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Supreme Court of Texas.
Natural Gas Pipeline Company of America
v.
William Justiss, Darlene Justiss, Joseph Justiss, Tommy Aslpaugh, Judy Alspaugh, Joe Denton Mashburn, Christine Mashburn, Joe Donald Mashburn, and Judy Mashburn.
No. 10-0451.

October 5, 2011.

Appearances:

Brett Busby of Bracewell & Giuliani, LLP, for Petitioner.
James R. Rodgers of The Moore Law Firm, LLP, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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ORAL ARGUMENT OF BRETT BUSBY ON BEHALF OF THE PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first matter 10-0451 Natural Gas Pipeline Company of America v. William Justiss.

MARSHAL: May it please the Court, Mr. Busby will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ATTORNEY BRETT BUSBY: May it please the Court, the pipeline compressor stations that Petitioner NGPL operates are heavily regulated by the government. Here the record of State testing and onsite monitoring shows that station 802 generally complied with its state and federal permits and that NGPL promptly addressed issues raised by regulators. It also consistently investigated when it received complaints from the station's neighbors. Now six years after the station began operation, several neighbors filed this permanent nuisance suit and obtained a $2 million judgment. This Court should reverse and render judgment for NGPL for two reasons. First, the two-year statute of limitations bars the Plaintiff's permanent nuisance suit and, second, there's legally insufficient evidence of damages because the Plaintiffs offered only conclusory opinions of loss property value damages that were unsupported by any factual basis.

JUSTICE DAVID M. MEDINA: When does the statute begin to run here?

ATTORNEY BRETT BUSBY: Our position is that the statute, the conclusive evidence shows that the statute began to run some time prior to August, 1996, which is two years before suit was filed and that's based on the Plaintiff's own evidence in this case. And what we have to show because limitations is our burden is that was there conclusive evidence that the station first caused unreasonable discomfort or annoyance prior to August of 1996. And here's what the record shows that it was no later than 1994 for noise and no later than 1995 for odor.

JUSTICE DAVID M. MEDINA: How's that measured?

ATTORNEY BRETT BUSBY: Well the standard in the charge is did it cause unreasonable discomfort or annoyance to persons of ordinary sensibilities and so the Plaintiffs, we look to the Plaintiffs' testimony about what they were experiencing out, which is uncontroverted in the record. In 1993, Mr. Bubba Justiss said that noise from the station was keeping him awake. In April, 1994, he and his wife hired a lawyer to write NGPL saying the noise was causing them total frustration and torment and that they had a claim for the loss and value of their land at that time in April, 1994.

JUSTICE PHIL JOHNSON: It says that in the lawyer's letter?

ATTORNEY BRETT BUSBY: Yes, sir, and that's defense Exhibit 21. And in May, 1994, Joe Donald and Judy Mashburn also hired a lawyer to write to my client that they're writing that their lives had been disrupted by the noise and it had affected their peaceful use of their homes and property. That's defense Exhibits 23 and 25. With respect to odor, there were odor reports in '94 through early '96 and the one that I'll mention to the Court is the January, 1995 complaint for Mr. Bubba Justiss. This was some notes taken of a complaint that was called in, I believe. It's defense Exhibits 19 and 32, saying that Mr. Justiss and his wife could hardly breathe because of the fumes from the plant and that the smell was so bad that it was making them sick and that was in January of '95.

JUSTICE EVA M. GUZMAN: But if those odors were, they came and they went, why weren't they temporary odors from 1994 to 1998 or so and then this became a permanent nuisance if you will. I mean can they change character, I guess that's my legal. Can they change character that way? Yeah, it bothers us, but it's not that bad.

ATTORNEY BRETT BUSBY: I think they could change character, but there was no testimony to the effect that Your Honor mentioned that it's not that bad. This is not like a case that was cited by the plaintiffs in the brief, a case from the 5th Circuit called Sunray Oil v. Sharp where the plaintiff was saying well there's some noise or vibration from a compressor station and it was considerable in 1949, but it was not substantial or highly offensive until 1951, which was within the two-year limitations period. There's no testimony from anybody that it was only temporary or it was not substantial or it was not offensive until we got within two years of the limitations period.

JUSTICE DEBRA H. LEHRMANN: I mean can I ask you please, but wasn't there evidence that, in fact, that the noise and the nuisance, if you will, changed substantially during 1997 and '98 going from perhaps disagreeable or undesirable to unbearable? And if it was, isn't that at least some evidence supporting the jury's findings?

ATTORNEY BRETT BUSBY: Well there was no evidence that they said it was only disagreeable or undesirable before and it's unbearable after. There's no testimony to that effect in the record. I know that's what the Plaintiffs characterize it as in their brief, but if you read the citations there, the Plaintiffs never say that. There is evidene that it got worse, to you point.

