ORAL ARGUMENT — 11-19-98
98-0247
SIPRIANO V. GREAT SPRINGS WATERS OF AMERICA

REA: I am Pam Rea and along with Dick Swift, I represent the petitioners, Siprianos and the Fains. We are here today to ask this court to reject the English rule of groundwater capture and to replace it with the restatement rules 'reasonable use rule," as set forth in the restatement of torts. And to pray for the relief for the petitioners.

There is little doubt that the English rule adopted nearly a century ago has outlived the rationale upon which it was based. In today's world, it allows knowing and sometimes even intentional harm to landowners. The respondents have put forth two major reasons urging this court to remain with the rule that is out of step at the time, and I will address those two issues. First, whether S.B. 1, and the Texas Water Code prevent a change in the court created law on groundwater capture. And second, whether the reasonable use rule can be adopted without uncertainty and chaos.

GONZALEZ: Even if the answer is no to the questions, it's another question as to whether or not we ought to defer to the legislature this very important issue?

REA: Yes, I will. That will include that in there. This case was granted on a motion for summary judgment and so the facts are very brief. Essentially, Ozarka leased land near the Siprianos and Fains. Four days after Ozarka began pumping, Mr. Sipriano's well was completely dry, the Fain's suffered tremendously, and the well remains very low and endangered.

Turning to the first point. Neither S.B. 1 nor the Texas Water code addressed any particular common law scheme for ownership of groundwater nor do they prevent a change in the court created law. The water code and S.B. 1 are enabling legislation. Neither of these creates groundwater conservation districts. Neither one of them requires the creation of groundwater conservation districts. They merely allow it.

ENOCH: It is indicated in some of the amici briefs that where states have moved away from the English rule, they have primarily done so by way of statutory enactments by legislation. Do you agree?

REA: Yes, early on, particularly the ones that have moved toward the permitting, a solid permitting system, have moved away from the English rule to a permitting system have done so logically by a statutory move.

ENOCH: In 1917, the state passed its constitutional amendment, art. 16, §59, and that assigns to the legislature the obligation to make reasonable accommodation for conservation of natural resources, and I'm assuming that includes water. Has Texas moved away from the English rule by way of legislative enactment in a constitutional amendment?

REA: Not for individual harm. The state did pass the constitutional amendment and required the legislature to act on that, and the legislature did act on that. And has put forth S.B. 1 and the water code, and the purposes of S.B. 1 and the water code - it's a conservation and planning tool for the state's resource. It's a broad focus. But it doesn't address individual harm. It provides no remedy for individuals.

HANKINSON: But doesn't the constitution indicated an intent by the people to put this area of public policy within the domain of the legislature rather than the court regardless of what the legislature may have chosen to do or not to do?

REA: Well the conservation and planning element absolutely, and the legislature did that. However, the legislature itself put in a provision, §36.002, which reserves the common law or the court created cause of action for individual harm. That section states that the ownership and rights of the owners of the land are hereby recognized and nothing in the statute will be construed as depriving or divesting owners of their ownership rights other than those promulgated by the district.

BAKER: You said court created rule. Wasn't the rule of capture part of the common law of England before 1840, and didn't this state adopt the common law of England, and so wouldn't it therefore have adopted the rule of capture, so that rule is not court created?

REA: It is true, yes, that it was adopted. But I used court created rule because this court has carved out exceptions under that common law, which were not normally...

BAKER: With all due respect, that seems to me that argument means that the court has leaned toward private rights for owners when it carves out exception to the absolute rule. But that was also before the constitutional amendment wasn't it?

REA: No. Actually those carved out exceptions have been since the constitutional amendment. The exception for _____ is 1954 or 1955, and the *Friendswood* subsidence exception was in 1977. The injured families in this case it is important to note cannot themselves create a groundwater conservation district. They can't use this statute. What has to happen is that those landowners have to depend on a majority of landowners that live with them over that aquifer district area.

