

IN THE SUPREME COURT OF TEXAS

No. 04-1118

CITY OF SAN ANTONIO, PETITIONER,

v.

CHARLES POLLOCK AND TRACY POLLOCK, INDIVIDUALLY AND AS NEXT FRIENDS
OF SARAH JANE POLLOCK, A MINOR CHILD, RESPONDENTS

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

Argued October 18, 2006

JUSTICE MEDINA, joined by JUSTICE O'NEILL, dissenting.

The Pollocks claim that Sarah's leukemia was caused by her *in utero* exposure to benzene, which had migrated from the West Avenue landfill into their home. The claim rests on the testimony of two expert witnesses: Dr. Mahendra Patel, a pediatric oncologist and Sarah Pollock's treating physician, and Daniel Kraft, a petroleum engineer with extensive experience in the design, construction, and post-closure maintenance of landfills. Kraft gave his opinion about the amount of benzene in the Pollock home, and how it got there. Dr. Patel testified that Sarah's mother's exposure to benzene during pregnancy caused chromosomal damage, and Sarah's acute lymphoblastic leukemia (ALL). Dr. Patel's opinion was based on a review of the scientific literature

on the subject, his differential diagnosis, his treatment of Sarah, and Sarah's chromosomal injury that he described as a unique fingerprint of benzene exposure and damage *in utero*.

The City concedes that methane and benzene migrated from its landfill into the surrounding community. The City also does not contest the underlying science relied on by Dr. Patel or the dangers of exposure to benzene, a known carcinogen. Instead, the City contends that analytical gaps in the testimony of both experts render their respective opinions conclusory. The Court eventually agrees after delving into the underlying science. The Court analyzes the relationship between methane and benzene, the respective physical properties of both gasses, benzene's relationship to certain types of leukemia and chromosomal damage, and the respective testimony of both experts. Most significantly, however, the Court concludes that the City did not have to object or point out these analytical gaps in the trial court to preserve error. I respectfully disagree.

As a general rule, an objection is required to preserve error regarding the admission of evidence, and expert testimony is no exception. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a)(1); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). Without an objection, a trial court simply cannot be expected to fulfill its role as gatekeeper. Nor can an appellate court assume this role, particularly after the witnesses have testified, been dismissed, and the record closed. Nevertheless, the Court here assumes the role of gatekeeper *ex post facto*, allowing the City to complain about analytical gaps for the first time on appeal. Because the City did not object to the reliability of either expert witness in the trial court or complain about the analytical gaps it now details in this appeal, I would hold that the complaint has been waived.

I

I agree, however, that analytical gaps can undermine the reliability of an expert's opinion. The Supreme Court said as much in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), observing that courts do not have to focus entirely on the reliability of the underlying methodology or technique as in *Daubert*,¹ but are free to test reliability by analyzing whether the expert's opinion fits the facts of the case:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence . . . connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146; *see also* Richard O. Falk & Robert O. Hoffman, *Beyond Daubert and Robinson: Avoiding and Exploiting "Analytical Gaps" in Expert Testimony*, 33 THE ADVOCATE 71, 72 (Winter 2005).

The Supreme Court also has recognized that the trial court's role as gatekeeper, like other rulings on the admission of evidence, is a discretionary decision subject to review only for an abuse of that discretion. *Joiner*, 522 U.S. at 142-43.

This Court soon followed *Joiner*, concluding in *Gammill v. Jack Williams Chevrolet, Inc.*, that an expert's opinion can be unreliable if there is too great an analytical gap between the underlying data and the expert's opinion.² 972 S.W.2d 713, 727 (Tex. 1998). We cautioned,

¹ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

² One observer has suggested that analytical gaps are of two types: "(1) the underlying data-facts gap, which focuses on material variances between the data underlying the expert opinion and the actual facts of the plaintiff's case; and (2) the methodology-conclusion gap, which focuses on whether the expert properly explains how the

however, that the trial court's job was not to determine whether an expert's conclusions were correct, but only whether the analysis used to reach them was reliable. *Id.* at 728. We further noted that the trial court's gatekeeper decisions in this regard were to be reviewed under the abuse of discretion standard. *Id.* at 727.