JUSTICE DEBRA H. LEHRMANN: Getting worse. Those words -were.

ATTORNEY BRETT BUSBY: Yes, Your Honor. Yes there is evidence that it got worse and what this Court has said is the question in Schneider, this Court said the question is when does the substantial interference first occur? The question is even if the full extent of the damages have not occurred, what you have to find out, because this is a permanent nuisance claim, is when did it first cause unreasonable discomfort or annoyance. And

even if the full extent of the damages has not yet occurred, that will cause the claim to accrue and this Court said the same thing in Exxon v. Emerald Oil recently, that limitations runs when facts exist that authorize the plaintiff to seek a judicial remedy even if you don't know the full extent of the injury yet. You can't sit back and wait to see if things get worse. There's a policy of diligence behind the statute of limitations that requires the plaintiffs to sue.

JUSTICE DAVID M. MEDINA: Was sending the letter seeking a judicial remedy?

ATTORNEY BRETT BUSBY: Well, they were representing in the letter that they had a judicial remedy at that time and I think that's right on point with Exxon v. Emerald Oil because that's the question, are you authorized to seek a judicial remedy? Clearly, they thought they were because they had their lawyers write us and said we have a claim.

JUSTICE DON R. WILLETT: And that's Exhibit 21?

ATTORNEY BRETT BUSBY: Yes, Your Honor.

JUSTICE PAUL W. GREEN: Let's say you're right on limitations, where does that leave the landowner under these kind of conditions?

ATTORNEY BRETT BUSBY: Well, Your Honor, I think the landowner if they feel like they have a claim, they need to go ahead and file suit.

JUSTICE PAUL W. GREEN: No, I mean, they delayed, it's unclear whether it was substantial or insubstantial or whatever and they end up filing suit to protect their interests and they're going to add on limitations. Is that just it for them?

ATTORNEY BRETT BUSBY: Well in this case, they already hired lawyers to sue.

JUSTICE PAUL W. GREEN: I'm not asking about that.

ATTORNEY BRETT BUSBY: I understand. And you know I think if they feel like that they are, if they have complaints of total frustration and torment and if there are things that are making them sick then, yes, the law requires them to be diligent and file suit. If the other case were the rule and this Court were to say okay, so you complained about all these things, but you said it's getting worse and that's enough to reset the limitations period.

JUSTICE PAUL W. GREEN: Well it's not like a car wreck where you have an incident and you have your two years to run. This is a continuing situation.

ATTORNEY BRETT BUSBY: Yes.

JUSTICE PAUL W. GREEN: And so it's your position that nonetheless, they're out of limitations, they have no remedy.

ATTORNEY BRETT BUSBY: Because they sued for a permanent nuisance, yes, that's right.

CHIEF JUSTICE WALLACE B. JEFFERSON: And they will never have a remedy. What if today the emissions became so toxic that people couldn't live there? Are you saying that that wouldn't be a substantial change either? That from this point forward, there can be no nuisance claim against your client?

ATTORNEY BRETT BUSBY: No, Your Honor, what Schneider says and what this Court has said is you need

a substantial change in the nature of the nuisance in effect that you would have a different injury and the examples that have been given in the cases are if there are objective physical changes, say another pipeline was run into the station or there are extraordinary new forces like a flood in some of the cases. That if given rise to new damages that you couldn't anticipate at the time you brought the prior suit, of course, it's not fair to say that you can't sue for those things, but there's no evidence that there were any sort of objective physical changes to the plant or extraordinary new forces at work here. So, yes, we absolutely agree that if you couldn't anticipate those damages at the time that the original suit should have been filed, then you should be able to bring another claim, but there's no evidence of that here.

JUSTICE EVA M. GUZMAN: The language that was used in Schneider is conversely once the conditions begin to recur more often, the nuisance should normally be treated as permanent because it is injury to the property in general that has occurred. Is it your position that in 1994 when they began complaining about the odor and then in '95 and then in '96 in January and then in March of '96 that that sequence of events fits within that language, the conditions begin to recur more often?

ATTORNEY BRETT BUSBY: Yes, Your Honor, and the Plaintiffs have never contended that it was only a temporary nuisance at the time in '94 and '95 and '96. There's no evidence that those conditions would meet the Schneider definition of a temporary nuisance where it was so sporadic that you couldn't predict when it would come back. And all the evidence has been that this, whenever the wind blows their way, this is something that they smell or hear.

JUSTICE EVA M. GUZMAN: So let's assume that they should have sued back then for that permanent nuisance. In 1998, when things changed, the odor became even more substantial and they were cited and they corrected the problem. Was that a temporary nuisance? Can they recover for that if you don't recover for the rest?

