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Grave Consequences: 14th Court Says Cemetery Not Abandoned

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Sometimes finding a lawyer is a litigant's biggest battle. That's what Catherine Levandovsky realized two years ago when she was looking for an attorney to help her mother fight gas companies that wanted to move the bodies in her family's 114-year-old cemetery. More than seven firms turned Levandovsky down when they learned her mother didn't want to file a separate suit to seek damages against the companies, she says.



Matt McCormick

"I was amazed. We actually literally had people on the phone that said, 'Yeah. Have you thought about suing them and getting some money?' " Levandovsky says. "I told them, 'No. You don't understand. We just don't want the bodies removed.' "

In desperation, Levandovsky Googled a firm founded by her mother's cousin: Huntsville's Moak & Moak. Matt McCormick, who primarily practices real estate litigation at the firm, was intrigued and agreed to represent Levandovsky and her mother, Mary Catherine, against the companies in a declaratory judgment action the companies had filed in a Chambers County state district court.

"I don't come across these kinds of clients very often in my work," McCormick says.

According to the July 12 opinion from Houston's 14th Court of Appeals, the background in *Levandovsky v. Targa Resources Inc., et al.* is as follows: In 1955, Edgar C. Fisher sold 200 acres of Chambers County land to Warren Petroleum, predecessor in interest to Targa (which the 14th Court uses to refer collectively to defendants Targa Resources and Targa Downstream LLC). The deed from Fisher to Warren Petroleum included a reservation of the surface estate of the one-acre cemetery. The reservation explicitly stated that Warren Petroleum would own fee simple title to the property, but it was not permitted to use the surface estate of the cemetery, which included family graves that dated back to 1898.

On Dec. 18, 2010, Targa brought a declaratory judgment action, *Ex Parte Targa*, seeking removal of the dedication of the property for cemetery purposes to permit the exhumation and transfer of the human remains to a perpetual-care cemetery. Targa alleged the cemetery was abandoned because no family members had visited it in 35 years.

Mary Catherine Levandovsky (Edgar Fisher's granddaughter and the real party in interest) became aware of the cemetery after a Targa representative contacted her about the declaratory judgment action and she was served with a copy of the original petition. McCormick says she filed a pro se response denying the cemetery was abandoned before she hired him to represent her. At trial, he argued that Targa had failed to establish that relocation of the graves was in the best interests of the

public and that the cemetery was an important location for personal and general historical reasons.

Among other things, Targa argued it was dangerous for people to visit the cemetery due to risks associated with a large gas processing facility.

The trial court ruled in Targa's favor and declared that the cemetery was abandoned. Mary Catherine Levandovsky appealed to the 14th Court.

On appeal, McCormick says he argued that the cemetery did not meet the definition of "abandoned" under common law.

David Gunn, a partner in Houston's Beck Redden & Secrest who represents Targa on appeal, says Texas Health & Safety Code §771.036(c) supports his argument that the cemetery was abandoned. He says he also argued that the case should not be decided on a point of law that was not before the trial court.

According to the 14th Court's opinion, the Texas Historical Commission (THC) adopted a definition of an "abandoned cemetery" in May 2010, prior to the filing of the suit. According to Texas Administrative Code §22.1, an abandoned cemetery is "a non-perpetual care cemetery containing one or more graves and possessing cemetery elements for which no cemetery organization exists *and* which is not otherwise maintained by any caretakers."

The THC filed an amicus brief in *Levandovsky* arguing that §22.1 "should have been applied by the trial court, but was not."

In an opinion written by Chief Justice Adele Hedges and joined by Justices Charles Seymore and Jeff Brown, the 14th Court referenced photos Targa had filed that showed the cemetery "is surrounded by a fence, headstones are clearly visible, and the area within is maintained by Targa." Therefore, the cemetery "does not meet the Commission's definition of an abandoned cemetery," the appeals court noted.

McCormick says the decision turned on the THC's amicus brief.

Catherine Levandovsky says, "I think Matt did a fantastic job. This is a very obscure area of the law. . . . [T]he case law was on our side . . . but we got lucky and the administrative code was also on our side."

Gunn says his clients are disappointed in the ruling and they are considering filing a motion for rehearing.

Tom Kelley, a spokesman for the Texas Attorney General's Office, which filed the amicus brief on behalf of the THC, declines comment about the decision.

