

No. 05-1076

IN THE SUPREME COURT OF TEXAS

**EXXON CORPORATION, *et al.*,
Petitioners,**

v.

**EMERALD OIL & GAS COMPANY, L.P., and
LAURIE T. MIESCH, *et al.*,
Respondents.**

**On Petition for Review from the
Thirteenth Court of Appeals, Corpus Christi, Texas**

**BRIEF OF *AMICUS CURIAE*
TEXAS AND SOUTHWESTERN CATTLE RAISERS ASSOCIATION**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas and Southwestern Cattle Raisers Association (“TSCRA”) submits this *Amicus Curiae* brief as friend of the Court, pursuant to Texas Rule of Appellate Procedure 11, in support of Respondents’ position. **For docketing purposes, TSCRA files this identical brief separately under cause numbers 05-0729 and 05-1076, because this brief addresses issues that are germane to both causes.** TSCRA would show the Court as follows:

STATEMENT OF INTEREST
OF THE TEXAS AND SOUTHWESTERN
CATTLE RAISERS ASSOCIATION

The Texas and Southwestern Cattle Raisers Association represents cattle raisers in Texas, Oklahoma, and New Mexico through legislative and regulatory initiatives, educational programs, industry research, and promotion. The Texas and Southwestern Cattle Raisers Association, with approximately 14,000 members, is one of the largest livestock trade organizations in the state of Texas. TSCRA members own and operate ranch lands throughout the state of Texas. TSCRA urges this Court to affirm the court of appeals ruling on the discovery rule issue in this lawsuit, as TSCRA members could incur a similar inherently undiscoverable injury from oil and gas operations on their ranches. Moreover, TSCRA encourages this Court to also affirm the court of appeals’ application of Texas Natural Resource Code Section 85.321, because many TSCRA members depend on Texas statutes and rules to recover for damages to their ranch lands when state conservation laws are violated.

All attorneys’ fees incurred in the preparation of this brief will be paid by TSCRA.

STATEMENT OF FACTS

TSCRA adopts and incorporates by reference the Statement of Facts contained in Laurie T. Miesch, et al.'s (hereinafter "Respondent Lessors") Brief on the Merits.

ISSUES PRESENTED FOR REVIEW

TSCRA adopts and incorporates by reference the Issues Presented contained in Respondent Lessors' Brief on the Merits. The issues presented for review that potentially affect TSCRA's membership, and consequently, are the focus of this brief, are whether the discovery rule was appropriately applied to this lawsuit and whether the court of appeals acted appropriately by enforcing the express language within Texas Natural Resource Code Section 85.321.

SUMMARY OF THE ARGUMENT

This lawsuit arose from a unique factual background and series of events that led to what Exxon would describe as a low-key, discreet injury. Indeed, the injury was unobtrusive; so inconspicuous in fact, that the injury was, by the court of appeals' terms, "inherently undiscoverable." *Exxon Corp. v. Miesch*, 980 S.W.3d 299, 315 (Tex. App. – Corpus Christi 2005). The subsurface damage to wellbores during oilfield plugging operations, subsequently sealed with concrete and covered beneath several feet of soil, was exacerbated by the filing of false information with the Railroad Commission. As a result, the court of appeals correctly applied this Court's precedents regarding application of the discovery rule. *See Miesch*, 980 S.W.3d at 315. This Court has consistently held that a claim involving inherently undiscoverable and objectively verifiable injury is subject to the discovery rule. *Ruebeck v. Hunt*, 176 S.W.2d 738 (Tex. 1944); *Gaddis v.*

Smith, 417 S.W.2d 577 (Tex. 1967); *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988); *Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1996); *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732 (Tex. 2001).

