5 of 18 DOCUMENTS

CAL–CO GRAIN COMPANY, INC., WARREN WHATLEY, HAROLD L. EVANS, AND LESTER FRAZIER Appellants, v. RICHARD WHATLEY AND WIFE, GLENDA WHATLEY, Appellees.

NUMBER 13–05–120–CV

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI

2006 Tex. App. LEXIS 7536

August 24, 2006, Memorandum Opinion Delivered
August 24, 2006, Filed

PRIOR HISTORY: [*1] On appeal from the County Court at Law of Calhoun County, Texas.

JUDGES: Before Chief Justice Valdez and Justices Rodriguez and Castillo. Memorandum Opinion by Chief Justice Valdez. Dissenting Memorandum Opinion by Justice Castillo.

OPINION BY: ROGELIO VALDEZ

OPINION:

MEMORANDUM OPINION

Appellees, Richard and Gloria Whatley, live across the highway from Cal–Co Grain Co., Inc. ("Cal–Co"), a grain storage facility in Port Lavaca, Texas. Alleging that grain dust from Cal–Co's operations was blown onto their property, appellees brought suit against appellants, n1 Cal–Co, Warren Whatley, Harold L. Evans, and Lester Frazier, for breach of contract, nuisance, and negligence. A jury found in favor of appellants and awarded appellants $66,000.00 in attorney's fees and costs. The trial court's final judgment did not award these fees and costs to appellants, but instead entered a take–nothing judgment against all parties. Cal–Co requests that the Court reverse the judgment and render the $66,000.00 in favor of appellants as found by the jury. We reverse and remand to the trial court **[*2]** for entry of judgment in accordance with this opinion.

n1 Appellants will be identified herein individually or jointly as "Cal–Co."

Background

In 1985, Richard Whatley sold his interest in Cal–Co to Warren Whatley, Harold L. Evans, and Lester Frazier. As part of the sale, the parties entered into a settlement agreement whereby Cal–Co, Warren Whatley, Evans, Frazier, and Claude Nunley n2 settled and compromised litigation between the parties then pending in the 135th Judicial District Court of Calhoun County. In addition to other provisions, the settlement agreement provided:

> [Appellants], as well as their successors and assigns, agree that any damage resulting from trespass, nuisance, or any other form of cause of action, whether sounding in tort, contract, or other legal basis, arising from the operations of Cal–Co Grain Company, Inc. on or after August 1, 1985, particularly including blowing dust being deposited upon the residence of Richard E. Whatley and wife, Shirley Whatley, n3 shall **[*3]** not be released hereby, and that [appellants] shall make every reasonable effort to prevent the operations of the Cal–Co Grain facility from allowing or permitting, or causing in any way whatsoever, any grain dust to be deposited or blown upon the residence of Richard E. Whatley and wife, Shirley Whatley, and shall particularly take all necessary percautions [sic] and efforts to cease activities of the grain company during those periods of time when the wind at the grain facility shall be blowing from a hearing [sic] 030 to 060 degrees true north. The purpose of this paragraph shall not be to create, nor increase or decrease, any legal liability of [appellants], toward Richard E. Whatley and wife, Shirley Whatley, but shall not simply serve as notice to all parties that when the wind is blowing from the directions mentioned, and the grain company activities are being carried out, that the prob-

> ability of damage to the residence of Richard E. Whatley and wife, Shirley Whatley exists. Further, it is expressly agreed and understood that the foregoing is not to be construed in any way as a stipulation or admission that Richard E. Whatley and wife, Shirley Whatley have or will suffer **[*4]** any damage whatsoever arising from the operations of Cal–Co Grain Company, Inc. on or after August 1, 1985. That should the said Richard E. Whatley and wife, Shirley Whatley subsequently be of the opinion that they have been damaged by such operations, it shall be incumbent upon said individuals to prove their cause of action and damages in a court of competent jurisdiction.

n2 Claude Nunley was not a party in the underlying cause and is not a party to this appeal.

n3 The agreement specifically designated Shirley Whatley as Richard Whatley's wife. Richard Whatley and Shirley Whatley later divorced and Richard Whatley married Glenda Whatley.

