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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 12-0905

In The Supreme Court of Texas

ENVIRONMENTAL PROCESSING SYSTEMS, L.C.,
Petitioner,

v.

FPL FARMING LTD.,
Respondent.

On Appeal from the Ninth Court
of Appeals of Texas No. 09-08-00083-CV

RESPONDENT/CROSS-PETITIONER'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent and Cross-Petitioner FPL Farming Ltd. ("FPL Farming") files this Motion for Rehearing and respectfully shows as follows:

INTRODUCTION

Ford Frost, FPL Farming's corporate representative, testified unequivocally and without contradiction that FPL Farming never consented to Environmental Processing Systems, L.C.'s ("EPS") storage of industrial waste beneath FPL Farming's land:

> Q. Okay. Now, FPL as we sit in this courtroom, is FPL consenting to doing that, putting waste under your land?
>
> A. No, sir, we do not consent and have not consented for them to inject waste and store it under our property.

8 RR 136:19-24. This evidence conclusively established lack of consent and entitled FPL Farming to a directed verdict on this element of its trespass claim. If such uncontradicted evidence from the landowner is not sufficient to prove lack of consent, it is unclear how a landowner can ever prevail on this issue.

Despite this unrebutted evidence, the trial court denied FPL Farming's "no evidence" directed verdict motion on the issue of consent.[1] This Court then charged FPL Farming with a procedural default because it did not cite this evidence in its directed verdict motion. Unless corrected on rehearing, the Court's failure to honor the undisputed evidence in the record will radically change Texas procedural law for the worse in several ways.

First, parties will now be unfairly penalized for following existing precedent. When FPL Farming filed its directed verdict motion over seven years ago, the vast majority of intermediate appellate courts in Texas had held that consent is an affirmative defense to trespass, and no court had ever directly held that the plaintiff bears the burden of proof on consent. Moreover, before this case, this Court admittedly had not squarely addressed the issue. *See Envt'l Processing Sys., L.C.*

[1] The Beaumont court considered the directed verdict issue on the merits and affirmed the trial court.

v. FPL Farming Ltd., ___ S.W. 3d ___, 2015 WL 496336, at *9 (Tex. Feb. 6, 2015) ("*FPL Farming V*"). Without rehearing, this Court's decision will impose a new clairvoyance requirement on parties with respect to future changes in the law. That outcome would be as unrealistic and inefficient as it is unfair.

Second, parties will now be required to marshal and recite all their evidence in a "no evidence" directed verdict motion. No court has ever before interpreted the Texas Rules of Civil Procedure to require this. And this Court should not trigger this landslide change to longstanding Texas trial practice now. FPL Farming complied with Rule of Civil Procedure 268's requirement that it "state the specific grounds" for its directed verdict motion. Nothing more is—or should be—required of FPL Farming (or any other party). Directed verdict motions should not become a bloated regurgitation of the record.

Third, parties will now risk procedural default based on surprise arguments that were not raised in the briefs. Texas Rule of Appellate Procedure 55.2 provides that all arguments not made in a party's briefs are waived. EPS did not argue in its briefs or at oral argument that FPL Farming's directed verdict motion failed to preserve its legal sufficiency challenge. Indeed, it appears that even EPS did not anticipate the Court's procedural default ruling. The decision in this case effectively repeals Rule 55.2 and will require parties to address purely hypothetical

arguments of which they have no prior notice simply to avoid surprise rulings. This is unsound law and policy.

Finally, if the bedrock principle that cases should be disposed of in the interests of justice means anything, the Court should not ignore the conclusive evidence of lack of consent in this case. There can be no dispute about what actually happened: FPL Farming never gave EPS consent to inject and store waste under its property. FPL Farming instead resisted EPS's trespass at every turn, steadfastly maintaining this position from day one, both before and during this protracted litigation. There was never any doubt about FPL Farming's position nor the evidence that supports it. FPL Farming should not forfeit its basic substantive right to protect its property from trespass simply because this Court believes the wrong box was checked at one point along this winding procedural road.

For these reasons, the Court should reverse the decisions of the trial court and Beaumont court denying FPL Farming's directed verdict motion, reverse the Beaumont court and affirm the trial court's decision excluding the 1996 Settlement Agreement from evidence, and remand this case for a new trial.[2] The Court has unintentionally wreaked havoc on Texas civil practice—not just in trespass or tort

[2] If further action is necessary, the Court could simply dismiss EPS's petition as improvidently granted or alternatively reach the issues and affirm the decision of the Beaumont court of appeals.

cases, but in *all* cases. FPL Farming therefore respectfully asks this Court to grant the motion for rehearing.