Furthermore, the court of appeals held that the injury suffered by Respondents gave rise to a claim under Texas Natural Resources Code Section 85.321. *Miesch*, 980 S.W.3d at 323-27. The express language of the statute creates a private cause of action for interest owners against other parties that have violated state conservation statutes. See TEX. NAT. RES. CODE § 85.321. Because Exxon damaged the Respondents' real property interests by sabotaging wellbores, concealing its actions, and filing false information with the Railroad Commission, the court of appeals appropriately held Exxon violated Texas conservation statutes, and applied Texas Natural Resources Code § 85.321, allowing Respondents to recover damages. *Miesch*, 980 S.W.3d at 323-27.

ARGUMENT

A. The court of appeals followed this Court's well-established discovery rule precedent.

An injury is inherently undiscoverable if it is, "by its nature, unlikely to be discovered within the limitations period despite due diligence." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734-35 (Tex. 2001); *S.V. v. R.V.*, 933 S.W.2d 1, 7 (Tex. 1996); *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996).

In this lawsuit, Exxon intentionally plugged the wellbores owned by the lessors in such a way that the wells could not be re-entered. Exxon cut casing and left the casing, tubing, refuse, tank bottoms, and other junk in the wellbores. *Miesch*, 980 S.W.3d at 312,

316. Moreover, Exxon employees filed falsified and incomplete records with the Railroad Commission; thus, a review of publicly available records would not have revealed the wellbore damage. *Id.* at 329-30. The trial court and the court of appeals held that the injury in this lawsuit was inherently undiscoverable. *Id.* at 313, 315.

1. This Court's discovery rule precedent.

The court of appeals did not “ignore[.]...existing law.” (Petitioner’s Brief on the Merits, p.1). To the contrary, the court of appeals’ decision is in line with this Court’s well-established precedent regarding application of the discovery rule. This Court consistently applies the discovery rule in cases involving an inherently undiscoverable and objectively verifiable injury. *See, e.g., Ruebeck*, 176 S.W.2d at 740 (applying the discovery rule to plaintiffs’ action for fraud and conspiracy against a general contractor, because the contractor’s failure to use certain roofing materials previously agreed to was concealed from the plaintiffs so that the injury was not discovered until nine years after roof construction was complete); *Gaddis*, 417 S.W.2d at 580 (applying the discovery rule to plaintiff’s malpractice action after doctors left a surgical sponge inside the plaintiff’s body during a Caesarean section); *Willis*, 760 S.W.2d at 643-44 (holding that plaintiff’s legal malpractice action was subject to the discovery rule, because the plaintiff could not have discovered attorney’s malpractice until after the divorce decree at issue had been improperly drafted). The discovery rule serves to prevent the “shocking results” that would occur when a deserving plaintiff is barred from recovery despite the fact that the plaintiff did not know of the wrongful act until after the limitations period had run. *Gaddis*, 417 S.W.2d at 581; *Willis*, 760 S.W.2d at 644.

2. Exxon's Position.

Despite this Court's well-established position on the discovery rule, Exxon argues that the discovery rule should not be applied to cases involving concealed damages to oil and gas wellbores. (See Petitioner's Brief on the Merits, p. 11-14). Rather, Exxon urges this Court to expand the holdings of *HECI Exploration Co v. Neel* and *Wagner & Brown, Ltd. v. Horwood*, without regard for this Court's analysis within those two opinions. In fact, Exxon's argument to expand *HECI* and *Wagner* here seems to be based on the premise that this is an oil and gas case, and the *HECI* and *Wagner* cases arose in the oil and gas industry. See *HECI Exploration Co v. Neel*, 982 S.W.2d 881 (Tex. 1998); *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732 (Tex. 2001). Exxon contends, in effect, that *all* injuries in oil and gas cases are discoverable.

But, as this Court has explained, "the binding rule of a case is determined from the facts which the Court deemed important." *Gen. Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 670 (Tex. 1961). Therefore, under a more careful analysis of *HECI* and *Wagner*, the injuries in those two lawsuits are distinct from the injury here.

HECI and *Wagner* both involved oil and gas production. In both cases, this Court was faced with the issue of whether the discovery rule applied. *HECI*, 982 S.W.2d at 885-87; *Wagner*, 58 S.W.3d at 735. But, the similarities between those cases and this case end there. This injury is distinct from the injury at issue in either *HECI* or *Wagner*.