In 2001, appellees filed suit against Cal–Co claiming that Cal–Co breached the 1985 settlement agreement and that Cal–Co's operations constituted a nuisance. Appellees complained that appellants allowed grain dust to be blown onto their residence. Cal–Co counterclaimed for attorney's fees under *section 251.004 of the Texas Agriculture Code* **[*5]** and *section 38.001 of the Texas Civil Practice and Remedies Code*.

The jury found that Cal–Co did not breach the 1985 settlement agreement. Specifically, the jury answered "No" to questions regarding (1) whether Cal–Co failed to take every reasonable effort to prevent grain dust from being deposited at appellees' residence; (2) whether Cal–Co failed to take all necessary precautions and efforts to cease activities of the grain company during those periods of time when the wind at the grain facility was blowing from a bearing of 030 to 060 degrees true north; and (3) whether Cal–Co caused a substantial interference with appellees using and enjoying their land which proximately caused actual damages to appellees. The jury further found that Cal–Co was engaged in agricultural operations. The jury awarded Cal–Co attorney's fees of $63,000, court costs of $1,000, travel costs of $1,000, and incidental expenses of $1,000.

In contrast to the jury's findings, the trial court's final judgment provides, in part:

> THE COURT FINDS THAT the settlement agreement does not make provisions concerning attorney fees to be awarded the prevailing party in enforcing **[*6]** the agreement.
>
> THE COURT FINDS FURTHER THAT a compromise and settlement agreement is distinguishable from a contract and that, therefore, Chapter 38 of CPRC does not apply in this case. n4
>
> THE COURT FINDS FURTHER THAT the provision of the settlement agreement allowing Richard E. Whatley and wife to bring suit is irreconcilable with *Section 251.004 of the Texas Agriculture Code* and that the Compromise Settlement Agreement and Release is to be given full force and effect and shall prevail over *Section 251.004 of the Texas Agriculture Code*.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT the Defendants Cal–Co Grain Company, Inc., Warren Whatley, Harold L. Evans, and Lester Frazier take nothing in their affirmative defense n5 against Plaintiffs Richard Whatley and Glenda Whatley.
>
> Costs of court are assessed against parties incurring same, for which let execution issue if not timely paid.

n4 Appellants do not challenge on appeal the trial court's finding that a compromise and settlement agreement is distinguishable from a contract and, therefore, chapter 38 of the civil practice and remedies code does not apply. Accordingly, the Court will not address the merits of this provision of the judgment.

[*7]

n5 We assume that the trial court herein is referring to appellant's counterclaim for attorney's fees given the "take–nothing" language in the judgment. Neither party disputes this characterization of appellant's position as an affirmative defense, which is another issue that this Court need not address. We note that the appellants raised numerous affirmative defenses in their fourth amended original answer and counterclaim.

Analysis

In one issue, Cal–Co contends that the trial court erred as a matter of law by failing to award it attorney's fees and expenses. Cal–Co argues that the 1985 settlement agreement and *section 251.004 of the agriculture code* should be construed together. Cal–Co further argues that, to the extent that the 1985 agreement conflicts with the Texas Agriculture Code, the code prevails.

In contrast, appellees contend that the agriculture code does not apply in this case because Cal–Co is not a producer of food or other agricultural products. Appellees contend that, as a grain elevator, Cal–Co is essentially only a middleman.

The Texas Legislature passed the Right **[*8]** to Farm Act in 1981 in order "to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products," and "limiting the circumstances under which agricultural operations may be regulated or considered to be a Nuisance." *TEX. AGRIC. CODE ANN. § 251.001* (Vernon 2004); *see also Holubec v. Brandenberger, 111 S.W.3d 32, 35, 46 Tex. Sup. Ct. J. 702 (Tex. 2003)*. To further this policy, *section 251.004(a)* of the Act shortens the period for bringing a nuisance action against an agricultural operation to one year. *TEX. AGRIC. CODE ANN. § 251.004(a)* (Vernon 2004); *Holubec, 111 S.W.3d at 35*. The defense in *Section 251.004(a)* is intended to bar a nuisance action against a lawful agricultural operation one year after the commencement of the conditions or circumstances providing the basis for that action. *TEX. AGRIC. CODE ANN. § 251.004(a)*; *Holubec, 111 S.W.3d at 34*; *Aguilar v. Trujillo, 162 S.W.3d 839, 852 (Tex. App.—El Paso 2005, pet. denied)*.

