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Supreme Court of Texas.
Coastal Oil and Gas Corporation and Coastal Oil and Gas USA, L.P.,
Petitioners,
v.
Garza Energy Trust, et al., Respondents.
No. 05-0466.

September 28, 2006

Appearances:
Elizabeth N. Miller (argued), Scott, Douglass & McConnico, L.L.P., Austin, TX, for petitioners.
Michael D. Jones (argued), Kilburn, Jones, Gill & Campbell, L.L.P., Houston, TX, for respondents.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David M. Medina, Paul W. Green, Phil Johnson, Harriet O'Neill

CONTENTS
ORAL ARGUMENT OF ELIZABETH N. MILLER ON BEHALF OF THE PETITIONER
REBUTTAL ARGUMENT OF ELIZABETH N. MILLER ON BEHALF OF PETITIONER

JUSTICE: - has three matters on a total submission docket and then the order of their appearance they are 05-0466: Coastal Oil and Gas Corporation and Coastal Oil and Gas USA versus Garza Energy Trust et al. from Hidalgo County in the 13th Court of Appeal District. Justices O'neill and Wainwright are not sitting in this Court. Docket number 05-0538 inn the state of Marvin Snash ceased from Angelina County and the Ninth Court of Appeal District. And docket number 05-0613L: In Re Bexar County Criminal District Attorney's Office, an original proceeding. The Court has allotted 20 minutes per side in these arguments and will take a brief, brief recess between the arguments. Do we expect to complete all of them before noon. These proceedings are being recorded and a link to the argument should be posted on Court's website by the end of the day, today. The Court is now ready to hear argument in 05-0466, Coastal Oil and Gas versus Garza Energy Trust.
COURT MARTIAL: May it please the Court, Ms. Miller to present arguments for the petitioner. Petitioner have reserved 5 minutes for rebuttal.

ORAL ARGUMENT OF ELIZABETH N. MILLER ON BEHALF OF THE PETITIONER

MS. MILLER: May it please the Court. This case squarely presents for the first time the question of whether there should be a trespass

or subsurface fracture in the state of Texas. We believed the answer for that question is "no" for four reasons. The first reason is a policy reason. We have production left in this state that will not be obtained without fracture. Everybody agrees, all experts in this case agree, all the industry agrees that fracture is absolutely necessary to recover the line of share of the oil and gas production that is left in this state. As a matter of public policy, we should encourage fracture not penalized it. To do otherwise, is going to cause waste. The second reason why we think that the answer should be there is no cause of action, it would be simply do not control the path of a crack. Neither current technology North Brockon Kenneth allow us to control the direction or path of the crack is going to take once we pop the fluid down in to the wellbore and out through the corporation in that wellbore. It does not allow us to know in advance the path that's going to follow. Nature is going to tell us the path. It can grow in three directions. It can grow up, it can grow out, it can grow long, those are things that we do not control. Particularly, as in this case, when what we're trying to determine is where a crack, cracked two miles deep in the rack and out to a length no deeper in depth than the edge of this envelope exist. The third reason is we already have a remedy for parties who's property might be drained because of fractures on offsetting wells. There is no need to recognize another trespass cause of action to protect the plaintiffs&7D in this case or to protect often mineral owners. Those well recognized remedies are in this case, suing your operator for fair to protect if you are being drained or if you are an offsetting mineral interest owner who is on lease, the remedy of self-help drilling your own well, cracking it, and then producing whatever you can legally produce out of that wellbore. The fourth reason is, is my partner Jane Webber would tell you, you're not asking for things acts here on cracking, if cracking causes damage to the reservoir, if there is some situation where one cracks negligently and cracks into a water zone and the water then gets in the producing zone and waters it out, and causes reservoir damage. The, the loss, of otherwise recoverable reserves, there is a cause of action for that, the Ilet case, Ilet versus Tecson says there is a cause of action for negligent operations that injure a reservoir. We're not trying to have a things acts on that. We're not trying to have things acts on illegal wealth. If an operator corrupt an illegal wealth, he is not protected because no production yet comes out of an illegal wealth is protected production. There is no kings acts here for cracking, what we're talking about is no cause of action for drainage by a cracked well. We think - ...

