

OUTLINE - Petitioner's Brief on the Merits
Acme v. Zeta

IDENTITY OF PARTIES AND COUNSEL

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This case involves a breach of contract claim by Don Zeta (“Zeta”) against Acme Resources, Inc., the successor in interest to XYZ Petroleum Company and TM Corp. (collectively “Acme”). In 1981, Zeta entered into a farmout agreement with Acme, under which he acquired a 25% working interest in a well after it paid out. In 1987, Acme decided to plug and abandon the well after it stopped producing in paying quantities. Zeta filed a breach of contract action in 1990, claiming in pertinent part that Acme breached its duty arising under custom and usage in the oil and gas industry requiring it to give him notice prior to plugging and abandoning the well. *Zeta*, No. 01-99-00553-CV at *2. The trial court initially granted summary judgment in Acme’s favor, but the First District reversed and remanded on the factual issue of custom and usage, the existence of which Acme purportedly failed to refute with summary judgment evidence. (CR: 293, 543).

On remand, the trial court admitted parol evidence of custom concerning notice of abandonment despite the language of the farmout agreement requiring notice of abandonment before and not after casing had run. (RR1: 156; App. Tab D). As discussed in the appellate court’s opinion, Zeta offered the testimony of two witnesses, John Doe and James Madison. Doe testified that it was “usually” the practice to give a working interest owner an opportunity to take over a well prior to abandonment. *Zeta*, No. 01-99-00553-CV at *4. Madison testified that it was “common knowledge” that a nonoperating working interest owner was entitled to notice of plugging and abandonment. *Id.* Neither witness testified that such custom existed in 1981. The only time-specific evidence of custom regarding notice of abandonment centered around American Association of Petroleum Landmen forms issued in 1956 and 1977. (RR3: 589).

SUMMARY OF ARGUMENT

The court of appeals erroneously held that custom and usage was admissible to impose an extra-contractual duty upon Acme to give notice to Zeta of abandonment after casing had run and that the trial court acted properly by inferring Acme had knowledge of the custom that the trial court concluded was universal. (See App. Tab A). The court of appeal’s affirmance in a published opinion has an adverse impact upon this state’s jurisprudence. Not only will the court of appeals’ error of law impact oil and gas cases concerning similar facts, but it will also undermine the

sanctity of written agreements throughout the state. Despite a party's absence of knowledge of a custom or the clear language of a freely-negotiated contract expressly omitting such a duty arising from custom, the First District will continue to impose extra-contractual duties upon a party despite the absence of a meeting of the minds on that issue. Moreover, review should also be granted because in affirming the trial court's omission of a jury question on Acme's knowledge, the appellate court created a split among the appellate districts. *Zeta*, No. 01-99-00553-CV at *4 fn1. Several other courts of appeals require that jury questions on custom issues be submitted in a two-part question concerning both the existence and the parties' knowledge of the custom.

The court erred in imposing an extra-contractual obligation upon Acme to give Zeta notice of plugging and abandonment after the well ceased to produce. There is no evidence that such a custom and usage existed in 1981 or that Acme was aware of the custom at that time. To the contrary, the farmout agreement expressly limited any duty of notice of abandonment to before and not after casing had run. (App. Tab D).

In executing the agreement, Acme did not agree to give such notice, nor did Zeta demand that such notice be given. Courts cannot vary the terms of a written agreement and rewrite a contract to impose additional duties upon which there was no meeting of the minds. Thus, allowing the court of appeals' published opinion to

stand will undermine the certainty of a party's obligation under a contract in the oil and gas industry and beyond.

Further, regardless of whether evidence of custom and usage was properly admitted, the trial court invaded the province of the fact finder and eliminated an element of Zeta's burden of proof. Despite well-settled law that custom can only vary the terms of an agreement where such custom exists and the parties had knowledge of the custom at the time of the contract, the court refused to submit a jury question on whether Acme had knowledge of the custom. Instead, the court inferred from the testimony that Acme had knowledge because it concluded the custom was universal. By only submitting a jury question on whether the custom existed in 1981, the court invaded the province of the fact finder and relieved Zeta of the necessity of showing that Acme was aware of the custom. (App. Tab A).

ARGUMENT

POINT I THIS COURT SHOULD GRANT REVIEW FOR TWO REASONS: (1) TO CORRECT THE TRIAL COURT'S ERRONEOUS APPLICATION OF PAROL EVIDENCE TO AN UNAMBIGUOUS CONTRACT, WHICH IMPACTS THE JURISPRUDENCE OF THE STATE SHOULD THE PUBLISHED OPINION STAND AND (2) TO HEAL THE SPLIT BETWEEN THE APPELLATE DISTRICTS AS TO WHETHER JURY QUESTIONS ON CUSTOM AND USAGE ARE REQUIRED ON BOTH THE EXISTENCE OF AND THE PARTIES' KNOWLEDGE OF THE CUSTOM.

Review should be granted because the court of appeals' published opinion adversely affects the jurisprudence of the state and creates a conflict among the courts of appeals.. Texas Rule of Civil Procedure 47.4 provides that an opinion should be published only if it impacts the decision of future cases, addresses prior existing law, or involves issues of continuing public interest:

An opinion should be published only if it does any of the following:

- (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
- (b) involves a legal issue of continuing public interest;
- (c) criticizes existing law; or
- (d) resolves an apparent conflict of authority.

Tex. R. App. P. 47.4. By publishing its opinion despite the absence of a new rule of law or the criticism of an existing law, the First District implicitly recognized either that the legal issues and facts in this case are likely to recur again in future cases or

that the case presents legal issues of continuing public interest. Additionally, in its opinion, the First District expressly recognized that a conflict exists between the courts of appeal on whether trial courts are required to submit a jury question on whether the defendant was aware of the custom at the time of the agreement. *See Zeta*, No. 01-99-00553-CV at *5 fn. 1. Both the existence of a split among the courts of appeals and the negative impact upon the jurisprudence of the state favor granting review in this case.

A. This Court Should Grant Review Because the Court of Appeals’ Erroneous Application of Parol Evidence to an Unambiguous Contract Impacts the Jurisprudence of the State by Undermining the Sanctity of Written Agreements.