A trial court, however, cannot abuse its discretion if it is never asked to exercise it. Thus, to preserve a no-evidence complaint that expert testimony is unreliable, a party must object in the trial court. *See Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409-10 (Tex. 1998) (objection made after jury verdict was too late); *see also Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005) (objection must be made when deficiency becomes apparent); *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004) (motion to strike made immediately after cross-examination held timely). But an objection is not invariably required; there is a limited exception to the general rule.

When the expert's testimony is speculative or conclusory on its face, a party does not have to object to its admissibility to complain that the expert's naked opinion is no evidence. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) ("bare conclusions—even if unobjected to—cannot constitute probative evidence"). It is obviously important then to distinguish unreliable expert testimony from conclusory expert testimony because the former requires a timely objection, while the latter does not. What then separates the conclusory from the merely unreliable?

methodology was applied to the plaintiff's facts in arriving at the conclusion." Kimberly S. Keller, *Bridging the Analytical Gap: The Gammill Alternative to Overcoming Robinson & Havner Challenges to Expert Testimony*, 33 ST. MARY'S L.J. 277, 310 (2002).

The distinction apparently is the difference between something and nothing. As the Court recently explained in *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008): An expert’s testimony is conclusory if the expert merely gave an unexplained conclusion or asked the jury to “take my word for it” because of his status as an expert. *Arkoma* concluded that an expert’s opinions were not conclusory even though the expert’s foundational data was not in the record, and it was not entirely clear how the expert had reached his conclusions. We wrote:

[The expert’s] testimony could have been a lot clearer; his references to “up here” and “right there” on slides and posters used at trial often make it hard to tell what he is talking about. But we cannot say on this record that his opinions were unreliable or speculative. Nor were they conclusory as a matter of law; [the expert] did not simply state a conclusion without any explanation, or ask jurors to “take my word for it.” It is true that without the foundational data in the appellate record, we cannot confirm that “cash off my runs ... divided by mcf” yielded the \$1.62, \$1.41, \$1.43, and \$1.59 prices he calculated as the low range for damages. But experts are not required to introduce such foundational data at trial unless the opposing party or the court insists.

Id. at 389-90 (footnotes omitted). *Arkoma* further explained when a party should object to preserve error:

Texas law requires an objection to expert testimony before or during trial if the objection “requires the court to evaluate the underlying methodology, technique, or foundational data,” but no objection is required if the complaint “is restricted to the face of the record,” as when the complaint is that an opinion was speculative or conclusory on its face, or assumed facts contrary to those on the face of the record.

Id. at 388 (footnote omitted) (citing *Coastal Transp. Co.*, 136 S.W.3d at 233). Thus, an objection is not required to preserve an appellate complaint about an expert’s naked conclusions, but if the expert purports to rely on something more than his credentials or reputation, an objection is necessary. This

exception is rarely applied, probably because naked conclusions ordinarily draw immediate objections.

The exception was applied in *Coastal*, however. In that case, Coastal failed to object to the following testimony from a trucking-safety expert regarding gross negligence:

Q: When viewed objectively from Coastal's point of view at the time of the September '93 incident, in your opinion, did Coastal's failure to stop using probes that could have [sensor failure] problems, did that involve a high degree of risk, considering the probability and magnitude of the potential harm to others?

A: Yes, it did, very high.

Q: In your opinion, did Coastal have an actual subjective awareness of the risk involved in failing to stop using probes that can have [sensor failure] problems?

A: Yes, again and again.

Q: And in your opinion, did Coastal nevertheless proceed with conscious indifference to the rights, safety, or welfare of others?

A: That's the only conclusion I can draw.

