ORAL ARGUMENT – 12-04-02
01-1214
HOLUBEC V. BRANDENBERGER

BRADY: This is a nuisance case about an injunction that forever more prohibits legal activity on 450 acres of rural land because of a nuisance found on 10 acres of that land that a jury deemed to cause damages in the amount of $7,262.50.

I would like to address three points. First, the injunction entered by the TC is over-broad, an abuse of discretion and should be overturned. Second, I would like to speak briefing to the implications of this court's opinion in the Payne case with regard to question 8 as submitted to the jury in our case. And finally, address the implications of ch. 251 of the Texas Agricultural Code, The Right To Farm Act.

The Holubecs began their sheep feeding operation in 1986. In 1996, they began an improvement to that operation wherein they converted a 20 acre trap into a 10 acre intense feed yard with alleys and pens and gates. From 1986 to 1996 by the respondents own pleadings no nuisance existed. There were feeders in the area. There was water supplied to the sheep. Feed was brought in from outside for sheep in the 20 acres to eat.

The five years before 1997, an average of 2,247 sheep were confined in that 20 acre area. However, under the injunction entered by the TC that operation, the 1986 to 1996 operation would not be allowed. In fact, no feeding of any animal within a confined area on the 450 acres would be allowed.

PHILLIPS: Couldn't hear or understand question.

BRADY: I'm asking for two alternative remedies. First, to dissolve the injunction in its entirety and impose the findings found by the jury because a balancing of the equity(?) was not called for, or in the alternative under the right to farm act a point of error to find that question 8 deprived the Holubec's of their defense under that act, and to therefore remand to the TC for a new trial.

ENOCH: What were the Holubec trying in this case? It is not clear to me from the briefing what was being tried. Are you saying that you expanded the operation and from the date you wanted the TC to submit to the jury, that's the one-year time frame starts from the date that you expanded the operation, or are you saying that you didn't expand the operation and therefore the time had expired back in 1987?

BRADY: There was an expansion. The 1986established date of operation is not the relevant date for terms of the statute of repose. The expansion commenced on March 19, 1997.

ENOCH: That was the confining(?) of the 10 acres?

BRADY: That's correct. And under 251.003, you get a new established date of operation when that expansion commences.

ENOCH: And so Holubec agrees that he did change his operation substantially after 1986. It's just that it was not the 1986 they should have been looking at. It was the 1997 date.

BRADY: That's correct.

PHILLIPS: But he didn't always testify entirely consistently with that...

BRADY: That's correct. There is testimony in the record that Mr. Holubec testified that his established date of operation was 1986. However, the statute makes it very clear that the granting of a second established date of operation after an expansion does not divest an operation of its original established date of operation.

HECHT: The statute does not make much very clear unfortunately. Tell us what you make of this provision. On the one hand you can't bring an action a year after the date the operation begins. And you say that's March 19, 1997. But then there's a proviso if the conditions have existed substantially unchanged since that date. And there's no finding in this record one way or the other on that. What's the evidence?

BRADY: There's no finding in this record because of the question 8 problem. Question 8 as submitted by the respondents asked if the conditions or circumstances constitute the basis of the nuisance had existed unchanged since 1986. Holubec's trial counsel objected to that, particularly the date on there. The Holubec's trial counsel offered an alternative question 8, which was admittedly not perfect in tracking the language of the statute. I think that the objection was good enough under Payne and the question was good enough under John Carlow Texas to get us home and to preserve...

PHILLIPS: What would the perfect question have been? I have the one you submitted here. But if you had it to do over, if you get the opportunity to do it over again what would it say?

BRADY: A question which says, have the conditions or circumstances that constitute the basis for the nuisance remain substantially unchanged since March 1997?

PHILLIPS: Substantially unchanged would relate back to the sort of conditions or nuisance is not operation?

BRADY: That's right.

PHILLIPS: That's what's wrong with this question?

BRADY: The 8th that the Holubecs offered does not contain the conditions or circumstances proviso. That's correct.

HECHT: But then the question you think is going to be did it relate back to March 1997. And what if the answer is no it didn't, because that was the day the expansion was completed but in May still more than a year before the lawsuit was brought, that's when it actually took off, that's when they really started moving, then what?

BRADY: There are two issues to address in answering your question. The first is, if the jury finds that the conditions or circumstances and answers that question no, then the rightful _____ defense would not be available to the Holubecs. We need to take that question to a jury to find out. That's why we're not asking for rendition but merely for a new trial.