The court of appeals’ published opinion adversely impacts the jurisprudence of the state. First, the court’s erroneous application of parol evidence of custom and usage, notwithstanding the language of the farmout agreement limiting notice of abandonment to before and not after casing had run, constitutes a sharp departure from this state’s jurisprudence on contract law. The bedrock tenant of contract law is the requirement of mutual assent between the contracting parties. *See Garrett v. International Milling Co.*, 223 S.W.2d 67, 71 (Tex. 1949); *Summers v. Mills*, 21 Tex. 77, 1858 WL 5419 at *6 (1858). “The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter.” *Summers*, 1858 WL 5419 at *6. Parties who execute unambiguous contracts delineating numerous duties on the behalf of each

party should not be required to fulfill additional contractual duties which the parties did not agree upon at the time of the contract. Here, the trial court imposed extra-contractual duties and substantial damages upon Acme, the successor in interest to Total, despite the lack of a meeting of the minds by the parties on the issue of notice of post-casing abandonment. The parties agreed that Acme was required to give notice of plugging and abandonment before and not after casing had run. (App. Tab D).

Courts should not be able to rewrite a contract to add extracontractual duties that are omitted from an unambiguous contract. The court of appeals erroneously concluded that parol evidence of custom and usage was “admissible to add to a contract that is silent on a particular matter” without conducting into inquiry into whether post-casing notice of abandonment was an essential missing term or an extracontractual duty for which neither party bargained. *See Acme Resources MAQ, Inc. v. Zeta*, No. 01-99-00553-CV at *11 (Tex. App. – Houston [1st Dist.] June 15, 2000). As aptly stated by the Amarillo Court of Appeals, a court cannot utilize parol evidence to rewrite an unambiguous contract:

Simply put, we cannot change the contract merely because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it. This is so because parties to the contract are considered masters of their own choices. They are entitled to select what terms and provisions to include in a contract before executing it. And, in so choosing, each is entitled to select what terms and provisions to include in a contract before executing it. And, in so choosing, each

is entitled to rely upon the words selected to demarcate their respective obligations and to strike and, thus, voluntarily bind themselves in the manner they choose. And, that is why parties are bound by their agreement as written. For a court to change the parties' agreement merely because the Court did not like the agreement, or because one of the parties subsequently found it distasteful, would be to undermine not only the sanctity afforded the contract but also the expectations of those who created and relied upon it.

Cross Timbers Oil Co. v. Exxon Corp., 22 S.W.3d 24, 26 (Tex. App. – Amarillo 2000, app. for mandamus filed 6/9/00). The trial court incorrectly concluded that the contract was silent on whether post-casing notice of abandonment was required. By specifically requiring notice of abandonment “[s]hould Farmee decide not to run casing,” the parties clearly limited notice of abandonment to before and not after casing had run. (CR:). Zeta could have negotiated additional language requiring notice of any abandonment.

Second, this Court's published opinion adversely affects the jurisprudence of this state because the issue of whether to apply parol evidence of custom and usage often arises in contract actions both inside and outside of the oil and gas industry. To allow custom and usage to change a written instrument despite the lack of the parties' knowledge or their intentional disregard of such custom allows the rewriting of an agreement based upon subsequent conditions that may not have even existed at the time of the contract. *See Provident Fire Ins. Co. v. Ashy*, 139 Tex. 334, 340, 162 S.W.2d 684, 686 (1942); *Atwood v. Rodman*, 355 S.W.2d 206, 214 (Tex. Civ. App.

– El Paso 1962, writ ref’d n.r.e.). Allowing the First District’s opinion to stand in this case would erode confidence that courts will enforce agreements as written. In this case, the parties agreed that Acme would provide notice of abandonment prior to running casing and not after. (CR:). But the court of appeals’ opinion places an unwieldy burden upon parties, like Acme, to specifically exclude duties under custom and usage that may not even be in existence at the time of the contract. It is not enough that the language of the contract limits notice to pre-production; apparently, the First District requires that operators expressly state that they need not give notice of plugging or abandonment at any time other than pre-production.

B. This Court Should Also Grant Review to Remedy a Split Between the Appellate Districts as to Whether Custom and Usage Should be Submitted in a Two-Part Jury Question Requiring Both Evidence of the Custom’s Existence as Well as the Parties’ Knowledge of such Custom.

Review should also be granted to resolve conflict created by the First District’s minority position that trial courts need not submit a jury question on whether a defendant had knowledge of custom and usage. Other courts of appeals have held that a trial court should submit a two-part jury question on custom and usage: (1) whether a custom and usage existed at the time the contract was made and (2) whether the custom was so universal and widespread as to be known by all the parties. *See Texas Gas Exploration Corp. v. Broughton Offshore Ltd. II*, 790 S.W.2d 781, 785 (Tex. App. – Houston [14th Dist.] 1990, no writ); *Corso v. Carr*, 634 S.W.2d 804,

808 (Tex. App. – Fort Worth 1982, writ ref’d n.r.e.); *Arnold D. Kamen & Co. v. Yung*, 466 S.W.2d 381, 366 (Tex. Civ. App. - Dallas 1971, writ ref’d n.r.e.); *State Nat’l Bank of Houston v. Woodfin*, 146 S.W.2d 284, 286 (Tex. Civ. App. – Galveston 1940, writ ref’d). As acknowledged in its opinion, the First District is in the minority in affirming the trial court’s omission of a jury question on whether Acme had knowledge of the custom. *See Acme Resources MAQ, Inc. v. Zeta*, 23 S.W.3d 551, 556 fn.1 (Tex. App. – Houston [1st Dist.] 2000, pet. filed 9/6/00).