JUSTICE: Let me ask you about number three. The alternative remedies, I gather, I gather that they all require the adjacent mineral loader to incurred considerable expense. I mean, there is one thing to say, you have self-help but dealing wells, well is not inexpensive, so I take it was all of the remedies that you say are alternative, it maybe-- took maybe pulling, the-- there's some significant cost involved?

MS. MILLER: Well, let's take the situation of the cost involved in dealing your own well. Yes, their cost involved. In these wells, in these deep wells, there were three to four million dollars, three, three plus to dealing another million to cracks, those were significant cost. But your Honor, I think that it's not quite recognize the rule of capture and the remedy of self-help. Most ...

JUSTICE: I, I just want to be sure that all of the, are, the remedies have a significant cost as well.

MS. MILLER: The remedy has a cost to the person that it has to drilled the well, yes. But, but that person has no right to the minerals underneath this crack without drilling him. You can't put a fence around your track and say "I own this 260 acres, there are minerals underneath them and I don't have to do anything and you're not allowed to drain them". That's not our law in Texas. The rule of capture says, "anybody has the right to drill his mini-legal wells as they can on their track and to produce them within the rules in compliance with the Well row Commission and to produce whatever comes out of them, even if it's drained." And so, yes, it will cost them to drill but that's the, that's their, all they had is the right or opportunity to try to get their own resource, not to keep their resource from being drained. As to and under as to at least mineral owners, their cause would be the cause for making the band of wealthy owner to protect them from drainage. It may just be the demand upon the wealthy owners has had done it, and then lessee has had done it, and then the lessee would drill. Obviously, that doesn't work, there's a lawsuit, lawsuits have cause to drain but it's a breach of contract action and if they prevail, they would recover their attorney's fees to do so. Let me turn now to, to talking about this four reasons perhaps a little bit deep yet. Let's talk about the policy reason, that, that cracking should be encouraged and not penalized. Cracking is the universal completion technique that we used, in, in drilling and completing in a tight gas stands or any reservoir in which there is a very low permeability. As many of the commentators have told us, we're passed the low-- picking the low fruit on the, on the tree in the state. The production we have left in the state is going to be production that is harder to get. The main producing areas in the state, the Bornettshale that produce so much about, would not exist but for the technique of cracking. Everybody knew they will reserve in the Bornettshale for a long time. But they couldn't get out until they could crack, until they developed the cracking techniques. In Hidalgo County we have, with this lawsuit is, we have eleven hundred wells that have been cracked. Eleven hundred wells on plaintiffs acres alone which this is a matter I put on the board which is also in your brief. The yellow this plaintiff a, acreage, all the wells drill on the yellow acreage are wells drilled by Coastal. Every single one of those wells is cracked, everyone of them. The, the need to crack is to prevent waste; if we do not crack we will not recover the reserves. In Re Bexar Commission vs Manzeal, which was a water flood case, this Court had been looked at whether the encroachment of all wells on lease line by the water is the type of encroachment that she did rise to a cause of action for trespass. It was a water flood project that had been approved by the Re Bexar Commission. Single leased project with the operator wanted to inject water for the sole purpose of flooding water across his property knowing full well that his, he put water in and it will cross his property, it was going to cross on to the other side. And the purpose was to view that the capture, all the positive injures he could capture in front of that water. The Court, in determining whether or not it would, it was proper to enjoined that action as a trespass, set up the initial analysis. And it said clearly, "water encroachment is a thing trespassing." But the issue was not whether it is a thing trespassing, the issue was whether it is the type of thing for which fracture, or I'm sorry, for which trespass should be a, should exist and, and the, the person doing the pushing should be liable in trespass for that encroachment.