ENOCH: That's an argument that's made by a couple of the amici here, but it seems to me it sort of begs the question. It looks like a couple of amici acknowledge that a reasonableness rule, the restatement that you are urging in effect permits through court law a regulation of water usage to balance the interests of the adjacent property owners on the use of this water. And as a part of the argument they say, that it doesn't help them to say that the legislature has provided a mechanism to do that, because these are the small landowners and they don't have the political power to impose that on the big landowners. It seems to me that smacks a little bit of the notion: Well, I

understand we have the mechanism, but since we can't win it politically, we would like the courts to impose this regulatory scheme on it. How do you respond to the argument that, well if you don't win that democratic battle what is the principle upon which the court then says: Well if you can't, then we'll just simply give you a tort remedy, a tort cause of action that you can say, well their usage of the water - Ozarka's for a commercial enterprise is unreasonable because I can't use the water privately on my land. And in effect, I can impose a regulation on the use when I couldn't win it by getting the community to vote for the regulation?

REA: Because the courts have been the traditional protector of individual rights, and there are many, many regulatory statutes which provide like this one for permitting or licensing schemes that coexist with common law remedies for or court created remedies, if you will, for individual harm. And the reason that's important in this case is because the purpose of this statute, if you read the statute it's a series of enabling 'mays': 'may' create a groundwater conservation district, the board 'may' do this, 'may' do that, but does not ever provide for that board, if it ever existed in the first place, which it didn't here, to remedy those individuals. Even for instance under a sewage licensing and permitting statute which does exist in Texas, a person may be out of compliance with that licensing scheme. In the process they may hurt their neighbor. While they may be subject to the regulatory scheme for being out of compliance on that statute, their neighbor who was harmed by the spillage of the sewage, still has a court created or common law cause of action in tort to put them back to the position they were in, and so it is with this statute. Because this statute provides. There is nothing in there that provides an individual a remedy.

OWEN: If we were to retire, as you put in your brief, the English rule, should we do it prospectively because of expectations and investments based on the longstanding rule that's been in effect?

REA: In this case, no. Because in this case, first of all, the *East* circumstances can be distinguished from the present. That court stated that it was applying the rule under the circumstances that we cannot know. Their exact words were something to the effect that, we cannot regulate what we cannot know. But today, aquifers under the ground are not secret and they are not occult.

OWEN: But the longstanding policy even that we reaffirmed in 1978 or 1977 in *Friendswood* is that the English rule prevails in Texas with some exceptions. And people have relied upon that and made investments on that. And if we are going to change the law should we do it prospectively?

REA: I would argue that in this particular instance, that it does apply and that our client should get a new trial for two reasons. First of all, that *East* can be distinguished on the basis of knowledge, because when Great Springs Water d/b/a Ozarka acted, it knew or should have known that it was creating the harm. We live in a world in which pumpers know. They know where the aquifer is and they know what they are draining.

OWEN: But the law heretofore was even if you know, that's your property right to do that. Because of the expectations and reliances, should we change the law in this case or do it prospectively?

REA: I don't think that the law was that we apply it no matter whether you knew or not. The *East* case carefully sets forth the basis, it's rationale, that we can't regulate what we cannot know. Second of all, the respondents actually knew because they knew four days later when the well went dry and finally they knew of the *Friendswood* decision of 1978, which told them they could be liable for negligent pumping. And, although that would have been subsidence they knew that they could be responsible for harming another. And even though it's a different harm they were required to act reasonably under *Friendswood* and so they knew what they had to do.

HECHT: You referred to 36.002 of the Code, which talks about ownership rights. Does the landowner own all of the water he can capture?

REA: Under the current system, he owns it as soon as he captures it. He has the right under the land, the has the right to capture, and then once he has capture, he owns.

HECHT: If he owns it, how can we take away that ownership or impinge on it without constitutional implications?

REA: Because what we are proposing is not a radical departure from that present rule.

HECHT: Departure or not, whether you take a dime or a dollar, or ten thousand dollars, it's still a taking?

REA: Because all it requires now, all we are asking is that it requires that the current system under the restatement, it is the current system a default to nonliability if you will, but with the imposition that the pumping be reasonable. And that is certainly - first of all, the *Friendswood* case, does require a reasonability; and second of all, if the argument is that we relied on the old law to be unreasonable, to knowingly harm people, that should not be what Texas stands for in protecting landowner's rights.

