

CAUSE NO. 2019-33415

ABEL AND NANCY VERA, et al
Plaintiffs,

vs.

FIGURE FOUR PARTNERS, LTD.,
PWSA, INC., and,
REBEL CONTRACTORS, INC.
Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

234th JUDICIAL DISTRICT

Defendant Rebel Contractors, Inc.'s Motion to Transfer Venue and Original Answer and Counter-Claim Subject Thereto

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **Rebel Contractors, Inc.**, Defendant in the above-entitled and numbered cause, and files this its Motion to Transfer Venue and Original Answer and Counter-Claim Subject Thereto, in response to the Plaintiffs' live pleading, and would respectfully show unto the Court as follows:

**I.
MOTION TO TRANSFER VENUE**

Defendant files this its Motion to Transfer Venue objecting to venue in Harris County as to the following Plaintiffs named in Plaintiffs' Original Petition:

- Wendy Curtis
- Lawrence Defuria
- Sylvie Descours
- Cecilia Diaz
- Martha Gomez
- Yesenia Gonzalez

- Greg Guy
- Kelly Guy
- Bradley Hales
- Richard McMahan
- Cindy McMahan
- Mary Booke Nictoria
- Daryl Palmer
- Jennifer Perry
- Darren Porter
- Nathan Rodriguez
- Merrie Rodriguez
- Marcus Ticer

Upon information and belief, this Defendant specifically denies, as to each of the Plaintiffs named above, the allegation set forth at paragraph 8 of Plaintiffs' Original Petition that venue is proper in Harris County, Texas "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)".

Upon information and belief, this Defendant specifically denies, as to each of the Plaintiffs named above, the allegation set forth at paragraph 3 of Plaintiffs' Original Petition that each of the Plaintiffs named in Plaintiffs' Original Petition "are residents of Kingwood, Harris County, Texas."

Upon information and belief, this Defendant specifically denies, as to each of the Plaintiffs named above, the allegation set forth at paragraph 9 of Plaintiffs' Original Petition that

each of the Plaintiffs named in Plaintiffs' Original Petition "have been residents of the Elm Grove neighborhood in Kingwood, Texas."

To date, this Defendant has not been able to confirm that the Plaintiffs named above actually resided in Harris County as of May 7, 2019 or are currently residents of Harris County. Upon information and belief, the above-named Plaintiffs reside in Montgomery County, and resided in Montgomery County on May 7, 2019 as well. Accordingly, upon information and belief, the homes of the above-named Plaintiffs which are alleged to have been damaged by the Defendants, as set forth in Plaintiffs' Original Petition, were located in Montgomery County, not Harris County.

Plaintiffs' Original Petition alleges the Defendants collectively 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 residential development referenced in Plaintiffs' Original Petition is located in Montgomery County, Texas.

Upon information and belief, venue is improper in Harris County as to the Plaintiffs named above, because none of the events giving rise to the claims of the above-named Plaintiffs actually occurred in Harris County.

Furthermore, Plaintiffs' Original Petition does not allege that venue is proper as to any of the above-named Plaintiffs pursuant to TEX. CIV. PRAC. & REM. CODE § 15.003(a). This Defendant also specifically denies that each of the Plaintiffs named above can establish each of the four elements required by section 15.003(a) to avoid transfer or dismissal of such Plaintiff's claims.

Upon information and belief, venue is proper in Montgomery County, Texas, for two independent reasons. First, Plaintiffs' Original Petition alleges that the each of the Plaintiffs

named above 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 the allegedly damaged real property of the above-named Plaintiffs is, upon information and belief, located in Montgomery County, venue is proper and mandatory in Montgomery County as to the claims of such Plaintiffs pursuant to Section 15.011.

Alternatively, even if the above-named 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 the claims of the above-named Plaintiffs occurred in Montgomery County. All of the Defendants' alleged development work giving rise to Plaintiffs' claims occurred in Montgomery County, and, upon information and belief, the Plaintiffs named above reside in Montgomery County, and allegedly suffered damages in Montgomery County.

Based on the foregoing, this Defendant respectfully requests that the Court sever the claims of the Plaintiffs named above from the claims of the other Plaintiffs named in Plaintiffs' Original Petition, and transfer the claims of the Plaintiffs named above from Harris County to Montgomery County, Texas, a county of proper and/or mandatory venue as to such claims.

II.
DEFENDANT'S ORIGINAL ANSWER SUBJECT TO MOTION TO TRANSFER VENUE

Subject to and without waving Defendant's Motion to Transfer Venue, and pursuant to Rule 92 of the Texas Rules of Civil Procedure, this Defendant denies each and every, all and singular, the material allegations contained in Plaintiffs' live pleading, and demands strict proof

of same by a preponderance of the credible evidence or by such greater burden of proof as may be imposed under the laws and Constitution of the State of Texas.

