This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
FPL Farming Ltd.
v.
Environmental Processing Systems, L.C.
No. 09-1010.

March 1, 2011.

Appearances:

Claudia Wilson Frost of Pillsbury Winthrop Shaw Pittman, LLP, for petitioner.

Richard G. Baker of Baker & Zbranek, P.C., for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS



CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first cause, 09-1010, FPL Farming Ltd. v. Environmental Processing Systems.

MARSHAL: May it please the court, Ms. Claudia Frost will present argument for petitioner. Petitioner has reserved five minutes for rebuttal.

## ORAL ARGUMENT OF CLAUDIA WILSON FROST ON BEHALF OF THE PETITIONER

ATTORNEY CLAUDIA WILSON FROST: May it please the court, I apologize at first, I have very little voice today. I am so sorry, under the weather. First, FPL Farming finds itself before the Court today on the horns of a dilemma. Does it have an action for a trespass against EPS for invading its groundwater with waste as it litigated before the Liberty County Court in 2007? Or does it, as the Beaumont Court's opinion hold have a cause of action against the State of Texas for confiscating its groundwater and giving it to EPS to store waste in without compensating FPL for that taking? EPS has a permit to operate a Class 1 waste disposal well in Liberty County. At the time of trial in 2007, EPS had pumped approximately 100 million gallons of waste, including acetone and napfoline into the [inaudible] formation. It's a reservoir at this location that contains brine or saltwater. The reservoir underlies the five acres that EPS leased for siting its well and the adjacent lands around it,

including those belonging to FPL Farming. FPL sued EPS for subsurface trespass, negligence and unjust enrichment. The cause we submit by the erroneous jury instructions and questions, including those that improperly shifted the burden of proof on certain issues to FPL and required FPL to prove elements of a cause of action not required by Texas law. The jury returned the defense verdict for EPS. The Beaumont Court of Appeals affirmed the judgment on the basis that FPL did not have a cause of action for trespass and based on the extension of this Court's decision in Manziel, an oil and gas case, to waste applicable, they extended to waste water injection wells.

JUSTICE DAVID M. MEDINA: Why wouldn't that apply here?

ATTORNEY CLAUDIA WILSON FROST: Why wouldn't Manziel apply here?

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY CLAUDIA WILSON FROST: Your Honor, there's several reasons. First of all, actually there are three that I can put in categories. First, there are different public policy considerations at issue in Manziel dealing with oil and gas, then dealing with wastewater and groundwater. Second, we have a different statutory and regulatory framework at issue in both of the two cases. And, third, there are different rights and interests between the parties that are implicated.

JUSTICE DEBRA LEHRMANN: May I ask you, should we treat subsurface wastewater differently than hydraulic fracturing?

ATTORNEY CLAUDIA WILSON FROST: Yes.

JUSTICE DEBRA LEHRMANN: And could you explain that?

ATTORNEY CLAUDIA WILSON FROST: I certainly will, Your Honor, and the reason is the context in which you examine it. I think the easiest way to distinguish the two is to look at the facts and circumstances under which both of those, these questions are presented. In the oil and gas context and I think the court's opinion in Garza v. Coastal or Coastal v. Garza, Justice Hecht's opinion, is probably the most cogent statement of what the oil and gas industry and the interplay between the rules of capture and correlative rights and so forth are in the oil and gas context. That was a case, of course, where the court didn't conclude whether in that case a particular fracking technique was a trespass, but the court analyzed the issue there. What is clear is that in the oil and gas context, you have two people, let's say adjoining landowners. They are competing to try to develop the same resource of a common reservoir. Landowner A and landowner B both want as much of the oil and gas out of that reservoir as they can reasonably get. In the State of Texas, there is police power and otherwise and the laws have imposed or superimposed a very complex scheme through the Railroad Commission and otherwise to balance and regulate that production. Those two competitors for the same resource are paradigmatically different from EPS and FPL. Both of them have rights to the groundwater in the formation to be sure, but they are not competing to use it in the same way at all and it would be a mistake to use the law that applies where two people are competing to use the same resource for the same way and just seeing who can get most out of it, to a situation as here where EPS on the one hand is trying to use that formation to dispose waste in whereas FPL wants to use the groundwater and the formation and produce it for other purposes.

JUSTICE DAVID M. MEDINA: What if there is no groundwater involved? Let's say the environmental contamination leaches offsite and contaminates property elsewhere.

ATTORNEY CLAUDIA WILSON FROST: That's a totally different issue. I would think that that leaching would constitute a trespass and pollution under some potentially under some regulatory scheme.

JUSTICE DAVID M. MEDINA: Well how's this any different other than water being involved?

ATTORNEY CLAUDIA WILSON FROST: Well, the reason is is that you would be polluting, if I understand the Court's question, you would be polluting, in this instance, the groundwater and the formation whereas in that, you'd be polluting some other formation. I don't know whether you'd be polluting an oil and gas strata.

