IN THE SUPREME COURT OF TEXAS

NO. 05-0466

COASTAL OIL & GAS CORP. AND
COASTAL OIL & GAS USA, L.P., PETITIONERS,

v.

GARZA ENERGY TRUST ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued September 28, 2006

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE BRISTER, JUSTICE GREEN, JUDGE CHRISTOPHER,[1] and JUSTICE PEMBERTON[2] joined, and in all but Part II-B of which CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

JUSTICE WILLETT filed a concurring opinion.

JUSTICE JOHNSON filed an opinion concurring in part and dissenting in part, in which CHIEF JUSTICE JEFFERSON joined, and in Part I of which JUSTICE MEDINA joined.

JUSTICE O'NEILL and JUSTICE WAINWRIGHT took no part in the decision of the case.

The primary issue in this appeal is whether subsurface hydraulic fracturing of a natural gas well that extends into another's property is a trespass for which the value of gas drained as a result may be recovered as damages. We hold that the rule of capture bars recovery of such damages. We also hold:

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[1] Hon. Tracy E. Christopher, Judge, 295th District Court, Harris County, Texas, sitting for JUSTICE O'NEILL by commission of Hon. Rick Perry, Governor of Texas, pursuant to Section 22.005 of the Texas Government Code.

[2] Hon. Robert H. Pemberton, Justice, Court of Appeals for the Third District of Texas at Austin, sitting for JUSTICE WAINWRIGHT by commission of Hon. Rick Perry, Governor of Texas, pursuant to Section 22.005 of the Texas Government Code.

- mineral lessors with a reversionary interest have standing to bring an action for subsurface trespass causing actual injury;
- the measure of damages for breach of the implied covenant to protect against drainage is the value of the minerals lost because of the lessee's failure to act with reasonable prudence, and there is no evidence of that value in this case;
- some evidence supported the jury's finding of breach of the implied covenant to develop, and whether lessors' repudiation of the lease was a defense was, on this record, a matter of law;
- some evidence supported the jury's finding of bad faith pooling;
- admission into evidence of a memorandum containing a racial slur was reversible error; and
- the trial court did not abuse its discretion in refusing to abate this case for two related cases.

We reverse the judgment of the court of appeals[3] and remand the case to the trial court for further proceedings.

I

Respondents,[4] to whom we shall refer collectively as Salinas, own the minerals in a 748-acre tract of land in Hidalgo County called Share 13, which they and their ancestors have occupied for over a century. At all times material to this case, petitioner Coastal Oil & Gas Corp.[5] has been the lessee of the minerals in Share 13 and an adjacent tract, Share 15. Coastal was also the lessee of the minerals in Share 12 until it acquired the mineral estate in that 163-acre tract in 1995. A natural gas

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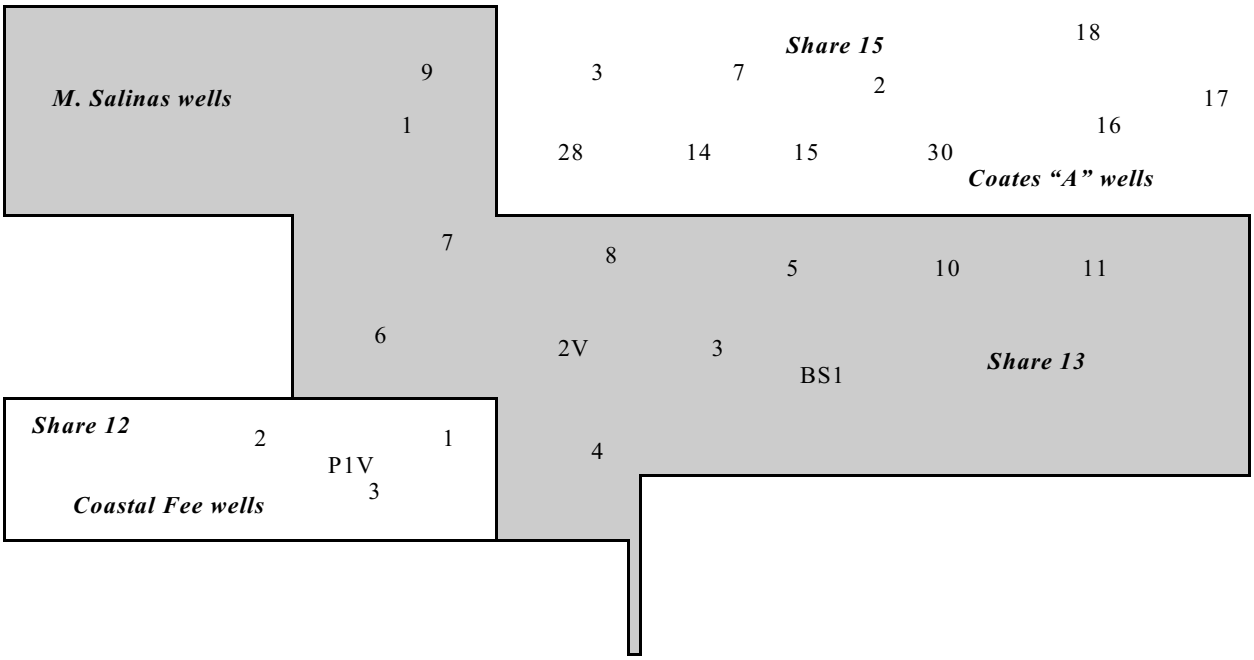
[3] *Mission Resources, Inc. v. Garza Energy Trust*, 166 S.W.3d 301 (Tex. App.–Corpus Christi 2005).

[4] Respondents are Hilda Salinas, Hilaria Salinas, Margarito Salinas, Maria Rosa Salinas, Vincente Saenz, Jr., Mercedes Salinas de Longoria, Miguel Angel Salinas, Maria Elva Delgado, Edwardo Saenz, Jr., Olivia Salinas Perez, Lydia Robbins, Aurelia Salinas Sendejo, Maria Matilde Salinas Guerrero, Luis Humberto Delgado, Marco Antonio Delgado, Ramon Garcia, Jesus Israel Muniz, Javier Lopez, Francisca Muniz Vasquez, Meliton Lopez, San Juanita Lopez Alaniz, Olga Betancourt Lopez, Myrna Betancourt Lopez, Sylvia Nora Betancourt Lopez, Norberto Lopez, Oscar Angel Lopez, Leticia Lopez, Ampora S. de Garza, Nellie S. Ibarra, Norma L. Torres, Esteban Saenz, Mary Elizabeth Saenz, Eloy Saenz, Hilaria Muniz Hernandez, and the beneficiaries of the Garza Energy Trust, dissolved December 31, 2004 — Juan Lino Garza, Sr., Romulo Garza, Guadalupe Garza, Jr., Aida Garza Lopez, Maria Rita Garza Carreles, Elma Garza Cantu, Eduardo Garza, Jose Carmen Garza, Jr., Carlos Garza, and Billy Salvador Robbins.

[5] Coastal is now El Paso Production Oil & Gas Company. Coastal Oil & Gas USA, L.P. is also a petitioner, but the parties have identified no difference in the interests of the two Coastal entities, and we refer to them collectively as "Coastal".

reservoir, the Vicksburg T formation, lies between 11,688 and 12,610 feet below these tracts. The following schematic depicts the surface area.



Title disputes have roiled the area for years. Coastal interpleaded respondents in a 1978 action to resolve disagreements among them over their respective interests in Share 13. Those issues were resolved by an agreed judgment in 1982. Many Share 13 owners sued in 1988[6] and again in 1995[7] over their boundary with Share 15. That issue was not resolved until 1999.[8] The plaintiffs in those cases also claimed that their gas was being drained to wells on Share 15.

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[6] *Juan Lino Garza, et al. v. Elizabeth H. Coates Maddux, et al.*, Cause No. C-035-88-G (370th Dist. Ct., Hidalgo County, Tex., filed Jan. 7, 1988).

[7] *Amelia Garza de Salinas, et al. v. Elizabeth H. Coates Maddux, et al.*, Cause No. C-6239-95-B (93rd Dist. Ct., Hidalgo County, Tex., filed Dec. 7, 1995).

[8] *Garza v. Maddux*, 988 S.W.2d 280 (Tex. App.–Corpus Christi 1999, pet. denied) (affirming summary judgment in the *Juan Lino Garza* suit).

From 1978 to 1983, Coastal drilled three wells on Share 13, two of which were productive, the M. Salinas No. 1 and No. 2V, though the other, the B. Salinas No. 1 ("BS1" on the diagram), was not. In 1994, Coastal drilled the M. Salinas No. 3, and it was an exceptional producer. The No. 3 well was about 1,700 feet from Share 12. The closest well on Share 12 was the Pennzoil Fee No. 1 ("P1" on the diagram), but Coastal wanted one closer, so in 1996, Coastal drilled the Coastal Fee No. 1 in the northeast corner of Share 12, as close to Share 13 (and the M. Salinas No. 3) as Texas Railroad Commission's statewide spacing Rule 37 permitted — 467 feet from the boundaries to the north and east.[9] That location was too close to the Pennzoil Fee No. 1,[10] and the Commission refused Coastal an exception because both wells would drain from Share 13. So Coastal shut in the Pennzoil Fee No. 1, a producing well, in order that it could operate the Coastal Fee No. 1 well near Share 13. In February 1997, Coastal drilled the Coastal Fee No. 2, also near Share 13.