JUSTICE: Does it make a difference in Manzeal, that there is a

commission order authorized in a trespass issue?

MS. MILLER: It makes a difference in the facts but it does not make a difference in the policies. In that case, the Re Bexar Commission did approved the water injection. In this case, the Re Bexar commission does not required the permitting or approval of a cracking technique. It has been asked on many occasions to adopt rules about cracking, particularly on short acreage. Wells that are drilled on less than a regular density or-- are shoulder to a leasing line than, than regular rules. And each instance, the Re Bexar Commission has refused to adopt those policies, they do require that cracking be noted on the completion paper. The interble crack did not a prompt that used so that information is available for everybody to see. But they don't require a permanent, and I think the reason they don't is probably three-fold. The Re Bexar Commission has the right to pass rules for two things; to protect correlative rights and to prevent waste. Cracking is not causing waste. Cracking will prevent waste, it will get reserves that you can not get otherwise. What about correlative rights? For once again, correlative rights are the right to have an opportunity to recover, to do legally what everybody else is doing legally. And they, they haven't found that it's necessary to regulate branch one to protect correlative rights. I think the third reason is straight each just not the impractical. Cracking is done as a completion technique to a well. A radio is on, it drill well, it have to log it, you have to figure out that if you have anything damaged are you going to try to corporate. And once you do that, that's when you design the crack program, and that's when you, when you, the act should crack the well.

JUSTICE: Ms. Miller, those arguments on the policy issue, very compelling but, there first be an issue on this juris--on these standing issues whether or not a royalty interest owner has standing as oppose to the actual lessor of the line, can you address that?

MS. MILLER: Yes Sir, I can. The wealthy younger does not have standing to bring a trespass claim. The trespass action is a cause of action for entry to possession of the property. What the younger does not have possession of the minerals. A lease in oil and gas lease under like, unlike a leased of the piece of a, land or a, a building is a defeasible fee interest. It conveys to the lessee, the exclusive right and ownership of the minerals. The minerals emplaced in the ground, exclusive right to produce them, exclusive right to sell them. So they have it in the ground and they have it at the cert of the yard, ownership in, in, in place states so it is possession in the ground. Well, the Wolf Younger has, and this was most clearly stated in the, in the recent Natural Gas versus Fuel case is during the time of release, it has the right to receive royalties, the payment of money upon the production and sale of those minerals. And it has a reversionary right in the interest, should the lease ever terminate? If this lease ever terminate, if that fails to have production or operations, some kind in the future the lease terminates, and the royalty owner will receive that the minerals state. But while they leases in place the, the royalty owner has no property possession any right in, in those minerals. Because of that, they do not have standing to bring the cause of action for entry to the possession of those minerals. Royalty owners can't bring trespass to try cuddle cases, which is another possessor type cause of action. Realty owners can't sue for partition of the minerals or prevent partition of the minerals all under the same guides that they do not have a, a ownership right for the possession of those minerals. Yeah, they have a mineral interest, nobody does that, but their mineral interest while is unreleased is the right to receive the

royalty. We think that's why they don't answer us in this case.

JUSTICE: Let me ask you a nearer question about the jury question eight.

MS. MILLER: Jury question eight, all right.

JUSTICE: You say that the the question did not properly submit the contract measure of damages, if that argument should prevailed, do you see the remedy, rendition or remand for the track?

MS. MILLER: I believe the remedy would be rendition.

JUSTICE: Would you object to the question that it did not submit the contract measure properly?

MS. MILLER: Yes Sir, we did, we has specific objection on that.

JUSTICE: I have question on the, Coastal was required to protect Sierra 13 from drainage, correct?, -

MS. MILLER: Yes

JUSTICE: - the owners of lawsuit about the cause of action against Coastal -

MS. MILLER: Yes Sir.

JUSTICE: - by Garza for that. What, a, and damages for the award, what in-- or, or yeah, what damages are worth for that?

