

CAUSE NO. 2019-33415

ABEL AND NANCY VERA, ET AL.,

Plaintiffs,

v.

**FIGURE FOUR PARTNERS, LTD., PSWA, INC.,
and REBEL CONTRACTORS, INC.,**

Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

234TH JUDICIAL DISTRICT

**DEFENDANTS FIGURE FOUR PARTNERS, LTD.'S
AND PSWA, INC.'S MOTION TO TRANSFER VENUE,
ORIGINAL ANSWER AND COUNTERCLAIM**

Defendants Figure Four Partners, Ltd. and PSWA, Inc. (collectively, “Defendants”) file this Motion to Transfer Venue, Original Answer and Counterclaim. By filing this Motion to Transfer Venue, Original Answer and Counterclaim, Defendants expressly do not waive, and reserve, their right to file a Motion to Dismiss pursuant to Chapter 150 of the Texas Civil Practice and Remedies Code,¹ and respectfully show the Court the following:

DEFENDANTS’ MOTION TO TRANSFER VENUE

1. Defendants object to venue in Harris County as to the following Plaintiffs identified in Plaintiffs’ Original Petition:

- Wendy Curtis
- Lawrence Defuria
- Sylvie Descours
- Cecilia Diaz
- Martha Gomez
- Yesenia Gonzalez
- Greg Guy
- Kelly Guy
- Bradley Hales
- Richard McMahon

¹ Defendants are concurrently filing their Motion to Dismiss pursuant to Chapter 150.

- Cindy McMahon
- Mary Booke Nictoria
- Daryl Palmer
- Jennifer Perry
- Darren Porter
- Nathan Rodriguez
- Merrie Rodriguez
- Marcus Ticer

A. Upon Information and Belief, Venue is Not Proper in Harris County

2. Upon information and belief, Defendants specifically deny paragraph 8 of Plaintiffs’ Original Petition that venue is proper in Harris County, Texas as to each “because the events giving rise to [each of their claims] occurred in Harris County Texas, pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(1)” as to the Plaintiffs identified in paragraph 1.

3. Upon information and belief, Defendants specifically deny paragraph 3 of Plaintiffs’ Original Petition that each of the Plaintiffs identified in paragraph 1 above “are residents of Kingwood, Harris County, Texas.”

4. Also upon information and belief, Defendants specifically deny paragraph 9 of Plaintiffs’ Original Petition as to the Plaintiffs identified in paragraph 1 that each “have been residents of the Elm Grove neighborhood in Kingwood, Texas.”

5. To date, Defendants have not been able to confirm the Plaintiffs identified in paragraph 1 above actually reside in Harris County. Upon information and belief, these Plaintiffs reside in Montgomery County, and did so on May 7, 2019 as well. Thus, upon information and belief, the identified Plaintiffs’ homes alleged to have been damaged by Defendants, as set forth in Plaintiffs’ Original Petition, were in Montgomery County, not Harris County.

6. Plaintiffs’ Original Petition alleges Defendants were developing a plot of land for a residential community that bordered the north side of the Elm Grove neighborhood in Kingwood,

Texas. *See* Plaintiffs' Original Petition, ¶ 10. The development referenced in Plaintiffs' Original Petition is located in Montgomery County, Texas.

7. Venue is therefore, upon information and belief, improper for these Plaintiffs in Harris County because none of the events giving rise to these Plaintiffs' claims actually occurred in Harris County.

8. Furthermore, Plaintiffs' Original Petition does not allege that venue is proper as to any of the identified Plaintiffs pursuant to TEX. CIV. PRAC. & REM. CODE § 15.003(a). Defendants also specifically deny that the identified Plaintiffs can establish the four elements required by section 15.003(a).