JUSTICE DAVID M. MEDINA: Well, if I have a license to inject waste into the earth and for whatever reason, let's say it's porous limestone and the waste migrates offsite 100 miles and contaminates some other person's property. How is that any different from here? I mean, that seems are there environmental laws against that? It seems like that would benefit you [inaudible].

ATTORNEY CLAUDIA WILSON FROST: Well, certainly, as the landowner on whose land the waste crossed or on to whose land the waste crossed could very easily have a cause of action for trespass too. It would be an invasion, an unconsented to invasion on to their land.

JUSTICE DAVID M. MEDINA: So we're trying to determine whether or not this charge is correct or whether or not you have a cause of action and trespass?

ATTORNEY CLAUDIA WILSON FROST: Well, Your Honor, I believe they have a cause of action for trespass and the Beaumont Court was wrong in concluding that the permit immunized EPS from civil liability.

JUSTICE DALE WAINWRIGHT: Counsel, your distinction between oil and gas versus water seems more based on the use or the attempted use of the resource rather than the difference between the different minerals, if I can call water a mineral here. It sounded like you started out by arguing the difference was based on different minerals, oil and gas on one hand versus water, but now it sounds more like your distinction is the use, polluting it versus attempting to draw it out for one's own purpose.

ATTORNEY CLAUDIA WILSON FROST: No, Your Honor, there are different uses, but that's not, I think it's fundamental to understand that there are different uses, competing uses being made of the reservoir so that changes the rights as between the parties.

JUSTICE DALE WAINWRIGHT: If the distinction is based on the use, then your argument could lead to different rules for the same resource based on its use. If your distinction is based on the nature of the resource, then it's more categorical and I'm not sure which one you're arguing.

ATTORNEY CLAUDIA WILSON FROST: We are arguing that we own the groundwater so we own it in fee. We don't have to use it to own it. We have a right to exclude like any other property interest owner has.

JUSTICE DALE WAINWRIGHT: So why is Manziel inapplicable here?

ATTORNEY CLAUDIA WILSON FROST: Manziel is inapplicable because we believe that the policy reasons, the legal reasons and the law that's developed around oil and gas contemplates a different set of circumstances than the one present here. I don't think it's appropriate to superimpose a scheme with the Railroad Commission. For example, Railroad Commission can and is charged with the duty of preventing waste and protecting correlative rights. So if in a situation, in an oil and gas situation where you have two people in the field who are trying to produce hydrocarbons from the reservoir and, again, that does deal with what they're doing with the reservoir, but that's the authorized, that's the use they're making. They own it. They own the oil and gas and they are trying to produce it. If one doesn't want to produce it, he doesn't have to. Somebody can under the rule of capture, someone can take the oil and gas out from under him and that won't change his ownership. He owned it. So I don't want that to be the misconception, but I think it's just important to understand the difference in the two schemes in order to understand the regulatory and legal framework and that's why Manziel is different, but the policy considerations are definitely different. Secondary recovery operations pursuant to the permit in Manziel didn't constitute a trespass, but says they were carried out to increase the ultimate recovery of oil and gas and

that would become impossible if they were subject to traditional trespass rules. Secondary recovery rules hold a place of special importance in Texas. Wastewater injection wells are not used to increase the ultimate recovery of groundwater. By contrast, to oil and gas, an injection well destroys the ability of neighboring landowners to recover use of groundwater.

CHIEF JUSTICE WALLACE B. JEFFERSON: But on that point, isn't that something that the TCEQ takes into consideration before it issues a permit for that purpose. They know or presumably they're going to consider whether by issuing this permit there is the possibility of contamination of neighboring property owners' groundwater. So if that's the case and they're making that consideration before the issue permit, then why should we go behind that regulatory action and permit a lawsuit?

ATTORNEY CLAUDIA WILSON FROST: Well, Your Honor, you wouldn't be going behind the regulatory action at all. The TCEQ's regulation specifically Texas Administrative Code Section 305122c provides that the issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights.

CHIEF JUSTICE WALLACE B. JEFFERSON: But doesn't the TCEQ consider that as a possibility before they issue a permit or not?

ATTORNEY CLAUDIA WILSON FROST: I understand that they do consider impact on adjacent landowners yes, but they do not, in any way, abrogate or eliminate any kind of civil liability or right to make a claim. In fact, the Berkeley Court and the FPL one court indicated that there is an invasion then certainly there is a cause of action that could be [inaudible].

JUSTICE PAUL W. GREEN: One of the things the TECQ would know about, as I understand it, these injection wells were going into a saltwater formation. What's the use of saltwater?

ATTORNEY CLAUDIA WILSON FROST: There's plenty of uses. I didn't mean to interrupt you, I'm sorry.