ATTORNEY BRETT BUSBY: I think they could have brought a temporary nuisance claim and, in fact, I believe their petition did include a temporary nuisance claim, but they chose not to submit that to the jury. And so, yes, I think that would have been some evidence to support a temporary nuisance claim when the State came in and cited NGPL saying this is a category 5 odor. But then the State came back and did eight times and did testing over subsequent years and said that the odor had been resolved. So our position is that's a temporary nuisance claim and if you wanted to submit that, you had pled it and you were entitled to submit that to the jury.

JUSTICE DON R. WILLETT: Can you shift gears and talk about the evidentiary point?

ATTORNEY BRETT BUSBY: Certainly. With respect to the damages, this is the other reason that the Court should reverse and render for us because the only evidence of damages that the Plaintiffs offer for their property values was their own conclusory opinions and that evidence is legally insufficient to support the award of 1.2 million. Now the property owner rule, which this Court has visited recently, obviously makes property owners presumptively qualified to opine on the value of their property, but they also must provide a factual basis to support their opinion of damages. This Court and many others have held that an opinion can't be speculative or conclusory and it must be supported by relevant facts and we've collected the cases at page 22 of our merits brief. The owners here are simply saying that they are familiar with the market value of the property and that doesn't meet the factual basis requirement. Really, you've got two separate inquiries here. One is why would this witness know what the property is worth. Are they qualified to get on the stand and talk about that? The other question is how did the witness arrive at the number that they gave for the value of the property and is there sufficient evidence to support that number? Now familiarity with property values, it's only going to answer the first question, are they qualified to testify? It establishes, but it doesn't provide a factual basis of how did you get to this number that you threw out to the court. And if that weren't the rule, if all you had to do is say I'm familiar with the value of the property, what you would have, I mean somebody could get on the stand and say I think my property was worth a billion dollars and it's worth zero. And if that's all the evidence now it's worth zero and I own the property and I'm familiar with it.

JUSTICE DON R. WILLETT: What would you require of property owners?

ATTORNEY BRETT BUSBY: Well I think you have to provide some factual, I'm not going to say in every case it has to be this, but you have to provide some facts that show how you got to the number and it's easy to do. In a prior case between these very parties that's discussed on page 16 of our reply brief most lengthily, the court of appeals held that Mr. Justiss had given damage testimony that did have a foundation and some of the things that he mentioned were an appraisal of the property for an easement and the selling prices of two nearby pieces of property. Those are some examples of the kinds of things you can do, but this is not difficult.

JUSTICE DON R. WILLETT: Do they need to present calculations of why market value goes up or down and why it may go up or down? I mean what level of sophistication or specificity would you require of property owners?

ATTORNEY BRETT BUSBY: Well I don't think the Court has to get into the details of saying what you have to have because we didn't have anything here. We just had a number. And so you need some reason to believe that the number you're throwing out there has some tethering to the reality outside the head of the person who is.

JUSTICE DON R. WILLETT: Do you think it ought to be, whatever it is, it ought to be looser and more generous for property owners as opposed to other witnesses testifying as to property value.

ATTORNEY BRETT BUSBY: I don't think so necessarily because I think the property owner rule answers a different question, are they qualified to get up on the stand and testify as a matter of the admissibility of their testimony. I think that the factual, the legal and factual sufficiency standard should be the same for a lay witness as it would be for an expert witness. I mean this Court has said you can't speculate and you have to have some relevant facts to support your testimony and I think the rule should be the same in the lay witness context whether it's a property owner or someone else. Yes, they can get on the stand, but --

JUSTICE DON R. WILLETT: You sort of characterized the testimony as, well, you know I'm familiar with market value and here's what I think it is, but does the record show that some of the witnesses had a bit more factual kind of basis for their numbers?

ATTORNEY BRETT BUSBY: Here's what the record shows. I don't believe that it shows any basis for the numbers that says here's how I got to this number. I think that's what's required, something that would say you know I'm not just pulling this out of the air. Here's how I got to this number. The witnesses' testimony falls really into two categories. One is that they're generally familiar with property values in the area from their work or from selling other property over the years. Mr. Joe Donald Mashburn said he was a loan officer so he was generally familiar with this because of his work. Some of the other Plaintiffs had sold property. Now that qualifies them as witnesses, but it doesn't provide any basis for the opinion that the nuisance has diminished value of their property by a particular amount. I mean there was no discussion of how they got to the number or why the other pieces of property were comparable or anything like that that they had experience with. Now there were other Plaintiffs made the conclusory assertion in their damages testimony that the numbers they were giving based on fair market value and they used those magic words market value, fair market value, something like that, but there was no support for that and this Court said in Porras that magic words are not enough. You need to show some reason why how you got to that number.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any other questions? Thank you, Mr. Busby.

