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Supreme Court of Texas.
Carol Severance
v.
Jerry Patterson, Commissioner of the Texas General Land Office; Greg Abbott, Attorney General for the State of Texas; and Kurt Sistrunk, District Attorney for the County of Galveston, Texas.
No. 09-0387.

April 19, 2011.

Appearances:

J. David Breemer of Pacific Legal Foundation, for Appellant.Daniel L. Geyser from the Office of the Attorney General, for Appellees.

Before:

Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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JUSTICE NATHAN L. HECHT: The Chief Justice is not sitting in the first case. The Court is ready to hear argument in the first case.

MARSHAL: May it please the Court, Mr. Breemer will present argument for the Appellant. The Appellant has reserved five minutes for rebuttal.

ORAL ARGUMENT OF J. DAVID BREEMER ON BEHALF OF THE PETITIONER

ATTORNEY J. DAVID BREEMER: Good morning, Your Honors. The Court's initial deci-

sion was correct in its fundamental position that easements created by public use along the shore do not pick themselves up and roll inland onto new areas of private land not subject to public use simply because the vegetation line has moved. The key to this decision is not the avulsion or erosion doctrine. The key to this decision is settled easement law, holding that easements created by public use are defined by that public use in terms of extent and location and while they may deviate by minor degrees as public use moves uninterrupted, they do not substantially relocate on the basis of some change in a geological feature like vegetation.

JUSTICE DAVID M. MEDINA: What did Carol Severance lose that she didn't have or that she had? You know we talked about the bundle sticks last time and whether or not she actually received this when she acquired the property.

ATTORNEY J. DAVID BREEMER: Right.

JUSTICE DAVID M. MEDINA: It seems to me that she acquired the property after the 1958 statute and all these, and so, therefore, there was no easement there for her to acquire. She purchased that house and whatever was on there. So what did she bargain for?

ATTORNEY J. DAVID BREEMER: Well, she purchased a feasible title with her land ownership going to the high tide line and no easement ever proven on her property so what she lost was the fundamental right to exclude and control her property when it was determined that because the vegetation moved that now there's an easement and public access on that property where there had never been any public access before. So she's losing that fundamental right to lose her property. The fact that there was the Open Beaches Act prior to her purchase, it doesn't strip away her core fundamental common law rights because there is no common law easement or role in easement incorporated in the Open Beaches Act. So if the Open Beaches Act is taking away her right, then the Open Beaches Act is causing the taking of private property.

JUSTICE DEBRA H. LEHRMANN: Excuse me, may I ask you, did she have an expectation of exclusive use at that point in time when she brought that property?

ATTORNEY J. DAVID BREEMER: She absolutely did. It's not an ordinary hazard of beach property ownership to have your land turned into a public beach park overnight simply because the vegetation line disappears. That's a state-created hazard and if the state's going to create that hazard, then it has to mitigate for the impacts on private property rights, which don't stop at the right to exclude other, but as soon as you have that purported easement on there because the vegetation has moved, then you've got no right to repair, no right to rebuild. You can be removed at any time. That's not something you--

JUSTICE DEBRA H. LEHRMANN: --bought it, she didn't have that expectation, isn't that correct? It was because of a naturally occurring event that occurred later, correct?

ATTORNEY J. DAVID BREEMER: You expect naturally occurring events, but you don't expect that because the beach grass disappeared and you have a sandy lot one day that that means that that's all of a sudden public property.

JUSTICE DEBRA H. LEHRMANN: Well how often do, does the vegetation line move in this area of the state? Isn't it pretty frequently an occurrence that there are storms and hurricanes that move that vegetation line?

ATTORNEY J. DAVID BREEMER: Well sure. Again, you expect storms and hurricanes and you expect that they're going to have some effect, but you don't expect, nowhere in the common law can you find an expectation that because the vegetation disappears, therefore a public easement that's created down here is now going to be over there. That's not an ordinary expectation. That's a state-created doctrine. Even the Open Beaches Act didn't recognize that rolling easement doctrine when it was enacted and it didn't come into being later on and they still can't identify, I mean the state, still can't identify any common law authority that allows an easement created by walking on one strip of land to suddenly be way inland 150 feet because it's just denuded of vegetation overnight.

JUSTICE DEBRA H. LEHRMANN: But isn't there a distinction between the beach and, for example, a river because with a river, if you have some type of a sudden event, it's going to be very unusual, right? An earthquake. What's going to cause a river to move, which is usually a boundary, whereas when you're talking about the ocean, these events that cause the vegetation line to move are recurring. Don't they happen quite frequently? Do you know exactly how many times they've happened in the last 100 years?

ATTORNEY J. DAVID BREEMER: They've happened very often, but I think the crux of this case is not hurricanes or rivers. It's easements. Easements, when you're talking about river cases or beach cases, you have to put them in the context of easements. The easement created along Galveston was not created by the vegetation line. It was created by public use and once it's created by public use, that use defines where it is. Now maybe as use migrates inland as the water line moves, the use can migrate inland moderately, but it can't pick itself up and move because the vegetation line moved.
The vegetation line is only a boundary marker to the extent at the original easement. To the extent that it is coterminous is with the line of public use when it was created. Then it's a boundary marker. But once that vegetation line departs and leaves the area of public use and it's just way in there like to the highway on Bolivar Peninsula, it doesn't have anything to do with the easement anymore. It's just vegetation and the easement stays where the public use was.

JUSTICE DEBRA H. LEHRMANN: Well, if it doesn't roll, then isn't it going to be impossible perhaps to ever prove that public use not because somebody's put up a fence, which would be a legitimate, relevant way to prevent the hostile use, but because of acts of nature that can't be controlled and because of that, because that easement is going to naturally move

either to the land that's seaward of the vegetation line or it's going to move under water. Because of that recurring event, isn't it going to be practically impossible to ever prove an easement by prescription?

