IN THE SUPREME COURT OF TEXAS

NO. 05-0466

COASTAL OIL & GAS CORPORATION 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 JOHNSON, joined by CHIEF JUSTICE JEFFERSON, and by JUSTICE MEDINA as to Part I, concurring in part and dissenting in part.

I join the Court's opinion except for Part II-B. As to Part II-B, I would not address whether the rule of capture precludes damages when oil and gas is produced through hydraulic fractures that extend across lease lines until it is determined whether hydraulically fracturing across lease lines is a trespass. As to Part IV-A, I agree that admission of the 1977 memorandum constituted error and was harmful, but I would hold that a harm analysis is not necessary because admission of the memorandum was incurable error.

I. Rule of Capture

The rule of capture precludes liability for capturing oil or gas drained from a neighboring property "whenever such flow occurs solely through the operation of natural agencies in a normal

manner, as distinguished from artificial means applied to stimulate such a flow." *Peterson v. Grayce Oil Co.*, 37 S.W.2d 367, 370-71 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 98 S.W.2d 781 (Tex. 1936). The rationale for the rule of capture is the "fugitive nature" of hydrocarbons. *Halbouty v. R.R. Comm'n*, 357 S.W.2d 364 (Tex. 1962). They flow to places of lesser pressure and do not respect property lines. The gas at issue here, however, did not migrate to Coastal's well because of naturally occurring pressure changes in the reservoir. If it had, then I probably would agree that the rule of capture insulates Coastal from liability. But the jury found that Coastal trespassed[1] by means of the hydraulic fracturing process, and Coastal does not contest that finding here.[2] Rather, Coastal contends that a subsurface trespass by hydraulic fracturing is not actionable. In the face of this record and an uncontested finding that Coastal trespassed on Share 13 by the manner in which it conducted operations on Share 12, I do not agree that the rule of capture applies. Coastal did not legally recover the gas it drained from Share 13 unless Coastal's hydraulic fracture into Share 13 was not illegal. Until the issue of trespass is addressed, Coastal's fracture into Share 13 must be considered an illegal trespass. I would not apply the rule to a situation such as this in which a party effectively enters another's lease without consent, drains minerals by means of an artificially created

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[1] *See* Laura H. Burney & Norman J. Hyne, *Hydraulic Fracturing: Stimulating Your Well or Trespassing?*, 44 ROCKY MTN. MIN. L. INST. 19-1, 19-45 (1998) ("Under both common law and modern definitions, a trespass occurs if a 'thing' physically crosses property boundaries. . . . [T]his definition is satisfied when fracing extends beyond lease or unit lines.").

[2] As the Court notes, Coastal drilled the Coastal Fee No. 1 approximately 467 feet from the lease lines to the north and east. That made the well less than 700 feet from the lease lines north of the well through those east of it. Coastal knew it was going to hydraulically fracture the well because all the wells producing from the Vicksburg T were fracture-treated. The fracture operation on the well was designed to cause fractures to extend over 1000 feet from the well and force proppant into them to keep them open. There was disagreement as to whether the effective length of the fractures extended into Share 13. The jury resolved that in favor of Salinas.

channel or device, and then "captures" the minerals on the trespasser's lease. *See id.* at 375 (limiting the rule of capture to oil and gas that is legally recovered); *see also SWEPI, L.P. v. Camden Res., Inc.*, 139 S.W.3d 332, 341 (Tex. App.—San Antonio 2004, pet. denied).

In considering the effects of the rule of capture, the underlying premise is that a landowner owns the minerals, including oil and gas, underneath his property. *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948). In *Halbouty*, this Court succinctly harmonized this property rule with the rule of capture:

> To infer that the rule of capture gives to the landowner the legally protected right to capture the oil and gas underlying his neighbor's tract is entirely inconsistent with the ownership theory. To harmonize both rules, the rule of capture can mean little more than that due to their fugitive nature, the hydrocarbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage. That is to say that since the gas in a continuous reservoir will flow to a point of low pressure the landowner is not restricted to the particular gas that may underlie his property originally but *is the owner of all that which he may legally recover*.