In its Response in Opposition to Acme’s Petition for Review, Zeta claimed that this Court lacks jurisdiction because *Broughton Offshore*, *Corso*, *Kamen*, and *Woodfin* do not contain “a substantial identity of the material facts.” (Respondent’s Brief p. 3, citing *Coast Corp. v. Garza*, 979 S.W.2d 318, 320 (Tex. 1998)). Specifically, Zeta argued that the contracts in *Broughton Offshore*, *Corso*, and *Kamen* contained entirety clauses and express language absent in this case. (Respondent’s Brief pp. 4-5). Thus, Zeta concludes that this Court lacks jurisdiction because the conflicts between the cases are not “so far on the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.” (Respondent’s Brief, p. 5, citing *Christy v. Williams*, 298 S.W.2d 565, 567 (Tex. 1957)). But Zeta does not discuss the materiality of the factual distinctions between the conflicting cases, thereby, ignoring another principle expressed in *Coast Corp.* “[I]mmaterial factual variations do not preclude a finding of jurisdictional conflict.” *Coast Corp.*, 979

S.W.2d at 320. “A conflict could arise on very different underlying facts if those facts are not important to the legal principle being announced.” *Id.* In *Newman v. Obsteller*, 960 S.W.2d 621 (Tex. 1997), the Court utilized its conflict jurisdiction to interpret a statute even though the conflicting cases arose under very different facts. *See Newman*, 960 S.W.2d at 621 (suit by high school student against coach for intentional infliction of emotional distress); *Galveston v. Whitman*, 919 S.W.2d 929, 932 (Tex. App. – Houston [14th Dist.] 1996, writ denied) (suit against emergency service dispatchers for alleged delay in responding to an emergency); *Davis v. Mathis*, 846 S.W.2d 84, 88 (Tex. App. – Dallas 1992, no writ) (suit against a bus driver arising from accident). Zeta’s argument that this Court lacks jurisdiction because the conflicting cases do not present identical facts is meritless in the absence of any discussion of the materiality of these factual distinctions.

As explained by Justice Hecht in his dissent in *Coastal Corp.*, the true test of the Court’s conflict jurisdiction is “whether the court of appeals’ decision on a material point of law is so contrary to the decision of another court or this Court, disregarding unimportant factual distinctions, that if both decisions were made by one court, the later would have to overrule the earlier.” *Coastal Corp.*, 979 S.W.2d at 327 (J. Hecht, dissenting), *accord Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 431 (Tex. 2000) (focus for conflict jurisdiction is whether “differences in the facts, including procedural facts, prevent the holding in one case from controlling in another”). In

Bernal, this Court concluded that “[c]onflicts jurisdiction does not require that the two cases be identical either on the facts underlying the causes of action nor on the procedural facts.” *Bernal*, 22 S.W.3d at 431. This Court then utilized its conflict jurisdiction in *Bernal* to clarify whether a jury must return findings on liability and actual damages issues before it heard evidence on punitive damages. *Id.* at 432. Hence, Zeta’s argument that this Court lacks jurisdiction fails in the absence of material factual distinctions between this case and even one of the opinions in *Corso*, *Kamen*, or *Broughton Offshore*.

In addition to the implicit conflicts presented by *Corso*, *Woodfin*, and *Broughton Offshore*, an express conflict exists between the First District Court of Appeal’s decision in this case and the decision of the Fifth District Court of Appeals in *Kamen*. In that case, the Fifth District Court of Appeals rejected *Kamen*’s assertion that the trial court incorrectly refused to submit a special issue on custom and usage. In addition to concluding that the evidence was insufficient to submit such a special issue, the court stated that *Kamen*’s requested issue should have been properly submitted as two issues on both existence and knowledge:

Finally, appellants only requested the one issue [on the existence of the custom and usage] whereas, in order to establish the custom and usage it would be incumbent upon appellants to also prepare and submit an issue relative to the knowledge of the alleged custom and usage by Young. This was not done. Appellants’ Point 3 is overruled.

Kamen, 466 S.W.2d at 386. As recognized by the First District Court of Appeals in its opinion below, its holding conflicts with the Fifth District Court of Appeals' holding in *Kamen*. See *Acme Resources MAQ, Inc. v. Zeta*, No. 01-99-00553-CV *10, fn 1 (Tex. App. – June 15, 2000, pet. filed). The Fifth District required a two-part jury question on both the existence and the parties' knowledge of custom and usage. In this case, the First District Court of Appeals affirmed the trial court's submission of a jury question only addressing whether custom and usage existed in 1981 requiring notice of abandonment. The jury never determined whether the custom and usage was so universal as to put Acme on constructive notice of the custom and usage. The two holdings cannot be reconciled and create a conflict in authority.

This Court should grant review to resolve the split among the courts of appeals and to establish clear guidelines for charging a jury on custom and usage. Although improperly admitted in this case, parol evidence of custom and usage is often necessary to illuminate ambiguous contracts or those with essential missing terms. The First District should not be allowed to continue its divergence from the established rule of law adopted by several other appellate courts, especially when the appellate court issued a published opinion in this case. Such a conflict between the appellate courts will encourage forum shopping in cases where custom and usage arises because the position advocated by the First District restricts the fact-finder's role in determining whether a party actually was aware of the custom and usage.

Further, by invading the province of the jury and making a finding as a matter of law whether a custom and usage is so universal as to raise a presumption of constructive knowledge, the court effectively eliminates an element of a plaintiff's burden of proof.

POINT II THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF Acme'S MOTION FOR DIRECTED VERDICT AND THE JUDGMENT BELOW WHERE: PAROL EVIDENCE OF CUSTOM AND USAGE WAS INADMISSIBLE TO ALTER OR ADD NONESSENTIAL TERMS TO AN UNAMBIGUOUS CONTRACT; THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE THE ALLEGED CUSTOM AND USAGE EXISTED IN 1981; THE TRIAL COURT INVADDED THE PROVINCE OF THE FACT FINDER IN REFUSING TO SUBMIT A JURY QUESTION ON WHETHER Acme HAD CONSTRUCTIVE OR ACTUAL KNOWLEDGE OF THE CUSTOM AND USAGE; AND THE COURT DISREGARDED THE PLAIN LANGUAGE OF THE EXCULPATORY CLAUSE RELEASING Acme FROM LIABILITY.

Review should be granted to correct an erroneous opinion adversely affecting the jurisprudence of this state. The trial court disregarded well-established contract principles by engrafting extracontractual duties onto a complete, unambiguous contract, by determining that a custom and usage was so widespread and general – despite the lack of any temporally-specific evidence of custom and usage in 1981 – that Acme had constructive notice of it, and by disregarding the plain language of the farmout agreement's exculpatory clause relieving Acme of liability in this case. First, parol evidence of custom and usage was inadmissible in this case to vary and add to

the terms of an unambiguous, complete contract. Any notice of abandonment was limited to before and not after casing had run. If Zeta desired post-casing abandonment then he should have included such language in the contract, and the trial court erred in altering and adding to the contract language. Second, even if parol evidence of custom and usage was admissible in this case, which Acme contests, the evidence is legally insufficient to prove that such custom and usage existed at the time of the contract. All of Acme's witnesses testified about a nebulous custom and usage requiring notice of abandonment without stating that such custom and usage existed in 1981. The jury charge in this case specifically required the jury to find that custom and usage existing in 1981 required notice of abandonment. *Acme*, 23 S.W.3d at 554.