In *HECI*, the injury that gave rise to the lawsuit was the oil and gas operator's failure to give notice to the royalty owners of the operator's intent to sue an oil and gas operator of an adjoining lease, and the operator's subsequent success in that lawsuit.

HECI, 982 S.W.2d at 884. This Court held that the discovery rule did not apply to the lawsuit, because a “failure to notify” is not a type of injury that is inherently undiscoverable. *Id.* at 886. The injurious event that gave rise to the *Wagner* lawsuit was a lease operator’s wrongful deduction of excessive gas gathering and compression charges from royalty payments. *Wagner*, 58 S.W.3d at 733. Because the royalty-owner plaintiffs in *Wagner* had a variety of methods available to discover their alleged injury: royalty statements listing the charges, an independent investigation firm’s analysis of the statements, and contact with the lease operator regarding the charges, this Court held that the action was barred by the statute of limitations, and the discovery rule did not apply because “a royalty owner should exercise due diligence to determine whether charges made against royalty payments are proper and reasonable.” *Id.* at 734-36.

To the contrary, this lawsuit, and the underlying injury, do not center on either a claim of failure to provide information or a claim of excessive deductions from royalty payments. Rather, this lawsuit and injury are more akin to the types of injuries this Court has previously characterized as inherently undiscoverable and subject to the discovery rule. *See, e.g., Ruebeck*, 176 S.W.2d at 740 (applying the discovery rule to plaintiffs’ action for fraud and conspiracy against a general contractor, because the contractor’s failure to use certain roofing materials previously agreed to was concealed from the plaintiffs so that the injury was not discovered until nine years after roof construction was complete); *Gaddis*, 417 S.W.2d at 580 (applying the discovery rule to plaintiff’s malpractice action after doctors left a surgical sponge inside the plaintiff’s body during a Caesarean section).

Adopting a discovery rule analysis contrary to *Ruebeck* and *Gaddis*, an analysis that no longer focuses on the *type* of injury, would eliminate the very “predictability and consistency” that led to this Court’s adoption of the “category of injury” analysis. *See Altai*, 918 S.W.2d at 456. Indeed, Exxon’s argument is strikingly similar to the one that the petitioners urged this Court to adopt in *Wagner*. But, this Court denounced that position:

Wagner & Brown and Canyon argue that *HECI* stands for the proposition that all claims for breach of oil and gas lease covenants are categorically exempt from the discovery rule's application. That reading, however, *oversimplifies our analysis in HECI*.

Wagner, 58 S.W.3d at 735 (emphasis added).

3. Respondent’s injury was inherently undiscoverable.

This Court’s discovery rule analysis requires a determination of whether the injury complained of is “generally capable of detection.” *See Altai*, 918 S.W.2d at 457. In their leading treatise, Professors Smith and Weaver have commented on the application of the discovery rule in an oil and gas setting:

“[I]f there is nothing to alert a party to a potential injury and no public records or other information reveal[] the injury, the injury is inherently undiscoverable and the discovery rule should apply.”

E. Smith & J. Weaver, TEXAS LAW OF OIL AND GAS §2.7(B) (2d ed. 2005), p. 2-112 – 2-113.

The facts of this lawsuit are in accord. The sabotaged wellbores are located below the surface. After the wellbores were sabotaged against re-entry, the wells were sealed with cement and covered with several feet of soil; there was nothing to alert a party to the

injury. Exxon withheld essential interpretive data regarding the wellbore plugging activities from the Railroad Commission and the Respondents. *Miesch*, 980 S.W.3d at 315-16. Moreover, Exxon failed to provide the Railroad Commission with accurate records about the plugging procedure and final condition of the well, despite Exxon's assurance that all information regarding the leases and reserves had been submitted to a "data room" in 1990. *Miesch*, 980 S.W.3d at 330. Exxon employees also filed falsified and incomplete reports with the Railroad Commission. *Id.* In sum, public records related to the wellbores at issue did not reveal or even hint at the injury. The injury was inherently undiscoverable.

