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OPINION OF THE SUPREME COURT OF TEXAS (MARCH 3, 2023)

SUPREME COURT OF TEXAS

HELENA CHEMICAL COMPANY,

Petitioner,

v.

ROBERT COX, ET AL.,

Respondents.

No. 20-0881

On Petition for Review from the Court of Appeals for the Eleventh District of Texas

Argued October 26, 2022

Before: James D. BLACKLOCK, YOUNG, Judges.

JUSTICE BLACKLOCK delivered the opinion of the Court.

JUSTICE YOUNG did not participate in the decision.

The plaintiffs are farmers who claim that an aerial herbicide drifted onto their farms and damaged their cotton crops. The defendant is Helena Chemical Company, which oversaw the aerial application of herbicide that the farmers blame for the damage. The district court granted summary judgment for Helena, but the court of appeals reversed. This Court is now

asked whether the evidence that Helena's application of herbicide caused the plaintiffs' injury raises the genuine issue of material fact required to survive summary judgment. As explained below, we agree with the district court that it does not. The court of appeals' judgment is affirmed in part and reversed in part, and the summary judgment for Helena is reinstated.

I.

A.

The plaintiffs farm cotton in Mitchell County.[1] Defendant Helena distributes an herbicide called Sendero, which is primarily used to kill mesquite trees. Sendero contains two active ingredients—clopyralid and aminopyralid. These ingredients are used in many other products, but their use in combination is apparently unique to Sendero.

The plaintiffs allege that Helena supervised an aerial application of Sendero over several non-contiguous parcels of the Spade Ranch, a large ranch spanning parts of Coke, Sterling, and Mitchell Counties. Two planes sprayed roughly 3,300 gallons of Sendero over several days in July 2015. The spray was released from eight to ten feet above the treetops. The plaintiffs allege that the herbicide drifted onto their properties and damaged cotton crops planted in 2015 and 2016.

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[1] The plaintiffs are Robert Cox, James Cox Trust, Cox Farms, Tanner Cox, Loren Rees, Tyson Price, Russell Erwin, David Stubblefield, Rushnell Farms, Brooks Wallis, Hoyle & Hoyle, and Jack Ainsworth.

The plaintiffs blame Helena for reduced crop yields in over 14,000 acres of cotton fields scattered across hundreds of square miles of Mitchell County. These fields are located between 1.8 miles and 25 miles from the places on the Spade Ranch where Helena sprayed Sendero. The precise locations of the allegedly affected fields are not entirely clear from the record, which contains only a high-altitude map showing color-coded parcels identifying most of the plaintiffs' fields. The placement of the fields follows no discernable pattern. Some fields are bunched together, while some are isolated by many miles.

After Helena's application of Sendero over the Spade Ranch, the plaintiffs complained of crop damage. Texas Department of Agriculture (TDA) inspector Cory Pence investigated the incident in July 2015. He concluded that the Spade Ranch application of Sendero was a possible cause of the plaintiffs' crop damage. He claimed to find "markers" for both aminopyralid and clopyralid. He was unable, however, to identify a "consistent pattern" or "drift pattern" of crop damage over this large area. Pence conducted only a visual inspection, and TDA never conducted any laboratory tests for aminopyralid or clopyralid. When deposed, Pence could not explain the difference between markers for aminopyralid and clopyralid.

The plaintiffs allege that Sendero is highly toxic to cotton plants and should only be applied when the risk of drift onto nearby, sensitive areas is minimal. Warnings on Sendero's label say as much, and Helena does not contend otherwise. The plaintiffs allege that weather conditions—including wind, temperature, and humidity—were such that Sendero should not have been sprayed on the days in question. They further

allege that application of the herbicide at an inappropriately high altitude resulted in greater drift onto neighboring properties.

The plaintiffs harvested and sold what they could from their 2015 crops. They gathered only limited evidence of the herbicide damage, either at the time they noticed it or at the time of harvest. Notably, many of the plaintiffs filed insurance claims attributing their crop losses to drought or other adverse weather. The record contains three photographs of allegedly damaged crops. These photos come from unidentified fields and were taken on unknown dates.[2]

B.

The plaintiffs sued Helena and other defendants in 2015 in Mitchell County. They sought recovery under various theories for the reduced cotton crop produced by their land in 2015 and 2016, as well as mental-anguish damages and punitive damages.

Helena filed several dispositive motions. The district court granted Helena's motion for partial summary judgment as to mental anguish, gross negligence, and punitive damages. Helena also filed a no-evidence motion for summary judgment, arguing that no evidence supported the element of causation essential to recovery under all the plaintiffs' claims. Helena

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[2] Plaintiffs' experts Ronald Halfmann and Tracey Carrillo, whose opinions are discussed below, attested that they had reviewed "hundreds" of photographs of crop damage in Mitchell County, but these photographs are not in the record, which is silent as to the dates, the precise locations, or any other specifics regarding the crop damage depicted in the photographs reviewed by the experts.

simultaneously filed a motion to strike the plaintiffs' expert opinions on causation, arguing that the opinions were unreliable and therefore inadmissible. Helena further contended that even if the experts' opinions were admitted, they would constitute no evidence of causation, requiring summary judgment for Helena.

The plaintiffs retained five experts whose testimony bears on causation: Ronald Halfmann, Tracey Carrillo, Daylon Royal, Paul Rosenfeld, and Paul Ward. Their affidavits, expert reports, and deposition testimony are part of the record and were the focus of the no-evidence summary-judgment motion and the motion to strike.[3] The experts did not visit the affected fields or collect cotton samples. They relied on reports from TDA inspector Pence and from the plaintiffs, as well as on other available information.

Ronald Halfmann is a former inspector with the TDA. He identified himself as an expert "in agricultur[al] application of pesticides" with "extensive experience investigating pesticide drift." He opined that

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[3] A separate group of plaintiffs sued Helena in Reagan County. The lawyers in that case and in this case agreed that certain expert affidavits and depositions could be used in both cases. Although they did not so argue in the district court, the plaintiffs now contend that this Rule 11 agreement restricted Helena's right to challenge the reliability of the experts' testimony. We disagree. We read the agreement as intended to eliminate needless duplication of discovery and to permit the use of the expert opinions insofar as they recite the experts' "qualifications and experience," the "methodology employed" by the experts, and the "scope and extent" of the opinions. We do not read the agreement as intended to waive Helena's right to challenge the substance of the experts' opinions as unreliable. The attorneys who executed the agreement did not argue in the district court that the agreement has the effect now claimed.

Helena breached the standard of care for use of aerial herbicides, that weather conditions and faulty application techniques caused excessive drift, and that the Spade Ranch application of Sendero damaged 15,000 acres of cotton as claimed by the plaintiffs. He stated that Sendero can drift up to 20 miles under hazardous weather conditions and that, in his opinion, only a large application of herbicide would have caused the damage reported by the plaintiffs.

Tracey Carrillo is an agronomist and entomologist. He has many years of experience in cotton farming and herbicide drift. In his opinion, damage from Sendero occurred in all the plaintiffs' fields. He based this opinion on the Sendero label, plant tissue samples that were tested for clopyralid and aminopyralid, observations from the farmers, the report of TDA investigator Pence, and other information. He explained that damage to cotton fields from Sendero is prolonged and substantial and that damage from aerial-drift events is widely known and accepted. He opined that crop damage in 2015, 2016, and 2017 was consistent with a large-scale application of Sendero. He concluded, based on his review of the evidence, including lab test results, that "there is no doubt that [the plaintiffs'] cotton was contaminated from spray drift of applications of Sendero conducted by [Helena]."

Daylon Royal is a crop-dusting pilot. He also addressed physical drift. He advised Carrillo that it was highly probable that Helena's application of Sendero had caused the herbicide to drift onto the plaintiffs' fields because of wind and temperature conditions at the time. He relied on a "rule of thumb" that as much as 50% of aerially applied pesticide drifts away from the targeted field.

Paul Rosenfeld is an environmental chemist who has studied the effect of Sendero on crops. He provided evidence that Sendero results in long-term damage to cotton fields. Based on Pence's TDA report and other information, Rosenfeld concluded that Sendero drifted onto the plaintiffs' farms and damaged their cotton crops. He testified that Helena's 2015 Sendero application would remain in the soil and damage the plaintiffs' crops in 2016.

Paul Ward grew bean plants in soil samples taken from Mitchell County and compared them to samples grown in potting soil. He had no prior experience evaluating herbicide exposure and no experience with Sendero, clopyralid, or aminopyralid. He did not know whether any scientific studies confirmed that his methods were reliable to show what actually happens in cotton fields.

The district court held an extensive hearing on the motion to strike the expert testimony. It later granted the summary-judgment motion and the motion to strike and rendered judgment for Helena. The court of appeals reversed, in large part. 630 S.W.3d 234, 249 (Tex. App.—Eastland 2020). It reasoned:

> Although Halfmann, Carrillo, and Rosenfeld could not specifically trace the purported drift of clopyralid from the Spade Ranch to Appellants' cotton fields, they provided a reliable scientific basis for their opinions that Appellants' cotton crops were damaged by a large-scale aerial application of clopyralid to the south of Appellants' fields. Relying on Pence's investigation and observations that Helena's aerial application of Sendero, which was done in conditions that exacerbated drift,

> was the only such large-scale application at the relevant time and place, they concluded that the damage to Appellants' cotton crops was caused by Helena. We see no analytical gap in such a conclusion. We sustain Appellants' second issue as to Appellants' expert witnesses with one exception: that exception being Royal's attempt to offer an opinion that Sendero drifted from Helena's application site to Appellants' fields.

Id. at 243-44. Because it concluded that the experts' evidence was reliable and therefore admissible, the court of appeals also concluded that there was evidence of causation sufficient to survive summary judgment. *Id.* at 244-45.

The court of appeals did, however, agree with Helena that it was entitled to partial summary judgment as to claims for mental anguish and punitive damages. The plaintiffs do not challenge the court of appeals' affirmance of summary judgment in this regard. After affirming in part and reversing in part, the court of appeals remanded the case to the district court for further proceedings. *Id.* at 249. Helena petitioned for review in this Court, and we granted the petition.

II.

A.

A party may move for summary judgment, after adequate time for discovery, "on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P.

166a(i). The court must grant such a "no-evidence" motion unless the non-moving party responds with "evidence raising a genuine issue of material fact." *Id.* Appellate courts review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In so doing, we examine the evidence in the light most favorable to the non-moving party, indulging reasonable inferences and resolving doubts against the party seeking summary judgment. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

The issue before this Court is whether the plaintiffs' evidence raised a genuine issue of material fact on causation, which is an essential element of all the plaintiffs' claims on which they bear the burden of proof. To survive summary judgment, the plaintiffs' causation evidence must raise a genuine fact issue as to whether it is more likely than not that Helena's application of Sendero in July 2015 caused a reduced yield of cotton and therefore reduced income for the farmers.

The central inquiry—viewed either through the lens of a motion to strike the evidence or a summary-judgment motion—is whether the plaintiffs' experts offered reliable evidence of causation. As for the motion to strike, "[a]dmission of expert testimony that does not meet the reliability requirement is an abuse of discretion." *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006). As for the summary-judgment motion, if the expert's opinion is not reliable, it is no evidence and will not defeat a no-evidence motion for summary judgment. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 410 n.23 (Tex. 2016) ("Unreliable expert testimony is legally no evidence."); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 713

(Tex. 1997) ("If the expert's scientific testimony is not reliable, it is not evidence."). To resolve this appeal, we will assume the experts' opinions have been admitted, and we will ask whether these opinions are reliable evidence of causation sufficient to overcome Helena's motion for summary judgment.

A witness may be qualified to testify as an expert based on his "knowledge, skill, experience, training, or education." TEX. R. EVID. 702. Although an expert witness need not always be formally credentialed as a scientist, expert testimony on scientific matters—such as the aerial drift of herbicide particles or the effect of herbicide exposure on plants—naturally must be "grounded 'in the methods and procedures of science.'" *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993)); *see also Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 721-22 (Tex. 1998) (discussing reliability analysis for scientific opinion based on witness's skill, experience, or training). Unreliable testimony, by contrast, includes that which "is no more than 'subjective belief or unsupported speculation.'" *Robinson*, 923 S.W.2d at 557 (quoting *Daubert*, 509 U.S. at 590). "If the expert brings only his credentials and a subjective opinion, his testimony is fundamentally unsupported and therefore of no assistance to the jury." *Cooper Tire*, 204 S.W.3d at 801. The mere *ipse dixit* of the expert—that is, asking the jury to take the expert's word for it because he is an expert—will not suffice. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). Instead, an expert's conclusions must have a reliable basis other than the expert's say-so. And "if no basis for the

[expert] opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence." *Id*. at 818.

In determining the reliability of expert testimony, courts must consider not just whether the expert's methods are grounded in science, but also whether the data to which the expert applies his methods are reliable. "If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." *Havner*, 953 S.W.2d at 714. Moreover, "an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious." *Id.* Likewise, "if an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded." *City of Keller*, 168 S.W.3d at 813.

We have also recognized that expert testimony is unreliable if "there is simply too great an analytical gap between the data and the opinion proffered." *Gammill*, 972 S.W.2d at 727 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). "We are not required . . . to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2005). "Analytical gaps may include circumstances in which the expert unreliably applies otherwise sound principles and methodologies, the expert's opinion is

based on assumed facts that vary materially from the facts in the record, or the expert's opinion is based on tests or data that do not support the conclusions reached." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 349 (Tex. 2015) (citations omitted).

Augmenting the above standards, our decision in *Robinson* identified six non-exclusive factors courts may consider in determining whether expert testimony is reliable:

1. the extent to which the theory has been or can be tested;
2. the extent to which the technique relies upon the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique's potential rate of error;
5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. the non-judicial uses which have been made of the theory or technique.

923 S.W.2d at 557. The "*Robinson* factors" are not always determinative when assessing an expert's reliability, but even when they are not, the court must be provided with some way of assessing the reliability of objected-to expert testimony, apart from the expert's credentials and say-so. *Gammill*, 972 S.W.2d at 726.[4]

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[4] Amicus curiae High Plains Wine & Food Foundation, unlike the parties, relies heavily on this Court's decision in *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598 (Tex. 1961). *Pitchfork*

B.