In March, Salinas sued Coastal for breach of its implied covenants to develop Share 13 and prevent drainage. Salinas was concerned that Coastal was allowing Share 13 gas, on which Coastal owed Salinas a royalty, to drain to Share 12, where Coastal, as both owner and operator, was entitled to the gas unburdened by a royalty obligation. Salinas's suit prompted a flurry of drilling by Coastal on Share 13 — eight wells in fourteen months. Not until late 1999 did Coastal drill again on Share 12.

The Vicksburg T is a "tight" sandstone formation, relatively imporous and impermeable, from which natural gas cannot be commercially produced without hydraulic fracturing stimulation, or "fracing", as the process is known in the industry. This is done by pumping fluid down a well at

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[9] 16 TEX. ADMIN. CODE § 3.37(a)(1) (2007) (Tex. R.R. Comm'n, Statewide Spacing Rule) ("No well for oil, gas, or geothermal resource shall hereafter be drilled nearer than 1,200 feet to any well completed in or drilling to the same horizon on the same tract or farm, and no well shall be drilled nearer than 467 feet to any property line, lease line, or subdivision line; provided the commission, in order to prevent waste or to prevent the confiscation of property, may grant exceptions to permit drilling within shorter distances than prescribed in this paragraph when the commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property.").

[10] *Id*.

high pressure so that it is forced out into the formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants — sand, ceramic beads, or bauxite are used — that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. Fracing in effect increases the well's exposure to the formation, allowing greater production. First used commercially in 1949, fracing is now essential to economic production of oil and gas and commonly used throughout Texas, the United States, and the world.

Engineers design a fracing operation for a particular well, selecting the injection pressure, volumes of material injected, and type of proppant to achieve a desired result based on data regarding the porosity, permeability, and modulus (elasticity) of the rock, and the pressure and other aspects of the reservoir. The design projects the length of the fractures from the well measured three ways: the hydraulic length, which is the distance the fracing fluid will travel, sometimes as far as 3,000 feet from the well; the propped length, which is the slightly shorter distance the proppant will reach; and the effective length, the still shorter distance within which the fracing operation will actually improve production. Estimates of these distances are dependent on available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control that direction; the fractures will follow Mother Nature's fault lines in the formation. The vertical dimension of the fracing pattern is confined by barriers — in this case, shale — or other lithological changes above and below the reservoir.

For the Coastal Fee No. 1, the fracing hydraulic length was designed to reach over 1,000 feet from the well. Salinas's expert, Dr. Michael J. Economides, testified he would have designed the operation to extend at least 1,100 to 1,500 feet from the well. The farthest distance from the well

to the Share 13 lease line was 660 feet.[11] The parties agree that the hydraulic and propped lengths exceeded this distance, but they disagree whether the effective length did. The lengths cannot be measured directly, and each side bases its assertion on the opinions of an eminent engineer long experienced in hydraulic fracturing: Economides for Salinas, and Dr. Stephen Allen Holditch for Coastal. Holditch believed that a shorter effective length was supported by post-fracing production data.

All the wells on Share 12 and Share 13 were fraced. As measured by the amount of proppant injected into the well, the fracing of the Coastal Fee No. 1 and No. 2 wells was, as Economides testified, "massive", much larger than any fracing operation on a well on Share 13. Several months after filing suit, Salinas amended his pleadings to assert a claim for trespass, alleging that Coastal's fracing of the Coastal Fee No. 1 well invaded the reservoir beneath Share 12, causing substantial drainage of gas.

In 1997, Coastal formed an 80-acre unit comprised of just under 73 acres in the southwest corner of Share 13 and a little over seven acres in the southeast corner of Share 12. The unit included the M. Salinas No. 2V and No. 4 wells but did not include a well on Share 12. The unit benefitted Salinas by making it possible for the M. Salinas No. 8 to be drilled in the most desirable location, within 1,200 feet of the M. Salinas No. 2-V, which Rule 37 would otherwise have prohibited.[12] But Salinas complained that the unit effectively freed Coastal from its royalty obligation on the amount of gas equal to Share 12's portion of the gas produced from the two unit wells on Share 13, about nine percent (7/80ths), since that amount would be apportioned to Share 12, and that Salinas would have received the same benefit — the No. 8 well — along with higher

[11] The well is on the corner of a square, the opposite sides of which are the lease lines. The shortest distance between the well and Share 13 is 467 feet. The longest distance is the length of the diagonal, 660 feet.

[12] *See* Rule 37, *supra* note 9.

royalties if Coastal had included only one Share 12 acre in the unit. Salinas added to his lawsuit a claim for bad-faith pooling.

At trial, Salinas claimed that he had lost royalty revenue because of Coastal's delay in developing Share 13. Coastal argued that its delays were due in part to concerns over uncertainties about Salinas's title. In response, Salinas offered in evidence an internal memo from Coastal's files, written in 1977, discussing title problems among the Share 13 owners which the author attributed to the fact that their ancestors were, in his words, "mostly illiterate Mexicans". The memo concluded that drilling on Share 13 was worth the risk despite the title problems. Coastal's objection that the memo was irrelevant and unfairly prejudicial was overruled.[13] Coastal also offered evidence that because the price of gas had been increasing, Salinas actually benefitted from any delay in development.

Regarding drainage, Salinas's expert, Economides, testified that because of the fracing operation on the Coastal No. 1 well, 25-35% of the gas it produced drained from Share 13. He explained he could not be more definite because of two factors that could not be ascertained: the exact direction taken by the fractures and the extent of their incursion into Share 13, and whether conditions in the reservoir varied from Share 12 to Share 13. Economides calculated the value of that gas to be between $388,000 and $544,000. Coastal, as noted, offered evidence from its expert that no gas drained from Share 13 due to fracing. On their bad faith pooling claim, Salinas offered evidence of $81,619 damages in lost royalties.

The jury found:

- Coastal failed to reasonably develop Share 13 after 1993, causing Salinas $1.75 million damages for interest on lost royalties;
- Coastal breached its duty to pool in good faith, causing Salinas $1 million damages in lost royalties;

[13] *See* TEX. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

- Coastal's fracing of the Coastal Fee No. 1 well trespassed on Share 13, causing substantial drainage, which a reasonably prudent operator would have prevented, and $1 million damages in lost royalties;
- Coastal acted with malice and appropriated Salinas's property unlawfully, and should be assessed $10 million punitive damages;
- Salinas's reasonable attorney fees for trial were $1.4 million.

The trial court reduced the damages for bad-faith pooling from $1 million to $81,619 and the damages for drainage from $1 million to $543,776, in each instance the maximum amount supported by Salinas's evidence, and otherwise rendered judgment on the verdict.

The court of appeals reversed the attorney fee award because it included fees for Salinas's prosecution of a claim of breach of the implied covenant to market, on which the jury found no damages, and remanded the case for attorney fees to be redetermined.[14] In all other respects, the court of appeals affirmed.[15]

II

We begin with Salinas's contention that the incursion of hydraulic fracturing fluid and proppants into another's land two miles below the surface constitutes a trespass for which the minerals owner can recover damages equal to the value of the royalty on the gas thereby drained from the land. Coastal argues that Salinas has no standing to assert an action for trespass, and even if he did, hydraulic fracturing is not an actionable trespass. Because standing may be jurisdictional,[16] we address it first.[17]

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[14] 166 S.W.3d 301, 330 (Tex. App.–Corpus Christi 2005).

[15] *Id*. at 331.

[16] *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) ("A court has no jurisdiction over a claim made by a plaintiff without standing to assert it."); *but cf. Allen v. Wright*, 468 U.S. 737, 750-752 (1984) (differentiating between the jurisdictional and prudential components of federal standing doctrine). This Court has not indicated whether standing is always a matter of subject-matter jurisdiction.

[17] *Cf. Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, ___ U.S. ___, ___, 127 S. Ct. 1184, 1191 (2007) ("[*Steel Co.*] clarified that a federal court generally may not rule on the merits of a case without

A

As a mineral lessor, Salinas has only "a royalty interest and the possibility of reverter" should the leases terminate, but "no right to possess, explore for, or produce the minerals."[18] Texas courts have occasionally stated that "[t]he gist of an action of trespass to realty is the injury to the right of possession."[19] Since Salinas has no possessory right to the minerals in Share 13, Coastal argues he has no standing to sue for trespass.

But courts have stated the rule too broadly. At common law, trespass included several actions directed to different kinds of wrongs.[20] Trespass *quare clausum fregit* was limited to physical invasions of plaintiff's possessory interest in land;[21] trespass on the case was not[22] and provided an action for injury to a non-possessory interest, such as reversion.[23] Professors Prosser and Keeton explain:

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first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction).").