ATTORNEY BRETT BUSBY: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Rodgers will present argument for the Respondent.

ORAL ARGUMENT OF JAMES R. RODGERS ON BEHALF OF THE RESPONDENT

ATTORNEY JAMES R. RODGERS: May it please the Court, Counsel, thank you, in addressing the issue that Mr. Busby brought up about the statute of limitations and accruing of the cause of action and in reference in the brief, there is some argument that perhaps we're trying to change the Schneider case. In fact, I think the Schneider case was the blueprint that this case should be analyzed by because Schneider's stance for the proposition is when the nuisance becomes a substantial interference. Well substantial by its very nature has some vagary within that. For instance, if you look at City of Abilene v. Downs, there was a sewage plant that was installed. People could smell the odor of the sewage, but yet while it might be annoying to them, while it may be, if you might ask them, they might say it was substantial, but as far as jurisprudence, the law said well no, not until there is substantial inference can you bring this action.

JUSTICE DAVID M. MEDINA: What impact, if any, does the December, 1994 letter have?

ATTORNEY JAMES R. RODGERS: Well I think the letter certainly sets out that there were complaints, but it does not establish that there was substantial interference because the rest of the testimony shows that NGPL said whatever you're smelling is faint, it was passing, it was a transitory, we've taken steps to correct that and as Mr. Busby said in his very first comment to you, we're a well-regulated industry. We're tested all the time by the State and we're in compliance. So whatever you smelled or whatever you heard, we have addressed; it has passed on. But what happened differently is and this is where the evidence is very important, all of the Plaintiffs testified that in '97 or '98, something changed dramatically. It became much worse.

JUSTICE EVA M. GUZMAN: But you began to complain in 1994 and at least through 1996 and the language in Schneider says if a nuisance occurs several times in the years leading up to a trial and is likely to continue, then you have enough evidence of frequency and duration. Why didn't those documented complaints beginning in 1994 establish that you, in fact, had a permanent nuisance at that time? I'm not understanding how you get around that.

ATTORNEY JAMES R. RODGERS: In fact, the cases say when you have a right to seek judicial relief, you must show a substantial inference. By definition that means interference alone is not enough. That's exactly what was said in City of Abilene v. Downs. The very same argument that Mr. Busby started his argument is what people would be faced with. We're regulated. We're tested. We're within compliance. We're always okay, but our evidence is in '97 and '98, these people said it got unbearable. It became much worse, not just them, but third parties said that as well.

JUSTICE EVA M. GUZMAN: But in 1994, Joe Donald and Judy Mashburn wrote, their lives have been disrupted and the noise has affected their peaceful use of their homes and property and it seems from the record that it continued through at least 1998.

ATTORNEY JAMES R. RODGERS: All of the testimony was in '97 or '98, the situation became much worse.

JUSTICE EVA M. GUZMAN: But in 1995, Bubba Justiss complained that he and his wife could hardly breathe because of the fumes from the plant. So again my question is why wasn't that enough at the time that even though they had assurances from NGPL that everything was fine, certainly they knew it wasn't?

ATTORNEY JAMES R. RODGERS: Well if you look at the City of Abilene v. Downs where the landowner is living next to the sewage plant and he smells sewage, but yet the Court says, and I don't think anybody could say smelling sewage wouldn't be, if you were the landowner, to you it's annoying and everything, but does it rise the level to which you could have judicial intervention and seek a nuisance claim. You have to show substantial inference. So what we had in this case is a condition that much worsened in '97, '98 to a point that a ru-

ral mail carrier went to his employer and said I want to change jobs. I can't go out there.

JUSTICE DON R. WILLETT: But the fact that it got worse in '97, '98 doesn't mean it wasn't substantial before that.

ATTORNEY JAMES R. RODGERS: That's a fact issue for the jury and that's what the jury found is that it became substantial in June of 1998. So what they heard was they heard the testimony about the letters. They heard the testimony about the prior complaints. They heard the testimony of the worsening condition. They also heard the testimony of the Defendants that there was nothing substantial in '92 to '97 at all, but then they also found the citation from the State of Texas in '98, which is for the first time the State of Texas found substantial interference and cited NGPL for that. I think under the standard of review of legal insufficiency and a jury can believe or disbelieve various parts of the testimony, that would be enough to say there is some evidence to support this verdict and you're to ignore anything to contrary on that. Now NGPL argues well the State of Texas cited them in 1998, then they had eight tests thereafter and there was no citation, but the record indicates, it clearly shows those eight subsequent testing was not really testing at all. They were self-reporting by NGPL themselves. In fact, it was found that inspectors were writing reports in Tyler and never coming up to the facility where supposedly the noise had been corrected so a jury would be able to piece together and believe various parts of what and that's why the jury issue was submitted. When did it become substantial because there was evidence both ways?