"[T]he ultimate issue . . . in a toxic tort case . . . is always specific causation—whether the defendant's product caused the plaintiff's injury." *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 351 (Tex. 2014). It is important to emphasize at the outset that the plaintiffs' injury here is not "damage" to cotton plants, such as wilted leaves. Instead, the injury for which the plaintiffs seek recovery is a financial one decreased revenue from a reduced yield of cotton at harvest. It is therefore not enough for the plaintiffs to show that drifting herbicides reached their plants and "damaged" them in some way. Instead, they must show that Helena's

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Land assessed expert testimony in an aerial-drift case, but unlike the amicus, we do not understand *Pitchfork Land* to require a unique "standard for measuring the legal sufficiency of causation evidence in crop-dusting cases." Rather than cordoning off crop-dusting cases into a special category, we should read *Pitchfork Land* in conjunction with our more recent caselaw on expert testimony on scientific matters in toxic-tort cases, in which we have established more searching standards for evaluating the reliability of any such testimony. *Robinson*, in particular, was a landmark 1995 case that largely adopted the federal standards articulated in *Daubert* and signaled the beginning of this Court's modern approach to expert testimony in cases alleging exposure to toxic substances. *Robinson* involved facts remarkably similar to those here; the allegation was crop damage caused by fungicide. It would be quite odd for one approach to the reliability of expert causation evidence to apply in a case about crop damage from herbicides, but another approach to apply in a case about crop damage from fungicides. The reality is that cases like *Daubert* and *Robinson* marked an important development in the courts' approach to these matters, which has since become settled law. It should be unremarkable to observe that many earlier cases, including a 1961 spray-drift case, do not fully reflect the approach to expert testimony required by *Robinson* and later cases.

application of Sendero caused their plants to yield less cotton at harvest. They need not prove this at the summary-judgment stage, however. To survive Helena's motion for summary judgment, the plaintiffs must proffer some evidence creating a genuine fact issue as to whether Helena's application of Sendero caused the reduced crop yield. *Draughon v. Johnson*, 631 S.W.3d 81, 88 (Tex. 2021).

The plaintiffs suggest that, apart from the expert testimony on which they rely, the lay opinions of the farmers themselves about the source of their crop failure can provide evidence of causation sufficient to survive summary judgment. In the context of this case, we disagree. "Expert testimony is required when an issue involves matters beyond jurors' common understanding." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006); *accord Gharda*, 464 S.W.3d at 348. Determining whether a particular application of aerial herbicide substantially contributed to the failure of crops miles away requires knowledge and analysis of scientific matters beyond the competence of laymen.[5] It goes without saying that plants, like all living things, become sickly or die for any number

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[5] *See, e.g.*, *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 620 (Tex. App.—San Antonio 2015, pet. denied) (stating that the requirement of expert testimony is "obvious" where the "claims arise out of alleged emissions and migration of hazardous substances"); *Foust v. Estate of Walters*, 21 S.W.3d 495, 505 (Tex. App.—San Antonio 2000, pet. denied) ("A negligence claim against an aerial applicator [of herbicide] must be established with expert testimony."); *Hager v. Romines*, 913 S.W.2d 733, 734-35 (Tex. App.—Fort Worth 1995, no writ) ("We find that the standard of care in the aerial application of herbicide, as well as the violation of such standard, must be established by expert testimony.").

of natural and man-made reasons. And the expected aerial migration of herbicidal particles over vast distances due to weather conditions and spray techniques is plainly not a matter with which laymen are generally familiar. The plaintiffs were not offered as expert witnesses, and their lay opinions, standing alone, are insufficient to survive summary judgment.

As another initial matter, Helena argues that the required evidentiary showing of toxic exposure at a sufficient dose must be made for each "field" for which the plaintiffs seek recovery. According to Helena, "the term 'field' is used by the [U.S. Department of Agriculture's] Farm Services Agency to designate the smallest unit of land for agricultural production." Helena asks us to require discrete proof of causation as to each such "field" at the summary-judgment stage. Although the U.S.D.A.'s field designations provide a convenient way to categorize vast swaths of farmland, we cannot say that as a matter of law every plaintiff in a crop-loss case must proffer field-by-field proof using the U.S.D.A.'s field boundaries. To be sure, proof of toxic exposure at one spot on a farmer's land is not proof of exposure throughout all of the farmer's land. The plaintiff must show causation for the entire area for which he seeks recovery, and using the U.S.D.A's field designations may be a useful way to do so. But how a plaintiff goes about making that proof—or how a defendant goes about opposing it—need not in every case invoke the field boundaries defined by the federal government.

C.

In a toxic-tort case alleging human exposure to harmful substances, the "minimal facts necessary to

demonstrate specific causation" include "[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities." *Builder Servs. Grp., Inc. v. Taylor*, No. 03-18-00710-CV, 2020 WL 5608484, at *6 (Tex. App.—Austin Sept. 17, 2020, pet. denied); *see also Robinson*, 923 S.W.2d at 557. What is true of injured plaintiffs in a toxic-exposure case is also true of injured crops in an herbicide-drift case. There must be reliable evidence that the failed crops for which recovery is sought were more likely than not (1) exposed to the harmful chemical, (2) at levels of exposure sufficient to cause the lost yields alleged. In addition, there must be reliable evidence ruling out other plausible alternative causes of the lost yields. *Bostic*, 439 S.W.3d at 350; *Havner*, 953 S.W.2d at 720. Without some scientifically reliable evidence of these facts, the evidence of causation offered does not rise above subjective belief and will not survive a no-evidence motion for summary judgment. *Robinson*, 923 S.W.2d at 557.

We turn first to whether the plaintiffs' evidence that their crops were exposed to Helena's Sendero was sufficient to survive summary judgment. Although the "field-by-field" proof demanded by Helena is not required, the plaintiffs must nevertheless come forward with reliable evidence of causation for any area for which they seek recovery. One obvious way to begin to show toxic contamination over a widespread area in such a case would be laboratory test results from spots throughout the allegedly affected area, coupled with reliable evidence that the tested areas are representative of the whole area for which damage is claimed. Yet rather than proffer lab testing confirming the presence of Sendero in representative areas, the

plaintiffs offer only three positive lab results indicating the presence of clopyralid at identifiable locations. Three or four other tests indicated the presence of clopyralid at unknown locations within the allegedly damaged acreage.

No test indicated the presence of aminopyralid, the other active ingredient in Sendero. The plaintiffs' experts acknowledged that herbicides other than Sendero contain clopyralid. Thus, the laboratory tests do not establish the presence of Sendero—as opposed to other herbicides—anywhere in the plaintiffs' fields. Nevertheless, the plaintiffs' experts also stated that aminopyralid often does not show up in laboratory testing because it is present in such small quantities. Deficiencies in aminopyralid testing are a matter within the expertise of Halfmann and Carrillo, and their opinions in this regard qualify as some evidence, at the summary-judgment stage, that (1) lab tests indicating positive results for clopyralid can indicate the presence of Sendero, and (2) lab testing will not necessarily distinguish Sendero from other herbicides.

The problem with the plaintiffs' lab-testing evidence, however, is that their witnesses offered no reliable way to extrapolate from the small number of positive lab tests any conclusion at all about the presence of clopyralid—much less Sendero[6]—in the rest

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[6] TDA inspector Pence testified that he found "markers" for clopyralid and aminopyralid in the plaintiffs' fields, and it appears the plaintiffs' experts may have relied on this statement in concluding that Sendero was present. But Pence could not explain, at his deposition, what damage to a plant is a "marker" of aminopyralid, as opposed to other herbicides. And none of the plaintiffs' experts—who relied heavily on pictures of the plants and reports from visual inspections by the farmers—

of the vast and scattered acreage for which recovery is sought. Even if the lab results are some evidence indicating Sendero's presence in the areas with positive test results, they are no evidence that Sendero was present anywhere else.[7]

This is not to say that the plaintiffs needed to test every field in order to survive summary judgment. But they do need to show, using reliable methodology, that the acreage for which they actually have the kind of hard scientific data our cases typically require is representative of the larger area for which they seek recovery.[8] They could do so, perhaps, by showing

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provided an additional basis for concluding that the plants exhibited damage from Sendero, as opposed to other products. Carrillo testified that a visual inspection, even by an agronomist like himself, cannot distinguish between cotton plants exposed to Sendero and plants exposed to products containing only clopyralid or other herbicides. Plaintiffs' experts Ward, Rosenfeld, and Halfmann agreed. Helena offered unrebutted evidence that clopyralid is found in numerous herbicides, including many herbicides used more commonly in the area during the summer months than Sendero. Halfmann confirmed that herbicidal treatment of mesquite by multiple land owners would likely occur during the summer.

[7] As for the sites that tested positive for clopyralid, the causation evidence is insufficient to survive summary judgment for the reasons explained in Parts II.D and II.E, even if the positive clopyralid test is some evidence of Sendero's presence at these sites.

[8] *See Plunkett v. Conn. Gen. Life Ins. Co.*, 285 S.W.3d 106, 115-17 (Tex. App.—Dallas 2009, pet. denied) (affirming no-evidence summary judgment where expert relied on positive mold test of furniture from one unit of a 241-unit apartment complex, purported to extrapolate that test to "all property from all units," and failed to provide "empirical evidence or methodology" explaining the validity of the extrapolation); *Purina Mills, Inc., v. Odell*, 948 S.W.2d 927, 934, 937 (Tex. App.—Texarkana 1997, pet.

that the location of the positive clopyralid tests relative to the aerial Sendero application are such that the herbicide must have drifted through other, untested areas before reaching the tested area. They did not attempt to do this. Nor have they made any other effort to demonstrate with reliable methodology that positive lab results in a few places are indicative of the wider presence of clopyralid throughout the affected area.

To help fill the gap in testing data, the plaintiffs could have proffered a recognized model of the herbicide's drift through the air onto the allegedly affected properties. Such evidence could provide a reliable indication that Helena's product actually reached the allegedly damaged areas. The plaintiffs' experts did not attempt to do this, however. They acknowledged that scientific models of aerial drift exist, but they did not employ these models or make any effort to recreate the aerial drift that would have occurred from the Spade Ranch given the weather conditions on July 1-4, 2015. They acknowledged that aerial drift typically occurs in a predictable pattern, in which fields closer to the source exhibit more damage than those farther away. And they acknowledged that the scattered pattern of steady damage in this case does not fit the usual aerial-drift model. Yet the only analysis provided of the drift pattern is that there was a heavy south wind on the days in question

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denied) (holding that expert testimony was insufficient where plaintiff claimed 200 cattle were injured by defendant's feed due to metal contamination, only two or three cattle were diagnosed with "hardware disease," and experts had failed to conduct "a methodological or technical study of all the cattle or representative samples of the feed").

and the affected fields are north of the Spade Ranch.[9] This observation certainly indicates the likelihood that some Sendero floated in the general direction of the plaintiffs' fields, but it is no evidence of causation because it amounts to no more than speculation that Sendero actually landed on these particular, scattered fields in a concentration sufficient to cause the crop damage and attendant loss of yield alleged.

The only testimony offered about aerial-drift patterns was inconclusive or speculative. Carrillo stated that there was no discernable pattern of harm to the damaged crops that would be "a common characteristic of physical drift." Halfmann similarly testified that the "patchiness of the damage" in this case could not "scientifically . . . be explained by anyone" under a theory of drift patterns or a drift mechanism, and that the observed "sporadic effects" were "unexplainable." The experts essentially expressed the view that aerial drift must have occurred here because of the widespread damage alleged—even though the damage pattern was not consistent with typical drift patterns. But their conclusions in this regard lack a reliable foundation grounded in science and amount to no more than speculation. They offered no drift model that had been tested, cited no studies supporting their analysis, offered no reasoned discussion of the potential rate of error of their analysis, gave no indication that their approach to understanding aerial drift had been accepted in the scientific community, and could point to no non-judicial use of their methods.

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[9] Pence, who personally investigated the incident, was likewise unable to identify any "consistent pattern" or "drift pattern" of crop damage over this large area.

Robinson, 923 S.W.2d at 557. Thus, none of the *Robinson* factors are present, and the plaintiffs offer no alternative basis on which a court could find that their expert testimony on aerial-drift patterns is scientifically reliable. Just as in *Robinson*, the experts failed to present a scientifically valid model that could explain why there was "no consistent pattern of damage to the trees," or in this case, the cotton crops. *Id.* at 551.

We do not suggest that precision of proof is required in such a case. Nor do we suggest a rigid requirement that such cases must always be proved with scientific modelling of the aerial-drift pattern or with any other precise category of evidence. But it defies reason to suggest that Helena's aerial application of Sendero landed in roughly equal quantities on all 111 fields scattered across hundreds of square miles of Mitchell County. Some scientific attempt to model where the Sendero probably drifted, in what amounts, and why, could at least have provided rational estimates of how much of Helena's Sendero, if any, reached these scattered fields. This information might enable the plaintiffs to establish that Helena's Sendero substantially contributed to their losses across the entire area. Or it might narrow the area for which the plaintiffs can obtain recovery. Either way, assignment of liability to Helena could be based on a rational analysis bearing some indicia of reliability—not on the kind of assumptions and speculation we have repeatedly deemed insufficient. *See, e.g.*, *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003); *Cooper*

Tire, 204 S.W.3d at 801-07; *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499-500 (Tex. 1995).[10]

D.

A scientific model of the aerial drift—which the plaintiffs' experts did not attempt to offer—could also have provided evidence on another important facet of causation in toxic-exposure cases: the dosage. We have often articulated the requirement in similar cases that the plaintiff establish with evidence the dosage required to produce the alleged injury. For example, in *Robinson*, we held that an expert's testimony regarding contamination of pecan trees by fungicide was unreliable because the expert had "no knowledge as to what amount or concentration of [contaminants] would damage pecan trees." 923 S.W.2d at 559. Similarly, in *Cooper Tire*, we held that an expert's theory that a tire suffered a manufacturing defect because of wax contamination was unreliable, in part because the expert "conducted nothing in the nature of a quantitative analysis of wax contamination, such as calculating the amount of wax deposited on the skim stock or the amount of wax necessary to cause a tire malfunction." 204 S.W.3d at 802.[11]

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[10] We do not purport to be aware of all possible methods of proof in cases such as this one. By suggesting that the plaintiffs might have raised a genuine fact issue on causation by proffering additional types of evidence, we do not hold that all plaintiffs in spray-drift cases must proffer such evidence to survive summary judgment.

[11] *See also Pollock*, 284 S.W.3d at 820 n.33 ("[A]ny agent, even tap water, may produce a toxic effect at a sufficiently high level of exposure," while "even the deadliest poison is harmless at a sufficiently low level of exposure.").

Later, in *Borg-Warner Corp. v. Flores*, we observed: "One of toxicology's central tenets is that 'the dose makes the poison.'" 232 S.W.3d 765, 770 (Tex. 2007). We rendered judgment for the defendant because "absent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which [the plaintiff] might have been exposed or whether those amounts were sufficient to cause asbestosis." *Id.* at 771-72. Still later, in *Bostic*, we required proof of dose in mesothelioma cases, even though "relatively minute quantities of asbestos can result in mesothelioma." 439 S.W.3d at 338. The Court held that "proof of 'some exposure' or 'any exposure' alone will not suffice to establish causation." *Id.* Instead, "the dose must be quantified" because "[t]he essential teaching of *Flores* is that dose matters." *Id.* at 353, 360; *see also Abraham v. Union Pac. R.R.*, 233 S.W.3d 13, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) ("Knowledge of the *extent* of exposure to a potentially harmful substance is essential to any reliable expert opinion that the particular substance caused a disease.") (emphasis added).