[18] *Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 194 (Tex. 2003).

[19] *E.g., Pentagon Enters. v. Sw. Bell Tel. Co.*, 540 S.W.2d 477, 478 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.); *see McMillan v. Dooley*, 144 S.W.3d 159, 188 (Tex. App.–Eastland 2004, pet. denied); *Lighthouse Church of Cloverleaf v. Tex. Bank,* 889 S.W.2d 595, 598 n.3 (Tex. App.–Houston [14th Dist.] 1994, writ denied); *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 833 S.W.2d 736, 739 (Tex. App.–Houston [1st Dist.] 1992, writ denied).

[20] 1 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 1.3, at 7 (3d ed. 2006) ("'Trespass' was really a 'family of writs' that summoned the defendant to show why ('ostensurus quare') he had done certain wrongs.").

[21] *Id.* § 1.3, at 8; *Slye v. Guerdrum*, 29 App. D.C. 550 (1907) ("It is, of course, axiomatic that at common law the gist of the action of trespass *quare clausum fregit* is injury to the possession, and that, generally speaking, the plaintiff must show actual or constructive possession at the time of the trespass.").

[22] HARPER, *supra* note 20, § 1.3, at 9-10.

[23] *See Alexander v. Letson*, 7 So. 2d 33 (Ala. 1942); *Crowder v. Fordyce Lumber Co.*, 125 S.W. 417 (Ark. 1910); *Gibbons v. Dillingham*, 10 Ark. 9 (1849); *Rogers v. Duhart*, 32 P. 570 (Cal. 1893); *Halligan v. Chicago & Rock Island R.R. Co.*, 15 Ill. 558 (1854); *Brown v. Bridges*, 31 Iowa 138 (1870); *Pacific Ry. Co. v. Walker*, 12 Kan. 601 (1874); *Baltimore & Ohio. R.R. Co. v. Boyd*, 63 Md. 325 (1885); *French v. Fuller*, 40 Mass. 104 (1839); *Ware v. Collins*, 35 Miss. 223 (1858); *Burnett v. Thompson*, 52 N.C. (7 Jones) 407 (1860); *Casey v. Mason*, 59 P. 252 (Okla. 1899); *Williams v. Goose Lake Valley Irrigation Co.*, 163 P. 81 (Or. 1917); *Duffield v. Rosenzweig*, 144 Pa. 520 (1891); *Union Petrol. Co. v. Bliven Petrol. Co.*, 72 Pa. 173 (1872); *Greber v. Kleckner*, 2 Pa. 289 (1845); *Forsythe v. Price*, 8 Watts 282 (Pa. 1839); *Stultz v. Dickey*, 5 Binn. 285 (Pa. 1812); *Dial v. Gardner*, 89 S.E. 396 (S.C. 1916); *Arneson v. Spawn*, 49 N.W. 1066 (S.D. 1891); *Catlin v. Hayden*, 1 Vt. 375 (1829).

> Thus a landlord cannot sue for a mere trespass to land in the occupation of his tenant. He is not without legal remedy, in the form of an action on the case for the injury to the reversion; but in order to maintain it, he must show more than the trespass — namely, actual permanent harm to the property of such sort as to affect the value of his interest.[24]

Salinas's reversion interest in the minerals leased to Coastal is similar to a landlord's reversion interest in the surface estate. By his claim of trespass, Salinas seeks redress for a permanent injury to that interest — a loss of value because of wrongful drainage. His claim is not speculative; he has alleged actual, concrete harm whether his leases continue or not, either in reduced royalty revenues or in loss of value to the reversion.[25] This gives him standing to sue for a form of trespass,[26] and under our liberal pleading rules, unlike the common law, he was not required to specify which form. At common law, choosing the wrong form of action was fatal to the case, but modern civil procedure has abandoned such rigid distinctions.[27] It is important to note, however, that

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[24] W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 78 (5th ed. 1984) (footnotes omitted); *see* HARPER, *supra* note 20, § 1.2, at 5; *see also Gulf, Colo. & Santa Fe Ry. v. Settegast*, 15 S.W. 228, 230 (Tex. 1891) ("The rule is well settled that the landlord may sue for and recover for damages to his reversionary interest; that is, he may bring an action for any permanent injury to the property."); *see generally* RESTATEMENT (FIRST) OF PROPERTY §§ 211 ("The owner of a future interest, in order to obtain any relief as against an act or omission to act of a third person, must establish that the conduct of such third person (a) is such conduct as would have been sufficient to entitle the owner of complete property in the affected thing, to some relief; and (b) causes either harm or reasonable apprehension of harm to such owner of a future interest in view of the character of the act or omission to act and of the substantiality of his future interest."), and 214 ("When conduct of a third person satisfies the requirements stated in § 211 and consists of acts or omissions to act affecting land, then (a) the owner of a future interest which consists of complete property in such land except for one or more prior estates for life is entitled to recover a judgment against the third person for the damages caused to the owner of the future interest by the conduct of such third person; and is entitled to the proceeds of such judgment . . . .").

[25] *See also HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998) ("A royalty interest is an interest in real property that is a distinct part of the mineral estate. Although royalty is payable only as minerals are produced, a royalty owner is entitled to compensation for damage to a reservoir underlying an oil and gas lease." (citations omitted)).

[26] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-305 (Tex. 2008) ("For standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." (footnotes omitted)).

[27] *See* HARPER, *supra* note 20, §§ 1.2, at 5 ("The distinction between the landlord's action, for damage to the reversion, and the tenant's action, for trespass, retains significance in modern times, despite the abolition of the distinction between the forms of action. Under contemporary rules of pleading, of course, neither the landlord's nor the tenant's action should be dismissed simply because it appears to have been brought in the wrong form. The older rule is important, however, since it affected the measure of damages recoverable in a way that still prevails."), and 1.3, at 11 ("Under the formulary system of the common law a plaintiff's suit could proceed in only one form of action; if the wrong form were chosen, plaintiff lost the case even if facts were shown that would entitle recovery in another form. . . . The

Salinas's claim of trespass does not entitle him to nominal damages (which he has not sought).[28] He must prove actual injury.

B

Had Coastal caused something like proppants to be deposited on the surface of Share 13, it would be liable for trespass,[29] and from the ancient common law maxim that land ownership extends to the sky above and the earth's center below, one might extrapolate that the same rule should apply two miles below the surface. But that maxim — *cujus est solum ejus est usque ad coelum et ad inferos* — "has no place in the modern world."[30] Wheeling an airplane across the surface of one's property without permission is a trespass; flying the plane through the airspace two miles above the property is not. Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes.[31] But neither did he imagine oil wells. The law of trespass need no more be the same two miles below the surface than two miles above.

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hardships bred by the rigidity of this system finally led to the great procedural reforms of the mid-nineteenth century, which, among other things, abolished the distinctions between the old forms of action and provided for a single civil action in which the parties should be given their remedies (or defenses) according to the facts pleaded and proved under whatever legal theory the court found appropriate.").

[28] *See* KEETON, *supra* note 24, § 13, at 75 ("The common law action of trespass could be maintained without proof of any actual damage. . . . The plaintiff recovered nominal damages where no substantial damage was shown . . . . On the other hand, the action on the case required proof of actual damage, and could not be maintained without it."); HARPER, *supra* note 20, § 1.2, at 5 ("The distinction between the landlord's action, for damage to the reversion, and the tenant's action, for trespass, retains significance in modern times, despite the abolition of the distinction between forms of action. Under contemporary rules of pleading, of course, neither the landlord's nor the tenant's action should be dismissed simply because it appears to have been brought in the wrong form. The older rule is important, however, since it affected the measure of damages recoverable in a way that still prevails.").

[29] *Glade v. Dietert*, 295 S.W.2d 642, 645 (Tex. 1956) ("To constitute a trespass entry upon another's land need not be in person, but may be made by causing or permitting a thing to cross the boundary of the premises.") (internal quotes omitted).

[30] *United States v. Causby*, 328 U.S. 256, 260-261 & n.5 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *Cujus est solum ejus est usque ad coelum*." (citing 1 Coke, Institutes (19th ed. 1832) ch. 1, § 1(4a); 2 Blackstone, Commentaries (Lewis ed. 1902) p. 18; 3 Kent, Commentaries (Gould ed. 1896) p. 621)). The maxim continued "*et ad inferos*" — to the depths.

[31] *See also* HARPER, *supra* note 20, § 1.5, at 20 ("The maxim must be taken in the light of the actual decisions in which it found expression, and these all dealt with invasions of the airspace, close to the ground, that interfered with actual or potential use and occupation of the land (as by structures, trees, etc.).").