Id. at 231. Distinguishing a no-evidence reliability complaint from a no-evidence conclusory complaint, we said that an expert's "bare conclusions—even if unobjected to" are not probative evidence. *Id.* at 233. We thus drew a "distinction between no evidence challenges to the reliability of expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert and no evidence challenges to conclusory or speculative testimony that is non-probative on its face." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex. 2004) (citing *Coastal Transp. Co.*, 136 S.W.3d at 233).³ *Coastal* did not involve a reliability challenge requiring

³ The Court suggests that *Ramirez* concerned only a conclusory challenge, but the case also involved a reliability complaint. One significant issue in the case was when the left rear wheel on the Volkswagen came off its axle. *Ramirez*, 159 S.W.3d at 902. Edward Cox, the plaintiff's metallurgical expert at trial, testified that a defective bearing caused the wheel to separate from the axle. *Id.* at 910. Cox "was not offered as an accident reconstructionist to help establish when . . . the defect caused the accident," and the Court rejected his "limited opinions on the

an objection in the trial court because there was nothing for the trial court to evaluate; the expert did not purport to use any methodology, technique, or foundational data but rather merely delivered his subjective opinion concerning Coastal's gross negligence. That is not the present case.

In rendering his opinion, Kraft, the landfill engineer, used a generally accepted Environmental Protection Agency ("EPA") landfill air model,⁴ testimony regarding odors in the Pollock home indicative of the presence of organic hydrocarbons, such as benzene, the City's gas monitoring records, a physical site inspection, and two decades of historical geologic records and maps. Because no benzene readings had actually been taken at the Pollock home, Kraft relied on, among other things, a 1998 benzene reading from a sealed monitoring well known as GMP-9A. This well was in the landfill 100 feet from the Pollock home and 128 feet underground. Although the reading at GMP-9A was taken more than four years after Sarah's alleged *in utero* exposure in 1993, Kraft concluded that the benzene levels in the Pollock home would have been equal to or greater than that of a sample taken from the well in 1998, that being, 160 ppb (parts per billion) benzene.

The City argues that Kraft's opinion is conclusory because he does not explain how the benzene concentration level in the Pollock home can be the same as that in a sealed testing well. Although Kraft's opinions were predicated on various reports and an EPA landfill gas emissions

causation issue" as conclusory. *Id.* at 910-11. When the Court says here that there was no objection, it is referring to Cox's testimony. *See* ___ S.W.3d at ___ & n.27. Volkswagen objected to the testimony of Ronald Walker, the plaintiff's accident reconstructionist, and that testimony was analyzed by the Court under "the standards of reliability." *Id.* at 904. The *Ramirez* Court concluded that Walker's opinion was indeed unreliable because of a particular analytical gap in his analysis. *Id.* at 906. Thus, the trial court abused its discretion in admitting the testimony and erred in not sustaining Volkswagen's objection.

⁴ Kraft estimated the methane-benzene generation ratio by using the USEPA Landfill Gas Generation Model (LandGEM) version 2.01. The model was developed by the EPA's Control Technology Center for estimating landfill gas emissions.

model, the City maintains that his testimony contains a fatal “analytical gap” because he failed to account for atmospheric conditions. This analytical gap, the City argues, renders Kraft’s opinion conclusory.

The complaint, however, goes to Kraft’s methodology or technique in evaluating the data because he was comparing benzene concentrations not only at different locations but also at different points in time. Relying on his air model, Kraft testified that the benzene levels produced by the landfill peaked in the late seventies and began to diminish thereafter. Thus, benzene levels would have been higher in 1993 during Sarah’s gestation than in 1998 when the benzene reading from the monitoring well was taken. Kraft testified to the following without objection:

Q. Mr. Kraft, have you done any calculations and projections about the migration of gas that the – from the West Avenue Landfill to the Pollock home during the period 1992 to 1994?

A. Yes.

* * *

Q. Okay. What kind of records did you look at in reaching your opinions?

A. Field data sheets from methane surveys that were done in the neighborhood surrounding the landfill, interoffice correspondence with the City of San Antonio, letters to the City of San Antonio from the TNRCC [Texas National Resource Conservation Committee] and the Texas Department of Health, records on geologic data that was collected by City employees, reports that were produced by the City’s consultants.

* * *

Q. Do you have an opinion, Mr. Kraft, as to whether the Pollocks were chronically exposed to benzene concentrations in their home?