HECHT: So you agree with the respondent's position that if you completed an expansion on Jan 1, 1995, but you don't actually start using it enough to create the nuisance until 5 years later, and then suit is brought two years after that, you agree with the respondents well this act doesn't apply because the nuisance problem didn't occur until 5 years after the expansion?

BRADY: I hesitate to say I agree with the respondents on that point. On thing I would point out at the first is that the effective date is not when that expansion is completed in its entirety, but the date of commencement of the established operation under 251.003.

HECHT: The actual sheep being present, but operation going on.

BRADY: And that goes to my next point. Which is under 251.004. But we have to consider the whole proviso, which is the conditions or circumstances complained of as constituting the basis for the nuisance. And that's the question. What is the basis for the nuisance action? It's our position that the basis for the nuisance action is the confinement of the sheep in that 10 acre feedlot.

JEFFERSON: Why isn't the basis the consequences of the action? The flies, the smells and all that why wouldn't that be the action?

BRADY: The legislature could have provided that the ramifications of the operation, or that the conditions complained of had existed substantially unchanged. But the legislature didn't say that. The legislature said the conditions or circumstances are the basis for the nuisance action.

O'NEILL: So under that scenario then, the nuisance itself might not have arisen at the time the action is cut off, and doesn't that present an open court's problem?

BRADY: I don't believe it does, because this is a statute of repose and the legislature through its policy choices in 251.001 has made it clear that this chapter is meant to the limit the conditions.

O'NEILL: But still wouldn't that pose a potential open court's challenge? This is different from the architects sort of 10 year statute where it's just not discussed, but the defective condition may exist. It's just not discovered for 10 years. Here, the injury would not even arise until after the limitations had run, and isn't that a problem under open courts?

BRADY: I would grant that it could be a problem under open courts. But think of the scenario where a person moves next to an established operation, which I grant is not the condition in this case, that's been going on for more than a year. And the conditions or circumstances are unchanged. Under a statute of limitations framework that person's injury does not accrue until that person moves to that area.

O'NEILL: I'm saying even if we grant you that this is a statute of repose, even if we say okay it doesn't depend upon accrual, it is a statute of repose, it's still problematic to say that their action can be cutoff by repose before the nuisance even arose.

BRADY: I would grant that there are issues related to open courts in some scenarios that one could think about related to this act. I think the legislature in making its policy choices considered those scenarios and decided that the preservation of our agricultural operations in this state...

O'NEILL: I understand the policy reasons behind it. You could still have a good policy reason and violate open courts, which is a judicial decision. That has not been raised in this case. Is that correct?

BRADY: That's correct. I don't believe that the idea that this statute violates the open courts provision has been briefed enough to be before the court today. But I would certainly acknowledge that there could be an open courts problem in some scenarios. I don't believe that's the case here.

ENOCH: I guess you could say that a feedlot operation will produce smells and flies and problems that will affect neighboring property, but not necessarily so. If this 10 acre deal had been 500 ft away from the residence, or had been around the bend from the residence, or had a row of trees in-between the residence it's entirely possible this entire operation could have been conducted without producing a nuisance. There would be no basis for a nuisance. To say that I'm raising sheep is a nuisance isn't really the answer. It's the way that you _____ way that produces a nuisance isn't it?

BRADY: No.

ENOCH: Couldn't I argue that you know you started sheep doing, but you did something in the process of raising these sheep that caused the nuisance, not the sheep themselves, you weren't cleaning up the manure timely, or you moved the dead pit right here, and after a year it finally filled up with enough carcasses that it started producing a nuisance that wasn't there before.

Isn't there some flexibility in the statute that it wasn't exactly that you decided to establish a feedlot. It's the way you were running the feedlot that would be the basis of a nuisance?

BRADY: I believe that there is. I agree with that hypothetical and that there is some flexibility in the statute. I would point out that I think those inquires are fact inquiries. And while it may be unclear as to whether question 8 should have been March or June of 1997, what is clear is that it shouldn't have been 1986, and that because of that defective question the jury did not get to grapple with the very fact issues that your hypothetical raises.

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RESPONDENT

MILLER: With regard to the statutory interpretations, from what I heard of petitioner's argument their proposed interpretation has softened from §5 of their brief, which basically said that the date of operation should control when a statute of repose began. And pretty much omitted that portion of the statute that talks about conditions and circumstances changing.

HECHT: I was never sure that was their position even though you were afraid it was in your briefs. You say that this statute never applies the bar of nuisance action if the conditions substantially change after the _____ operation begins? It just doesn't apply at all?

