

IN THE SUPREME COURT OF TEXAS

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No. 96-0541
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TARRANT COUNTY WATER CONTROL AND
IMPROVEMENT DISTRICT NUMBER ONE, PETITIONERS

v.

P.D. FULLWOOD, INDIVIDUALLY AND D/B/A P.D. FULLWOOD
OPERATING COMPANY, LA PESCA PRODUCTIONS, INC. AND
HAUPT, INC., RESPONDENTS

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ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS
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JUSTICE HECHT, dissenting from the denial of application for writ of error.

The Court's denial of the application for writ of error in this case means that taxpayers in Fort Worth and nearby cities must pay over \$2,000,000 for their water that they do not owe. The public interest involved in this case deserves full review. I respectfully dissent from the denial of application for writ of error.

The principal issue raised here is whether the Tarrant County Water Control and Improvement District Number One is liable for inverse condemnation of a mineral interest. The circumstances are these.

To construct the Richland-Chambers Reservoir, which now provides fresh water for Fort Worth and nearby cities, the Tarrant County Water Control and Improvement District Number One acquired some 45,000 acres, including a 316.3-acre tract owned by P. D. Fullwood and his wife. Fullwood and his wife conveyed only the surface to the District. The deed included the following provisions:

The purpose of this conveyance and purchase is to enable the Grantee to construct, own, control, maintain and operate on and over said property a reservoir designed to effect the storage of water as an additional supply of drinking water for

the City of Fort Worth and Tarrant County, Texas. This reservoir is to be created by means of the construction of a dam with all appurtenant works.

This conveyance is made to consummate a negotiated sale of the land hereinafter described, in lieu of condemnation proceedings. The consideration paid to Grantor includes and covers all damages and claims which Grantor might have asserted in condemnation proceedings, including but not limited to that caused to Grantor's adjacent property by the impounding and storage of water in said reservoir.

* * *

The Grantor herein reserves unto themselves, their heirs, successors and assigns, all oil, gas and other fluid or gaseous minerals in and under the land herein described, together with the right of ingress and egress for the purpose of exploring for, and producing the same therefrom, subject and subordinate, however, to the right of Grantee to construct, maintain and operate a reservoir for impounding fresh water. Grantor, their heirs, successors and assigns, shall prevent contamination of said reservoir during or resulting from the use and development of the said reserved mineral estate.

At the time, the minerals were leased. Fullwood and his two sisters each owned one-third of a one-eighth royalty, and Fullwood owned the possibility of reverter in the entire mineral interest. Ten wells had been drilled on the tract, four of which were still producing. The District condemned the leasehold interests and proceeded to plug the wells and to remove all equipment, pipelines, and electric lines and poles. (Over the entire lake bed area, the District plugged about 800 wells and removed related materials.) The District also offered to purchase the royalty interests. Fullwood's sisters accepted, but Fullwood himself declined. When production ceased, the mineral interest reverted to Fullwood, who then re-entered one well, elevated the wellhead on a platform above the eventual lake surface, and restored production. Fullwood did not attempt to re-enter any of the other wells before inundation. After inundation, Fullwood contributed part of his acreage to a unit in which four directional wells were later completed, two of which are producing.

Claiming that the District had thwarted further efforts to restore production of his minerals, Fullwood sued the District for inverse condemnation of his mineral estate. The district court granted partial summary judgment for the District, holding that it had not taken any property of Fullwood's except his royalty interest. After a jury trial, the court awarded Fullwood \$60,000 for what the jury found to be the value of his royalty interest at the time the District plugged the wells, based on the

anticipated future economic productive life of the oil reserves. Fullwood appealed only from the partial summary judgment; the District did not appeal. Thus the \$60,000 award became final. The court of appeals reversed the partial summary judgment and remanded, explaining:

Although Fullwood's right to produce the minerals was made subordinate to the Water District's right "to construct, maintain and operate a reservoir," the clause does not evidence an intent to convey the entire mineral estate to the Water District. Indeed, the subordination clause itself contains a covenant by Fullwood to prevent the contamination of the Reservoir from the use and development of his reserved mineral estate. Even though the rights of the dominant estate were made subordinate to the rights of the servient estate, the owner of each estate must exercise his rights with due regard for the rights of the other. As a result, any interference by the Water District with Fullwood's limited right to produce the minerals, beyond that reasonably necessary to inundate the Reservoir, constituted a taking by inverse condemnation. Because the summary judgment evidence suggests that the Water District did not reasonably accommodate Fullwood's development of the minerals, particularly in light of prior representations that it would do so, and that the Water District's actions restricted even Fullwood's limited access to the mineral estate, we . . . reverse the judgment and remand the cause for trial.

