App. 1

547 S.W.3d 881
Supreme Court of Texas.

The STATE of Texas, Petitioner,
v.
Bernard MORELLO, Respondent

No. 16-0457
|
Argued December 7, 2017
|
OPINION DELIVERED: February 23, 2018

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Attorneys and Law Firms

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Opinion

Justice Johnson delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Guzman, Justice Lehrmann, Justice Boyd, Justice Devine, and Justice Brown joined.

This case involves Bernard Morello's challenge to the assessment of civil penalties against him under the Texas Water Code for actions that he performed as an employee of White Lion Holdings, L.L.C., after White Lion was assessed penalties under the same section based on his actions. The trial court concluded that both Morello and White Lion could be assessed penalties. The court of appeals disagreed and reversed. We agree with the trial court. Accordingly, we reverse the court of appeals' judgment and reinstate that of the trial court.

I. Background

Vision Metals, Inc., owned and operated a pipe manufacturing facility that caused groundwater contamination. The predecessor to the Texas Commission on Environmental Quality, the Texas Water Commission (collectively, TCEQ), issued Vision a hazardous waste permit and compliance plan governing both the closure of hazardous wastewater impoundments located on the property where the manufacturing facility was located and the post-closure care of the property. This plan included the requirement that an acid neutralization treatment system (ANTS) be used to treat recovered groundwater. The compliance plan obligated

Vision to (1) implement a corrective action program, (2) reduce the groundwater contamination as well as monitor and file reports detailing corrective actions and results of tests on the groundwater, and (3) provide assurance to the TCEQ that Vision was financially capable of conducting the corrective action program.

Vision eventually filed for bankruptcy. In a 2004 bankruptcy auction, Bernard Morello agreed to purchase the property for $650,000. After Morello learned of the environmental obligations accompanying the property, he sought to renegotiate the deal. The parties agreed to a reduced price of $150,000 and the bankruptcy court approved the agreement.

Morello formed White Lion Holdings, L.L.C., to own and hold title to the site. He was the only member of the company. The day before closing, Morello assigned to White Lion all of his rights, duties, and obligations associated with the property. Morello personally paid for the property, but Vision transferred the property, along with the permit and its accompanying compliance plan, directly to White Lion. The TCEQ has several requirements with which owners must comply in order to transfer property that is the subject of a permit and compliance plan. *See* 30 TEX. ADMIN. CODE § 305.64. Morello completed applications to transfer the permit and the compliance plan to White Lion in accordance with these regulations. On July 23, 2004, the TCEQ approved the transfers.

In December 2004, the TCEQ notified White Lion and Morello of violations of the compliance plan. These

included failing to perform a groundwater monitoring program and failing to comply with reporting requirements. The TCEQ also sent a notice of enforcement based on White Lion's failure to provide assurance of its financial ability to fulfill the plan. The TCEQ continued sending notices to Morello of the violations until April 2006, when the State sued White Lion. In its suit, the State alleged that White Lion did not meet the requirements of the compliance plan, including the requirement to provide assurance of financial capability. Later, the State amended its petition and added Morello as a defendant. It alleged that both Morello and White Lion were required, and failed, to comply with the compliance plan and provide assurance of financial capability to fulfill it.

In August 2013, the State moved for summary judgment against White Lion. It asserted that for over nine years, White Lion had deliberately failed to maintain and monitor the groundwater remediation system. The State sought civil penalties of $50 per day, for a total of $325,600. *See* TEX. WATER CODE § 7.102. The State also sought, contingent on the trial court's granting summary judgment against White Lion, severance of the claims against it from those against Morello and final judgment against White Lion. The trial court granted summary judgment; awarded civil penalties, the outstanding hazardous waste facility fees, and attorney's fees; and severed the claims against White Lion from those against Morello. White Lion appealed and the court of appeals affirmed. *White Lion Holdings, L.L.C. v. State*, No. 01-14-00104-CV, 2015 WL

5626564 (Tex. App.–Houston [1st Dist.] Sept. 24, 2015, pet. denied).

Over a year after the trial court granted summary judgment against White Lion and while White Lion's appeal was pending, the State sought summary judgment against Morello. In its motion, it asserted that it is a violation of the Water Code for a "person" to "cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute." *See* TEX. WATER CODE § 7.101. The State alleged that Morello was personally and substantially involved with operating, managing, and making decisions concerning White Lion's facility, and indeed was the sole decision maker for White Lion. The State also asserted that Morello personally removed the ANTS, removed the facility's domestic wastewater treatment plant, and threw away (or directed to be thrown away) monitoring well protective housing caps. Those actions, the State asserted, amounted to causing, suffering, allowing, or permitting a violation of law under Water Code section 7.101.

In response, Morello maintained that third parties who purchased personal property at Vision's bankruptcy auction damaged the remediation system as they were removing the property. He also claimed that all of his actions were performed in his capacity as White Lion's agent, and not in his individual capacity; thus, he was not personally responsible for any of White Lion's failures to comply.

The trial court granted the State's motion for summary judgment and awarded civil penalties in the amount of $367,250, based on the minimum fine of $50 per day for each day the statute was violated. *See* TEX. WATER CODE § 7.102. After the trial court denied Morello's motion for new trial, he appealed. He asserted three issues: (1) the State failed to establish that he was personally liable; (2) the trial court erred by not granting his motion for new trial based on the erroneous severance of the State's claims against him from those against White Lion; and (3) the trial court erred by denying his motion for new trial based on newly discovered evidence.

The court of appeals reversed. 539 S.W.3d 330 (Tex. App.–Austin 2016). It reached only Morello's first issue, holding that the State failed to establish as a matter of law that Morello was individually liable for the alleged violations. *Id.* at ___. The court began by recognizing that the formation of a limited liability company is intended to shield members from the company's liabilities and obligations, *id.* at 338 (citing TEX. BUS. ORGS. CODE § 101.114), while also noting the common law principle allowing a corporate officer to be held individually liable when the officer "knowingly participates in tortious or fraudulent acts . . . even though he performed the act as an agent of the corporation." *Id.* at 337 (quoting *Nwokedi v. Unlimited Restoration Specialists, Inc.*, 428 S.W.3d 191, 201, 210 (Tex. App.–Houston [1st Dist.] 2014, pet. denied)). The court concluded there had been no showing that "the alleged failures to satisfy the terms of the compliance

plan and failure to provide financial assurance are tortious or fraudulent conduct of Morello individually or that those failures to comply should somehow be treated as if they were." *Id.* at 340. The court held that because the State failed to establish that Morello could be held individually liable as a matter of law, the trial court erred by granting the State's motion for summary judgment. *Id.* at ___.

In this Court, the State challenges the court of appeals' conclusion that a member of a limited liability company cannot be held liable for violations of environmental laws where the member was personally involved in the violations. The State argues that, as reflected by the plain language of the Water Code, the Legislature expressly intended for individuals, as persons, and not only corporations, to be liable for environmental violations under section 7.102. Thus, according to the State, the proper question is whether section 7.102 applies to the actions Morello took, not whether Morello can invoke the corporate shield to escape liability. The State also claims that the severance issue is not properly before this Court because it should have been raised (if at all) in White Lion's appeal. In any event, the State urges that neither Morello nor White Lion objected to the severance, so the issue has been waived.

Morello responds that the court of appeals correctly held that corporate officers cannot be held individually liable for actions taken on behalf of the company. He claims he is not individually liable because he did not own the property, was not a party to

the compliance plan, and never undertook any obligations related to the compliance plan. He also asserts that the State improperly severed the case against him from the one against White Lion, thereby avoiding a judgment for joint and several liability that would have allowed only a single recovery for the same acts. He maintains that where a single claim is improperly severed into separate claims against different parties, as this one has been, the second appeal should be dismissed for lack of jurisdiction. Finally, Morello argues that assessing fines against each of two parties substantively doubles the allowable fine, and because there is no relationship here between the fines imposed and the offense, the fines are unconstitutionally excessive.

II. Discussion

A. Personal Liability

Morello's claim that he cannot be held personally liable is based on the premise that "a member or manager is not liable for a debt, obligation, or liability of a limited liability company," including single member limited liability companies. TEX. BUS. ORGS. CODE § 101.114; *see id.* § 101.101(a). But the State's position is not based on the Business Organizations Code; it is based on the Water Code. The State says that Water Code sections 7.101 and 7.102 apply directly to Morello individually—he is liable because of his own actions and liability under the statute, not because of the company's liability.

We begin by examining the Water Code. Our review is de novo to the extent the review is based on statutory interpretation. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017). We determine and give effect to the Legislature's intent by, first and foremost, relying on the plain meaning of the statute's words. *Id.*

Section 7.101 provides:

> A person may not cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute.

TEX. WATER CODE § 7.101. And section 7.102 provides:

> A person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to any other matter within the commission's jurisdiction to enforce . . . shall be assessed for each violation a civil penalty not less than $50 nor greater than $25,000 for each day of each violation. . . .

Id. § 7.102.

Morello asserts that section 7.102 is inapplicable to him personally because the term "person" in this section of the Water Code excludes an individual. However, Chapter 7 of the Water Code does not define "person." *See id.* § 7.001. That being so, we determine the meaning of "person" as we generally determine the meaning of words used in, but not defined by, a statute: we read them in context and construe them according

to rules of grammar and common usage. *Cadena Comercial USA Corp.*, 518 S.W.3d at 325 (*citing* TEX. GOV'T CODE § 311.011). And "person" according to its common usage is an individual. *See* BLACK'S LAW DICTIONARY 1324 (10th ed. 2014) (defining "person" as "[a] human being").

Morello asserts that "person" in section 7.102 does not include an individual because the definition of "person" in the Solid Waste Disposal Act, which he claims is applicable here, includes only corporations, organizations, business trusts, and other legal entities. *See* TEX. HEALTH & SAFETY CODE § 361.003(23). But we need not decide whether the definitions in the Solid Waste Disposal Act apply to Water Code section 7.102 enforcement actions. That is because even if they do, the definition of "person" in that Act includes individuals: " 'Person' means an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity." *Id.* Thus, because there is no statutory definition *excluding* individuals from the definition of person, we interpret the term as it applies in common usage—to include individuals. Under the plain language of the Water Code, an individual may be assessed a penalty for causing, suffering, allowing, or permitting a violation of a permit relating to the TCEQ. TEX. WATER CODE § 7.102.

Morello argues that he never assumed, nor did the State ever transfer to him, any obligations under the permit. But nothing in the language of the Water Code (1) limits the number of persons to whom its penalties

apply, (2) provides that only one penalty may be assessed per occurrence or per violation, or (3) permits an enforcement proceeding only against a landowner or the permit holder. The language is broad and applies to "a" person who causes or allows the violation of a permit, not "the" person holding the permit. Therefore, under the plain language of the statute, if Morello caused or permitted a violation of White Lion's permit, the State could assess a penalty against him regardless of whether White Lion or others might also be subject to penalties arising from violations and regardless of who had obligations under the permit.

The court of appeals concluded, and Morello argues, that he cannot be held individually liable because he was acting as an agent of White Lion; agents may only be held individually liable for "tortious" or "fraudulent" acts they commit; and his actions cannot be characterized as either of those types. 539 S.W.3d at ___. The State responds that courts have recognized a corporate officer who personally participates in violating a statutory provision may be personally liable. For example, under the Texas Deceptive Trade Practices Act (DTPA), a corporate agent acting in the scope of his employment can be held personally liable for violations of that statute. *Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002). In *Miller*, homeowners sued Barry Keyser, the sales agent for a homebuilder, for making false statements to them about the size of their lots. *Id.* at 715. Keyser claimed that he could not be personally liable for acts taken in the scope of his employment because he was acting solely on behalf of the

homebuilder. *Id.* at 716. We rejected this argument, concluding that based on the plain language of the DTPA permitting a claim against "any person," Keyser was liable for DTPA violations where he personally made the misrepresentations to the homeowners. *Id.* at 716-17.

The court of appeals in this case considered *Miller* to be inapplicable, stating that our decision "focused on how the [DTPA] is designed to protect consumers and is construed in favor of consumers" and that our conclusion "comport[ed] with Texas' longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts." 539 S.W.3d at 340 (quoting *Miller*, 90 S.W.3d at 716). While we acknowledged these issues in *Miller*, they were not the focus of our decision. Rather, we noted multiple times that the questions posed were whether Keyser could be liable under the language used by the Legislature in the DTPA and whether he personally made misrepresentations. 90 S.W.3d at 716-17, 720. Here, the question is the same: does the language used by the Legislature in the Water Code apply to Morello's personal actions? We conclude that it does.