ATTORNEY J. DAVID BREEMER: Well, I wouldn't say it's impossible. The state has done it before. In fact, the easement on Galveston was proven by a prescription implied dedication by public use. So I don't think it's impossible and I don't think that the easement that, again, the court's initial decision was correct and it was correct in this sense that public use can migrate by minor degrees when it follows the water line uninterrupted, but it can't substantially relocate and so I'm not saying that it's absolutely rigidly fixed.
What I'm saying is the question before the Court that the Fifth Circuit certified is whether an easement rolls based on nothing but the vegetation line and the answer to that has to be no because there is no common law rule that allows that anywhere in the United States and including Texas.

JUSTICE DAVID M. MEDINA: It seems like that was a good balancing, to me anyway, test the way that the legislature came up with this compromise on the 200-foot vegetation line. I still don't understand if Carol Severance purchased this property subject to all the disclaimers that there's this easement why she even has standing to pursue this claim. When you sign an arbitration clause, it says you're going to give up your constitutional right to a jury trial. You're going to dispute your litigation through arbitration. How is this not any different? Clearly, she was aware of what she was giving up?

ATTORNEY J. DAVID BREEMER: Well, I would say there's a difference because she didn't sign away any constitutional right. She was told that the state customarily used the vegetation line as a landward boundary and that's fine. The state can customarily view it that way, but unless it has the force of the law, then no one has an obligation to conclude that they have no legal rights and she looks at the Open Beaches Act. She looked at the common law and can't find a rolling easement, can't find why the state has a right to customarily view it as the vegetation line as the common law boundary and I would just say that as a matter of sound constitutional principles, you can't stick, you can't just divest people of their constitutional rights by warning them beforehand that, hey, we might come and take your property if these events occur.

JUSTICE DAVID M. MEDINA: I absolutely agree with you. That's not what occurred here, in my view. How should the state proceed if you prevail here? If there's some discussion about a $40 million project that was delayed or canceled or may not even be used to restore the beaches of Galveston. Maybe that money could be used for public education. What should be done here for the best interest of the public and the best interest of the citizens to protect their private rights of ownership here?

ATTORNEY J. DAVID BREEMER: Well, I'll take that as a two-part question. I'll answer the renourishment issue before. I think that is, frankly, a red herring. I think that the beach

was renourished at surfside the same time the state officials were telling you they couldn't renourish the Galveston beach area and the beach was renourished to surfside because they considered it to be covered by the high tide line to be the wet beach and I'm just wondering why I can't do the same thing on Galveston, put a strip of sand to the high tide line that the public can use and there wouldn't be any concern about whether they could renourish the beach or not. If it can be done down there, it could be done up there.

JUSTICE DAVID M. MEDINA: Well what if that's done and the landowner says well, thank you very much, State of Texas, but I'm going to fence this off?

ATTORNEY J. DAVID BREEMER: Well, you can't fence off the beach to the high tide line.

JUSTICE DAVID M. MEDINA: You can fence off, well, I think maybe with this decision, you could fence off the beach to the water.

ATTORNEY J. DAVID BREEMER: Well, I would disagree that you necessarily can do that. There's [inaudible]--

JUSTICE DAVID M. MEDINA: You can block access to the property, the sand in front of the beach home.

ATTORNEY J. DAVID BREEMER: If that was a real concern, I don't think it would be very expensive to buy a few vertical access easements to allow the public to walk down to the new strip of sand that the state could dump there to the high tide line. That would be extremely inexpensive. We're not talking about buying all of Texas coast. It will be a few vertical access. So I don't think that's compared to $40 million that said can't be done. I don't think that's a serious problem.

JUSTICE DAVID M. MEDINA: And the state would do that again after the next hurricane and then so on after the next hurricane?

ATTORNEY J. DAVID BREEMER: Potentially, or it can plan farther ahead than it has in the past and acquire and make bigger acquisitions and start to acquire private property if it wants it, according to the law. I understand that the public desires or someone say needs additional land, but that's not the law of the land. The law of the land is easement law. The law of the land is you got to prove easements if you want them or get them by consent. For instance, trading renourishment for an easement or pay for them and that may be difficult and inconvenient in some cases, but it's supposed to be difficult to acquire easements on private property.

JUSTICE PAUL W. GREEN: Mr. Breemer, let me ask you a question. You're not contending that there has to a meets and bounds description of an easement?

ATTORNEY J. DAVID BREEMER: No, I'm not.

JUSTICE PAUL W. GREEN: Okay, so somebody, take a tract of property that there is an easement across because somebody has to be able to get from one side of the property to the other to access their own property so there is, everybody acknowledges there is an easement across that property and but something happens, a sinkhole or something that makes going the usual access across that property is no longer available and the only other way to get to the property is through somebody's house. What happens to the easement?

ATTORNEY J. DAVID BREEMER: If you got to go through someone's house, well I say in that situation, the house wins.

JUSTICE PAUL W. GREEN: The house wins?

ATTORNEY J. DAVID BREEMER: Yes, the house wins.

JUSTICE PAUL W. GREEN: So the easement goes away?

ATTORNEY J. DAVID BREEMER: If that's the only situation and I would think that that would be very unusual, but if that's the only situation where the easement is, the original easement is lost and it's between the house and the easement, then the house is going to win. That's the primary use of that property. That's the part of the fee-simple title and the easement is not. But in most cases, what will happen is something slightly different. You'll have the pothole or whatever and then they will go around it and I'm okay with that. Easemental law allows that.

JUSTICE PAUL W. GREEN: Right.

ATTORNEY J. DAVID BREEMER: And I'm okay and I think easemental law allows as the water line creeps up, the public and the public use follows the water line, not the vegetation line because that's inland, the water line, as public use follows that water line, then it can creep up too. Not based on erosions, but based on the uninterrupted public use. But what can't happen is there's public use here and the next day, the state says, now there's public use over there too where there never has been. That's a different creature altogether.

JUSTICE EVA M. GUZMAN: You claim where there never has been. Do you agree that the public has a right to use the beaches that predates any division or subdivision of those lots? I mean, when do you contend this public's right to use the beach originated?

ATTORNEY J. DAVID BREEMER: When did it begin? In the 1964 Seaway case, it was proven that there was an easement along Galveston due to public travel since the late 19th century.

JUSTICE EVA M. GUZMAN: So you would agree that the public's right to use the beach predates any subdivision of the land. I mean, it's been there forever.

