No. 16-0505

IN THE SUPREME COURT OF TEXAS

MURPHY EXPLORATION & PRODUCTION COMPANY–USA,
Petitioner,
v.
SHIRLEY ADAMS, CHARLENE BURGESS, WILLIE MAE HERBST JASIK, WILLIAM ALBERT HERBST, HELEN HERBST, AND R. MAY OIL & GAS COMPANY, LTD.,
Respondents.

FROM THE COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS AT SAN ANTONIO

BRIEF OF AMICUS CURIAE TEXAS LAND & MINERAL OWNERS ASSOCIATION IN SUPPORT OF RESPONDENTS' BRIEF ON THE MERITS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Texas Land & Mineral Owners Association ("TLMA"), is a statewide advocacy association whose members are farmers, ranchers, and royalty owners. TLMA advocates for a business and legal environment that promotes the production of oil and natural gas in a manner that respects the property rights of landowners.

TLMA has an interest in the affirmation of the court of appeals' opinion because members of TLMA currently have oil and gas leases which contain express offset clauses substantially similar to the one at issue in this case. Murphy seeks to change the common understanding and purpose of offset clauses and deprive mineral lessors in the State of Texas—many of whom are members of TLMA—of their contractually-negotiated rights under these offset clauses, as well as deprive them of their common law right under the rule of capture to protection against the drainage of oil and gas beneath their properties.

Pursuant to Texas Rule of Appellate Procedure 11, Amicus respectfully submits this brief in support of the Herbsts' Brief on the Merits and urges this Court to affirm the ruling of the Fourth Court of Appeals. Amicus has paid for the preparation of this brief, and a copy has been served on all parties.

STATEMENT OF FACTS

Amicus adopts and incorporates by reference herein the Statement of Facts as set forth in the Herbsts' Brief on the Merits as it pertains to the arguments in this brief.

SUMMARY OF ARGUMENT

While modern drilling techniques have permanently changed oil and gas development in Texas, they have not changed the legal rule that underpins the whole of our oil and gas jurisprudence: the rule of capture. Unless this Court is willing to dispense with this most basic tenet, it cannot accept Murphy's argument. The rule of capture generally allows a landowner to drain oil and gas from neighboring property without liability. In most cases, the adjacent landowner's only remedy is to drill an offset well to protect its property from drainage. The rule of capture *necessitates* the drilling of offset wells to protect against drainage—the two ideas are correlative.

In this case, Murphy argues that Texas law should recognize the differences between traditional and unconventional drilling methods and the "minimal drainage" context of Eagle Ford wells when interpreting the express offset obligations in the Herbsts' oil and gas leases. Murphy thinks this "makes sense" considering the "context" of tight shale formations. But Murphy's theory would have effects far beyond the "context" of the Eagle Ford Shale. This Court

has long recognized that mineral lessors are entitled to protection from drainage of their minerals to neighboring leases regardless of geological context. If Murphy prevails, however, lessors with similar offset provisions would lose this protection in all formations and from all well types throughout the State of Texas.

Contrary to Murphy's argument, this Court recently affirmed that the rule of capture was applicable to all formations, including the Eagle Ford Shale and other shale formations, and to all drilling methods, including horizontal, hydraulically fractured wells. A party's only remedy against artificial stimulation processes entering onto one's property, as occurs with hydraulic fracturing, is to drill a corresponding artificially stimulated offset well because that is what the rule of capture requires.

An offset well is a well that protects against drainage, even in tight shale formations. Murphy did not meet its summary judgment burden to prove that a well drilled more than 2,450 feet from a producing well on an adjacent lease was drilled to protect the leasehold from drainage or could reasonably be anticipated to do so. Because of the harm that Murphy's position in this appeal would inflict upon thousands of mineral owners and lessors across Texas, Amicus urges this Court to affirm the ruling of the court of appeals.