JUSTICE PAUL W. GREEN: You can't pump it out on the crops and so forth, can you?

ATTORNEY CLAUDIA WILSON FROST: Well, there are plenty of uses for saltwater. In fact, in our brief, we cite one that I think is of particular interest. I know there's aquaculture and heating greenhouses and a variety of other things and, of course, technology is developing rapidly in these areas, but one of the more interesting ones, I think, is the Inland Desalination Project in El Paso where 4% of El Paso's drinking water is coming from desalinated underground water, saltwater.

JUSTICE NATHAN L. HECHT: Assuming that you have a cause of action for trespass, why doesn't the jury's failure to find the trespass indicate that you just failed in your proof of injury?

ATTORNEY CLAUDIA WILSON FROST: Your Honor, we submit it because the charge improperly put the burden of proof on FPL to disprove consent number one.

JUSTICE EVA GUZMAN: Does the fact that you pled it was done without your consent, though, does that shift the burden in any way? That seems to be what they argued in their brief?

ATTORNEY CLAUDIA WILSON FROST: It is. No, Your Honor, we don't believe that it does for the reasons we state in our brief.

JUSTICE NATHAN L. HECHT: But the argument on the other side is that the only evidence at trial was that there wasn't consent.

ATTORNEY CLAUDIA WILSON FROST: There was consent?

JUSTICE NATHAN L. HECHT: Was not consent. That was the only evidence that was in your favor that there was no consent.

ATTORNEY CLAUDIA WILSON FROST: They argued, they argued fairly strenuously that we had not consented or that we had consented, rather, and---

JUSTICE NATHAN L. HECHT: But on what basis?

ATTORNEY CLAUDIA WILSON FROST: They argued in their closing argument and I will get it actually when I sit down to get you some actual quotes from it, but they were certainly suggesting that we did it on the basis of acquiescence, I believe. They basically said that we knew all along that they were building this facility and we sat by and said nothing. It's really, I think their theory and my understanding of the law and what we cite in our brief is that the consent to a trespass is judged after the trespass not before.

JUSTICE NATHAN L. HECHT: The evidence of entry at trial was disputed. Is that true?

ATTORNEY CLAUDIA WILSON FROST: I don't believe it was ever disputed. What was disputed was the propriety of the methodology that was used by our expert, not necessarily the fact. What EPS basically did was argue through its expert that basically debunks the methodology that our expert used, which, by the way, happened to be the one that the TCEQ uses, that the EPA uses and that EPS itself used when it was doing its applications, but nonetheless, the expert for EPS said that he didn't believe that that was necessarily a model and, therefore, it wasn't certain enough was really the issue.

JUSTICE NATHAN L. HECHT: Is it fair to say that there was no evidence of a manifestation of injury like you drilled the well and there was evidence of pollution or anything like that?

ATTORNEY CLAUDIA WILSON FROST: That is correct. No well was drilled on FPL's land to test for that. I think it would have cost almost $1 million to do it.

JUSTICE DEBRA LEHRMANN: You indicated that the trespass would occur or the consent would occur after the trespass. Did the adjacent landowners get notice from the TCEQ that a permit application has been filed?

ATTORNEY CLAUDIA WILSON FROST: I believe they are supposed to get notice.

JUSTICE DEBRA LEHRMANN: Would that be an appropriate time to object to the trespass since the TCEQ takes into consideration that there may be some migration?

ATTORNEY CLAUDIA WILSON FROST: The trespass hasn't occurred yet. That's the issue. So you can't really object or consent to a trespass that hasn't occurred yet and certainly opposing a permit even if which was done in this case certainly with regard to the second application, there was no consent to a trespass by virtue of the contest or lack of contest.

JUSTICE DEBRA LEHRMANN: What about the silence though? Weren't you silent for a long time before objections were made to the trespass?

ATTORNEY CLAUDIA WILSON FROST: Not after the, not to the trespass. The trespass itself based on the evidence that our expert indicated was not until January of 2007 and there was objection immediately after that and, in fact, we probably, FPL would have objected sooner had they known that EPS had sited the well in violation of the permit 500 feet closer to the property line than they were supposed to. I see my?

JUSTICE DEBRA LEHRMANN: Because I don't know that industry that well, one more question. Any time that you have this injection, is there the possibility or will it always migrate or not necessarily?

ATTORNEY CLAUDIA WILSON FROST: I can't say unequivocally that it would. You might have some sort of faults in the subsurface that would prevent it. Certainly the TCEQ does ask for geological and reservoir reports to understand that better at the time it considers the application.

JUSTICE DEBRA LEHRMANN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The Court is ready to argument now from the respondent.

MARSHAL: May it please the Court, Mr. Richard Baker will present argument for the respondent.