JUSTICE EVA M. GUZMAN: In 1994, could you evaluate though the reasonable impact of having that plant there? Do you believe that they could have evaluated that these noises would continue, these odors would continue just having this plant there? Because I think Schneider talks about the point in time when you can reasonably evaluate the future impact.

ATTORNEY JAMES R. RODGERS: When does it become substantial is what it all comes down to? That is the question. What one person may think is substantial to them, the courts may say is not substantial just like the people living next to the sewage plant in Abilene case. They may have thought it was substantial to them, but that still does not give them a right to seek judicial relief. Now here we have a situation where the State of Texas agreed. It's like these people came up with this as if maybe they were just making it up that it got a lot worse in '97 and '98 and lo and behold that's exactly when the citation here in the State of Texas.

CHIEF JUSTICE WALLACE B. JEFFERSON: You're saying, in effect, there could never be a summary judgment or a successful motion for summary judgment in a case like this.

ATTORNEY JAMES R. RODGERS: I think each case is going to stand on its facts, its unique facts of the circumstances. There certainly could be situations where it's absolutely clear you have substantial inference and there could be summary judgment evidence. But in a situation where, for instance, the landowner is having to try to bring this case, he's not in control of the premises, he's not in control of facilities out there. The people that are and supposedly the regulators for the State are saying everything's fine. Whatever you smelled was faint and passing and transitory and we're putting up sound boards and whatever. So you just wait and you're okay. Well then as a landowner, you say something. I don't know what happened to that facility, but in '97 and '98, it got tremendously worse and lo and behold, even the State of Texas found substantial interference.

JUSTICE NATHAN L. HECHT: But in arguing that, what's substantial to one person may not be substantial to another, what you are arguing, even if there could be a possible summary judgment, is that for one landowner there might be a permanent nuisance and for the guy next door, it might not be.

ATTORNEY JAMES R. RODGERS: Well, but I don't think it's substantial to that party. I think it's substantial overall. I don't think you could say, hey, it's substantial to Mr. Smith, but it's not substantial to Mr. Jones.

JUSTICE NATHAN L. HECHT: I thought that was your argument.

ATTORNEY JAMES R. RODGERS: Well, no, what I said is it raises a fact question on when it became substantial to --

JUSTICE DON R. WILLETT: So everything goes to trial?

ATTORNEY JAMES R. RODGERS: Well I think every case could be different. You could have a situation where let's say in '94 when the people wrote the letter or complained and let's say the State of Texas had sited in NGPL and found that they were not in compliance, but yet nobody did anything or they didn't file anything. Or the defendants said, yes, we are putting out a certain level of noise and odor and we're never going to be able to change that.

JUSTICE DON R. WILLETT: But if you have a single landowner who says, in my personal subjective view, things subjectively worse, that that would be sufficient to survive summary judgment [inaudible].

ATTORNEY JAMES R. RODGERS: That'll be sufficient to survive summary judgment, but still you are going to have secure a jury finding and then if you were to somehow prevail, survive a factual sufficiency review at the court of appeals' level. I think--

JUSTICE NATHAN L. HECHT: Well what you are arguing, let me be clear, what you are arguing is that if Jones brings that suit and loses, Smith can bring the same suit and say well Jones is just not as sensitive to this as I am?

ATTORNEY JAMES R. RODGERS: I don't know about that, I'm not sure.

JUSTICE NATHAN L. HECHT: I thought you said what was substantial to one person is substantial to --

ATTORNEY JAMES R. RODGERS: No, I don't mean as far as substantial as far as the rule. What I'm saying is you may think it's substantial to you. It's just like the people that live next to the sewage plant in the City of Abilene. If you smell sewage, how could somebody else tell you well that's not really that bad? To you it may be, but that does not necessarily authorize you to be able to go and prevail on a nuisance claim when they're able to say that's transitory. We're going to fix it. It's going to get better and everything. You may not be satisfied with that argument, but do you have the right, can you go in and prevail on a nuisance claim when you have absolutely no proof when, like in their testimony they said these odors were faint. This noise, don't worry, it's going to go away. How can you, even though it might be in your mind not anything minor, but yet you're faced with the inability to prove or do anything, but then the condition does substantially worsen where even the State of Texas acknowledges that it was a category five violation.

JUSTICE NATHAN L. HECHT: I still don't understand why that doesn't mean a different result in every suit.

ATTORNEY JAMES R. RODGERS: Well I don't think it means a different result. I think it means you submit the issue to the jury. But that's a factual --

JUSTICE NATHAN L. HECHT: Right, but a jury in one case could resolve it one way and a jury in another case with the neighbor, the adjacent neighbor, could resolve it the way.