Just as it was no answer in *Bostic* to say that any exposure to asbestos can harm a person, it is no answer here to say that any exposure to Sendero can harm cotton plants. Sendero's product label says that it is toxic to broad-leaf plants, which include cotton. And Rosenfeld opined that exposure as diffuse as ten parts per billion could harm cotton. But there is simply no evidence at all in this case about the amount of Helena's Sendero that is alleged to have landed on the plaintiffs' crops miles away from the Spade Ranch. Halfmann conceded that he had not "reconstructed how much Sendero drifted to any spe-

cific cotton field." Nor is there any evidence that the unspecified amount of Sendero alleged to have landed on these fields was sufficient to make Helena's Sendero application a substantial factor in the lost crop yields suffered by the plaintiffs.

Crucially, while it is undisputed that very small amounts of Sendero can damage cotton plants, no evidence was proffered indicating how much exposure would be required to substantially contribute to the lost crop yields suffered by the plaintiffs. In fact, two of the plaintiffs' experts acknowledged that cotton plants showing signs of herbicide damage do not necessarily end up suffering reduced yield. According to Carrillo, "It could go either way. . . . They could or could not [have diminished yield]."[12] And none of the plaintiffs' experts knew how much exposure to Sendero would cause reduced crop yield.

The plaintiffs do not seek recovery for wilted leaves in July. They seek recovery for reduced cotton harvests months later, long after the application of Sendero to the Spade Ranch. The damaged crops were harvested and sold, although they did not produce the volume of cotton desired. Whether Helena's airborne Sendero was a substantial factor in causing the plaintiffs' lost yield depends in part on how much Sendero landed on the crops. It also depends on the presence of other factors contributing to reduced yields, such as unfavorable weather (for which the farmers made insurance claims seeking recovery of the same losses). Without knowing how much Sendero

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[12] Rosenfeld also acknowledged that exposure to clopyralid and resulting physical symptoms in cotton plants do not necessarily result in yield losses, especially at low levels of exposure.

exposure was required to produce the plaintiffs' injuries and without a reliable estimate of how much Sendero landed on the fields, the factfinder could not even begin to reasonably determine whether Helena's Sendero—rather than something else, such as weather or other herbicides—caused the losses.

E.

This brings us to the question of plausible alternative causes. We have often said in similar cases that the plaintiff bears the burden to account for such causes. "We recognized in *Havner*, generally, that 'if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.'" *Bostic*, 439 S.W.3d at 350 (quoting *Havner*, 953 S.W.2d at 720); *accord JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 162 (Tex. 2015); *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 218 (Tex. 2010). And in *Robinson*, we observed that an expert's "failure to rule out other causes of the damage renders his opinion little more than speculation." 923 S.W.2d at 559; *see also Cooper Tire*, 204 S.W.3d at 807-08.

Alternative causes need not necessarily be ruled out entirely, however. In *Bostic*, we explained that in cases where multiple causes might have contributed to the injury, the expert does not have to completely eliminate the other causes as possible contributors. Instead, the analysis of alternative causes must be sufficient for the factfinder to reasonably conclude that the defendant's conduct was a "substantial factor" in causing the injury. *Bostic*, 439 S.W.3d at 350-51. Nor must the plaintiff negate every conceivable alternative cause imagined by the defendant or the court.

The testimony need only account for "other plausible causes raised by the evidence." *Transcon. Ins. Co.*, 330 S.W.3d at 218 (emphasis added).

Here, the evidence clearly indicates the plausibility of two alternative causes—weather and other herbicides. First, none of the experts accounted at all for the possible effect of weather on the reduced crop yields. On this record, the undisputed fact that many of the plaintiffs applied for insurance benefits for losses caused by weather confirms the need for their experts to account for this plausible alternative explanation for their losses. But the expert testimony makes no attempt to carry this burden.

Second, the record indicates that there could have been any number of other herbicide applications in the area, including efforts by individual property owners or by oil and gas operators. Halfmann acknowledged that herbicides other than Sendero are commonly used in the area during the summer. Most importantly, the record shows that there was another aerial Sendero application in the area. The record contains no indication that the experts investigated or analyzed the alternative reasons that clopyralid would have been detected in the tested fields—or that herbicide damage would have been visually observed—other than because of Helena's use of Sendero.

The plaintiffs' evidence thus fails to account for two plausible alternative causes—weather and other herbicides—either of which might wholly explain the damage or render the defendant's contribution trivial. *Bostic*, 939 S.W.3d at 351 (recognizing "that a defendant's trivial contribution to multiple causes will not result in liability").

In an effort to rule out other applications of clopyralid-containing herbicides as alternative causes, Carrillo and Halfmann observed that Helena's application in early July 2015 was the only application large enough to cause the heavy losses alleged by the plaintiffs. This idea that only Helena's large application of Sendero on a windy day could account for the widespread losses alleged—appears throughout the plaintiffs' evidence and argument. But this approach largely assumes the matter to be proved. If we assume that all the reduced crop yields claimed in all the plaintiffs' scattered fields had one source, then Helena's application of Sendero in July 2015 is perhaps a likely culprit (although weather remains a possibility, and the plaintiffs' experts made no attempt to account for it). The law does not permit this assumption, however.

Instead, the law acknowledges the reality that an injury may have many plausible sources, and it puts the burden on plaintiffs to proffer evidence accounting for plausible alternative causes other than the defendant's conduct. When an injury may have multiple contributing causes, the plaintiff must at least show that the defendant's conduct was a substantial factor in causing the injury, taking into account any plausible alternative causes raised by the evidence. *Bostic*, 439 S.W.3d at 350-51; *Transcon. Ins. Co.*, 330 S.W.3d at 218. Here, the plaintiffs' experts failed altogether to account for the potential contribution of plausible alternative causes—such as

other herbicides or weather—to the plaintiffs' reduced crop yields.[13]

The plaintiffs cannot account for plausible alternative causes of reduced cotton harvests in the fall and winter merely by demonstrating crop damage in

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[13] Carrillo acknowledged that expert testimony in this case would need to exclude "other sources for the possible damage that the plaintiffs are alleging in this case" but that he did not do so. Rosenfeld testified that he did not know whether other applications of herbicides containing clopyralid could have been responsible for the damage to the plaintiffs' crops. Halfmann testified that he had not personally excluded other causes but that he relied on TDA inspector Pence in that regard. None of the plaintiffs' experts conducted an independent study or systematic review of other applications of herbicides during the relevant time period that might account for the plaintiffs' reduced harvest. Instead, they relied on Pence's TDA report. In this regard, Pence's report cannot fairly be characterized as scientifically reliable evidence. Pence testified that his investigation indicated a possibility, as opposed to a probability, of crop damage in Mitchell County that could be tied to Helena's application of Sendero. The only effort he made to eliminate other sources of the crop damage, over an area comprising hundreds of square miles, was to "drive up and down [four] roads looking for effects" from other applications and to ask some of the farmers if they saw anything. He did not meet with all the farmers or look into herbicide use by oil and gas operations in the area. Moreover, he ignored a TDA computerized database known as the PIER System, which tracks herbicide applications. Pence's investigation cannot be characterized as a scientific effort to account for other herbicide applications, much less weather. Importantly, Pence made no attempt to determine the cause of the plaintiffs' reduced crop yields later in the year. To be fair, such analysis was outside Pence's job description. The burden was on the plaintiffs and their attorneys to obtain expert testimony explaining the effect of the alleged Sendero exposure in July 2015 on crop yields several months later, taking into account other plausible explanations for reduced yield, such as weather or other herbicides.

July.[14] There must instead be an affirmative showing that the defendant's conduct was a substantial factor in causing the reduced crop yield at harvest time, notwithstanding plausible alternative explanations. Any such proof is lacking here. Other than the experts' say-so, the record is silent regarding the extent of the causal connection between the crop damage observed by Pence and the farmers in July and the reduced crop yield several months later. This "analytical gap" in the causal chain between the allegedly tortious conduct and the damages suffered requires summary judgment for Helena. *See Gharda*, 464 S.W.3d at 349; *Ramirez*, 159 S.W.3d at 912; *Gammill*, 972 S.W.2d at 727.

III.

For these reasons, the evidence of causation offered by the plaintiffs fails to raise the genuine issue of material fact necessary to survive summary judgment. The court of appeals' judgment is affirmed in part and reversed in part, and a take-nothing judgment on all claims is rendered.

James D. Blacklock
Justice

OPINION DELIVERED: March 3, 2023

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[14] Again, the experts acknowledged that observed herbicide damage will not necessarily result in reduced crop yield. *See supra* at 23-24.

MANDATE OF THE SUPREME COURT OF TEXAS (MARCH 3, 2023)

IN THE SUPREME COURT OF TEXAS

HELENA CHEMICAL COMPANY,

Petitioner,

v.

ROBERT COX, ET AL.,

Respondents.

No. 20-0881

MANDATE

To the Trial Court of Mitchell County, Greetings:

Before our Supreme Court on March 3, 2023, the Cause, upon petition for review, to revise or reverse your Judgment.

No. 20-0881 in the Supreme Court of Texas

No. 11-18-00215-CV in the Eleventh Court of Appeals

No. 16643 in the 32nd District Court of Mitchell County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court

of Appeals for the Eleventh District, and having considered the appellate record, briefs, and counsels' argument, concludes that the court of appeals' judgment should be affirmed in part and reversed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is affirmed in part and reversed in part;

2) A take-nothing judgment is rendered on all claims by Respondents Robert Cox, et al., against Helena Chemical Company; and

3) Helena Chemical Company shall recover, and Respondents Robert Cox, et al., shall pay, all costs incurred in this Court and in the court of appeals.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Eleventh District and to the District Court of Mitchell County, Texas, for observance.

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have recognized, obeyed, and executed.

BY ORDER OF THE SUPREME COURT OF THE STATE OF TEXAS, with the seal thereof annexed, at the City of Austin, this the 5th day of May, 2023.

/s/ Blake A. Hawthorne
Clerk

By Monica Zamarripa
Deputy Clerk

OPINION OF THE ELEVENTH COURT OF APPEALS FOR THE STATE OF TEXAS (OCTOBER 16, 2020)

IN THE ELEVENTH COURT OF APPEALS

ROBERT COX ET AL.,

Appellants,

v.

HELENA CHEMICAL COMPANY,

Appellee.

No. 11-18-00215-CV

On Appeal from the 32nd District Court Mitchell County, Texas Trial Court Cause No. 16643

Before: Jim R. WRIGHT, Senior Chief Justice, BAILEY, C.J., STRETCHER, J., WILLSON, J.

Opinion Filed October 16, 2020

OPINION

This appeal arises from a suit filed by Appellants[1] against Helena Chemical Company[2] for damages

[1] Appellants are Robert Cox, Tanner Cox, Cox Farms, James Cox Trust, David Stubblefield, Brooks Wallis, Russell Erwin, Jack Ainsworth, Loren Rees, Tyson Price, Rushell Farms, and Hoyle & Hoyle.

allegedly caused to Appellants' cotton crops by drift from the aerial application of Sendero, an herbicide that contains clopyralid and aminopyralid and is toxic to broadleaf plants such as cotton. Appellants asserted claims against Helena for negligence, gross negligence, negligence per se, and trespass. The trial court granted Helena's motions for partial summary judgment on Appellants' claims for mental anguish, gross negligence, malicious conduct, and punitive damages. The trial court later granted Helena's motion to strike the opinions of Appellants' experts as to causation and Helena's no-evidence motion for summary judgment. The trial court rendered judgment that Appellants take nothing on all of their claims against Helena. We affirm in part and reverse and remand in part.

Appellants present three issues on appeal. Appellants contend that the trial court erred (1) when it granted partial summary judgments related to trespass, emotional distress, and punitive damages; (2) when it granted Helena's motion to strike expert witness evidence on causation; and (3) when it granted Helena's motion for a no-evidence summary judgment on the element of causation.

Before reaching the propriety of the summary judgment, we must first address Appellants' second issue, which requires us to determine whether the trial court abused its discretion when it struck the opinions and testimony of six of Appellants' experts. *See Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84-85 (Tex.

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2 Although Appellants originally sued other defendants as well, Helena was the only remaining defendant at the time of the final judgment.

2018) (citing *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017)); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Robinson*, 923 S.W.2d at 558; *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. With regard to the admissibility of expert testimony, the Texas Supreme Court has held that, in addition to showing that an expert witness is qualified and that the expert's testimony is relevant to the issues in the case, Rule 702 requires the proponent to show that the expert's testimony is based upon a reliable foundation. *Robinson*, 923 S.W.2d at 556; *see, e.g.*, *Foust v. Estate of Walters*, 21 S.W.3d 495, 504-05 (Tex. App.—San Antonio 2000, pet. denied) (upholding admission of expert testimony in negligence suit against aerial applicator for damages allegedly caused to cotton crops from herbicide drift). "Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347-48 (Tex. 2015) (quoting *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006)). Courts generally determine the reliability of an expert's chosen methodology by applying the *Robinson* factors. *Id.* at 348. The *Robinson* court explained:

There are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702. These factors include, but are not limited to:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

We emphasize that the factors mentioned above are nonexclusive. Trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence. The factors a trial court will find helpful in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each particular case.

[. . .]

The trial court's role is not to determine the truth or falsity of the expert's opinion. Rather, the trial court's role is to make the

> initial determination whether the expert's opinion is relevant and whether the methods and research upon which it is based are reliable. There is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it. . . .

Robinson, 923 S.W.2d at 557-58 (citations and footnote omitted).

The *Robinson* relevance and reliability requirements apply to all expert testimony, but the *Robinson* factors cannot always be used in assessing an expert's reliability. *Cooper Tire*, 204 S.W.3d at 801. Nevertheless, "there must be some basis for the opinion offered to show its reliability." *Id.* (quoting *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998)).

Expert testimony has been held to be unreliable "if there is too great an analytical gap between the data on which the expert relies and the opinion offered." *Gharda USA*, 464 S.W.3d at 349 (quoting *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904-05 (Tex. 2004)). Whether an analytical gap exists is largely determined by comparing the facts the expert relied on, the facts in the record, and the expert's ultimate opinion. *Id.* We do not determine if the expert's opinions are correct, but instead, we determine only whether the analysis used to reach the opinions is reliable. *Id.* (citing *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002)).