As the State points out, at least one court of appeals has interpreted the Water Code as making individuals responsible for violations of environmental laws. In *Ex parte Canady*, the court concluded that employees of a company that paid an administrative penalty for Water Code violations could be prosecuted individually for violations of the Code. 140 S.W.3d 845, 850-51 (Tex. App.–Houston [14th Dist.] 2004, no pet.).

The court stated, "It is clear the legislators intended the Water Code to impose more stringent standards when dealing with hazardous waste disposal and to assure that each person be accountable for his actions that violate a provision of the code." *Id.*

And previously, in *State v. Malone Service Co.*, the same court of appeals rejected the assertion that the president and a plant manger [sic] of a company could not be individually liable for Water Code violations because they did not hold the permit. 853 S.W.2d 82, 84 (Tex. App.–Houston [14th Dist.] 1993, writ denied). The court described the conduct at issue in that case as an "environmental tort" and concluded that an environmental tort was analogous to a situation where a corporate officer may be personally liable for participation in a tort and that "[l]iability is based on the agent's own actions, not his status as an agent." *Id.* at 85 (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)).

The court of appeals in this case declined to follow *Malone.* 539 S.W.3d at ___. The court did not necessarily agree that corporate officer liability could extend to an "environmental" tort and also did not see Morello's conduct in this case as aligning with environmentally tortious conduct because he did not deposit or discharge hazardous substances. 539 S.W.3d at ___. However, the language of the statute does not distinguish between depositing or discharging hazardous substances and other violations for which a penalty may be assessed. TEX. WATER CODE § 7.102.

Further, federal and state courts have consistently rejected the position that where an environmental statute applies to a "person," corporate officers can avoid individual liability for violating the statute if they personally participated in the wrongful conduct. *See, e.g.*, *Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (concluding that the federal act "prevents individuals from hiding behind the corporate shield" when they "actually participate in the wrongful conduct"); *U.S. v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987) ("[I]mposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances."); *T.V. Spano Bldg. Corp. v. Dep't of Natural Res. & Envtl. Control*, 628 A.2d 53, 61 (Del. 1993) (concluding that the State could impose personal liability on an officer who "directed, ordered, ratified, approved, or consented to the improper disposal"); *People ex rel. Burris v. C.J.R. Processing, Inc.*, 269 Ill.App.3d 1013, 207 Ill.Dec. 542, 647 N.E.2d 1035, 1039 (1995) ("[C]orporate officers may be held liable for violations of the [state environmental act] when their active participation or personal involvement is shown."). While these cases involved different statutes than the one at issue here, our view accords with theirs that under an environmental regulation applicable to a "person," an individual cannot use the corporate form as a shield when he or she has personally participated

in conduct that violates the statute. And Morello was not held liable for a debt, obligation, or liability of White Lion as he asserts is prohibited by the Business Organizations Code. *See* TEX. BUS. ORGS. CODE § 101.114. Rather, he was held individually liable based on his individual, personal actions. We disagree with the court of appeals' conclusion otherwise.

B. Severance and Constitutionality of Fines

Morello next argues that the trial court's improper severance of the case against him from the one against White Lion deprived the court of appeals of jurisdiction. Morello also asserts that the severance resulted in two judgments based on identical theories of liability and facts and that such result violates his constitutional rights to equal protection and due course of law by imposing excessive fines leading to, essentially, a double recovery for the State. Although the court of appeals did not reach these issues, in the interest of judicial economy, we will consider them instead of remanding them to the court of appeals. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 97 (Tex. 2012) ("The court of appeals did not address the Hospital's claim of immunity. Rather than remanding the case to the court of appeals for it to do so, however, we address the issue in the interest of judicial economy.").

In regard to Morello's first contention—that improper severance deprived the court of appeals of jurisdiction to consider his appeal—he references *Dalisa, Inc. v. Bradford*, 81 S.W.3d 876 (Tex. App.–Austin 2002,

no pet.). There, the court of appeals held that because the claims had been improperly severed, the resulting judgments were interlocutory and not final. *Id.* at 882. Because the appeal was from an interlocutory order, the court dismissed it for want of jurisdiction. *Id.* The State first claims Morello waived any objection to the severance by failing to assert the objection below. But challenges to lack of subject matter jurisdiction may be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

And as to the merits of Morello's challenge, "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. Trial courts have broad discretion to sever claims, and a severance is improper only if the trial court abused its discretion in ordering the severance. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). Severance is proper when (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of an independently asserted lawsuit, and (3) the severed claim is not so interwoven with the remaining action that the actions involve the same facts and issues. *Id.*

Here, the controversy involves more than one cause of action—the State asserted separate claims against White Lion and Morello. Further, the State could have asserted its claims against Morello and White Lion in separate lawsuits. And while the two cases are factually intertwined, they are not so interwoven as to override proper severance. The State's case against Morello involved evidence of his personal

actions that was not presented in the case against White Lion, such as his personal removal of the facility's domestic wastewater treatment plant and the ANTS, as well as his personal actions in throwing away the monitoring well protective housing caps. Therefore, the trial court did not abuse its discretion by severing the claims against White Lion from those against Morello. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733-34 (Tex. 1984) (holding severance was proper in a case against two defendants after summary judgment had been granted against one defendant). That being so, the judgment against him was not interlocutory, but final and subject to appeal.

Morello further contends that the severance violates his constitutional rights to equal protection and due course of law by imposing excessive fines resulting in, essentially, a double recovery for the State. We disagree.

Article 1, Section 13 of the Texas Constitution provides that "[e]xessive [sic] bail shall not be required, nor excessive fines imposed." TEX. CONST. art. I, § 13. The term "fines" includes civil penalties of the type at issue here. *See Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980). "[P]rescribing fines is a matter within the discretion of the legislature." *Id.* We will "not override the legislature's discretion, 'except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.'" *Id.* (quoting *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S.W. 951, 953 (1903)). Here, the State sought the minimum statutory fine against White Lion and did

the same regarding Morello. While the fine imposed against Morello is not insubstantial, the statute is clear that the amount accrues daily. TEX. WATER CODE § 7.102. The TCEQ notified Morello of the compliance plan violations in 2004. His own delay in compliance resulted in the continued accrual of civil penalties. Therefore, the amount of the fine does not "shock the sense of mankind." *See Pennington*, 606 S.W.2d at 690.

Further, the severance of the claims did not result in a double recovery for the State as Morello asserts. It is true that the civil penalties against Morello and White Lion are to be paid to the State. But they are not recoveries in the sense that they are to reimburse the State for loss or damage. As Morello argues, the monetary assessments are designed to *penalize* Morello and White Lion. They are not recoveries designed to make the State whole for damages it suffered and undertook to prove, much less are they two separate recoveries for the same damages the State suffered. Thus, the civil penalties assessed against Morello are constitutional.

III. Conclusion

Morello is a "person" subject to penalties under the Water Code individually; the court of appeals had jurisdiction over his appeal; and the penalties assessed against him are not unconstitutional. We reverse the judgment of the court of appeals and reinstate that of the trial court.

Justice Blacklock did not participate in the decision.

539 S.W.3d 330
Court of Appeals of Texas,
Austin.

Bernard MORELLO, Appellant
v.
The STATE of Texas, Appellee

NO. 03-15-00428-CV
|
Filed: May 6, 2016

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT, NO. D-1-GV-06-000627, HONORABLE RHONDA HURLEY, JUDGE PRESIDING

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Before Justices Puryear, Goodwin, and Field

MEMORANDUM OPINION

David Puryear, Justice

The State of Texas filed suit against Bernard Morello and White Lion Holdings, L.L.C., alleging various

violations of rules promulgated by the Texas Commission on Environmental Quality (the "Commission") and seeking injunctive relief as well as the imposition of civil penalties against Morello and White Lion and attorney's fees. After filing its petition, the State filed a traditional motion for summary judgment against White Lion. *See* Tex.R. Civ. P. 166a(c). In addition, the State requested that the district court sever the claims against Morello from those against White Lion in the event that the district court granted the State's motion for summary judgment. *See id.* R. 41 (allowing for severance of claims). Ultimately, the district court granted the State's motion for summary judgment and motion to sever. Subsequently, the State filed a traditional motion for summary judgment against Morello. After reviewing the State's motion and Morello's response and after convening a hearing, the district court granted the State's motion for summary judgment and ordered Morello to pay $367,250.00 in civil penalties. Following that ruling, Morello filed a motion for new trial, and the district court denied the motion. Morello appeals the district court's judgment granting the State's motion for summary judgment and the district court's order denying his motion for new trial. We will reverse the district court's judgment and remand for further proceedings.

BACKGROUND

The property at issue in this case was originally owned by Vision Metals, Inc. ("Vision"), and was previously used as a pipe-manufacturing facility. *See White*

Lion Holdings, L.L.C. v. State, No. 01-14-00104-CV, 2015 WL 5626564, at *1 (Tex.App.—Houston [1st Dist.] Sept. 24, 2015, no pet.) (mem. op.) (setting out background facts forming dispute between State and White Lion). There were five surface-water impoundments located on the property. *Id.* At some point, Vision became aware "that the impoundments were sources of groundwater contamination, including elevated concentrations of" various chemicals, and the Commission issued a hazardous-waste permit to Vision "to govern the management, closure, and long-term care of the" reservoirs. *Id.*; *see also* Tex. Health & Safety Code §§ 361.017 (providing that Commission "is responsible for the management of industrial solid waste"), .024 (empowering Commission with ability to "adopt rules . . . and establish minimum standards of operation for the management and control of solid waste"), .061 (authorizing Commission to "issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste"). As part of the closure process, caps were placed on the impoundments, and chemicals were added to stabilize them.

Along with the permit, the Commission also issued a compliance plan requiring Vision to engage in various corrective actions to clean up the contamination, monitor the groundwater, file reports regarding the corrective actions taken, file reports containing the results of testing performed on the groundwater, and "provide financial assurance for operation" of the corrective programs. *See* 30 Tex. Admin. Code §§ 305.401

(2016) (Tex. Comm'n on Envtl. Quality, Compliance Plan) (allowing Commission to "establish a compliance plan" "[i]n order to administer the groundwater protection requirements relating to compliance monitoring and corrective action for facilities that store, process, or dispose of hazardous waste in surface impoundments"), 335.167(a), (b) (2016) (Tex. Comm'n on Envtl. Quality, Corrective Action for Solid Waste Management Units) (requiring owner seeking permit for "processing, storage, or disposal of hazardous waste" to "institute corrective action as necessary to protect human health and the environment" and stating that "[f]inancial assurance for such corrective action shall be established and maintained"). Several years later, Vision declared bankruptcy.

After Vision declared bankruptcy, Morello bid on the property at an auction and entered into an agreement to purchase the property. A little over a month later, Morello assigned his rights to purchase the property to White Lion, which is a limited liability company that Morello formed. When the closing occurred after the assignment, Vision conveyed all of its interest in the property to White Lion. Subsequent to the closing, the Commission transferred the hazardous-waste permit and the compliance plan to White Lion.

A few years after the permit and property were transferred to White Lion, the State, on behalf of the Commission, filed a suit against White Lion alleging that White Lion did not adhere to the requirements of the compliance plan, including the financial-assurance requirement. *See* Tex. Water Code § 7.105 (authorizing

attorney general, "[o]n the request of the . . . commission," to "institute a suit in the name of the State for injunctive relief . . . , to recover a civil penalty, or for both"). Later, the State amended its petition and sought to hold Morello individually liable as well. In its amended petition, the State noted that White Lion "is a limited liability company organized under the laws of Texas" and that "Morello is the manager and operator of White Lion." Further, the State alleged that an "owner or operator of a facility must continue corrective action measures for the duration of the compliance period" and must submit "written reports detailing the effectiveness of the corrective action program," 30 Tex. Admin. Code § 335.166(6), (7) (2016) (Tex. Comm'n on Envtl. Quality, Corrective Action Program) (listing responsibilities for "owner or operator required to establish a corrective action program," including filing reports), and that a "new owner or operator . . . must provide financial assurance within six months," *id.* § 305.64(g) (2016) (Tex. Comm'n on Envtl. Quality, Transfer of Permits) (setting out requirements for transferring permit and stating that "new owner or operator must demonstrate compliance" with financial-assurance requirement "within six months of the date of the change of ownership"). In addition, the State alleged that the compliance plan required "Morello and White Lion to" "set and record the flow rate of each recovery well each week," "inspect all aboveground collection system pipes weekly," "sample each well during the first and third quarters of each year," "complete data analysis within sixty days of sampling," "repair or propose to replace broken wells within 90 days of

identifying the problem," "submit reports on January 21 and July 21 of each year summarizing the status of the corrective action plan," and "provide $574,000 in financial assurance."