MILLER: Yes. That's how it's written.

HECHT: It doesn't seem to make a lot of sense. As long as it's found nuisance on the first day, then it's grandfathered in no matter what happens, but if it gets to be a nuisance later nothing happens.

MILLER: That's exactly how it's written. And of course the two-year statute of limitations still applies. The general two year statute would apply.

HECHT: But that wouldn't say that existing operation when somebody moves in. This saves that I take it.

MILLER: Right.

HECHT: If you move in where there's an operation on-going that has not substantially changed since it started and no question it's a nuisance, that's too bad.

MILLER: That's what this statute was designed to protect: existing agricultural operations that have been going on for some time and someone moves in next to it came to the nuisance. And that's the general purpose of this statute. It's not designed to cover the situation where a feedlot is built next to an existing residence. And that's really what happened in this case despite what petitioners claimed at trial.

HECHT: Do you agree at this point with the CA the undisputed date, commencement of operations is March 19, 1997?

MILLER: No. I don't think we do. And the reason is, there was on-going construction on that feedlot after March 19, 1997. The most expensive part of the feedlot, which was the lagoon that caught all of the wastewater over next to the Brandenberger's house, wasn't even built until 1 year after the lawsuit was filed. Waterlines were not put in the pens up next to the Brandenberger's house until within a year of the time the suit was filed. There was a progressive building of this feedlot.

HECHT: But even if it were that date, do you still think you win because the operation substantially changed after that date?

MILLER: Yes. The conditions and circumstances, to use the statutory language that constitutes the basis of the nuisance, did not appear until late August 1997. And intermittently the Brandenbergers began to notice a smell after a rain, noticing flies on occasion within a year of the time they filed suit. It progressively got worse until there were hordes of flies that pestered them all the time. The smell was constant at times.

The testimony in this case from expert witnesses is that it takes 6 months to a year for a feedlot to develop the manure pact necessary to sustain the colonies of flies that so plagued the respondents in this case. So if we look at this as a statute of repose, it certainly does cut off some very valuable rights before they ever accrue. And would work injustice to property rights of neighbors to the feedlot.

PHILLIPS: Why do you say this is a limitations statute as opposed to a repose?

MILLER: Because it has the proviso in there about the conditions and circumstances have to exist. If you read the statute according to its language they would have to exist on the first day of operation. And because of that there would be a cause of action on the date of operation. Otherwise, the statute doesn't apply according to the language.

O'NEILL: But if we adopt your reading that the conditions that give rise to a _____ the nuisance that become apparent, then does it matter if we call it a statute of limitations or repose for your purposes here?

MILLER: It makes no difference. The CA was exactly right on that. It's immaterial as to the outcome of this case. Whether or not it's a statute of repose or statute of limitations, you simply look at whether or not the conditions or circumstances constitute a basis for nuisance action remains substantially unchanged _____ establish date of operation.

The theory of defense at the trial of this case was in a state of flux. And it remains in a state of flux through the TC, the CA and this court. It originally started out from pretrial

motion for summary judgment, depositions and answers to interrogatories that the Holubecs had adopted a theory of defense that said these Brandenberger plaintiffs and their predecessors in title came to our nuisance. And obviously they wanted to have that sort of a theory because that's what this statute was designed to protect. Mr. Holubec testified that he operated his feedlot before the house was ever built. The house was built in 1989. That was his testimony in deposition. That was testimony in an affidavit for summary judgment. A week before trial we had to exchange exhibits and the respondents had a big blown-up USDA aerial photograph that shows, it was taken in 1983, 3 years before the Holubecs ever leased this place, and it showed the Brandenberger house on there. And the Holubecs had invested too much in this defense that they didn't completely change it. Therefore at trial they still maintained and testified the established date of operation was 1986. That there was no substantial change from 1986 until the date of trial, that that feed lot had been run like it had always been run. That there was no change in it. And it was clear, unequivocal testimony backed up by answers to interrogatories and pleadings. That was the consistent position that was taken in this. They did change the testimony about when the Brandenberger's house was built. And said, well we don't know when it was built at trial. But admitted that in all pre-trial they said it was built after the feedlot was there.

So that's the defense that the petitioners chose to present to the TC. And the TC submitted jury question No. 8 by substituting in the statutory language established date of operation, the date Dec. 31, 1986, which comported with the testimony of the Holubecs as to when their established date of operation was.