A. Yes, I do have an opinion on that.

Q. And what is that opinion?

A. It’s my opinion that they were chronically exposed to landfill gas.

- Q. And did the landfill gas include benzene?
- A. Yes, it did.
- Q. What is your opinion of the range of benzene to which they were exposed? And please express it in terms of a numerical value.
- A. I believe that they were consistently exposed to benzene concentrations in the vicinity of 160 parts per billion, or even higher.
- Q. In your report, Mr. Kraft, I believe you said 40 to 160 parts per billion; is that correct?
- A. That's correct.
- Q. Why are you now saying it might be higher than 160 parts per billion?
- A. For several reasons.
- Q. And what are those reasons?
- A. Number one would be the gas modeling that I did with the United States Environmental Protection Agency model, the — you know, the landfill gas emissions model, which indicates that the amount of benzene produced by the landfill decreased over time.
- Q. What other reasons, Mr. Kraft?
- A. The analytical results that were collected at GMP-9 in January of 1998, they also measured the oxygen concentration. Landfill gas – landfill gas samples that have over 2 percent oxygen indicate that there has been some dilution from atmospheric air occurring, therefore, the concentrations that were measured in that sample were likely to be slightly lower than they were in the actual landfill gas itself, because it was diluted while they were sampling it.

In accordance with the City's argument, the Court suggests that Kraft testified that the air in the Pollock's home was the same as that in the sealed well, but the above demonstrates this to be an inaccurate representation of his testimony. Kraft testified that the concentration of gas in the landfill was likely higher than the samples taken from the well because these samples had already been diluted with atmospheric air. Thus, the Court assumes the existence of an analytical gap that may have existed, but also might have been explained had the City made an appropriate objection.

Next, Dr. Patel, the pediatric oncologist, gave his opinion that Sarah's *in utero* exposure to benzene during the first trimester caused her ALL. He relied on: (1) his review of the literature, (2) the matched pattern of abnormalities in Sarah's chromosomes and the chromosomal abnormalities in lab-induced carcinogenesis caused by benzene exposure, (3) his academic background in human genetics, and (4) Kraft's opinion that Sarah's mother was chronically exposed to at least 160 ppb of benzene while Sarah was *in utero*. Dr. Patel, moreover, excluded other plausible factors for Sarah's ALL, including family history and benzene exposure from other sources.

While the City acknowledges that Dr. Patel based his opinion, in part, on his review of certain epidemiological studies, it maintains that Dr. Patel's testimony is conclusory because none of these studies actually support his scientific opinion. In particular, the City argues that these studies all involve substantially higher exposure levels and, moreover, fail to find a causative association between benzene exposure and Sarah's particular type of leukemia. None of these concerns were brought to the trial court's attention, and Dr. Patel testified without objection.

Moreover, Dr. Patel explained that the exposure levels in these studies were actually less than Sarah's daily, chronic exposure during gestation. Dr. Patel explained that the effect of a toxin is based on two types of exposure, the peak dose exposure and the duration of that exposure. Taking both into account, the studies report their results as cumulative exposure over time, often as an annual dosage. Dr. Patel testified that the Pollocks' chronic exposure here would convert to a much greater annual dosage than those discussed in the studies. Moreover, Dr. Patel testified that Sarah's chronic and cumulative *in utero* benzene exposure as a developing fetus was more significant than the annual exposure to an adult as described in the studies. Again, there was no objection to these conclusions.

The underlying epidemiological studies referenced by Dr. Patel reflect a correlation between exposure to benzene and an increased risk for certain types of leukemia. For example, the studies in evidence reflected that occupational benzene exposure in the mother was related to a risk of childhood leukemia, especially acute nonlymphocytic leukemia (“ANLL”); that benzene metabolites could cause chromosomal damage in human lymphocytes; that benzene could cross the placenta and harm a fetus; that exposure to benzene could cause chromosomal damage similar to that suffered by Sarah; and that benzene exposure is responsible for at least a portion of childhood cancers of which ALL is the most common. Dr. Patel further testified about epidemiological evidence linking benzene to another form of leukemia, acute myeloid leukemia (“AML”), and quoted from the article “that evidence linking benzene to AML is no less persuasive than for ALL.” None of this testimony came as a surprise to the City as Dr. Patel had made these same points in his expert report.⁵