Moreover, the State urged that the Commission sent "Morello and White Lion a notice of violation letter for failing to provide financial assurance," conducted an investigation of the property, and discovered that "Morello and White Lion" "had not prepared or submitted any reports regarding groundwater monitoring activities"; "had not conducted semiannual groundwater sampling and analysis"; "failed to repair or propose to replace the broken recovery wells"; "were not operating the complete, required corrective action system"; "failed to record the weekly flow rate of each recovery well"; "failed to conduct inspections of the aboveground collection system pipes on a weekly basis"; and "failed to notify the [Commission] of any periods of corrective action system shutdown." The State also asserted that "Morello and While [sic] Lion are required to perform the duties set out in the compliance plan" and were required to begin performing the duties when the Commission "transferred [the] hazardous waste permit . . . and compliance plan . . . to White Lion" but that neither of them "ever performed" those duties and were, therefore, "in continuous daily violation of 30 Tex. Admin. Code § 335.166(6)." *See id.* § 335.166(6). Finally, the State alleged that "Morello and White Lion were required to provide financial assurance within six months" of obtaining ownership of the property but that they "never provided financial

assurance" and were "in continuous violation of 30 Tex. Admin. Code § 305.64(g)." *See id.* § 305.64(g).

Subsequent to Morello being named in the suit, the State moved for and obtained summary judgment against White Lion. In addition, the State asked the district court to sever its claims against Morello, and the district court granted the request. After the district court granted the State's motions, the State filed a motion for summary judgment against Morello. In its motion, the State urged that its attached evidence demonstrated that Morello "has ensured that nothing would be done to comply with the terms, conditions, and limitations set forth in the Compliance Plan" and failed to provide the required financial assurance. After convening a hearing on the motion and reviewing the various responsive filings, the district court granted the State's motion for summary judgment. Following that ruling, Morello filed a motion for new trial. Ultimately, the district court denied Morello's motion. Morello appeals the district court's judgment in favor of the State and the order denying his motion for new trial.

STANDARD OF REVIEW

We review a trial court's granting of summary judgment de novo. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex. 2005). When reviewing the granting of a traditional motion for summary judgment, we take as true all evidence favorable to the nonmovant and indulge all reasonable inferences and resolve any

doubts in its favor. *Id.* Summary judgment is properly granted when the evidence establishes that the movant "is entitled to judgment as a matter of law" because there are no genuine issues of material fact. Tex.R. Civ. P. 166a(c). In addition, "[u]nder Rule 166a, a trial court cannot grant summary judgment for a reason that the movant does not present to the trial court in writing," and "in an appeal from a summary judgment, issues an appellate court may review are those the movant actually presented to the trial court." *Cincinnati Life Ins. Co. v. Cates,* 927 S.W.2d 623, 625 (Tex. 1996).

DISCUSSION

In three issues on appeal, Morello contends that the district court's decision to grant the State's motion for summary judgment "was error requiring reversal of such judgment and remand of the case for a new trial" because the State did not establish a basis upon which he could be held individually liable for the alleged violations; that the district court "abused its discretion and committed harmful, reversible error by denying Morello's Motion for New Trial based on the erroneous severance of the State's claims against White Lion"; and that the district court "abused its discretion and committed harmful, reversible error by denying Morello's Motion for New Trial based on newly discovered evidence." Given our resolution of Morello's first issue on appeal, we need not address his remaining two issues.

Summary Judgment

As set out above, although the State acknowledged that White Lion is a limited liability corporation and that the obligations that were imposed on Vision had been transferred to White Lion, the State still sought to impose individual liability on Morello for violations of the compliance plan and permit. When challenging the granting of the State's motion for summary judgment in his first issue, Morello highlights that the State acknowledged in its amended petition that White Lion "is a limited liability company organized under the laws of Texas" and that "Morello is the manager and operator of White Lion." In light of the fact that White Lion is a limited liability company, Morello argues that he cannot be held individually liable for the conduct at issue because the State did not attempt to pierce the veil of the company and because the State has not asserted that his alleged misconduct falls within the type of conduct for which an agent of a limited liability company may be held individually liable for his actions taken on behalf of the company.

Although the issue of individual liability in the context of corporate law has been more clearly established, the issue as it pertains to limited liability companies is less settled. For corporations, it is a "bedrock principle of corporate law . . . that an individual can incorporate a business and thereby normally shield himself from personal liability." *Willis v. Donnelly,* 199 S.W.3d 262, 271 (Tex. 2006); *see Castleberry v. Branscum,* 721 S.W.2d 270, 271 (Tex. 1986) (providing that "[t]he corporate form normally insulates

shareholders, officers, and directors from liability for corporate obligations"); *see also Holloway v. Skinner,* 898 S.W.2d 793, 795 (Tex. 1995) (explaining that, in general, "the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts"). That principle is subject to exceptions in circumstances in which maintaining the corporate shield would result in "'injustice' and 'inequity,'" including situations involving "fraud, evasions of existing obligations, circumvention of statutes, monopolization, criminal conduct, and" other similar behavior. *SSP Partners v. Gladstrong Invs. (USA) Corp.,* 275 S.W.3d 444, 455 (Tex. 2008). For example, the general principle does not apply if the owner is essentially the alter ego of the corporation and caused the corporation to commit fraud. *Tryco Enters., Inc. v. Robinson,* 390 S.W.3d 497, 507–08 (Tex.App.—Houston [1st Dist.] 2012, pet. dism'd). In those types of circumstances, "the corporate veil may be pierced" and liability imposed on a corporate officer. *See id.* at 508. The inequitable conduct "is necessary before disregarding the existence of a corporation as a separate entity. Any other rule would seriously compromise what we have called a 'bedrock principle of corporate law'—that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations." *SSP Partners,* 275 S.W.3d at 455.

At the time that White Lion was formed, the creation of limited liability companies was governed by the Texas Limited Liability Company Act. *See* Act of May 25, 1991, 72d Leg., R.S., ch. 901, § 46, 1991 Tex. Gen.

Laws 3161, 3192–216 (amended 2003, 2007, 2009, 2011, 2013) (current version at Tex. Bus. Orgs. Code §§ 101.001–.622). Prior to trial in this case, the legislature promulgated the Business Organizations Code, which became effective in January 2006 before the State filed its suit and governs, among other things, the creation of limited liability companies. *See* Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267, 267–595 (adopting prior version of Business Organizations Code); *see also* Tex. Bus. Orgs.Code §§ 402.001, .003, .005 (setting out transitional period by which entities formed prior to passage of Code were governed by prior law, procedure by which previously existing entity may elect to be governed by Code, and deadline by which Code provisions begin to apply to previously existing entities). Both the Act and the Code mandate that "a member or manager is not liable for the debts, obligations or liabilities of a limited liability company including under a judgment, decree, or order of a court" "[e]xcept as and to the extent the" agreement of the company specifically provides "otherwise." Tex. Bus. Orgs.Code § 101.114; Act of May 25, 1991, 72d Leg., R.S., ch. 901, § 46, art. 4.03, 1991 Tex. Gen. Laws 3161, 3203. Further, the Act and the Code explain that a "member of a limited liability company" may only be named as a party in an action "by or against" the company if the suit is brought "to enforce a member's right against or liability to the" company. Tex. Bus. Orgs.Code § 101.113; Act of May 25, 1991, 72d Leg., R.S., ch. 901, § 46, art. 4.03, 1991 Tex. Gen. Laws 3161, 3203. Neither the Act nor the version of the Code in effect at the time of the lawsuit mentioned

"veil-piercing principles as an exception to limited liability or whether or how such remedies might be applied against" limited liability companies. *See Shook v. Walden,* 368 S.W.3d 604, 613 (Tex.App.—Austin 2012, pet. denied) (discussing absence of veil-piercing provisions from Act); Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267, 267–595.[1]

Recently, this Court was presented with a case in which we were asked to consider the potential applicability of veil piercing to limited liability companies. *See Shook,* 368 S.W.3d at 607. In the opinion, this Court acknowledged that no statute in effect at that time addressed veil-piercing concepts in the context of limited liability companies, and this Court assumed for the sake of addressing the appellant's arguments that those concepts could be applied and determined that if they were applied, "the availability of the veil-piercing remedy would be governed by extra-statutory equitable principles." *Id.* at 607, 613, 619. When describing the possible contours of those principles, this Court explained that "claimants seeking to pierce the veil of" a limited liability company "must meet the same requirements" that would be necessary to pierce the veil

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[1] In 2011, the legislature added section 101.002 of the Business Organizations Code, which specified that the statutes "regulating and restricting veil piercing of corporations" applied to limited liability companies, "their members, and their managers." *Shook v. Walden,* 368 S.W.3d 604, 613–14 (Tex.App.—Austin 2012, pet. denied); *see* Tex. Bus. Orgs.Code § 101.002 (explaining that sections 21.223, 21.224, 21.225, and 21.226 of Code apply in limited-liability-company context).

of a corporation under the governing law in effect during the time relevant to the appeal. *Id.* at 621.

Under the Business Corporation Act and under the provisions of the Code in effect prior to trial, those standards provide that a "holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate" may not be held liable "to the corporation or its obligees with respect to," among others, "any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, [beneficial] owner, subscriber, or affiliate is or was the alter ego of the corporation," "or on the basis of actual" "or constructive fraud, a sham to perpetrate a fraud, or other similar theory," unless "the obligee demonstrates that the holder, [beneficial] owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, [beneficial] owner, subscriber, or affiliate." *See* Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, sec. 21.223, 2003 Tex. Gen. Laws 267, 427; Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, art. 2.21, 1997 Tex. Gen. Laws 1516, 1522. Further, the Business Corporation Act and the Code provide that the liability described above "is exclusive and preempts any other liability" imposed "under common law or otherwise" but does not limit a person's obligation if the person has agreed "to be personally liable" or "is otherwise liable to the obligee" by the Business Corporation Act or Code or by another "applicable

statute." *See* Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, sec. 21.224, 2003 Tex. Gen. Laws 267, 427; Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, art. 2.21, 1997 Tex. Gen. Laws 1516, 1523.

Similar to *Shook,* we do not need to decide whether veil-piercing concepts apply in the limited liability context because although Morello challenged the ability of the State to hold him personally liable for the alleged misconduct, the State did not assert in its petition, its motion for summary judgment, or its response to Morello's reply to the State's motion for summary judgment that it was attempting to pierce White Lion's "veil" in order to hold Morello individually liable or, relatedly, that Morello attempted to cause or did cause White Lion to perpetuate a fraud on the State primarily for his direct personal benefit.[2] *See Endsley Elec., Inc. v. Altech, Inc.,* 378 S.W.3d 15, 22 (Tex.App.—Texarkana 2012, no pet.) (explaining that "[t]he various theories for piercing the corporate veil must be specifically pled or they are waived, unless they are tried by consent"); *see also Sanchez v. Mulvaney,* 274 S.W.3d 708, 712 (Tex.App.—San Antonio 2008, no pet.) (affirming summary judgment in favor of owner of limited liability corporation and explaining that there was no evidence of fraud that would make owner individually liable for breach of contract). For example, the State did not allege that White Lion had "been used as a 'sham' to perpetuate 'fraud' or to 'evade an existing

[2] During the hearing regarding the motion for summary judgment, the State said the following: "To be clear, the [S]tate's not seeking to pierce the corporate veil."

legal obligation,' or . . . [had] been organized and operated as a mere 'tool' or 'business conduit' of another person, i.e., an 'alter ego.'" *See Shook,* 368 S.W.3d at 611 (quoting *Castleberry,* 721 S.W.2d at 271–72); *see also Castleberry,* 721 S.W.2d at 272 (explaining that "[a]lter ego applies when there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice"). Accordingly, the State failed to invoke any veil-piercing theory that Texas law might conceivably recognize in the limited-liability-company context.