O'NEILL: My understanding is that your position is that the conditions that form the basis of the nuisance _____ and that didn't really appear until August. Is that right?

MILLER: That's right.

O'NEILL: If that's the case and there's evidence to support that why does it matter when the operation began? Whether it's 1997 or 1986 why does that make any difference?

MILLER: Only because of the statutory language. I think if the court looks at you open courts argument and go that direction it doesn't matter.

O'NEILL: But that depends upon how you define the basis of the nuisance. If we agree that the basis of the nuisance are the effects and not the sheep, if we were to say that it were the effects to avoid open courts problems and there's evidence to support your position that those effects does not present themselves until August, why does the date of the operation matter?

MILLER: I don't think it does. And in our brief we've got one section that says there's no evidence of any nuisance before August 1997, and therefore, they wouldn't be entitled to a jury question on an affirmative defense anyway. Because as a matter of law conditions and circumstances arose within a year of the time suit was filed. After the established date of operation.

ENOCH: Is part of the argument that the court should not find error in the submission of this question because it was invited?

MILLER: I believe it is invited but I don't believe it's even error because that's their judicial admission, and we've cited cases that normally the testimony on declaration is a quasi judicial admission. When that judicial admission is made I think cannot be said to have abused its discretion in believing their testimony and submitting their own defensive theory according to their own testimony.

HECHT: Coming to the injunction. It looks pretty broad.

MILLER: We do not agree that that's a broad injunction or an injunction that is too onerous.

HECHT: Well it says, for example, disposing of dead animals. So if your pet dog died you would just have to bury it across the road. It seems a little broad.

MILLER: The Holubecs have a lot of land. As J. Powers recognized in his opinion of the CA, their actions in this case appear wilful. Locating a feedlot 135 ft from their neighbor's bedroom window is a little bit extreme. When people behave like this, I think it puts a red light on the TC's mind - we've got to have an injunction that cannot be circumvented. And of course this court's writings go way back. The San Antonio Bar Assn v. Guardian Title case comes to mind as an example of this court's saying that the TC should fashion an injunction that will prevent the harm and prevent circumvention of the harm that's...

O'NEILL: Are you saying there's a punitive aspect to this injunction?

MILLER: I do not think so. I think that it anticipates what could go wrong, how the injunction should be circumvented, and it enjoins those actions. Disposing of dead animals. There was evidence that the Holubecs put a dead pit right up next to the Brandenberger's fence line.

HECHT: That's the problem though that I have is it doesn't say maintaining a dead pit close to the boundary. It just says disposing of any dead animal. I take it this is rural property, so I assume you might shoot a skunk out there or something and not just want it lying around. But it says you can't do that.

MILLER: The evidence was that the Holubecs had a place that after suit was filed they began to dispose of dead animals on it. It was not on the land that adjoined the Brandenbergers.

OWEN: If they wanted to partition this property and sale it, this injunction would not let the new owner do any of these things either. If your horse died you couldn't bury its carcass, or if a milk cow died. You can't feed the horse out of a feed bucket.

MILLER: I disagree on feeding the horse out of a feed bucket. The way that says you can't feed them except for what the land can support and produce in supplemental feed.

OWEN: You go to the feed store and buy Purina Horse Chow you can't come out there and put...

HECHT: No. It says that they are prohibited from feeding any feed within 1,750 feet of the existing _____.

MILLER: Right. Which gives them plenty of room on the other part of this land to feed animals.

HECHT: On this L-shaped tract?

MILLER: Right. It probably runs ½ of 2/3 of the distance from the Brandenberger house but there's plenty of area down on the other parts of the land to put out the feed. The way it's situated you can look at the aerial maps and evidence that they can feed hay and feed past that 750 ft. boundary.

ENOCH: My concern about that just the posture of the case is they were doing a lot of this in 20 acres. And I couldn't tell whether they added more sheep in the 10 acres or whether they just took the sheep on 20 acres and put them into 10 acres. So it's hard for me to tell. But it looked like this injunction - the argument is that the injunction takes that whole 20 acres, or whatever it is, and puts it outside the scope of running what they were running before they were using the 10 acres. Am I incorrect about that?

MILLER: No. And here's the problem. They cite Rogers, that talks about a building, where there was a gambling establishment on the first floor and the TC entered an injunction saying no gambling in the building, and it applied to the second floor. And they say all the TC had the discretion to do was to deal with this 10 acre tract. And we propose that cannot be the law. The Rogers case was an Eastland CA case, the leasehold in the second floor and the first floor were different leasehold interests owned by different people. There was no evidence of gambling or that gambling could be had on the second floor. I don't think it's in point.