ARGUMENT

I. FPL Farming Conclusively Proved That It Did Not Consent to EPS's Trespass.

Frost unequivocally testified that FPL Farming did not consent to EPS's injection of industrial waste beneath FPL Farming's property. *See* 8 RR 136:19-24. EPS did not, and could not, offer any evidence to controvert Frost's testimony.[3] In addition, for the past sixteen years, FPL Farming has tirelessly opposed EPS's injection well operations in both the Texas Commission on Environmental Quality and the courts. Under these circumstances, Frost's testimony, which was undisputed and corroborated by other evidence, required the trial court to grant FPL Farming's directed verdict motion. *See Collora v. Navarro*, 574 S.W.2d 65, 69-70 (Tex. 1978).

Faced with this incontrovertible evidence, EPS mustered only its untenable theory that FPL Farming consented to EPS's trespass by not objecting *before* the trespass occurred. As explained in FPL Farming's Opening Brief on the Merits on

[3] EPS has previously argued that the 1996 Settlement Agreement between EPS and FPL Farming's predecessor-in-title, J.M. Frost III, is evidence of implied consent. As explained in FPL Farming's Opening Brief on the Merits on its Cross-Petition, at 15-17, and Reply on the Merits on its Cross-Petition, at 15-18, as a matter of law the 1996 Settlement Agreement is not evidence of consent, and the trial court properly excluded it. Inadmissible evidence cannot defeat a legal sufficiency challenge. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). The Court did not address the admissibility of the 1996 Settlement Agreement in its opinion. *See FPL Farming V*, 2015 WL 496336, at *10.

its Cross-Petition, at 9-15, and Reply on the Merits on its Cross-Petition, at 3-11, implied consent arises only when a landowner fails to object *after* a trespass has occurred. *See Gen. Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 835 (Tex. App.—Dallas 2000, no pet.), *overruled on other grounds by FPL Farming V*, 2015 WL 496336, at *6-7; *see also City of El Paso v. Zarate*, 917 S.W.2d 326, 330-31 (Tex. App.—El Paso 1996, no writ) (holding in a premises liability case that "[t]he landowner may assume that persons will not penetrate his boundaries uninvited" (quotations omitted)); *Richardson v. Lone Star Salt Co.*, 49 S.W. 647, 648 (Tex. Civ. App.—Austin 1899, no writ) (holding in a nuisance case that "[a] wrongdoer ought not to be encouraged in the commission of a wrong simply because there is no formal protest against his conduct"). Nothing supports EPS's contention that a landowner consents by failing to object to a hypothetical trespass that *may* occur *ten years* in the future.[4]

The only admissible evidence conclusively proved that FPL Farming did not authorize EPS to store industrial waste beneath FPL Farming's land. Accordingly, the trial court should have granted FPL Farming's motion for a directed verdict on consent. The Court should remove the unjustified and dangerous procedural roadblocks its decision created.

[4] The Court did not address the validity of EPS's implied consent theory in its opinion. *See FPL Farming V*, 2015 WL 496336, at *10.

II. FPL Farming Should Not Lose Its Substantive Rights Based on an Unsound and Newly Minted Theory of Procedural Default.

A. FPL Farming Properly Presented Its Legal Sufficiency Challenge Based on the Law as It Existed at the Time of Trial.

In its opinion in this case, the Court acknowledged that it had "not squarely addressed the question of which party bears the burden of proving consent in a trespass action." *FPL Farming V*, 2015 WL 496336, at *3. Although the Court also stated that the decisions by the intermediate appellate courts were not uniform, it did not cite a single appellate case that rejected FPL Farming's position. Six of the decisions the Court cited (from five different appellate courts) held that consent is an affirmative defense. *See id.* at *3 & n.2. The only contrary decision the Court cited, *Watson v. Brazos Electric Power Cooperative, Inc.*, 918 S.W.2d 639, 645-46 (Tex. App.—Waco 1996, writ denied), merely approved a trespass charge submitted by the landowner without discussing which party bears the burden of proof on consent.

Based on this overwhelming authority, and the fact that the evidence conclusively proved that FPL Farming never consented to EPS's trespass, FPL Farming made what it reasonably believed was a proper "no evidence" directed verdict motion. By definition, a "no evidence" motion will not cite any evidence. Thus, nothing more was required.