ATTORNEY J. DAVID BREEMER: The public's right to use the area that it proved it had acquired an easement to predates the subdivision, but it didn't acquire a rolling easement. It acquired an easement by implied dedication of prescription to a line of vegetation that the Seaway court believed was fixed and that line of vegetation marked the end of the public use. So, yes, it acquired a right there, but it never acquired the right for the easement to be way over there.

JUSTICE EVA M. GUZMAN: Even if it was acquired by prescription or implied, does the public retain anything though? Does the public retain anything after the movements that caused the changes?

ATTORNEY J. DAVID BREEMER: Yes. And that, I think this is the best accommodation you're going to get consistent with the law and that's that that easement that was proven along Galveston is probably under water now. I'm quite certain it is, but I'm not saying that easement disappeared instantly as soon as it became under water. Because public use migrates uninterrupted or has migrated uninterrupted, as the water line moved in, that public use continued even though the original easement area is gone.
So I'm saying, yes, there is, but it is limited. It's not what the state officials claim. It's not what the Fifth Circuit asked about a rolling easement that moves solely on the basis of the vegetation line. It migrates by minor degrees based on public use, but not way inland based on vegetation line.

JUSTICE EVA M. GUZMAN: What is your strongest argument supporting that it's limited when it was there to begin with since time in memorial?

ATTORNEY J. DAVID BREEMER: If an easement is impliedly dedicated, the public right extends only to the land actually used by the public, Tiffany on Real Property, Volume 3, Section 374. The scope of a prescriptive easement is primarily the function of the continued use.

JUSTICE EVA M. GUZMAN: But if we assume that the public had the right to access the dry beach from time in memorial, then that is the public's use. They had used it.

ATTORNEY J. DAVID BREEMER: Well and I will make this my last answer unless you have more questions. It didn't have a right from time to memorial. There was no, when the state granted the land on Galveston into private hands, there was no reservation. The court made this clear. So the right, at that point, the land's all private. The right came into existence when that by prescription and dedication and when that was proven. It wasn't from time in memorial. The court, it states starts from the premise that land that is dry sand begins as private property. That's the Luttes decision. It begins, starts with private property. Then you

have to prove an easement.

JUSTICE NATHAN L. HECHT: Any other questions?

JUSTICE DALE WAINWRIGHT: Sorry, one other question, if I may. The argument's been made by the state that it cannot renourish beaches that it does not own. The briefing cite, Section 33.609 of the Natural Resources Code that indicates that with consent of the property owner and in some instances without consent of the private property owner, renourishment projects may continue. In fact, it says, "The commissioner may undertake a coastal erosion response with the consent." How is that different from the state's position or they're just contradictory?

ATTORNEY J. DAVID BREEMER: I just don't think that that is, that there's been enough effort to figure out how you can do it. I think you can do it that way by consent. Yes, it may take a little bit of time, but that's the price of ensuring that the law is followed or, as I said before, you can renourish to the high tide line and then there will be a long strip there just like there is in the surfside right now or you can trade if the property owner is willing, new sand for an easement. There's many ways to do it.

JUSTICE NATHAN L. HECHT: Thank you, counsel. The Court is now ready to hear argument from the Appellees.

MARSHAL: May it please the Court, Mr. Geyser will present argument for the Appellees.

ORAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF THE RESPONDENT

ATTORNEY DANIEL L. GEYSER: May it please the Court. The Plaintiff today continues to press for a property right that she never had and in doing so, she invites the Court to eviscerate a fundamental public right reflecting an unbroken tradition of dry beach access extending to the days of the Republic.

JUSTICE DAVID M. MEDINA: Let me ask you this. You had the 1958 Texas Open Beaches Act, about 200 years of what I think is public use precedent, and the Texas Constitution that you argued last time, appeared to me anyway to be favorable to you. That didn't carry the day. What, if anything, new do you have to persuade the Court to change its decision?

ATTORNEY DANIEL L. GEYSER: Well, what I hope will persuade the Court to reconsider its initial decision is, first, that there's really not a lot that the Court needs to alter in order to get what we submit is actually a correct understanding of the common law. The Court today actually unanimously rejected almost every point that my friend has made.
Easements are not static on the beach. That doesn't reflect the underlying natural composition. They do move in response to natural changes. The vegetation line is connected to the wet beach and a principles of ocean do not apply to the wet beach precisely because hurri-

canes and other storms are an expected and ordinary hazard of beachfront ownership, but the logic of that point compels the conclusion that the same hurricanes affecting the same area of the dry beach, necessarily, are also expected by the property owners.

JUSTICE PAUL W. GREEN: Mr. Geyser, why would anybody want to build a house anywhere close to the beach if you're right?

ATTORNEY DANIEL L. GEYSER: Well, first, people didn't always build houses close to the beach because the public has traditionally used this area at the beach for the access they're using today.

JUSTICE PAUL W. GREEN: What your rule would be is that somebody who purchases property and thinks it's behind the vegetation line and thinks that they have a fee-simple interest in that ground that can build a house that that's not so. If you say that somewhere along the line if a storm comes through, the state can require them to give up that house with no compensation because, in spite of what they think, it is burdened with some easement that might roll on to the property. Is that what the rule's going to be?

ATTORNEY DANIEL L. GEYSER: It's what the rule has always been, Justice Green. I think it's important too is don't just look at the expectations of the front row landowner. Look at the expectations of the second, third and fourth row landowner who purchased those properties and relies on the idea that they could access a private beach, not that they have a really good view of a beach that they can't walk on. It's also the expectation that fueled the investment in the surrounding economic community, which is fueled largely by tourism as the Galveston Chamber of Commerce explained. So the expectations in this area are actually most startling upset by rule that suddenly pulls the rug out from under the dry beach access that the public has held.

JUSTICE DALE WAINWRIGHT: So your argument is that persons who purchase homes on the beach on the second, third, fourth or even fifth row back from the front row of houses, buy it with the expectation that one day the state can take it?