Instead, the State attempted to rely on the common-law principle allowing for a corporate officer to be held individually liable when he "knowingly participates in tortious or fraudulent acts . . . even though he performed the act as an agent of the corporation."[3] *See Nwokedi v. Unlimited Restoration Specialists, Inc.,* 428 S.W.3d 191, 201, 210 (Tex.App.—Houston [1st Dist.] 2014, pet. denied) (upholding individual liability for

[3] We note that this Court was recently asked to review the propriety of imposing individual liability on agents of a limited liability company under this common-law principle. *See Key v. Richards,* No. 03-14-00116-CV, 2016 WL 240773, at *2–4 (Tex.App.—Austin Jan. 13, 2016, no pet. h.) (mem. op.). In that case, this Court noted that the legislature has "broadly insulated . . . members from liability for" a limited liability company's obligations but upheld the imposition of individual liability for agents "without clear direction from the Supreme Court holding that the legislation has thereby abrogated longstanding common law recognizing that corporate agents are liable for their own tortious conduct and may even be liable for an entity's liabilities based on the equitable principles of veil piercing." *Id.* at *3 n.4.

person who owned controlling interest in company where evidence showed that he participated in company's fraud by engaging in contract negotiations, informing representative which contract terms to modify, telling other company that it would be receiving checks from Travelers, and instructing Travelers to not issue check to other company); *see also Leyendecker & Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 375 (Tex. 1984) (rejecting argument that employee cannot be held liable for tort committed in scope of employment and explaining that "[a] corporation's employee is personally liable for tortious acts which he directs or participates in during his employment"); *Physio GP, Inc. v. Naifeh,* 306 S.W.3d 886, 889 (Tex.App.—Houston [14th Dist.] 2010, no pet.) (providing that "[t]he purpose of individual liability in the corporate setting is to prevent an individual from using the corporate structure or agency law as a blanket to insulate himself from liability for his otherwise tortious conduct"); *Sanchez,* 274 S.W.3d at 712 (explaining that "the corporate veil is not required to be pierced" "to hold an agent individually liable for his tortious or fraudulent acts," distinguishing issue of individual liability from that of liability under alter ego, and stating that trial court erred by rendering summary judgment in favor of employee on non-contract claims on ground that plaintiffs were required to pierce corporate veil); *Dixon v. State,* 808 S.W.2d 721, 723–24 (Tex.App.—Austin 1991, writ dism'd w.o.j.) (affirming individual liability where corporate officer committed tort of conversion). Specifically, the State acknowledged that the structure of a limited liability company "is intended to shield its

members from the liabilities and obligations of the company," *see* Tex. Bus. Orgs.Code § 101.114, but the State urged that the "statutory shield does not deflect the liability" for the conduct at issue and was "not required to be pierced."

Although the State attempted to invoke this general rule of personal liability when moving for summary judgment, the State did not allege in its live petition or in its motion for summary judgment that Morello engaged in any fraudulent or tortious activity; on the contrary, the State argued in its motion that "[t]his matter is not a tort action" and is instead "a statutory enforcement action brought against Morello as operator and sole decision maker of White Lion." Similarly, in the State's reply to Morello's response to the State's motion for summary judgment, the State clarified that its arguments regarding Morello's behavior "are viewed[] not in the context of a tort."

Instead of urging that Morello engaged in fraudulent or tortious conduct, the State contended that this principle of law also covers "wrongful acts."[4] Under

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[4] In its appellee's brief, the State points to a prior unpublished opinion by this Court as support for its assertion that an employee or owner of a limited liability company can be held individually liable for an entity's wrongdoing if he "participates in the entity's wrongful conduct." *See Coleman v. Savoie,* No. 03-97-00548-CV, 1998 WL 305322, at *3–4 (Tex.App.—Austin June 11, 1998, no pet.) (not designated for publication). However, because that opinion was issued in 1998 and was not designated for publication, it does not have any precedential value. *See* Tex.R.App. P. 47.7(b). Although we need not further address the analysis from that case, we note that although this Court upheld

this expanded reading of the general principle, the State asserted in its motion for summary judgment that Morello can be held individually liable for the failure to adhere to the terms of the compliance agreement that was transferred to White Lion and for the failure to provide financial assurance because that conduct violated provisions of the Administrative Code; because section 7.101 of the Water Code provides that "[a] person may not cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute"; and because section 7.102 of the Water Code authorizes the assessment of a penalty on "[a] person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit." *See* Tex. Water Code §§ 7.101, .102; *see also* Tex. Gov't Code § 311.005(2)

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the judgment imposing individual liability on the "employee-manager" of a limited partnership and a limited liability company for personally installing a sidewalk over the appellee's easement and, thereby, interfering with the appellee's use of the easement, *Coleman,* 1998 WL 305322, at *1, *3 n.1, *3–4, the cases that were cited in support for the proposition that the employee could be held "personally liable for the entity's wrongdoing" because he actively participated in the wrongdoing all recited the general rule of law that an employee may be held personally liable for his *tortious or fraudulent* acts that he committed during his employment, *see id.* at *3 (citing *Leyendecker Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 375 (Tex. 1984); *Taiwan Shrimp Farm Vill. Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc.,* 915 S.W.2d 61, 73 (Tex.App.—Corpus Christi 1996, writ denied); *McIntosh v. Copeland,* 894 S.W.2d 60, 63 (Tex.App.—Austin 1995, writ denied); *Remenchik v. Whittington,* 757 S.W.2d 836, 839 (Tex.App.—Houston [14th Dist.] 1988, no writ); *Great Am. Homebuilders, Inc. v. Gerhart,* 708 S.W.2d 8, 10–11 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)).

(defining "[p]erson").[5] In other words, the State asserted in its motion that "when a statute provides for individual liability, as does the Water Code, an individual corporate officer may be held liable for his own violations."

In light of the argument above, the State, in its motion for summary judgment, pointed to various portions of Morello's deposition and other evidence establishing, among other things, Morello's role in the company, in performing the corrective actions required, in failing to repair equipment that had been installed to treat the contaminated groundwater, in failing to treat or test the groundwater, and in removing from the property or throwing away equipment that had been installed as part of the compliance plan and asserted that at "all times relevant to this suit, Morello has been personally, substantially, and solely involved with operating, managing, and making decisions concerning the facility and its operation" because

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[5] When reviewing the summary judgment granted in favor of the State against White Lion, our sister court of appeals discussed section 7.102 and explained that "[s]tatutes providing for liability of any 'person' in violation allow courts to render judgments against both corporate entities and their agents." *See White Lion Holdings, L.L.C. v. State,* No. 01-14-00104-CV, 2015 WL 5626564, at *3 (Tex.App.—Houston [1st Dist.] Sept. 24, 2015, no pet. h.) (mem. op.). However, that statement was made in the context of determining whether our sister court had jurisdiction over the claims in that case and whether the district court properly severed the claims against White Lion, *id.* at *2–4, and our sister court was not called upon to and did not address whether individual liability was appropriate in the absence of any proven tortious or fraudulent conduct.

he "is the sole manager and officer of White Lion." Accordingly, the State asserted that Morello could be held individually liable for the "wrongful acts which he directs, participates in, or has knowledge of and assented to" and that "Morello's actions amount to deliberate, blatant, and conscious violation of the Compliance Plan and each of its terms, conditions, and limitations." Relatedly, the State contended that Morello "as the sole member, owner, and decision-maker of White Lion, is a person that caused, allowed, and/or permitted White Lion to violate the Compliance Plan and related rules."

Turning to the issue of whether the State established as a matter of law that Morello could be held individually liable, we note, as a preliminary matter, that all of the cases that the State cited in its summary-judgment motion for the proposition that "wrongful acts" fall within the principle allowing for individual liability of corporate agents recite the longstanding rule that a corporate employee may be held liable for his "tortious" or his "fraudulent" acts when acting as an agent but do not indicate that conduct falling outside of those types of misconduct may also serve as a basis for individual liability. *See Leyendecker,* 683 S.W.2d at 374–75 (affirming judgment against company employee for libel); *Nwokedi,* 428 S.W.3d at 210 (addressing individual liability for committing fraudulent transfers under Uniform Fraudulent Transfers Act); *Sanchez,* 274 S.W.3d at 712–13 (remanding case to trial court to allow court to address issue of individual liability for employee on claims

that employee committed tortious or fraudulent acts); *Dixon,* 808 S.W.2d at 723, 724 (discussing individual liability of company president for "actively participating in the tort of conversion").

Furthermore, the cases relied on by the State as support for the proposition that the legislature intended to allow for individual liability to be imposed on an agent of a limited liability company even in the absence of fraudulent or tortious conduct through the passage of sections 7.101 and 7.102 of the Water Code do not seem to support that proposition and certainly do not compel that type of groundbreaking conclusion. First, the State referred to *Miller v. Keyser,* 90 S.W.3d 712 (Tex. 2002), for the proposition that an individual is liable for his own violations even if he was acting on behalf of a corporation when there is a governing statute that allows for the imposition of individual liability. In that case, the supreme court determined that an agent of a corporation may be held liable under the Deceptive Trade Practices Act, which the court explained allows "a consumer to bring suit against *any person* whose false, misleading, or deceptive acts, or other practices . . . are the producing cause of the consumer's harm" and to bring suit "for 'any unconscionable action or course of action by *any person.*'" *Id.* at 715 (citing Tex. Bus. & Com.Code § 17.50(a)(1) and quoting Tex. Bus. & Com.Code § 17.50(a)(3)).[6] Although the court

[6] The actual language of the Deceptive Trade Practice Act in effect at the time the supreme court issued its opinion in *Keyser* provided as follows: "A consumer may maintain an action where any of the following constitute a cause of economic damages or

did discuss the broad scope of the phrase "any person" in the Deceptive Trade Practices Act when determining that Keyser's role as agent did "not excuse Keyser from DTPA liability," *see id.* at 716, 717, the court primarily focused on how the Deceptive Trade Practices Act is designed to protect consumers and is construed in favor of consumers, *id.* at 715, and how its conclusion that Keyser could be held personally liable "comport[ed] with Texas' longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts," *id.* at 717. In other words, the court explained that "[a]gents are personally liable for their own torts" and that "[t]here is no basis for concluding differently based on the claims brought under the" Deceptive Trade Practices Act. *Id.* at 718. In the current case, there has been no showing that the alleged failures to satisfy the terms of the compliance plan and failure to provide financial assurance are tortious or fraudulent conduct of Morello individually or that those failures to comply should somehow be treated as if they were. On the contrary, as discussed above, the State did not allege any fraudulent conduct and specifically stated that the violations at issue are not torts.

Next, the State pointed to *State v. Malone Service Co.,* 853 S.W.2d 82, 84–85 (Tex.App.—Houston [14th Dist.] 1993, writ denied). In *Malone,* our sister court

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damages for mental anguish: . . . the use or employment by any person of a false, misleading, or deceptive act or practice" or "any unconscionable action or course of action by any person." *See* Act of May 17, 1995, 74th Leg., R.S., ch. 414, § 5, sec. 17.50(a), 1995 Tex. Gen. Laws 2988, 2992 (amended 2005) (current version at Tex. Bus. & Com.Code § 17.50(a)).

overruled the argument that the president of a company and its plant manager could not be held individually liable under a former provision of the Water Code, which provided that "'[a] person who violates any provision of a permit issued under this chapter shall be subject to a civil penalty in any sum not exceeding $5,000 for each day of noncompliance and for each act of noncompliance.'" *Id.* at 84 (quoting former subsection 27.101(a) of Water Code). When determining that individual liability was appropriate, the court noted that "a corporate officer who participates in or directs the commission of a tort may be held personally liable" and then likened the conduct at issue in the case to "an environmental tort." *Id.* at 85.