The Texas Supreme Court applied an analytical-gap analysis when it addressed the reliability of the testimony of an accident reconstruction expert in *TXI*

Transportation Co. v. Hughes, 306 S.W.3d 230, 235 (Tex. 2010). The court noted that the *Robinson* "methodology" factors are difficult to apply to accident reconstruction testimony in vehicular accident cases and that it is appropriate "to analyze whether the expert's opinion actually fits the facts of the case." *TXI*, 306 S.W.3d at 235 (citing *Ramirez*, 159 S.W.3d at 904-05). In doing so, courts determine "whether there are any significant analytical gaps in the expert's opinion that undermine its reliability." *Id.* An analytical gap arises when the expert improperly applies otherwise sound principles and methodologies, the expert's opinion is based on incorrectly assumed facts, or the expert's opinion is based on tests or data that do not support the conclusions reached. *Gharda USA*, 464 S.W.3d at 349.

In the case before us, Helena filed a Motion to Strike Plaintiffs' Expert Opinions on Causation. Helena asserted in its motion to strike that "many of Plaintiffs' experts are not qualified to make the specific opinions they seek to offer, their opinions are not based on any reliable evidence or scientific principles, and none of the experts rule out potential alternative causes of Plaintiffs' alleged crop damage." The trial court granted Helena's motion and struck "all causation opinions or testimony offered by Ronald Halfmann, Daylon Royal, Tracey Carrillo, Paul Rosenfeld, Ron Roberts and/or Paul Ward."

Approximately one month before Helena filed its motion to strike, the parties had entered into a Rule 11 agreement "regarding the opinions and deposition testimony" of Appellants' retained experts: Halfmann, Royal, Rosenfeld, Carrillo, Roberts, and Ward. *See* TEX. R. CIV. P. 11. In the agreement, which was signed by

counsel for both Helena and Appellants and was attached as an exhibit to Helena's no-evidence motion for summary judgment and Helena's motion to strike, the parties agreed that the deposition testimony of Halfmann, Royal, Rosenfeld, Carrillo, Roberts, and Ward was "admissible" with respect to each expert's qualifications and experience, the methodology employed to reach each expert's opinions, the scientific bases for those opinions, the scope and type of evidentiary bases for those opinions, and the scope and extent of those opinions. The agreement indicates that the parties were "not agreeing that the actual supporting factual evidence relied on by any expert . . . or the actual opinions reached by any expert" were relevant or admissible.

Whether Appellants' causation experts were justified in relying on the "supporting factual evidence" is, in this case, an issue of fact. The record reflects that, as stipulated by Helena in the Rule 11 agreement, the experts retained by Appellants were well qualified and experienced in their fields of expertise: Halfmann—agriculture, aerial application of chemicals, and drift and pesticide investigations; Royal—aerial application of herbicides; Rosenfeld—chemistry and herbicides; Carrillo—agriculture, plant pathology, herbicides, and drift; Roberts meteorology; and Ward—agriculture.

Roberts and Ward did not offer an expert opinion as to causation. In his expert report, Roberts expressed an opinion about the weather conditions at the target pastures from July 1 through July 4, 2015, based on the data from the Mesonet stations on either side of the target pastures. Ward conducted germination testing on soil samples taken from Appellants' fields after they harvested their 2015 crops. Ward preserved

his records on a graph that included a series of grades assigned to each sample at regular intervals after planting, the longitude and latitude of the field from which the particular sample was gathered, and the identity of the farmer associated with that field. Ward's germination testing revealed that no germination occurred in a significant number of the samples and that, in the vast majority of the samples, "symptoms of Sendero damage appeared after[]" germination. As noted by Helena in its motion to strike, "Ward unequivocally disclaimed any knowledge or opinions regarding whether herbicide in fact drifted from the applications in question to any of [Appellants'] fields." Because Roberts and Ward did not offer an expert opinion that Helena caused the damage to Appellants' cotton, the trial court erred in excluding their testimony.

Royal mainly addressed the applicable standards of care and the breach of those standards by Helena and the pilots who applied the Sendero for Helena. In one sentence in his report, Royal states: "Historical drift events reveal that Sendero drifted to farmers' fields." Royal had personal experience as an applicator in a historical drift event, but to the extent that the above sentence constitutes an expert opinion that Helena's aerial application of Sendero caused Appellants' damages, that opinion was inadmissible based on the analytical gap in Royal's conclusion as to causation in this case based on "[h]istorical drift events." However, the crux of Royal's expert report related to the standards of care and the breach of those standards by Helena and the pilots—an opinion that Royal was well-qualified to give and that was based on his knowledge of crop dusting, on the

relevant weather data, and on the planes' Sat-Loc records, among other factors. Thus, Royal's testimony should not have been excluded in its entirety but, rather, only to the extent that Royal attempted to offer an opinion that Sendero drifted from Helena's application site to Appellants' fields.

Rosenfeld opined largely as an expert on Sendero and its toxic and lasting effects on cotton. Rosenfeld also touched on the issue of drift and indicated that "Sendero drift from aerial application of pesticide damaged cotton." Rosenfeld relied on the results of the tests from the samples taken by Appellants, Helena, and Cory Pence (a pesticide inspector and regional education specialist for the Texas Department of Agriculture), all of which showed the presence of clopyralid. Rosenfeld also relied upon the TDA report that was prepared by Pence, Appellants' reports of damage to their cotton, and the related photographs and imagery taken of such damage. He determined that Appellants' reports were consistent with the characteristics of aerial dispersion of Sendero.

Halfmann had almost forty years of experience in the profession of or the regulation of the aerial application of chemicals for agriculture in Texas. For fifteen years, he was an operator and pilot that specialized in rangeland brush control on large ranches in West Texas—the same type of application conducted by Helena on the Spade Ranch. For twenty years, Halfmann was employed by the Texas Department of Agriculture, where he co-authored the department's Pesticide Complaint Investigation Manual, trained inspectors and staff on the prevention of spray drift, and provided label advisory language for the Environmental Protection Agency's "Spray Drift Task Force."

Halfmann also worked on the technical aspects of advanced computer modeling for drift prevention programs and investigated hundreds of drift events similar in cause or effect to those alleged in this case. Halfmann indicated that drift modeling via computer simulation revealed the extraordinary risk of applying Sendero in the weather conditions that existed at the time of the aerial application in this case. Halfmann stated that computer programs for drift modeling were not typically designed to consider the high wind speeds that occurred during the aerial application in this case. Halfmann indicated that he had worked with the EPA when it came out with its spray drift model; he explained that the EPA's spray drift model was designed to determine "the probability of a product drifting," not the distance that it would drift.

Carrillo—who has a doctorate degree in Environmental Plant Sciences, Agronomy; a master's degree in Entomology, Plant Pathology and Weed Science; and a bachelor's degree in Rangeland Management—has extensive professional experience with herbicide applications. He has conducted research on cotton for more than thirty years and is a certified crop advisor with education and training in spray drift.

Halfmann and Carrillo offered extensive testimony and opinions related to causation. Halfmann and Carrillo determined that the damage to Appellants' cotton crops resulted from a large-scale aerial application of clopyralid during early July. During the first week of July, Helena aerially applied over 3,300 gallons (over twelve tons) of Sendero to target mesquite trees on more than 15,000 acres of the Spade Ranch. The pilots made over 600 runs to apply the Sendero along several miles of land that was situated gener-

ally on a west to east axis. Halfmann and Carrillo relied on weather data, Sat-Loc flight records, lab tests showing the presence of clopyralid in some of Appellants' cotton plants, descriptions and hundreds of pictures of Appellants' damaged cotton plants, a map showing the locations of the application sites and the affected fields, and a short video depicting the actual aerial application of chemicals at the Spade Ranch in early July. Despite adverse weather conditions, the pilots, at times, sprayed the herbicide while at least thirty feet above the ground. To conclude that it was Helena's aerial application that caused the damages, Halfmann and Carrillo relied on Pence's visual observations and investigation to rule out the possibility that there was another large-scale aerial application of clopyralid at the relevant time in the area of Appellants' cotton fields.

While we agree with Helena that expert opinions as to causation are not admissible if those opinions lack foundational data or are based on mere assumptions, we do not agree that the opinions on causation that were provided by Appellants' experts lacked foundational data or were based on mere assumptions or invalid assumptions. When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). Appellants' causation experts may have based their opinions on some disputed facts, but they did not base their opinions on assumed facts that varied from actual, undisputed facts. Although Halfmann, Carrillo, and Rosenfeld could not specifically trace the purported drift of clopyralid from the

Spade Ranch to Appellants' cotton fields, they provided a reliable scientific basis for their opinions that Appellants' cotton crops were damaged by a large-scale aerial application of clopyralid to the south of Appellants' fields. Relying on Pence's investigation and observations that Helena's aerial application of Sendero, which was done in conditions that exacerbated drift, was the only such large-scale application at the relevant time and place, they concluded that the damage to Appellants' cotton crops was caused by Helena. We see no analytical gap in such a conclusion. We sustain Appellants' second issue as to Appellants' expert witnesses with one exception: that exception being Royal's attempt to offer an opinion that Sendero drifted from Helena's application site to Appellants' fields.

In their third issue, Appellants assert that the trial court erred when it granted Helena's no-evidence motion for summary judgment. After an adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). We review a no-evidence motion for summary judgment under the same legal sufficiency standard as a directed verdict. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). Under this standard, the nonmovant has the burden to produce more than a scintilla of evidence to support each challenged element of its claims. *Id.* Evidence is no more than a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Kindred v.*

Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)). Courts must consider the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the movant. *Merriman*, 407 S.W.3d at 248. "We review the trial court's grant of summary judgment de novo." *Lujan*, 555 S.W.3d at 84 (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)).

Here, Helena asserted in its motion that there was no evidence as to the element of causation. Helena argued below and urges on appeal that, to prove causation, Appellants must establish that Sendero, an herbicide that contains clopyralid, physically traveled from the application sites to "each" of the 111 cotton fields that Appellants claim were affected. According to Helena, the "causation elements must be established—and summary judgment must be decided—independently for each allegedly affected field." We disagree with such a contention. First, each field does not comprise a separate plaintiff. Second, nonmovants need not marshal all their proof in response to a motion for summary judgment; they "need only point out evidence that raises a fact issue on the challenged elements." *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

In response to Helena's no-evidence motion, Appellants relied on the affidavits of Halfmann and Carrillo and various exhibits. The summary judgment evidence presented by Appellants indicated that their cotton crops in Mitchell County were damaged by clopyralid or Sendero, that the application of clopyralid or Sendero had to have occurred around the first week of July 2015, that the application had to have

been a widespread aerial event, that no other aerial applications were observed during the applicable timeframe, and that Pence had driven the area around the affected fields to look for any other potential applications of clopyralid or Sendero but had found none. According to Appellants' summary judgment evidence, Pence traced the damage symptoms to the Spade Ranch, where over 3,300 gallons of Sendero had been applied aerially to mesquite trees on July 1, 2, 3, and 4 by two planes in conditions that were, at times, adverse to the aerial application of chemicals. The adverse conditions included high winds blowing in the direction of Appellants' various cotton fields; high temperatures; the release of chemicals while the plane was flying above the recommended height; and the application of an inappropriate amount of chemicals, which would have created smaller droplets or "driftable fines" more susceptible to drifting "miles and miles" away from the target field.

Helena has not provided any authority that would lead this court to conclude that the experts' opinions should have been struck or that a take-nothing summary judgment was appropriate due to Appellants' failure to present evidence specifically related to each of the 111 cotton fields for which Appellants sought damages. A no-evidence summary judgment is not appropriate if the nonmovant presents "some" evidence that raises an issue of fact related to the challenged element. We believe that, as set forth above, Appellants presented summary judgment evidence that raised an issue of fact on the element of causation. Therefore, we sustain Appellants' third issue.

In their first issue, Appellants contend that the trial court erred when it granted partial summary

judgments in favor of Helena on issues related to Appellants' claims for trespass, emotional distress damages, and punitive damages. The record reflects that Helena filed combined traditional and no-evidence motions for partial summary judgment related to these matters. In its motion for partial summary judgment on Appellants' claims for gross negligence, malicious conduct, and punitive damages, Helena set forth at least thirty grounds upon which it moved for summary judgment. In each of its nine motions for partial summary judgment on the individual Appellants' claims for mental anguish, Helena presented several grounds for summary judgment. We will address only those summary judgment grounds necessary to the disposition of this appeal. *See* TEX. R. APP. P. 47.1.

With respect to the no-evidence grounds, we will apply the well-recognized standard for no-evidence summary judgments that we applied to Appellants' third issue. *See Merriman*, 407 S.W.3d at 248. With respect to the traditional summary judgment grounds, we observe the following well-recognized standard. A party moving for traditional summary judgment bears the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017). For a defendant to be entitled to a traditional summary judgment, it must either conclusively negate at least one essential element of the cause of action being asserted or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Evidence is conclusive only if reasonable people could not dif-

fer in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the movant initially establishes a right to summary judgment on the issues expressly presented in the motion, then the burden shifts to the nonmovant to present to the trial court any issues or evidence that would preclude summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex. 1979). In reviewing both traditional and no-evidence summary judgments, we consider the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts against the movant. *Merriman*, 407 S.W.3d at 248; *City of Keller*, 168 S.W.3d at 824.

When it granted Helena's motions for partial summary judgment, the trial court did not specify whether it did so on traditional or no-evidence grounds. When a trial court does not specify the grounds upon which it grants summary judgment, appellate courts will affirm if any of the theories are meritorious. *Knott*, 128 S.W.3d at 216. Generally, we consider the no-evidence grounds first. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). If the nonmovant fails to overcome its no-evidence burden on any claim, we need not address the traditional grounds related to that claim. *Id.*

With respect to Appellants' request for punitive damages, Helena asserted in its motion for summary judgment that there was no evidence of any gross negligence or malice that could be attributed to Helena. Helena specifically asserted, among other things, that there was no evidence of the following: that Helena authorized or ratified any gross negligence or malicious conduct of the aerial applicators or of

Helena's employee Jeffery Fritz Gerhard, that Gerhard or the applicators were unfit, that Helena was grossly negligent or acted maliciously when it hired Gerhard or the applicators, and that Gerhard or any of the applicators was a vice principal of Helena. Helena also asserted that the evidence established as a matter of law that Gerhard was not the kind of employee who could authorize or ratify grossly negligent or malicious conduct on behalf of Helena under Texas law and that neither the applicators nor Gerhard was a vice principal of Helena.

The summary judgment evidence reflects that Helena, via Gerhard, hired Lauderdale Aerial Spraying to perform an aerial application of herbicide on the Spade Ranch in Mitchell County in July 2015. Helena, a member of the Texas Aerial Applicators Association, had ground rigs for its application of chemicals but did not, at that time, have aerial capabilities. Doug Ripley and Clyde Kornegay piloted the two planes used for the aerial application at the Spade Ranch in 2015. Kornegay and Ripley were not employees of Lauderdale.