ATTORNEY DANIEL L. GEYSER: They bought it with the expectation that they were to have land that is in a dangerous area, which is why the legislature has a statutory disclosure that explains exactly how the common law works in this area. People invest against the backdrop of that common law rule and they often are told--

JUSTICE DALE WAINWRIGHT: There is a difference between God taking your property and the state taking your property. If it's the former, that's way beyond this Court's pay grade. If it's the latter, both the United States and the Texas Constitutions provide a remedy for that.

ATTORNEY DANIEL L. GEYSER: But that takes a predicate question is there a property interest here at all?

JUSTICE DALE WAINWRIGHT: And you've said that there is one going back centuries, but you've cited no authority for that proposition in your briefs or today yet.

ATTORNEY DANIEL L. GEYSER: That's not so, Your Honor. We disagree with that. The state of public cases, including Feinman, Matcha, and Moody have traced the dry beach access all the way back since the days of the Republic.

JUSTICE DEBRA H. LEHRMANN: Would you go through that because I know that that has been argued before, but not successfully and so how can you convince the Court that, in fact, the common law does go back prior to the last several years?

ATTORNEY DANIEL L. GEYSER: Well, I think it's important to distinguish between finding a case that reflects the underlying common law principles and understanding that the common law rights arose far earlier than those cases came into existence. Before the [inaudible]--

JUSTICE NATHAN L. HECHT: That is the problem. If it's not in a case and it's not in a statute and it's not a deed, where is it? That's the problem.

ATTORNEY DANIEL L. GEYSER: But it's in all those three things, Justice Hecht. The Open Beaches Act reflects that the vegetation line, which does move, is part of the common law. The Texas Republic endorsed that and enshrined it into the Texas Constitution. The unanimous decisions of four intermediate appellate courts, including in cases where writ was refused NRE. So this Court did look at it.

JUSTICE NATHAN L. HECHT: They seem to be in some tension with Seaway. Do you think that's true or how do you read Seaway?

ATTORNEY DANIEL L. GEYSER: I don't think so. I think Seaway so that the evidence showed that the beach was generally in the same geographic location, but in Feinman, looking at predominantly the same record, the court recognized that, in fact, that that sort of blenched reality to think that no storm hit the Texas coast and affected it for over 100 years.

JUSTICE NATHAN L. HECHT: But there was an argument in Seaway, the first argument in Seaway was that we have this right as a matter of law and the court said we don't know of anything to support that.

ATTORNEY DANIEL L. GEYSER: I think if the court did say that, it was incorrect because if you look to the general use and the general common law principles and how this operates, you looked at things like fixed and settled expectations used to tradition. You see how if you take an originalist approach, how the public has used this general area since the beginning of time. All these factors point in our favor. Also--

JUSTICE DALE WAINWRIGHT: Counsel, let me make sure we're on the same page here. In Seaway, after a trial, it was proven that there was an easement there. What you're asking for today is a proclamation that an easement rolls without proof that it exists on this new property, correct?

ATTORNEY DANIEL L. GEYSER: Well, it's the same easement, but without new proof.

JUSTICE DALE WAINWRIGHT: So you're asking that we hold that an easement rolls from an existing parcel onto a new parcel that the public has never used for a beach.

ATTORNEY DANIEL L. GEYSER: In exactly the same way--

JUSTICE DALE WAINWRIGHT: True or false?

ATTORNEY DANIEL L. GEYSER: True, in the same way that the same principle applies, for example, the navigational servitude context. A river could be located on one piece of property and there can be what truly is an avulsion of that and hurricanes are not truly avulsion events. It can cut any channel and even if that river has never been on that new property before, the public has the same rights to the same navigational servitude. It's not a new navigational servitude.
The public doesn't have to re-establish it in that new location. It's the same easement and the reason for that, it's defined by its natural dynamic boundaries, which every member of this Court recognized necessarily must apply to have any sensible or workable system along the dry beach context. A static system, as my friend has suggested the Court should adopt, is completely unworkable in this context and we would submit that applying the principles of avulsion to this context would be equally and workable for the same reasons that the Court said it would be unworkable as applied to the wet beach.

JUSTICE DALE WAINWRIGHT: So your position, the state's position is that, in this case, the easement that existed on the parcel between Severance's land and the ocean, that that easement can roll back on to the next property when a hurricane takes away the first row of properties and that if another hurricane comes, it can roll back two more rows of lots, if the hurricane takes away those lots. What's the limit on how far this easement can migrate or roll?

ATTORNEY DANIEL L. GEYSER: The limit is looking to the common law and how it's developed over time and those are expectations that those landowners have, not just by virtue of looking to the uninterrupted beach access, but the statements from the legislature.

JUSTICE PAUL W. GREEN: Is it reasonable limitation? A limitation based upon what's reasonable?

ATTORNEY DANIEL L. GEYSER: I don't see how it's reasonable to expect that a tradition that has prevailed uninterrupted for over 100 years should suddenly disappear.

JUSTICE PAUL W. GREEN: So it can even be unreasonable, is that what you mean?

ATTORNEY DANIEL L. GEYSER: I'm sorry, Your Honor.

JUSTICE PAUL W. GREEN: It can even be unreasonable?

ATTORNEY DANIEL L. GEYSER: It would unreasonable for a landowner in this context to expect the law suddenly to change overnight notwithstanding the fact that it's been endorsed by all three branches of Texas government, that the political branches that are closest to shaping the substantive law of Texas property.

JUSTICE PAUL W. GREEN: So all those houses that were built along the beach area, it was unreasonable for the property owners to have built those homes there?

ATTORNEY DANIEL L. GEYSER: Not at all, Your Honor, because they enjoy the use of the property while it's actually not been swallowed by the water and it's important to remember that if the water actually does up and submerge that land, title shifts to the state. That doesn't mean that they're unreasonable for locating there. It just means that it's a risk.

JUSTICE PAUL W. GREEN: So let's go back to the example I gave your opponent. The sinkhole takes up the access and the only other access across the property is through the house and you say that, in that instance, the dominant estate, that would be the easement in that case, would go through the house, would destroy the house?

ATTORNEY DANIEL L. GEYSER: If the easement is a dominant estate, then the Severance, which is the land, is subject to the rights of the easement holder.