Section 251.004 of the agriculture code provides: **[*9]**

> (a) No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation. . . .
>
> (b) A person who brings a nuisance action for damages or injunctive relief against an agricultural operation that has existed for one year or more prior to the date that the action is instituted or who violates the provisions of Subsection (a) of this section is liable to the agricultural operator for all costs and expenses incurred in defense of the action, including but not limited to attorney's fees, court costs, travel, and other related incidental expenses incurred in the defense.
>
> (c) This section does not affect or defeat the right of any person to recover for injuries or damages sustained because of an agricultural operation that is conducted in violation of a federal, state, or local statute or governmental requirement that applies to the agricultural operation or portion of an agricultural operation. **[*10]**

TEX. AGRIC. CODE ANN. § 251.004 (Vernon 2004). The three elements of the code's statute of repose are: that the alleged nuisance creator is an agricultural operation; that it was lawfully operating for one year prior to suit; and that the conditions complained of existed substantially unchanged since the established date of operation. *See TEX. AGRIC. CODE ANN. § 251.004(a)* (Vernon 2004); *Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544, 548 (Tex. App.—Corpus Christi 2004, no pet.)*. The "established date of operation" means "the date on which an agricultural operation commenced operation." *TEX. AGRIC. CODE ANN. § 251.003* (Vernon 2004); *Holubec, 111 S.W.3d at 36*. If the "physical facilities of an agricultural operation are subsequently expanded," the expanded operation acquires "a separate and independent established date of operation," which is the date the expanded operation commences. *TEX. AGRIC. CODE ANN. § 251.003* (Vernon 2004); *Holubec, 111 S.W.3d at 36*. The commencement of an expanded operation, however, **[*11]** "does not divest the agricultural operation of a previously established date of operation." *TEX. AGRIC. CODE ANN. § 251.003* (Vernon 2004); *Holubec, 111 S.W.3d at 36*.

In the instant case, the parties stipulated at trial: (1) that the conditions that appellees complained of were substantially unchanged for at least one year prior to January 12, 2001, the date of suit, and (2) that Cal–Co had been lawfully in operation for at least one year prior to January 12, 2001. Accordingly, the only issue remaining is whether or not Cal–Co constituted an agricultural operation.

At the time of suit and trial, an "agricultural operation" was defined as follows:

> 'Agricultural operation' includes but is not limited to the following activities: cultivating the soil, producing crops for human food, animal feed, planting seed, or fiber, floriculture; viticulture; horticulture; raising or keeping

> livestock or poultry; and planting cover crops or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure."

Act of 1981, 67th Leg. P. 2595, ch. 693, § 21, 1981 Tex. Gen. Laws **[*12]** 2595 (amended 2005) (current version at *TEX. AGRIC. CODE ANN. § 251.002(1)* (Vernon Supp. 2005)). The code contains three definitions for the term "agricultural product." *Hendrickson v. Swyers, 9 S.W.3d 298, 301 n.2 (Tex. App.—San Antonio 1999, pet. denied)*. *Section 52.002* defines "agricultural products" as including " horticultural, viticultural, forestry, dairy, livestock, poultry, and bee products and any farm and ranch product." *TEX. AGRIC. CODE ANN. § 52.002(1)* (Vernon 2004). Section 53.001 defines "agricultural product" as meaning "farm, orchard, or dairy products," specifically excluding livestock. *Id.* § 53.001(1) (Vernon 2004). *Section 58.002* defines "agricultural product" as "an agricultural, horticultural, viticultural, or vegetable product, bees, honey, fish or other seafood, planting seed, livestock, a livestock product, a forestry product, poultry, or a poultry product, either in its natural or processed state, that has been produced, processed, or otherwise had value added to it in this state." *Id. § 58.002(2)* (Vernon 2004).