9. Venue is proper, upon information and belief, in Montgomery County, Texas, for two independent reasons. First, Plaintiffs' Original Petition alleges that the identified Plaintiffs seek recovery for damages to real property. *See* Plaintiffs' Original Petition, ¶¶ 12, 25(a), 25(c), 25(d). Actions for the recovery of damages to real property are subject to a mandatory venue statute requiring venue in the county in which all or a part of the property is located. TEX. CIV. PRAC. & REM. CODE § 15.011. Because Plaintiffs' damaged real property is, upon information and belief, located in Montgomery County, venue is proper in Montgomery County pursuant to section 15.011.

10. Alternatively, even if these Plaintiffs are not seeking damages to real property, venue is proper pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) because all or a substantial part of the events giving rise to these Plaintiffs' claims occurred in Montgomery County. All of Defendants' alleged development work giving rise to Plaintiffs' claims occurred in Montgomery County, and, upon information and belief, these Plaintiffs reside in Montgomery County and allegedly suffered damages in Montgomery County.

11. Based on the foregoing, Defendants respectfully request that the Court sever the claims of the Plaintiffs identified above, and transfer those Plaintiffs' claims to Montgomery County, Texas.

DEFENDANTS' ORIGINAL ANSWER

A. General Denial

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendants generally deny each and every, all and singular, the material allegations contained in Plaintiffs' Original Petition, and any amendments thereto. Defendants state that said allegations are not true, in whole or in part, and demand strict proof thereof.

B. Defenses and Reservation of Rights

2. Defendants assert the following defenses that are required to be pled by Texas Rule of Civil Procedure 94, and expressly identify other limitations to Plaintiffs' claims for which Defendants do not bear the burden of proof.

3. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs failed to comply with Chapter 150 of the Texas Civil Practice and Remedies Code.

4. Pleading further, and in the alternative, and without waiving the foregoing, the damages alleged are the result of prior or pre-existing conditions in the premises at issue over which Defendants had no control and did not cause.

5. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs' alleged damages are the result of an Act of God and not acts or omissions of Defendants.

6. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs' alleged damages were the result of new, independent, intervening, and superseding causes for which Defendants are not legally responsible.

7. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs' alleged damages were caused by the acts, omissions, or negligence of third parties or instrumentalities that were not connected with Defendants and over which Defendants had no control or right of control.

8. Pleading further, and in the alternative, and without waiving the foregoing, Defendants invoke the provisions of Chapter 33 of the Texas Civil Practices and Remedies Code, as it pertains to proportionate responsibility, comparative fault, contributory negligence, assumption of risk, contribution, indemnity, and settlement credits. Chapter 33 specifically mandates, among other things, the reduction of damages for the negligence, liability, responsibility, or other conduct alleged, which is attributable to any other party, including Plaintiffs, other defendants, contribution defendants, settling persons, and/or responsible third parties. Alternatively, Defendants invoke the provisions of Chapter 32 of the Texas Civil Practice and Remedies Code.

9. Pleading further, and in the alternative, and without waiving the foregoing, some or all of Plaintiffs' claims are or may be barred because Defendants acted with due care and complied with applicable statutory, regulatory, and common law requirements provides by federal, state, and local law.

10. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs' claims and causes of action are barred, in whole or in part, because Plaintiffs assumed the risk that resulted in Plaintiffs' alleged damages.

11. Pleading further, and in the alternative, and without waiving the foregoing, to the extent discovery in this case shows a failure to mitigate Plaintiffs' alleged damages, Plaintiffs' claims and causes of action may be barred, in whole or in part, to that extent.

12. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs may not recover attorneys' fees from Defendants for the claims and causes of action asserted in this lawsuit.

13. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs have not fulfilled all conditions precedent necessary to maintain this lawsuit.

14. Pleading further, and in the alternative, and without waiving the foregoing, Plaintiffs' recovery, if any, on its causes of action in this lawsuit is subject to the one satisfaction rule.

15. Pleading further, and in the alternative, and without waiving the foregoing, Defendants further allege that Plaintiffs' claim for pre-judgment interest is limited by the dates and amounts set forth in Chapter 304 of the Texas Finance Code.