JUSTICE PAUL W. GREEN: The reason [inaudible] has nothing to do with it in that case?

ATTORNEY DANIEL L. GEYSER: Well, you have to reasonably use any easement, including this easement, which is why if there's a broad stretch of beach, the state, as a matter of policy and as a matter of common sense and I think as a matter of background easement law, will not remove the house because the public can still affect with the use of the easement the purpose of the easement. I think a contrary rule that says that principles of avulsion apply to movements of the dry beach would eliminate the public's easement notwithstanding the fact that it has been a part and bedrock fixture of Texas Common Law since the days of the Republic that's prevailed uninterrupted until this past November.

JUSTICE DALE WAINWRIGHT: Counsel, you keep talking about the public's use of this

property has remained uninterrupted since the days of the Republic. The property that was used for a beach since the days of the Republic is gone. It's, do you agree with your opposing counsel it's under water?

ATTORNEY DANIEL L. GEYSER: It may be under water, but I think that fundamentally misunderstands the--

JUSTICE DALE WAINWRIGHT: Do you agree it's gone? You can't build on it.

ATTORNEY DANIEL L. GEYSER: You can't, Your Honor, but that's why this is not an easement defined by meets and bounds location.

JUSTICE DALE WAINWRIGHT: Answer my question first. When the Hurricane Rita came, the property that the public was using for a beach got wiped away. It's gone.

ATTORNEY DANIEL L. GEYSER: I don't know for certain, but I believe it is, but I--

JUSTICE DALE WAINWRIGHT: So this uninterrupted use by the public of the beach for this long time is on property that's under water, not on property that's in the dry beach today, correct?

ATTORNEY DANIEL L. GEYSER: Yes, but that does not--

JUSTICE DALE WAINWRIGHT: As a matter of physics, that's correct.

ATTORNEY DANIEL L. GEYSER: I will concede for purposes of the argument that it is.

JUSTICE DALE WAINWRIGHT: So this uninterrupted line of use going back two centuries is pretty tenuous because unless the public's using the beach under water.

ATTORNEY DANIEL L. GEYSER: Absolutely not, Your Honor. And I think that fundamentally misunderstands the situation. This is an easement defined by use and it's not used tied to meets and bounds location. I think that one mistake that my friend has made is thinking that there's a universal and categorical rule that applies across the board to every kind of easement and that's simply not the case. Easements depend on context. They depend on purpose. They depend on workability and all of these factors tie into suggesting that this easement, in particular, which is not defined by saying let's take a GPS line of where the public beach started and that's where the beach is. It recognizes that they used this area of the beach, the dry beach, which necessarily was established as the beach moved over time with storms over time. So I don't believe it is--

JUSTICE NATHAN L. HECHT: How is the exclusive use easement any different from title that the state sought in Luttes?

ATTORNEY DANIEL L. GEYSER: It's different both legally and practically. Practically it's different because the landowner still has a right to maintain a structure on the property so long as it's not interfering with the use of the easement. And, in fact, if the beach, if the water goes back out, then the landowner has full rights again if the vegetation line moves seaward of the house to exclude the public from the land. Legally it's different because a right--

JUSTICE NATHAN L. HECHT: Wouldn't that say movement occur with title. If the state owned the dry beach, which that's what it was asking for in Lutes, that same shift would occur would it not?

ATTORNEY DANIEL L. GEYSER: It may, Your Honor, but I think, again, it misses the point. A right of use under an easement is different than title. Title is one thing and the right of a burden's title is different and in the same way that having title doesn't give you the right to have a nuisance on your property even though it's not in the title itself. The state didn't impliedly reserve the right to apply the common law of nuisance to any piece of property.

JUSTICE DON R. WILLETT: What legal weight should we give the Jones and Hall Grant from 1840?

ATTORNEY DANIEL L. GEYSER: It's there, but it's irrelevant and the reason it's irrelevant is it dealt only with title. It did not grant sovereignty to those landowners. They're still subject to the background principles of the common law, which include things like the doctrine of nuisance and include things like easement law, including the fact if you look down and trace the historic use of this area of the beach, an area of the beach again not defined by meets and bounds location, but defined by the use of a certain category and character of beach, namely the dry beach, as defined by the vegetation line and the mean high tide line, then that is the easement that burdens that title. So any title that was granted under the Jones and Hall Grant, it didn't say that for here to eternity, adverse possessions out the door because that wasn't written into the Jones and Hall Grant.

JUSTICE DON R. WILLETT: But there was no expressed reservation of either title to that property or public use of the beach?

ATTORNEY DANIEL L. GEYSER: Well they didn't have to in the same way they didn't have to reserve the right to apply the doctrine of nuisance to that title. The title is a bare ground of title. If they had written into the title that the public has a right to use that land, then this wouldn't be an easement under the common law. It would be an easement as a matter of title, but that's not what we're arguing here so I really don't think it's relevant to this case. What is relevant to this case is--

JUSTICE DALE WAINWRIGHT: Is it relevant that before the Jones and Hall Grant, the state had a right to preclude private use of the beach, but didn't reserve that right at all in the

grant or didn't mention it in the grant?

ATTORNEY DANIEL L. GEYSER: I don't believe so, Your Honor, for the same reason that I'm sure if the state had the right to apply the doctrine of nuisance to those properties and yet still have the right to do that today.

JUSTICE DALE WAINWRIGHT: So if I own a piece of property that has an easement and I deed it to someone without recognizing that easement, your argument would be that the easement still exists or your argument is that the beach is different and we should apply a different property law to it?

ATTORNEY DANIEL L. GEYSER: There are different kinds of easements and I think there are two fundamental points here. One, if there's a prescriptive easement into the title and that's suddenly wiped out, then, of course, that easement disappears. But the other fundamental point is this is an easement that is implied under the common law and it also could arise after title was granted. It's simply not the case. Let's suppose, for example, that the common law right to beach access didn't exist in 1841. If it did exist by 1850 or 1851 by virtue of common law principles, then that easement prevails today even if the title didn't initially reserve that right.