MS. MILLER: Well, your Honor, that's, that's the question that the, the right measure of damage was, was set but if, I might explain that just a moment ...

JUSTICE: Okay then, and when you're answer for the explain, what extent if the right measure of damages were awarded. What does that do you to the fracture and trespass lawsuit, if anything?

MS. MILLER: All right. The, a, a lawsuit for fair to protect them from drainage has two things that you have to find, to have liable on that. In this Suzette Adem versus Alexander and the Mendel case, very clear in Texas law. They have to show that some would failed to act, the operator failed to act is a reasonable prove the operator under the same maximum circumstances and that they failed to protect from substantial drainage which they should have done with some expectation profit to be sell. If you do that, the standard of damage is what the board would have been paid, had they protected from drainage? Had they drill the well to protect it from drainage? There is absolutely no evidence in this record presented by the plaintiffs on what royalties they would have obtained, had a well being drilled to protect from drainage. The question that, the subpart of that question, your Honor, is what does that do to the trespass case? I believe the trespass does not exist here. It is simply a breach of contract action. What they're suing on is the subject matter of their contract. They're suing in trespass for drainage or the failure to act as a reason of the improvement operator to protect them from drainage which is their contract action. If there are note damages for the drainage case, that could have gotten, they just asked the wrong standard for them. There is no trespass claim and there are note trespass claim.

JUSTICE: Just a follow up, if we said their work, their, that the trespass action did exist, what impact would recovery for the very operated has occurred in after, if they recovered damages to prevail?

MS. MILLER: It would, well, it's two different -

JUSTICE: What?

MS. MILLER: - damages, it would basically have two different measures of damages and I suppose that would require an election from them at that point, if they hadn't proper questioned,-

JUSTICE: Right

MS. MILLER: -on trespass that there, don't think they do. But the damages are separate, trespass doesn't require a proof of reason to

improve an operator or the proof of substantial damage and the measure would be the amount drained. Contract requires recently prove the operator substantial drainage, and what would you gotten had to drill the well, those are two different things.

JUSTICE: Thank you.

MS. MILLER: Thank you.

JUSTICE: Further questions? Thank You Counsel. The Court is now ready to the argument from the respondent.

COURT ATTENDANT: May it please the Court, Mr. Jones to present the arguments for respondent.

MS. JONES: Good morning, your Honors. May it please the Court. Let me talk right now immediately about the measure of damages, question, just asked. This Court in HGCI versus Neo in 1998, held that the royalty owner has a cause of action, for damage or for compensation for damage to a reservoir, underlying a law of gas lease. At that time, this Court also said, "We never had the occasion to opine upon the measure of damages that should be crafted for such a cause of action." I need to say two things about that all, first is Coastal and the Amid does contend that damage to the reservoir has some other meaning than the powerful bolt cracking and fracturing of the reservoir rock underneath that land. I don't know what could be more dummy, more prevented damage to the reservoir, that the actual frocking and cracking of the rock.

JUSTICE: Well, one thing, there could be more damage against you can't get in more minerals.

MS. JONES: That's true and to the extent that the minerals are removed by the cracking or trespassing, you never going to recover those either.

JUSTICE: Well, some out of this.

MS. JONES: Yes, and, and, and, and the, that's the case, that, that's why we're here complaining about today.

JUSTICE: Let me ask you among to, about your position, about adequacy of the contract remedy or other remedies. In your brief under heading, about why the skies not falling. You refer to the general land offices Amacos letter, and say that many times the option to pull and a compensatory royalties, remedy this kind of problem adequately. And then you'd say, in another place that self-help remedy which would be the drill-your-own-well or the cracked, doesn't exist because a lessor can't do that, but it seems that the obvious answer to that is that he could demand that his lessee do at the orders the operator. And so I'm wondering, what do you think that contract remedy is adequate or the pulling in the other things that been mention or not?

MS. JONES: Your in the eye of approach is-

JUSTICE: Yeah.