Third, the lower court failed to submit a question regarding Acme's knowledge of the custom and usage and only submitted a jury question on whether the custom and usage existed in 1981. (RR:). Instead, the court supplanted the role of fact finder by determining that the custom and usage was so universal and general that Acme had constructive and/or actual knowledge of it.

A. Parol Evidence of Custom and Usage is not Admissible to Impose a Extra-Contractual Duty under a Complete, Unambiguous Contract that Clearly Limits Notice of Abandonment to Before and not After Casing had Run.

By ignoring Texas law prohibiting admission of parol evidence of custom and usage to add a contractual obligation to an unambiguous contract, the lower courts imposed additional duties to which the parties did not agree at the time the farmout agreement

was executed in 1981. “In the absence of fraud, accident, or mistake, Parol Evidence is inadmissible to vary, alter, or add to the terms of a written contract, clear in its terms this rule forbids the adding by parol where the writing is silent as well as to vary it where it speaks.” *Corso v. Carr*, 634 S.W.2d 804, 809 (Tex. App. – Fort Worth 1982, writ ref’d n.r.e.). It is undisputed that the contract was unambiguous – in fact, Zeta stipulated at trial that the 1981 Farm out Agreement was unambiguous. (RR1: 160-161). Therefore, in the absence of allegations of ambiguity, fraud, accident, or mistake, the issue of custom and usage became moot.

1. Parol Evidence of Custom and Usage was Improperly Admitted to Alter the Terms of the Contract by Rendering the Pre-Casing Notice of Abandonment Provision Superficial.

Moreover, contrary to the court of appeals’ determination, parol evidence was not admissible to vary the terms of the contract that expressly limited notice of abandonment to before and not after casing had run:

Should Farmee decide not to run casing, but to plug and abandon any well, Farmee shall give Farmor Forty-eight (48) hours within which to elect whether or not it desires to take over and assume operations on such well.

(CR: Article IV(B)). “In construing an unambiguous oil and gas lease [the court’s] task is to ascertain the parties’ intentions as expressed in the lease.” *Addison Bank v. Temple-Eastex, Inc.*, 665 S.W.2d 550, 553 (Tex. App. -- El Paso), *reversed on other grounds*, 672 S.W.2d 793 (1984). “[W]here a

contract is clear and complete, new terms cannot be added by incorporating a usage or a custom that var[ies] or contradict[s] the terms of a plain and unambiguous contract, either expressly or by implication.” *Republic National Bank of Dallas v. National Bankers Life Ins. Co.*, 427 S.W.2d 76, 80 (Tex. App. -- Dallas 1968, writ ref. n.r.e.) (rejecting application of custom and usage to vary or add to terms of unambiguous contract). The intent of the parties is clear from the express language of the contract that specifically required notice of abandonment before and not after casing had run. (RR:). Engrafting an additional duty to give notice after casing would nullify the language in article IV specifically requiring notice if Acme abandoned the well prior to casing.

2. Parol Evidence of Custom and Usage was Improperly Admitted to Add to the Terms of the Contract by Engrafting an Extracontractual Duty of Post-Casing Notice Favorable to Zeta.

The First District Court of Appeals’ conclusion that “[e]vidence of custom and usage is admissible to add to a contract that is silent on a particular matter” is an overstatement. Although it is true that a parol evidence is admissible to provide a missing, essential term to a contract, courts may not rewrite a contract to add extracontractual duties not provided for in a contract. “In the absence of fraud, accident, or mistake, Parol Evidence is inadmissible to vary, alter, or add to the terms of a written contract, clear in its terms this rule forbids the adding by parol where the writing is silent as well as to vary it

where it speaks.” *Corso v. Carr*, 634 S.W.2d 804, 809 (Tex. App. – Fort Worth 1982, writ ref. n.r.e.). Thus, a court may not rewrite a contract to add an extracontractual duty that the parties omitted from the contract by exclusion.

The specific language limiting any notice of abandonment to before casing had run and the inclusion of other post-drilling duties in the contract show that the parties intended to exclude any post-casing notice requirement. “In construing an unambiguous oil and gas lease [the court’s] task is to ascertain the parties’ intentions as expressed in the lease.” *Addison Bank v. Temple-Eastex, Inc.*, 665 S.W.2d 550, 553 (Tex. App. -- El Paso), *reversed on other grounds*, 672 S.W.2d 793 (1984). Moreover, the exclusion of additional contractual provisions by omission does not render a contract “silent” on that issue. *See Dowdle v. Texas American Oil Corp.*, 503 S.W.2d 647 (Tex. App. – El Paso 1973, no writ). In *Dowdle*, the El Paso Court of Appeals rejected the application of custom and usage to add terms to an unambiguous contract. The employment contract in that case provided that the company would pay its president \$60,000. After his resignation, the president sued his former employer for severance paid, alleging that custom and usage dictated that he be paid a severance package, or at the very least, for his un-used vacation time. *Id.* at 648-49. The appellate court determined that custom and usage was

inadmissible because the absence of any language requiring a severance package indicated the parties' intention to exclude such provisions:

[Mr. Dowdle] was hired for \$60,000 and that is plain. The absence of additional provisions from this contract indicate an intention to exclude them, rather than an intention to include them. The maxim 'expressio unius est exclusio alterius' applies. Dowdle accepted this compensation figure for the last year when he accepted his employment and entered upon his duties. This plain statement of compensation effectively excludes any other compensation.