ARGUMENT

A. The Offset Clause

The Herbsts' oil and gas leases (the "Leases") contain the following express offset clause (the "Offset Clause"):

> 25.) It is hereby specifically agreed and stipulated that in the event a well is completed as a producer of oil and/or gas on land adjacent and contiguous to the leased premises, and within 467 feet of the premises covered by this lease, that Lessee herein is hereby obligated to, within 120 days after the completion date of the well or wells on the adjacent acreage, as follows:
>
> (1) to commence drilling operations on the leased acreage and thereafter continue the drilling of such off-set well or wells with due diligence to a depth adequate to test the same formation from which the well or wells are producing from on the adjacent acreage; or
>
> (2) pay the Lessor royalties as provided for in this lease as if an equivalent amount of production of oil and/or gas were being obtained from the off-set location on these leased premises as that which is being produced from the adjacent well or wells; or
>
> (3) release an amount of acreage sufficient to constitute a spacing unit equivalent in size to the spacing unit that would be allocated under this lease to such well or wells on the adjacent lands, as to the zones or strata producing in such adjacent well.

Murphy contends that the Offset Clause has nothing to do with drainage protection, and from a "four-corners" reading "plainly mean[s] that once a neighboring well meets the location requirements specified in detail in the opening paragraph, Murphy has 120 days to commence operations on a well. That well must be drilled with "due diligence," be located "on the leased acreage," and be completed to a "depth adequate to test the same formation" as the triggering well.

Once drilled according to these requirements, the well is "such off-set well." There are no further requirements."[1] Murphy thus argues it has complied with the Offset Clause. Amicus refers to this argument as Murphy's "four-corners" argument.

Alternatively, Murphy argues that the term offset well has a different meaning in this case given the geological context. Murphy states: "Murphy had presented undisputed evidence that there is little-to-no drainage in the Eagle Ford Shale"[2] and that the term "[offset well] can have different meanings depending on the legal context (contractual provision or implied covenant) and the type of oil and gas operation (traditional vertical drilling in conventional reservoirs or horizontal tight shale drilling)."[3] Then Murphy uses this "context" to cherry pick one of several Merriam-Webster definitions of the word "offset" as the appropriate definition of "off-set" in the Offset Clause, stating:

[1] *See* Murphy's Brief on the Merits at 8-9.
[2] *See id*. at 6.
[3] *See id*. at 14.

> "In other words, [an offset well] "serves to counterbalance or to compensate for" the triggering well's production. *See* Offset Definition, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/offset. . . . And that makes sense in the undisputedly minimal drainage context of horizontal tight shale drilling, where the concern is not so much protecting against direct drainage from any particular well, but rather merely counterbalancing production from the same formation."[4]

As the Herbst Well "serves to counterbalance or to compensate for" production from the Lucas Well, Murphy argues it has complied with the Offset Clause. Amicus refers to this argument as the "context" argument.

Note that, under both of Murphy's arguments, the Offset Clause supersedes the implied covenant to protect against drainage, yet, at the same time, Murphy asserts that the Offset Clause has nothing to do with drainage protection.[5] For the reasons explained in this brief, both of Murphy's arguments must fail.

B. The "four-corners" argument

As the Herbsts thoroughly explain in their brief on the merits, Murphy's four-corners approach would read the term "offset" out of the Offset Clause. This is in direct contravention of one of the most important canons of contract construction, that all words of an oil and gas lease must be given meaning, and "offset well" has an understood meaning in Texas law.

Murphy attempts to justify reading the term "offset" out of the Leases by arguing that if "offset well" were interpreted as a well "to protect against

[4] Murphy's Brief on the Merits at 11.
[5] *See id.* at 17.

drainage", it would render the prepositional phrases "with due diligence" and "completed to a depth adequate to test the same formation" surplusage.[6] Murphy suggests that "the term 'off-set' is already doing that work (and more) by ensuring drainage protection."[7]

However, under the implied duty to protect against drainage, *how* an offset well is drilled is separate from *what* an offset well is.[8] The implied covenant requires the drilling of such offset well as a "reasonably prudent operator" would drill.[9] The phrases "due diligence" and "same formation" are part of the "reasonably prudent operator" standard of the implied covenant, not the offset well requirement in the Leases.[10] This concept is discussed in *Magnolia Petroleum Co. v. Page*.[11] In *Magnolia*, the lessor sued the lessee alleging that the lessee failed to drill an offset well with "due diligence" under an express offset clause contained in the lease.[12] The court disagreed, as the express offset clause did not incorporate the "reasonably prudent operator" standard, and stated:

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[6] *See* Murphy's Brief on the Merits at 12.
[7] *See id.*
[8] *See Good v. TXO Production Corp*., 763 S.W.2d 59 (Tex. Civ. App.—Amarillo 1988, writ ref'd n.r.e.) (stating that the standard under how an offset well is drilled in an express offset clause is determined by the language of the express provision, not the implied covenant).
[9] *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567-68 (Tex. 1981) (noting "the standard of care in testing the performance of implied covenants by lessees is that of a reasonably prudent operator under the same or similar facts and circumstances").
[10] *See Good*, 763 S.W.2d at 61 (defining that standard under the implied covenant to protect against drainage as "a standard of reasonable diligence, requiring substantial drainage before an obligation to drill an offset well to protect against drainage is imposed").
[11] *Magnolia Petroleum Co. v. Page*, 141 S.W.2d 691 (Tex. App.—San Antonio 1940, writ ref'd).
[12] *Id*. at 692.

> It is unquestionably the law that where the lease is silent as to the duty of a lessee to drill offset wells to prevent drainage that an implied covenant will be presumed and such implied covenant would require the drilling of such offset wells as a reasonably prudent operator would have drilled under the same or similar circumstance. . . . However, when expressed covenants appear in the lease, implied covenants disappear. In this lease there is an expressed covenant as to appellant's duty with reference to avoiding drainage from the leased premises.[13]

In this case, the Herbsts intentionally did not incorporate the reasonably prudent operator standard in the Offset Clause in order to avoid the requirement that they prove profitability as a prerequisite to Murphy's obligation to drill an offset well. Therefore, under the holding in *Magnolia*, the phrases "with due diligence" and "completed to a depth adequate to test the same formation" are not "surplusage" but necessary, as these requirements would not be implied in the Offset Clause by the courts.

C. The "context" argument

In response to Murphy's four-corners argument, the Herbsts and the court of appeals provided a detailed treatment of the commonly understood meaning of "offset well" in the oil and gas industry and in Texas jurisprudence.[14] The cases and authorities cited by the Herbsts and the court of appeals are virtually

[13] *Magnolia*, 141 S.W.2d at 693.
[14] *Adams v. Murphy Expl. & Prod. Co.*—USA, 497 S.W.3d 510, 514-15 (Tex. App.—San Antonio 2016, pet. filed).

unanimous in recognizing that an offset well is a well that protects against drainage.

This is to be expected, as the relationship between the term "offset well" and the rule of capture goes back to the very beginning of oil and gas development.[15] Under the rule of capture, the sole remedy of an adjoining landowner is to drill an offset well to protect their property from drainage.[16] It is in this well-defined context that the term "offset well" has been used in more than 100 reported Texas cases since 1908.[17]

Murphy seeks to redefine this meaning and distinguishes each relevant case and authority presented by the Herbsts and the court of appeals based on the idiosyncrasies of the Eagle Ford Shale and horizontal drilling.[18] However, it is the rule of capture that provided the context for the Offset Clause, not the specifics of

[15] "The rule of capture and its evil twin, the 'offset drilling' rule have informed oil and gas extraction since Colonel E.L. Drake drilled the first commercial well in Pennsylvania in 1859." Bruce Kramer & Owen Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 900 (2005).

[16] *See Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935) (noting that under the rule of capture, the "only way the landowner can protect himself is to drill offset wells"); *see also Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 98 (Tex. 2008) (noting "[t]he rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through a reservoir").

[17] *J.M. Guffey Petroleum Co. v. Jeff Chaison Town Site Co.*, 107 S.W. 609 (Tex. Civ. App. 1908, no writ).

[18] For example, Murphy states that relevant cases cannot be used by the Herbsts as they "predate the revolution of hydraulic fracturing and horizontal drilling in tight shale formations by decades." *See* Murphy's Brief on the Merits at 16.

any formation or drilling technique. And even assuming Murphy's "context", Murphy provides no legal support for its selected definition of offset well.