MS. JONES: -math. For example, Coastal Gas has the authority, as you can see they formed unit, but they didn't form unit when they draw the Coastal Fee Number One. They could have a well relieving bidder there.

JUSTICE: Okay. So it seems to me the answer then is that, that the pulling would be an adequate remedy in respect to the, trespass claim. You don't need the trespass to be halt.

MS. JONES: That is, that is correct, and the pulling is very inexpensive and it could have been done, they did, Coastal did pull when it was to their economic interest. They didn't pull when it wasn't.

JUSTICE: So I, I'm just trying to get that argument which at, I take it, from your brief it, it is not an argument that if we don't

have a cause of action for trespass, we're going to suffer injury that we can't find remedy for. You think that they're usually, in fact in every case, is, is some wreck.

MS. JONES: In this case, I don't think there wasn't a, a, a remedy and the reason is because we got the common lessee situation. And this ...

JUSTICE: You just speak, a remedy, if you, as you just said they had pulled under the Fee One.

MS. JONES: Indeed, that, that would be memo of a remedies for this one. But we need-- I think we need the trespass cause of action to prompt that sort of responsible response to the situation. This was not a responsible response to not pull, to not a comprehends to a royalty, when they have the opportunity. I would also, before I leave the contract measure of damages, this Court held in Kirmy Gibby versus Helton, that one measure of damages for breach of the implied coverage to protect was the traditional method, what I called the traditional method or the hypothetical well. In that model of damages, the plaintiffs' experts must hypothesized an offset well. The X-I hypothezise and it would be drilled without problem. The X-I hypothezise that it will be completed without problem. The X-I hypothezise that it would be produce without problem. An then that expert calculates the estimated estimate recovery of that well times the price of the time, times the royalty interest to derive damages. I thought it was significant that this Court said that was one measure of damages. We believed another measure of damages should be the amount of oil and gas drained by the draining well from the offsetting leaks or from my lease, my plaintiff's lease in this case. And the reason the ...

JUSTICE: What about, what about which there is still a lot of hypothesis?

MS. JONES: But you've got a wellbore, you got some objective data, you know what the production rates are, you know what the prosody, the is the space in the wreckage. You know, what the permeability is, that's the connectivity between the spaces. You know, what the saltwater concentration is. You got all of this reservoir insuring-- engineering parameters from that well and reservoir engineers will tamely estimate drainage, drainage fee or acres of drainage around the well. It's also, not only the do we believe-it's or more accurate measure but it's also generally going to be much lower because it's not going to include oil and gas from, if I may approach again, from over here which wouldn't normally be the case. We assumed radiant drainage around these well were not include royalty on reserves over here and it would only include royalty on the reserves on this site of well, being drained by the Coastal Fee Number One.

JUSTICE: Are punitive's warranted, if it's really unclear the matter of law whether accord even occurred?

MS. JONES: Your Honor, I want to talk a little bit about that. I think the laws of physics also require us to conclude that there was a fracture here. First, Coastal's expert and my expert, both testified that the fracture went across the lease lines. That fracture can be stylized or to appear like this envelope but it goes by that. And the opening here is next to the wellbore. And there is shells on the top and shells on the bottom to limit the drill up. And the width point gets, gets less than half an inch. Coastal put 2,559,000 pounds of back cite profit in this crack. Someone with more mathematical skills that I can calculate the volume inside that envelope. And-- let me step back one second-- the experts all agree that the crack proceeds bilaterally.

So you get one on each side. It doesn't matter in this case what direction that crack builds you, is going to cross the line. And the ...

JUSTICE: But my question is it, if it's a open question whether fracturing constitute the trespass. Is in or punitive damages was worn to that the recently curdle operator doesn't really know what the legal standard is. And do you get, do you really have to know your conducts is, is unlawful for more punitive's?

MS. JONES: Well, in this case they designed, they're computer designed on the, on the fracture was eleven hundred feet. They know what they were doing, in fact, and, I,-- I'm trying to get to your Honors' question-- in fact the Re Bexar Commission found that, that Coastal Fee Number One Well and I referee to ...