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RESPONDENT

HANSLICK: I represent Great Spring Waters of America, more commonly known as Ozarka. In petitioner's time before the court, they urged this court to undue 94 years of evolving groundwater regulation in the State of Texas. In my time before the court, I will argue that given the legislature's active role in this area, this court and Texas courts are not the proper place for this debate.

OWEN: Even assuming that a water district were created in Henderson county, how would that help these plaintiffs? How would that remedy their situation?

HANSLICK: These petitioners do have a remedy of a water district being created without getting a majority of their neighbors to petitioner for one, because the legislature can enact a bill that would create a district in this area.

HECHT: That's an easier process?

HANSLICK: That remains to be seen.

OWEN: Assuming there is one created regardless of how it's created, and assuming that the board takes control and starts issuing permits and controls production, how does that help these plaintiffs who's wells have already run dry and Ozarka's wells would be grandfathered, I presume, under S.B. 1?

HANSLICK: There is a grandfather provision. But what S.B. 1 and the groundwater districts provide is that existing wells still have to receive a permit. And they have to a beneficial purpose to receive that permit. And under the rule-making authority of the district, the district could come back later and restrict the permits and the pumping allotted under those permits. So there is a mechanism in a groundwater district to then curtail under the police-power and regulatory rule-making authority that the groundwater districts are given under S.B. 1, to once a permit is issued to later cut back if it fits within what the district sees is best for that plan for that region.

OWEN: And assuming there is no district created what remedy do these plaintiffs have?

HANSLICK: If there is no district created, they have the remedies of digging a deeper well, digging an off-set well, or trying to petition for a groundwater district, because that is what the legislature of this state has said is best for the state. It is the way that the legislature has decided to regulate groundwater well into the next century. In fact, as the court pointed out, beginning back in 1917, the citizens of this state charged the legislature with the duty to regulate the state's resources. Article 16, §59 provides that the legislature shall pass all laws which regulate, preserve and conserve the state's resources. The legislature has taken upon that responsibility and recognized the need for additional groundwater regulation. They did this by creating a statutory framework for the creation of groundwater districts. And it is the intent of the legislature found in §36.0015, that groundwater conservation districts are the state's preferred method of regulating groundwater.

PHILLIPS: In the debate over S.B. 1, did the legislature consider amending or abolishing the rule of capture?

HANSLICK: I believe the early commentary that the rule of capture did surface an issue to

whether to abrogate it or to continue, and the legislature, although the words 'rule of capture' do not appear in S.B. 1, by affirming §36.002 in a landowner's interest, ownership interest in the underground water has confirmed that the rule of capture is alive within S.B. 1, and that the groundwater districts through a regulatory procedure will regulate groundwater.

PHILLIPS: Is there anything in the legislative history that would suggest the legislature didn't realize or didn't fully appreciate that it had the power to abrogate the rule?

HANSLICK: I'm not aware of anything in the legislative history where the legislature acknowledged it did not have the power to do away with the rule of capture had it seen fit. In fact, I think it may be the contrary. But I'm not privy to all the legislative history.

ENOCH: But as you said, in fact, the legislature gave the authority to restrict a landowner's pumping of water. Once the permitting process begins, and necessity and beneficial, that implies that at some point in the future a landowner may not be able to pump as much as they can pump?

HANSLICK: It may very well, but that would fall under the legislature's rule-making authority, which this court has deferred to the legislature in that area, and the citizens of the state have deferred to the legislature.

ENOCH: Now let's say, okay the constitution said: Legislature it's your job to go out and manage it; and the legislature says: We're not going to manage, we are going to say people in Henderson, if you want to manage you can, but we're not going to manage it for you. So they say: we're opting out, we're not going to manage, we are going to leave it up to that local citizenry to do so out there. Now someone comes to the SC and says: SC there is not going to be any management of this property out here, but you have a case adopted common law, where there were two rules you could pick from: the American rule and the English rule. You chose English rule in 1904, but had you known in 1904 the ability to literally suck the ground dry, we don't think the court would have decided the case that way. Is the court not free at this point even with the constitutional amendment in the teens to come back and say: we adopted a rule that governs the unregulated areas of the state that was premised on a faulty science, and court, we have an obligation knowing what science is to correct that faulty decision in 1904?