ORAL ARGUMENT OF RICHARD G. BAKER ON BEHALF OF THE RESPONDENT

ATTORNEY RICHARD G. BAKER: Thank you. Counsel, Court, I want to thank you personally for the opportunity to be here. This may be my only chance to substantively discuss any issues with the honorable members of this Court and I want to tell you that it's been 24 years since I've been in this room to watch an argument. The first time was the Patrick V. Barrett case I cited in the brief. I was a law student and helped J. Z. [inaudible] as he argued that case. I sat right over there and his son is present with me today, so that's a nice thing. Now, the matter to this case. When the court granted the petition for review, I wondered why because if you look at the court's jurisdictional [inaudible] the justices of the Court of Appeals did not disagree. They were uniform.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there a conflict among the courts of appeals on this question?

ATTORNEY RICHARD G. BAKER: I don't believe so.

CHIEF JUSTICE WALLACE B. JEFFERSON: FPL and the Berkeley case?

ATTORNEY RICHARD G. BAKER: No, sir, and I want to explain that because I do think on reflection that you would want to consider this case under Rule 561(a)(6), I believe, and that is if the Beaumont Court of Appeals decided an important question of state law, that should be, but has not been resolved by the Supreme Court. Now that doesn't mean the Beaumont Court of Appeals decided it wrongly.

JUSTICE NATHAN L. HECHT: You're a little timid in you defense of the Court of Appeals' opinion.

ATTORNEY RICHARD G. BAKER: Yes, sir.

JUSTICE NATHAN L. HECHT: And so I'm not clear. Do you agree with the Court of Appeals that whenever an agency issues a permit like this, there just can't be liability?

ATTORNEY RICHARD G. BAKER: I do not agree with that bold of a statement. I believe it is a factor.

JUSTICE NATHAN L. HECHT: Kind of what the Court of Appeals held isn't it?

ATTORNEY RICHARD G. BAKER: Well they said it was a factor because, I believe what they held is they followed your opinion in Coastal Oil and Gas v. Garza that gets to the crux of this case. Is there a deep subsurface plume migration cause of action for trespass in the state of Texas when the operator is non-negligent. We have a jury finding on that and is permitted, the evidence is conclusive on that, this well location business, that was something that was brought up for the first time at trial. It may be a typo or something, but there's been

physical site inspection. There's never been a problem with TCEQ saying your well's in the wrong place. That's the only issue and it's not dispositive and we didn't have a fact finding on that either. But in any event, you get back to the point, is there such a trespass cause of action? And spending days and days and years and years with this issue, looking at the authorities, I can see where you might want to clarify that, not necessarily for this case only, but for future cases.

JUSTICE DAVID M. MEDINA: Let's talk about the permit.

ATTORNEY RICHARD G. BAKER: Yes, sir.

JUSTICE DAVID M. MEDINA: Are you saying that by getting the grant of a permit, you can operate which ever you see fit and not be concerned about---

ATTORNEY RICHARD G. BAKER: No, sir. I believe that it's a question of are you operating within the boundaries of the law. Is it a lawful operation? Is it non-negligent operation? That's how I would consider the fact that you have a permit. If you drilled a well without a permit, you've got a problem.

JUSTICE DAVID M. MEDINA: No, we're not talking about that. We're talking about you having a permit. The Court of Appeals' opinion seems to say that you have a carte blanche permit to do whatever's necessary to fulfill the requirements of that permit.

ATTORNEY RICHARD G. BAKER: Your Honor, I respectfully disagree. I would read the exact language.

JUSTICE DAVID M. MEDINA: You don't have to read it.

ATTORNEY RICHARD G. BAKER: Right, but I don't think they hold that strongly. They do say it's a big factor like it was in Manziel, but they also say that there is no recognized cause of action in Texas yet acting as a proper Court of Appeals because the Friendswood Development v. Smith case is a prime example of what we're talking about here, the dynamic here. In Friendswood, that was a subsurface pumping of subsidence, not only taking other peoples' what they claimed was their groundwater, but causing the bay to flood other peoples' property. It just lowered the land. The Court of Appeals affirmatively created a cause of action and the Texas Supreme Court written by Justice Danielson said well, well, wait, that's not your role, Court of Appeals. You don't create causes of action. We, the Texas Supreme Court, do and there is no cause of action here, but you know what? There is a problem and we're going to create a cause of action if the conduct is willful, wanton, negligent, that sort of thing. That is a prime example of how the system operates and should operate and that's what the Beaumont Court of Appeals did in this case. They said we don't see a cause of action that the Supreme Court has created. Now this Supreme Court is reviewing the issue.

JUSTICE EVA GUZMAN: Well, they're relying on Manziel and I guess where the policy different reasons, completely different, you couldn't have secondary recovery operations if you could sue for trespass, but where the analogous policy reason here?