The goal of statutory construction is to give effect to the **[*13]** intent of the legislature. *Monsanto Co. v. Cornerstones Mun. Utility Dist., 865 S.W.2d 937, 939, 37 Tex. Sup. Ct. J. 199 (Tex. 1993)*. Here, the legislature specified its intent in the code itself. *Section 251.001* provides:

> It is the policy of this state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. It is the purpose of this chapter to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be regulated or considered to be a nuisance.

TEX. AGRIC. CODE ANN. § 251.001 (Vernon 2004). "Clearly, this language is directed towards protecting farmers and ranchers who engage in activities that produce food." *Hendrickson v. Swyers, 9 S.W.3d 298, 300 (Tex. App.—San Antonio 1999, pet. denied)*.

Cal–Co is a storage facility for grain. It loads, stores, and unloads milo and corn. Warren Whatley testified that Cal–Co "takes in grain and stores it for farmers" as part of the "process" of getting grain from the fields "to humans and livestock." Harold Evans testified **[*14]** that Cal–Co is "definitely" an agricultural operation because it handles farmers' and ranchers' grain. According to witness Buster Nunley, Cal–Co is "a part of the process of producing livestock feed" and "a part of that process of producing crops for animals–for animal food." Cal–Co is a "distribution point" for grain.

We conclude that Cal–Co constitutes an agricultural operation within the meaning of the code. Accordingly, given the parties' stipulations, all three elements of the code's statute of repose have been met.

We next consider whether the settlement agreement affects application of the agriculture code's statute of repose and award of attorney's fees. Unlike the trial court, we do not conclude that the settlement agreement and *section 251.004* are irreconcilable. The settlement agreement specifically provides, in part, that "The purpose of this paragraph shall not be to create, nor increase or decrease, any legal liability of [appellants], toward Richard E. Whatley and wife, Shirley Whatley." The agreement further provides "That should the said Richard E. Whatley and wife, Shirley Whatley subsequently be of the opinion that they have been damaged by such operations, **[*15]** it shall be incumbent upon said individuals to prove their cause of action and damages in a court of competent jurisdiction." If we were to conclude that the settlement agreement precluded application of *section 251.004* to the instant situation, it would effectively create liability on the part of appellants where none would otherwise exist given the statute of repose.

We sustain appellants' sole issue. Because of our resolution of this issue, we need not address appellees' cross–point. *See TEX. R. APP. P. 47.1*.

Conclusion

Given the foregoing, we reverse the trial court's judgment insofar as it fails to award appellants attorney's fees and costs under *section 251.004 of the agriculture code*. We remand this issue to the trial court for entry of judgment in accordance with this opinion.

ROGELIO VALDEZ

Chief Justice

DISSENT BY: Justice Castillo

DISSENT:

DISSENTING MEMORANDUM OPINION

I respectfully disagree with the majority in two respects. In particular, appellant Cal–Co has not shown that (1) the trial court's enforcing the parties' compromise settlement agreement on the question of attorney fees is reversible error, and, (2) it is entitled to attorney **[*16]**

fees because it is engaged in an "agricultural operation" as that term is statutorily defined. Thus, I dissent.

Enforcement of the Parties' Compromise Settlement Agreement

Appellees Richard and Glenda Whatley sued to enforce their compromise settlement agreement with Cal–Co. The trial court expressly found that the agreement does not make provisions concerning an award of attorney fees. The record supports the finding. The trial court concluded that the agreement controlled the disposition of the attorney fee award and, implicitly because of the agreement's silence, rejected the jury's award of attorney fees.

We review a trial court's conclusions of law de novo and uphold them unless they are erroneous as a matter of law. *See State v. Heal, 917 S.W.2d 6, 9, 39 Tex. Sup. Ct. J. 221 (Tex. 1999)*; *Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544, 547 (Tex. App.—Corpus Christi, no pet.)*. Attorney fees are not recoverable unless such a recovery is provided by statute or a contract between the parties. n1 *Travelers Indem. Co. v. Mayfield, 923 S.W.2d 590, 593, 39 Tex. Sup. Ct. J. 678 (Tex. 1996)*. This case involves a compromise settlement agreement. The parties' compromise **[*17]** must be made in good faith and the instruments evidencing same must not be executed to cloak the real transaction. *See Finn v. Alexander, 139 Tex. 461, 163 S.W.2d 714, 716 (Tex. 1942)*.