As support for the proposition that a corporate officer can be held liable for the commission of an environmental tort, the *Malone* court cited *Leyendecker & Assoc., Inc. v. Wechter,* 683 S.W.2d 369, 375 (Tex. 1984). However, the opinion in *Leyendecker* did not discuss environmental torts or suggest that a corporate officer could be held liable for one and instead addressed whether a corporate employee could be held individually liable when he committed the tort of libel in the scope of his employment. *See id.* Moreover, the conduct at issue in *Malone* that the court analogized to an environmental tort was consistent with what the legislature had described as an environmental tort in a former provision of the Civil Practice and Remedies Code discussing proportionate responsibility. *See* Tex. Civ. Prac. & Rem.Code § 82.005(d)(1) (providing that provision governing products-liability suits does not

apply to "environmental tort as defined by Sections 33.013(c)(2)"). At the time that *Malone* was decided, the provision explained that an environmental tort occurred when "personal injury, property damage, or death" are "caused by depositing, discharge, or release into the environment of any hazardous or harmful substances." *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, sec. 33.013(c)(2), 1987 Tex. Gen. Laws 37, 42, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.07, .10(5), sec. 33.013, 2003 Tex. Gen. Laws 847, 858, 859. In *Malone,* the defendant company was ordered by the Texas Water Quality Board to stop placing waste materials into an "earthen pit and to close the pit," but the company "covertly" "continued to pump sludge into the pit," shut down the pumps when inspectors came, and disregarded the terms of a compliance agreement by tearing holes in the tarpoleum fabric used to cover and close the pit in order to "continue to pump waste into the pit." 853 S.W.2d at 84. In the current case, the conduct alleged by the State does not align as easily with the description of an environmental tort because there was no allegation that Morello deposited or discharged any hazardous substances. Regardless, the analysis from *Malone* is not binding on this Court. *See HWY 3 MHP, LLC v. Electric Reliability Council of Tex. (ERCOT),* 462 S.W.3d 204, 211 n.4 (Tex.App.—Austin 2015, no pet.) (explaining that analysis from sister court of appeals is not binding); *see also State v. Johnson,* No. 03-98-00086-CV, 1998 WL 818051, at *7 (Tex.App.—Austin Nov. 30, 1998, no pet.) (not designated for publication) (distinguishing *Malone* from facts of that case and

explaining that *Malone* and similar cases "have held a corporate officer responsible for *torts* of the corporation" (emphasis added)).[7]

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[7] In its motion for summary judgment, the State also relied on a memorandum opinion from this Court. *See Health Enrichment & Longevity Inst., Inc. v. State,* No. 03-03-00578-CV, 2004 WL 1572935 (Tex.App.—Austin July 15, 2004, no pet.) (mem. op.). In that case, this Court affirmed the imposition of civil penalties against the owner of an assisted living facility. *Id.* at *1, *8–9. However, in that case, liability on the sole owner was imposed for running an assisted living facility without a license. *Id.* at *8. Both the current version and the former version of the Health and Safety Code in effect at the time *Health Enrichment* was decided mandate that a "person may not establish or operate an assisted living facility without a license" and authorize the imposition of a civil penalty on a person who operates a facility without a license. Tex. Health & Safety Code §§ 247.021, .045(b)-(c); Act of May 7, 1999, 76th Leg., R.S., ch. 233, § 1, secs. 247.021, .045, 1999 Tex. Gen. Laws 1064, 1066, 1072. The provisions authorizing civil penalties for someone who operates a facility without a license in the current and the former versions are separate from the portions authorizing the imposition of penalties for failing to comply with a rule and impose a harsher minimum penalty, which is some indication that the legislature intended to treat violations for operating a facility without a license differently from the failure to comply with an administrative rule. *See* Tex. Health & Safety Code § 247.045(a); Act of May 7, 1999, 76th Leg., R.S., ch. 233, § 1, sec. 247.045, 1999 Tex. Gen. Laws 1064, 1071–72.

In this case, there has been no allegation that Morello was similarly operating a facility without a license, and there is no statute similarly singling out for the imposition of a civil penalty the conduct alleged in this case that is distinct from the provision authorizing the imposition of a civil penalty for failing to comply with a governing rule. Accordingly, we do not believe that the analysis from *Health Enrichment* supports the State's assertion that Morello was individually liable for the alleged misconduct in this case as a matter of law. *Cf.* Tex. Health & Safety Code § 247.045(h) (containing provision authorizing State to "seek

For all of these reasons, we must conclude that the State failed to establish as a matter of law that Morello could be held individually liable for the alleged violations at issue and, therefore, that the district court erred by granting the State's motion for summary judgment. Accordingly, we sustain Morello's first issue on appeal.

CONCLUSION

Having sustained Morello's first issue on appeal, we need not reach his remaining two issues challenging the denial of his motion for new trial, and we reverse the district court's grant of summary judgment and remand this cause for further proceedings consistent with this opinion.

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satisfaction from any owner, other controlling person, or affiliate of the person found liable," which was enacted after *Health Enrichment*).

2015 WL 5626564

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Houston (1st Dist.).

White Lion Holdings, L.L.C., Appellant
v.
The State of Texas, Appellee

NO. 01–14–00104–CV

|

Opinion issued September 24, 2015

On Appeal from the 98th District Court, Travis County, Texas, Trial Court Case No. D–1–GV–13–001068

Attorneys and Law Firms

Joan Marie L. Bain, Jacqueline Smith, for Appellant.

Craig James Pritzlaff, for Appellee.

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

MEMORANDUM OPINION ON REHEARING

Harvey Brown, Justice

The trial court entered summary judgment for the State of Texas that White Lion Holdings, L.L.C. violated the terms of a compliance plan issued by the Texas Commission on Environmental Quality (TCEQ). White Lion appeals, arguing in two issues that the

trial court improperly denied its motion for continuance and that the summary-judgment evidence raised questions of material fact sufficient to prevent summary judgment. We affirm.[1]

Background

In 2006, the State initiated this lawsuit, alleging that White Lion violated a waste-management compliance plan issued by TCEQ. The plan and a contemporaneously-issued permit govern the monitoring, treatment, and management of surface wastewater impoundments and a plume of contaminated groundwater at a facility now owned by White Lion and formerly used for pipe manufacturing in Rosenberg, Texas. During its operational life, the facility generated hazardous wastewater that was treated onsite in a system that included five surface impoundments. The prior owner of the facility, Vision Metals, discovered that the impoundments were sources of groundwater contamination, including elevated concentrations of cadmium, cobalt, lead, barium,

[1] On April 9, 2015, we rendered our original opinion in this case. On May 26, 2015, White Lion filed three motions: a motion to supplement the record, a motion for rehearing, and a motion for rehearing en banc. It subsequently amended the motion for panel rehearing and the motion for rehearing en banc. We deny the motion to supplement the record and motion for panel rehearing, but withdraw our opinion and judgment of April 9, 2015, and issue this opinion and a new judgment in their stead. We dismiss the motion for rehearing en banc as moot. *See, e.g.*, *Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 41 (Tex.App.—Houston [1st Dist.] 2005, pet. denied).

chromium, nickel, silver, zinc, iron, sulfate, and acidic compounds.

In 1988, the TCEQ's predecessor, the Texas Natural Resources Conservation Commission, issued Hazardous Waste Permit 50129–001 to Vision Metals to govern the management, closure, and long-term care of the wastewater impoundments. Contemporaneously, it issued to Vision Metals Compliance Plan 50129. The compliance plan has been modified several times since then.

White Lion acquired the facility in a bankruptcy sale in April 2004. At the same sale, various third parties purchased machinery and equipment at the property. According to White Lion, some of those third parties damaged the facility while removing their property in the period from April 2004 through August of that year. White Lion estimated the costs of repairs to exceed $1.4 million and initiated lawsuits to recover damages from the third parties.

Meanwhile, the existing permit and compliance plan were transferred to White Lion. White Lion, however, did not provide the State with a required "financial assurance" mechanism, such as a bond or irrevocable letter of credit, guaranteeing its performance of its obligations under the permit and compliance plan. It did, however, request an extension of time to provide such assurance. White Lion also discussed with the United States Environmental Protection Agency switching the site to a "plume management approach," which would simplify management of the site,

but the EPA told White Lion that such an approach was not feasible.

TCEQ gave White Lion an extension of time to address outstanding compliance issues and submit an amendment to the compliance plan but did not extend the time for White Lion to provide financial assurance. White Lion never submitted any application to amend the compliance plan and never provided any financial assurance.

In 2006, the State sued White Lion for violations of the compliance plan, seeking civil penalties under the Water Code, unpaid hazardous waste facility fees, an injunction to secure White Lion's performance of its duties under the compliance plan, and attorney's fees. The State later amended its petition, naming White Lion's owner, Bernard Morello, as an additional defendant.

The case was set for trial in 2008, continued, set again in 2011, and continued again. In August 2013, the State filed a motion for summary judgment. White Lion responded, arguing in part that full compliance with the plan was impossible, that it had complied to the extent possible, and that injunctive relief was improper in the absence of a showing of a risk of irreparable injury. White Lion also moved for a continuance to obtain an expert opinion on the costs and feasibility of repairs to the site.

The trial court held a hearing at which it denied White Lion's motion for continuance and then granted the State's motion for summary judgment. It entered

judgment that the State recover from White Lion (1) civil penalties of $325,600, (2) unpaid hazardous waste facility fees of $129,464.15, (3) pre-judgment interest on the unpaid hazardous waste facility fees, (4) attorney's fees, (5) costs of court, and (6) post-judgment interest.[2] It also enjoined White Lion as follows: "White Lion shall [immediately] comply with each limitation, requirement, and condition of the Compliance Plan." In the same order, the trial court severed the State's case against Morello, rendering the judgment against White Lion final. The State later obtained summary judgment in the severed case against Morello.

In two issues, White Lion appeals, arguing, first, that the trial court erred in denying White Lion's motion for continuance and, second, that the trial court improperly granted summary judgment because White Lion raised questions of material fact.[3]

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[2] The original judgment incorrectly stated, under the heading "Post-Judgment Interest," that "[t]he State shall recover *pre*-judgment interest on all amounts awarded in this judgment at the annual rate of 5.00%." On the State's motion, the trial court entered judgment *nunc pro tunc* correcting "pre-judgment" in that section to "post-judgment" and making other clerical corrections.

[3] On January 7, 2014, the Texas Supreme Court ordered this appeal transferred from the Court of Appeals for the Third District of Texas. See TEX. GOV'T CODE ANN. § 73.001 (West 2013) (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Third District and that of this Court on any relevant issues. *See* TEX.R.APP. P. 41.3.

Our Jurisdiction over this Appeal

On rehearing, White Lion argues for the first time that we lack jurisdiction to hear this appeal. It argues that the State's case against Morello was improperly severed from the case against White Lion and that, under controlling authority, a judgment rendered after an improper severance is not an appealable, final judgment. In support of this argument, White Lion has submitted to this Court (1) the State's motion for summary judgment against Morello, (2) Morello's response, (3) the final summary judgment against Morello, (4) Morello's motion for new trial, and (5) the "Trial Court Order, if any, denying Motion for New Trial." It asks that we grant leave to supplement the record to include these documents and, having done so, hold that the severance was improper.

White Lion's jurisdictional argument has three parts: (1) the State's case against Morello is based entirely on his status as the sole member of White Lion; (2) the severance order is invalid because it (a) severs a single cause of action into separate claims and (b) severs inextricably intertwined claims against different parties; and (3) an invalid severance requires dismissal under the case law of the Austin Court of Appeals where this appeal was originally filed.

We have jurisdiction only over final judgments "[u]nless there is a statute specifically authorizing an interlocutory appeal." *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex.1985) (orig.proceeding) (per curiam); *see Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95

(Tex.2012). "Jurisdiction over the subject matter of an action may not be conferred or taken away by consent or waiver, and its absence may be raised at any time." *Carroll v. Carroll*, 304 S.W.3d 366, 367 (Tex.2010) (per curiam) (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex.1993)).

Under Rule 41 of the Texas Rules of Civil Procedure, "[a]ny claim against a party may be severed and proceeded with separately." TEX.R. CIV. P. 41. "This rule grants the trial court broad discretion in the matter of severance and consolidation of causes." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex.1990) (citing *McGuire v. Commercial Union Ins. Co. of N.Y.*, 431 S.W.2d 347 (Tex.1968)). "The trial court's decision to grant a severance will not be reversed unless it has abused its discretion." *Id.* (citation omitted). "A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Id.* (citations omitted).

The first step of White Lion's argument is factually incorrect: the State's motion against Morello focuses on Morello's actions and failures to act, as distinct from White Lion's actions and inactions. Among other theories, the State argues that Morello is liable for penalties because (1) he purchased the site personally and assigned it to White Lion, but did not himself comply with his own obligations with respect

to the site; (2) as a corporate officer, he can be held personally liable for penalties under the Water Code; (3) he lacked the expertise to manage the site and made no efforts to manage it until the State filed suit; and (4) he personally took or failed to take actions that resulted in White Lion's violation of the compliance plan, such as removing the groundwater treatment system, throwing away "monitoring well protective housing caps," and directing White Lion not to comply with the compliance plan in various ways.

