resources, sought nine injection well permits from the Railroad Commission for secondary recovery efforts in Andrews County, Texas. *Ring Energy v. Trey Res., Inc.*, 546 S.W.3d 199, 202-03 (Tex. App.—El Paso 2017, no pet.). Ring's predecessor operated five wells in the same area. *Id*. at 203. Ring did not protest Trey Resources' permit applications. The Commission granted the permits without a formal hearing. Before beginning operations, Ring filed suit in Andrews County seeking an injunction out of concern for potential waste caused by Trey's operations.

After a lengthy interpretation of the statute, the El Paso Court of Appeals held a complaining party under the statute can sue for injunctive relief in any county, especially the county where the injury is threatened. *Id.* at 215. However, the court acknowledged the difficulty of successfully pleading under the statute, as it requires a showing of injury as well as the defendant's inability to respond to the claim in damages. *Id*. at n. 14.

2. Monetary Damages

a. Damages Depend on Type of Trespass and Permanent or Temporary Injury (*Gilbert Wheeler*)

"The commission of a trespass does not necessarily mean the actor will be liable for damages." *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 920 (Tex. 2013). Different recoveries are available, depending on whether the trespass was committed intentionally, negligently, accidently, or by an abnormal dangerous activity.'" *Id*; *XTO Energy, Inc. v. Goodwin*, 583 S.W.3d at 495; *Watson v. Brazos Elec. Power Coop.*, 918 S.W.2d 639, 645 (Tex. App.—Waco 1996, writ denied)). As previously mentioned, characterizing damages as permanent or temporary will also impact the measure of damages.

At the time of this writing, only one of the core subsurface trespass cases on fracing, subsurface water migration, and directional drilling addresses an award of monetary damages to a plaintiff: *Mission Resources* the appellate court decision before *Garza*. That was an award of exemplary damages, which is covered below. However, the award was overruled by the Texas Supreme Court, in *Garza*, where it was held that damages for drainage caused by fracing are precluded by the rule of capture. *Garza*, 268 S.W.3d at 11-12. Those cases dealing with subsurface water migration either do not address damages or end with a take nothing judgment. *See Envtl. Processing Sys., L.C.*, 457 S.W.3d at 426. The cases addressing subsurface trespass by directional drilling exclusively award injunctions, as in the case of *Howell*, where the court intervened in equity to avoid the necessity of a multiplicity of damage suits, or the cases feature failed trespass claims, like *Lightning Oil*. *Howell*, 407 S.W.2d at 528; *Lightning Oil*, 520 S.W.3d at 51. One directional drilling case, *XTO Energy, Inc. v. Goodwin*, discusses damages the plaintiff, Goodwin, won at the trial court level. 584 S.W.3d at 486. However, those awards are only mentioned by the appellate court at the onset of its sufficiency of the evidence analysis, wherein the awards are vacated. *Id*. at 499.

b. Exceptions to the *Gilbert Wheeler* Damages Rules

At present, neither the Economic Feasibility nor the Intrinsic Value of Tress Exception has been applied in a subsurface trespass context. In fact, it seems that only the Economic Feasibility Exception may ever come into play.

3. Nominal Damages

"Even if a plaintiff fails to plead or prove that the defendant did any injury by entering plaintiff's property, the plaintiff is still entitled to nominal damages." *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 120–21 (Tex. App.—El Paso 2015), *opinion modified and supplemented*, 474 S.W.3d 481 (Tex. App.—El Paso 2015, no pet.). Much like monetary damages, none of the present subsurface trespass cases deal with nominal damages.

4. Exemplary Damages

Those who knowingly and intentionally trespass, or who do so maliciously, may be liable for additional forms of damages. *Coinmach Corp*., 417 S.W.3d at 922; *XTO Energy Inc. v. Goodwin*, 584 S.W.3d at 495. Exemplary damages are recoverable when "the harm...results from: (1) fraud; (2) malice; or (3) gross negligence." *Coinmach Corp.*, 417 S.W.3d at 922; TEX. CIV. PRAC. & REM. CODE § 41.003(a). This degree of harm must be shown by clear and convincing evidence. *Id*.