ATTORNEY RICHARD G. BAKER: Well, it's in the public interest stated by the legislature and, in fact, I think your Amicus brief that you received recently, it says there's 529 class I injection wells in the US. There's 188 in Texas, 78 hazardous, 110 non-hazardous. We're a non-hazardous and, in fact, what do we inject? Non-hazardous wastewater.

JUSTICE DEBRA LEHRMANN: How would making you liable for the subsurface migration frustrate or thwart the purposes or the policy reasons behind allowing this type of injection to begin with?

ATTORNEY RICHARD G. BAKER: Any expert, on this record, a plaintiff that doesn't like it can present an expert that knows the calculation for the formula of a cylinder and opine that it has now migrated or about to

migrate across the deep subsurface that I claim is mine although I don't have to show you any authority that it's mine. I claim it's mine and shut down the industries.

JUSTICE DAVID M. MEDINA: Well, you know, I disagree with that having been involved in environmental litigation, but what is not here, which I think is significant is there's not a manifestation of damage and let's talk about that.

ATTORNEY RICHARD G. BAKER: Yes, sir.

JUSTICE DAVID M. MEDINA: What if there is, for whatever reason, a right created? Shouldn't there be a manifestation of some type of damage before a claim can go forward?

ATTORNEY RICHARD G. BAKER: That's what the Ohio Supreme Court found that if we're going to say this is actionable, theoretically might be a trespass, might not, but if we're going to say it's an actionable trespass where courts get involved, you have to show real injury, actual injury and that it violates your expected, reasonable and foreseeable use of the deep subsurface too.

JUSTICE DEBRA LEHRMANN: Your client is making 8-1/2 cents a gallon and I think they've sold like 100 million gallons. So what is the rule that justifies using someone else's subsurface area without compensation when you're getting 8-1/2 cents a gallon on that?

ATTORNEY RICHARD G. BAKER: That question begs the fundamental question in this case, the fundamental question that was mentioned in the Garza case. Has the State of Texas adopted the ad celum et ad inferos maxim that if you own the surface, you own as far down as, I guess, arbitrarily you want to go, the center of the earth, farther, I don't know. This Court says it has not. The US Supreme Court says no court recognizes that is the law. This Court says they don't recognize it as the law and that's why I begin the inquiry why do you think it's a trespass without the Texas Supreme Court saying number one, you own absolutely to the exclusion of any other use, the deep subsurface no matter how deep and you own to the exclusion of any other use, anybody in this world all substances down there.

JUSTICE PHIL JOHNSON: You know there are some people that they buy land in order to get the water under that land.

ATTORNEY RICHARD G. BAKER: Yes, sir.

JUSTICE PHIL JOHNSON: And then so your argument is that's just simply if they through the years have accumulated a great deal of acreage in order to be able to use the water under that land, then they just have been paying money on a false assumption.

ATTORNEY RICHARD G. BAKER: No, sir. Texas recognizes that right that land ownership is the ownership of a bundle of rights and among those rights, the Robinson case, I believe I cited, tells you that between the surface and the mineral oil and gas [inaudible].

JUSTICE PHIL JOHNSON: If you recognize that, then how far down do they own the water?

ATTORNEY RICHARD G. BAKER: Well, that's what the Ohio Supreme Court said that number one, they didn't, water ownership I started answering before I listened to the whole question. Water ownership is another issue. The use is what's going on. How far down can you prevent someone else from using the deep subsurface underneath what is recognized as your surface, I think is the appropriate question. Water ownership is another question entirely.

JUSTICE PHIL JOHNSON: So you're not saying that they don't own the water in this formation that you're

pumping into. You're just saying you can use the formation as you choose once you have a permit.

ATTORNEY RICHARD G. BAKER: If we're non-negligent, not a nuisance, that sort of thing, use. I think you raised the question or maybe it was you raised earlier about what if there is no water down there. Listen, if we can analyze it that way. There is no water down there so water ownership is not an issue in this analysis. So who has the right to use the deep subsurface, a mile and a half deep, two miles deep, three miles deep? Who has that right? Where did the private landowner who claims the surface obtain that right?

JUSTICE DAVID M. MEDINA: That's what I want to ask you? You said about bundle of rights. Where does Texas get the authority to grant these permits? Was that specifically reserved in when the Spanish land grants were given, taken over?

ATTORNEY RICHARD G. BAKER: Well, we can analogize, tidelands, navigable stream beds, that sort of thing that had long been accepted that even though the sovereign granted you water, I mean land adjoining the water or land in which a navigable stream passed through. It didn't really grant you those things. Those were always held back unless it was expressly granted and I believe the case out of Galveston, the Menard case where the State of Texas needed money and they sold part of the Galveston Bay to Menard and they had some deeds and some legislative acts and, in fact, in the context of navigable streams and I'm sorry I'm digressing, but it's the only analogy I can think of in context of navigable streams. If your original survey from the State of Texas, original patent or the sovereign Mexico crossed a navigable stream and it wasn't supposed to, surveyors weren't supposed to do that, but they did it anyway and they had a lot of oil and gas activity down there. This is particular to my area. The Small Bill was passed, which is basically a legislative grand to the landowner of the original patent and the signees that you now own the stream bed that you never really got in the original patent because we didn't expressly grant that to you in the original patent. I would say the same analogy.