We have not previously decided whether subsurface fracing can give rise to an action for trespass. That issue, we held in *Gregg v. Delhi-Taylor Oil Corp.*, is one for the courts to decide, not the Railroad Commission.[32] In 1961, when we decided *Gregg*, the Commission had never addressed the subject, and we specifically indicated no view on whether Commission rules could authorize secondary recovery operations that crossed property lines. The next Term, in *Railroad Commission of Texas v. Manziel*, we held that a salt water injection secondary recovery operation did not cause a trespass when the water migrated across property lines, but we relied heavily on the fact that the Commission had approved the operation.[33] Thirty years later, in *Geo Viking, Inc. v. Tex-Lee Operating Company*, we issued a per curiam opinion holding that fracing beneath another's land was a trespass,[34] but on rehearing we withdrew the opinion and expressly did not decide the issue.[35]

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[32] 344 S.W.2d 411, 415 (Tex. 1961). Salinas points to language in our opinion that could be read to suggest that hydraulic fracturing below another's property constitutes an actionable trespass. For example, we offered that the allegations in that case were "sufficient to raise an issue" whether there was a trespass. *Id.* at 416. But we were not required to reach the issue.

[33] 361 S.W.2d 560, 568-569 (Tex. 1962). We stated:

> We conclude that if, in the valid exercise of its authority to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis. The technical rules of trespass have no place in the consideration of the validity of the orders of the Commission.

Id. We acknowledge that our opinions in *Gregg* and *Manziel* are in some tension and did not perfectly delineate the Commission's authority to regulate secondary recovery operations.

[34] 1992 Tex. LEXIS 40, 1992 WL 80263, at *2, 35 Tex. Sup. Ct. J. 661 (Apr. 22, 1992) (No. D-1678) (per curiam op. withdrawn on reh'g) ("Although oil and gas are subject to legitimate drainage under the law of capture, the owner 'is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.' *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558, 561 (1948). Fracing under the surface of another's land constitutes a subsurface trespass. *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411, 416 (1961); *Amarillo Oil v. Energy-Agri Products*, 794 S.W.2d 20, 27 (Tex. 1990). Therefore, the rule of capture would not permit [an operator] to recover for a loss of oil and gas that might have been produced as the result of fracing beyond the boundaries of its tract.").

[35] 839 S.W.2d 797, 798 (Tex. 1992) (per curiam) ("The per curiam opinion and judgment of this court issued April 22, 1992 are withdrawn. Further, the order of this court of April 22, 1992, granting the application for writ of error is withdrawn, as the application was improvidently granted. In denying petitioner's application for writ of error, we should not be understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture or trespass as they apply to hydraulic fracturing.").

We need not decide the broader issue here. In this case, actionable trespass requires injury,[36] and Salinas's only claim of injury — that Coastal's fracing operation made it possible for gas to flow from beneath Share 13 to the Share 12 wells — is precluded by the rule of capture. That rule gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract.[37] The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation.[38] Salinas does not claim that the Coastal Fee No. 1 violates any statute or regulation. Thus, the gas he claims to have lost simply does not belong to him. He does not claim that the hydraulic fracturing operation damaged his wells or the Vicksburg T formation beneath his property. In sum, Salinas does not claim damages that are recoverable.

Salinas argues that the rule of capture does not apply because hydraulic fracturing is unnatural. The point of this argument is not clear. If by "unnatural" Salinas means due to human intervention, the simple answer is that such activity is the very basis for the rule, not a reason to suspend its application. Nothing is more unnatural in that sense than the drilling of wells, without which there would be no need for the rule at all. If by "unnatural" Salinas means unusual, the facts are that hydraulic fracturing has long been commonplace throughout the industry and is necessary for commercial production in the Vicksburg T and many other formations. And if by "unnatural"

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[36] *See Lyle v. Waddle*, 188 S.W.2d 770, 773 (Tex. 1945). As already noted, this case does not involve a trespass against a possessory interest, which does not require actual injury to be actionable and may result in an award of nominal damages. *See McDaniel Bros. v. Wilson*, 70 S.W.2d 618, 621 (Tex. Civ. App.–Beaumont 1934, writ ref'd) ("[E]very unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight, and gives a cause of action to the injured party."); *see also* RESTATEMENT (SECOND) OF TORTS § 163 (1965) ("One who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land [or] its possessor . . . .").

[37] *Halbouty v. R.R. Comm'n.*, 357 S.W.2d 364, 374 (Tex. 1962); *Eliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948); *Corzelius v. Harrell*, 186 S.W.2d 961, 964 (Tex. 1945); *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 292 (Tex. 1923); *see also Houston & Tex. Cent. Ry. Co. v. East*, 81 S.W. 279, 280 (1904).

[38] *See also* 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 1.1(A) (2d ed. 1998) ("The rule of capture may be the most important single doctrine of oil and gas law.").

Salinas means unfair, the law affords him ample relief. He may use hydraulic fracturing to stimulate production from his own wells and drain the gas to his own property — which his operator, Coastal, has successfully done already — and he may sue Coastal for not doing so sooner — which he has also done, in this case, though unsuccessfully, as it now turns out.[39]

Salinas argues that stimulating production through hydraulic fracturing that extends beyond one's property is no different from drilling a deviated or slant well — a well that departs from the vertical significantly — bottomed on another's property, which is unlawful.[40] Both produce oil and gas situated beneath another's property. But the rule of capture determines title to gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place. The gas produced through a deviated well does not migrate to the wellbore from another's property; it is already on another's property. The rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through a reservoir.[41] It is

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[39] In applying the rule of capture, the court of appeals drew a natural/unnatural distinction in *Peterson v. Grayce Oil Co.*, 37 S.W.2d 367, 370-374 (Tex. Civ. App.–Fort Worth 1931), *aff'd*, 98 S.W.2d 781 (Tex. 1936), holding that drainage resulting from the use of vacuum pumps did not fall within the rule of capture because it did not "occur[] solely through the operation of natural agencies in a normal manner, as distinguished from artificial means applied to stimulate such a flow." But the distinction is either meaningless or circular because all extraction of oil and gas is by artificial means. In *Railroad Commission v. Manziel*, 361 S.W.2d 560, 568-569 (Tex. 1962), we held that injecting water into a reservoir in a secondary recovery operation to increase production was not a trespass. The outcomes of these cases were different, not because water injection is less artificial than vacuum pumps, but because Railroad Commission rules allowed water injection and forbade vacuum pumps.

[40] *Hasting Oil Co. v. Tex. Co.*, 234 S.W.2d 389, 398 (Tex. 1950); 16 TEX. ADMIN. CODE § 3.37(m)(5) ("A well that is either bottomed off the lease, deviated after April 1, 1949, drilled in direct violation of a specific condition or limitation placed in the Rule 37 permit, or is in violation of a specific commission order, is an illegal well and it shall not be permitted, and such well where permit is refused shall not be considered a replaceable well under commission replacement-well regulation.").

[41] *Stephens County*, 254 S.W. at 292; *see Ryan Consol. Petrol. Corp. v. Pickens*, 285 S.W.2d 201, 210 (Tex. 1955) (Wilson, J., joined by Hickman, C.J., and Garwood, J., dissenting) ("[T]he owner of the adjoining tract from which the oil is migrating can protect himself by drilling offset wells. This equal right to drill has always supported the constitutionality of the rule of capture. Take it away and the reason for the rule fails, leaving a result not only unjust but one inconsistent with the fundamental concept of ownership of oil and gas in place as a part of the realty. . . . Under our law no one has a right simply to capture the property of someone else. But because of early difficulty in determining the source of oil produced from a well we stopped judicial inquiry at the mouth of the well, called it the rule of capture, and said that adjoining landowners could protect themselves by going and doing likewise. Admittedly this was a matter of expediency, and in the then state of the oil business and the then knowledge of reservoir dynamics, it reached a practical result.").

a rule of expedience. One cannot protect against drainage from a deviated well by drilling his own well; the deviated well will continue to produce his gas. Nor is there any uncertainty that a deviated well is producing another owner's gas. The justifications for the rule of capture do not support applying the rule to a deviated well.

We are not persuaded by Salinas's arguments. Rather, we find four reasons not to change the rule of capture to allow one property owner to sue another for oil and gas drained by hydraulic fracturing that extends beyond lease lines.

First, the law already affords the owner who claims drainage full recourse. This is the justification for the rule of capture, and it applies regardless of whether the drainage is due to fracing. If the drained owner has no well, he can drill one to offset drainage from his property. If the minerals are leased and the lessee has not drilled a well, the owner can sue the lessee for violation of the implied covenant in the lease to protect against drainage.[42] If an offset well will not adequately protect against drainage, the owner (or his operator) may offer to pool, and if the offer is rejected, he may apply to the Railroad Commission for forced pooling.[43] The Commission may also regulate production to prevent drainage.[44] No one suggests that these various remedies provide inadequate protection against drainage.

Second, allowing recovery for the value of gas drained by hydraulic fracturing usurps to courts and juries the lawful and preferable authority of the Railroad Commission to regulate oil and gas production. Such recovery assumes that the gas belongs to the owner of the minerals in the drained property, contrary to the rule of capture. While a mineral rights owner has a real interest in

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[42] *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 568 (Tex. 1981) ("The implied covenant to protect against drainage is part of the broad implied covenant to protect the leasehold. The covenant to protect the leasehold extends to what a reasonably prudent operator would do under similar facts and circumstances.").