> n1 Parties to a contract may provide by agreement that the prevailing party is entitled to recover attorney fees. *See Weng Enters. v. Embassy World Travel, 837 S.W.2d 217, 222–23 (Tex. App.—Houston [1st Dist.] 1992, no writ)*. The "prevailing party" is the party who successfully prosecutes or defends the action on the main issue. *Id. at 223*.

The jury's award of attorney fees finds no support in the parties' agreement. Because the settlement agreement is silent with respect to attorney fees and the judgment is consistent with the agreement, I would hold that Cal–Co has not demonstrated that the trial court's rejection of the attorney fee award is erroneous as a matter of law. *See Heal, 917 S.W.2d at 9*; *Hondo Creek, 132 S.W.3d at 547*. Further, **[*18]** Cal–Co has not demonstrated that the ruling constitutes reversible error. *See TEX. R. APP. P. 44.1(a)(1)*.

"Agricultural Operation"

Even so, Cal–Co bases its claim to attorney fees on the Right to Farm Act. n2 *See* Act of 1981, 67th Leg., R.S., ch. 693, 21, 1981 Tex. Gen. Laws 2595 (amended 2005) (currently codified at *TEX. AGRIC. CODE ANN. 251.001 et seq.* (Vernon 2004 & Supp. 2006)). Implicitly, the majority concludes that testimony that Cal–Co is "a part of the process of producing livestock feed" and "a part of that process of producing crops for animals–for animal food" suffices to prove Cal–Co "constitutes an agricultural operation" as that term is statutorily defined. For the reasons stated below, I would hold that the Right to Farm Act does not contemplate that a private, commercial enterprise involving the storage or distribution of grain is an "agricultural operation" under the terms of the Act.

> n2 A person who brings a nuisance action for damages or injunctive relief against an agricultural operation that has existed for one year or more prior to the date that the action is instituted or who violates the provisions of *subsection (a)* of this section is liable to the agricultural operator for all costs and expenses incurred in defense of the action, including but not limited to attorney fees, court costs, travel, and other related incidental expenses incurred in the defense. *See TEX. AGRIC. CODE ANN. § 251.004(b)* (Vernon 2004); *Hendrickson v. Swyers, 9 S.W.3d 298, 299–300 (Tex. App.—San Antonio 1999, pet. denied)*.

[*19]

In order "to conserve, protect, and encourage the development and improvement of agricultural land for the production of food and other agricultural products," the Legislature passed the Right to Farm Act in 1981 "limiting the circumstances under which agricultural operations may be regulated or considered to be a nuisance." *TEX. AGRIC. CODE ANN. § 251.001*. The Act defines "agricultural operation" in relevant part as including "producing crops for human food, animal feed." *Id. 251.002(1)*. Thus, we must discern whether storing or distributing grain is included in the meaning of the term "producing crops for . . . animal feed" under the Act. *See id*.

Because the issue presented for review is one of statutory construction, involving purely legal determinations, the proper standard of review is de novo. *See Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318, 45 Tex. Sup. Ct. J. 631 (Tex. 2002)*; *Walker v. Packer, 827 S.W.2d 833, 840, 35 Tex. Sup. Ct. J. 468 (Tex. 1992)*. It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. *Cameron v. Terrell & Grant, Inc., 618 S.W.2d 535, 540, 24 Tex. Sup. Ct. J. 265 (Tex. 1981)*; **[*20]** *Allison v. Allison, 3 S.W.3d 211, 214 (Tex. App.—Corpus Christi 1999, no pet.)*. Every word excluded from a statute must also be presumed to have been excluded for a purpose. *Cameron, 618 S.W.2d at 540*; *Wood v. Victoria Bank & Trust Co., N.A., 170 S.W.3d 885, 890 (Tex. App.—Corpus Christi 2005, pet.*