JUSTICE PAUL W. GREEN: What are the elements of an easement by common law?

ATTORNEY DANIEL L. GEYSER: Well you can get it by prescription or dedication.

JUSTICE PAUL W. GREEN: But it's not those. It's not that. I mean those were clearly defined elements in the law what easement by prescription or by dedication. That's not this situation. So it's by custom is the way that you've described it in the briefing. What are the elements of an easement by custom?

ATTORNEY DANIEL L. GEYSER: Custom is, just to be clear, is a fully independent way that supports reaching the same conclusion [inaudible].

JUSTICE PAUL W. GREEN: What are the elements for that?

ATTORNEY DANIEL L. GEYSER: You look to a consistent, uninterrupted use since the beginning of time, which I believe we have here. It's peaceable and it's reasonable. It reflects common expectations and understanding. It's been endorsed by the political branches.

JUSTICE PAUL W. GREEN: And those are all fact questions.

ATTORNEY DANIEL L. GEYSER: And I don't think any of those facts are contested. I think it's absolutely clear that the public has the use of dry beach in whatever location--

JUSTICE DALE WAINWRIGHT: Actually, there's no proof, no evidentiary proof in this case going back to the U. S. District Court. So there's no proof of what you're arguing.

ATTORNEY DANIEL L. GEYSER: Well, there's no proof.

JUSTICE DALE WAINWRIGHT: Maybe the facts are uncontested, but there's no proof in this record.

ATTORNEY DANIEL L. GEYSER: Your Honor, this is an unfortunate consequence of the opera posture of a certified question. This case was dismissed at the motion to dismiss [inaudible].

JUSTICE DALE WAINWRIGHT: [inaudible] procedural posture of the case, but there's no proof in this record, no evidence.

ATTORNEY DANIEL L. GEYSER: But there is proof in other cases that the Court can take judicial notice of.

JUSTICE DALE WAINWRIGHT: But we don't, when we take a case, we're bound by the record. We don't go to other cases and adopt their records to decide this case.

ATTORNEY DANIEL L. GEYSER: Just as the Court's initial disposition of this case referenced the consistent unbroken access since the 1830's, I think the same logic and the same factual findings that undergird at that conclusion can undergird a revised opinion recognizing the same exact use.

JUSTICE DEBRA H. LEHRMANN: Do you know of any instances where rolling easements have been recognized in other contexts?

ATTORNEY DANIEL L. GEYSER: I think a great example is one of navigational servitudes. That is a river that changes even with a pure avulsive event, it can cut a dramatically different channel for the river and the public's right to use that river for navigational purposes carries with the change. And here, if you actually look to the principles of avulstion, they simply do not apply when the natural forces that are affecting the dry beach are entirely ordinary, entirely expected and entirely predictable.

JUSTICE DAVID M. MEDINA: Are there any other cases that you are aware of where the court has gone back to the original land grant to determine what the state or the public has and doesn't have?

ATTORNEY DANIEL L. GEYSER: I'm not aware of any that would ask has an easement that has arisen after the land grant somehow affected by the lack of a reservation in the original land grant.

JUSTICE DAVID M. MEDINA: Can you distinguish between a natural slow-occurring event also an act of God like erosion versus an avulsive event. Certainly, they are obvious, but the court said that an easement would still exist if it's a natural occurring erosion versus an avulsive event.

ATTORNEY DANIEL L. GEYSER: I think that highlights, I can't, Your Honor, and I think that highlights the pure unworkability of this rule. No one will know exactly what unspecified subset of natural events are suddenly avulsive events and which are pure erosion. It's impossible to disaggregate the effects of daily erosion from a storm or from a hurricane and it's not clear at all anyway how much does the land have to move in order to say that suddenly this is a qualifying avulsive event so that the government entities on the ground who are charged with regulating the beach and engaging in systematic programs of beach renourishment know if they're putting public dollars into private land.

JUSTICE NATHAN L. HECHT: Well, we can argue about workability and policy, but in the end, if the state doesn't have this right and it doesn't exist for a long time, for us to give it to the state today is a taking under Federal law, is it not a Federal Florida Beaches case?

ATTORNEY DANIEL L. GEYSER: No, absolutely not, Your Honor. Actually, it stopped the beach renourishment points in exactly the opposite direction. Even under Justice Scalia's plurality opinion, he looked back and asked, it's only judicial taking if the law was clearly established in support of that particular property right. In this case, the law was clearly established that this property right that's being claimed does not exist. I think it's impossible to read the Open Beaches Act.

JUSTICE NATHAN L. HECHT: If that were not the case, then it would be a taking.

ATTORNEY DANIEL L. GEYSER: If every consideration under girding and ordinary common law analysis were flipped as it would have to be in this case so that, in fact, it was abundantly clear that the public can never use the dry beach, the political branches had never endorsed it. The rule had proven completely unworkable. Avulsive events were always deemed to eliminate the public's right notwithstanding the fact that they've held it, if you looked at the true record, for over 100 years, then, yes, it would be judicial taking potentially under a four-justice plurality not a majority of the court. But, of course, that's not the case here and if this is an ordinary common law analysis, I think this court has never before rejected the considered judgment of the political branches and has looked to rule this proven workable--

JUSTICE DALE WAINWRIGHT: If the legislature were to pass a law that says my house that I owned is not my house. That would be a violation of the law.

ATTORNEY DANIEL L. GEYSER: Of course, Your Honor.

JUSTICE DALE WAINWRIGHT: Absent assuming no other contradictory facts.

ATTORNEY DANIEL L. GEYSER: Of course.

JUSTICE DALE WAINWRIGHT: So defining property as the US Supreme Court has said is a matter for the states to decide and the legislature can't pass a statute and hasn't as I see it in this case passed a statute that attempts to take away property. The Open Beaches Act says the public has a right to use the beach even private beach if it has acquired the right of use by virtue of continuous right in the public since time in memorial. And we've asked several times for you to give us some authority going back before the 1964 Seaway case for the proposition that the public has had the right to use private beach property for public easement since that time in memorial. Give us authority, one case, one statute, one constitutional provision.