Gerhard explained the process as follows:

> The way it works on these jobs, any of the jobs that I do with these end users, ranchers, is that I set it up. I meet with the grower. We talk about what products are going to be used, what he's trying to control, and then we agree on how many acres. We get it mapped out. And then I line it up with the applicator that I feel is best suited to do the application.
>
> And once we get to the job site, . . . we turn it over to the applicator. . . .

Gerhard indicated that the ultimate responsibility for the mitigation of drift belongs to either the applicator, which Gerhard said was "Lauderdale" in this case, or "the pilots."

Kornegay and Ripley agreed with Gerhard that the applicators have the ultimate responsibility to prevent drift. According to Ripley, however, he, Kornegay, and Gerhard made a "collective decision" at one point to not spray a particular area of the Spade Ranch because of the drift potential. The pilots and Gerhard also had discussions about suspending the application at the Spade Ranch, but the application was not suspended. Ripley indicated that Gerhard and the pilots "worked as a team" but that Gerhard was "in charge" and had the "power to say stop." Furthermore, Gerhard monitored the weather, informed the pilots of the wind conditions, monitored the mixing of the chemicals, and watched the pilots spray. Gerhard admitted that he used his handheld Kestrel 3000, a wind meter, while at the Spade Ranch during the July 2015 aerial application of Sendero. Helena supplied the chemicals used in the aerial application, delivered those chemicals to the Spade Ranch, informed Lauderdale of the "window" of time in which the application needed to occur (taking into account tree growth, ground temperature, and weather conditions), and told Lauderdale at what rate and volume to apply the Sendero.

Gerhard and the pilots knew the winds were out of the south and knew that cotton crops were located north of the Spade Ranch. Gerhard was familiar with Sendero and its warning label.

The purpose of punitive damages is to protect society by punishing the offender; the purpose is not

to compensate an injured party. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). Consequently, punitive damages are available only if the harm suffered by the claimant resulted from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2015); *see also id.* § 41.001(5), (6), (7). Because Appellants asserted a claim for trespass as well as gross negligence, we note that, to recover punitive damages for the tort of trespass, the trespass must have been committed maliciously. *Wilen v. Falkenstein*, 191 S.W.3d 791, 800 (Tex. App.—Fort Worth 2006, pet. denied). "Malice" is defined as "a specific intent by the defendant to cause substantial injury or harm to the claimant." CIV. PRAC. & REM. § 41.001(7).

A corporation is liable in punitive damages for malice or gross negligence only if the corporation itself committed the malicious or grossly negligent act. *Qwest Int'l Commc'ns, Inc. v. AT & T Corp.*, 167 S.W.3d 324, 326 (Tex. 2005); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998). The Texas Supreme Court has developed tests to distinguish between acts that are solely attributable to agents or employees and acts that are directly attributable to the corporation. *Ellender*, 968 S.W.2d at 921; *Hammerly Oaks*, 958 S.W.2d at 391. A corporation is liable for punitive damages if it authorizes or ratifies an agent's malice or gross negligence, if it maliciously or grossly negligently hires an unfit agent, or if the acts of malice or gross negligence were committed by a vice principal of the corporation. *Qwest*, 167 S.W.3d at 326; *Ellender*, 968 S.W.2d at 921-22; *see Hammerly Oaks*, 958 S.W.2d at 389. The term "vice principal" encompasses the following: "(a) corporate officers; (b) those who have

authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business." *Ellender*, 968 S.W.2d at 922 (citing *Hammerly Oaks*, 958 S.W.2d at 391). To determine whether acts are directly attributable to the corporation, courts do not simply judge individual elements or facts but, rather, should review all the surrounding facts and circumstances to determine whether the corporation itself acted with malice or gross negligence. *See id.* (citing *McPhearson v. Sullivan*, 463 S.W.2d 174, 176 (Tex. 1971)).

The summary judgment evidence reflects that Gerhard averred that he was employed by Helena in "a sales role" and called himself a "range and pasture specialist." Gerhard and the vice president of Helena's Southern Business Unit both averred that Gerhard had never been a corporate officer of Helena; had never had the authority to hire or fire Helena employees; had never had responsibility for or control over Helena's safety rules, equipment, or workplace conditions; and had never held a management position for Helena or for any department or division within Helena. Although Appellants claim that Gerhard was a "manager" and that Helena ratified Gerhard's actions, they presented no summary judgment evidence that would support these conclusory statements. Appellants failed to present any summary judgment that Gerhard was a vice principal of Helena, that Helena acted with malice or gross negligence in the hiring of an unfit agent, or that Helena authorized or ratified any malice or gross negligence that may have been

committed by Gerhard, Lauderdale, or the pilots. Therefore, we hold that the trial court properly granted Helena's motion for summary judgment on the issue of punitive damages.

Helena also moved for partial summary judgment on Appellants' claims for mental anguish. Helena asserted in its motions for partial summary judgment as to mental anguish that Appellants had no evidence of malevolence, ill will, or animus directed at Appellants as required to recover for mental anguish associated with Appellants' claims for gross negligence. Helena also asserted in its motions for partial summary judgment that Appellants "cannot establish" that any trespass onto their property was "deliberate and willful" as required to recover for mental anguish associated with Appellants' claims for trespass.

In Texas, there are only a few situations in which a claimant who was not physically injured may recover for his mental anguish. *Motor Express, Inc. v. Rodriguez*, 925 S.W.2d 638, 639 (Tex. 1996). Mental anguish damages cannot be awarded in a negligence case brought for damage to property unless the negligence was gross in nature and involved some ill will, animus, or intention to harm the claimant personally. *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997); *MBR & Assocs., Inc. v. Lile*, No. 02-11-00431-CV, 2012 WL 4661665, at *8 (Tex. App.—Fort Worth Oct. 4, 2012, pet. denied) (mem. op.); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 561-62 (Tex. App.—Austin 2004, no pet.); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 753-57 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (applying principle in gross negligence case); *accord Strickland v. Medlen*, 397 S.W.3d 184, 190 (Tex. 2013) (stating

that *Likes* bars personal-injury-type damages such as mental anguish in a case alleging negligent property damage). The rationale for this rule is consistent with the general principle that emotional distress is not usually recoverable as an element of property damages unless an improper motive is involved. *MBR & Assocs.*, 2012 WL 4661665, at *8; *Seminole Pipeline*, 979 S.W.2d at 757.

Although Appellants presented some summary judgment evidence that may have shown that Helena (via Gerhard and perhaps via Lauderdale and the pilots) was grossly negligent in the aerial application of Sendero and that Appellants experienced mental anguish as a result of the damage to their cotton crops, Appellants presented no summary judgment evidence to suggest that Helena's, Gerhard's, Lauderdale's, or the pilots' actions were motivated by animus, hostility, malevolence, or ill will. "Without this additional element, the presence of gross negligence alone is not sufficient to support an award for mental anguish arising solely from damage to property." *Seminole Pipeline*, 979 S.W.2d at 757; *see also Woodlands Land Dev. Co. v. Jenkins*, 48 S.W.3d 415, 429-30 (Tex. App.—Beaumont 2001, no pet.). Because Appellants failed to present any summary judgment evidence of animus, hostility, malevolence, or ill will, the trial court did not err when it granted Helena's motions for partial summary judgment as to mental anguish associated with Appellants' claims for negligence and gross negligence.

Similarly, mental anguish damages cannot be awarded for a trespass unless the trespass was "deliberate and willful," thereby limiting the potential for excessive liability. *Coinmach Corp. v. Aspenwood*

Apartment Corp., 417 S.W.3d 909, 922 (Tex. 2013); *see also Lakeside Village Homeowners Ass'n v. Belanger*, 545 S.W.3d 15, 37 (Tex. App.—El Paso 2017, pet. denied). An unauthorized entry onto the land of another is a trespass, and it is a willful trespass if it was intended and deliberately done. *Ripy v. Less*, 118 S.W. 1084, 1085 (Tex. Civ. App.—Texarkana 1909, no writ).

Although Appellants presented some summary judgment evidence that Helena, via Gerhard and the pilots, were aware of the dangers of Sendero drift and of the potential for Sendero to drift in adverse conditions, Appellants failed to present any evidence that Helena, Gerhard, Lauderdale, or the pilots willfully and deliberately caused Sendero to drift onto Appellants' properties. Therefore, the trial court did not err when it granted Helena's motions for partial summary judgment as to mental anguish associated with Appellants' claims for trespass.

We overrule Appellants' first issue.

We reverse the judgment of the trial court insofar as it rendered a take-nothing judgment against Appellants; however, we affirm the judgment of the trial court with respect to Appellants' claims for mental anguish and punitive damages. We remand the cause to the trial court for further proceedings not inconsistent with this court's opinion.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

October 16, 2020

Panel consists of: Bailey, C.J.,

Stretcher, J., and Wright, S.C.J.[3] Willson, J., not participating.

[3] Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

ORDER ON DEFENDANT HELENA CHEMICAL COMPANY'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT AND FINAL JUDGMENT (MAY 24, 2018)

IN THE DISTRICT COURT
OF MITCHELL COUNTY, TEXAS
32ND JUDICIAL DISTRICT

ROBERT COX, TANNER COX, COX FARMS, JAMES COX TRUST, DAVID STUBBLEFIELD, BROOKS WALLIS, RUSSEL ERWIN, JACK AINSWORTH, LOREN REES, TYSON PRICE, NATHAN HOYLE, RUSHELL FARMS, HOYLE & HOYLE, WALLIS FARMS, ET AL.,

Plaintiffs,

v.

HELENA CHEMICAL COMPANY, LAUDERDALE AERIAL SPRAYING, L.L.C., KENNETH LAUDERDALE, HELI AG, L.L.C, ET AL.,

Defendants.

Cause No. 16643

Before: Al WALVOORD, Judge.

ORDER ON DEFENDANT HELENA CHEMICAL COMPANY'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT AND FINAL JUDGMENT

On the 24th day of May, 2018, came for consideration Defendant Helena Chemical Company's ("Helena") No-Evidence Motion for Summary Judgment (the "Motion"). After considering the Motion, any response and reply thereto, the evidence on file, the pleadings, argument of counsel, and all things properly before it, the Court finds that the Motion should be granted.

It is therefore ORDERED, ADJUDGED, and DECREED that the Motion be, and hereby is, GRANTED in all respects.

It is further ORDERED, ADJUDGED, and DECREED that judgment is rendered in favor of Helena on all of Plaintiffs' claims, and that Plaintiffs take nothing against Helena by reason of those claims.

It is further ORDERED, ADJUDGED, and DECREED that this Order disposes of all parties and claims and is a final and appealable judgment. All costs are taxed against the party incurring same. All relief not expressly granted herein is denied.

SIGNED and ORDERED this 24th day of May, 2018.

/s/ Al Walvoord
Judge

ORDER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REHEARING (MAY 5, 2023)

IN THE SUPREME COURT OF TEXAS

HELENA CHEMICAL COMPANY,

Petitioner,

v.

ROBERT COX, ET AL.,

Respondents.

No. 20-0881

COA #: 11-18-00215-CV

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause. (Justice Young not participating)

**SWORN COMPLAINT
BEFORE THE TEXAS ETHICS COMMISSION
(JULY 23, 2007)**

SWORN COMPLAINT
BEFORE THE TEXAS ETHICS COMMISSION

I. Identity of Complainant

I, Nelson Alex Winslow, complainant, hereby file this sworn complaint with the Texas Ethics Commission. My address is 1300 Guadalupe St., Ste. 108, Austin, TX 78701. My telephone number is 512-381-1111.

II. Identity of Respondent

The respondent is Nathan L. Hecht. The respondent holds the position or title of Justice, Texas Supreme Court, Place 6. The respondent's address is Supreme Court of Texas, P.O. Box 12248, Austin, TX 78711. The respondent's telephone number is 512-463-1312.

III. Nature of Alleged Violation

(Include the specific law or rule alleged to have been violated, if possible. The Texas Ethics Commission has jurisdiction to enforce only Chapters 302, 305, and 572 of the Government Code and Title 15 of the Election Code.)

Justice Hecht accepted and received a $100,000 discount on legal services in violation of Elections Code Sec. 253.155(b) and Sec. 253.157(a)(2). Addi-

tionally, he failed to report this in-kind contribution in violation of Election Code Sec. 254.031 and Sec. 254.0611.

IV. Statement of Facts

(State the facts constituting the alleged violation, including the dates on which or the period of time in which the alleged violation occurred. Identify allegations of fact not personally known to the complainant but alleged on information and belief. Please use simple, concise, and direct statements.)

In August of 2006, Justice Hecht was represented by Charles Babcock of Jackson Walker in a hearing before the State Commission on Judicial Conduct. In this hearing Justice Hecht challenged the public admonishment he had received from the Commission in relation to comments he made about Harriet Miers while she was being considered for appointment to the United States Supreme Court. Justice Hecht was billed approximately $450,000 for this legal representation. According to media reports, however, Justice Hecht and Jackson Walker negotiated a discount of more than $100,000 on his bill sometime after the August hearing. This discount constitutes an in-kind contribution of legal services that appears to be in excess of the $30,000 limit allowable by law.

As payment to a law firm for representation is an acceptable political expenditure according to the Texas Ethics Commission, Justice Hecht had to report the amount he paid to Jackson Walker. According to reports filed with the Ethics Commission, Justice Hecht paid $28,671.67 to the firm on December 5, 2006, and $313,744.85 on April 17, 2007, for a total

of $342,416.52. This is more than $100,000 less than the original amount billed for his legal services.

Campaign contributions are limited to $5,000 per individual per Elections Code Sec. 253.155(b) and $30,000 per law firm per Sec. 253.157(a)(2). This $100,000 discount given by Charles Babcock and Jackson Walker and accepted by Justice Hecht clearly appears to exceed the maximum limit.

Additionally, Justice Hecht failed to report this in-kind contribution in violation of Elections Code Sec. 254.031 and Sec. 254.0611.

V. Listing of Documents and Other Materials

(List all documents and other materials filed with this complaint. Additionally, list all other documents and other materials that are relevant to this complaint and that are within your knowledge, including their location, if known.)

A) Statement of Facts

B) News Article from the Fort Worth Star-Telegram

C) Campaign Finance Report for Justice Hecht, Semi-Annual July 2007

D) Campaign Finance Report for Justice Hecht, Semi-Annual January 2007

VII. Affidavit

BASED ON INFORMATION AND BELIEF

(Execute this affidavit if the acts alleged are not within your direct personal knowledge, but are based on reasonable belief.)

I, Nelson A. Winslow, complainant, swear that I have reason to believe and do believe that the violation alleged in this complaint has occurred. The source and basis of my information and belief is TEC Filings and WWS on accounts.

/s/ Nelson A. Winslow
Signature of complainant

Sworn to and subscribed before me by the said Nelson A Winslow this the 23 day of July, 2007, to certify which witness my hand and seal of office.