⁵ In the concluding paragraphs of that report, Dr. Patel stated:

If one looks at Sarah’s chromosomal markers as mentioned above, the specific chromosomal aberrations noted and those detected in benzene-exposed workers are remarkably similar. There is aneuploidy, i.e.: > 46 chromosomes and specifically in benzene exposed workers there were trisomies in the G group of chromosomes as noted for Sarah, specifically for chromosomes: 7, 8, 9 and 21. It should be noted that the association with childhood leukemia and benzene exposure has been reported from Holland, China, United States, Britain and Japan.

Particularly of parental exposure of solvents containing benzene, there is an increased risk of childhood leukemia. The odds ratio for parental benzene exposure was as high as 5.81. As mentioned above it was suggested benzene and its metabolites may cause genetic damage in germ cells, which are then passed on to the offspring and/or cause direct genetic damage in developing fetus following maternal exposure.

It also suggests that there is an increased likelihood of ALL when such an exposure occurs during the critical organogenesis phase if not as germ mutation. In-vitro experimentation using human leukemia cells HL60 and human lymphocytes following exposure to benzenetriol, a direct derivative of benzene, shows oxidated DNA damage. Similar DNA damage has also been shown to correlate in animal model systems. It has been mentioned that benzene is associated with acute myeloid leukemia; however, the overall data clearly does not indicate association limited to AML but also to ALL.

The opinions and testimony of the engineer and doctor here are far removed from the “bare conclusions” we rejected as conclusory in *Coastal*. See *Coastal Transp. Co.*, 136 S.W.3d at 232 (witnesses qualifications and bare opinion not enough). Neither expert asked the jury to trust their opinion merely on the basis of their expertise. They instead purported to analyze the underlying data that they (and apparently the City also) considered relevant before rendering their respective opinions.

The City’s present complaints about analytical gaps is nothing more than an unpreserved reliability challenge. Analytical gaps are not complaints about naked opinions, lacking any basis in the record, but rather are assertions that specific errors or omissions in an expert’s analysis render his or her opinion unreliable. See, e.g., *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 38-39 (Tex. 2007); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006); *Kerr-McGee Corp.*, 133 S.W.3d at 254; *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). When the complaint is that the expert’s analysis of otherwise reliable scientific data is flawed or that the underlying data itself is questionable, a party must object to preserve its complaint. See *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002) (“a party must object to the testimony before trial or when it is offered”); see also *Gen. Motors Corp.*, 161 S.W.3d at 471 (objection must be made when deficiency becomes apparent). And the failure to object to expert testimony cannot be cured through cross-examination or counter-expert testimony. *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590-91 (Tex. 1999). The Court’s

Thus, after reviewing the literature and Sarah’s case, per se, it is in my medical opinion that there is reasonable medical and scientific certainty and probability of linking maternal exposure to benzene, organic acids and hydrocarbons in the environment with the development of ALL in Sarah Pollock.

opinion today unfortunately blurs the distinction between expert testimony that purports to have a basis in science (unreliable expert testimony) and expert testimony that lacks any apparent support apart from the expert's claim to superior knowledge (conclusory expert testimony).⁶ The Court's decision today is not only wrong, it is also unfair and may encourage gamesmanship in the future. Why have a pretrial *Robinson* hearing or make a reliability objection during trial and run the risk that the proffering party may fix the problem, when the expert's opinion can be picked apart for analytical gaps on appeal? See *Robinson*, 923 S.W.2d at 552; see also *Ellis*, 971 S.W.2d at 411.

Reliability objections are important; they serve several purposes. First, they give the proffering party an opportunity to cure any defects, thus, avoiding trial and appeal by ambush; second, they give the trial court the opportunity to test and question the expert's testimony and thereby intelligently perform its role as gatekeeper; and, third, they result in a more fully developed record for appellate review under the abuse of discretion standard. *Ellis*, 971 S.W.2d at 409, 412. Because the City's complaints here go to reliability, an objection was required. Because the Court holds otherwise, I dissent.