357 S.W.2d at 375 (emphasis added). Coastal concedes that gas must be legally produced in order to come within the rule of capture. *See also Elliff*, 210 S.W.2d at 562-63 ("[E]ach owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by *lawful* operations conducted on his own land.") (emphasis added) (citing 1 W.L. SUMMERS, OIL AND GAS § 63 (Perm. ed.)); *Commanche Duke Oil Co. v. Tex. Pac. Coal & Oil Co.*, 298 S.W. 554, 559 (Tex. 1929) ("[O]ne owner could not properly erect his structures, surface or underground, in whole or part beyond the dividing line, and thereby take oil on or in the adjoining tract, or induce that oil to come onto or into his tract, so as to become liable to capture there or prevent the owner of the adjoining tract from enjoying the benefit of such oil as

might be in his land or as might come there except for these structures."). The key word is "legally." Without it, the rule of capture becomes only a license to obtain minerals in any manner, including unauthorized deviated wells, and vacuum pumps and whatever other method oilfield operators can devise.

Today the Court says that because Salinas does not claim the Coastal Fee No. 1 well violates a statute or regulation, the gas that traveled through the artificially created and propped-open fractures from Share 13 to the well "simply does not belong to him." But that conclusion does not square with the underlying rationale for the rule of capture as we expressed it in *Halbouty*, and as seems only logical and just: an operator such as Coastal owns the oil and gas that is *legally* captured. *See Halbouty*, 357 S.W.2d at 375. And "legally" should not sanction all methods other than those specifically prohibited by statute or rule of the Railroad Commission. It simply cannot be a legal activity for one person to trespass on another's property. *See* BLACK'S LAW DICTIONARY 522 (7th ed. 1999) (defining "legal duty" as a "duty arising by contract or by operation of law; an obligation the breach of which would be a legal wrong [such as] the legal duty of parents to support their children"); *Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936) (noting that a trespasser is one who enters upon the property of another without any right, lawful authority, or express or implied invitation). The question the Court does not answer, but which it logically must to decide this case, is whether it was legal for Coastal to hydraulically fracture into Share 13. The answer to the question requires us to address Coastal's primary issue: does hydraulic fracturing across lease lines constitute subsurface trespass.

We have held that a trespass occurs when a well begun on property where the operator has a right to drill is, without permission, deviated so the well crosses into another's lease. *See Hastings Oil Co. v. Tex. Co.*, 234 S.W.2d 389 (Tex. 1950). Coastal argues that there are differences between taking minerals from another's lease through fracturing and taking them by means of a deviated well. Maybe there are, even though both involve a lease operator's intentional actions which result in inserting foreign materials without permission into a second lease, draining minerals by means of the foreign materials, and "capturing" the minerals on the first lease. The question certainly is not foreclosed. *See Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 414 (Tex. 1961); Terry D. Ragsdale, *Hydraulic Fracturing: The Stealthy Subsurface Trespass*, 28 TULSA L. J. 311, 339 (1993) (noting that "[f]rom both a functional and physical perspective, a hydraulic fracture is largely analogous to a directionally drilled well"). In *Gregg*, 344 S.W.2d at 414-15, we suggested that sand fracturing may constitute a trespass, and in *Railroad Commission of Texas v. Manziel*, 361 S.W.2d 560, 567 (Tex. 1962), we implied that subsurface trespasses are not different from other trespasses.

To differentiate between a deviated well and a fractured well, the Court says that gas extracted from a neighboring lease through a deviated well is not subject to the rule of capture for two reasons: the neighbor cannot protect from such drainage by drilling a well, and there is no uncertainty that the deviated well is producing another owner's gas. I fail to follow the Court's logic. As to the first reason, the neighbor can protect from either a fracture extending into the neighbor's property or a deviated well. Both simply provide the means for gas to flow to an area of lower pressure and from there to the drilling operator's property where it is captured. The only difference is the degree of drainage that can be prevented by offset wells, and a fracture's exposure to the

reservoir may be greater than that of the deviated well and thus drain more gas. As to the second reason, the purpose of both a deviated well and a hydraulic fracture is for gas to flow through them to be gathered at a distant surface. Coastal fractured its well so gas would flow through the fractures to the wellbore, and no one contends that gas did not do so. The evidence showed that the effective length of a fracture can be fairly closely determined after the fracture operation. Coastal's expert testified that the effective length of the fractures (that length through which gas will flow) did not extend into Share 13, while Salinas's expert opined that it did. As in most trials, the jury was called upon to resolve the conflicts in testimony. It resolved them in favor of Salinas. In sum, the jury decided that part of the gas produced from Coastal Fee No. 1 was a result of the channel created by Coastal's fracturing into Share 13. There was evidence to support the finding.