JUSTICE DAVID M. MEDINA: Sorry to interrupt, Counsel. Let me take you back to Justice Johnson's question. Let's assume he owns the water a mile deep under his land. You said there's a distinction between ownership and right to use. If he owns that water a mile deep under his land and I'm the adjacent property owner, can I use that water any way I deem fit other than to waste it if there's a distinction between ownership and the rights of use, the bundle of sticks that you said go along with the property ownership? I'm not sure I'm clear on your distinction there. It seems like the ownership also includes the right to preclude others from using your property. Why is that not so?

ATTORNEY RICHARD G. BAKER: It is so, but not absolutely so. For instance, put it in specific context of drilling wells and using wells in injection. The Delhi case is where a lot of this confusion begins and it is dicta, but it is dicta that has been repeated in other cases as actual holding, but it's not really actual holding when you look at the facts of that. There was, the Hastings case and Delhi case suggest that actually penetrating the deep subsurface and now I'm not talking about water and I'm sorry, but penetrating the deep subsurface underneath the surface owners. You're using the water. You're using the minerals. You're using the structure, the soil itself, might be a trespass in those cases. They didn't hold it was. They said it might be if you look at the particular facts. But then they cite the [inaudible] case where the Railroad Commission actually authorized such a slant hole drilling to shut off the neighboring well that blew out and the neighbor said, hey, you can't do this. That's trespass. I have the absolutely right to exclude you from that deep subsurface and the court held, intermediate court, said no, you don't. It's with authority and the Texas Supreme Court expressly left that open question. What has happened in answering your water question, the Texas Supreme Court has repeatedly said what is not a trespass and we can go down through the cases?Delhi. Say what is not a trespass and then they said what might be a trespass, but they've never held use of water like this, brine water that nobody else is using, is a trespass or wrongful and we get back to the question of why would the court entertain and review this case. CO2 is coming next.

JUSTICE NATHAN L. HECHT: We might, those trespass questions are interesting, but we have a failure to find the trespass here, which would dispose of the case, but the petitioner says that the burden of proof is mis-

placed and, therefore, we can't take that finding as fact. What's your response to that?

ATTORNEY RICHARD G. BAKER: I cited the Texas Supreme Court case beginning with Pilcher, the McDaniel case. The McDaniel case is the only case with a published jury charge that the Supreme Court reviewed, writ refused, this intermediate court of appeals, which is binding on the district court, said it was error not to give a charge substantially like that and every time you have seen from the Supreme Court or something that the Supreme Court has reviewed, a trespass definition, it has always been without consent or authority, without consent or authority and I agree with you on the record. I was there at trial. I was there at the intermediate court of appeals. The only issue presented before the jury was Mr. Frost's testimony that we had no consent. What was excluded and I like Justice Guzman's question about your time to object at the permit hearing. There was a permit objection by the Frost predecessor and there was a payment of $185,000 to the Frosts to withdraw that objection and there was the Frost's interpretation to this Court and to the Austin Court of Appeals that the payment of that money was compensation for the impairment of any of their subsurface rights for possible damages. Okay, sounds like pretty good stuff. In fact, if you review the trial record, FPL has sued us for breach of contract on that agreement when we had amended our permits, although we have never exceeded our original permit rates, injections, volume. They sued us for breach of contract because you paid us, but you weren't supposed to go seek another increased volumes and increased pressure and increased rights. You weren't supposed to do that and then they dropped it at the eve of trial because they knew that would be evidence of consent and our?

JUSTICE DALE WAINWRIGHT: I'm sorry, Counsel, what's the name of that Court of Appeals case that defines trespass for jury instruction purposes?

ATTORNEY RICHARD G. BAKER: McDaniel.

JUSTICE DALE WAINWRIGHT: You said it was a writ refuse case.

ATTORNEY RICHARD G. BAKER: Watson, it's Watson v. Brazos Electric Cooperative and it also relies upon the McDaniel case and it's in my brief, I call it the Pilcher line of case and that stone resources thing, it's a self-defining issue that has muddied this up. It does say consent is an affirmative defense, but it only quotes itself and other cases only quote it and it just, and I have analyzed what I think happened there is because of a rules change and they were trying to uphold a default judgment.

JUSTICE EVA GUZMAN: As your closing argument where you argued that they had essentially, I guess, not proven that they did not consent. If it was an error to submit the charge that way, does your closing argument sort of lead to the conclusion that but for the error, you know.

ATTORNEY RICHARD G. BAKER: On the issue of consent?