HANSLICK: To answer that question is exactly why it's best for the legislature to decide. This court recognized in *Friendswood* that it is proper for the legislature to do this because courts are not equipped to handle groundwater regulation on a suit-by-suit basis.

HECHT: The legislature didn't decide *East*, we decided *East*. Why can't we undecide *East*?

HANSLICK: Because there have been almost 94 years of settled expectations as this court

recognized in *Friendswood* countless farmers, municipalities and businesses have relied on the property expectations in being able to capture groundwater and use it for a beneficial purpose. Going back to Justice Enoch's question, the groundwater districts - the intent behind the legislature is to provide the mechanism because as S.B. 1 recognizes, we need regional solutions to reasonable problems. And the intent behind the legislature in forming groundwater districts is to allow a legislatively regulated system so that because of the advances in science, the legislature has at its disposal numerous resources to consider the advances in science, and has throughout this century continued to modify the law to take into account the advances in science. And this court as it recognized in *Friendswood*, courts aren't able to do that on a case-by-case basis.

ENOCH: But the court in *Friendswood* in fact did it.

HANSLICK: This court in *Friendswood* as was noted in that opinion was reacting to what the legislature had done in 1973 in amending groundwater districts to provide for control over subsidence, specifically in the Southeastern part of the state in 1975 when the legislature created the Houston/Galveston Conservation or subsidence district. In *Friendswood* this court specifically referenced that in saying that in following that policy decision by the legislature, we now find that if you're negligent pumping proximately causes subsidence, we will recognize that as an exception to the rule of capture. The legislature has not spoken as to any other manner of limiting the rule of capture or changing the rule of capture. What the legislature has said is, that it is not for a court administered system to govern groundwater because it would result in a mirid of court decisions across the state that would be based on an individual basis and it would not have the foresight of planning into the future.

SPECTOR: What percentage of the state's groundwater is presently under these groundwater districts?

HANSLICK: I do not know the percentage. I would be happy to supplement a letter to the court if the court wishes.

HECHT: There are 42 districts?

HANSLICK: Yes.

HECHT: A fraction of the state?

HANSLICK: Currently, a fraction of the state. The court must keep in mind that S.B. 1 has just been implemented. The culmination of the legislature's process beginning in 1917, more specifically starting in 1949 with the creation of the first groundwater district, coming up through S.B. 1 in 1997, where in S.B. 1 regional plans are not even due until Sept. 1, 2000. And S.B. 1 provides for 50 years of planning to ensure that Texas has an adequate water supply well into the next century. So that process is just beginning.

PHILLIPS: I gather from your responses both in your brief and today about the legislature and its authority that you're not contending there's any constitutional implications to either anything the legislature might do or anything the court might do in changing the common law?

HANSLICK: Certainly, as this court noted in the issues that were in the *Barshot*(?) case that some change could impact some of the amicus briefs that have outlined possible takings challenge to changing the rule, because as this court noted in *Friendswood*, becomes such an established rule of property law in the state.

HECHT: But you've not raised that?

HANSLICK: Respondent in their brief on the merits did not raise that issue.

HECHT: But you think it exist?

HANSLICK: Yes. It's for these reasons, the respondent asks this court to affirm the lower courts and allow the legislature's plan to be implemented and carried out by the legislature rather than the courts.

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RESPONDENT

HIDALGO: My name is Boris Hidalgo, and I'm an attorney also representing Ozarka. The petitioners argue that the rule of capture should be abandoned because it is harsh and antiquated and because it ignores the advancement in science, scientific knowledge.

GONZALEZ: You disagree with that?

HIDALGO: Yes. The petitioners ask you to open the court and open the doors of the courthouse to lawsuits based on tort to determine water right's laws on a case-by-case basis, one defendant, one plaintiff at a time. Ozarka disagrees, because this case does not justify the sweeping changes sought by the petitioner, and because the alternative approach suggested by the petitioners will not best serve the needs of Texas.