The Court gives four reasons "not to change the rule of capture" to allow a cause of action for drainage accomplished by hydraulic fracturing beyond lease lines. I disagree with some of the four reasons,[3] but my fundamental disagreement is not with the reasons the Court gives. My fundamental disagreement is with the Court's premise that its decision is *not a change* of the rule of capture. I believe the Court is changing the rule, and I would not do so.

The Court says that mineral owners and lessors aggrieved by drainage because of hydraulic fracturing have numerous alternative remedies such as self help, suits against their lessee, offers to

[3] The Court also says that proving the value of oil and gas drained by hydraulic fracturing deep under the ground is difficult. But similarly, proving the value of damages from breach of the implied covenant to protect from drainage requires expert testimony about a hypothetical well that should have been drilled to protect the lease, and calculation of the hypothetical effects that hypothetically would have taken place deep underground. *See Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 254 (Tex. 2004). Difficulty in proving matters is not a new problem to trial lawyers. Besides, Coastal does not mount an evidentiary challenge to the jury findings.

pool, and forced pooling. That is true in many cases, as witnessed by the amici briefs. But not all property owners in Texas are knowledgeable enough or have the resources to benefit from those remedies. The rules of ownership and capture apply to them, also. Amici and the Court reference the importance of hydraulic fracturing to development of the Barnett shale field and other mineral interests in Texas. Who could quarrel with the facts? But those reports in many instances refer to mineral leasing and royalty payment benefits being received by small property owners, in many cases so small as to be single-family residence owners. Today's holding reduces incentives for operators to lease from small property owners because they can drill and hydraulically fracture to "capture" minerals from unleased and unpooled properties that would otherwise not be captured. Today's holding effectively allows a lessee to change and expand the boundary lines of its lease by unilateral decision and action—fracturing its wells—as opposed to contracting for new lease lines, offering to pool or utilizing forced pooling, or paying compensatory royalties. Such a situation is exemplified by the facts facing this Court in *Gregg*. 344 S.W.2d 411. Gregg had a small lease surrounded by mineral interests owned by Delhi-Taylor. *Id.* at 412. Gregg planned to "expand" his lease by fracing a well and recovering minerals that he would not have been able to recover otherwise because of the tight gas formation. *Id.* The problem was that he was going to be recovering some of the minerals from Delhi-Taylor's part of the reservoir. *Id.* We did not have difficulty recognizing that Gregg's fracing into Delhi-Taylor's minerals, if it occurred, potentially was a trespass that the courts could enjoin. *Id.* at 416.

Additionally, not all property owners in Texas may benefit from the remedies the Court mentions. For example, the Court references the Mineral Interest Pooling Act, and says that if an

owner's offer to pool is rejected, the owner may apply to the Railroad Commission for forced pooling. *See* TEX. NAT. RES. CODE §§ 102.001-.112. But it is not clear that royalty owners such as Salinas can do so. *See id.* § 102.012; *R.R. Comm'n of Tex. v. Coleman*, 460 S.W.2d 404 (Tex. 1970) (interpreting predecessor statute).