ATTORNEY DANIEL L. GEYSER: I think I can give you all of those. If you look at the statute Section 61.025 is the statutory disclosure section, which makes emphatically clear that the legislature understands that not just the easement as it existed at one point in time controls, but easement moves in response to erosive events. That's, those are disclosures that were written by the legislature into the statute.

JUSTICE DALE WAINWRIGHT: If we disagree that the Open Beaches Act establishes a rolling easement any other authority.

ATTORNEY DANIEL L. GEYSER: If you look to Feinman, Matcha, and Moody.

JUSTICE DALE WAINWRIGHT: Because the Open Beaches Act doesn't mention rolling easement. It doesn't mention migratory easement.

ATTORNEY DANIEL L. GEYSER: That is not true, Your Honor. The statutory disclosure section, which, again, this isn't a charge to the GLP to promulgate a regulation to provide a disclosure. 61.025 says specifically that these words, this is the legislature saying this, these words shall be included in every deed in this area and it says specifically that the public has a right between the mean high tide and the vegetation line and that right continues after the vegetation line is moved in response to natural events, including storms. So I think that there is no way to say that the Open Beaches Act and the legislature did not understand the public's right to be fully dynamic.

JUSTICE DALE WAINWRIGHT: And 61.025 says that the notice must be included in an executory contract. It doesn't say included in the deed. It further says that the notice to the property owners is that your structure may come to be located on a public beach because of coastal erosion and storm events. It says the owner of the structure, you could be sued by the state of Texas in order to remove the statute or the structure. Under my reading of it, nowhere does it say you buy this property subject to the state's taking of it. It says the state may sue

you to prove a position, but you can always sue. The question is can you win?

ATTORNEY DANIEL L. GEYSER: Well there are two separate things, Your Honor, and I apologize if I said deed instead of executory contract. I think those are--

JUSTICE DALE WAINWRIGHT: It says deed.

ATTORNEY DANIEL L. GEYSER: I apologize.

JUSTICE DALE WAINWRIGHT: If it were in the deed, we wouldn't be here today because she would have sold away the right to an easement. It says executory contract.

ATTORNEY DANIEL L. GEYSER: I think I disagree that there's a material distinction between those two, but I will accept that for now. I think the important point is that the party of the Open Beaches Act that says the state can sue specifically for removing the structure. It doesn't say that the public's rights under the easement need to be established in a lawsuit. Those rights exist. That's why the legislature [inaudible].

JUSTICE DALE WAINWRIGHT: But it doesn't say the contrary either. You can't presume that the statute says everybody who purchases beach property with on the condition that the state can take it at some point in the future. It has to say that and if it does, we probably have problems with the US Supreme Court.

ATTORNEY DANIEL L. GEYSER: This is not a taking because there's no property right in the first instance, but I think we respectfully disagree. I don't think it's even possible to read 61.025 and have any doubt that the legislature understood that the public's rights since they are fully dynamic in response to erosive events and avulsive events.

JUSTICE NATHAN L. HECHT: Any other questions.

JUSTICE DAVID M. MEDINA: Yes. You were asked just recently to provide all the authority that you can think of. I don't know if you fully explained that or were able to give that. Would you like to answer that completely?

ATTORNEY DANIEL L. GEYSER: I think that it's answered, I think, in part in our, in the four filings we have with the rehearing stage, but I also think that it's important to look to the common law analysis and traditional common law factors and this Court has never thrown out a rule that's proven so durable and stable over time based on so little evidence and so little basis and the inability to cite a single case rule precedent principle that suggests that the rolling easement hasn't existed since the beginning of time.
And that the records in Feinman, in Luttes and Matcha and the Arrington decisions, these are all premised on the idea that the state has a fully dynamic rolling easement because the state has used, not the state, I'm sorry, the public has used the dry beach since the beginning of

time. That record was uncontested, I believe, in those cases and even if it were contested, the court rejected it because it's so apparently obvious that this is how this area of land has been used no matter its location.

JUSTICE NATHAN L. HECHT: Thank you, Counsel.

REBUTTAL ARGUMENT OF J. DAVID BREEMER ON BEHALF OF PETITIONER

ATTORNEY J. DAVID BREEMER: Thank you, Your Honors. I would like to quote or focus on what the state claims when the private property owner loses its land to water. When the water encroaches on the property owner's land, the state says that's all ours now. When the water encroaches and covers their easement, they say, we can move it. The property owner doesn't get to move their property and land. Why does the state get to move its property and land? They don't have any reason for that except tradition, but a tradition that supposedly exists since 1960s or 1970s without legal or constitutional foundation doesn't become legitimate because it's been around for awhile or it's popular in some quarters.

JUSTICE NATHAN L. HECHT: What's your take on the Seaway case?

ATTORNEY J. DAVID BREEMER: I think the Seaway case was the case that looked at this issue the most carefully and the most comprehensively and correctly established it. There was an easement proven under the doctrines of implied dedication and the common law by public use of a certain area and that that easement, the court did not expect that the easement to move. It's clear in its findings and it thought that one of the findings was that the vegetation line and the area of public use was stable and that's what the state has got to live with now. It concedes, what's new here is that it concedes the easement's created by public use, but once--

JUSTICE DEBRA H. LEHRMANN: May I, excuse me, I'm sorry, but may I ask you. The Open Beaches Act states, in essence, that if the state has acquired an easement by prescription, dedication or by virtue of continuous right in the public, the public has a right of ingress and egress to the wet beach and the dry beach. Because of the dynamics of the sea, that may not be possible to prove. Do you agree with that?

ATTORNEY J. DAVID BREEMER: It may not be possible to prove where?

JUSTICE DEBRA H. LEHRMANN: It may not be able to prove use along the sea between the tide, any mean tide line and the vegetation line because of how that's always moving and it may not be able, you may not be able to prove that. Do you agree with that?

ATTORNEY J. DAVID BREEMER: I'm not sure I agree, but I would say if you can't prove public use of a certain area, then you don't have a right to use it.

JUSTICE DEBRA H. LEHRMANN: And then my question is then what is the purpose of that statutory language? Doesn't that language in a statute have to assume that the easement rolls?