JUSTICE: The question is you try to turn-- the question is whether you try to turn the contract claim in to tort claim and part of the reason we don't do that is because Therese and the Dogo County award 10 million in punitive damages every time you do. So why do we, should we do it here again?

MS. JONES: You Honor, in, in, there in-- actions in one case can be both a breach to contract and a tort. In this case, I will, I will like to address that. The Revoir Commission found when if, and if I could referee to our math at Cabay, you'll see that what my-- what Coastal is not wrong here if may go to the board. There was a law right here about Penzzoil Fee Number One, Coastal was the oil and gas lease, lessee from Pennzoil, they require the ledge from them. That ledge was a 25 percent royalty leaks. The yellow part of that chart is only 84 per- is, is 84 percent. They have a 16 percent royalty burned. Coastal acquired Sierra 12, all the Sierra 12 in 1995. They eliminated the royalty burn, it was a 100 percent revenue leaks. They then wanted to locate a well where they locate that Coastal Fee Number One. But there was a problem, the Pennzoil Fee Number One Well, which they already had on that lease Sierra 12 was closer than twelve hundred feet, completed in the same reservoir. So Coastal filed an application for an exception. They wanted-- they want that the Revoir Commission, to approve the location to Coastal Sea Well. After hearings, the evidence, the Revoir Commission found that any reserves produced by that well would come from the offsetting tract. And that Coastal facility drill this well over here to recover the reserves. That decision became final. Coastal then decided, we can't do that if you look at the map on behind tab one of our brief. There's a green outline there. That green outline shows the most productive part of the field. Coastal shot in the Pennzoil Fee Number One Well which they had drilled before after the district formation so they could drill Coastal See Number One. And they implemented the largest crack in the field, on that well, to give them to the good part of the reservoir under Sierra 13 without the allegation of a royalty. And ...

JUSTICE: Will you tell of Judge Medina's question about standing?

MS. JONES: Pardon

JUSTICE: Will you tell of Judge Medina's question about standing?

MS. JONES: Yes, Justice Brister is that, I'm sorry,

JUSTICE: What's your answer?

MS. JONES: What.

JUSTICE: I'm convince to her ...

MS. JONES: Yes, I will.

JUSTICE: Can't tell whether I'm convince to her.

MS. JONES: I understand. I want-- I didn't know whether or not I needed to. I, I believe that HGCI versus Neil is a standing and that

the Ellot versus Tecson case is a standing, your Honor. It recognizes a cause of action, there's been a harm, of the people who have been harmed are the plaintiffs in this case, they meet the requirements to standing. Theoretically and doctrinally royalty is real property interest. It is a fee interest. And I post a rhetorical question, what is the tort to a real property interest? The tort to a real property interest is trespass. We can't convert personal property, we can't convert real properties, excuse me. Conversion is for personal property. This is like fitting a round Adonis ware hall, if you use the traditional analysis of a trespass cause of action. This Court recognize that in HCCI versus Neil, they gave the royalty owner cause of action for, to seek damages for damage to the reservoir. We believed the reservoir has been damaged in this case audibly and directly. And that, almost the VCAP gas was drained from under Sierra 13 into the Coastal See Number One Well, where there was no royalty allegation. It was the taking of property without due process or without-

JUSTICE: Just ...

MS. JONES: - just compensation.

JUSTICE: Just want to be clear, there certain minute injury Coastal evidences that the cracking affected the property but, is there any damage in the sense that recovery of mineral is lost as oppose to recovery for the plaintiffs? Is there any evidence in this case that the cause of this activity, no one can recover some of the minerals in the reservoir?