The Court, Coastal, and amici reference the importance of hydraulic fracturing to the development of mineral interests in Texas, and raise valid concerns about the effect on mineral production if hydraulic fracturing subjects the fracturing operator to exemplary damages.[4] Just as a clean slate is not presented as to whether the rule of capture applies here, we do not have a clean slate in regard to mineral recovery operations and related considerations. In *Manziel*, this Court considered the legitimacy of salt water injection recovery operations authorized by the Railroad Commission. 361 S.W.2d 560. The public policy pronouncements set out in *Manziel* are applicable to techniques, such as hydraulic fracturing, that allow for more efficient and fuller recovery of diminishing mineral resources:

> The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources. If the intrusions of salt water are to be regarded as trespassory in character, then under common notions of surface invasions, the justifying public policy considerations behind secondary recovery operations could not be reached in considering the validity and reasonableness of such operations. See: Keeton and Jones: 'Tort Liability and the Oil and Gas Industry II,' 39 TEX. LAW REV. 253 at p. 268. *Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities*

[4] Amici uniformly predict dire consequences if hydraulic fracturing of wells is subject to trespass liability standards. No brief offers support for the position that fracturing will affect drilling anywhere but in close proximity to lease lines. The briefs do not offer actual numbers, statistics, or even "educated guesses" directed to how many wells or locations would be affected.

> *in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.*

361 S.W.2d at 568 (emphasis added).

The Legislature has made it the policy of this state to encourage secondary recovery of minerals, *Manziel*, 361 S.W.2d at 570, and has declared that waste in the production of oil and gas is unlawful. TEX. NAT. RES. CODE §§ 85.045, 86.011. Waste includes "physical waste or loss incident to or resulting from drilling, equipping, locating, spacing, or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of oil or gas from any pool." *Id.* § 85.046(6). *See also id.* § 86.012(5).

Courts have long protected the interests of mineral lessors by imposing duties on lessees in regard to protection and development of leases. *Grubb v. McAfee*, 212 S.W. 464, 465 (Tex. 1919). Technology and the leasing process have developed through the years, but the law continues to support the goals of mineral lessors and society. It does so, in part, by implying covenants in leases that enhance exploration for and recovery of minerals and protect lessors' goals in executing leases.[5]

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[5] One commentator has categorized the major implied covenants as follows:

(A) Implied covenants to develop the leases.
  (1) To drill an initial well.
  (2) To reasonably develop the lease after production has been acquired.
(B) Implied covenants of protection.
  (1) To protect against drainage.
  (2) Not to depreciate the lessor's interest.
(C) Implied covenants relating to management and administration of the lease.
  (1) To produce and market.
  (2) To operate with reasonable care.
  (3) To use successful modern methods of production and development.
  (4) To seek favorable administration action.

R. HEMINGWAY, THE LAW OF OIL AND GAS § 8.1 (1971).

Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 567 (Tex. 1981). One such duty of lessees encompassed within the covenant to manage and administer the lease is a duty to use modern methods of production. *See id.* n.1. Manifestly, this is an area in which policy decisions predominate and in which the Legislature and Railroad Commission have the resources and expertise to provide rules and adjust equities among the various interests. Nevertheless, the law is flexible enough to balance the interests of society as to energy availability, the inability of producers to recover certain minerals in an economically viable manner absent use of methods such as hydraulic fracturing and the rights of individual mineral owners. *See Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979) (noting that the genius of the common law lies in its ability to recognize when a rule needs to be modified to better serve the needs of society). Even if it were to be decided that hydraulic fracturing is subject to traditional trespass rules, equitable considerations are proper in determining the availability of damages for trespass related to the recovery of minerals, just as equitable considerations resulted in implied covenants protecting and promoting goals of mineral leases and lessors. *See Bender v. Brooks*, 127 S.W. 168, 170-71 (Tex. 1910) ("The controversy arises over the method by which the rights of the parties shall be adjusted . . . . The law will determine the rights of the parties, but equity will adjust the account between them."); *Hunt v. HNG Oil Co.*, 791 S.W.2d 191, 193 (Tex. App.—Corpus Christi 1990, writ denied).

In balancing the interests involved here, it seems that even if hydraulic fracturing is subject to trespass law, precluding recovery of *exemplary* damages for a trespass through a hydraulic fracture could be deemed reasonable. For example, the testimony in this case reveals that although the fracture length of an operation can be estimated before the job is done, the effective length—the

length of the fracture through which gas will flow—cannot. Because there are clearly difficulties and technological limitations in these expensive but necessary operations, the law should be flexible in considering them. Preclusion of exemplary damages would be one way to minimize discouraging the use of advances in technology and recovery techniques, yet leave in place protection for rights of individual mineral owners to their property. A possible consideration for precluding exemplary damages if hydraulic fracturing were subject to trespass law could be the defense that, in light of industry standards at the time, a reasonably prudent lessee could have believed the fracturing operation was necessary to economically recover the minerals from the lessee's estate.