/s/ Lynn Tobias
Signature of Officer administering oath

Lynn Tobias
Print name of officer administering oath

Notary
Title of officer administering oath

COX ET AL. MOTION FOR REHEARING FILED IN THE SUPREME COURT OF TEXAS (MARCH 20, 2023)

No. 20-0881

IN THE SUPREME COURT OF TEXAS

HELENA CHEMICAL COMPANY,

Petitioner,

v.

ROBERT COX, ET AL.,

Respondents.

On Petition for Review from the
Eleventh Court of Appeals at Eastland, Texas

RESPONDENTS' MOTION FOR REHEARING

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{ Table of Contents and Authorities Omitted }

TO THE HONORABLE SUPREME COURT OF TEXAS:

INTRODUCTION

This motion for rehearing should be granted because the opinion of the Court departs from the record and entrenched precedent recognizing trespass of herbicide, and it has excluded reliable expert opinion without justification in this record or the authority of *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598 (Tex. 1961) (hereinafter, *Pitchfork*). Under the standards of *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005) (hereinafter, *Keller*), this motion for rehearing must be granted.

I.

Statement of the Case

The Court should grant rehearing so that the established law concerning invaded property is not needlessly and unreasonably upended by the Opinion of March 3, 2023. The Opinion as worded dramatically changes Texas law without reconciling statutes and precedent to do so. This case presents several jurisprudentially important legal issues relevant to the Plaintiff-farmers' interest in their property and the environment, and any farmer's fundamental right to receive redress for harm suffered from negligent trespass. Thus, the issues in this case are of undeniable statewide importance.

1) Foremost, the Opinion excludes, and would thereby in the future foreclose the essential testimony of any farm owner who conscientiously observed the

condition of his property during ordinary husbandry of his or her growing crops. By barring a reasonable expert from considering such information—normally and regularly relied upon by such experts (*see In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007); Tex. R. Evid. 703)—the Opinion undermines without explanation the Property Owner Rule and its pertinent and relevant presumption which favors such reliance. *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 849 (Tex. 2011).

2) Secondly, the Opinion will result in an implied and unduly onerous burden to collect evidence which was actually unavailable to the Plaintiff-farmers herein: to wit, useful lab results. Thus, the effect of the Opinion abrogates the holding of *International Harvester Co. v. Kesey*, 507 S.W.2d 195, 197 (Tex. 1974) without addressing that authority.

3) Thirdly, the Opinion's ruling conflicts with that of *Keller,* 168 S.W.3d 802, *supra*, as the Court weighed evidence after drawing inferences adverse to the non-moving party concerning damages caused by Sendero, the herbicide in question. As such, it contradicted the standard of review which clearly requires the Court to review "the entire record in the light most favorable" to the Plaintiff-farmers, and "indulge every reasonable inference and resolve any doubt" against the movant of the motion for summary judgment. *Ibid.*

4) Finally, the age of a decision per se is insufficient reason to overrule established precedent as declared in *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2D 598 (Tex. 1961), absent open conflict among courts of appeals decisions on the same subject. As

the case before this Court involves trespass against a possessory interest, the action does not require actual injury before redress is appropriate because an award of nominal damages is permitted. *See Lightning Oil Co. v. Anadarko E&P Onshore, LLC,* 520 S.W.3d 39, 46 (Tex. 2017).

II.

STATEMENT OF PROCEDURAL HISTORY

The Court of Appeals opinion held that the expert opinions proffered by the Plaintiff-farmers in response to the Motion for Summary Judgment were reliable and admissible. It did so only after examining the record and applying the proper standard of review, that of the substantial evidence test. (*See Keller, supra,* 168 S.W.3d 802, 824.) This Court's Opinion, however, reviewed the evidence only after drawing adverse inferences and thus resulted in a mere cursory review of the application of the factors laid out in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (*Robinson*, hereinafter.)

This case is not on review after a trial verdict. Rather, it has wound its way to this august body following the granting of a summary judgment motion brought by the Defendant-appellant Helena. As laid out in Texas Rule of Civil Procedure 166a(i) and *Hamilton v. Wilson*, 249 S.W.3d 425 at 426 (Tex. 2008) [*per curiam* opn.], when responding to a no-evidence summary judgment motion, the respondents are not required to marshal all proof; their response need only point out evidence sufficient to raise a fact on the challenged elements. Following a granting of such a motion after a proffered tender by the respond-

ents, a reviewing court should sustain such a grant only if 1) there is a complete absence of proof of a vital fact, OR 2) rules of law or evidence bar the reviewing court from giving weight to the only evidence proffered, OR 3) the proffered evidence is no more than "a scintilla", OR 4) the evidence conclusively establishes the opposite of a vital fact. (*See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (hereinafter Ridgway).

A "scintilla" is that amount "so weak as to do no more than create a mere surmise or suspicion of its existence" and is thus no evidence at all. (*Ridgway, supra*, 135 S.W.3d at 601.) The Plaintiff-farmers herein provided the trial court with five experts, including the inspector from the Texas Department of Agriculture (hereinafter TDA) and a former inspector from that same authority. Additionally, the Plaintiff-farmers' observations and concerns were documented and then relied upon by those experts. Thus, evidence of causation was well-established by reliable and convincing evidence from multiple sources, clearly meeting the showing necessitated by the motion.

III.

FACTS IN THE RECORD

Facts recited in the Court's decision are markedly at odds with the evidence preserved in the Clerk's Record ("CR"). The factual contradictions are numerous.

A. Helena's Expert Confirmed Farmers' Observations of Sendero Damage

Helena's expert Dr. Banks confirmed the farmers' observation of Sendero damage in their fields during

his inspection months after the drift event. (Erwin CR 3321: 5-3322: 11 ("Sendero damage"); Stubblefield 3324: 12-3325: 11 ("from Sendero").)

Mr. Pence, a senior TDA investigator, in the course of his duties, relied on the farmers as one facet of his investigation. (CR 3295: 14-22 (speaks with complainants); 3298: 15-24 (interviews witnesses for sources).) The TDA inspector reported that he traced consistent symptoms from the target pastures on Spade Ranch to the famers' cotton fields. (CR 3297: 1-23; 3655: 3-18; (at page 25: 3655:21-3656:11).)

Respondents' expert, Dr. Rosenfeld presented multiple peer reviewed studies which confirmed cotton sensitivity to clopyralid. ((CR 2066: 2-23; 2443: 6-15; 2452: 14-2453:9.) The Sendero label developed under the direction of the EPA is scientific evidence that Sendero is toxic to cotton and very persistent in organic material and soil. (CR 3202 (Avoiding Injury to Non-Target Plants; Including cotton); 3204 (Crop Rotation; one or more years to replant).)

B. Photographs Showed Consistent Widespread Damage to Cotton

Respondents' expert, Mr. Halfmann found that the photographs by TDA display consistent herbicide effects. (CR 3344: 11-24; 3351: 1-22.) Dr. Carrillo, also retained by the respondents, relied on hundreds of photos in conjunction with lab results. (CR 2514: 15-2515: 15; 3436: 1-6.) He was able to match farmers' descriptions of damage with the TDA photos (CR 3437: 22-3438: 6). Dr. Banks also uses photographs to "depict" the condition of plants. (CR 3313: 5-16.)

C. Inspector Observed Unique Markers for Sendero

As the Court recognized, only Sendero contains both aminopyralid and clopyralid. Inspector Pence identified both unique markers from reference photos provided by the UC Davis data bank. (CR 2030: 8-14; 3300: 1-3; 3301: 4-11.)

D. Lab Results Confirmed Both Unique Markers for Sendero

A TDA lab report showed aminopyralid present, but not measurable (BDL). (Exhibit to the deposition of Dr. Carrillo CR 2587.) Numerous lab results showed clopyralid in cotton lint, seed, and burs. (CR 2600-2604.) Although negative lab tests are reported, the dispersion of positive results leaves no doubt that drift was widespread. (Halfmann report CR 2709 ¶ 19.)

Lab results reported in non-detectable amounts do not rule out the presence of phytotoxic levels of Sendero (Halfmann CR 3196 ¶ 52; 3351: 13-16; Dr. Carrillo: 2170 ¶ 12; Dr. Rosenfeld: 3479: 2-15). Dr. Rosenfeld testified that clopyralid at one (1) part per billion is phytotoxic for cotton. (CR 2416: 2-10.)

Dr. Carrillo confirmed the presence of Sendero on cotton from available lab results. (CR 3183 ¶¶ 34-35.) Dr. Rosenfeld found level of lab testing "sufficient." (CR 2407: 3-13.) Halfmann also found that the lab testing in this drift event was "sufficient." (CR 2640: 1-22.)

E. Drift "Pattern" Is Misleading; Swath Was Not Expected

Helena presented no evidence that a missing "pattern" was significant to a drift expert. After investigating drift for more than ten (10) years, Mr. Pence, the TDA inspector, did not expect to find a "pattern." (CR 2024: 1-12 (really no pattern); 3297: 7-20 (lot of variables).) After a much longer career investigating drift for the State of Texas, Halfmann expected no discernable pattern, describing a drift pattern as spotty; one spot in a field; and fingers. (2626: 25-2627:20; 2628: 3 6 ("sporadic"); 3335: 1-25 (no standard pattern); 3337: 15-18 ("hopscotch").)

Dr. Carrillo also explained that a drift "pattern" will be altered by multiple variables. (CR 2570: 1-2571: 6; 2572: 17-25; 2574: 16-25.) The only pattern was south to north *with* the wind. (CR 3438: 7-11.) Helena's expert Zannetti acknowledged the numerous variables that affect drift patterns in unexpected ways. (CR 3227: 9-23; 3223: 16-23; 3235: 1-11; 3237: 1-14.)

F. Computer Modeling Is Unreliable in Extreme Wind Conditions

Halfmann finds use of AGDISP as predictive model troubling. (CR 2631: 11-2633:4.) He attests that computer models are not programmed to account for winds speeds as high as those experienced during the Helena application. (CR 2710 ¶ 28.) Dr. Rosenfeld does not find current computer modeling reliable in this context (CR 2403: 11-16.) AGDISP contains a disclaimer that it does not work beyond two miles. (CR 3461: 2-3462: 24.)

G. It Is Well-Established: Sendero Damage Reduces Cotton Yield

Although Helena never raised the question of how much yield was lost, every expert expected some yield loss to follow the drift. Dr. Rosenfeld cited the peer reviewed study from Texas that clopyralid causes a "very significant" yield reduction. (CR 3491: 4-15.) On Dr. Rosenfeld's instruction, a man with twenty (20) years in experimental agriculture graded and recorded 1600 mostly negative germination tests and took numerous photographs of the results. (Ward CR 3149 ¶ 3; 2344: 2-20.) Dr. Carrillo attested: "Any impact on physiological growth of the plant is going to impact yield." (CR 3185 ¶ 43.)

Respondents' experts attest to the farmers' capacity to observe and report their yield loss. (Halfmann CR 3198: ¶ 59 (best gauge); Dr. Carrillo 3184-3185: ¶ 42 (well qualified to assess).)

H. There Was No Plausible Alternative Source of Herbicide Damage

The only other source of herbicide in the record was applied by Helena. (Gerhard CR 1504: 1-19; 3272: 13-20; Seaton 1125: 24-1126: 8; 1126: 13-24.) Helena's pilot saw no other applications during the Spade Ranch application. (Kornegy CR 3279: 1-4.) Helena's site manager saw no other applications during multiple projects in the area. (Gerhard CR 1502: 1-8.) TDA searched and found no alternative source (CR 3298: 2-24; 3655:21-3656:11.)

Halfmann does not believe an alternative source of herbicide exists. (CR 2636: 20-2637: 3; 2637: 10-25.) Dr. Carrillo is not aware of any alternative

source. (CR 2531: 24-2532: 5.) Dr. Rosenfeld found no evidence of an alternative source of herbicide damage to cotton in the vicinity of the farmers' fields. (CR

2412: 9-24; 2420: 5-2421: 1; 3481: 5-9.) Helena's Drs. Zanetti and Banks were provided no evidence of an alternative source of herbicide. (Zannetti CR 4785: 20-23; 4789: 7-9; Banks 3318: 10-3319: 17.)

I. Drought Is Not Alternative Source of Damage Caused by Sendero

Helena's motion did not posit that drought is an alternative source of herbicide damage or that it might be confused with herbicide symptoms. Some farmers received no drought compensation. (Stubblefield CR 3707:17-3708:12.) Other respondents' fields were irrigated, eliminating drought contribution to yield losses. (R. Cox 9 tracts CR 1971-1972; T. Cox 2 tracts CR 1972; L. Rees 1 tract CR 1973.)

IV. Argument

A. Experts Reviewed Sufficient Evidence to Reconstruct the Drift Event

The blanket exclusion of the opinions offered by respondents' five (5) well-qualified experts who conducted an extensive investigation relying on all available and reliable evidence—including opinions from experts retained by the petitioner defendant-does not square with *Keller*, *International Harvester*, and *Pitchfork* and finds scant factual support in the record.[1]

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[1] Please refer to II FACTS IN RECORD, *supra.*

1. Respondent Farmers are Competent to Testify Regarding Condition of Their Cotton as Part of a Reconstruction

Helena's own expert, Dr. Banks confirmed the TDA inspector's photos show herbicide damage from the major active ingredient in Sendero-clopyralid.[2] (CR 3308: 3-3309: 7.) He acknowledged the farmers were in a "better" position to observe symptomology, before he inspected their cotton. (CR 3315: 6-18.) The defense expert was aware of the farmers' experience and education in their profession. (CR 3313: 17-3314: 18.)

Texas Rule of Evidence 701 preserves the Property Owner Rule requiring that a witness must be personally familiar with the property and its fair market value, and creates a presumption as to both. *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 849 (Tex. 2011). Rule 701 allows a lay witness to provide opinion testimony if it is (a) rationally based on the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *Id.* at 852.

> Based on the presumption that an owner is familiar with his property and its value, the Property Owner Rule is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values. Under the Rule, an owner's valuation testimony fulfills the same

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[2] See, II FACTS IN THE RECORD, Section A, *supra.*

> role that expert testimony does. (Citations.) . . . Like expert testimony, landowner valuation testimony may be based on hearsay. (Citation.)

Nat. Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 157-58 (Tex. 2012).

The TDA investigation traced consistent symptoms from the target pastures on Spade Ranch to the famers' cotton fields. (CR 3655: 3-18.) Both Dr. Carrillo and Halfmann relied on the reported observations made by Mr. Pence who interviewed the impacted farmers as part of his duties. (Affidavit of Halfmann CR 3192 ¶¶ 23-29; Affidavit of Dr. Carrillo 3180-3181 ¶¶ 17-23.) The farmers found damage and monitored their crops for yield loss. (Jack Ainsworth (CR 2152: 12 18; 2153: 15-2154: 1; 2344: 7-20); Cox (CR 2126: 1-14); Erwin (CR 3321: 5-21.) Rees (CR 3789: 1-24); Stubblefield (CR 2132: 15-25; 3324: 12-3325: 11); Wallis (CR 1217: 1-25; 2141: 16-25; 2714: 3-7).)