⁶ The Court's indiscriminate mixing of unreliable and conclusory expert opinions is most apparent in its reliance on *Exxon Corp. v. Makofski*, 116 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), a court of appeals' opinion written by a current member of this Court, and *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). In both cases, timely objections were made to the reliability of the respective experts. JUSTICE BRISTER, writing for the Fourteenth Court of Appeals, observed that it was the defendant's responsibility "to object at trial (which it did repeatedly) so the plaintiffs would have an opportunity to cure any defects regarding reliability and present us with a fully developed record." *Makofski*, 116 S.W.3d at 180-81 (citations omitted). Having preserved its complaint, the court of appeals subsequently concluded that the expert's testimony was unreliable and thus no evidence because "[n]o epidemiological study established a statistically significant doubling of the risk of ALL from exposure to benzene" as required by *Havner*. See *id.* at 188. This Court then concludes that "[f]or the same reasons, we reach the same conclusion here." ___ S.W.3d at ___. But this case is not *Makofski* or *Havner* as the City conceded during oral argument, stating: "We cannot go into the statistical significant part of *Havner* because we did not object to the scientific reliability, we didn't make a *Daubert* objection and we have not tried to do that." Thus, the Court's conclusion is based on an authority the City has expressly conceded does not apply.

II

I agree with the Court, however, that there is no evidence to support the Pollocks' takings claim under article I, section 17 of the Texas Constitution for damage to their property. The Pollock's theory in this case was that the City effectively took their property (and caused their daughter's illness) by failing to abate the migration of benzene gas from the landfill after learning of the problem. I agree with the Court that there is no evidence of the City's requisite intent for a takings claim here. ___ S.W.3d at ___ (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)). Nor do I find any basis for the Pollocks' personal injury claim under this constitutional provision.

Article I, section 17, entitled "Taking, damaging or destroying property for public use," does not mention bodily injury or death. TEX. CONST. art. I, § 17. It refers only to property, granting the government the legal right to take property for a public purpose with the corresponding obligation to pay for it. Thus, the "State, in the exercise of its sovereign power, has the unquestioned right to take, damage, or destroy private property for public use," *State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941), but the constitution does not authorize the state to kill or cause bodily injury when doing so. Government actions that cause death or personal injury are neither validated, nor compensated, as the lawful exercise of the State's eminent domain authority. Such actions may be subject to other types of lawsuits, but they are not the basis for liability under the takings clause of our constitution. 1 GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 63 (1977).

I accordingly agree with the Court that the Pollocks cannot recover under Article I, Section 17 because there is no evidence that the City intended a taking, and, apart from that, no basis for the award of personal injury damages even had the City intended to damage the Pollocks' property.

III

Although the Pollocks do not have a takings claim, they have also asserted a negligence claim, raising the issue of whether the Tort Claims Act applies here to waive the City's governmental immunity. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. The Tort Claims Act provides a limited waiver of governmental immunity "when personal injury or death is caused by a 'use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.'" *Texas A&M Univ. v. Bishop*, 156 S.W.3d 580, 583 (Tex. 2005) (quoting TEX. CIV. PRAC. & REM. CODE § 101.021(2)). Neither the court of appeals nor this Court has considered this issue, albeit for different reasons. The court of appeals, having concluded that the Texas Constitution authorized the Pollocks' claims, found application of the Tort Claims Act unnecessary. 155 S.W.3d 322, 332-33. This Court, on the other hand, renders any waiver under the Act irrelevant by concluding there is no evidence that the City's negligence caused Sarah's leukemia. Because I disagree with both conclusions, I turn now to the arguments on this issue.

The City argues that the Tort Claims Act does not apply in this case because the Pollocks failed to establish a claim within its narrow waiver of immunity. The City's argument focuses on the court's charge that asked the jury (1) whether the "negligence, if any, of the City of San Antonio proximately caused the occurrence or injury in question" and (2) whether the City's "operation of the West Avenue Landfill constituted a nuisance" as that term was defined in the charge. The jury

answered yes to both questions. The City objected to the charge, arguing that the case should be submitted as a premises liability case rather than as a case of general negligence and nuisance. The City submits that this charge error is fatal to the Pollocks' claim of waiver under the Act. I disagree.