Whatever the result, I would decide the trespass issue.

II. The 1977 Memorandum

Turning to the 1977 memorandum, Coastal moved for its exclusion prior to trial in a separate trial brief as well as during trial, yet the trial court admitted it. The offensive sentence referencing "illiterate Mexicans," along with most of the rest of the memorandum, was read to the jury when Salinas's counsel examined Coastal's corporate representative. The memorandum was discussed again when Salinas's counsel asked plaintiff Margarito Salinas how the language of the memorandum made him feel. He testified that he and his other family members felt infuriated and insulted when they saw it because it insulted his ancestors. The court then granted Salinas's counsel's request to publish the exhibit to the jury.

The memorandum came up again in closing argument. As set out in the Court's opinion, Coastal's counsel argued that it was an attempt to inflame the jury: "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." Coastal's argument on the issue clearly was an attempt to defuse the problem created by the offensive evidence and testimony.

Texas Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Balancing the probative value of the evidence against the risk of unfair prejudice, like other evidentiary rulings, is left to the trial court's discretion. *See Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000). In this instance, the inflammatory nature of the language was apparent and had no relevance to any issue being tried.

Salinas focuses on the relevance of the document to land title issues. Salinas also claims that the document was not unfairly prejudicial to Coastal, the cases Coastal cites are irrelevant because they concern jury arguments, and it was Coastal, not Salinas, that made a plea for racial unity. I am not persuaded.

The attorneys who prepared and tried this case were probably in the best position to predict the memorandum's inflammatory effect on the jury. We have recognized that one method of measuring the prejudicial impact of evidence is to consider "the efforts made by counsel to emphasize the erroneous evidence." *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). The extent and intensity of opposing counsel's attempts to exclude the evidence, and failing exclusion, to neutralize its effects, should also be considered. *Id.* Coastal's attorneys saw the potential effect of the offensive language and tried on multiple occasions to exclude it from evidence. Salinas's counsel, on the other hand, never offered the memorandum without the offensive

language and made sure that the memorandum was woven into the fabric of the trial. Further, although Salinas's attorney did not mention the memorandum's offensive language in his argument, one of Coastal's two attorneys who gave closing argument devoted his entire argument to the memorandum in a clear attempt to diminish its effect. Coastal's attorney referenced "gringos," stated that he was offended by the term "illiterate Mexicans," and spoke in Spanish to the jury when arguing that the jury should not accept Salinas's invitation "to throw sound judgment out the window." Salinas's counsel then addressed the memo in rebuttal argument with a less-than-subtle ethnicity-based appeal to the all-Hispanic jury:

> 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 these paid experts like Rick Garza who got paid 50,000 to prepare a map, or 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?*

(emphasis added).

Paraphrasing what we said in *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 472 (Tex. 2005), the harm of this evidence is manifest. The memorandum was intended to and did inject racial prejudice into the trial. The question we are bound to address related to our system of justice is how to best minimize the number of cases that appear to be or are tried under the cloud of mistrust that

admission of this type of evidence engenders. One commentator has addressed the problem as follows:

> It is important to recognize that rejection of race, religion and sex as classifications in rulings on relevance is not based entirely on the notion that there can be no logical distinctions resting on these bases; instead, it rests on the belief that in a multi-cultural society like ours, fairness in adjudication does not consist entirely in the accuracy of the factual determinations but may require some sacrifice of accuracy to avoid the suspicion that the decision rests on prejudice disguised as science. . . . Trial judges can expect much less leeway in appellate review of relevance rulings that involve such classifications.

CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5179 (1978).