Moreover, it does not appear that the Court has ever before required a party to marshal its evidence to support a directed verdict motion. Rule of Civil Procedure 268 requires a party to state the "specific grounds" for a directed verdict motion, but has not been interpreted to require a party to marshal its evidence. In addition, the trial in this case lasted only three days, the parties presented only six witnesses, and the issue of consent was argued vigorously throughout the trial. The trial court was well aware of the parties' positions and the relevant issues.[5] The Court should not let this case hinge on a novel theory of procedural default especially when the law supported FPL Farming's view that consent was an affirmative defense.

B. Not Even EPS Argued That FPL Farming Failed to Preserve Its Legal Sufficiency Challenge.

One need look no further than EPS's briefs to see just how surprising this new theory of procedural default is. Even EPS did not suggest that FPL Farming failed to preserve its legal sufficiency challenge.[6] Rule of Appellate Procedure 55.2(i) requires briefs to contain "a clear and concise argument for the contentions

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[5] The Court also cited *Dow Chemical Co. v. Francis*, 46 S.W.3d 237 (Tex. 2001) (per curiam), and *Collora*, but apparently only for the proposition that a plaintiff's directed verdict motion can be granted only if he conclusively establishes the facts on which his claim is based, which FPL Farming did. *See FPL Farming V*, 2015 WL 496336, at *9; *see also supra* Part I. *Dow* involved a preservation issue related to alleged judicial bias, but not directed verdict. *See* 46 S.W.3d at 241. (There was a legal sufficiency challenge in *Dow*, but it did not involve any waiver issues. *See id.* at 241-42.) *Collora* did not involve a preservation question at all.

[6] EPS presumably believed, just as FPL Farming did, that FPL Farming's legal sufficiency challenge had been properly preserved, and thus, EPS saw no reason to raise this issue.

made, with appropriate citations to authorities and to the record."[7] Arguments that are not properly raised under Rule 55.2(i) are waived. *See Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999). The Court's decision to raise that issue *sua sponte*, and then dispose of the case on this basis, effectively repeals Rule 55.2(i) and departs from settled precedent governing the orderly disposition of appeals.

C. The Interests of Justice Warrant a Directed Verdict for FPL Farming on the Issue of Consent.

Finally, the interests of justice heavily favor vindicating FPL Farming's substantive rights. As discussed above, the evidence of FPL Farming's lack of consent was crystal clear. *See supra* Part I. It would be unjust to deprive FPL Farming of a remedy for the unlawful invasion of its land based on newly-minted procedural technicalities. *See Hamrick v. Ward*, 446 S.W.3d 377, 385 (Tex. 2014) (noting that a remand in the interest of justice is appropriate when the Court's decision clarifies or overrules prior precedent on which a party relied). Moreover, ignoring FPL Farming's unrebutted evidence of lack of consent may leave parties wondering what, if anything, can amount to a showing that consent was withheld.

[7] Although Rule 55.2(i) applies to a petitioner's brief, the respondent's brief "must conform to 55.2," except for a few exceptions that do not include Rule 55.2(i).

CONCLUSION AND PRAYER

Rehearing exists precisely to remedy the kind of prejudicial errors that occurred here. FPL Farming conclusively proved that it did not consent to EPS's storage of industrial waste beneath FPL Farming's property. The Court's *sua sponte* decision that FPL Farming did not properly preserve this issue is incorrect and unfair especially because FPL Farming's directed verdict motion followed the law as it existed at the time of trial. Even EPS did not raise or brief the procedural default issue on which the Court's decision rests. Accordingly, the Court should grant FPL Farming's Motion for Rehearing, reverse the decisions of the trial court and Beaumont court denying FPL Farming's directed verdict motion, reverse the Beaumont court and affirm the trial court's decision excluding the 1996 Settlement Agreement from evidence, and remand this case for a new trial.

FPL Farming respectfully requests that the Court grant the relief it requests in this motion, that it take any other action necessary as set forth herein, and that it grant FPL Farming such other and further relief to which it may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR FPL FARMING LTD.

CERTIFICATE OF COMPLIANCE

Respondent/Cross-Petitioner certifies that its Motion for Rehearing (when excluding the caption, signature, certificate of compliance, and certificate of service) contains 2,287 words.

/s/ Christopher J. Richart
Christopher J. Richart

CERTIFICATE OF SERVICE

I certify that on March 9, 2015, Respondent's Motion for Rehearing was served by first-class mail on:

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