(1) The Offset Clause was not negotiated under the context of the Eagle Ford Shale

Murphy's context argument hinges on the theory that the Leases were negotiated against the context of the Eagle Ford Shale and "there is little to no drainage in the Eagle Ford Shale."[19] However, the Leases granted Murphy all depths, not just the Eagle Ford, and they do not prohibit vertical drilling, nor do they mandate hydraulic fracturing.[20] And while Murphy's expert may have opined that the Leases were "written with the Eagle Ford Shale and hydraulic fracturing operations in mind"[21], such intent is not found within the four-corners of the Leases.[22]

Murphy's statement that "there is little to no drainage in the Eagle Ford Shale" is also misleading, as Murphy has conflated "drainage" (which occurs in all

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[19] *See* Murphy's Brief on the Merits at x and 6.

[20] There are other formations under the Herbsts' property, including the Austin Chalk, the Edwards Lime and the Georgetown, that can be, and are, produced with unfractured, traditional vertical wells, e.g., API 42-013-34317; API 42-013-35302; API 42-013-34192; API 42-013-35016; API 42-013-33991; API 42-013-34059; API 42-013-35193.

[21] *Adams*, 497 S.W.3d at 516.

[22] Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence. *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 244 (Tex. 1981) (explaining that the parties' express contractual language prevails over the parties' subjective intent). And even if Murphy only intends to drill Eagle Ford, horizontal, hydraulically fractured wells, it cannot define its obligations under the Offset Clause in light of its drilling practices. In *Texas Oil & Gas Corp. v. Vela* this Court focused solely on the language in the lease and refused to consider the marketing realities prevailing when the leases were executed. 429 S.W.2d 866 (Tex. 1968).

producing oil and gas wells) with "drainage area."[23] Amicus assumes Murphy argues that the drainage *area* of Eagle Ford horizontal wells is comparatively compact compared to other formations.[24] However, even if this is true, it has no bearing on whether any individual Eagle Ford well is draining an adjoining lease. [25]

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[23] "Drainage" is the "migration of oil or gas in a reservoir due to a pressure reduction caused by production from wells bottomed in the reservoir." It can be local, being the "movement of oil and gas towards the well bore of a producing well," or it can be field-wide—the migration of hydrocarbons throughout an entire reservoir. Coutret, Henry C. (1999), *The Engineering Aspects of the Implied Covenant to Protect Against Drainage*, Annual of the Arkansas Natural Resources Law Institute 44. Available electronically from http://scholarworks.uark.edu/anrlaw/44. "Drainage Area" is the area around the well that is depleted of hydrocarbons. In permeable formations, where hydrocarbons can move more freely and are more susceptible to pressure differentials, the drainage area may be larger. All producing wells "drain." If oil and gas did not move towards the well bore, the well would not produce.

[24] All wells, vertical and horizontal, whether drilled in conventional or unconventional formations, will have a "drainage area" or an area around the well that is depleted of hydrocarbons. In impermeable shales like the Eagle Ford, the drainage area may be more compact, but it will *at least* extend out to the effective fracture length of the well, and possibly farther, as the oil and gas present in the shale matrix flows from the matrix into the fractures and thence into the well. It has been theorized that Eagle Ford drainage area can extend 200 to 300 feet beyond effective fracture length: "Based on the reservoir simulation and economic analysis, well spacing of 330 ft and 400 ft maximizes the net present value of a black oil Eagle Ford reservoir by assuming 50 nD reservoir permeability and fracture half-length of 100 and 150 ft, respectively. Well spacing of between 400 ft and 500 ft maximizes the NPV in the retrograde gas case study." Lalehrokh, F., & Bouma, J. (2014), *Well Spacing Optimization in Eagle Ford*, CPE/CSUR Unconventional Resources Conference – Canada. Calgary, Canada: Society of Petroleum Engineers. doi:10.2118/171640-MS.