Yet, under the position that Exxon urges this Court do adopt, many TSCRA landowners damaged by a similar inherently undiscoverable injury to a wellbore could be precluded from pursuing claims for damages. In *Gulf Oil Corp. v. Alexander*, 291 S.W.2d 792 (Tex. App. – Amarillo 1956), a landowner's 372 acre farm and underlying fresh water strata, was polluted by salt water seepage from an adjoining oil and gas operation's salt water disposal pit. *Alexander*, 291 S.W.2d at 794. The salt water seepage began in early to mid-1952. *Id.* at 795. The landowner did not discover the damage until March 1, 1953. *Id.* The court applied the discovery rule, and the landowner's petition, filed August 1, 1954, was not barred by limitations. *Id.* Exxon's position would preclude landowners similarly situated to the landowner in *Alexander* from recovery. This Court's precedent does not support such a rule of law.

B. The plain language of Texas Natural Resources Code Section 85.321 allows for a claim for waste.

Oil and gas operators have a duty to not destroy a well and thereby waste reserves. See TEX. NAT. RES. CODE §§ 89.001; 89.011. The Texas Natural Resources Code, specifically sections 89.001 and 89.011, require operators to plug wells in a manner that protects the environment and preserves the ability to re-enter the well. TEX. NAT. RES. CODE §§ 89.001; 89.011. And, the plain language of Texas Natural Resources Code Section 85.321 expressly allows a claim against those who violate natural resource conservation laws and create waste. TEX. NAT. RES. CODE § 85.321. Even so, Exxon urges this Court to disregard the plain language of Section 85.321, and in so doing, asserts that a party has sufficient resources to bring a claim for waste under the terms of a lease agreement. Exxon further contends that allowing a statutory claim for waste will cause the “floodgates of litigation” to open wide. (See Petitioner’s Brief on the Merits, Cause No. 05-0729, p. 14-26). Exxon’s argument is flawed, and TSCRA members would be adversely affected if this Court adopts Exxon’s position.

1. Texas has a strong public policy to conserve natural resources.

The State of Texas and this Court have, historically, adhered to a policy to conserve natural resources. “The prevention of the waste of gas is a well-established public policy of the State of Texas.” *Railroad Comm’n of Tex. v. Rowan Oil Co.*, 259 S.W.2d 173, 175 (Tex. 1953). Indeed, Article 16, Section 59 of the Texas Constitution provides that, “[t]he conservation...of all of the natural resources of this State,...and the preservation and conservation of all such natural resources of the State are each and all

hereby declared public rights and duties.” TEX. CONST., art. XVI, § 59. In 1977, the 65th Texas Legislature undertook the task of balancing a variety of interests while regulating oil and gas operations occurring in this state. The legislature enacted what is now Texas Natural Resources Code § 85.321, granting all parties with an interest in land a cause of action against other parties who have violated Texas natural resource conservation laws.

A party who owns an interest in property or production that may be damaged by another party violating the provisions of this chapter ... or another law of this state prohibiting waste or a valid rule or order of the commission may sue for and recover damages and have any other relief to which he may be entitled at law or in equity.

TEX. NAT. RES. CODE § 85.321.

2. The court of appeals’ interpretation of Section 85.321 will not result in a “flood of litigation.”

There is no indication that interpreting the statute as written would somehow cause a surge in litigation. The language that grants parties a private action for damages has been in the statute since 1977. Moreover, this Court made clear in *HECI* that Section 85.321 expressly allows an interest owner to bring a damage suit for “violation of the conservation laws of this state, or a Railroad Commission rule or order.” *HECI*, 982 S.W.2d at 891.

The right of interest owners to bring a private action against operators simply furthers Texas’s public policy to protect the state’s natural resources. Indeed, the threat of a damage suit by those who “own an interest in property or production” adversely affected by an operator’s violations of law may actually serve to deter wasteful and environmentally unsound oil and gas practices. Thus, there will be no “surge” of

litigation for “floodgates” to retain in the first place, much less will any such “floodgates” open, should this Court affirm the court below.