[43] TEX. NAT. RES. CODE §§ 102.001-.112. *See Railroad Comm'n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36 (Tex. 1991).

[44] *Benz-Stoddard v. Aluminum Co. of Am.*, 368 S.W.2d 94 (Tex. 1963).

oil and gas in place,[45] "this right does not extend to *specific* oil and gas beneath the property";[46] ownership must be "considered in connection with the law of capture, which is recognized as a property right"[47] as well. The minerals owner is entitled, not to the molecules actually residing below the surface, but to "a fair chance to recover the oil and gas in or under his land, *or* their equivalents in kind."[48] The rule of capture makes it possible for the Commission, through rules governing the spacing, density, and allowables of wells, to protect correlative rights of owners with interests in the same mineral deposits while securing "the state's goals of preventing waste and conserving natural resources".[49] But such rules do not allow confiscation; on the contrary, they operate to prevent confiscation.[50] Without the rule of capture, drainage would amount to a taking of a mineral owner's property — *the* oil and gas below the surface of the property — thereby limiting the Commission's power to regulate production to assure a fair recovery by each owner. The Commission has never found it necessary to regulate hydraulic fracturing, a point to which we will return below, but should it ever choose to do so, permitting fracturing that extended beyond property lines, however reasonable in terms of industry operation, would be met with the objection that the Commission had allowed the minerals in the drained property to be confiscated. While "'all property is held subject to the valid exercise of the police power' and thus not every regulation is a compensable taking, . . . some are."[51] "Physical possession is, categorically, a taking for which

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[45] *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935)

[46] *Seagull Energy E & P, Inc. v. R.R. Comm'n.*, 226 S.W.3d 383, 388-389 (Tex. 2007) (emphasis added).

[47] *Texaco, Inc. v. R.R. Comm'n*, 583 S.W.2d 307, 310 (Tex. 1979); *see also Brown*, 83 S.W.2d at 940.

[48] *Gulf Land Co. v. Atl. Ref. Co.*, 131 S.W.2d 73, 80 (Tex. 1939) (emphasis added).

[49] *Seagull Energy*, 226 S.W.3d at 389.

[50] *Gulf Land*, 131 S.W.2d at 80.

[51] *Seagull Energy*, 226 S.W.3d at 389; *accord Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004) (quoting *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984)).

compensation is constitutionally mandated".[52] We need not hold here that without the rule of capture, all regulation of drainage would be confiscatory and thus beyond the Commission's power. We observe only that the rule of capture leaves the Commission's historical role unimpeded. "It is now well settled that the Railroad Commission is vested with the power and charged with the duty of regulating the production of oil and gas for the prevention of waste as well as for the protection of correlative rights."[53] The Commission's role should not be supplanted by the law of trespass.

Third, determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle. One difficulty is that the material facts are hidden below miles of rock, making it difficult to ascertain what might have happened. Such difficulty in proof is one of the justifications for the rule of capture. But there is an even greater difficulty with litigating recovery for drainage resulting from fracing, and it is that trial judges and juries cannot take into account social policies, industry operations, and the greater good which are all tremendously important in deciding whether fracing should or should not be against the law.[54] While this Court may consider such matters in fashioning the common law, we should not alter the rule of capture on which an industry and its regulation have relied for decades to create new and uncertain possibilities for liability with no more evidence of necessity and appropriateness than this case presents. Indeed, the evidence in this case counsels strongly against such a course. The experts in this case agree on

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[52] *Sheffield Development Co.*, 140 S.W.3d at 669-670 (Tex. 2004); *accord Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . .").

[53] *Texaco, Inc. v. R.R. Comm'n*, 583 S.W.2d 307, 310 (Tex. 1979); *see Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) ("[T]he Commission would obviously have jurisdiction over the use of techniques to enhance production and protect correlative rights."); TEX. NAT. RES. CODE § 86.081(a) ("For the protection of public and private interests, the commission, on written complaint by an affected party or on its own initiative and after notice and an opportunity for a hearing, shall prorate and regulate the daily gas well production from a common reservoir if the commission finds that action to be necessary to: (1) prevent waste; or (2) adjust the correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell the gas as permitted in this chapter."); *id.* § 85.202(a)(4) ("The rules and orders of the commission shall include rules and orders: . . . to require wells to be drilled and operated in a manner that will prevent injury to adjoining property . . . .").

[54] *Texaco, Inc.*, 583 S.W.2d at 310 (Tex. 1979) ("The business of producing, storing and transporting oil and gas is a business affected with a public interest . . . .").

two important things. One is that hydraulic fracturing is not optional; it is essential to the recovery of oil and gas in many areas, including the Vicksburg T formation in this case. (This fact has recently been brought to the public's attention because of development in the Barnett Shale in north Texas, which is entirely dependent on hydraulic fracturing.[55]) The other is that hydraulic fracturing cannot be performed both to maximize reasonable commercial effectiveness and to avoid all drainage. Some drainage is virtually unavoidable. In this context, common law liability for a long-used practice essential to an industry is ill-advised and should not be extended absent a compelling need that the Legislature and Commission have ignored. No such need exists.

Fourth, the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change. The Court has received amicus curiae briefs in this case from the Railroad Commission, the General Land Office, the American Royalty Council, the Texas Oil & Gas Association, the Texas Independent Producers & Royalty Owners Association, the Texas Alliance of Energy Producers, Harding Co., BJ Services Co., Halliburton Energy Services, Inc., Schlumberger Technology Corp., Chesapeake Energy Corp., Devon Energy Corp., Dominion Exploration & Production, Inc., EOG Resources, Inc., Oxy Usa Inc., Questar Exploration and Production Co., XTO Energy, Inc., and Chief Oil & Gas LLC. These briefs from every corner of the industry — regulators, landowners, royalty owners, operators, and hydraulic fracturing service providers — all oppose liability for hydraulic fracturing, almost always warning of adverse consequences in the direst language.[56] Though hydraulic fracturing has been

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[55] *E.g. Demand for Workers in the Barnett Shale on the Rise*, DALLAS BUS. J., June 23, 2008; Mary Fallin, *Hail the Shale*, NAT'L REV., July 2, 2008; Clifford Krauss, *There's Gas in Those Hills*, N.Y. TIMES, Apr. 8, 2008, at C1.

[56] *E.g.* Brief of American Royalty Council as Amicus Supporting Petitioners at 2 ("[W]hile the prevailing parties in the case below are royalty owners, the long-term effect of the court of appeals' decision is disastrous for royalty owners throughout Texas. If operators are faced with the possibility of tort liability when engaging in hydraulic fracturing, they will likely fracture fewer and fewer wells, with the ultimate effect of royalty owners losing out on hundreds of millions of dollars in royalties and the economy of the entire state weakened."); Brief of BJ Services Co., et al. as Amici Supporting Petitioners at 24 ("The [lower courts'] decisions do not reflect the law, they are wrong, and portend nothing short of chaos for oil and gas producers and related service companies in the State of Texas, perhaps in other oil and gas producing states as well."); Brief of Harding Co. as Amicus Curiae Supporting Petitioners at 2

commonplace in the oil and gas industry for over sixty years, neither the Legislature nor the Commission has ever seen fit to regulate it, though every other aspect of production has been thoroughly regulated. Into so settled a regime the common law need not thrust itself.

Accordingly, we hold that damages for drainage by hydraulic fracturing are precluded by the rule of capture. It should go without saying that the rule of capture cannot be used to shield misconduct that is illegal, malicious, reckless, or intended to harm another without commercial justification, should such a case ever arise. But that certainly did not occur in this case, and no instance of it has been cited to us.

III

We turn now to Salinas's claims for breach of the implied covenant to protect against drainage, breach of the implied covenant to develop, and bad-faith pooling.

A

Coastal had an implied obligation to act as a reasonably prudent operator to protect Share 13 from drainage, which could have been discharged by drilling offset wells to counter production on Share 12.[57] The jury found that Coastal failed to meet this obligation but was instructed to find as

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("[T]here is every reason to make it clear that the tort of trespass will not be allowed to imperil use of the sound practice of hydraulic fracturing. To do otherwise would be to impose massive costs on all segments of the Texas oil and gas industry and impede development and production of vitally needed oil and gas reserves."); Brief for Railroad Commission of Texas as Amicus Curiae Supporting Petitioners at 2 ("A judicial determination that a cause of action for subsurface trespass by fracture treatment exists in Texas would create a significant disincentive for oil and gas operators to continue to use and refine this longstanding and effective production technique."); Brief for Texas General Land Office as Amicus Curiae Supporting Petitioners at 2 ("Recognizing a cause of action for subsurface trespass by fracture treatment is not only ill-advised from a public policy standpoint, it is neither warranted in practice nor necessary to protect mineral owners from drainage caused by subsurface fractures."); Brief for Texas Independent Producers and Royalty Owners Ass'n and Texas Alliance of Energy Producers as Amici Curiae Supporting Petitioners at 18 ("The impact of [a] . . . holding that a cause of action for trespass by hydraulic fracturing exists . . . will bring dramatic and adverse consequences to technology, to operators and to the Railroad Commission's ability to prevent waste."); Brief of Texas Oil & Gas Ass'n as Amicus Curiae Supporting Petitioners at 4 ("[L]egitimate hydraulic fracturing should never be considered a tortious activity. Holding otherwise would jeopardize secondary recovery operations that have been used for over fifty years and have contributed greatly to this nation's energy reserves.").