A copy of the court of appeals' unpublished opinion is attached.

On remand, after a bench trial, the district court concluded that "[b]ased on the Court of Appeals opinion in this cause, and based on other facts in this cause, at least a large part of the mineral interest was damaged by inverse condemnation." The court's only finding supporting this conclusion was the following:

Based on the inundation of the surface for the reservoir, the cost of attempted re-entry, if possible, would be very costly. The other alternative means of directional drilling would also be very costly.

The issue of damages was then tried to a jury, who found the damages to Fullwood's mineral estate to be \$1,947,065. The district court rendered judgment for Fullwood for that amount plus the \$60,000 previously awarded and not appealed. The court of appeals reduced Fullwood's damage award by \$18,000 received in settlement with a third party and affirmed. A copy of the court of appeals' second opinion is also attached.

The District argues that because Fullwood agreed in the deed that his mineral estate would be subordinate to the District's surface estate, it had no duty not to interfere with his development and production of the minerals. I disagree. Ordinarily, "a mineral estate together with the common

law right to use the surface estate is the dominant estate.” *Chambers-Liberty Counties Navigation Dist. v. Banta*, 453 S.W.2d 134, 137 (Tex. 1970). But Fullwood and the District modified this rule by agreement expressed in their deed. However, the deed provides that Fullwood’s mineral interest will be “subject and subordinate” only “to the right of Grantee to construct, maintain and operate a reservoir for impounding fresh water”, not to other rights the District might assert. The deed also obligated Fullwood to “prevent contamination of said reservoir during or resulting from the use and development of the said reserved mineral estate”, but it did not preclude him from all production of his minerals. The District had no right to interfere with Fullwood more than was reasonably necessary to construct, maintain, and operate the reservoir, and if it did so, it damaged Fullwood’s property. If that damage is compensable under Article I, Section 17 of the Texas Constitution, then Fullwood would be entitled to judgment against the District for inverse condemnation.

The District argues that there is no evidence that it interfered with Fullwood’s production of his minerals more than was necessary to operate the reservoir. Here, I agree with the District. Fullwood argues that the District unnecessarily interfered with his mineral production by unlawfully embedding steel in the plug in the well Fullwood re-entered, wrongfully attempting to enjoin the re-entry operation, filing groundless complaints with the Railroad Commission, requesting the electric utility to discontinue service, and removing the pipelines it acquired by condemnation of the working interest. The District did improperly plug one well, but there is no evidence from which the jury could compute the damages the plug caused in either increased costs of re-completing the well or any loss of production. The District’s claims in court and commission proceedings were not an unreasonable interference with Fullwood’s rights but an effort to exercise its own rights, even if it did not ultimately prevail. Requesting discontinuance of existing electric service was necessary to protect users of the reservoir from electrocution and did not prevent Fullwood from arranging for other service. And the District was entitled to remove the pipelines and other materials it acquired by condemnation of the working interest.

Fullwood also argues that the District was obliged to accommodate him, such as by building levees to accommodate mineral production, but this is incorrect. Fullwood's deed to the District clearly expresses that the mineral estate is to be subordinate to the District's operation of the reservoir. As long as the District's activities were reasonably necessary toward that end, it was not required to facilitate Fullwood's efforts. Unquestionably, inundation of the surface has made mineral production more difficult and costly, but that was contemplated in the deed. The District has not prevented Fullwood from producing his minerals.

Whether there has been inverse condemnation is a question of law for the court, although consideration of the facts is, of course, part of the determination. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984). In this case, the dispute is over the significance of the evidence rather than the evidence itself. There is nothing in the evidence to show that the District reasonably interfered with Fullwood's exercise of his rights as to amount to inverse condemnation.

I would grant the District's application for writ of error, reverse the judgment of the court of appeals, and render judgment for Fullwood for only \$60,000 plus interest. The parties to this case are well represented by excellent counsel. The issues have been thoroughly brt only Fullwood and the District but thousands of taxpayers who reside in the District. There is, as I have shown, error in the lower courts' decisions which ought to be corrected. In short, there are compelling reasons for the Court to grant review and none to refuse it.

Hence, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: February 13, 1998