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No. 14-14-00589-CV

In the Fourteenth Court of Appeals Houston, Texas

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CHRISTOPHER A. PRINE
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1717 BISSONNET, LLC,

Appellant,

vs.

PENELOPE LOUGHHEAD, ET AL,

Appellees.

ON APPEAL FROM THE 157TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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No. 14-14-00589-CV

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1717 BISSONNET, LLC,

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APPELLANT'S REPLY BRIEF

Appellant 1717 will reply to Appellees' brief.

1. *Adequacy vs. Current Availability of Damage Remedy*.

Plaintiffs' legal remedy, albeit adequate, is unripe. "Plaintiff may not invoke the equitable powers of the court merely because its remedy at law is not available at the time it brings the action." *Great Am. Ins. Co. v. Geris*, 1987 Pa. Dist. & Cnty. Dec. LEXIS 1, *20-21 (Pa. C.P. 1987).

2. *No Case Authorizes Damages for a Contingent Nuisance*.

No case allows recovery of lost market value for a merely contingent, prospective injury to land. To allow such recovery here would be tantamount to creating a new cause of action – strict liability for injury to market value of real property. Intermediate appellate courts cannot

create new causes of action. *Burroughs v. APS Int'l, Ltd.*, 93 S.W.3d 155, 161 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

3. *A Contingent Injury Cannot Support Market Value Damages*.

In arguing that 1717 is committed to building the "Ashby High Rise", Plaintiffs are attempting to finesse their way around yet another fundamental principle precluding the recovery of market value damages – lost market value is recoverable for permanent but not temporary nuisances. *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004). "[A] nuisance as to which any future impact remains speculative at the time of trial must be deemed 'temporary.'" *Id*. at 280.

Mr. Spilker admitted that his trial-time snapshot of lost market value will fluctuate depending on what ultimately gets built.[1] Following trial, the plans for the Project materially changed. *See* Cross-Appellee's Br., at pp. 11-12. The plans remain subject to further modification. Thus, the nuisance impact is speculative and temporary, making market value loss unrecoverable at this time. *Schneider*, *supra*.

4. *Proof of Damage Causation Is Insubstantial*.

To reiterate – since there is no nuisance in fact at 1717 Bissonnet, proof of damage causation cannot depend upon any physical condition buyers can observe. Plaintiffs thus needed to prove that the market has responded to correct information about the Project becoming a nuisance and that buyers will likely pay less for Plaintiffs' properties for that reason and not some other reason.

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[1] 9 RR 62-63.

Mr. Spilker relied on no market study to show what prospective buyers know about the Project. Indeed, several Plaintiffs bought their properties knowing little if anything about the plans.[2] The anonymous "market" knows no more.

Mr. Spilker's naked conclusion that the yard sign propaganda cannot account for the loss of value has no support. Thus, it lacks probative value. *See Earle v. Ratliff*, 998 S.W.2d 882, 884 (Tex. 1999) ("An expert's simple ipse dixit is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts.").

5. *Texas Law Does Not Support Strict Liability for a High Rise Apartment*.

Whether the liability question closely tracks Texas Pattern Jury Charge 12.2C does not determine whether the evidence warranted the submission of a strict liability question. The *Likes* opinion itself supplies the relevant commentary on that issue, not the PJC. Notably, Plaintiffs appear to have conceded, as they must, that a high rise building amidst single family residences is not the sort of abnormality covered by the *Rylands v. Fletcher* doctrine.

6. *A Shadow Is Not a Nuisance*.

Plaintiffs' reliance on *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982), is unavailing. Here, no evidence shows that any Plaintiff fuels his/her home by solar power.

Plaintiffs' two Texas cases are also unavailing. *Ladd v. Silver Star I Power Partners*, LLC, No. 11-11-00188-CV, 2013 Tex. App. LEXIS 6065, 2013 WL 3377290 (Tex. App.—Eastland May 16, 2013, pet. denied) (mem. op.), concerned noise and light flicker caused by a wind turbine, not a shadow from a building. *Champion Forest Baptist Church v. Rowe*,

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[2] *See* 6 RR 225, 7 RR 124-25, 147-48, 183-84, 193-99, 8 RR 31, 43-44, 9 RR 97-98.