MS. JONES: No, your Honor. That, that, that did occur but there is a definite amount that was calculated and testified to by our expert getting way as to what was drained from Sierra 13. In the Revoir Commission found that those reserves produced by the Coastal See Number One Well, would come from the Sierra 13. So we believe that there's clear and convincing evidence here that Coastal knew that it was going to be draining reserves from under Sierra 13 in to their 100 percent owned Coastal See Number One Well, and that Sierra minded and reasonable jurors could conclude that, that there was a trespass. Yes, judge?

JUSTICE: I want to ask you two questions, what about the firm minded jurors in reference to, I understand, was a memorandum that was submitted over objection by Coastal and involving some reference to a literate Mexicans in that area. Then also Mrs. Millers' contention on the policy reasons why the, the method that was done to the scratch test oil is, is not better than creating a new torch of that the, there, there's some different measure of damages?

MS. JONES: Well, let me address the second question first. It, it's our position that this Court can limit this cause of action to a common lessee situation. This Court has limited certain rules to common lessee situation and at least to our cases Shaw versus Dansver 1956 Texas Supreme Court case which excuses notice in the case of a common lessee with, with drainage. And separately in Amical versus Alexander common lessee situation, this Court held that the lessee cannot dilute it's duty to it's lessor because of duties to other lessors. The 1977, memo , sorry. The 1977 memo goes to the implied covenant to develop claim. And the 1977 memo, everyone concentrates on, of, on, on the words that you refer to your Honor, but there's also another very key parted memo and that memo, and that key part is, I recommend that Coastal take the calculated risk of drilling on Sierra 13, they did. Then in 1982, they removed that risk when a judgment can unitize all of the royalty interest. There was never a problem with Coastal drilling on Sierra 13, yet, yet at the trial they keep mentioning old type of

problems, type of problems. May I approach again? Those type of problems and it's also in the, on tab one, the map on tab one are our brief involved various up here. There is no reason why they couldn't drill here, but their reason was if we drill, where these red dots are-- we'll then have corresponding navigation to drill there. Well, that's no excuse as Amicol versus Alexander shows it.

JUSTICE: Okay, let me just before your time runs out-- if I spray water on my neighbor's lawn, is that a trespass?

MS. JONES: Technically yes.

JUSTICE: Have we ever said so?

MS. JONES: You said in Greg versus Delhi and in the withdrawn opinion in due licence ...

JUSTICE: Let's skip over the withdrawn opinion -

Mr, Jones: Okay.

JUSTICE: - since the withdraw on the ...

MS. JONES: Very, very good. You said in Greg versus Delhi, this is a silent surface trespass.

JUSTICE: I'm, but I'm so against your answer.

MS. JONES: But you ...

JUSTICE: My, my concern is, if spring water under the surface, and sand is a trespass, then throwing sand on top of the surface would have to be a trespass too?

MR JONES: It could be if so known with that ...

JUSTICE: We left that specifically, I think that we should specifically left that question over because it turns all looses law in to trespass law, doesn't it? I mean every fumes, fumes are just air molecules, light, bright light gentlemen as just photons so -

MS. JONES: Yes, your Honor.

JUSTICE: Clearly, we have no news, this is left for all trespasses.

MS. JONES: If they're intentional for the purpose, I, I think we have a little bit more ordinary than just a, -

JUSTICE: There is neither trespass nor -

MS. JONES: - which is modern.

JUSTICE: - neither trespass nor no sins has to be intentional.

MS. JONES: Trespass is intentional, now whether you, your actions are intentional actions, I, I, think that's you know, when you, you have to intentionally break the claws as they said in all valiant. And your action is intentional, otherwise, I suppose it is a negligent trespass but that gives beyond my analysis at this manner. I'm sorry, that's in the 1977 memo, so it, it's our position that, that memo resolved that issue and it was in our duty to demonstrate that, that issue was resolve and it did not excuse the Coastal's fair to develop as Re Bexar could not learn in entirely manner.

JUSTICE: Any further questions?

JUSTICE: Thank you Counsel.