ATTORNEY J. DAVID BREEMER: No, it doesn't have to assume that at all and the key word in that passage is "if". The state continuously has claimed that the public beach goes to the vegetation line. The public beach goes to the vegetation. That's not what the statute says. It says if an easement exists there by prescription, dedication and continues right then the public will have a right to that area to the vegetation line. It's a conditional right and I know over time, it's become less than conditional and that's the problem. We got to bring it back to what it was meant to do and consistent with the law and once that happens, these workability questions are going to work themselves out.
The state has the capability, the capacity to do this. It's not going to end public beaches forever. It's no foreclosing proof. It's not foreclosing consent. It's not foreclosing payment. It's not even saying that there's static beach that's never can move at all, none of that. In fact, the state is getting a quite good accommodation here because, as I said before, if you're a property owner and your land's covered with water, you're done, but if you're the state and your land's covered with water, the initial decision was correct in saying that that easement by public use, uninterrupted public use that follows the water line can continue to exist, but it can't move the easement from point A to point C. There is no common law authority for that. The Open Beaches Act does not say that. It never was intended to say that. It was a policy of expedience to avoid the difficulties of proof because it is difficult and it's supposed to be. It's supposed to be hard to take private property.

JUSTICE DEBRA H. LEHRMANN: Wasn't it passed in response to Luttes?

ATTORNEY J. DAVID BREEMER: Yes.

JUSTICE DEBRA H. LEHRMANN: And so under your reading, then how does that, how does it adequately deal with that?

ATTORNEY J. DAVID BREEMER: Well it can't overturn a decision of this Court. The Open Beaches Act doesn't and wasn't intended to overturn a decision of the court. It was intended to marshal the state's resources to prove and protect easements that were proven because normally the state doesn't do that, right? Normally, a public or property owner or someone that cares about a walk on the beach has to go into court. But the Open Beaches Act says we'll do it, the state. We'll do it, but we'll only do it up to the vegetation line. We'll enforce easements there and we'll prove them if necessary. That's what the Open Beaches Act did, which was quite an extension as it is, but it didn't terminate this decision. This didn't overrule that decision.

JUSTICE DALE WAINWRIGHT: Remember, there have been many, many Amicus briefs

filed. I've been through all of them. One of them asks recognizing the dynamic nature of property in the beach area, winds blowing, the tides are changing every day and sometimes imperceptibly. The public easement where it exists that's seaward, that line is changing every day. One Amicus suggests that the backside of the public easement, the landward side in the dry beach, should be static. Should be a line that is not dynamic. What's your thought about that?

ATTORNEY J. DAVID BREEMER: Well, I think that's close, that's more or less the rule of law. It is a big difference between the water and the vegetation line and the water line is the common law, recognized as the common law boundary of state ownership impressed with the public trust, but there's no public trust in the sand and the vegetation line is not a common law easement boundary. The line of public use is. So I think it's correct to say that the boundary, the landward boundary of that easement is the furthest extent of the public use, not the vegetation line.

JUSTICE DALE WAINWRIGHT: And it's static? And you think that line is static?

ATTORNEY J. DAVID BREEMER: That line, I would say that that line is static, but until the point that the water, the public can follow the water line. We got to keep our eyes on the water line, not the vegetation because the vegetation is what's causing the problems. If you have 150 feet inland like after Tropical Storm Frances, it's nowhere near the public use. The public use is down by the water.

JUSTICE PHIL JOHNSON: May I ask a question?

JUSTICE NATHAN L. HECHT: Yes.

JUSTICE PHIL JOHNSON: And if you have an avulsive event or that moves the land out into the water so that we now have uncovered land, we don't have an easement on that either because the public hasn't been using it?

ATTORNEY J. DAVID BREEMER: No, I think the public has used, has been using that land.

JUSTICE PHIL JOHNSON: How?

ATTORNEY J. DAVID BREEMER: If it's closer between, you're saying--

JUSTICE PHIL JOHNSON: Say Mrs. Severance's house is right here and the high water mark is right here and we have an event that moves the high water mark out here. What happens to that land between her house and the high water mark?

ATTORNEY J. DAVID BREEMER: Like newly accreted land.

JUSTICE PHIL JOHNSON: Accreted and, exactly.

ATTORNEY J. DAVID BREEMER: And I would say that that area presumably had been used by the public in the past either sufficiently long to acquire an easement or with the acquiescence of the property owner. So I wouldn't say that that necessarily, that that accretion would mean that there's like a strip of land where the public can't get to the sea so they're blocked. I wouldn't say that.

JUSTICE PHIL JOHNSON: So do we still have the, so is it your position that we would still have the public beach from where it was before the accretion all the way to the high water, to the mean high tide line?

ATTORNEY J. DAVID BREEMER: If that area had been--

JUSTICE PHIL JOHNSON: Move out toward there?

ATTORNEY J. DAVID BREEMER: If that area had been subject to continuous and uninterrupted public use, I would say yes because--

JUSTICE PHIL JOHNSON: But how could it be public use if it's under water?

ATTORNEY J. DAVID BREEMER: I'm saying presumably they had used that area before sufficiently long to establish an easement.

JUSTICE PHIL JOHNSON: What it hadn't never been that way? It's never been dry before. Now it's accreted. We don't have a public beach there now?

ATTORNEY J. DAVID BREEMER: I guess I'm having a hard time imagining a situation along Texas where an area that is covered with water--

JUSTICE PHIL JOHNSON: That's what lawsuits are about. Things happen that people didn't imagine.

ATTORNEY J. DAVID BREEMER: It's, you know, it's, with respect, it's a different case. We are here on a certified question that is about whether an easement can move inland based solely on natural changes to the vegetation and the answer to that question has got to be no because there is no common law authority for that in any Texas case law. What happens with down the road with, in different factual situations. I know the Amici and the state have tried to make this a case about a series of complicated what-if's, but I don't think that's before the Court at this time and the question that is before the Court, the answer's got to be no. There is no rolling easement in Texas common law.

JUSTICE NATHAN L. HECHT: Thank you, Counsel. Well, it was warm in here before we started. The case is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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