JUSTICE EVA GUZMAN: Because you took advantage of the charge and argued in your closing argument.

ATTORNEY RICHARD G. BAKER: I argued the charge and what is not discussed and that's why I reprinted the argument for the Court so the reader could judge. I argued that on the equitable unjust enrichment question. Is this unjust enrichment for us to spend all this money to go through all the permit process? They know about it. They let us build it and they sit back and say nothing. The jury couldn't hear they got $185,000 to withdraw their objection, but they say nothing and then file a lawsuit and argue unjust enrichment. We need to get paid too. That's when that was argued and the reader can judge for his or herself.

JUSTICE EVA GUZMAN: Well, if that was error, did that lead to the rendition of an improper verdict or contribute to that?

ATTORNEY RICHARD G. BAKER: No, because all the evidence, the only evidence before the jury was no consent. So if the evidence would have been conclusive on that issue anyway.

JUSTICE EVA GUZMAN: You specifically argued they failed to affirmatively prove the lack of consent. I'm assuming you did, I mean.

ATTORNEY RICHARD G. BAKER: No, I don't think so. No.

JUSTICE EVA GUZMAN: [inaudible] say that you did.

ATTORNEY RICHARD G. BAKER: No, I don't think they proved that. In fact, in my jury argument, I believe I mentioned the only evidence of consent was Mr. Frost's testimony that we didn't have consent. I believe I argued what he said, I believe. That's why I set it forth in the brief.

JUSTICE NATHAN L. HECHT: You said a little earlier that operations under a permit would not give rise to liability unless there was some other fault involved and you said negligence and then you said nuisance. I wonder if you meant to say nuisance because surely contamination is nuisance and if the plume goes across the line and contaminates water on the other side, even though the operation was not negligent, you think there is liability or not liability?

ATTORNEY RICHARD G. BAKER: Nuisance requires actual harm. Without actual harm, you have no nuisance and you have the?

JUSTICE NATHAN L. HECHT: Were actual harm?

ATTORNEY RICHARD G. BAKER: There's no actual harm.

JUSTICE NATHAN L. HECHT: If there were?
ATTORNEY RICHARD G. BAKER: If there were, you'd have an Ohio chance [inaudible].

JUSTICE NATHAN L. HECHT: So you think there would be liability if you contaminated the water supply on the other side?

ATTORNEY RICHARD G. BAKER: If you could show actually harm, yes, and you get over the [inaudible] because you have commercial activities are held differently in nuisance than private activities and this is obviously a commercial activity in the public's best interest, safest, most environmentally sound way of disposing this and protecting our water, protecting water. I'd like to finish up with the Court has repeatedly held what is not a trespass. It may be time for the Court to hold that this is not a trespass and let the legislature develop this on its own and if the Court assumes it's a trespass, please question why. Where is that authority? What case do we cite that this fact situation has been before the Court and the Court has held it is a trespass because we had courts, we've never had that in Texas and the Ohio court examined the issue in the late 90s and they couldn't find a case where it's ever been held to be a trespass so they created the cause of action, but that cause of action required actual harm, actual use of the competing neighbors arguing we want damages for your injections. Thank you very much. Oh this is the last two minutes? Thank you.

MARSHAL: You're done.

ATTORNEY RICHARD G. BAKER: All right, never.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions?

ATTORNEY RICHARD G. BAKER: My one opportunity. I would like to address the water issue before we. If the Kickapoo, Denis v. Kickapoo.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Baker, do this briefly. Your time has expired and I see there are no further questions.

ATTORNEY RICHARD G. BAKER: Oh I saw 1:35 here, I'm sorry.

MARSHAL: Oh, you're done, sir.

ATTORNEY RICHARD G. BAKER: Oh, never mind. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Baker. The Court will hear rebuttal.

JUSTICE DAVID M. MEDINA: I know there are some points that you want to cover, but could you just briefly respond to the Amicus brief as filed by the Underground Injection Council. They essentially say if you prevail, you'll defeat the purpose of these environmental regulations, which is to store these contaminated waste deep into the ground so that people living here today or at least for the next 10,000 years aren't harmed.

REBUTTAL ARGUMENT OF CLAUDIA WILSON FROST ON BEHALF OF PETITIONER

ATTORNEY CLAUDIA WILSON FROST: Certainly, Your Honor. First of all, a holding for FPL won't shut down all injection wells and the Amicus brief's position is based on a false premise, namely that permitting an action for subsurface trespass here would effectively prohibit Class 1 injection wells. That's just not the case. Allowing some of its owners to sue for trespass for subsurface migration would merely require well owners to purchase subsurface leases or site their wells on land areas in the middle of a larger tract and there won't be any trespass. In this instance, this is a problem of EPS' own making in many respects. They chose, as a business decision, when they started to do this to only lease five acres for a well operation that they knew would extend far beyond that. Indeed, they had to tell the TCEQ or TNRCC as it was then, exactly how far this plume would migrate over one, five, 10, 20 and 30 years and it might surprise you to know that in 10 years, according to those calculations, the waste plume would migrate 51.99 acres, according to plaintiff's exhibit 4, their amended permit application, and this is after they wanted to up the production. This is at their maximum hiring?