REBUTTAL ARGUMENT OF ELIZABETH N. MILLER ON BEHALF OF PETITIONER

MS. MILLER: Your Honors, I'd like to start by addressing the, the Judge Willet questions on punitive damages in cracking. This Court has never determined, never ever, not in Greg, not in Manzeal, not in the Geo-Brakon case that fracture is a trespass, that is an open question. You asked the question, Judge Willet is, whether or not you can have

punitive damages for something like this. All of the parties in this lawsuit, all of the experts have told us, "we do not control the path," three quotes from the record. "A fracture will go where it wants to go and not where we want it to go," that is a quote from Dr. Comoniz. But pleasure is ...

JUSTICE: And a punitive is not just intentionally doing but for, for being substantially certain that it will occur.

MS. MILLER: Let me address the substantially certain because the next quote is from Dr. Holdich, "we have no control over the direction or the size of shape of the hydraulic crack, that's our expert." Third quote, "crack can unintentionally travel direction and links for which they were not designed," that is the Slamberjay experts. Slamberjay is the company who's business is, either has to do cracks. What we have is a designed hinder. There was no evidence, zero evidence in the record put on by Dr. Comoniz to determined where that crack went after it was cracked. Dr. Conmoniz' position was, if you designed in the, in the office, in the computer a fracture design to keep you compete the way you designed it, it must have gone where that design goes.

JUSTICE: I know you can't tell in advance how far may extend but can you tell, after has extended whether has in fact extended the need of a certain property?

MS. MILLER: There is a way to do 3D modeling after the fact which in this case Dr. Holdich did, where you take production and pressure and reservoir information after you do the crack to determine not the path but the drainage area. He did that work, that the evidence of the record is that the azimuth, the direction from north, south, east and west is generally going to be a parallel to fault, I mean if that azimuth implies that a crack if, if it went eleven hundred feet is designed would have crossed the line, some portion of it. But what they were talking about was the prop link, the grain of box cite. Box cite grain, Dr. Comoniz goes one out to one grain of Box cite which was the size of a puppy feet. Then a puppy feet would have travel across that leased line, that's not the drainage area. The effective link of a crack is always smaller than the prop link of, of a crack. Nobody talk Dr. Comoniz has been talked about effective link, he talked about prop link. In the 3D remodeling done after the fact on actual production from the well, the only evidence in the record was Dr. Holdich's. Dr. Comoniz said he didn't do that even though his book, that he was so proud of, said that's the only way you can the determine what's the drainage area is. In this case, the evidence from that modeling was that while part of the prop, part of those box cites might have cross the line in the most terrific area, but this is only a practice 500 feet of wide. There was a bump crack, top crack, middle crack. The middle crack was the only one that was affected because in reality this is one of the poorest wells in the field even after crack. That one, the effective drainage area was less than 500 feet, was less than the 467 feet from the, from the wellbore. That's the only evidence in the record. So what's happened is, the design is the liability. The fact that one designed it on the computer that is a 2d model. The computer says, "We're going to assume that the crack goes no higher up and down than a 150 feet." But we assume that, we solve only for length and width. That crack is applied in a 3d world with a 500 foot inerrable, there is no 150 foot limit on how far it can grow up and down.

JUSTICE: That's, that's all very interesting in the, I guess oil and gas fuel and scientific world for this expert can't predict the results of their, their methods to scratch test oil but as just as Brister said certainly there substantially certain that something will

occurred when they uses these methods that something is to drain or greed to get the oil, right?

MS. MILLER: Absolutely. But your Honor, that's true of every single well drilled anywhere, one does not drill well to try to produce as little as they possibly can.

JUSTICE: Understood.

MS. MILLER: Every time you put a well down there, your goal is to get as much as you can out of there. And in a tight gas stand you can't get anything if you do not crack it. And if you crack, according to their test, a crack link they're not more than 467 feet, you will not have any request Marshal.

JUSTICE: Thank You. Any further questions? The case is submitted and the Court announces a brief recess.

Clerk: All rise.

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