The second step of White Lion's argument is also flawed. The severance order did not split one cause of action, but rather split two causes of action on the same legal theory: one claim against each defendant. Nor did it split inextricably intertwined claims. The claims against White Lion and those against Morello are based on the Water Code, which imposes liability on any "person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to any . . . matter within [TCEQ's] jurisdiction to enforce." TEX. WATER CODE. ANN.. § 7.102 (West 2008). Statutes providing for liability of any "person" in violation allow courts to render judgments against both corporate entities and their agents. *E.g.*, *Miller v. Keyser*, 90 S.W.3d 712, 715-18 (Tex.2002) (because Deceptive Trade Practices Act imposes liability on "any person" who violates it, both companies and their agents can be held liable). The ways in which White Lion and Morello allegedly violated the compliance plan are different. Moreover, to the extent the facts supporting the State's claims against White Lion are

intertwined with those supporting the claims against Morello, those facts are undisputed. No party disputes, for example, that no monitoring is being performed at the site or that the site's remediation, monitoring, and control systems are offline, disabled, dismantled, or missing entirely. In other words, the claims overlap only with respect to facts that are conclusively established in the record, and there is no risk that a severance would create inconsistent judgments.

In its motion for rehearing, White Lion also argues for the first time that the severance violates the due process protections and prohibitions on excessive fines in the United States and Texas Constitutions. It did not, however, preserve these arguments by raising them in the trial court, nor did it raise them on appeal. "As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal." *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex.1993). Both due-process and excessive-fines arguments can be waived.[4] By failing to preserve these arguments, White Lion has waived them. TEX.R.APP. P. 33.1(a)(1).

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[4] *E.g.*, *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex.2003) (due process); *Anderson v. McCormick*, Nos. 01–12–00856–CV, 01–12–00857–CV, 2013 WL 5884931, at *3 (Tex.App.—Houston [1st Dist.] Oct. 31, 2013, no pet.) (mem.op.) (due process); *Ratsavong v. Menevilay*, 176 S.W.3d 661, 671 (Tex.App.—El Paso 2005, pet. denied) (due process); *Konkel v. Otwell*, 65 S.W.3d 183, 188 (Tex.App.—Eastland 2001, no pet.) (excessive fines); *Armstrong v. Steppes Apartments, Ltd.*, 57 S.W.3d 37, 49 (Tex.App.—Fort Worth 2001, pet. denied) (both due process and excessive fines).

We hold that the trial court did not abuse its discretion by granting the State's conditional motion for severance. Because the severance was proper, we need not reach the final step of White Lion's argument: whether this Court, as the transferee court of an appeal originally filed in the Austin Court of Appeals, can exercise jurisdiction over a summary judgment that purports to be final but results from an improper severance. Because the documents that White Lion has provided from the State's case against Morello are relevant only to its jurisdictional arguments, we deny White Lion's motion to supplement the record.

We have jurisdiction over this appeal. Accordingly, we proceed to the merits.

Motion for Continuance

In its first issue, White Lion argues that the trial court erred in denying White Lion's motion for continuance. White Lion requested a continuance on two occasions. First, in its response to the State's motion for summary judgment, it requested "that any hearing on [the motion] be reset for at least 90 days to give [White Lion] time to consult with experts to determine what remedial action is feasible." In that response, it admitted that the facility's mitigation and monitoring systems had no electrical power and were not operational, arguing that "[c]ompliance with the [Compliance] Plan has been rendered impractical and commercially and economically [i]nfeasible by damages to the facility by third parties." White Lion then filed a motion for

continuance, asking "that the court reset the hearing [on] the State's [motion for summary judgment] for 90 days . . . to give [White Lion] time to confer with experts to determine the cost and feasibility of restoring the existing remedial system and/or modifying the remedial system." According to White Lion, it "want[ed] to resolve this matter but need[ed] a reasonable time to evaluate the situation." In the motion, it acknowledged that it needed "an extension to comply with TCEQ's requests" and that, as of August 2013, White Lion "need[ed] to quickly come into full compliance with the existing [compliance] plan." The trial court denied the motion for continuance at the start of the hearing on the motion for summary judgment.

A. Standard of review

We review a trial court's ruling denying a motion for continuance for an abuse of discretion. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex.2002); *Carter v. MacFadyen*, 93 S.W.3d 307, 310 (Tex.App.—Houston [14th Dist.] 2002, pet. denied). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Marchand*, 83 S.W.3d at 800. The trial court may order a continuance of a summary judgment hearing if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." TEX.R. CIV. P. 166a(g). In a first motion for continuance based on the ground that testimony is needed, the affidavit supporting the

motion must (1) show that the testimony is material and (2) state that due diligence has been used to procure the testimony, describing the diligence used and why it failed, if known. TEX.R. CIV. P. 252. In determining whether there has been an abuse of discretion, we view the evidence in the light most favorable to the trial court and indulge every presumption in favor of the judgment. *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 526 (Tex.App.—Houston [1st Dist.] 1994, no writ) (citing *Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485 (Tex.App.—Houston [1st Dist.] 1983, writ dism'd)).

B. The trial court did not abuse its discretion

White Lion has not shown that the trial court abused its discretion by denying the requested continuance. White Lion acquired the property in April 2004. TCEQ transferred the then-existing permit and compliance plan to White Lion and issued a revised permit and compliance plan identifying White Lion as the permittee and property owner in July 2004. The State initiated this suit in April 2006 and filed its motion for summary judgment in August 2013. White Lion thus had possession of the property for over nine years and notice of the State's claims for more than seven years before the summary-judgment motion. But it admits that it made no attempt to retain an environmental consultant during that period of over nine years, waiting until just two weeks before the State filed its motion for summary judgment to begin its search. White Lion makes no attempt in either its motion for continuance or its appellate brief to explain why it could not

have retained an expert and obtained a report before that time.

Further, White Lion did not articulate in its motion for continuance why it needed an expert's opinion before the motion for summary judgment hearing. It stated only that it wanted "time to confer with experts to determine the cost and feasibility of restoring the existing remedial system and/or modifying the remedial system." But those were not issues before the trial court when it considered the motion for summary judgment. That motion addressed only whether White Lion had complied with the compliance plan and governing law and, if not, what civil penalties, unpaid fees, and injunctive relief should be assessed against it. White Lion's evidence, if obtained, would have pertained to the cost of remediation, not White Lion's liability or the calculation of penalties or fees for its past noncompliance. Indeed, White Lion made no attempt to connect the expert opinions that it sought to any of the claims on which the State obtained summary judgment.

We also note that the affidavit supporting the motion for continuance did not describe the evidence that White Lion sought, show that the evidence is material, state that due diligence has been used to procure the evidence, or describe the diligence and why it failed, if known. TEX.R. CIV. P. 252.

Because White Lion failed to demonstrate that it needed a continuance to obtain evidence essential to its defense, we hold that the trial court did not abuse

its discretion in denying the motion for continuance. Accordingly, we overrule White Lion's first issue.

Motion for Summary Judgment

In its second issue, White Lion argues that the trial court erred in granting the State's motion for summary judgment. White Lion contends that it demonstrated the existence of genuine issues of material fact in five categories: (1) whether its compliance was excused under the compliance plan's force majeure clause; (2) whether the State "misrepresented" to the trial court the financial assurance requirements to which White Lion is subject; (3) whether the hazardous waste permit fees awarded in the judgment were "legally valid"; (4) whether the State provided sufficient evidence to obtain injunctive relief; and (5) whether the State improperly sought judgment as to lands owned by White Lion but not subject to the permit or compliance plan. We will address each argument in turn.

A. Standard of review

We review a trial court's grant of summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex.2009). Rule of Civil Procedure 166a(c) provides that a movant is entitled to summary judgment if the summary-judgment evidence establishes that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly

set out in the motion or in an answer or any other response." TEX.R. CIV. P. 166a(c); *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997). "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX.R. CIV. P. 166a(c).

B. White Lion's noncompliance was not excused

White Lion first argues that its failure to comply with the compliance plan was excused under the plan's force majeure clause, which provides that "noncompliance with one or more of the provisions of this Compliance Plan may be justified only to the extent and for the duration that non-compliance is caused by a 'Force Majeure' event. . . ." The compliance plan defines "Force Majeure" as "an event that is caused by an Act of God, labor strike, or work stoppage, or other circumstance beyond the Permittee's control that could not have been prevented by due diligence, and that makes substantial compliance with the applicable provision or provisions of this Compliance Plan impossible."

According to White Lion, the evidence that it submitted in response to the State's motion for summary judgment raised a fact issue as to whether the force majeure clause applies due to actions taken by third parties that damaged the facility. When it purchased the facility, other buyers purchased equipment located at the facility, and the bankruptcy court required it to

give those buyers access to the facility to remove the machinery and equipment that they had purchased. According to White Lion, some of those buyers caused significant damage to the property, resulting in the virtual destruction of the electrical system and disconnection of all electrical power. It estimates that repairing the electrical system, which is necessary to operate corrective equipment, will cost at least $500,000. White Lion has sought to recover damages from certain of the equipment buyers and their contractors, with varying success. It argues that, without such recoveries, the damages caused by these third parties made its "compliance with the Compliance Plan . . . a physical impossibility when it acquired the Property." It also argues that compliance was "impractical and commercially and economically infeasible." Thus, according to White Lion, there is a fact issue regarding whether its noncompliance was excused.

The State argues that White Lion did not preserve this argument for appeal because it did not mention the force majeure clause or the concept of force majeure in its response to the motion for summary judgment. The State is correct. White Lion has waived its contractual force majeure argument on appeal. *See* TEX.R. CIV. P. 166a(c); TEX.R.APP. P. 33.1(a). But White Lion's response argued that compliance was "rendered impractical and commercially and economically [i]nfeasible by damages to the facility by third

parties." It has therefore preserved a common-law excuse-by-impossibility argument.[5]

White Lion did not introduce any evidence that it could not control, mitigate, or, after the fact, remediate the actions of third parties at the site, even though it acknowledges that such actions ceased by August 2004, more than a decade before the trial court entered summary judgment. While it attached to its response to the motion for summary judgment pleadings from various lawsuits that it has filed against third parties, none of those pleadings was verified or sworn. At most, those documents demonstrate the nature of White Lion's claims against those parties. They do not demonstrate that the claims are true, much less that the cost of repairing the damage caused by third parties rendered compliance with the compliance plan impossible at any point in time. Nor did White Lion demonstrate that it was unable to pay the costs of the necessary repairs.

We hold that White Lion failed to raise a fact issue with respect to whether its noncompliance with the compliance plan was excused.

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[5] The State argues that no such excuse is possible because "White Lion's defenses are limited to those set forth in the Compliance Plan and the Texas Water Code." We need not address this argument because, even assuming that the economic impossibility defense is available, White Lion has failed to demonstrate that a fact issue exists regarding that defense.

C. White Lion admitted that it did not meet its financial assurance requirements

White Lion next contends that the State "misrepresented" facts to the trial court, specifically that (1) White Lion was required to maintain $574,000 in "financial assurance," guaranteeing its performance of its obligations; (2) White Lion never provided any financial assurance to the State; and (3) White Lion was required to maintain financial assurance in the amount set by the original 1988 compliance plan, even though the costs of remaining post-closure work at the facility were much lower.

As a threshold matter, we note that the State adduced evidence that White Lion violated the compliance plan in numerous ways, not merely by failing to provide financial assurance. "When the trial court does not specify the basis for its summary judgment, the appealing party must show it is error to base it on any ground asserted in the motion." *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex.1995). For the reasons below, we hold that the evidence supports the State's arguments in its motion for summary judgment regarding White Lion's financial-assurance obligations.

TCEQ is required to establish a compliance plan governing "compliance monitoring and corrective action for facilities that store, process, or dispose of hazardous waste in surface impoundments, waste piles, land treatment units, or landfills. . . ." 30 TEX. ADMIN. CODE § 305.401(a) (West 2015). The owner or operator of an affected site must perform the duties set

forth in the compliance plan. *Id.* § 335.166(2) (West 2015). He also must establish and maintain financial assurance for the corrective actions to be taken. *Id.* § 335.167(d) (West 2015).

The State sent a request for admission under Rule of Civil Procedure 198.1, asking White Lion to admit that the compliance plan "requires White Lion to provide at least $574,000 in financial assurance for the Facility." White Lion admitted this to be true. White Lion also admitted, in response to another request for admission, that it "has never obtained financial assurance for the Facility." White Lion argues, however, that the permit required a lesser amount of financial assurance than that required by the compliance plan, the permit is the controlling document, and the different amounts therefore raise a fact issue. But the Administrative Code requires White Lion to comply with both the permit and the compliance plan. *E.g.*, 30 TEX. ADMIN. CODE §§ 335.166-.167. While the permit incorporates the compliance plan as part of its terms, the plan is enforceable in its own right. *Id.* White Lion admits that the compliance plan required $574,000 in financial assurance, a requirement that it had not met.