JUSTICE EVA GUZMAN: Is this after they paid that 185 or?

ATTORNEY CLAUDIA WILSON FROST: This is their amended application. This is the one we objected to. Then, 30 years, it's 148.86 acres. So it's not as if, as the Amicus seems to intimate that what this would require is for it would effectively prevent Class 1 injection wells because there was nothing that a trespass claim would shut them down.

JUSTICE DON R. WILLETT: At trial, what was the evidence of actual present harm as opposed to future potential harm?

ATTORNEY CLAUDIA WILSON FROST: Well, Your Honor, let me first step back and say in terms of harm, there was evidence of damage based on the two different measures. One was based on the fair rental value basically looking at the 40,000 a month that EPS was paying for its lease.

JUSTICE DON R. WILLETT: But there was a present drop in that rental value?

ATTORNEY CLAUDIA WILSON FROST: There was, yes. And then there was another measure of damages that was smaller based on how much the storage had been displaced. I think there was a calculation of 8.75% of the waste had crossed, of the production during that year had crossed into FPL's land and there was a calculation on 8.75 cents or 8.5 cents for that. So 30,000 and 40, but---

JUSTICE DALE WAINWRIGHT: Counsel, on the consent point, should the settlement established consent at least to the initial injection rates in the first permit because you all settled that. As to the expanded or increasing injection rates in the second application, I know you objected to that, but there was a settlement on the injection rates under the first permit. Why doesn't that establish consent at least to that extent?

ATTORNEY CLAUDIA WILSON FROST: Sure, Your Honor, the settlement agreement did not settle any of the rights or claims that FPL might have against EPS for damages or trespass or anything else. EPS was in a bind. They needed to finish their well within a certain time in order to be in compliance with their lease and FPL was objecting to the permit and delaying the process and they needed to move on. So they bought FPL out of its objection to the permit so that they could avoid that delay and get on with it.

JUSTICE DALE WAINWRIGHT: So is it fair to say then that your client agreed to issuance of the permit, the first permit?

ATTORNEY CLAUDIA WILSON FROST: They didn't protest the permit, but, again, Your Honor, that does not, the amended?

JUSTICE DALE WAINWRIGHT: I understand, it means what it means. I'm not saying it means the whole world, but is it fair to say that your client agreed then to issuance of the first permit?

ATTORNEY CLAUDIA WILSON FROST: I wouldn't say we agreed to it.

JUSTICE DALE WAINWRIGHT: Didn't object to it?

ATTORNEY CLAUDIA WILSON FROST: FPL withdrew its objection, yes, that is correct.

JUSTICE DALE WAINWRIGHT: For a consideration?

ATTORNEY CLAUDIA WILSON FROST: For consideration and as EPS has told the courts as set forth in the recitals of the settlement agreement, EPS settled the matter not to compensate Mr. Frost for damages, but to resolve the contested case and get its permits issue. Those are EPS' words about what it was and that the settlement agreement itself, if you look at it, is unambiguous and on its face it doesn't report to be a release or a lease or anything else. I'd like to address your question, Justice Willett, just a second, in terms of harm and I think yours, Justice Medina. There need not be any manifestation of damage or injury. As the court in Coastal acknowledged, the owner of a possessory interest as FPL has, does not need to show injury in order to establish trespass so the linkage of harm and injury with the trespass cause of action is one that's not supported by the jurisprudence of this state. In fact, it's contrary to it so there is no harm requirement on existing law.

JUSTICE PHIL JOHNSON: Counsel, you're over time, but the Court of Appeals on that question, the Court of Appeals said that there is no explanation about how you have showed that you were injured in regard to the negligent cause of action. Now you have cited testimony about that might go to unjust enrichment. They leased their land and then they put it in yours, but how about injury apart from unjust enrichment? What testimony or evidence is there that of injury apart from that?

ATTORNEY CLAUDIA WILSON FROST: All the injury evidence was, Your Honor, that we were, FPL was going to be impaired in its ability to use the property for agriculture and for uses, desalination and other uses that it could use it for and that there had been harm in the same measure from the pollution to the resource.
JUSTICE PHIL JOHNSON: So the harm was because you could not use it or might not be able to and the measure was the amount that by which they had charged people to put the waste in?

ATTORNEY CLAUDIA WILSON FROST: Correct. And if I may address one more thing, if the Court, please.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, your time has expired. Are there any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

2011 WL 807474 (Tex.)

END OF DOCUMENT