What if they had a 1 acre feed lot that was in the corner closest to the Brandenberger house. Are we to say that we've got to have a new trial, but all the court can do is say you can't put a feedlot on that 1 acre. So the Holubecs move it over 1 acre, 210ft if it's a square acre and put a feedlot on that. And we would have to have another trial to keep them off of that acre. And they keep progressively going down the fence line until finally it gets far enough away.

ENOCH: It seems to me had they not reduced the 20 acres down to 10 acres, we wouldn't be here because it seems the statute would essentially apply. Because the basis of the nuisance didn't occur until it was reduced from 20 to 10. So shouldn't the extent of the TC's

injunction be simply to undo the 10 and put then back on the 20?

MILLER: No, I don't think so. I think more understanding of the defense that the Holbuecs had a trial there were several problems with it. One, it just didn't comport with the facts. But the 20 acres was hotly disputed as to whether it was a feedlot at all at trial. The pictures in evidence are going to show that before 1996 it was a brushy trap. The owners and the occupants of the house, going back several occupants testified that they never saw any sheep, they never experienced any nuisance, they never had any flies fly on that 20 acre trap. The fence was falling down and they drove trucks over it to work on telephone lines. And it wasn't a feedlot was our position at trial.

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REBUTTAL

BRADY: Even if we concede, which we do not, all of the respondent's arguments regarding the right to farm act in question 8, the injunction in this case is still an abuse of discretion.

I would like to illustrate that by focusing on a couple of the cases that respondents cite. You've heard San Antonio Bar Assn v. Guardian Abstracts cited to you earlier this morning. However, the case also has this language which I think is instructive, and obviously too the injunction decree cannot prejudge new situations which were not before the court in the first instance. This injunction decree clearly does just that. It does not only prohibit the feeding of sheep in that 10 acre inclosure, it prohibits the feeding of any animal. If the Holubecs, for example, decided that they would use those 10 acres and the 15 or 20 pens there in stabling one horse per pen, they can't do that under the terms of this injunction, whether it imposes a nuisance on their neighbors or not. So what should the injunction look like? I would submit to you that it ought to look like the injunction in another case cited by the respondents, Land v. Kinslo. That was a cotton gin case where a gin constructed a pipe 950 long that terminated 450 feet from the plaintiffs house. The gin blew the cotton burs, the trash to the end of that pipe and burned them there. There was evidence that that was a nuisance. The jury found that there wasn't a nuisance and the court awarded an injunction. As here, the jury awarded little or no monetary damages.

OWEN: But you agree that this court can't modify the injunction. We can point out what's wrong with it and remand it but we can't ourselves modify it.

BRADY: That's correct. I think that there are some instances where this court in the last few years, I believe there's UT Med School v. Tran(?) where this court did modify an injunction. But this injunction is such a mess that even if you could modify it, I would argue that you shouldn't.

And what did the injunction in the Kinslo case enjoin? The court points out the defendant was not restrained from ginning cotton. It did not put the defendant out to the ginning business. He wasn't even restrained from burning those burrs, that trash. He was only prohibited from burning burrs at a place and in a manner which will injure the plaintiff. So what the TC should

have done was consider injunctions like that one in fashioning this one.

The TC clearly should have considered cases like the SC's opinion in the Storey case. It should have considered cases like the Garland Grain case, which is incredibly, factually similar to this one. In both instances you had a going feedlot in a rural area, the feedlots were both 10 acres in size. They were both on the corners of the tract. The Garland Grain case had a 5,000 head cattle feedlot. We're talking about a feedlot with a maximum capacity of 5,500 head. The jury found a nuisance in both cases. It was a lawful business in both cases. And in both cases the residents was there before the feedlot. In the Garland Grain case all 41 landowner plaintiffs were there before the feedlot.

The court in Garland Grain dissolved the TC's injunction, which was not nearly as broad as this one, because questions of health were not involved. It was a rural area and there was an easily ascertainable legal remedy.

The court in so doing relied on this court's 1909 statement that it does not require argument or authority to say that damages to real estate can be easily compensated for in money.

O'NEILL: If the nuisance is ongoing it will not.

BRADY: Actually there have been holdings, there are holdings that recurring nuisance can be compensated for in money at one time. Meat Producers v. McFarland, 476 S.W.2d 406 is just such a case.
lagoon