denied) (op. on reh'g). Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision. *Cameron, 618 S.W.2d at 540*. Further, words that are not defined by a statute will be given their plain and ordinary meaning. n3 *See TEX. GOV'T CODE ANN. § 311.011* (Vernon 2005) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). We may consult dictionary definitions when ascertaining those meanings. *See Morgan Bldgs. & Spas v. Turn–Key Leasing, 97 S.W.3d 871, 880 n. 16 (Tex. App.—Dallas 2003, pet. denied)*. We must enforce the plain meaning of an unambiguous statute. *Tune v. Tex. Dep't of Pub. Safety, 23 S.W.3d 358, 363, 43 Tex. Sup. Ct. J. 1029 (Tex. 2000)*; **[*21]** *St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505, 40 Tex. Sup. Ct. J. 712 (Tex. 1997)* (holding that we interpret a statute that is clear and unambiguous by looking at the plain meaning of the statute's words).

> n3 Texas courts are to consider, among other factors, the language of the statute, legislative history, the nature and object to be obtained, and the consequences that would follow from alternative constructions, even when a statute is not ambiguous on its face. *Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493, 44 Tex. Sup. Ct. J. 675 (Tex. 2001)*; *Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 280, 37 Tex. Sup. Ct. J. 1138 (Tex. 1994)*.

Webster's defines the verb "produce" as to "create," "make," or "manufacture," among other similar definitions that connote, in the context of farming operations, functions that do not include storage or distribution of crops. *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 743 (2nd ed. 1979). Thus, the plain meaning of the dictionary's definition is that "producing crops for . . **[*22]** . animal feed" entails, among others, planting, growing, and harvesting crops for animal feed. *See id.* Consequently, the majority's conclusion that Cal–Co's storage or distribution of crops is engaged in an "agricultural operation" because it is "part of the process of producing livestock feed" or "part of the process of producing crops for animals" finds no support in the plain meaning of the statute. *See TEX. AGRIC. CODE ANN. § 251.002(1)*. The Act was designed in furtherance of the right to farm. *See id. § 251.001*; *Hendrickson v. Swyers, 9 S.W.3d 298, 300 (Tex. App.—San Antonio 1999, pet. denied)* ("Clearly, this language is directed toward protecting farmers and ranchers who engage in activities that produce food.").

We must enforce the plain meaning of its terms. *See Tune, 23 S.W.3d at 363*; *St. Luke's Episcopal Hosp., 952 S.W.2d at 505*. A commercial storage or distribution facility for grain is not within the ambit of the right to farm. *TEX. AGRIC. CODE ANN. § 251.001*. Nothing in the plain meaning of the term "producing crops for . . . animal feed" in the **[*23]** Act connotes protection of non–agricultural storage or distribution facilities from nuisance actions based on conditions or circumstances existing for more than a year before suit. *See id*. Thus, Cal–Co's proffered interpretation is not within the breadth of the Act. Further, because the Legislature did not include storage or distribution within the Act's terms, we must presume the terms were excluded for a purpose. *See Cameron, 618 S.W.2d at 540*; *Wood, 170 S.W.3d at 890*; *Allison, 3 S.W.3d at 214*.

Thus, even assuming the trial court erred in concluding that the parties' agreement prevailed over the Act and, even construing the agreement and the Act together as Cal–Co urges, Cal–Co is not engaged in an "agricultural operation." Rather, as the evidence demonstrates, it is engaged in the storage or distribution of the product of an agricultural operation. Consequently, Cal–Co is not entitled to statutory attorney fees under the Act. *Id. 251.004(b)*.

Conclusion

The trial court's conclusion that attorney fees are not encompassed in the parties' compromise settlement agreement finds support in the record **[*24]** and as a matter of law. Cal–Co's theory of recovery of attorney fees under the Right to Farm Act finds no basis in law or in fact. Accordingly, I would affirm the trial court's take–nothing attorney fee judgment in favor of the Whatleys.

ERRLINDA CASTILLO

Justice