2. Hundreds of Photographs of Herbicide Damage are Relied on by Experts

The TDA inspector provided hundreds of photos taken in Mitchell County that show clopyralid damage to cotton.[3] Helena received the 284 TDA photos. (CR 2568: 14-2569: 10.) Dr. Banks confirmed a sample of three (3) photos shows herbicide damage from ingredients in Sendero. (CR 3308: 3-3309: 7.) Dr. Banks uses photographs to record the symptoms on plants. (CR 3313: 5-16 (photographs depict condition).)

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[3] *See*, II FACTS IN THE RECORD, Section B, *supra.*

3. The TDA Inspector Observed and Understood the Unique Markers for Sendero

Pence identified the unique markers (aminopyralid and clopyralid) from reference photos provided by UC Davis data bank.[4] In discharging his duties for TDA, Pence relies on photographs regularly. (CR 3301: 4-11.) Pence submitted samples for lab testing at TDA and discussed the results in his deposition. (CR 2027: 8-21; 2581-2595.) A TDA lab report showing aminopyralid present, but not measurable (BDL) is an exhibit to the deposition of Dr. Carrillo. (CR 2587.) Dr. Banks disclosed that aminopyralid testing is pointless after the passage of time. (CR 3316: 13-21.)

Mr. Pence is a well-qualified TDA investigator. (CR 3287: 15-23 (field training); 3289: 1-6 (trains other inspectors); 3290: 6-25 (courses in plant symptomology); 3291: 17-3292: 20 (trained on photos and in the field); 3294: 1-15 (inspector follows a manual); 3296: 6-23 (manual calls for visual search for sources); 3299: 2-19 (refers to photos of symptoms to be certain.)

4. Lab Testing Confirmed Visual Observations of Herbicide Damage

> Lab results show clopyralid in cotton lint, seed, and burs. Although negative tests are reported, the dispersion of positive results leaves no doubt that drift was widespread.

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[4] *See*, II FACTS IN THE RECORD, Section C, *supra.*

(Halfmann affidavit CR 2709 ¶ 19.)[5]

Lab testing was sufficient by Halfmann's and Dr. Rosenfeld's standards. (CR 2540: 1-22; 2407: 3-13.) Dr. Rosenfeld went further to confirm that Ward's testing showed impaired germination in soil samples taken from impacted fields. (CR 3467: 16-3468: 11.) "[I]n many instances, experts may rely on inadmissible hearsay, privileged communications, and other information that the ordinary witness may not." *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007) (citing TEX. R. EVID. 703).

5. A Paintbrush "Pattern" Was Not Expected by the Experts Reconstructing the Drift

> "Most of the time, drift is real sporadic. As I tried to explain a while ago, there's not a certain pattern to it. Most of the time, in a lot of fields, you'll only see it in certain areas.

(Halfmann CR 2628: 3-6.)[6]

Halfmann explained the variables that cause pattern of drift to be irregular. (CR 2630: 4-18; 2630: 23-2631: 10.) Halfmann testified that, contrary to the common understanding of "pattern", greater impact may be farther from the application; skipping and spotting is typical; drift is usually sporadic; and paintbrush pattern is rare. (CR 3335: 10-3336: 13; 3337: 6-18; 3338: 3-17; 3339: 6-24.) Indeed, Helena

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[5] *See*, II FACTS IN THE RECORD, Section D, *supra.*

[6] *See*, II FACTS IN THE RECORD, Section E, *supra.*

presented no evidence that a missing "pattern" was noteworthy to anybody familiar with drift events.

6. Computer Modeling Is Not Reliable Under Extreme Weather Condition

During his long career in government service, Halfmann helped EPA develop the drift modeling program used by defense expert Dr. Zannetti. (CR 2631: 16-18.)[7] Although he employed the modeling program, Dr. Rosenfeld does not find current computer modeling reliable in this context. (CR 2402: 4-25; 3464: 5-8; 2403: 11-16.) He notes that AGDISP contains a disclaimer that it does not work beyond two miles. (CR 3461: 2-3462: 24.) Halfmann attests that computer models are not programmed to account for wind speeds as high as those experienced during the Helena application. (CR 2631: 11-2633:4; 2710 ¶ 28.)

7. Experts Established Phytotoxic Level and Yield Loss Caused by Sendero

> I'm seeing the effects on a photograph. Because cotton is so extremely, extremely sensitive to this product, it will show extreme effects, and thus-and still can't find it in the lab sample.

(Halfmann CR 3351: 13-16.)[8]

On review, the Court should "consider only evidence supporting the nonmovant's case and disregard all contrary evidence." *City of Keller v. Wilson*,

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[7] *See*, II FACTS IN THE RECORD, Section F, *supra.*

[8] *See*, II FACTS IN THE RECORD, Section G, *supra.*

168 S.W.3d 802, 824 (Tex. 2005). The Court's opinion, however, cherry-picks from the evidence and muzzles strong testimony from every owner-witness. Proof of causation may be by circumstantial evidence. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 459 (Tex. 1992).

a. Experts Established Harmful Dose Rate

Dr. Rosenfeld testified that clopyralid at the level of 1ppb is sufficient to harm cotton. (CR 2416: 2-10.) Dr. Carrillo attests that cotton damage from Sendero occurs below dosage levels detectable at labs. (CR 2170, ¶ 12.) Halfmann confirms that labs fail to detect levels that cause extreme symptoms. (CR 3351: 13-16.)

Contrary to the recitation in the decision, Ward had more than twenty (20) years in experimental agriculture. (CR 3149.) Ward had conducted: tests relating to other herbicides (CR 2332: 11-2333:3 (2-4-D)); other germination tests (CR 2300: 9-22); and greenhouse tests (CR 2332: 11-2333:3.)

Dr. Rosenfeld asked him to conduct a very simple germination test for phytotoxicity. (CR 3149 ¶ 1.) The samples Ward tested came with longitude and latitude records from Mitchell County. (CR 2314: 13-17.) He graded and recorded 1600 mostly negative germination tests and took numerous photographs of the results. (CR 3149 ¶¶ 2-3; 2344: 2-20.). An expert, in the position of Dr. Rosenfeld, may state an opinion on mixed questions of law and fact, such as whether certain conduct "proximately caused" injury, that would be off limits to the ordinary witness. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007).

Lab reports reflect that nine (9) samples were submitted by the farmers in Mitchell County (CR 3555-3557). Of those samples, two (2) reported measurable amounts of clopyralid. Four (4) other samples contained traces of the ingredient. At least 27 samples were taken by Helena. (CR 2579.) Samples that were reported in non-detectable amounts do not rule out the presence of phytotoxic levels of

Sendero (Mr. Halfmann: CR 3196 ¶ 52; 3351: 13-16; Dr. Carrillo: 2170 ¶ 12; Dr. Rosenfeld: 3479: 2-15).

b. Experts Established Yield Loss Caused by Sendero

The theory tested by the factors in *E. I. du Pont de Nemours & Co. v. Robinson*, 923 S.W. 2d 549, 558 (Tex. 1995) underlies causation: does Sendero cause yield loss in cotton? The instant case is far different than the *Robinson* matter which involved a single expert in an isolated circumstance, with untested theories developed for a novel product liability litigation. On the contrary, toxicity of Sendero on cotton is not in doubt in the agriculture community—at the EPA—or elsewhere in a reported decision. (Sendero label CR 3202 and 3204.)

Nor is there any means to measure yield loss more carefully than with the reasonableness required by *International Harvester Co. v. Kesey*, 507 S.W.2d 195, 197 (Tex. 1974). "The law does not demand perfect proof of damages for crop losses but liberally permits estimates of the value and probable yield of crops as well as the expense of cultivating and putting them on the market." *Id.* at 197.

If the toxicity of Sendero on cotton were in dispute, the *Robinson* factors were adequately addressed by multiple experts:

1. Theory has been tested: The Sendero label expresses the EPA conclusion that Sendero is toxic to cotton. The Jacoby study advanced by Dr. Rosenfeld confirms clopyralid reduces cotton yield "very significantly." (Exhibit no. 8 on Clopyralid Exhibit List appended to the defendant's motion CR 2461.)
2. Relies on subjective interpretation: There are no tools to take "objective" measurements of millions of stunted plants.
3. Subjected to peer review: The Sendero label is the product of long and careful study. The Jacoby study was peer reviewed and published in 1990.
4. Potential rate of error: The error rate in the EPA labeling process or the results in the Jacoby study is not disputed by Helena.
5. Whether theory has been generally accepted in relevant scientific community: Nobody in agriculture doubts that Sendero harms cotton.
6. Non-judicial use: The toxicity of Sendero has been the focus of agriculture science for many years. (Jacoby, 1990.) The topic is well-documented on the UC Davis website for symptom recognition relied on by TDA inspectors.

This Court will stand alone deciding herbicide damage to cotton is an untested theory that should be subjected to the *Robinson* analysis.

Dr. Rosenfeld presented peer reviewed studies which confirmed cotton sensitivity to clopyralid and yield loss. (CR 2066: 2-23; 2443: 6-15; 2452: 14-2453:9; *Clopyralid Exhibit List* Exhibit 8 CR 2461.) More importantly, he cited the peer reviewed study from Texas that clopyralid causes a "very significant" yield reduction. (CR 3491: 4-15.) Dr. Rosenfeld drew on the Jacoby study for quantitative analysis of the potential off-target drift. (CR 3492: 3-3493: 14.) Helena incorporated the study in its motion under the caption, "*Clopyralid Exhibit List*." (refer to Exhibit 8 CR 2461) Jacoby, Meadors, and Clark. "Effects of Triclopyr, Clopyralid, and Picloram on Growth and Production of Cotton." JPA 3.3 (1990): 297-301.

Having studied cotton throughout his professional career, Dr. Carrillo attested:

> "Any impact on physiological growth of the plant is going to impact yield."

(Carrillo CR 3185 ¶ 43.) [Emphasis added.]

The TDA inspector testified that younger plants are more susceptible to yield loss. (CR 3293: 15-20.) Drift in the first week of July found very young cotton downwind from the target pastures.

Respondent Jack Ainsworth expected Sendero damage to reduce his yield. (CR 2152: 12-18; 2153: 15-2154: 1; 2344: 7-20.) Robert Cox observed symptoms of herbicide damage that lead to lost yield. (CR 2126: 1-14.) Russel Erwin still found Sendero damage in his cotton months after the drift event. (CE 3321: 5-21.) Loren Rees assessed his damaged acreage. (CR 3789: 1-24.) David Stubblefield detected herbicide damage months after the drift event he knew would reduce his 2015 yield. (CR 2132: 15-25; 3324: 12-

3325: 11.) Brooks Wallis is a licensed applicator of herbicides, who reported symptoms he knew would reduce yield. (CR 1217: 1-25; 2141: 16-25; 2714: 3-7.)

> A leading treatise has observed that the substantial factor approach "in the great majority of cases . . . produces the same legal conclusion as the but-for test," but "was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result." This problem arises in toxic tort cases such as *Flores*, *Boomer*, *Rutherford*, and today's case, where the plaintiff has suffered exposure from multiple sources.

Bostic v. Georgia-Pac. Corp., 439 S.W.3d 332, 344-45 (Tex. 2014) [*Emphasis added*.]

In the instant matter, substantial factor causation is analytically sound, and doubts about the toxicity of Sendero to cotton should be resolved in favor of the non-moving respondent farmers. *Keller, supra.*

8. Experts Eliminated Any Plausible Alternative Herbicide Source

Although other pesticides containing clopyralid exist, there is zero evidence that any other herbicide was applied in the vicinity of the Helena drift event.[9] And not one photograph was offered by Helena to show the effects of any other herbicide. Glaringly, Helena's site manager explained that he was simul-

[9] *See*, II FACTS IN THE RECORD, Section H, *supra.*

taneously supervising multiple Sendero applications in the area. (CR 3272: 13-20 (movement from site to site); 1504: 1-24; Deposition Seaton 1126: 19-24.)

Helena's expert, Dr. Zanetti was provided no evidence of an alternative source of herbicide. (CR 4785: 20-23; 4789: 7-9.) Nor did Helena's other expert, Dr. Banks, know of a single application he could qualify as a plausible alternative. (CR 3318: 10-3319: 17.) Without knowing when, where, how much, what weather, another herbicide cannot be said to be a plausible alternative.

Halfmann does not believe an alternative source exists:

> Well, the consistency of effects of the fields even in different locations from the ones located nearest to the application site . . . to those from the further, the—the consistency in those effects indicate same timing or real close to same timing. So thus, now, if there was a multitude of applications on those same days as application on [the target] . . . , that would be a consideration, but that wasn't discovered.

(Deposition R. Halfmann CR 2636: 20-2637: 3.)

Halfmann does not know of any alternative that would cause the same effect over so many acres. (CR 2637: 10-25.)

TDA searched and found no alternative source (CR 3298: 2-24.) Inspector Pence was looking for an application in the same general time period (CR 3302:1-15). He looked for visual effects of herbicide

damage (CR 3651:4-3652:1). Mr. Pence looked beyond the target pastures on Spade Ranch (CR 3655: 3-8).

9. Drought is not an alternative to herbicide loss.

By appearance, timing, and source, drought is not a plausible alternative to herbicide damage detected by the famers, photographed by the TDA inspector and analyzed by experts for both sides.[10] Weather is only another potential incremental cause of yield loss. (The novel suggestion that cotton farmers in West Texas are not observant of the distinguishing characteristics of drought loss vs. herbicide damage, finds no support in the record.) In this context, drought is a red herring.

Moreover, insurance claims relating to drought loss are a collateral source.

> Long a part of the common law of Texas and other jurisdictions, the rule precludes any reduction in a tortfeasor's liability because of benefits received by the plaintiff from someone else— a collateral source.

Haygood v. De Escabedo, 356 S.W.3d 390, 394-95 (Tex. 2011)10

Helena never adduced a scintilla of evidence that: an insurance adjuster paid for herbicide damage; drought damage looks like herbicide damage; or drought loss occurred at or near the time of the drift event. As noted by a respondent, "[I]nsurance does not pay for chemical damage." (Erwin CR 3757: 4-6.)

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[10] *See*, II FACTS IN THE RECORD, Section I, *supra.*

Some farmers did not receive drought compensation at all. (Stubblefield CR 3707:17-3708:12.) Other respondents farmed irrigated cotton which is not impacted by dry weather. (R. Cox 9 tracts CR 1971-1972; T. Cox 2 tracts CR 1972; L. Rees 1 tract CR 1973.) The experts pointed out for the record that irrigated cotton is unaffected by dry conditions. (Dr. Rosenfeld CR 2055: 25-2056: 8; Dr. Carrillo ¶ 16 CR 3052.)