White Lion also argues that the State "misrepresented" to the trial court that the amount of financial assurance required by the compliance plan was $574,000, the same amount set in the first compliance plan in 1988, when the actual requirement is lower. It reasons that the amount required by the Administrative Code is "an amount no less than the current cost estimate" for closure, post closure, or corrective action.

30 TEX. ADMIN. CODE § 37.121 (West 2015). According to White Lion, the "current cost estimate" is lower than the original $574,000 figure due to changes at the facility over the years. In support, it relies on an EPA report from 2003 that purportedly concluded, as White Lion summarizes it, that "there was no imminent endangerment to public health and the environment."

But the report in question does not support such a conclusion. Rather, it indicated that contamination from the facility was "high unlikely" to impact "the drinking and agricultural water supply," but also concluded that "the plume may not be stable" and that the risk of additional exposures "is dependent on actions taken to mitigate the plume," including maintenance of the monitoring and recovery wells on-site. The undisputed evidence shows that each such well has been closed, destroyed, or abandoned. It also shows that the State correctly represented to the trial court the amount of financial assurance required by the compliance plan now in effect: $574,000. Moreover, contrary to White Lion's arguments, the "current cost estimate" is not simply the owner or operator's estimate of the costs associated with a waste site. Rather, that term is defined by statute as "[t]he most recent estimates prepared in accordance with commission requirements for the purpose of demonstrating financial assurance for closure, post closure, or corrective action." 30 TEX. ADMIN. CODE § 37.11(6) (West 2015). The only manner in which either the amount of financial assurance required or the current cost estimate could be decreased is upon a request by White Lion, subject to approval by

TCEQ. *Id.* § 37.151 (West 2015). White Lion has never made such a request.

The record thus conclusively shows that the compliance plan requires financial assurance of $574,000 and that White Lion "has never obtained financial assurance for the Facility."

White Lion also argues that it raised an issue of material fact regarding the calculation of civil penalties for its violation of the financial assurance requirements of the compliance plan. Specifically, it argues that Vision Metals provided financial assurance, that it assigned that financial assurance to White Lion, and that the financial assurance remained in effect until January 11, 2005. Thus, it contends that it raised a fact issue as to whether civil penalties could apply for any date before January 12, 2005.

We disagree. The evidence shows that Zurich North America, through its agent, Steadfast Insurance Company, issued an insurance policy to Vision Metals to satisfy the latter's financial assurance requirements. In April 2004, Vision Metals asked Zurich to assign its rights and obligations under that policy to White Lion. The record contains no evidence, however, that Zurich or Steadfast accepted this assignment.[6] Critically, it also contains no evidence that anyone provided evidence of such an assignment or attempted

[6] The policy provides that it "may not be assigned to a successor owner or operator of any 'waste facility' without the consent of [Steadfast] which shall not be unreasonably withheld, delayed or denied."

assignment to the State. Rather, the evidence shows only that White Lion informed the State in August 2004 that "[t]he financial assurance provided by [Vision Metals] will remain in effect with Zurich North America Insurance (Policy No. PLC3572779–04) until January 11, 2005." TCEQ responded on September 20, 2004, as follows:

> We understand that financial assurance for this permit and compliance plan currently is in effect through an insurance policy issued by Zurich North America Insurance to the previous facility owner, Visions Metals, Inc. However, as we stated in our August 27, 2004 letter to you, White Lion, as the new owner and operator, is required to establish financial assurance with[in] six months of the ownership change. To date, this has not been done.

There is thus no evidence that White Lion actually established financial assurance—whether in the form of the Zurich policy or otherwise—and provided it to the State. Rather, White Lion expressly admitted that it never obtained any financial assurance for the facility.

The evidence conclusively established that White Lion assumed responsibility under the compliance plan when it became the transferee of that plan on July 23, 2004. The evidence also conclusively established that White Lion never submitted any required water samples or reports as required by the plan and failed to prevent the destruction, removal, or abandonment of the recovery and monitoring wells or to repair or replace the wells after they were destroyed, removed, or

abandoned. Thus, White Lion was in continuous violation of the plan from that date through the date of the summary-judgment hearing on July 29, 2013, a period of 3,294 days. *See* discussion in Section E, *infra*. The evidence also conclusively showed that White Lion's deadline for establishing financial assurance was October 6, 2004. It had not established financial assurance by the summary-judgment hearing, 3,218 days later, resulting in additional violations of the plan. Under the Water Code, the civil penalty for violations of the compliance plan shall be not less than $50 nor more than $25,000 for each violation, and "[e]ach day of a continuing violation is a separate violation." TEX. WATER CODE ANN. § 7.102. The State stipulated to the minimum penalty for these violations of $50 each. The trial court thus awarded $50 per violation for a total of 6,512 violations, or $325,600. The evidence raised no question as to the dates for which the penalties should be imposed, and the trial court therefore did not err in its imposition of penalties.[7]

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[7] On rehearing, White Lion argues that it has raised fact issues regarding whether the State (1) "failed to mitigate its damages by failing to timely file a claim against the [prior owner's] insurance policy" and (2) is estopped from recovering due to its own dilatory conduct. White Lion did not make either of these arguments in its brief on appeal. Accordingly, it has waived them. TEX. R.APP. P. 33.1(a). Even to the extent that these arguments might have been implied in White Lion's briefing, they have no merit. This is not a case for damages, but for civil penalties, in part for White Lion's own failure to obtain an insurance policy as required by statute. *See* 30 TEX. ADMIN. CODE § 335.167(d) (West 2015). White Lion does not and cannot demonstrate that the State had any obligation to "mitigate" its recovery of penalties

D. The trial court properly awarded the State unpaid hazardous waste facility fees

According to White Lion, it never received a bill from TCEQ for permit fees for the years 2009 through 2013, nor did TCEQ make a demand for such fees until the State filed its motion for summary judgment. White Lion also argues that the permit expired in 2009. It concludes that these facts raise "fact questions as to whether these hazardous waste permit fees are legally valid, and in particular any fees accruing after the Permit expired in 2009."

White Lion does not attempt to explain why its obligation to pay hazardous waste facility permit fees, a statutory obligation imposed by Section 361.135 of the Health and Safety Code, could be contingent on receipt of an invoice or bill of any kind. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.135 (West 2010). It did not raise this argument in response to the motion for summary judgment, but asserted it for the first time in its motion for new trial. Because White Lion did not timely make this argument to the trial court in opposing the motion for summary judgment, it has waived it. TEX.R. CIV. P. 166a(c); *see also* TEX.R.APP. P. 33.1(a).

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for White Lion's noncompliance. Further, the circumstances of this case do not "clearly demand" application of the doctrine of estoppel to the State "to prevent manifest injustice," given White Lion's decade-long failure to comply with its obligations despite notices of violation and the filing of this lawsuit. *See Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 170 (Tex.2013).

White Lion also made no argument related to the permit's 2009 expiration in response to the motion for summary judgment. Rather, it raises those arguments for the first time on appeal. We therefore hold that it has waived any argument based on the expiration of the permit.

E. The trial court did not abuse its discretion in issuing a permanent injunction

White Lion contends that the trial court abused its discretion in entering a permanent injunction because it failed to consider all of the summary judgment evidence. Although White Lion does not specify which evidence it alleges that the trial court ignored, the essence of its argument is that it "never violated or threatened to violate the Permit or Compliance Plan and, in fact . . . did everything in its power to comply, despite other circumstances beyond [its] control that could not be prevented by due diligence." It also argues that the EPA and a contractor hired by White Lion both determined that the contamination on the property is decreasing; therefore, according to White Lion, the trial court should not have granted an injunction.

Texas Water Code Section 7.032 gives TCEQ the right to enforce its rules and permits by seeking an "injunction or other appropriate remedy." TEX. WATER CODE ANN. § 7.032(a) (West 2008). When a statute provides for injunctive relief, "the statute's express language supersedes the common law injunctive relief elements such as imminent harm or irreparable injury

and lack of an adequate remedy at law." *West v. State*, 212 S.W.3d 513, 519 (Tex.App.—Austin 2006, no pet.); *see also Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921 (Tex.Civ.App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (State need only meet statutory provisions of Securities Act and is not required to otherwise show probable injury); *Gulf Holding Corp. v. Brazoria Cnty.*, 497 S.W.2d 614, 619 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (State need not prove irreparable injury to be entitled to injunction under Open Beach Act). Thus, "[w]hen it is determined that a statute is being violated, it is the province and duty of the district court to restrain it, and the doctrine of balancing of equities does not apply." *Gulf Holding Corp.*, 497 S.W.2d at 619.

The record demonstrates conclusively that White Lion never fully complied with the compliance plan. In addition to its failure to provide the required financial assurance, the evidence demonstrates conclusively other violations. For example, the compliance plan required White Lion to install and maintain a groundwater monitoring and "corrective action" system with specific components, including various types of wells; sample, recover, and treat groundwater; and file various reports regarding White Lion's compliance with the plan and the status of the site. But the affidavit of TCEQ employee Elijah Gandee shows that, by July 2013, the "corrective action recovery and monitoring wells had been removed from the Property without authorization and/or had been improperly abandoned." The groundwater recovery and monitoring system had

also been destroyed or removed, the wells had been plugged and abandoned without required approvals, and one well head had been cut off, leaving an open hole. White Lion failed to submit any of the reports required by the plan. It never took any required samples or maintained any required records. The evidence thus conclusively disproves that White Lion raised any fact issue as to whether it violated the compliance plan.

The EPA report has no bearing on White Lion's violations of the plan. The "post-judgment inspection" report prepared by White Lion's consultant was not part of the summary-judgment record. Any argument based on that report is waived. TEX.R. CIV. P. 166a(c).

We hold that the trial court did not err in entering a permanent injunction requiring White Lion to comply with the compliance plan.

F. The summary judgment order was not overbroad

Finally, White Lion argues that the trial court erred by granting injunctive relief affecting land not subject to the compliance plan. This argument is based on a faulty premise.

The trial court's summary judgment order was a modified form of the proposed order submitted by the State. Both the proposed order and the order entered by the trial court included a definition of the term "Property" as including a total of approximately 172.19 acres. The trial court, however, struck all portions of

the proposed order that referenced the term "Property," other than the definition. The only injunctive relief that the trial court granted was to require White Lion to "comply with each limitation, requirement, and condition of the Compliance Plan." Thus, nothing in the judgment, other than the unused definition of "Property," mentions or affects land not covered by the compliance plan.

Because White Lion has failed to demonstrate that any issue of material fact precluded summary judgment, we hold that the trial court did not err in granting summary judgment to the State.

Conclusion

We deny all pending motions and affirm the judgment of the trial court.

2015 WL 667550 (Tex.Dist.) (Trial Order)
District Court of Texas.
353rd Judicial District
Travis County

STATE of Texas,
v.
Bernard MORELLO.

No. D-1-GV-06-000627.
April 14, 2015.

Final Summary Judgment

Ken Paxton, Attorney General of Texas.

Charles E. Roy, First Assistant Attorney General.

James E. Davis, Deputy Attorney General for Civil Litigation.

Jon Niermann, Chief, Environmental Protection Division.

Craig J. Pritzlaff, Assistant Attorney General, Environmental Protection Division, P.O. Box 12548, MC 066, Austin, Texas 78711-2548, Craig.Pritzlaff@texasattorneygeneral.gov, for plaintiff State of Texas.

Stephen A. Doggett, Attorney at Law, 201 South 11th Street, Richmond, Texas 77469, office@doggett-law.com, for defendant Bernard Morello.

Keith W. Lapeze, Taylor L. Shipman, Lapeze & Johns, PLLC, 601 Sawyer Street, Suite 650 Houston, Texas 77077, Keith@lapezejohns.com, for defendant Bernard Morello.

Rhonda Hurley, Judge.

The Court having considered the State's Motion for Summary Judgment, the Defendant's response thereto, the State's reply, the argument of counsel, the evidence on file, and the pleadings, the Court GRANTS the Motion.

The Court RENDERED FINAL JUDGMENT for the State of Texas in a letter dated March 9, 2015, and after reconsidering, confirmed its judgment in a separate letter dated April 6, 2015. This written judgment memorializes that rendition.