OWEN: Why is Texas so different from all the other states that have adopted the so-called American rule?

HIDALGO: Texas took a different tact at the inception of this state, allowing it to pursue the English rule.

OWEN: Well other states did as well, and then in midstream changed, and it hasn't been chaos in those states has there?

HIDALGO: Texas is much different from many other states. Texas is a vast territory that has a number of different ecological zones, different aquifers, different rainfall amounts, and different evaporation rates, which affect the state differently. And the courts of this state and the legislature in their infinite wisdom determined that it was better for the state to approach it differently than by following the American rule.

HECHT: There is some tension in your argument that says the rule of capture is not only a great thing, but virtually indispensable, but it's a good thing the legislature has abandoned it and gone to some sort of regulation. There seems to be some tension there.

HIDALGO: The way that we view it is that what the legislature did by S.B. 1 and in earlier legislation, specifically with reference to §36.002, is an incorporation or an integration of the rule of capture with the legislative plan so that they work together.

HECHT: But if there is all this planning and regulating, that's not the rule of capture?

HIDALGO: Texas is not a pure rule of capture state. That is a misnomer that many people have applied. Texas is a hybrid, and the hybrid is the combination of the rule of capture tied with the long-range planning provided by the legislature.

OWEN: If that long-range planning is not carried out in Henderson county, what's wrong with the American rule in the interim unless and until either the legislature or the citizens of Henderson county adopt a district?

HIDALGO: The American rule brings into play the reasonable use doctrine. The Reasonable Use doctrine provides that if a party is using water on the overlying land, that use is presumed to be reasonable. But if that water is being used off of the property, it is presumed to be unreasonable unless that party can justify that use.

ENOCH: But Sipriano only asks us to adopt the restatement and the unreasonable use contemplates that reasonable use can be either on the overlying land or even off land or used some place else. It's just that the use, whatever they are putting it to, cannot be unreasonable.

HIDALGO: But it must be justified at some point in time. And the problem with that is that at some point in time one party will challenge the other in the courthouse to determine what is the reasonable use.

OWEN: Which happens in courthouses all across the nation.

HIDALGO: Yes, it does. However, in the State of Texas, you have a plan that has been implemented by the legislature that is designed to deal with that at a different level where you're not dealing with it one case at a time...

OWEN: But it's only areas that have a district. We could craft conceivably a common law rule that says: unless and until an area creates a district under S.B. 1, the American rule prevails. What would be wrong with that?

HIDALGO: Ozarka disagrees with that position, because we believe that by doing that, you are working against the legislative plan. We believe that the federal rule would be to allow the legislative plan to take effect, and then allow the parties if they feel that they have not been able to secure the relief they need out of those water districts, to then come to the court. The difference is, that one works within the system, one works against the system.

OWEN: How does it work against the system? If the residents don't like the American rule they can vote to adopt a district.

HIDALGO: And the district can actually make changes, which might be able to adopt a different approach. In fact, the purpose of the district is to allow the people in that district to determine if one person within that district should have its rights to take water and limit it in some form or fashion, which is in a fashion it is a modification of the rule of capture going more towards the American rule. But it allows what the legislature called for, which is local input, local control, local solutions to local problems.

HECHT: In a tiny fraction of the state, though.

HIDALGO: In a tiny fraction of the state.

HECHT: How is that a comprehensive approach to the problem?

HIDALGO: The legislative plan is a comprehensive approach because it is available to all citizens of the state. You are allowed to request the creation of a district within whatever part of the state you can be. As Mr. Hanslick pointed out, S.B. 1 has made it easier to request a creation of a district, but we are only at the beginning steps of that process.

OWEN: Has there been any request in Henderson since this started?

HIDALGO: There was one request that was made by a representative outside of Henderson county. As I understand, that request was made without first seeking local input from the county judge, the county commissioners, or the representative that was responsible for that county, and at that point at their request, that request was withdrawn. Now that was a request made to the legislature. It was not one sought to be created locally. And under S.B. 1, there are two approaches: one, to request it locally; and one to request it through the legislature.