The Garza Energy Trust received exemplary damages as part of the appellate court decision before *Garza, Mission Resources, Inc. v. Garza Energy Trust*. It's the singular award of exemplary damages in the subsurface trespass context. The court reviewed the evidence as it related to the trial court's finding that Coastal acted maliciously as well as committed felony theft. *Mission Resources*, 166 S.W.3d at *313-16. The court of appeals specifically examined whether Coastal had acted with specific intent. Particularly concerning for operators is the fact that in order to make the determination the court exclusively relied on testimony from the Garza Trust's expert, Dr. Economides, about Coastal's well stimulation proposals. *Id*. at *315. Dr. Economides testified that his calculations and Coastal's well stimulation proposals indicated an intent by Coastal to create cracks extending 1,100 feet or more – a distance more than sufficient to reach the minerals under Share 13. The court never evaluated whether any drainage had actually occurred or measured the length of the actual cracks. Fortunately for operators, the award was overturned by *Garza*.

F. Subsurface Trespass Conclusion

While few cases comprise the body of law on subsurface trespass, some issues seem firmly decided and unlikely to change.

The 2008 *Garza* opinion remains the authoritative case on fracing, even in 2020. Fracing operations increase by the day and seem to be the safest technique for operators looking to avoid claims for subsurface trespass. Nonetheless, this author still recommends operators closely monitor fracing decisions that may affect *Garza*.

On the other hand, it's likely more cases will arise in the context of directional drilling and subsurface water migration.

Lightning Oil has set the stage for significant future litigation. Two parties laying claim to and exercising rights over essentially the same space is sure to breed future disputes. For now, operators should maintain contact with the surface owner. Try to understand their intended use of the surface and, more importantly, third parties it may want to authorize to drill through the subsurface. Where possible, advocate for a surface use agreement restricting the number and identity of parties authorized to drill through the subsurface.

Finally, subsurface water migration is a blank canvas. Texas courts won't be able to dodge the trespass question much longer. Like fracing, the use of injected water and subsurface disposal wells is steadily rising. If an operator plans to inject water to enhance recovery or for wastewater disposal, it must secure the required permits from the Railroad Commission.

IV. CONCLUSION

Tension in the oilfield is increasing, and not just as it relates to parties' interests and operations. These cases illustrate a growing legal tension between would-be plaintiffs and defendant operators.

In certain instances, a plaintiff's ability to bring a lawsuit is increasing. Nuisance claims based on minor injury, like odor, light, sound, and annoyance, are on the rise. Surface owners can more easily impede or halt an operator's intended use of the surface – Texas courts are entertaining narrower and narrower definitions of a plaintiff's preexisting use of the surface. Directionally drilling into a plaintiff's adjacent subsurface will support a claim for trespass. Conversely, a surface owner may authorize a third party to drill through the subsurface underlying their land, and the mineral owner is powerless to complain.

However, operators can take advantage of a number of recent developments in the law as well. The standard for proving causation in the aforementioned nuisance claims based on "annoyance" can be high and difficult to satisfy. Additionally, certain activity will not support a plaintiff's claims for trespass. Fracing is a key example. At the moment, the subsurface migration of water will not, either. The Texas Supreme Court's recent reformulation of the rules for damage to real property is also helpful. Where the measure and amount of damages for such injury were historically difficult to ascertain, it's now much clearer. Defendants can use this clarity to their advantage and avoid prematurely entering into settlement agreements with unnecessarily high settlement amounts.

Hopefully this review of the applicable law and relevant court opinions provides operators with helpful information to relieve some of that tension with their neighbor or, at the very least, be prepared if that tension bubbles over into a lawsuit.