3. Limiting waste claims to exclusively breach of lease actions would make any relief impossible for many interested parties.

Not all parties harmed by wasteful oil and gas operations are in contractual privity with the oil and gas operator. As Emerald’s brief in Cause No. 05-0729 demonstrates, some parties have an interest in the land or production even though they have no direct contractual relationship with the offending lessee or operator. Many TSCRA members are in that position. For example, many TSCRA members own the surface estates of the ranch lands they operate across the state, but may not have an interest in the mineral estate underlying their lands. Further, as in *Alexander*, TSCRA members can be harmed by oil and gas operations on adjacent properties as well. *See Alexander*, 291 S.W.2d at 794-95. In either situation, TSCRA members may be harmed by an oil and gas operator’s failure to comply with the statutes and regulations that govern activities involving the mineral estate.

For example, the Natural Resources Code contains several conservation statutes that an operator must comply with, including provisions designed to prevent pollution that could result from oil and gas operations. Operators are precluded from conducting wasteful activities, are charged with preserving the integrity of various underground strata, and must take steps to prevent injury to lands that adjoin drilling operations. *See, e.g., TEX. NAT. RES. CODE §§ 85.202 (a)(2), (4), and (5)*. Plugging rules adopted pursuant to the Code require that plugs be set in a certain manner to ensure water strata is

protected. *See, e.g.*, TEX. ADMIN. CODE §§ 3.14 (d)(2), (e)(4), (f)(3), (g)(4), and (e)(4). Also, operators must preserve records about drilled wells. TEX. NAT. RES. CODE §85.202 (a)(3). An operator's failure to adhere to these statutes and rules could adversely affect Texas landowners.

Many TSCRA members own only the surface estate of the property where they conduct their ranching operations. In such an instance, while the surface estate and the underlying mineral estate may have been severed, in terms of ownership of the legally-created estates, the two estates are, in reality, still quite connected. As the previously discussed *Alexander* case demonstrated, an oil and gas operator's violation of conservation statutes and rules could result in migration of pollutants into the water strata, and eventually affect the water or soil quality that are both vital to ranching operations. *See Alexander*, 291 S.W.2d at 794-95. The *Alexander* court held the operator's violation of Railroad Commission rules "gave [the landowner] the right to [pursue a] cause of action." *Id.* The landowner in *Alexander* would have faced a different result under Exxon's proposed rule of law. *See id.* This Court should therefore affirm the court of appeals decision on this issue.

TSCRA members, and other landowners, depend on accurate plugging records at the Railroad Commission. It is vital that this information is correct; otherwise, in the event underground, migrating pollution occurs, harming the surface estate, false Railroad Commission filings would only lead a surface owner down a prolonged, expensive rabbit trail in an attempt to locate the source of that pollution.

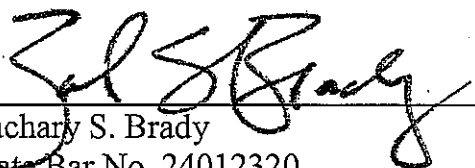
Under the rule of law that Exxon suggests, landowners would be without any practical form of relief when the conservation laws of this state were violated. Therefore, TSCRA strongly urges this Court to reject Exxon's argument, and preserve Texas landowners' right to avail themselves of the protections and remedies that Texas statutes and rules grant to a landowner whose property has been damaged by a violator of conservation statutes and rules. *See* TEX. NAT. RES. CODE § 85.321.

PRAYER

THEREFORE, *Amicus Curie* Texas and Southwestern Cattle Raisers Association prays that this Court affirm the judgment of the Thirteenth Court of Appeals.

Respectfully submitted,

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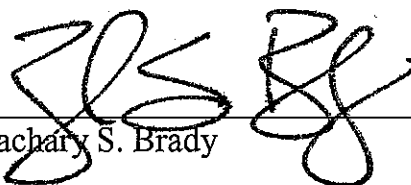
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