Dowdle, 503 S.W.2d at 652. Likewise, in this case, the omission of an provision requiring notice of abandonment after casing had run indicates the parties' intent to exclude such a provision. To include or express one thing implies the exclusion of the other. By temporally limiting the notice requirement to the time period prior to the running of casing, the parties clearly intended to omit a requirement of notice before post-casing abandonment. The inclusion of other provisions governing the parties post-casing relationship, such as those governing the drilling of additional wells, indemnification, insurance matters, rentals, royalties, and surrender of leases, shows that the agreement was intended to govern the parties' relationship both before and after casing had run. The fact that a farm-out agreement, by definition, establishes the obligation of the assignee to drill one or more wells does not support Zeta's contention before this Court that the agreement in this case only established the parties' pre-casing duties and was, therefore, silent on Acme's

duty of notice of post-casing abandonment. (Respondent's Brief pp. 7-8, citing *Mengden v. Peninsula Prod. Co.*, 544 S.W.2d 643, 645 n. 1 (Tex. 1976)). The parties temporally limited the notice requirement prior to running casing and omitted any notice requirement of abandonment after casing had run. (P.Ex.7 - IV.B).

Other jurisdictions across the country have also concluded that parol evidence of custom and usage is inadmissible to add a nonessential term to an unambiguous contract. See *Amoco Production Co. v. Em Nominee Partnership Co.*, 2 P.3d 534 (Wy. 2000); *Wood v. All American Assurance Co.*, 324 S.E.2d 483 (Ga.App. 1984). In *Amoco*, the Wyoming Supreme Court concluded that parol evidence of custom and usage was inadmissible "to fill a hole in a Unit Agreement and create an obligation to refund overriding royalties." *Amoco*, 2 P.3d at 537. The unit agreement did not require reimbursement of royalty payments for production obtained prior to the effective date of any revision of the participating area under the unit agreement, but was silent as to whether reimbursement of royalty payments for production after the revision's effective date was required. Amoco contended that reimbursement for royalty payments arising from production after the revision effective date is the custom and practice, that the defendants were aware of the custom and usage, and that custom and usage supplemented the

contract provisions. *Id.* at 540. The Wyoming Supreme Court rejected any application of evidence of custom and usage to add to the clear terms of the unit agreement:

Nothing in the language of Article 11 of the Unit Agreement addresses the repayment of leasehold royalties previously paid. Its plain language is concerned only with the potential of retroactive adjustment of royalties for production that had occurred prior to the effective date of the revision of the participating area. Amoco's endeavor to invoke the testimony of experts with respect to industry custom and practice in applying this language inverts our rule with respect to extrinsic evidence. Instead of relying upon the extrinsic evidence to resolve an ambiguity, Amoco seeks to invoke the extrinsic evidence to structure an ambiguity. This would amount to this Court writing a new contract for the parties, and we are foreclosed from that endeavor.

Amoco, 2 P.3d at 541. The language in the contract currently before this court is equally clear: "Should Farmee decide not to run casing, but to plug and abandon any well, Farmee shall give Farmor Forty-eight hours within which to elect whether or not It desires to take over and assume operations on such well." There is no language requiring Acme to give notice of abandonment occurring after casing. Zeta seeks to "invoke the extrinsic evidence to structure an ambiguity" in his favor, but this Court, like the Wyoming court, is foreclosed from structuring a more favorable contract for Zeta by adding nonessential terms supplementing the contract with extracontractual duties

In applying general contract principles, the Court of Appeals of Georgia has also rejected the admission of parol evidence of custom and usage to add an extracontractual notice duty to an unambiguous contract. *See Wood*, 324 S.E.2d at 483. In *Wood*, a contract between an insurance company and two servicing agents provided that the servicing agents would receive full commissions “until such time as the account named above makes written request to the Company that the servicing agent named above no longer acts as its servicing agent.” *Id.* at 655. The service agents’ agency was terminated in writing on November 5, 1976, effective December 1, 1976. The agents sued for breach of contract, contending that they were entitled to 30 days’ notice prior to termination. The Georgia Court of Appeals stated that such notice was not required under the clear, unambiguous language of the contract:

[T]he appellants may not with parole evidence impose upon the unambiguous written terms of the contract, which do not require thirty days’ advance notice of termination, an alleged industry practice of thirty days’ notice.

Wood, 324 S.E.2d at 656-57. The court’s reasoning under general contract principles is equally applicable to this case. Regardless of the alleged custom and usage requiring notice of abandonment after casing had run, the unambiguous contract expressly required notice of abandonment only prior to casing, and not after. Accordingly, the trial court erred in admitting parol

evidence of custom and usage to add a non-essential term to an unambiguous contract.

If Zeta had truly intended to receive notice of abandonment both before and after casing had been run, he should have included such language in the contract. *See Texas Gas Exploration v. Broughton Offshore Ltd. II*, 790 S.W.2d 781, 785 (Tex. App. – Houston [14th Dist.] 1990, no writ) (rejecting application of custom and usage where unambiguous contract only granted limited unilateral rights and parties failed to include other unilateral rights in contract). Other jurisdictions have refused to admit evidence of custom and usage to supplement a contract with nonessential terms. *See Burt v. Craig*, 360 P.2d 976 (Col. 1961). In *Burt*, the plaintiff sued to recover the appreciation value of an insurance company that he purchased, only to later default on the promissory note and mortgage. The purchase agreement specifically stated that appreciation value would be computed as “1 3/4 times the average annual net commissions . . .” The plaintiff contended that the appreciation equation included all commissions, and the defendants contended that “net commissions” excluded the sale of net or target businesses in accordance with custom and usage. *Id.* at 978-79. The Colorado Supreme Court affirmed the lower court’s refusal to consider custom and usage. The court stated “[i]f the Burts wanted ‘target or public’ business excluded from the average annual net

commissions they could have easily inserted a provision to that effect in the contract. Not having done so, they are bound by the contract as written.” *Burt*, 360 P.2d at 979. Here, the plain language of the contract only requires notice prior to casing. If either party wanted a provision requiring notice of abandonment after casing had run, they could have included such express language in the contract. In order for commerce to operate properly, contracts must be enforced as written and not on the basis of an inference rather than a meeting of the minds.

B. Even if the Trial Court Properly Admitted Parol Evidence of Custom and Usage, No Evidence was Offered that the Alleged Custom and Usage Existed at the Time of the Contract in 1981.