[57] *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 253 (Tex. 2004) ("An oil and gas lessee has an implied obligation to protect the leasehold from drainage. Local drainage occurs when oil migrates from under a lease to the well bore of a producing well on an adjacent lease. Drainage may be prevented by drilling an offset well. To establish a breach of the implied covenant to protect against drainage, a lessor must show proof (1) of substantial drainage from the lessor's field, and (2) that a reasonably prudent operator would have acted to prevent the drainage."); *Amoco Prod. Co.*

damages "[t]he value of the royalty on the gas drained from Share 13 by the subsurface trespass" by the Coastal No. 1 fracing operation, not the drainage a reasonably prudent operator should have prevented. The jury instruction assumes that a reasonably prudent operator on Share 13 should have prevented all drainage due to the fracing operation on the Coastal No. 1. Coastal complains that there is no evidence to support that assumption, that the jury should have been instructed to find as damages the value of the drainage that should have been prevented, and that there is no evidence of the amount of such drainage.

We have held that "[o]ne measure of damages" for breach of the implied covenant of protection is "the amount of royalties that the lessor would have received from the offset well on its lease."[58] But this would overcompensate the lessee if production from the offset well exceeded the drainage.[59] Another measure of damages is the value of the royalty on the drained gas,[60] but this, too, would overcompensate the lessee if not all of the drainage could have been prevented, either because

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v. Alexander, 622 S.W.2d 563, 568 (Tex. 1981) ("[B]ecause of the complexity of the oil and gas industry and changes in technology, the courts cannot list each obligation of a reasonably prudent operator which may arise. The lessee must perform any act which a reasonably prudent operator would perform to protect from substantial drainage. The duties of a reasonably prudent operator to protect from field-wide drainage may include (1) drilling replacement wells, (2) re-working existing wells, (3) drilling additional wells, (4) seeking field-wide regulatory action, (5) seeking Rule 37 exceptions from the Railroad Commission, (6) seeking voluntary unitization, and (7) seeking other available administrative relief. There is no duty unless such an amount of oil can be recovered to equal the cost of administrative expenses, drilling or re-working and equipping a protection well, producing and marketing the oil, and yield to the lessee a reasonable expectation of profit.").

[58] *Kerr-McGee*, 133 S.W.3d at 253.

[59] *See* 5 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL & GAS LAW § 825.2, at 167 (2007) ("The 'amount-the-offset-well-would-produce' formula gives the lessor his royalty on production from the offset well, even though the well would produce far more oil or gas than is being drained from the land. In short, there is no necessary correlation between the lessor's loss due to drainage and a recovery based on the amount of production from an offset well." (footnote omitted)).

[60] *See Southeastern Pipe Line Co. v. Tichacek*, 977 S.W.2d 393, 399 (Tex. App.–Corpus Christi 1998), *aff'd in part and rev'd in part*, 997 S.W.2d 166 (Tex. 1999) ("The measure of damages for breach of the drainage covenant is the royalty interest on the production lost by the producer's failure to prevent drainage. *Mandell v. Hamman Oil and Refining Co.*, 822 S.W.2d 153, 164 (Tex. App.–Houston [1st Dist.] 1991, writ denied); *County Management, Inc. v. Butler*, 650 S.W.2d 888, 890 (Tex. App.–Austin 1983, writ dism'd by agr.); *Wes-Tex Land Co. v. Simmons*, 566 S.W.2d 719, 721 (Tex. Civ. App.–Eastland 1978, writ ref'd n.r.e.).").

of the nature of the field, or the regulatory system, or for whatever reason.[61] The correct measure of damages for breach of the implied covenant of protection is the amount that will fully compensate, but not overcompensate, the lessor for the breach — that is, the value of the royalty lost to the lessor because of the lessee's failure to act as a reasonably prudent operator.[62]

Salinas's expert testified to the total amount of drainage due to the fracing of the Coastal No. 1 well, but Salinas points to no evidence, much less conclusive evidence, that a reasonably prudent operator should have prevented all of that amount.[63] The jury instruction was therefore incorrect. There is also no evidence of what amount of drainage a reasonably prudent operator should have prevented. Absent any evidence of the proper measure of damages, Salinas cannot recover on its claim for breach of the protection covenant.

B

Coastal also had an implied obligation to continue to develop Share 13 with reasonable diligence after the M. Salinas No. 3 well was completed.[64] Salinas alleged that Coastal's delay in drilling additional wells breached that obligation, and the jury agreed. Salinas claimed to have lost the interest income the royalties would have produced had they been paid sooner, and the trial court

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[61] *See* WILLIAMS, *supra* note 59, § 825.2, at 166 ("The 'amount-drained-away' formula presupposes that the offset well would have prevented all drainage, which is not necessarily true. The location of the protection well, which may be determined by a regulatory agenda, will affect its efficacy in preventing drainage. Where it is determined that for physical reasons or by virtue of valid governmental order the offset well would not prevent all drainage, damage should be allowed only for the drainage that could have been prevented." (footnote omitted)).

[62] *See Mandell v. Hamman Oil & Ref. Co.*, 822 S.W.2d 153, 164 (Tex. App.–Houston [1st Dist.] 1991, writ denied) ("The measure of damages for breach of the drainage covenant was the royalty interest on the production lost by the producer's failure to prevent drainage.").

[63] We have rejected the argument that a lessee should be held to a standard higher than a reasonably prudent operator when, as in this case, he is also the operator of the well that is draining the lessor's property. *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 569 (Tex. 1981) ("The reasonably prudent operator standard is not to be reduced to the [plaintiff lessors] because [their lessee] has other lessors in the same field. [The lessee's] status as a common lessee does not affect its liability to the [plaintiff lessors]."). *See generally* WILLIAMS, *supra* note 59, §§ 824-824.2 (discussing various arguments and authorities).

[64] *See W.T. Waggoner Estate v. Sigler Oil Co.*, 19 S.W.2d 27, 29 (Tex. 1929) ("Where a mining lease provided for oil or gas royalties, and failed to define the lessee's duty as regards development after discovery of paying oil or gas, the law implied the obligation from the lessee to continue the development and production of oil or gas with reasonable diligence.").

instructed the jury to consider only that amount in determining damages. Coastal offered evidence that the delay in development actually benefitted Salinas because the price of gas was increasing over time, resulting in higher royalty payments that more than offset the interest earlier payments would have earned. Coastal argues here, as it did in the trial court, that the jury should have been instructed to find the difference between the value of what Salinas received and what he should have received, which Coastal contends is zero.

For breach of the development covenant, a lessee is entitled to recover "the full value of royalty lost to him".[65] The parties agree that whether Salinas suffered a loss from the delay is not a simple interest calculation but depends on prices and production rates. Earlier payments at lower prices plus interest may well be less than later payments at higher prices, as the current market illustrates. A royalty payment on a $50 barrel of oil which should have been paid last year, plus a year's interest, is far less than the same royalty on a $150 barrel of oil this year. But the trial court's instruction, in the context of the evidence and argument, did not prevent the jury from considering Coastal's position. Coastal reads the instruction to confine the jury's consideration to determining the amount of some two years' lost interest, without regard for other factors. But the instruction directed the jury to consider Salinas's lost interest *income*, and had they believed Coastal's evidence, they could have answered zero — Salinas lost interest on earlier royalties but lost no net income. Coastal made this plain in summation.[66] The instruction should have been clearer, but we cannot say that it prevented the jury from considering all the evidence.

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[65] *Texas Pac. Coal & Oil Co. v. Barker*, 6 S.W.2d 1031, 1038 (Tex. 1928).

[66] Coastal's argument in summation, in part, was this: "[T]he fact of the matter is gas prices have increased and that means more dollars are being paid for gas today than they were, and that means more royalty is being paid today than it was. . . . Let's assume that the Plaintiffs took every single penny that they would have received had these wells been drilled earlier, every cent, and invested it, never spent it, never took it out of the bank, just invested it. . . . They're still 90 some thousand dollars ahead based upon the payment they are receiving now than this assumed payment that they could have gotten had we drilled earlier."

Coastal also argues that there is no evidence to support the jury's answer of $1.75 million. The components of the damages calculation — past and projected production rates, prices, and the time value of money — were all essentially undisputed at trial, and the result should have been a straightforward matter of mathematics, but the parties' respective experts disagreed on how the calculation was to be made. It appears to us that Salinas's expert's calculations failed to credit Coastal with interest on past payments it made, but the record is not entirely clear, and we cannot conclude that Coastal conclusively established that Salinas was not damaged by a delay in development, or that Salinas offered no evidence of the amount of such damages.