Accordingly, the Court ORDERS:

I. PAYMENT OF CIVIL PENALTIES

The State of Texas shall have judgment against and shall recover civil penalties from Bernard Morello in the amount of $367,250.00.

II. PAYMENT OF ATTORNEY'S FEES AND COSTS

The State of Texas shall have judgment against and shall recover attorney's fees from Bernard Morello in the amount of $26,844.00.

The State of Texas shall have judgment against and shall recover its costs of court from Bernard Morello.

III. POST-JUDGMENT INTEREST

The State of Texas shall have judgment against and shall recover post-judgment interest from Bernard Morello on all amounts awarded in this judgment at the rate of 5.00% compounded annually, from the date this judgment is entered until all amounts are paid in full.

After reconsidering the State's objections to summary-judgment evidence, the Court also orders that the State's objections to the admission of the Affidavits of David H. Heslep and Wayne Crouch, included with Bernard Morello's Response to the State's Motion for Summary Judgment at Exhibit H and Exhibit I, are OVERRULED.

THE COURT FURTHER ORDERS that execution to issue for this FINAL JUDGMENT.

THE COURT FURTHER ORDERS that the State of Texas shall be allowed such writs and processes as may be necessary to enforce this FINAL JUDGMENT.

This FINAL JUDGMENT finally disposes of all parties and all claims, and is appealable. All relief not expressly granted is denied.

SIGNED on *April 14,* 2015.

<<signature>>

HON. RHONDA HURLEY JUDGE PRESIDING

APPROVED AS TO FORM:

KEN PAXTON

Attorney General of Texas
CHARLES E. ROY
First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Civil Litigation
JON NIERMANN
Chief, Environmental Protection Division
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Attorneys for Defendant Bernard Morello

No. D-1-GV-06-000627

STATE OF TEXAS, **Plaintiff,**	§	**THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
WHITE LION HOLDINGS, L.L.C., and BERNARD MORELLO **Defendants.**	§	**353rd JUDICIAL DISTRICT**

FINAL SUMMARY JUDGMENT, PERMANENT INJUNCTION, AND ORDER OF SEVERANCE

(Filed Sep. 19, 2013)

The Court having considered the State's Motion for Summary Judgment and Motion for Severance, the Defendant's reply thereto, the argument of counsel, the evidence on file, and the pleadings, the Court GRANTS the Motion.

The Court hereby RENDERS FINAL JUDGMENT for the State of Texas. Therefore, the Court ORDERS:

I. PAYMENT OF CIVIL PENALTIES

The State of Texas shall recover civil penalties from White Lion Holdings, L.L.C. in the amount of $325,600.00

II. PAYMENT OF UNPAID HAZARDOUS WASTE FACILITY FEES

The State of Texas shall recover from White Lion Holdings, L.L.C. outstanding hazardous waste facility fees outstanding to the Texas Commission on Environmental Quality in the amount of $129,464.15, together with an award of pre-judgment interest.

III. PAYMENT OF ATTORNEY'S FEES AND COSTS

The State of Texas shall recover attorney's fees from White Lion Holdings, L.L.C. in the amount of $40,800.00.

The State of Texas shall recover its costs of court from White Lion Holdings, L.L.C.

IV. POST-JUDGMENT INTEREST

The State of Texas shall recover pre-judgment [sic] interest on all amounts awarded in this judgment at the annual rate of 5.00%.

V. PERMANENT INJUNCTION

The State of Texas' request for permanent injunctive relief is granted. Defendant, White Lion Holdings, L.L.C., and its officers, directors, managers, principals, partners, owners, employees, agents, servants, and all persons in active concert or participation with them, on their behalf, or under their control, whether directly

or indirectly who receive notice of this Injunction are permanently enjoined as follows:

A. Words and Terms for this Injunction

As used in this injunction, the words and terms set forth below shall have the following meanings:

1. "White Lion" shall mean White Lion Holdings, L.L.C.

2. "Effective Date" shall mean the date the Court grants summary judgment.

3. "Property" shall mean the (1) land, buildings and substation located at Spur 529 and Scott Road and consisting of 38.5 +/- acres which includes 1.522 +/- acres that comprises the substation; (2) farmland consisting of 133.69 +/- acres; and (3) vacant property consisting of 25.32 +/- acres, also described as located at or about 2010 Spur 529 at Scott Road in Rosenberg, Fort Bend County, Texas; owned by White Lion.

4. "TCEQ" shall mean the Texas Commission on Environmental Quality.

5. "Compliance Plan" shall mean Compliance Plan No. 50129, transferred to White Lion on July 23, 2004.

6. "Groundwater Protection Standard" shall be the concentration specified in Table I, Column B of the Compliance Plan (cadmium, 0.10 mg/L; cobalt, 2.2 mg/L; lead, 0.05 mg/L;

barium, 2.0 mg/L; chromium, 0.10 mg/L; nickel, 0.73 mg/L; silver, 0.18 mg/L; zinc, 11.0 mg/L).

7. "Corrective Action System" shall have the meaning set forth in Section II of the Compliance Plan.

B. Ordering Provisions of this Injunction

1. Subject to the provisions of this Injunction, immediately after the Effective Date, White Lion shall comply with each limitation, requirement, and condition of the Compliance Plan.

2. Within 10 days after the Effective Date, White Lion must provide financial assurance for the Property in accordance with Section XI. of the Compliance Plan in a form acceptable to the TCEQ and in an amount not less than $574,000, and must submit to TCEQ an originally signed version of the financial assurance mechanism obtained.

3. Within 15 days after the Effective Date, White Lion must inspect and evaluate each monitoring well, point of compliance well, corrective action system recovery wells, and corrective action observation wells that are part of the Corrective Action Program and Ground Water Monitoring Program set forth in the Compliance Plan, including, not limited to, the following wells identified in Table II of the Compliance Plan:

a. Monitoring Wells (MW): MW-1, MW-2; MW-3; MW-4; MW-5; MW-6; MW-7; MW-8; MW-9; MW-10; MW-11; MW-12; MW-13; MW-14; MW-15; MW-16; MW-17; MW-18A; MW-18B; MW-18C; MW-19A; MW-19B; MW-19C; MW-20A; MW-20B; MW-20C; MW-21A; MW-21B; MW-21C.

b. Recovery Wells (RW): RW-22; RW-23; RW-24; RW-25; RW-26.

c. Piezometer Wells (P): P-1; P-2; P-3.

White Lion must notify the TCEQ in writing immediately upon completion of the requirements stated in this paragraph.

4. Within 20 days after the Effective Date, if the conditions of any of the wells identified in Paragraph B.3. of this Injunction "no longer enable the well to yield samples representative of groundwater quality" (*see* Compliance Plan at Section III.D.3), White Lion must submit to the TCEQ a proposal for replacement of such well(s). Any new well must be designed and constructed in accordance with Attachment B, Well Design and Construction Specifications, of the Compliance Plan. Any well that is to be abandoned or plugged, shall be abandoned and plugged in accordance with Paragraph 14 of Attachment B of the Compliance Plan.

5. Within 60 days after the Effective Date, White Lion must repair, redevelop, replace, or take other necessary action to fully restore to full operating condition each of the wells identified in Paragraph B.3 of this Injunction. White

Lion must notify the TCEQ in writing immediately upon completion of the requirements stated in this paragraph.

6. Within 75 days after the Effective Date, as set forth in Section VI.C of the Compliance Plan, White Lion must obtain a groundwater sample from each of the wells identified in Paragraph B.3. of this Injunction and shall have each collected groundwater sample individually analyzed or the constituents listed in Table I, Columns A and C of the Compliance Plan (including cadmium, cobalt, lead, barium, chromium, nickel, silver, zinc, pH, conductivity, total dissolved solids, iron, and sulfate). White Lion shall have each of the collected groundwater samples analyzed in accordance with the current edition of U.S. EPA Publication SW-846, *Test Methods for Evaluating Solid Waste* and American Society for Testing and Materials (ASTM) Standard Test Methods or any other methods accepted by the TCEQ, and the groundwater analysis shall be conducted at a facility capable of measuring the concentration of each constituent at a concentration equal to or less than the corresponding Groundwater Protection Standard. *See* Compliance Plan Section VI.B. In each background well, point of compliance well, and corrective action system well, White Lion shall also measure and record water level measurements relative to mean sea level measured to within 0.01 feet, the total depth of each well, and descriptions of the appearance of the groundwater collected (clarity, color, odor). *See* Compliance Plan Section

VI.C.4. White Lion must notify the TCEQ in writing immediately upon completion of the requirements stated in this paragraph.

7. Within 90 days after the Effective Date, White Lion shall submit to the TCEQ a proposal for activation of the Recovery Wells and Corrective Action System at the Property. In accordance with Section III.B. of the Compliance Plan, such proposal must include a proposal method for management of groundwater recovered from each Recovery Well (including any purge water from any other well).

8. Within 90 days of the Effective Date, White Lion shall submit to the TCEQ a report in accordance with Section VII.B of the Compliance Plan, including the following information:

a. A narrative summary of the evaluations made following restoration of the wells as set forth in Paragraph B.3. of this Injunction and the sampling/analysis conducted as set forth in paragraph B.6. of this junction;

b. Water table maps prepared from the ground-water data collected as per Paragraph B.6. of this Injunction, and shall include directions of ground-water flow and estimation of the rate and direction of groundwater contamination migration;

c. An updated table and map of all monitoring and corrective action system wells, including all records, well logs, borings, and

related documents for each monitoring well, point of compliance well, corrective action system recovery well, and corrective action observation wells that are part of the Corrective Action Program and Ground Water Monitoring Program;

d. Results of the chemical analysis, submitted in a tabular format acceptable to the TCEQ, which clearly indicates each parameter that exceeds the Groundwater Protection Standard, including copies of the original laboratory report for chemical analyses showing detection limits and quality control and quality assurance data;

e. Tabulation of all water level elevations, depth to water measurements, and total depth of well measurements collected;

f. Potentiometric surface maps showing the elevation of the water table at the time of sampling conducted as per Paragraph B.6. of this Injunction, delineation of the radius of influence of the Corrective Action System, and the direction of groundwater flow gradients outside any radius of influence;

g. Tabulation of all data evaluations conducted pursuant to Section VI.D. of the Compliance Plan and the status of each well with regard to compliance with the Corrective Action objectives and compliance with the Groundwater Protection Standard;

h. Maps of the contaminated area depicting concentrations of constituents exceeding the Groundwater Protection Standards as isopleth contours or discrete concentrations if isopleth contours cannot be inferred;

i. An updated schedule summary of all activities required by the Compliance Plan as required by Section X. of the Compliance Plan;

j. Summary of any changes made to the monitoring/corrective action program and a summary of activities conducted as set forth in Paragraphs B.1. to B.6. of this Injunction, including all documents obtained from performance of those activities;

k. Tabulation of well casing elevations in accordance with Attachment B of the Compliance Plan; and

l. A corrective measures implementation report as set forth in Section VIII.F. of the Compliance Plan, if determined to be necessary.

9. White Lion shall address each report, proposal, or notice required to be submitted by the Injunction to:

With copies to:

Order Compliance Team
Texas Commission on
Environmental Quality
MC-224
P.O. Box 1308
Austin, Texas 78711-3087

Craig J. Pritzlaff
Case, AG#052198322
Office of the Attorney
General
Environmental Protection
Division
(MC 066)
P.O. Box 12548
Austin, Texas 78711-2548

VI. ORDER OF SEVERANCE

The Clerk will file a copy of this Final Summary Judgment and Permanent Injunction and Order of Severance under a separate docket number, to wit, **D-1-GV-13 001068** [Initials]

THE COURT FURTHER ORDERS that the Clerk of this Court shall issue a writ of permanent injunction against White Lion as set forth in Section V. of this ORDER AND FINAL JUDGMENT.

THE COURT FURTHER ORDERS that execution to issue for this FINAL JUDGMENT.

THE COURT FURTHER ORDERS that the State shall be allowed such writs and processes as may be necessary to enforce this FINAL JUDGMENT.

This FINAL JUDGMENT finally disposes of all parties and all claims, and is appealable. All relief not expressly granted is denied.

SIGNED this 19th day of SEPTEMBER 2013.

/s/ Tim Sucak
JUDGE PRESIDING
TIM SUCAK

FILE COPY

RE: Case No. 16-0457 DATE: 6/22/2018
COA #: 03-15-00428-CV TC#: D-1-GV-06-000627
STYLE: STATE v. MORELLO

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.

Relevant Constitutional Provisions

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

* * *

Section 1.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.