ATTORNEY JAMES R. RODGERS: And I think that happens in litigation all across the spectrum that, that sometimes happens, but I think in this situation, is the jury's finding of June 12, 1998, is there some evidence in the record to support that ignoring that to the contrary? Yes, there is. There's a category--

CHIEF JUSTICE WALLACE B. JEFFERSON: You talked about the postal worker who had been in that route

for 25 years and there's substantial change. Were there other third parties who corroborated the--

ATTORNEY JAMES R. RODGERS: Well all of the -- all of the plaintiffs testified. There were no other third parties that testified and then we had the certainly the citation from the State, but interestingly, interestingly in the Defendant's witnesses that they put on, appraiser, an expert that went out there, not a single one of them testified there was not odor and noise of a substantial interference type. They presented no evidence that there was not of that sort of situation.

JUSTICE DEBRA H. LEHRMANN: Excuse me I have a question. Why didn't you submit an issue on the temporary nuisance to the jury? Why didn't you do that?

ATTORNEY JAMES R. RODGERS: Well, in our opinion, it, we believe that it became a substantial interference in '97 and '98 when all of the people testified that it became a substantial interference and that's when it became unbearable, which was in line with the State of Texas finding of the substantial interference in '98 so our position was it became a substantial interference at that time and continued on.

JUSTICE DEBRA H. LEHRMANN: But why didn't you just plead that alternatively?

ATTORNEY JAMES R. RODGERS: Well if you claimed that it was a series of, of--

JUSTICE DEBRA H. LEHRMANN: Not pleaded, I mean submitted.

ATTORNEY JAMES R. RODGERS: -- a series of temporary, I am sure NGPL would have come in and said oh we've been doing this just like the same for years. We've been putting out noise and the odor and it's been the same for all these years. In fact, that is what they somewhat said on cross examination. So if you got into a temporary nuisance argument with them, they would say oh no, we've been doing this forever, or since we put the plant in. And then also under the very definition of permanent nuisance, by the time we went to trial, and this case was an old case, by the time it went to trial, we had filed suit originally, we did plead the alternative theories. By the time you went to trial, the testimony from all of the people was not only was it still bad like it got in ' 97, '98, it continued on all the way up to the trial some eight, nine, ten years later. So their own, the own continuation of it for a decade would have showed that it was permanent as opposed to temporary at that point.

JUSTICE DON R. WILLETT: Mr. Busby says the evidence that your clients gave the court on damages is conclusory and legally insufficient and you say what?

ATTORNEY JAMES R. RODGERS: Well, I say the property owner rule has long been in Texas and in these particular folks that testified, we had a gentleman that was on the state water planning committee, director of a bank, director of electric cooperative, loan officer at a bank, people had bought and sold property, people that their families had lived in this area for over 150 years.

JUSTICE DON R. WILLETT: And Mr. Busby says fine, that may go to their qualifications, but not to the basis, to the underlying foundation of their number.

ATTORNEY JAMES R. RODGERS: I think what Mr. Busby -- if you tried to put something else on the property owner rule to say, hey, you've got to show some sort of calculation, aren't you saying they've got to do like appraisers and show something. I think the whole basis and the case law says the property owner rule is to be construed liberally. Do these people have a basis for knowing the value of their property? They all testified to that basis. They said they were knowledgeable about market value. Some of them even had more experience than the average person would be. So if the property owner rule is going to have any viability, then that is the type of testimony you would be. Now if that goes to weight --

JUSTICE DON R. WILLETT: Can property owners give conclusory testimony on value?

ATTORNEY JAMES R. RODGERS: Well I don't think it was conclusory. I think it's conclusory for them to argue that it is conclusory because they testified. We lived out on this property, here's what we do with it, here's what we're faced with, the noise, the smell, the odor. I'm aware of market value. I would have to tell anybody who was going to purchase my property about all of this and aware of other transactions, I don't know how that's conclusory. I don't think that is conclusory. They didn't just pull it out of the air. They gave their basis. Now they may disagree with their opinion, but I think the case law says that goes to the weight to be submitted to the jury, for cross examination or whatever to be given. But to try to put anything else on the property owner rule is going to add something that never has existed; in fact, it would kill the rule because how could a property owner then ever give an opinion if you were going to say well now show me your calculations, show me you're comparables, show me exactly the methodology used, did you use the income approach or the capitalization approach or whatever? That would defeat the whole property owner rule, which has been a basic part of Texas law for years. So I think the statements were not conclusory.

JUSTICE PHIL JOHNSON: Well let me ask this. The court of appeals quotes the, Miss Christine Nashburn is saying that their home and three acres would be worth maybe $100,000 if it didn't have the pump station, but she didn't think it would be worth anything with the pump station. We might get $10,000 or $20,000. So would that support a finding of zero value for that property if it's some evidence as you say it is then would [inaudible] if the jury said that property is worth zero, it seems like under, if we take what you're saying and that's the rule, then there would be legal and factual sufficiency to support that.