B. Victims of Trespass Should Not Be Required to Collect Evidence Which Is Redundant or Unreliable

Because lab sensitivity varies widely, and phytotoxicity occurs below limits detectable at most labs, results are unreliable and must be informed by visual inspection. (Rosenfeld CR 2416: 2-10 (1ppb); 2407: 3-13; Carrillo 2170, ¶ 12; Halfmann 3351: 13-16 (undetectable level causes extreme effects in cotton).) The leading reconstruction models were not developed to model drift under high-wind conditions existing during the Helena application in Mitchell County. (Halfmann CR 2631: 11-2633: 4; Rosenfeld 2402: 4-25; 3464: 5-8.) The law does not demand perfect proof of crop loss. Extant authority liberally permits "estimates of value and probable yield of crops." *International Harvester Co. v. Kesey*, 507 S.W.2d 195, 197 (Tex.1974).

C. Weighing Evidence and Making Adverse Inferences Departs From *Keller's* Standards for No-Evidence Review

The Court of Appeals found the expert opinions reliable and admissible after making reasonable

inferences and resolving doubts in favor of the farmers. "Here, there is only one standard—a reviewing court must examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

When responding to a no-evidence summary judgment motion, the respondents are not required to marshal all proof; their response need only to point out evidence sufficient to raise a fact issue on the challenged elements. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (*per curiam*). The question is whether any damage to cotton occurred. The respondents cleared that hurdle.

D. No Justification Prompted Reversal of *Pitchfork* After More Than Sixty Years

It is noteworthy that in *Pitchfork Land & Cattle Co. v. King*, 346 S.W. 2d 598 (Tex. 1961), the Court considered historical herbicide drifts of thirty (30) miles and acknowledged drift exceeding fifteen (15) miles from Pitchfork Ranch pastures. *Id.* at 600-601. No aspect of the decision has been outdated in the last sixty (60) years.

E. Trespass Does Not Require Actual Injury

The respondent farmers plead a cause of action for trespass. It has long been the rule in Texas that:

> "Trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property." (Citation.)

> "[E]very unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight." (Citations.)

Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 46 (Tex. 2017)

The take nothing judgment rendered against the respondent farmers departs from the long-established rule allowing recovery of nominal damages on a trespass cause of action.

V.

PRAYER

Respondents respectfully request that the Court grant rehearing, reconsider the case, withdraw the prior opinion issued on March 3, 2023, affirm the court of appeals, remand for trial and grant such other relief as the Court may determine proper under the law.

Respectfully submitted,

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SENDERO SPECIMEN LABEL WITH DIRECTIONS FOR USE AND PRECAUTIONS, EXCERPTS

86a

Specimen Label

Dow AgroSciences

Sendero®

SPECIALTY HERBICIDE

®Trademark of The Dow Chemical Company ("Dow") or an affiliated company of Dow

[. . .]

Directions for Use

It is a violation of Federal law to use this product in a manner inconsistent with its labeling.

[. . .]

Use Precautions and Restrictions

[. . .]

- **Avoiding Injury to Non-Target Plants:** Do not aerially apply Sendero within 50 feet of a border downwind (in the direction of wind movement), or allow spray drift to come in contact with, any broadleaf crop or other desirable broadleaf plants, including, but not limited to, alfalfa, cotton, dry

beans, flowers, grapes, lettuce, potatoes, radishes, soybeans, sugar beets, sunflowers, tobacco, tomatoes or other broadleaf or vegetable crop, fruit trees, ornamental plants, or soil where sensitive crops are growing or will be planted. Avoid application under conditions that may allow spray drift because very small quantities of spray may seriously injure susceptible crops. Read and consider the "Precautions for Avoiding Spray Drift and Spray Drift Advisory" at the end of this label to help minimize the potential for spray drift.

[. . .]

Precautions for Avoiding Spray Drift

Avoid application under conditions that may allow spray drift because very small quantities of spray, which may not be visible, may injure susceptible crops. This product should be applied only when the potential for drift to adjacent sensitive areas (e.g., residential areas, bodies of water, non-target crops and other plants) is minimal (e.g., when wind is blowing away from the sensitive areas. A drift control aid may be added to the spray solution to further reduce the potential for drift. If a drift control aid is used, follow the use directions and precautions on the manufacturer's label. Do not use a thickening agent with Microfoil, Thru-Valve booms, or other spray delivery systems that cannot accommodate thickened spray solutions.

PLEA IN INTERVENTION AND MOTION TO DISQUALIFY FILED BY TEXANS FOR PUBLIC JUSTICE (OCTOBER 14, 2014)

Cause No. D-1-GN-09-000251

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 250TH JUDICIAL DISTRICT

NATHAN L. HECHT,

Plaintiff,

v.

TEXAS ETHICS COMMISSION,

Defendant.

TO THE HONORABLE JUDGE OF SAID COURT:

Texans for Public Justice, Intervenor, files this plea in intervention and motion to disqualify, as follows.

Introduction

1. Intervenor Texans for Public Justice[1] requests that this Court issue an Order disqualifying Texas Attorney General Greg Abbott as counsel for the Texas

[1] Texans for Public Justice is a non-profit entity formed in 1997, with a primary focus on access to the civil justice system, open government, and public information.

Ethics Commission, defendant, in this case for the following reasons:

(A) Attorney General Abbott has utterly failed to pursue this case, in which Chief Justice Nathan Hecht seeks to set aside a fine of $29,000 that the Texas Ethics Commission imposed on December 4, 2008 (and ordered payable within 30 days)—almost six years ago. Chief Justice Hecht filed the present lawsuit on January 27, 2009, and Attorney General Greg Abbott filed an Answer for defendant Commission on February 23, 2009. Since then, the case has languished. Almost nothing has happened. Attorney General Abbott, representing the Texas Ethics Commission, has failed to bring the case to trial or otherwise resolve the case. No hearings have been held or even scheduled. By his unconscionable delay, Attorney General Abbott has violated the Texas Rules of Judicial Administration, the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer's Creed, and the statutory and constitutional obligations of the Attorney General—and he has failed to collect the fine that should have been collected years ago for the benefit of Texas taxpayers. Instead, he has helped his friend, former colleague, and political ally, by allowing the case to be inactive and dormant.

(B) The Texas Supreme Court adopted the Texas Rules of Judicial Administration. Rule 6.1 specifies that civil jury cases are to be disposed of within 18 months. Attorney General Abbott has failed to act in the manner required by the very Court on which he served.

(C) Attorney General Abbott has violated multiple legal ethics rules and professional responsibility standards that he and every other Texas lawyer are

subject to—including (i) Texas Disciplinary Rule of Professional Conduct 3.02, which prohibits a lawyer from taking any position that "unreasonably delays resolution" of a matter, (ii) Texas Disciplinary Rule of Professional Conduct 1.06, which prohibits a lawyer from representing a client when the lawyer "reasonably appears to be adversely limited by the lawyer's . . . responsibilities to a third person or by the lawyer's . . . own interests" (—here, by Abbott's responsibilities, favoritism, and personal interests concerning his friend, former colleague, current political ally, and political-ticket colleague, Chief Justice Hecht), (iii) Texas Disciplinary Rule of Professional Conduct 2.01, which requires that a lawyer "exercise independent professional judgment" on behalf of the client, (iv) Texas Disciplinary Rule of Professional Conduct 3.04(d), which prohibits a lawyer from "knowingly disobey[ing] . . . an obligation under the standing rules of . . . a tribunal . . . ," and (v) Texas Disciplinary Rule of Professional Conduct 8.04(a)(12), which prohibits a lawyer from violating any Texas law "relating to the professional conduct of lawyers and to the practice of law."

(D) Attorney General Abbott has violated Article II(2) of the Texas Lawyer's Creed, which required him to "achieve my client's lawful objectives . . . in litigation as quickly and economically as possible." Then Justice Hecht signed the November 7, 1989, Order of the Texas Supreme Court adopting the Creed, and that Order states that Texas courts may enforce the Creed "when necessary . . . through their inherent powers and rules already in existence."

(E) By permitting, aiding and abetting, and acquiescing in almost six years of delay, Attorney

General Abbott has violated his fundamental constitutional and statutory duties (as recognized on the Attorney General's own website)[2] to "defend the laws" of Texas and "represent the State in litigation." Through his passive approach in this case, apparently designed to protect his friend and former colleague, Attorney General Abbott has violated his obligation under the Texas Disciplinary Rules of Professional Conduct to "zealously assert[] the client's position under the rules of the adversary system."[3]

Because of Attorney General Abbott's almost six years of unjustified delay, and his ongoing, extensive course of conduct in this case of violating his legal, constitutional, and ethical obligations, Intervenor Texans for Public Justice respectfully requests that this Court disqualify Attorney General Abbott as counsel for the Texas Ethics Commission, and that the Court appoint an independent counsel.

Authority of This Court to Grant the Relief Requested

2. As the Texas Supreme Court recognized in *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997), Texas trial courts have the "inherent power" to discipline a lawyer's behavior, to sanction "bad faith abuse of the judicial process," and to ensure an "adversarial process."

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[2] *See* https://www.texasattorneygeneral.gov/agency/agency.shtml. *See also* Tex. Gov't Code § 402.021 ("The attorney general shall prosecute and defend all actions in which the state is interested . . . .").

[3] Tex. Disciplinary R. Prof'l Conduct, Preamble ¶ 2 ("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

Specifically, the Texas Supreme Court (in a per curiam opinion, in which Justice Hecht and then Justice Abbott participated) held as follows:

> Courts possess inherent power to discipline an attorney's behavior. *See Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex.App.—Houston [1st Dist.] 1993, no writ)(holding that trial courts have the power to sanction parties for bad faith abuse of the judicial process not covered by rule or statute); *Kutch v. Del Mar College*, 831 S.W.2d 506, 509-10 (Tex.App.—Corpus Christi 1992, no writ) (same); *see also Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (recognizing the inherent power of courts to ensure an adversarial proceeding); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-99 (Tex. 1979)(recognizing that a court has inherent power 'which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity'). A court has the inherent power to impose sanctions on its own motion in an appropriate case.

(Emphasis added.)

3. Thus, this Court clearly has inherent power to discipline Attorney General Abbott and to disqualify him from representing the State in this case. Given Abbott's extraordinary and egregious pattern of inaction and neglect in this case, in apparent deference and favoritism toward his friend and former colleague, Chief Justice Hecht, Intervenor Texans for Public Justice submits that this Court should remove Abbott as counsel for the Texas Ethics Commission, and appoint

independent counsel to handle the case, to fulfill the statutory, constitutional, and ethical obligations that Abbott has violated, and to protect the interests of Texas taxpayers in collecting the monies that the Commission fined Chief Justice Hecht.

4. As noted above, the Texas Supreme Court Order (signed by Justice Hecht) adopting the Texas Lawyer's Creed also expressly recognized that Texas courts may enforce the obligations in that Creed under the court's "inherent power." Indeed, many Texas courts have imposed sanctions under the court's inherent power to impose sanctions.[4] In fact, clear

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[4] *See, e.g., In re Bennett, supra* (upholding sanctions of $10,000 each against plaintiffs' counsel who intentionally circumvented the random-assignment system for cases); *Davis v. Rupe*, 307 S.W.3d 528 (Tex. App.—2010, no pet.)(affirming inherent power sanctions against a lawyer, including a $15,000 monetary sanction and requiring the lawyer to participate in ten hours of ethics training, and stating that "[a] trial court has inherent power to discipline an attorney's behavior by imposing sanctions. . . . This inherent power exists to enable courts to effectively perform their judicial functions and to protect their dignity, independence, and integrity. . . . The power may be exercised to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of the court. . . . The core functions of a trial court include hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgments, and enforcing judgments."); *Gilbert & Maxwell, PLLC v. Texas Mutual Ins. Co.*, 2008 WL 5264910 (Tex. App.—Austin 2008, no pet.)(affirming a monetary sanction); *Clark v. Bres*, 217 S.W.3d 501 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)(affirming a sanctions order against a lawyer, including $2,500 in monetary sanctions and a requirement that she attend eight hours of continuing legal education in legal ethics); *Kings Park Apts., Ltd. v. National Union Fire Ins. Co.*, 101 S.W.3d 525 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)(affirming sanctions imposed under the trial court's

precedent exists to remove a member of the Texas Attorney General's staff from further participation in a case for misconduct. In *Lelsz v. Kavanagh*, 137 F.R.D. 646 (N.D. Tex. 1991), a federal judge ordered removal of an Assistant Attorney General from a case as a sanction for violating the federal court equivalent of the Texas Lawyer's Creed.

5. Comment 17 to Texas Disciplinary Rule of Professional Conduct 1.06 states that while raising questions of conflict of interest are "primarily the responsibility of the lawyer undertaking the representation," in litigation "a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility."

6. As noted above, Attorney General Abbott apparently has violated multiple Texas Disciplinary Rules of Professional Conduct in his handling of this case, including Rules 1.06, 2.01, 3.02, 3.04, and 8.04. The Texas Supreme Court has repeatedly held (including in multiple decisions in which Justice Hecht and Justice Abbott participated) that state courts look to the disciplinary rules for "guidance in determining whether an attorney should be disqualified from representing a party in litigation."[5] Attorney General Abbott's several rule violations in this case, including

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inherent power, including requirements that the defendant place a copy of the Texas Lawyer's Creed in every litigation file and educate every litigation supervisor concerning the contents of the Creed).

[5] *Henderson v. Floyd*, 891 S.W.2d 252, 253-54 (Tex. 1995); *accord In re Cerebrus Capital Mgt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005); *In re NITLA S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002); *In re User Sys. Servs., Inc.*, 22 S.W.3d 331, 334 (Tex. 1999).

through inexcusable delay, violation of case-disposition standards, and his personal conflicts of interest arising from his relationship with Chief Justice Hecht, clearly justify disqualification.

7. Moreover, Under Canon 3D(2), Code of Judicial Conduct, a Texas judge has a mandatory duty to report certain lawyer misconduct:

> A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

(Emphasis added.)

Conclusion and Request for Relief

8. For the foregoing reasons, Intervenor Texans for Public Justice requests that this Court set its motion to disqualify for hearing as soon as possible, and at the conclusion of the hearing, impose appropriate sanctions against Attorney General Greg Abbott under the Court's inherent power, including but not limited to disqualifying and removing Greg Abbott and the Assistant Attorneys General who have participated in the course of conduct described above as counsel for the Texas Ethics Commission in this case, and

grant such other and further relief as is appropriate and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Intervention and Motion to Disqualify has been served on counsel of record, as listed below, by certified mail, return receipt requested, on the _____ day of October, 2014.

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