This Court should grant review because the court of appeals erroneously concluded that Zeta presented sufficient evidence that custom and usage existed in 1981 requiring notice prior to plugging and abandoning a well. *See Zeta*, 23 S.W.3d at 556. The jury was specifically charged on whether the alleged custom and usage existed in 1981. *Id.* at 554. The only evidence of custom and usage was vague, nebulous, and not temporally-specific to 1981, when the farmout agreement was executed. Regardless if Acme was only entitled to a single broad-form jury issue on custom and usage, which Acme contests in its Petition for Review, the evidence must still be legally sufficient to support the jury’s findings and the court’s judgment in this case. *See Corso*, 634 S.W.2d at 808 (reversing judgment where parol evidence of custom

and usage was improperly admitted in absence of any evidence of custom and usage during relevant period). Accordingly, in order for the evidence to be legally sufficient to support the jury finding, the record must show some evidence that custom and usage requiring notice of abandonment existed in 1981.

The evidence is legally insufficient to support the submission of a jury issue on custom and usage or to support the judgment. Zeta offered no evidence that custom and usage existed in 1981 requiring post-casing notice of abandonment. Evidence of custom and usage must be temporally specific, and even a disparity of as little as a year may render the evidence insufficient. *See Corso v. Carr*, 634 S.W.2d 804, 808 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.). In *Corso*, the Fort Worth Court of Appeals concluded that evidence of custom and usage in 1978 did not apply to whether custom and usage required a seller to pay discount points in 1977. During trial, Zeta witness Doe made fleeting reference to American Association of Petroleum Landmen forms, which allegedly incorporated practices and procedures happening in the oil business when the forms were issued in 1956 and 1977. No testimony was heard regarding the contents of these forms in 1981. *Zeta*, 25 S.W.3d at 555. The introduction of industry forms from the 1950s and 1977 does not establish that the custom existed in 1981. The evidence in this case presents an even bigger, four-year gap between proof of custom and usage in a 1977 form and the time the agreement was executed in 1981.

Moreover, the testimony by Zeta's witnesses, at best, established a current custom and usage requiring notice of abandonment which cannot be retroactively applied to determine the parties' intent at the time the contract was executed in 1981. See *Atwood v. Rodman*, 355 S.W.2d 206, 214 (Tex. Civ. App. – El Paso 1962, writ ref. n.r.e.). *Atwood* involved a dispute over whether usage involving advances in science and technology had recharacterized limestone as a mineral covered in a mineral deed executed years prior. *Id.* at 214. The *Atwood* court refused to consider evidence of custom and usage occurring years after execution of the contract because to do so would require that “after science and technology find new uses, ... for various components of the earth or its surface, all contracts would again have to be re-examined, and the owners of surface and mineral estates would not know, now or then, the exact perimeters of what they hold.” *Atwood*, 355 S.W.2d at 214. Not only does the record show that Zeta admitted knowledge of the abandonment of the least, but it is clear that Zeta showed no interest in working the well at the time of the plugging in 1988 because the technology did not exist to make the well productive until years later. (RR 4-797 and 5-925). Only then, did Zeta sue Total for lack of notice of abandonment. In an attempt to engraft an extracontractual duty of post-casing notice, Zeta relies upon vague testimony by two witnesses as to the current custom and usage. Doe testified that there had been and was a “practice” where “notice is typically given in relation to plugging and abandoning” and that “any experienced operator” in the oil and gas industry understood this as it was “common

knowledge.” *Zeta*, 25 S.W.3d at 554. Madison testified that a non-operating working interest owner would be entitled to notice of plugging and abandonment so that he or she may have an opportunity to take over a well. *Id.* Neither witness made specific reference to 1981, the year the parties executed the farmout agreement.

Zeta’s reliance upon a discussion between XYZ’s landman and Zeta, the alleged “handshake deal” for which he provides no time reference, also does not prove that the custom and usage existed in 1981. (Respondent’s Brief p.11). “Conversations and negotiations preceding the execution of written instruments are inadmissible since same are deemed to have been merged in the writing itself.” *Texas Export Dev. Corp. v. Schleder*, 519 S.W.2d 134, 137 (Tex. Civ. App. – Dallas 1974, no writ), *citing* 2 McCormick and Ray, Texas Law of Evidence s 1601 (2d ed. 1956). The doctrine of merger acts as a corollary to the parole evidence rule, denying “efficacy to prior agreements or understandings, whether written or oral,” when an agreement is subsequently reduced to writing. *Leon, Ltd. et al v. Albuquerque Commons Partnership*, 862 S.W.2d 693, 700 (Tex. App. -- El Paso 1993, no writ); *Wilkins v. Bain*, 615 S.W.2d 314, 315 (Tex. Civ. App. -- Dallas 1981, no writ); *Davis v. Andrews*, 361 S.W.2d 419, 423 (Tex. Civ. App. -- Dallas 1962, writ ref. n.r.e.). It is not necessary for the written agreement to contain a merger clause for the doctrine of merger to apply. *See Smith v. Smith*, 794 S.W.2d 823, 827 (Tex. App. -- Dallas 1990, writ withdrawn); Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction*

and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation, 49 Baylor L.Rev. 657, 710 (1997) (“Once the parties have reduced their agreement to writing they are presumed to have selected from prior negotiations only the promises and agreements for which they choose to be bound.”) (citation omitted). Zeta testified that he had a meeting with the landman for Acme’s predecessor in 1981 and that they agreed that he would have the right to take over the well once it paid out. *Zeta*, 23 S.W.3d at 556. Quite simply, any alleged oral agreement between two parties is superseded by a written agreement that concerns the same subject matter is inadmissible parol evidence. The First District Court of Appeals erroneously considered this inadmissible parol evidence to show the parties intent to incorporate custom and usage into their written contract. *Zeta*, 23 S.W.3d at 556. This parol evidence was improperly admitted under the guise of proving the parties intent when executing the farmout agreement.