[25] According to industry literature, Eagle Ford drainage areas are incredibly difficult to ascertain, and may be larger than Murphy believes: "Unconventional reservoirs, specifically shale reservoirs, are heterogeneous as can be seen from the wide range of productions that are observed from the same formation. For example, the Eagle Ford Shale produces dry gas on its eastern regions and black oil on its western region. Production rates and fluid characteristics from wells located in the same region can be very different . . . . the mineralogy and total organic content show great variation across the play. The dominant mineral is calcite followed by quartz and clays. The total organic content depends on the depositional environment as well as on the maturation. There is not a well-defined trend in this particular parameter across the play and it seems to be dominated by regional geology and fluid maturation. . . . There is not much public literature that analyzes the impact that different lithologies within a formation have on fracture conductivity." Tenorio, O. E. (2016), *A Comprehensive Study of the Eagle Ford Shale Fracture*

A well with a compact drainage area can still drain an adjoining tract if the well is close enough to the property line. Indeed, the Court in *Garza* acknowledged that fractures from hydraulically stimulated wells can, and do, cross property lines, resulting in drainage.[26] The rule of capture thus applies to the Eagle Ford and other shale formations, regardless of the drilling techniques used. This is the fundamental flaw in Murphy's argument.[27] If the rule of capture applies, the right of a landowner to protect its property from drainage must also apply: "[t]he owner of the adjoining tract from which the oil is migrating can protect himself by drilling offset wells. This equal right to drill has always supported the constitutionality of the rule of capture. Take it away and the reason for the rule fails, leaving a result not only unjust but one inconsistent with the fundamental concept of ownership of oil and gas in place as part of the realty. . . ."[28]

If Murphy's drainage protection obligations under the express terms of the Leases are in any way lessened on the basis of perceived drainage patterns in the

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Conductivity, Master's Thesis, Texas A&M University. Available electronically from http://hdl.handle.net/1969.1/158000.

Another study noted that the fractures from a hydraulically fractured Eagle Ford well can extend out well beyond 350 feet: "Fracture network half-lengths ranged from 450 to 900 feet (averaging 700 feet). Fracture network widths ranged from 265 to 730 feet, with stage overlap imaged in some instances, indicating fracture complexity." Bazan, L. W., et al., *Advanced Completion Design, Fracture Modeling Technologies Optimize Eagle Ford Performance*, The American Oil and Gas Reporter, December 2011.

[26] *Garza*, 268 S.W.3d at 17.

[27] *Id.* at 16 (acknowledging that "the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change").

[28] *Ryan Consol. Petrol. Corp. v. Pickens*, 285 S.W.2d 201, 210 (Tex. 1955).

shale context, such a ruling would undoubtedly reawaken the question that *Garza* arguably put to sleep, that is, that the rule of capture applies to hydraulic fracturing.

(2) The Offset Clause was negotiated under the context of the rule of capture

Texas recognizes that oil and gas lessees have an implied duty to protect the leasehold from drainage. This implied duty is a logical derivative of the rule of capture and the offset drilling rule. A lessor who signs an oil and gas lease cannot then protect itself from the rule of capture by drilling an offset well, so Texas law obligates the lessee to protect the leasehold on the lessor's behalf, whether such obligation is expressly stated in the lease or not.

To prevail on a claim that the lessee has failed to protect the leasehold from drainage pursuant to the implied covenant, the lessor has the threshold burden to prove that an adjacent well is "substantially draining" the leased premises.[29] This is a difficult evidentiary burden for the lessor due to the complexities of reservoir characteristics, information asymmetry, and the expense of hiring experts.[30] If the lessor succeeds in proving substantial drainage is occurring, it must then prove that a reasonably prudent operator would drill an offset well, and that the offset well would be profitable.[31] This again necessitates experts, expense and speculation.[32]

[29] *Amoco*, 622 S.W.2d at 572.
[30] *See Garza*, 268 S.W.3d at 16 (stating "the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle").
[31] *See Amoco*, 622 S.W.2d at 572.