No. 01-86-654-CV, 1987 Tex. App. LEXIS 6168, *4-5 (Tex. App.—Houston [1st Dist.] 1987, no writ) (do not publish), recognizes that "'ancient lights' are not protected under Texas law."

7. *No Evidence Supports a Private Traffic-Related Nuisance.*

The jury was asked if the Project would constitute a "private nuisance" if built – interference with enjoyment of "their land."[3] Over objection, the trial court refused to ask whether each Plaintiff would be specially impacted by congestion on city streets.[4] No public nuisance claim was submitted.

Now recognizing their standing problem, Plaintiffs have attempted to recharacterize their traffic-related complaints as impaired access claims. No evidence proves that the Project, if built, would block "all reasonable access" to any Plaintiff's tract. *State v. Heal*, 917 S.W.2d 6, 10 (Tex. 1996). Fluctuating traffic is insufficient. *Id*.

Plaintiffs' cases are distinguishable.

In *Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987, no writ), homeowners sued to enjoin the construction of a motel on property deed-restricted to single family use. *Spiller* does not hold that public street traffic constitutes a private nuisance.

In *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212 (Tex. App.—Houston [14th Dist.] 1989, pet. denied), no issue was raised on appeal about whether the plaintiff homeowners had standing to complain about traffic on surrounding public streets. "When a court resolves a case on the merits without discussing its jurisdiction to act, it does not establish

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[3] CR 733.

[4] 14 RR 15.

a precedent requiring similar treatment of other cases once the jurisdictional problem has come to light." *Jezierski v. Mukasey*, 543 F.3d 886, 888 (7th Cir. 2008) (Posner, J.) (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984)). The verdict in *Freedman*, moreover, was upheld on proof that the defendant's parking lot would attract crime, not cause traffic (776 S.W.2d at 216); and nothing indicates whether the case was tried on a private or public nuisance theory.

Champion Forest is inapposite for the same reasons as *Spiller* – multiple possible grounds to support the temporary injunction , and no challenge to the plaintiffs' standing to complain of traffic on public streets.

Lethu Inc. v. City of Houston, 23 S.W.3d 482, 488 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), involved a "permanent physical obstruction" that was "intended to deny all access through the street." *See also State v. Bhalesha*, 273 S.W.3d 694 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (distinguishing *Lethu*).

8. *Sightlines Alone Create No Nuisance*.

In *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 621 (Tex. App.—Houston [14th Dist.] 2001, pet denied), peeping activity supported the claim, not the fact that the tower could facilitate peeping. Denial of the injunction was upheld, in part, because the peeping had ceased. *Id*.

9. *Plaintiffs Failed to Prove Ownership*.

1717 objected to the court's refusal to ask whether each Plaintiff owned a justiciable interest.[5] Thus, each Plaintiff's burden on appeal was to show ownership conclusively. *See* TEX. R. CIV. P. 279. The evidence referenced in Plaintiffs' brief does not prove standing at the time of trial.

* * * * *

Respectfully submitted,

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[5] 14 RR 14-15.

CERTIFICATE OF SERVICE

I certify that all counsel of record have been served a copy of the foregoing Appellant's Brief by electronic submission for filing and service on August 18, 2015, through an approved EFSP of the Texas Online EFiling for Courts.

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CERTIFICATE OF COMPLIANCE

Pursuant T.R.A.P. 9.4 (i)(3), the undersigned certifies that this Reply Brief complies with the type-volume limitations of T.R.A.P. 9.4 (i)(2)(D).

1. Exclusive of the exempted portions of T.R.A.P. 9.4(i)(1), this Reply Brief contains 1,174 words as indicated by the word count function of the below referenced software.

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/s/ *Ramon G. Viada III*
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