In its Brief in Opposition to the Petition for Review, Zeta skirts the lack of temporally-specific evidence establishing the existence of custom and usage in 1981 and, instead, argues that Acme waived this point by not attacking expert testimony regarding custom and usage. (Respondent’s Brief pp. 12-14). *See Collora v. Navarro*, 574 S.W.2d 65, 70 (Tex. 1978) (a failure to cross examine undermines the primary thrust of the complaint); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (a court may be entitled to decide an issue as a matter of law when there is no

conflict in the evidence); *accord, Ralston Purina Co. v. Barkley Feed & Seed*, 722 S.W.2d 431, 434 (Tex. App. – Houston [1st Dist.] 1986), *rev'd on other grounds*, 744 S.W.2d 932 (Tex. 1988); *Taylor v. Higgins Oil & Fuel*, 2 S.W.2d 288, 303 (Tex. Civ. App. – Beaumont 1928, no writ); *Exxon Corp. v. West*, 543 S.W.2d 667, 673 (Tex. Civ. App. – Houston [1st Dist.] 1976, writ ref'd n.r.e.), *cert. denied*, 434 U.S. 875 (1977) (the failure to offer contrary evidence constitutes effective corroboration of the testimony of an expert). Zeta's deceptively simple argument impermissibly shifts the burden of proof on custom and usage from Zeta to Acme. Under Zeta's theory, Acme failed to meet its burden of proof by not cross-examining Zeta's experts about their failure to testify that the custom and usage existed in 1981, but Acme is not required to disprove the existence of such custom and usage in 1981. Zeta's attempt to shift the burden of proof cannot remedy the glaring lack of evidence that the custom and usage existed in 1981.

C. A Trial Court Cannot Invade the Province of the Factfinder in Presuming that a Party Has Knowledge of a Custom, thereby Eliminating an Element of the Plaintiff's Burden of Proof.

The appellate court in this case created a split among Texas appellate courts by assuming the minority position that a jury question regarding Acme's knowledge of custom and usage was unnecessary because "upon a showing that a custom is general and universal, the parties are presumed to know of its existence" unless they rebut the presumption of knowledge. *Zeta*, No. 01-99-00553-CV at *10. The parties'

knowledge of custom and usage is a necessary element of proving application of custom and usage to a contract. *See generally Barreda v. Milmo Nat'l Bank*, 252 S.W. 1038, 1039-40 (Tex. Comm'n App. 1923, judgm't adopted). By holding that the trial court properly inferred that Acme had knowledge of the custom based upon the trial court's conclusion that the custom was universal, the appellate court disregarded the dictates of *Barreda*, determined a question of fact regarding the universality of the alleged custom and practice as a matter of law, and eliminated an element of the plaintiff's burden of proof.

Although the appellate court cited *Barreda* in support, it did not explain how the court, rather than the jury, had the authority to make the factual finding that the custom and usage requiring notice of plugging and abandonment was so widespread in 1981 that it triggered a presumption of knowledge by Acme. It is unclear from *Barreda* whether the case was even tried to a jury and whether the court submitted questions to the jury regarding the prevalence of the custom and usage in that case. As stated by the Galveston Court of Appeals, the existence of custom does not automatically equate that the custom is so universal and widespread as to be known by all parties:

While the record in the instant case shows said custom to have been recognized in brokerage and banking circles, there is neither pleading that appellee was familiar with the custom relied on, or that it was so general and universal as to charge appellee with knowledge of it, nor

is there evidence or circumstances which would charge him therewith.

State Nat'l Bank of Houston v. Woodfin, 146 S.W.2d 284, 286 (Tex. Civ. App. – Galveston 1940, writ ref'd). Custom and usage is a question of fact, for “such custom and usage change with time.” *Bates v. Texas Electric RY. Co.*, 220 S.W.2d 707, 711 at fn. (Tex. Civ. App. 1949, no writ). A trial court cannot make a finding that a custom and usage is so universal that a party’s constructive knowledge will be presumed.

Despite prohibitions against a court summarily determining issues of fact, in this case, the court, rather than the jury, made the factual finding that the alleged custom and usage was “general” and “universal.” Although Acme is unaware of a Texas case specifically addressing whether the universality of a custom and usage is an issue of fact or law, the Colorado Court of Appeals has concluded that “the issue of knowledge of the trade usage, whether actual or constructive, is generally a question to be decided by the trier of fact.” *Threadgill v. Peabody Coal Co.*, 526 P.2d 676, 678 (Colo. App. 1974), *citing* 5 S. Williston, *Contracts* s 662 (3d ed. W. Jaeger). By failing to submit the question of the extent of the custom and usage to the jury, the trial court invaded the province of the fact finder and eliminated Zeta’s burden of proving to a jury that the custom and usage was so general and widespread that it could be presumed that Acme had constructive knowledge. In any event, even if the

court could dispose of a question of fact as a matter of law, the evidence offered in this case fell far short of showing as a matter of law that the custom of giving notice prior to abandonment was so widespread as to create a presumption of knowledge of the custom by Acme. In fact, Zeta’s own expert responded that “usually” it was the practice to give notice of abandonment to a nonoperator. *Zeta*, 23 S.W.3d at 555. Acme respectfully urges Court to grant review in order to remedy the split between the circuits and to clarify the roles of the court and the jury in determining whether custom and usage is so universal to trigger a presumption of constructive knowledge.

D. THE COURT OF APPEALS MISAPPLIED TEXAS LAW BY LIMITING THE EXCULPATORY CLAUSE IN THE 1981 AGREEMENT TO LIABILITY ARISING FROM RIGHTS IN THE ACREAGE EVEN THOUGH THE PLAIN LANGUAGE OF THE CLAUSE ALSO PRECLUDES LIABILITY FOR FAILURE TO MAINTAIN Zeta’S WORKING INTEREST UNDER THE AGREEMENT.

Acme respectfully urges this Court to reconsider its limitation of the exculpatory clause in the farmout agreement to claims arising from “rights in the acreage” because such a holding is contrary to principles of contractual interpretation. The exculpatory clause states:

Farmee will use its best efforts to maintain all rights in the acreage, but the Farmee shall incur no liability to Farmor as a result of its failure to maintain the interest of both Farmor and Farmee hereunder, all or any of their rights in said acreage, or any part thereof.

(P.Ex.7). This Court concluded that Zeta did not seek damages for his rights in the acreage, but instead “sued for breach of a contractual duty to give notice imposed by

custom and usage.” *Zeta*, No. 01-99-00553-CV at *4 (Tex. App. – Houston [1st Dist.] June 15, 2000, n.p.h). In reaching this conclusion, this Court focused upon the phrase “rights in the acreage” to the exclusion of the other phrases in the clause and the disjunctive connector “or.”

1. In Focusing Solely upon the Phrase “Rights in the Acreage,” this Court Disregarded the Requirement that all Words in a Contract be Given Effect so as not to Render a Phrase Redundant or Nugatory.