Finally, Coastal contends that the trial court erred in refusing to ask the jury whether by suing to invalidate the leases, Salinas repudiated them, thereby suspending Coastal's development obligation.

> The law is well-settled in Texas that "[l]essors who . . . wrongfully repudiate the lessees' title by unqualified notice that the leases are forfeited or have terminated cannot complain if the latter suspend operations under the contract pending a determination of the controversy and will not be allowed to profit by their own wrong." A lessor's repudiation of a lease relieves the lessee "from any obligation to conduct any operations, drilling, re-working, or otherwise, on said land in order to maintain the lease in force pending the judicial determination of the controversy . . . over the validity of the lease."[67]

But Salinas argues that this rule applies only when a lessee suspends operations because of lease disputes, which Coastal did not do. Indeed, Coastal drilled eight additional wells on Share 13. Salinas contends that in these circumstances Coastal cannot assert repudiation as a defense to its delay in development. The parties' disagreement is legal, not factual, and Coastal has not asked us to resolve it. Coastal argues only that it was entitled to a jury finding on repudiation. Since none of the material facts was in dispute, no finding was necessary.

Accordingly, we reject Coastal's arguments regarding the development covenant, though for reasons that follow, we conclude that Coastal is entitled to a new trial.

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[67] *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 157 (Tex. 2004) (footnotes omitted).

C

The Salinas leases authorized Coastal to pool "at its option" whenever "in [its] judgment" pooling was "necessary or advisable . . . in order properly to explore, or to develop and operate said leased premises in compliance with the spacing rules of the Railroad Commission of Texas." Salinas had no right to insist that Coastal exercise this broad discretion in any particular way, but Coastal was obliged to act in good faith,[68] which the jury found it failed to do. Coastal complains that there is no evidence to support that finding.

Coastal formed the M. Salinas Gas Unit to include the M. Salinas No. 2-V and No. 4 wells, thereby allowing the M. Salinas No. 8 to be drilled in the most advantageous location, closer to the No. 2-V than Commission Rule 37 would have permitted. Coastal was required to include some acreage outside Share 13 in the Unit but was free to determine the amount of that acreage and the size of the Unit. Coastal chose to make the Unit 80 acres in all, to include 7.357 acres from Share 12, and to include two wells on Share 13 but none on Share 12. As a result, Coastal owed Salinas royalties only on his pro rata share of production from the two wells — 72.643/80ths, or 90.80375%. Without the Unit, Salinas was due a royalty on all gas produced from both wells.

Salinas argues that Coastal should have included only one Share 12 acre in the Unit, providing him the same benefit — the M. Salinas No. 8 well — but more royalties — on 79/80ths, or 98.75%, of production. Coastal counters that it was not required to maximize the benefit to Salinas and disregard its own interests altogether, so long as it acted in good faith. As evidence of bad faith, Salinas points to Coastal's decision not to include the Coastal Fee No. 1 well in the Unit, which would have given Salinas a royalty on part of its production; the inclusion of the M. Salinas

[68] *Southeastern Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 170 (Tex. 1999) ("A lessee has no power to pool without the lessor's express authorization, which is usually contained in the lease's pooling clause. For pooling to be valid, it must be done in accordance with the method and purposes specified in the lease. A lessee's pooling decision will be upheld unless the lessee pools in bad faith." (citations omitted)); *id.* at 171 ("Beyond the express terms of the lease, a lessor has no power to direct a lessee in its good faith pooling decisions . . . .").

No. 4 well in the Unit, which was unnecessary to obtain favorable spacing for the M. Salinas No. 8 and freed Coastal from part of its royalty obligation; and the location of the M. Salinas No. 4 and No. 6 wells in less favorable locations to prevent drainage to the Coastal Fee No. 1 well. We agree with Salinas that this evidence supports the jury's finding.

The jury also found damages of $1 million, which the trial court reduced to $81,619, the total Salinas claimed. We would affirm the award except that we conclude, as we will explain, that there must be a new trial.

IV

We come finally to two procedural issues raised by Coastal.

A

Coastal contends that the trial court abused its discretion by admitting in evidence a 1977 internal memo regarding Share 13 title issues that referred to Salinas's predecessors as "mostly illiterate Mexicans", because under Rule 403 of the Texas Rules of Evidence, "the probative value [was] substantially outweighed by the danger of unfair prejudice". Coastal argues that the memo was irrelevant to any issue in the case, and that Salinas used it to inflame the all-Hispanic jury, as evidenced by their verdict, which included damage findings exceeding Salinas's claims, findings that Coastal's actions were malicious and criminal, and an assessment of $10 million punitive damages. Thus, Coastal argues that admission of the memo was reversible error.

Salinas offered the one-page memo to counter Coastal's position that any delay in development between 1993 and 1997 was due to Coastal's concerns that any further investment in the lease could be jeopardized by flaws in Salinas's title, and that provisions in the Share 15 leases could make it difficult to recoup royalties paid to the wrong owners. Since 1988, Share 13 owners

had been involved in litigation with the Share 15 owners over the boundary between the two tracts.[69] The dispute was not addressed in the 1977 memo; the memo instead dealt with uncertainties in determining the Share 13 owners' respective interests in the property. Referring to a title opinion that had been prepared, the memo explained:

> The complex problems encountered by [the title examiner] result from the fact that possession of these lands began over 200 years ago and the people in possession were mostly illiterate Mexicans and later Mexican-Americans who had large families, many estate problems, heirship problems and errors of all kinds involving surveys and resurveys, partitions and attempted partitions.

Noting "the complete absence of base record title," the title examiner had concluded that "it would be extremely difficult, in fact almost impossible, for third parties who were not grantees in the Share 13 Deed or claiming thereunder to prevail if they sued" Coastal. Thus, the memo recommended that Coastal "assume the calculated risk of drilling [a] well" on Share 13. If the well were a producer, the memo continued, Coastal could "file an interpleader suit and let the court decide which parties are entitled to royalties and the percentages." That is exactly what Coastal did. When the M. Salinas No. 1 well was completed in 1978, Coastal filed an interpleader action, joining the various Share 13 owners. An agreed judgment resolving all issues was rendered in 1982.

Salinas argues that the memo was relevant to show Coastal's willingness to develop Share 13 despite title problems, undercutting its argument that delays were due to concerns over the Share 15 litigation. Of course, if Coastal's view of the Share 13 owners' pre-1982 title problems were indeed relevant, the undisputed facts established, without any need to refer to the memo, that those problems were not enough to stop Coastal from drilling on Share 13. Moreover, Coastal's assessment of those problems in 1977 suggests nothing about its assessment of a completely unrelated boundary dispute with the Share 15 owners that resulted in litigation some eleven years

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[69] *Garza v. Maddux*, 988 S.W.2d 280 (Tex. App.–Corpus Christi 1999, pet. denied) (noting that the dispute over the tract had become clear by 1982, and thus, even if the discovery rule applied, limitations would bar plaintiffs' claim for deed reformation as a matter of law); *see supra* notes 6-8.

later. None of the issues discussed in the 1977 memo — the source of the title problems, the likelihood they could be exploited, and the risk of drilling — was remotely involved in the present case. Specifically, the source of the Salinas owners' long-since-resolved title problems had nothing whatever to do with this case. Salinas argues that the 1977 memo "form[ed] the foundation for Coastal's decision to side with" the Share 15 owners in that litigation "instead of remaining neutral", but it did no such thing. Nothing in the memo suggests what Coastal's position might be in another lawsuit years later. Even if the memo indicated a general approach to title problems that might have influenced Coastal's position in the Share 15 boundary dispute, that position was also a matter of record and needed no proof. The 1977 memo added nothing material to the trial. It had no probative value.

But it did present a clear danger of unfair prejudice. The phrase, "illiterate Mexicans" could certainly be read as derogatory and not merely an unfortunate phrase included in describing the failure to maintain a clear record of title. The trial judge, Hon. Mario E. Ramirez, Jr., overruled Coastal's objection with this peculiar caveat: "It doesn't particularly inflame me." One of the plaintiffs, Margarito Salinas, testified on direct examination by his lawyer to a different reaction:

> Q. Let me hand you what's been marked Plaintiff's Exhibit 40 [the 1977 memo]. Do you recognize what that is?
>
> A. Yes, I do.
>
> Q. It has already been admitted into evidence, but when you saw that, how did you feel, Mr. Salinas?
>
> A. I feel infuriated, insulted because my ancestors were — are insulted in this memo, and it makes me really, really mad.
>
> * * *
>
> Q. How did the rest of the family members feel when they heard or read that?
>
> A. Well, the same way. They feel hurt. They feel infuriated.
>
> Q. Do you feel this lawsuit was necessary?