III.

Pleading further, and without waiver of the foregoing, Defendant would further show that any injury or damage suffered by Plaintiffs was caused by the conduct, acts or omissions of third parties over whom this Defendant has had, and has, no control or right of control.

IV.

Pleading further, in the alternative, and without waiver of the foregoing, Defendant further asserts that the incident and/or occurrences made the basis of this suit and the alleged resulting damages, if any, were the result of intervening, superseding or new and independent causes for which causes this Defendant is not legally responsible.

V.

Pleading further, and without waiver of the foregoing, Defendant hereby invokes all rights, remedies and elections afforded to it pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code, including but not limited to the rights and limitations of proportionate responsibility and contribution pursuant to Chapter 32, Chapter 33 (Subchapter A, §33.001, *et seq.* and Subchapter B, §33.011, *et seq.*). Those rights, remedies, elections, and limitations include but are not limited to:

1. The right of action to recover payment from each co-defendant against whom judgment is rendered for amounts set forth in any judgment;
2. The reduction or barring of Plaintiffs' damages if Plaintiffs' responsibility, if any, is greater than 50%;
3. The designation of any party as a responsible third party;

4. A comparison and an assignment of percentages of responsibility by the trier of fact of the responsibilities of the parties, settling persons and responsible third persons;
5. The reduction of the amount of recovery under §33.012 of the Texas Civil Practice & Remedies Code and any election attendant thereto;
6. The reduction of liability consistent with the §33.013 of the Texas Civil Practice & Remedies Code; and,
7. Contribution and/or indemnity as set forth in Chapters 32 and 33.

VI.

Pleading further, and without waiver of the foregoing, Defendant denies that Plaintiffs are entitled to any recovery. However, to the extent any recovery is had by Plaintiffs such recoveries must be offset by any amounts received from joint tortfeasors, other Defendants, or Third-Party Defendants. In the unlikely event that Defendant is found liable for any portion of Plaintiffs' damages, if any, Defendant is entitled to indemnity and/or contribution from each of the other Defendants and a percentage or pro-rata reduction of its liability to Plaintiffs pursuant to Chapters 32 and 33 of the Texas Civil Practice & Remedies Code, the doctrine of comparative fault and/or any other applicable law. Further, Defendant prays for all credit and/or offset rights at law by virtue of any settlement entered into by Plaintiffs with any party or non-party in connection with or relating to any matter pertaining to the claims made herein by Plaintiffs.

VII.

Pleading further, and without waiver of the foregoing, Defendant would further show that any injury or damage suffered by Plaintiffs was the result of an Act of God caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care.

VIII.

Pleading further, in the alternative, and without waiver of the foregoing, Defendant would show that the Plaintiffs have failed to comply with the requirements of Chapter 150 of the Texas Civil Practice and Remedies Code.

IX.

Pleading further, in the alternative, and without waiver of the foregoing, some or all of Plaintiffs' claims are, or may be, barred because this Defendant that all times relevant to Plaintiffs' claims acted with due care and complied with applicable statutory, regulatory, and common law requirements provides by federal, state, and local law.

X.

Pleading further, and without waiver of the foregoing, Defendant would show that the connection between this Defendant's purported acts and/or omissions and the Plaintiffs' injuries are simply too attenuated to constitute legal cause. *See Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex.1995) The elements of proximate cause cannot be established by mere conjecture, guess, or speculation. *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex.1980); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 755 (Tex.1975). The test for cause in fact is whether the negligent "act or omission was a substantial factor in bringing about injury," without which the harm would not have occurred. *Prudential*, 896 S.W.2d at 161 (citing *McClure*, 608 S.W.2d at 903); *see Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458-59 (Tex.1992); *Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 223 (Tex. 1988). Cause in fact is not shown if the defendant's negligence did no more than furnish a condition which made the injury possible. *See Bell v. Campbell*, 434 S.W.2d 117, 120 (Tex. 1968). Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of

events whereby the defendant's conduct brings about the injury. See RESTATEMENT (SECOND) OF TORTS § 435(2) (1965).

XI.

Pleading further, and without waiver of the foregoing, Defendant further would show that one or more of the Plaintiffs has failed to mitigate such plaintiff's own damages as would have been done by a person of ordinary prudence, and each such plaintiff's failure to mitigate plaintiff's own damages has proximately caused or at least contributed to such plaintiff's claimed damages.

XII.