It is exactly because of the uncertainty, expense and difficulty lessors face when proving substantial drainage and profitability that express offset clauses, like the Offset Clause at issue here, are inserted into oil and gas leases. These clauses are designed to supersede the implied covenant and give landowners assurance that they will be protected from drainage (and, by extension, the rule of capture) without engaging in costly litigation with lessees like Murphy, who steadfastly deny any duty to drill offset wells to protect the leasehold.

In fact, Murphy does not deny that the Offset Clause supersedes the implied covenant to protect against drainage. Murphy essentially concedes, therefore, that because the Offset Clause does not expressly mention the word "drainage," the concept of drainage protection is inherent within the term "offset well." If this was not the case, it would be *impossible* for the Offset Clause to supersede the implied covenant to protect against drainage, as an express clause cannot supersede an implied covenant unless they cover the same subject matter.[33] If the Offset Clause

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[32] An example of the burden lessors face in proving a breach of the implied covenant to protect against drainage is *Kerr-McGee v. Helton*, 133 S.W.3d 245 (Tex. 2004). In that case, the lessors offered the testimony of a petroleum engineer to establish the amount of gas a hypothetical offset well would have produced, that a reasonably prudent operator would have drilled the well, and the amount of royalty the lessor would have received. Although the court of appeals affirmed the verdict, this Court reversed and rendered judgment for the lessee, holding that the expert's testimony suffered from a fatal "analytical gap."

[33] J. L. Weaver, *When Express Clauses Bar Implied Covenants*, 37 NAT. RES. J. 491, 504 (1997) (claiming "an express lease provision dealing explicitly with the obligation to drill offset wells will normally displace the implied covenant to the extent the express clause is inconsistent with the implied covenant"); *see also Amoco*, 622 S.W.2d at 567 ("Since the early history of oil and gas litigation, the courts have held that covenants are implied when an oil and gas lease fails to express the lessee's obligation to develop and to protect the lease.").

was not a drainage protection clause, the Offset Clause and the implied covenant to protect against drainage would both be operative, meaning that if an adjoining well were located within 467 feet of the leased premises and draining, Murphy would have to drill two wells—one under the Offset Clause and one pursuant to the implied covenant to protect against drainage. This absurd result could not have been intended by the parties.

(3) Murphy gives no legal support for its Merriam-Webster definition of "offset well"

Murphy complains that the Herbsts and the court of appeals "looked for help [in defining offset well] in all the wrong places," "looked to the wrong portion of the industry" and "failed to acknowledge these important distinctions."[34] Yet Murphy urges the Court to adopt a definition from an online dictionary that has never been cited or used by any court, lawyer or industry manual in the context of drainage protection. Also, if Murphy had used the same dictionary to look up the term "offset well" Murphy would have found the following definition: "[a]n oil well drilled opposite another well on an adjoining property," which is precisely where the Herbsts contend the offset well should have been drilled.[35] Aside from the affidavit of its own expert, Murphy offers no evidence to support the existence,

[34] *See* Murphy's Brief on the Merits at 13-14.
[35] *See* Offset Well Definition, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offset%20well.

scope and applicability of such a specific interpretation of the term offset well within the oil and gas industry.[36]

While Murphy bases its argument on the specifics of the Eagle Ford, the Offset Clause controls drainage protection for all formations and all drilling techniques. If it fails for one, it fails for all.[37] If Murphy desired to limit its obligation to drill an offset well dependent upon geological conditions, it should have expressly included such language to limit the applicability of the Offset Clause to only certain depths and formations. For instance, if Murphy believed the drainage area of an Eagle Ford well is only 150 feet, or 100 feet, this could have been negotiated into the Offset Clause. To allow Murphy to now rewrite its obligations under the Offset Clause reads words into the instrument and violates the most basic rule of contractual construction—that the parties are masters of their own agreements.[38]

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[36] *See XTO Energy Inc. v. Smith Production Inc.*, 282 S.W.3d 672, 682 (Tex. Civ. App.—Houston [14th Dist.] 2009, pet. dism'd) (finding that expert did not show that the alleged custom and usage was "so general and universal that the parties to the JOAs are charged with knowledge of its existence to such an extent to raise a presumption that they dealt with reference to it"); *see also Grube v. Donnell Exploration Co.*, 286 S.W.2d 179, 180-81 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.) (holding that purported evidence of custom regarding drilling of oil and gas wells was insufficient because it did not show that the alleged custom was established for a sufficient length of time to have become generally known, certain and uniform).