16. Pleading further, and in the alternative, and without waiving the foregoing, Defendants affirmatively plead the damage limitations and all available defenses set forth in Chapter 41 of the Texas Civil Practice and Remedies Code.

17. Pleading further, and in the alternative, and without waiving the foregoing, Defendants deny that any act or omission giving rise to Plaintiffs' alleged damages justify a claim for exemplary or punitive damages. An award of exemplary or punitive damages against Defendants would violate the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 3 and 19 of the Texas Constitution in that such claims are arbitrary, unreasonable, and in violation of Defendants' rights to due process and equal protection under the law. Plaintiffs' claims are unconstitutionally vague to the extent that any of the claims against Defendants should be proven beyond a reasonable doubt under the Sixth Amendment of the United States Constitution, as opposed to a mere preponderance of the evidence. Defendants would

further assert that any claim for punitive damages in a civil matter constitutes an excessive fine in violation of the Eighth Amendment of the United States Constitution.

DEFENDANTS' ORIGINAL COUNTERCLAIM

A. Tex. R. Civ. P. 47 Statement

1. In accordance with Texas Rule of Civil Procedure 47, Defendants state that they seek monetary relief of \$100,000 or less and non-monetary relief, and that such damages are within the jurisdictional limits of the Court. Defendants reserve the right to amend this statement to plead for more than \$100,000 of monetary relief if the facts and circumstances dictate as the case progresses.

B. Facts

2. Plaintiffs' Original Petition asserts a claim under Section 11.086 of the Texas Water Code. Plaintiffs further seek attorneys' fees under Section 11.0841 of the Texas Water Code, which provides: "A district court may award the costs of litigation, including reasonable attorney fees and expert costs, to any political subdivision of the state, private corporation, or individual *that is a water right holder* and that prevails in a suit for injunctive relief to redress an unauthorized diversion, impoundment, or use of surface water in violation of this chapter or a rule adopted pursuant to this chapter." TEX. WATER CODE § 11.0841 (emphasis added).

3. The term "water right" is defined in the Water Code as "a right acquired under the laws of this state to impound, divert, or use state water." TEX. WATER CODE § 11.002(5).

4. "State water" is described in the Water Code as water from rivers, natural streams, lakes, every bay or arm of the Gulf of Mexico, as well as storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression and watershed in the State of Texas.

5. Plaintiffs' Original Petition does not allege that they are water right holders. Upon information and belief, none of the Plaintiffs were water right holders as of May 7, 2019.

C. Causes of Action

6. Accordingly, Defendants seek a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code for the following:

- a. That Plaintiffs are not water right holders under Texas law;
- b. that Section 11.0841 of the Texas Water Code only applies to claims brought by political subdivisions of the state, private corporations, or individuals in their capacity as water right holders; and
- c. therefore, Section 11.0841 does not allow Plaintiffs to recover attorneys' fees incurred in this lawsuit.

7. Pursuant to Texas Civil Practice and Remedies Code § 37.009, Defendants request that the Court award them their reasonable attorney's fees and costs as are equitable and just.

REQUEST FOR DISCLOSURE

Defendants request that Plaintiffs provide the disclosures required under Rule 194 of the Texas Rules of Civil Procedure within thirty (30) days from the date of service.

PRAYER

Therefore, Defendants respectfully request the Court:

- a. Grant Defendants' Motion to Transfer Venue as set forth herein;
- b. Enter a judgment that Plaintiffs take nothing by their claims;
- c. Enter a declaratory judgment as set forth herein;
- d. Award Defendants their attorneys' fees and costs of court, along with pre- and post-judgment interest; and

- e. Any such other and further relief to which Defendants may be justly entitled.

Respectfully submitted,

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By: /s/ Andrew K. York

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ATTORNEYS FOR DEFENDANTS FIGURE
FOUR PARTNERS, LTD. and PSWA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly furnished to the following counsel of record (1) electronically through the electronic filing manager (www.efiletexas.gov), and (2) via e-mail on this 17th day of June, 2019:

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