Acme respectfully submits that this Court disregarded tenants of contractual construction by ignoring the phrase “interest of both Farmor and Farmee hereunder” and, thus, improperly limiting application of the exculpatory clause to damages arising from “rights in the acreage.” Texas law discourages contractual interpretation that renders a phrase redundant or nugatory. Instead, courts must examine a written agreement in its entirety, harmonizing all of the provisions, so that none of the provisions will be rendered meaningless. *Communications Transmission, Inc. v. TriStar Communications, Inc.*, 798 F.Supp. 406, 407 (W.D. Tex 1992). “The presumption is that the contracting parties intend every clause to have effect, unless the clauses are irreconcilable or repugnant.” *Id.*, citing *Westwind Exploration v. Homestate Savings Ass'n*, 696 S.W.2d 378, 382 (Tex.1985). Thus, courts should give meaning to all words in a contract, rather than seizing upon one phrase to the exclusion of all others.

In this case, the phrases “interests of Farmor and Farmee hereunder,” “all or any of their rights in said acreage,” or “any part thereof” are independent from each other. In *Communications Transmission*, the appellate court reviewed a contractual satisfaction clause expressly limited to “quality of service or transmission.” *Communications Transmission*, 798 F.Supp. at 408. The court concluded that because all words and phrases are to be given effect, “service” was a broader term, independent from the term “transmission.” *Id.* Under this reasoning, the phrase “interests of Farmor and Farmee hereunder,” should be construed independently from the term “rights in the acreage.” Instead, this Court adopted Zeta’s interpretation of the exclusionary clause as “Farmee will use its best efforts to maintain all rights in the acreage, but the Farmee shall incur no liability to Farmor as a result of its failure to maintain ... all or any of their rights in said acreage.” (Appellee’s Brief p. 21). This Court’s interpretation improperly focuses solely on the “rights in the acreage” phrase, thereby rendering the phrase “interests of Farmee and Farmor hereunder” redundant and nugatory.

2. By Focusing Solely Upon the Phrase “Rights in the Acreage,” this Court Disregards the Disjunctive Connector “Or” Separating Distinct Phrases.

Not only do general contract principles require this Court to interpret the exculpatory clause in its entirety, but the use of the “or” conjunction requires this Court to give each phrase equal import. An objective and reasonable interpretation of a contractual clause separated by the disjunctive word “or” dictates that the two connected phrases are separate and apart from each other. *See Quindlen v. Prudential Ins. Co. of America*, 482 F.2d 876, 878 (5th Cir. 1973) (“the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately”); *Communications Transmission, Inc.*, 798 F.Supp. at 408 (holding that use of word “or” dictated that clause “quality of services or transmission” contained the term “transmission” and the broader, independent term “services”). By limiting the exculpatory clause to claims arising from “rights in the acreage,” this Court improperly disregarded the word “or” connecting the phrases “rights in the acreage” and “interest of both Farmor and Farmee hereunder.” The clauses are distinct and separate as is evident from the use of the disjunctive connector “or.” If the parties intended the phrases to be synonymous, they should have inserted words such as “and,” “including but not limited to” or “such as.”

3. This Court Erred in Limiting the Exculpatory Clause to Claims Arising from “Rights in the Acreage,” and Recovery for Acme’s Alleged Failure to Maintain Zeta’s Interest Under the Agreement Should be Barred.

Zeta cannot recover damages for the termination of its interest in the plugged and abandoned well because to do so would ignore the exculpatory clause’s express language that “Farmee shall incur no liability to Farmor as a result of its failure to maintain the interest of both Farmor and Farmee hereunder...” An interpretation of a contract which renders a provision meaningless is unreasonable. *See County of Maverick v. Texas Ass’n of Counties Workers’ Compensation Self-Insurance Fund*, 852 S.W.2d 700, 705 (Tex. App. – San Antonio 1993, no writ); *see also R.N. Stine v. Marathon Oil Co.*, 976 F.2d 254 (5th Cir. 1993) (holding that exculpatory clause applied to liability arising from breach of an operator’s duties of testing, turnover, or any well drilling); *Caddo Oil Co. v. O’Brien*, 908 F.2d 13, 17 (5th Cir. 1990) (concluding exculpatory clause applied to liability arising from accounting); *Grace-Cajun Oil Co. No. Two v. Damson Oil Corp.*, 897 F.2d 1364, 1366 (5th Cir. 1990) (applying exclusionary clause to liability arising from failure to file well status application). Like the Fifth Circuit cases of *Marathon*, *O’Brien*, and *Grace-Cajun Oil*, the exculpatory clause in this case precluded liability arising from the purported administrative duty of giving notice prior to post-casing abandonment.

This Court erred in limiting the exculpatory clause to liability arising from rights in the acreage, because Zeta's interest under the agreement included the working interest extinguished by Acme's plugging and abandonment of the McDuffie well. *See Young v. Rudd*, 226 S.W.2d 469, 473 (Tex. Civ. App. -- Texarkana 1950, writ ref. n.r.e.). In *Young*, the Texarkana Court of Appeals stated that "[t]he decisions of this state have long held that the conveyance of an interest in oil, gas and other minerals in the land constitutes an interest in the land." *Id.*, citing *Tex. Jr.*, Vol. 31-A, p. 87. "Royalty, bonus, and rentals under oil, gas and mineral leases constitute interests in the land, and they have well-defined meanings in the oil and gas industry. *Young*, 226 S.W.2d at 473. Likewise, in this case the development and operation of the drilling sites constitutes an "interest" under the farmout agreement. The farmout agreement governs not only the acquisition of the lease, but the development and operation of the drilling site as well. (P.Ex.7). In proving breach of contract, Zeta cannot allege on the one hand that Acme is liable for damaging his interests under the agreement by plugging and abandoning the well without notice, but then on the other hand ignore the exculpatory clause expressly precluding liability for failure to maintain his interest under the agreement. The exculpatory clause precludes recovery because Acme's alleged omission of notice of abandonment after casing had run extinguished Zeta's working interest in the well and resulted in "failure to maintain the Farmee or Farmor's

interest” under the agreement. Accordingly, the judgment should be reversed accordingly.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that the Supreme Court of Texas grant this petition for review, reverse the judgment of the court of appeals, remand the case for trial, and grant Petitioner such other and further relief to which it may be justly entitled.