Now Ozarka is not opposed to the creation of such a district in Henderson county. We simply want to make sure that it is not punitive in nature, and that it is processed or that

it comes about with the proper notification to the representatives, the county and the people who are sought to be governed by that district.

HECHT: But you hadn't got up a petition yet?

HIDALGO: We have not, no.

HECHT: And you don't intend to introduce a bill?

HIDALGO: We don't know at this point. It may be that we may have to do that. As I said, we are not opposed to the creation of such a district. We are happy to work with that.

GONZALEZ: As long as they allow you to pump 24-hours a day, 7-days a week?

HIDALGO: No, sir. We are not pumping at that level. We have taken the allegations made by the petitioners here as true, because this case was decided on a motion for summary judgment. The fact of the matter is, Ozarka stepped in and created its operations at the very outset sank 5 monitor wells within 500 feet of the bore holes from which the water is pumped. Right now Ozarka pumps approximately 90-110,000 gallons a day. But you need to compare that with what other municipalities and organizations do. The city of Houston currently has 200 wells in operation. On any given day, 170 of those wells are pumping. And they are pumping in excess of 580,000 gallons a day per well. Ozarka is pumping 90-100.

BAKER: But they are not bottling it and selling it to the world.

HIDALGO: They are producing it for the community. And the problem is, that in a municipal locale, you have one well located on one piece of property, usually a city lot, and you wind up having all of the people that live around it in a much closer proximity than the Fain's do a 1-1/2 mile away from Ozarka, or the Siprianos ½ mile a way.

OWEN: Now you're arguing reasonableness aren't you?

HIDALGO: Yes. But I think that it's important to note the issues here that the allegations that have been made are mere allegations. It is not a situation where Ozarka has pumped irresponsibly.

OWEN: If there is a district imposed, how many Ozarka wells will be subject to having their production governed by a district board?

HIDALGO: Right now there are three bore holes that have been placed at that operation. One of them has been capped. It is not utilized. There are two wells that are in place.

OWEN: Would they be subject to pumping limits if a district was created, or would they be grandfathered?

HIDALGO: If a district were created, as Mr. Hanslick pointed out initially, anyone who has any kind of a pumping operation within that district, would be permitted by that district. However, it is within the police power of that district based on the complaints or the information made available by the people in that district, to regulate or reduce the amount of pumpage that occurs there. However, that will be done after evaluating all of the local information.

ENOCH: The bottom line is, if this court adopted the American rule, you would immediately petition to create a district, but you wouldn't be subjected to it - a different standard of reasonableness depending on which neighbor sued you?

HIDALGO: I don't know the answer to that. That is a possibility. But Ozarka would not be the only one. There are a number of municipalities, industry, and other organizations as evidenced by the numerous amicus briefs that you have received that will have to take some kind of action to protect themselves.

HECHT: So we could further the legislative scheme by adopting the American rule?

HIDALGO: I disagree.

HECHT: It sounds like everybody would rush to the legislature?

HIDALGO: That is a problem that could occur. But that is not the best solution for Texas.

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REBUTTAL

SWIFT: I also represent the petitioners in this case. The respondents insist that any change in the rule of capture as it exist will wreak economic havoc, multitude of litigation, and all kinds of problems. This argument implies that they are now unreasonably producing water. That's the very basis of their argument, because if they are reasonably producing it, they won't create economic havoc, they won't create litigation, they won't cause any problems. The sky won't fall. There will be no dire consequences. The change we seek is simply to have reasonable people decide on settled expectations.

HECHT: Why should the juries of this state be called upon to set water policy?

SWIFT: They are called upon to set policy in many different areas.

HECHT: Well surely water policy can be set by some decision-maker in the state other

than a 12-person jury in each case?

SWIFT: In a perfect world, yes, you are probably right. But this court has been asking the legislature to act since 1955 on this issue. They've criticized. The English rule has come under harsh criticism. In 1978, in the *Friendswood* case, this court said: we call upon the legislature to act. And basically nothing has happened.