[37] *See Shell Oil Co. v. Stansbury*, 401 S.W.2d 623, 632 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) ("The duties of appellant to develop and to protect the leased premises from drainage exists as to each reservoir or stratum or horizon or sand lens containing sufficient oil and gas to invoke such obligations, express or implied.").

[38] *See Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.2d 24 (Tex. App.—Amarillo 2000, no pet.); *see also Dall. Power & Light Co. v. Cleghorn*, 623 S.W.2d 310, 312 (Tex. 1981) ("A court

D. Murphy's theory would remove drainage protection from thousands of lessors

As stated in this brief, Murphy simultaneously argues that the Offset Clause has nothing to do with drainage, [39] but then states that the implied covenant to protect against drainage is superseded by the Offset Clause.[40] However, if the Offset Clause supersedes the implied duty to protect against drainage, it must deal with the same subject matter as the implied covenant: *drainage protection.*[41]

Murphy cannot have it both ways. If Murphy's argument is accepted, then the Herbsts would essentially forfeit all drainage protection under either the express Offset Clause or the implied covenant. No matter what formation an

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does not have the power to place a different interpretation upon the contract on grounds of policy that it would be better for the lessor or landowners generally to have the contract different.").

[39] "The Offset Well Clauses say nothing about preventing drainage" and is merely about development "[the Offset Clause provides] lessor with a well of its own that is bottomed in the same formation." Murphy's Brief on the Merits at 1 and 11.

[40] "[I]mplied covenants do not supplant contrary terms of express provisions like the Offset Well Clauses" and "an implied covenant is presumed when, unlike here, a lease is silent about the duty to drill offset wells." *Id*. at 15 and 16.

[41] *See Amoco*, 622 S.W.2d at 567 ("Since the early history of oil and gas litigation, the courts have held that covenants are implied when an oil and gas lease fails to express the lessee's obligation to develop and to protect the lease."); *see also Middle States Petroleum Corp. v. Messenger*, 368 S.W.2d 645 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) ("The duty of the lessee to prevent drainage ordinarily requires him, in the absence of contrary agreement, to drill necessary offset wells, but where there is an express provision covering the subject, the court will not imply inconsistent obligations."). Further proof can be found in the way that Texas courts have analyzed offset obligations in relation to delay rental clauses in a lease. In Texas, the lessor's acceptance of delay rentals with knowledge of drainage does not bar the lessor from bringing suit for breach of the offset covenant. *See Texas Co. v. Ramsower*, 7 S.W.2d 872 (Tex. Comm. App. 1928), *aff'd on rehearing* 10 S.W.2d 537 (Tex. Comm. App. 1928) (delay rental clause refers to an initial exploratory or development well to be drilled at the will of the lessee and does not relate to the subject matter of the drainage covenant; the two covenants include different subjects).

adjacent well was drilled in, no matter whether or not the Herbsts could prove substantial drainage, Murphy would not be obligated to protect the leasehold from drainage under a typical offset well clause. [42] If an adjacent well was located within 467 feet of the Herbsts' property and draining, Murphy could drill a well *anywhere* on the leased premises and it would comply with the Offset Clause (as Murphy here argues). If the adjacent well were outside 467 feet and actually draining the leased premises, Murphy would not be obligated to drill an offset well, as the adjacent well would not trigger the Offset Clause, and the implied covenant would not apply. This amounts to a full waiver of offset protection, which courts strenuously disfavor even where the parties expressly intended to contract for such waiver.[43] This was not the intent of the parties in this case, nor was it the intent of the thousands of other lessors with similar offset provisions who, under Murphy's theory, would suddenly find they had no protection from the harsh results of the rule of capture.