This Court has long recognized that it is not acceptable advocacy to attempt to inflame the jury with irrelevant evidence of or reference to such "hot-button" matters as sex, race, ethnicity, nationality, or religion. Texas courts have not hesitated to treat such irrelevant evidence and comments as incurable error. *See Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979) ("The injection of new and inflammatory matters into the case through argument has in exceptional cases been regarded as incurable by an instruction. An appeal to racial prejudice falls into the category."); *Tex. Employers' Ins. Ass'n v. Haywood*, 266 S.W.2d 856, 858 (Tex. 1954) (holding that although inflammatory argument is usually regarded as "curable," racist argument "was so inflammatory and prejudicial that its harmfulness could not have been eliminated by either retraction or instruction"); *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 863 (Tex. App.—San Antonio 1990, writ denied) ("[I]ncurable reversible error occurs whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant

or a witness because of race or ethnicity."); *Penate v. Berry*, 348 S.W.2d 167, 168-69 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (finding that argument appealing to nationality prejudice was incurable error); *Tex. Employers' Ins. Ass'n v. Jones*, 361 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.) (prejudicial argument referring to religion of witness was incurable error); *Basanez v. Union Bus Lines*, 132 S.W.2d 432, 432-33 (Tex. Civ. App.—San Antonio 1939, no writ) (stating that comments that plaintiffs were Mexicans and defendant was "one of our citizens" were reversible error).

We recently held, in the context of jury argument, that some matters are not subject to harmless error analysis because they strike "at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts." *Living Ctrs. of Tex., Inc. v. Peñalver*, 256 S.W.3d 678, 681 (Tex. 2008). We held that such matters are "incurably harmful not only because of [their] harm to the litigants involved, but also because of [their] capacity to damage the judicial system." *Id.* We gave, as the paradigm example of such incurable error, "appeals to racial prejudice [that] adversely affect the fairness and equality of justice rendered by courts because they improperly induce consideration of a party's race to be used as a factor in the jury's decision." *Id.* I would apply the same analysis where appeal to racial prejudice is made though admission of documentary evidence. And, I would hold that pleas for ethnic solidarity or racial prejudice are unacceptable even when not made in explicit terms. *See Freedom Newspapers of Tex. v. Cantu*, 168 S.W.3d 847, 857 (2005).

In this case, the offensive language could have been redacted. While a redaction probably would have drawn jurors' attention to the redaction and might have caused confusion or misinterpretation, redactions or other methods of screening irrelevant and passion-inducing evidence

are better than allowing admission of evidence that distorts the fact-finding process. The term "illiterate Mexicans" may have been one of historical fact rather than a racial slur. But even if the words were originally intended to be only historical fact, at the present time the phrase undoubtedly induces strong feelings along racial lines. And as to the argument that Coastal did not object timely to Margarito Salinas's testimony about how the memorandum made him and his family feel, a major part of the damage would have been accomplished by the mere asking of the question and Coastal's making an objection. An objection would have highlighted the language as well as the fact that Coastal recognized its offensive nature.

Salinas has not claimed that the offensive phrase was relevant to an issue regarding race, such as discrimination, or that Coastal's damage causing actions were racially motivated. The trial court or Salinas's lawyers could have found some way to introduce the contents of the memorandum without introducing the racially oriented language if they truly felt the memorandum's contents were relevant for some purpose other than arousing racial prejudice. For example, they could have redacted the offensive language, or read the memorandum's contents into the record minus the offending language. Admitting the memorandum in its entirety made all its contents part of the trial. It was used to examine witnesses, was published to the jury, was available for counsel to reference during trial and jury argument, and was available for the jurors to review during their deliberations.

I would hold that a harm analysis is unnecessary. Intentional introduction of evidence such as the memorandum with its offending phrase affects not only the particular case in which it is admitted, but also sets a precedent and strikes at the appearance of and actual impartiality, equality, and fairness of justice rendered in our judicial system. I would hold that admission of the

memorandum requires reversal and remand for a new trial without conducting a harm analysis. *See Living Ctrs.*, 256 S.W.3d at 680-81.

I would not hold that the rule of capture applies to gas produced from Share 13 by means of the hydraulic fracture. I would not render judgment for Coastal on the trespass claim based on the rule of capture and would consider Coastal's issue as to whether hydraulic fracturing can constitute a subsurface trespass. I agree that the 1977 memorandum requires the case to be reversed. Otherwise, I join the Court's opinion and agree that the case must be remanded for a new trial.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 29, 2008