ATTORNEY JAMES R. RODGERS: I think there'd be a factual sufficiency argument on that. And --

JUSTICE PHIL JOHNSON: But there certainly would be legal, legally sufficient evidence for finding of zero even though the property's still out there. Home and property, they're living in it.

ATTORNEY JAMES R. RODGERS: I think it'd go to that weight to be given that testimony by fact finders.

JUSTICE PHIL JOHNSON: Would be legally sufficient under your position?

ATTORNEY JAMES R. RODGERS: Yes.

JUSTICE DON R. WILLETT: And that's the qualm I have is that your approach seems to fuse and blend quailfication with sufficiency if it's a property owner doing the testifying.

ATTORNEY JAMES R. RODGERS: Well, but I think the whole basis of the property owner rule is to say, first off, you don't ever get to that point unless you've got some viable cause of action that something has happened and damaged your property. I mean you can't just come in and say I want X number of dollars because there hadn't been anything happen. But the property owner's able to come in and say this is my property, this is what I've always done with it, it's been well maintained. I'm knowledgeable about property area. I'm having to live next to a pump station where there is constant odor and noise and vibration and my opinion it's decreased the value of my property.

JUSTICE DON R. WILLETT: So if a landowner says I've lived here for 20 years and I know what my neighbors have sold their property for, now there's this odor and this noise and I think my property is worth X now, would that be legally sufficient?

ATTORNEY JAMES R. RODGERS: That is some evidence whether or not it whether or not --

JUSTICE DON R. WILLETT: It's legally sufficient evidence?

ATTORNEY JAMES R. RODGERS: I think it's legally sufficient. Whether or not it's persuasive might be

something else, but it would be legally sufficient evidence.

JUSTICE DON R. WILLETT: So it's totally insulated though from appellate scrutiny altogether?

ATTORNEY JAMES R. RODGERS: No, it wouldn't be totally insolated. I think you've got to look at the circumstances. You've got to look at what the complaint is. You got to look at what is the damage that's been suffered. I mean is this some minor trifling thing or is there a valid basis for what is being argued here? These people gave very descriptive testimony about the impact on their property and so forth. So I don't think this is just, you just pull something out of the air. These people gave pages and pages of the impact and all and I think that all goes into not just their qualifications to give that opinion, but the basis of that opinion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Rogers, can you, going back to the permanent nuisance, what is a category five citation? Like what's the high and what's the low and what is it?

ATTORNEY JAMES R. RODGERS: Oh, five is the highest and under the state guidelines, this shows up in the record, five is when you have substantial interference. Anything less than five is not a substantial interference under the state of Texas on regulatory guidelines. So the State of Texas themselves in 1998 found for the first time a substantial interference. And to go back to the argument that was previously made, how are landowners, farmers, ranchers, school teachers without the sophistication and the capability in the State of Texas that the state of Texas didn't find the substantial interference until 1998, how could somebody out there have a judicially recognized claim they you go into court and prevail when even the State of Texas didn't find the substantial interference until 1998? But the category five is the worst category. There's five categories, five being the worst and in its own description of what a category five is there is the words substantial interference.

JUSTICE DON R. WILLETT: Is difficulty breathing substantial interference?

ATTORNEY JAMES R. RODGERS: Well that's where it might get, and what is difficulty in breathing, you know. There's lots of vagaries here, which is exactly why substantial interference was submitted to the jury, all of these things we talked about the letters, the category five, the previous complaints, all of that came in front of the jury. I think the analysis is when the jury said June of 1998, there was evidence to support that, the postman, the Plaintiffs, the State of Texas itself. There was evidence to support their finding. Now you have to ignore the evidence to the contrary if there was evidence to support that finding under legal sufficiency review and there certainly was in this record. This was a hotly contested case. There were facts, but that was a jury issue and that is what the jury found and it did have support in the evidence. In fact, the date the jury found is when the State of Texas gave a citation. Now they may argue well that citation was dated June 12th, they must have done the study a few days before. I think that's the difference without any distinction there. The jury found substantial interference based on evidence and they only needed some evidence to survive a legal insufficiency and that occurred in this case.

JUSTICE PHIL JOHNSON: Is there any evidence that the State was out there any other time other than that one time?

ATTORNEY JAMES R. RODGERS: We asked. What we found out is they didn't go back out there.

JUSTICE PHIL JOHNSON: I mean before, neither before, is there any evidence they--

ATTORNEY JAMES R. RODGERS: Well there is some evidence that they went before; they had gone before.

JUSTICE PHIL JOHNSON: So the only evidence is before?