A. Yes, I do.

Q. Why is that?

A. Because Coastal was taking advantage at every turn.

Q. Overall, what are your feelings about Coastal?

A. I feel that Coastal has done a lot of wrong to us. They hurt us a lot and that's about it.

At that point Salinas's lawyer handed the memo to the jury.[70]

This questioning of one of the plaintiffs had nothing to do with title problems and development delays. It had only to do with prejudice. Nothing else in the record reflects that Salinas had any legitimate purpose in introducing the memo. The memo was mentioned only twice in the evidence, once in the passage just quoted, and once earlier, when Salinas' counsel asked Coastal's corporate representative, Thomas Sandefur, to identify the memo. After Sandefur testified that he was not acquainted with the author or recipients named in the memo, counsel then read the memo aloud. Counsel asked no other questions about the memo, and it was never mentioned again until summation.

One of Coastal's lawyers, Jose E. Chapa, Jr., devoted his entire argument to the memo, stating in pertinent part:

> I came up here to talk to you about one thing. I came up here to talk to you about a departmental memo that referred to the term "illiterate Mexican." You heard Mr. Salinas testify that he was offended by the term "illiterate Mexican." I'm sure some of you may have been offended by the term "illiterate Mexican." I want to tell you that I'm offended by the term "illiterate Mexican." But I'm offended maybe for different reasons than the Plaintiffs are.
>
> I'm offended, number one, because it has no bearing. It has nothing to do with this lawsuit. And I'm offended because intelligent Plaintiffs' attorneys would try to insult your intelligence. We all know that our ancestors, our pioneering

[70] The court of appeals refused to consider the prejudicial effect of this testimony because Coastal failed to object to it. 166 S.W.3d 301, 324. Although Coastal failed to object and preserve any complaint about this testimony, we may still consider the testimony in resolving Coastal's argument regarding the relevance and prejudicial effect of the 1977 memo.

ancestors, were people that were more about the land and not people of the letter. The reason this came about is because this term was used and this term was offensive, but way back then our people knew the land. Our people knew things that pertained to the land. Our people knew cattle. Our people knew the game and the wildlife. Our people knew farming. Our people knew ranching. Nobody cared to read or to write. That wasn't an insult. That's just the way it was. We survived. And how did we survive? We survived through knowing the land, through using the land. That's how we were able to overcome.

The memo about the illiterate Mexican really about collaterally. It came about collaterally because a low level Coastal employee was ordered to do a title search. And in doing this, he wrote this opinion, this 50-page title opinion. And in this opinion he traced the land change back to even the King of Spain, back to the sovereign. He traced it back probably 200 years ago. And 200 years ago, ladies and gentlemen, I would almost guarantee you that 80 percent of the gringos were illiterate. The landed gentry was illiterate. And that's testified through and proven through a lot of these deeds if you check at the courthouse are marked with an "X", la marca. Back then not knowing how to read or write was not a thing of dishonor. Back then to place your mark on a piece of paper was your bond. It meant that you were going to abide by what you said. It meant that you were a man or a woman of honor. It meant that you were a person of the land, that knew the land and knew courage and knew survival.

Why have the Plaintiffs introduced this memo? Why have they done this? They've done this because they have no case. They've done this because the facts are against them. The Plaintiffs don't want you, ladies and gentlemen, to think about the facts. They just want you angry at us, angry at Coastal. They figure that if they can get you angry enough, then you are going to throw sound judgment out the window and that your decisions will be based on sentiment and not on reason. And we can't let them do that. To do that would break every rule of fairness that we stand for in this county and in this country. The Plaintiffs don't want an intelligent decision from you. The Plaintiffs just want you to punish us, to punish Coastal.

* * *

But I need to broach one other issue. Along with their lawyers, the Plaintiffs have been enriched in this case. "Nadie esta en la calle." Nobody is on the street, not the lawyers, not the Plaintiffs. You've heard that testimony. And they already have some, and they want more, and to give them more would just not be fair.

I am proud to be a Mexican American. I am proud to come from Mexican ancestry. I am proud to come from illiterate Mexican ancestry. That ancestry settled this country. That ancestry fought. That ancestry was courageous. And because of that ancestry, I'm here and a lot of us are here today.

In response, Salinas's counsel, Ramon Garcia, closed with the following:

Coastal is offended. First they are offended because of a memo that their own employees prepared, and it wasn't prepared way back then. It was prepared in 1977,

> not way back then. Now, they are offended — and I'm trying to talk about what they said. They already have some and now they are here wanting some more . . . .
>
> * * *
>
> Yeah, maybe at one time we were people of the land. But, you know, some of these people got educated. They learned how to read. They learned how to write. And the — you know, the thing about that memo is that it shows the attitude, the attitude on the part of the corporation. If you'll notice, the corporation did not bring in one person that received the memo, did not bring in the author of the memo to tell us what he really meant. No, they rely on . . . some of the lawyers that have nothing to do with this who are now coming in trying to explain something for this $10-billion corporation that didn't care enough to bring in the person that actually wrote the memo or received the memo so they can tell you what they really meant.
>
> Why are they referring to a — 1977 to illiterate Mexicans? Why not just call them owners of the land, owners of the royalty interest? What was so special? Why? Because they were trying to posture themselves. They were then trying to put themselves in a position of, who are we going to help. And you look at those memos. Are we going to help Mr. Coates [the Share 15 owner]? Oops. Are we going to help Mr. Coates up here, or are we going to help the [Salinases].

The evidence and argument establish that the only significance of the 1977 memo in the trial of this case was its use of the phrase, "illiterate Mexicans" to unfairly prejudice Coastal.

Evidentiary rulings are committed to the trial court's sound, not boundless, discretion. Because the significant danger of unfair prejudice presented by the memo substantially outweighed its probative value, which was zero, the trial court abused its discretion in admitting the memo in evidence. Salinas argues that Coastal waived its objection by addressing the memo in summation, but we have held that a party is entitled to explain or rebut evidence admitted over objection and is not required "to sit idly by and take its chances on appeal".[71] Salinas also argues that even if the memo should not have been admitted, the error was harmless because the memo was such a small part of the trial. But while the memo was mentioned only four times, we think the verdict shows that it was not without effect. Salinas asked for $544,000 damages for drainage; the jury found $1 million. Salinas asked for $81,619 damages for bad-faith pooling; the jury found $1 million. It is

[71] *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 4 (Tex. 1986).

hard to see how damage findings of more than three times the total Salinas *claimed* were products of reasoned deliberations. The findings clearly did not turn on any relevant evidence in the case; rather, they exceeded even Salinas's evidence and we think must have been due to the prejudicial effect of the memo on the jury. The jury also found by clear and convincing evidence that Coastal acted with malice, which the trial court defined as specific intent to cause substantial injury or conscious indifference to others' rights. They found beyond a reasonable doubt that Coastal was guilty of felony theft, the effect of which was to remove statutory limits on punitive damages,[72] which the jury assessed at $10 million. In all, reviewing the entire record, we believe the verdict indicates that the effect of the memo was clearly to inflame the jury.[73]

Salinas never used the memo in any relevant way, only in a way calculated to create unfair prejudice. We think Salinas succeeded. We therefore conclude that the trial court's abuse of discretion in admitting the 1977 memo was harmful error and requires a new trial.

B

Coastal also contends that this action, filed in 1997, should have been abated while an earlier action, filed in 1988, proceeded. The earlier action, to which we have previously referred, involved a dispute over the boundary between Share 13 and Share 15, as well as claims that Coastal, the operator on Share 15, was draining Share 13 in that direction and had failed to develop Share 13. Most but not all of the plaintiffs in both cases were the same, and some of the defendants, including Coastal, were the same. In sum: the boundary claim in the earlier case had nothing to do with this case, the drainage claims in the two cases were legally similar but factually distinct, the development claims were more closely related but not identical, and the parties overlapped but were not the same.

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[72] *See* TEX. CIV. PRAC. & REM. CODE § 41.008.

[73] *See also Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 889-890 (Tex. 1975) (holding in a condemnation case that admission of "highly inflammatory" photos of the carcasses of livestock and pets killed in a natural gas pipeline rupture near the landowners' property "were not calculated to aid the jury in its understanding of the case" and "must be construed as an attempt to appeal to the prejudice and passion of the jury", which "was reasonably calculated to cause and probably did cause the rendition of an improper judgment.").

We have held that a later-filed suit must be abated "[w]hen there exists a complete identity of parties and controversies" between it and a earlier suit.[74] Otherwise, "[a]batement of a lawsuit due to the pendency of a prior suit is based on the principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues",[75] matters committed to the sound discretion of the trial court in the first instance.[76] Coastal has provided no basis for us to conclude that the trial court in this case abused its discretion.

* * * * *

We reverse the court of appeals' judgment, render judgment that Salinas take nothing on his claims for trespass and breach of the implied covenant to protect against drainage, and remand the remainder of the case for a new trial.

Nathan L. Hecht
Justice

Opinion delivered: August 29, 2008

[74] *Dolenz v. Continental Nat'l Bank*, 620 S.W.2d 572, 575 (Tex. 1981).

[75] *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988).

[76] *Dolenz*, 620 S.W.2d at 575.