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[42] *See* Weaver, *When Express Clauses Bar Implied Covenants*, 37 NAT. RES. J., at 505 (noting that "the general rule appears to be that the typical express provision will bar the implied offset covenant to protect against an adjoining well brought in more than [the express distance] away, even if the well is draining the leased premises"). However, this result may change if Murphy was the one who drilled the adjacent, draining well. *See id*. at 506 ("Texas courts have held that the express offset clause is not effective to bar the implied covenant to protect against drainage at all in a "common lessee" situation.").

[43] *See Shell Oil Co. v. Stansbury*, 401 S.W.2d 623, 630 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) ("A lessor and lessee may contract so that lessee is never under obligation to drill an offset well. To so contract, however, the language must be very clear."). As the Offset Clause requires Murphy to drill an "offset well" it seems obvious that the obligation to drill an offset well was not waived.

Many of the land and mineral owners that are members of Amicus rely on express offset clauses such as the one at issue in this case to protect them from drainage without having to first satisfy the onerous burden contemplated under the implied covenant to protect against drainage. The interpretation urged by Murphy, if adopted, would create outcomes that go against the actual bargains and contemplations of the parties. This unjust outcome will result because Murphy desires to treat the Offset Clause as both a drainage protection clause and a development clause at the same time, in clear contravention of Texas law.[44]

The Herbsts and other lessors who have express offset clauses should not be penalized for successfully modifying the implied covenant to protect against drainage. The Offset Clause and others like it are specifically drafted and negotiated provisions which should not be rewritten or interpreted so as to deprive lessors of all drainage protection.

[44] A "development clause" requires a lessee to develop the property by drilling wells – it is unrelated to drainage protection: "It is true that drilling an offset well is in a sense developing the property. But the implied covenant to drill offset wells for protection of the property from drainage is a distinct obligation from the obligation imposed by the implied covenant to develop the property. They are two separate and distinct covenants. The express stipulation against, or the full performance of, the obligation of the lessee to develop the property will not relieve the obligation to prevent drainage." *Powell v. Danciger Oil & Refining Co.*, 134 S.W.2d 493, 497 (Tex. Civ. App.—Fort Worth 1939) (quoting *Stanolind Oil & Gas Co. v. Christian*, 83 S.W.2d 408, 409 (Tex. Civ. App.—Texarkana 1935,writ ref'd); *see also Foster v. Atlantic Ref. Co.*, 329 F.2d 485, 491 (5th Cir. 1964) (applying Texas law) (recognizing "[o]bligations to develop reasonably and to drill offset wells, whether they may be express or implied, are two separate matters").

CONCLUSION

Murphy is correct: hydraulic fracturing and horizontal drilling have revolutionized the oil and gas industry in Texas. However, the rule of capture and a landowner's right to offset drainage remain unchanged. If Murphy believes these rules do not conform with the realities of Eagle Ford development, Murphy's remedy lies in the lease negotiation process. But Murphy cannot strip the Herbsts and countless other land and mineral owners of drainage protection due to Murphy's drafting regrets. Amicus urges this Court to affirm the court of appeals, as Murphy failed to offer any evidence that the Herbst Well was an offset well, i.e., was drilled to protect against drainage from the Lucas Well.[45]

[45] It is ultimately immaterial for purposes of this case as to where Murphy would have had to drill the Herbst Well for it to qualify as an offset well under the Offset Clause. Murphy had the summary judgment burden to prove that the Herbst Well was drilled to protect the Herbsts' leasehold from drainage from the Lucas Well. Murphy not only failed to submit any evidence that the Herbst Well protected the leasehold from drainage, Murphy actively argues that the Herbst Well was not drilled to protect the leasehold from drainage. Under any test, it is clear that the Herbst Well was not an offset well and summary judgment was improper. However, Amicus is compelled to suggest that the simplest explanation is usually the best. In this case, because an adjacent well drilled within 467 feet of the Herbsts' property line is deemed to be draining the leasehold, it would seem reasonable that a reasonably similar well drilled by Murphy within 467 feet of the property line would be deemed to be protecting the leasehold from drainage and should qualify as an offset well under the Offset Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(i)(2), I hereby certify that this brief contains 6,067 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1). In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served upon counsel and parties of record, listed below, by electronic delivery on this 24th day of March, 2017.

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