ATTORNEY JAMES R. RODGERS: And then afterward they did these what they call office reviews, that's where the company fills out these reports sends it in to them, the inspector sits in his office--

JUSTICE PHIL JOHNSON: You're saying there's no evidence the State was out there afterwards?

ATTORNEY JAMES R. RODGERS: There is only once incident that we know of where anybody came out again. There was an incident where they described, they come out in a pick up and drove around one afternoon, but that's the only --

JUSTICE PHIL JOHNSON: Was that the State?

ATTORNEY JAMES R. RODGERS: That was the, somebody hired by the State is my understanding, but that was the only incident which we're aware of.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Rogers.

ATTORNEY JAMES R. RODGERS: Thank you.

REBUTTAL ARGUMENT OF BRETT BUSBY ON BEHALF OF PETITIONER

JUSTICE PHIL JOHNSON: Mr. Busby, Mr. Rogers says the category five violation in '98 is the state of Texas declaring that this is a substantial interference and what do you say?

ATTORNEY BRETT BUSBY: Well our response is, Your Honor, you can't have it both ways. The State is declaring that it's a substantial interference at that point, but then the State also came out and I, to Justice Johnson's point, I disagree with the characterization of the record and if you look at pages six and seven of our brief, there were eight investigations made after the citation by the commission's Tyler regional office staff, including odor surveys where they actually came out to the property. And all the citations are in our brief at pages six and seven during which no further nuisance conditions have been documented. State investigators returned again to conduct 41.5 hours of continuous air monitoring near the station in November, 2002 and the monitor compounds did not exceed air quality standards and were below the levels that would be expected to cause adverse health effects or odors. So you can't come in and say oh well the State cited you for a substantial interference, but then ignore that the State later concluded that that was resolved. You've got to take both parts. And so if the State says it's resolved, then all you have, all that is is evidence of a temporary nuisance.

JUSTICE PAUL W. GREEN: Why is a jury required to accept both?

ATTORNEY BRETT BUSBY: Well the jury is, as far as the state piece because I mean that's what the State concluded. The state said there was a violation and that it was later resolved. Now the jury certainly can consider the Plaintiff's testimony that things got worse, but as I described earlier, that's not the standard. The question is was it substantial, was there evidence that it first became substantial before, two years before the suite was file?

CHIEF JUSTICE WALLACE B. JEFFERSON: Substantial to whom? The point that was made earlier is, yes, the Plaintiffs may think difficulty breathing and that sort of thing. You and I may think it's not so bad. But you do have evidence from this mail carrier, who had been there 25 years and who said sometime in 1997 and '98, it got so bad that I didn't want to deliver mail there anymore.

ATTORNEY BRETT BUSBY: That's true and Justice Hecht's question, I picked up on this earlier and the answer is that it has to be an unreasonable discomfort or annoyance to persons of ordinary sensibilities, that's what the charge says. So it's an objective standard, it's not a subjective standard. And as to the postman, if you look at page 16 of our merits brief, we summarize the testimony there. He says that the fumes burned his nose and throat after the station was built and got worse in the late 1990's. I'd also like to address City of Abilene v. Downs, which was brought up. That was a case where the plant in that case had not reached full capacity at the

time that the initial complaints were made. It later, the capacity increased and so the court said, well, the capacity of the plant is increasing so you can have the accrual at the time the capacity increased later. There is no evidence of any of that type of change here, any kind of substantial change in terms of the physical things that were going on at the plant. Also, there was a discovery rule issue submitted in City Abilene v. Downs and this Court has subsequently clarified that the discovery rule is generally not applicable in nuisance cases and it was not submitted here.

JUSTICE EVA M. GUZMAN: Mr. Busby, you in your brief argue that we should discount their statements that the odor got worse because they had no objective evidence to substantiate those statements. What does objective evidence look like from your perspective if we're not to place much weight on the testimony of the people actually out there?

ATTORNEY BRETT BUSBY: Well, I think there are a number of ways you could do that. They came out and did the air monitoring in this case, for example, the State did and sent people out to do that. So there are a number of ways you could measure it objectively, but I don't think the court needs to hold that in this case in order to say that the statute of limitations applies because of the Plaintiffs' prior complaints. As far as the damages, I'd just like to point out that the court of appeals conceded at page 20 of its opinion that basically if we're right and the standard is that you have to have some factual basis for the number that there's no evidence of that. What they said is the record is silent, they said that the Defendants didn't bring out any testimony and neither did the plaintiffs, of course. So the record is silent regarding the facts supporting the Plaintiffs' opinions, including how they determined their claimed losses of property value. So if this Court holds that that is the standard as we submit it should based on all the cases we cited in the brief, even the court of appeals is saying they don't have any evidence of that and so we would ask the Court to reverse and render judgment on either of those bases.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel, the cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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