Pleading further, in the alternative, and without waiver the foregoing, Defendant would show that the Plaintiffs may not recover attorneys' fees from this Defendant for the claims and causes of action asserted in this lawsuit.

XIII.

Pleading further, in the alternative, and without waiver the foregoing, Defendant would show that Plaintiffs have not fulfilled all conditions precedent necessary to maintain this lawsuit.

XIV.

Pleading further and without waiver of the foregoing, Defendant would show that any recovery of exemplary damages against this Defendant is subject to the provisions of Tex. Civ. Prac. & Rem. Code §41.008, ("Limitation on Amount of Recovery"). Defendant further alleges, without waiver of the foregoing, that under Texas law, pre-judgment interest may not be assessed or recovered on an award of exemplary damages. *See*, Tex. Civ. Prac. & Rem. Code §41.008.

XV.

Pleading further and without waiver of the foregoing, Defendant would show that any award of exemplary and/or punitive damages against this Defendant would violate the due process clause of the Fifth Amendment and Fourteenth Amendment to the United States Constitution, in addition to Article 1, Section 19 of the Texas Constitution, in that:

1. Such punitive damages are intended to punish and deter the Defendant and thus this proceeding becomes essentially criminal in nature;
2. This Defendant is being compelled to be a witness against itself in a proceeding that is essentially and effectively criminal in nature, in violation of this Defendant's right to due process, and in violation of the Constitutions of the United States and of the State of Texas;
3. Plaintiffs' burden of proof to establish punitive damages in this proceeding, which is effectively criminal in nature, is less than the burden of proof required in all other criminal proceedings, and thus violates the Defendant's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and the rights of Defendant under Article 1, Section 19 of the Texas Constitution; and,
4. Inasmuch as this proceeding is essentially and effectively criminal in nature, this Defendant is being denied the requirements of adequate notice of the elements of the offense, and that such statutory and common law theories purportedly authorizing punitive damages are sufficiently vague and ambiguous, and Plaintiffs' Petition purporting to invoke such statutory and/or common law theory is so vague and ambiguous as to be in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and in violation of Article 1, Section 19 of the Texas Constitution.

XVI.

Defendant respectfully reserves the right at this time to amend this Original Answer to the Plaintiffs' allegations after this Defendant has had the opportunity to more closely investigate Plaintiffs' claims as it is the right and privilege of the Defendant to do so under the Texas Rules

of Civil Procedure and the laws of the State of Texas.

XVII.

Defendant's Original Counter-Claim

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

In accordance with Texas Rule of Civil Procedure 47, this Defendant states that it seeks monetary relief of \$100,000 or less, and non-monetary relief, and that such damages are within the jurisdictional limits of the Court. This Defendant reserves the right to amend this statement to plead for more than \$100,000 of monetary relief if warranted under the facts and circumstances as investigation and discovery progress.

B. Facts

Plaintiffs' Original Petition asserts a claim under Section 11.086 of the Texas Water Code. Plaintiffs further seek to recover 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).

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).

"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.

Plaintiffs' Original Petition does not allege that the Plaintiffs 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

Accordingly, this Defendant seeks a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code as to 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 entitle the Plaintiffs to recover attorneys' fees incurred in this lawsuit as is alleged in Plaintiffs' Original Petition.

Pursuant to Texas Civil Practice and Remedies Code § 37.009, this Defendant requests that the Court award Rebel Contractors, Inc. its reasonable and necessary attorney's fees and costs incurred in the pursuit of this counter-claim as same are equitable and just.

WHEREFORE, PREMISES CONSIDERED, subject to and without waiving its Motion to Transfer Venue, Defendant, **Rebel Contractors, Inc.**, prays that: 1) the Court, after due notice and hearing, grant Defendant's Motion to Transfer Venue as to the claims of the Plaintiffs named above, 2) enter a judgment in favor of this Defendant, and that Plaintiffs take nothing by their claims; 3) for entry of a declaratory judgment as set forth above; 4) allow this Defendant to be released, discharged and acquitted and to go hence without day; 5) for recovery of this Defendant's attorney's fees incurred in the prosecution of its cross-claim, as well as for Defendant's costs incurred in connection with the claims made the basis of this lawsuit; and, 6) for such other and further relief, whether general or special, at law or in equity, to which said Defendant may be justly entitled.

Respectfully submitted,

BROTHERS ALVARADO, P.C.

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**Attorneys for Defendant,
Rebel Contractors, Inc.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Defendant Rebel Contractors, Inc.'s Original Answer Subject to Motion to Transfer Venue* was served upon the following counsel of record in compliance with Rule 21a of the Texas Rules of Civil Procedure on this the 17th day of June, 2019, as follows:

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