“Premises liability is the body of law that [defines] the duties owed by an owner or occupier of land to persons who come onto his or her real property to protect them from injury on account of dangerous conditions or activities on the property.” 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 310.01[1] at 310-6 (2009). It is not a separate species of tort but rather a branch of the law of negligence that categorizes duty in relation to the plaintiff's purpose for entering the property, that is, as an invitee, licensee, or trespasser. *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). A premises liability case requires that the jury be instructed on the elements of the landowner's duty and thus the distinction between general negligence and premises liability remains important in Texas. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997) (rule stated in context of general contractor's liability for negligence of subcontractor); *see also Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 551 (Tex. 1985) (Kilgarlin, J., concurring) (suggesting that modern trend is “away from basing a landowner's liability on his visitor's artificially determined purpose of entry”).

By definition then a premises liability case involves an injury on the defendant's premises. But Sarah Pollock was not injured on the City's property; she became ill at her own home, allegedly because of the City's negligent use and management of the neighboring landfill. The duty owed by the City under these circumstances is not dependent on Sarah's status as an invitee, licensee, or trespasser, and thus the Pollocks' claim is not a premises liability case. The duty here instead rests

on the City's obligation not to contaminate adjoining private property with its waste disposal operations at the West Avenue Landfill.

The jury found that the City's operation of the landfill was both negligent and a nuisance. Although there was not evidence that the nuisance rose to the level of a taking, there was evidence that the City's negligence was a cause of the nuisance created by the landfill. We have said that personal injury damages may be recovered under these circumstances. *See Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 563 (Tex. 1936) (nuisance created by private sewage company sickening neighboring property owner); *City of Fort Worth v. Crawford*, 12 S.W. 52, 54 (Tex. 1889) (nuisance created by operation of garbage dump causing illness). Moreover, this Court and others have recognized that an owner or occupier's negligence on its own property may lead to liability for injuries suffered on adjoining property.⁷

I conclude then that the negligent operation of a landfill that causes a neighbor to become ill on her adjoining property is a condition or use of property causing personal injury within the contemplation of the Tort Claims Act. *See TEX. CIV. PRAC. & REM. CODE* § 101.021(2) (governmental unit of the State may be liable for personal injury or death caused by a condition or use of tangible personal or real property if a private person would be liable under Texas law). The Tort Claims Act, however, limits the State's liability for the bodily injury or death of a person to the

⁷ *See, e.g., Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910–911 (Tex. 1981) (owner or occupier liable for injury caused by debris falling across public street from building being demolished); *Atchison v. Tex. & P. Ry. Co.*, 186 S.W.2d 228, 229 (Tex. 1945) (duty breached when smoke from a grass fire on the defendant's premises reached an adjacent public highway, causing a collision); *Texas & P. Ry. Co. v. Brandon*, 183 S.W.2d 212, 214 (Tex. Civ. App.—Eastland 1944, writ ref'd) (duty to keep premises free of combustible materials to avoid fire that could spread to neighboring property); *Skelly Oil Co. v. Johnston*, 151 S.W.2d 863, 863-67 (Tex. Civ. App.—Amarillo 1941, writ ref'd) (gasoline manufacturing plant liable for creating oil slick on adjoining highway); *see also* J. HADLEY EDGAR, JR. & JAMES B. SALES, *TEXAS TORTS & REMEDIES* § 20.08, *Liability for Losses Outside Property* (2009).

“maximum amount of \$250,000.” TEX. CIV. PRAC. & REM. CODE § 101.023(a). I therefore would modify the court of appeals’ judgment to reflect the \$250,000 cap imposed by the Tort Claims Act, and, as modified, affirm the judgment awarding damages for Sarah Pollock’s personal injury.

David M. Medina
Justice

OPINION ISSUED: May 1, 2009