ENOCH: Let me ask you how this works. Now the Sipriano's well goes dry. Do we measure reasonable of Ozarka's pumping of the wells against a landowner who's well has gone dry, or do we measure reasonableness on Ozarka on whether or not for the purposes of selling water to other parts as a commercial enterprise, whether that is reasonable in terms of how much they are pumping verses their profit they are making, or is it reasonable verses the fact that made a neighbor's well run dry?

SWIFT: The restatement talks about many different factors to be considered. The fact of the harm that's caused is one, the investment somebody has is another, the overall water supply is another. There are many different factors that are included in the restatement. And all of those factors would need to be considered. It's not an either or situation.

ENOCH: So now if Ozarka is pumping in a community of 200-300 people, and one person's well goes dry, but one person's well simply is lower, another person's well has more minerals in it now than it did, so each sues Ozarka under a tort theory, under the restatement for reasonableness. Ozarka wins as to one, because they still have _____ water, but they lose as to one because it's too high a mineral, or maybe don't lose to that person, but then they lose to the one who's well has gone dry. So is Ozarka being reasonable or unreasonable in its pumping of its water?

SWIFT: In the scenario you just described, in one instance I would say yes, and the other no. I would think it would be up to the fact finder, whoever that might be.

PHILLIPS: You say this court has been asking the legislature to act for more than 40 years, but didn't the legislature act last session? I mean they considered the whole panoply of remedies and adopted 36.002.

SWIFT: They adopted an overall planning act. They didn't talk about any remedies. They didn't talk about individual rights. And they did come up with an overall plan.

PHILLIPS: They did talk about individual rights, the right to _____?

SWIFT: That's true. But in this instance they did not address the rule of capture in any way. The reasonableness rule is basically the same thing that's being imposed by the water districts. There is really no difference when you look at them.

OWEN: Well there is a difference. As Justice Enoch pointed out, the water district will be consistent and juries will not be case-to-case. The same conduct by one jury will be found not to be unreasonable and in a different case the same conduct is unreasonable.

SWIFT: And that goes along with the different regions in the state. I mean water supplies are different, aquifers are different.

OWEN: Ozarka's conduct, the same conduct in 3 different trials can have 3 different results, which would not happen I presume in front of a board or a district?

SWIFT: We don't know if that wouldn't happen in front of a board. It might. It could. And I don't presume to stand here and tell you that all juries are going to do the same thing. We all know that doesn't happen. So I can't presume to say that. The point of this, and one thing I want to be sure I cover with the court is this issue of prospective verses retroactive use if the court chooses to adopt what we seek. Ozarka knew what they were doing. They had the knowledge in *East* and the progeny of *East*. There's never been the issue of knowledge brought up, specifically brought up and pled. This case is here on its pleading. We pled that they knew they were going to dry the well up by their pumping and that they did dry it up. If this court chooses not to adopt the restatement rule, we urge them to make a new exception to the rule of capture on knowledge and knowingly doing this, and intentionally doing this. This is the only area of the law that allows you to intentionally and knowingly harm your neighbor.

HECHT: Would equitable relief be sufficient?

SWIFT: Sure. Yes, in this instance. And that's a big part of what this lawsuit is about. But they knew what would happen. In *East* they didn't have the knowledge.

OWEN: Well you say that. But in oil and gas law, you can knowingly and intentionally drain your neighbors. It's up to your neighbor to drill an offsetting well.

SWIFT: There are some other statutes and other things that come into play on oil and gas law, and all those kind of things, and it's governed by the RR Commission. And it's a really different animal at this point than water law. From my limited knowledge of oil and gas law.

OWEN: The common law still remains in Texas, that you can knowingly and intentionally drain your neighbor?

SWIFT: Well it's part of the rule of capture. We believe it's the only one. We think that a new trial should be granted, because our laws contemplate that people would act reasonably. That's the very essence of our system, is that people will act reasonably. And if they don't remedies are available. And this law allows people to act unreasonably. And it allows them to intentionally harm their neighbor. It allows them to knowingly harm their neighbors and take a very valuable

property from them. This is not about some environmentalist against the big company. This is about two farmers in East Texas where there are no water districts, and in some of the amicus briefs there is a map of the water districts. There are none in East Texas. And that's what this case is about.