# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

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No. 07-15-00102-CV

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RONALD WHITTINGTON AND MARY WHITTINGTON, APPELLANTS

V.

JAY GREEN AND CONNIE GREEN, APPELLEES

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On Appeal from County Court at Law No. 2
Potter County, Texas
Trial Court No. 101,936-2; Honorable Pamela Sirmon, Presiding

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December 20, 2016

## MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLEE, JJ.

This is a contract dispute concerning the enforcement of a *Compromise and Settlement Agreement* entered into in settlement of an earlier lawsuit involving conflicting claims concerning the rights, duties, and obligations of adjacent landowners as it pertains to the drainage of rain water from a higher elevation estate onto a lower elevation estate. Of significant import is the fact that this is not a case involving the

relitigation of the issues settled by that lawsuit. Appellants, Ronald and Mary Whittington, appeal the trial court's judgment in favor of Appellees, Jay and Connie Green, following a bench trial. By five issues, the Whittingtons challenge the trial court's judgment asserting the trial court erred in (1) finding that Ronald breached an earlier *Compromise and Settlement Agreement*; (2) finding that the injury to the Greens' property was a permanent injury; (3) granting injunctive relief to the Greens; (4) denying Ronald's claim under the Uniform Declaratory Judgments Act (hereinafter the "UDJA");[1] and (5) granting the Greens their attorney's fees and denying Ronald's request for attorney's fees. We affirm in part, reverse and render in part, and reverse and remand in part.

BACKGROUND AND PROCEDURAL HISTORY

The Greens built their home in 1994 in a housing addition outside the city limits of Amarillo. At the time they acquired the property, the south side of their property abutted property of a higher elevation to the south and west consisting of native rangeland and vegetation. Testimony established that the natural flow of water on the higher property was from the south and southwest, towards the north and northeast, through the higher elevation property, and then onto and across the Greens' lower elevation property, before ultimately passing onto other lower-lying properties further north.

In 2003, nine years after the Greens built their home, Ronald began construction of a home on the higher elevation property. In 2004, he installed caliche on a pre-

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-37.011 (West 2015 and Supp. 2016).

existing dirt road, and in 2007, he erected two curved, brick entrance structures, one on each side of the road, intended as an architectural feature on which he could display his home address. The structure on the north side of the road came within an inch of the Greens' property line. Ronald paved the driveway to his house in September 2007 and eventually moved into the home in February 2008. During the course of construction, Ronald caused various non-permeable surfaces to be constructed on the property, including a house, garage, driveway, metal building, swimming pool, and patio. Each of these improvements required some alteration of the natural landscape of the once-permeable rangeland.[2]

On July 31, 2009, in an effort to establish grass on his property, Ronald spread grass seed and a sticky hydromulch on the surface of his property. That night, a heavy rainfall caused his seed, hydromulch, and debris to wash onto the Greens' property. The rain event required extensive clean-up which was performed by Ronald and the Greens. On August 11, 2009, the Greens sent a letter to Ronald detailing their concerns about excess water flow and demanding his immediate remediation of the problem. Specifically, the Greens requested "that immediate action be taken to divert any and all water coming from your property . . . ." In response to the Greens' request, Ronald placed bales of hay on his property, along their common property line.

Dissatisfied by Ronald's remedial efforts, in November 2009, the Greens filed a lawsuit seeking damages from Ronald based upon their allegation of improper diversion

[2] Expert testimony established that removal of native vegetation and the installation of non-permeable surfaces speeds up water flow across the affected property.

of the natural flow of surface water onto their property.[3] In March 2010, in an effort to further remediate the Greens' concerns, Ronald met with an engineer to discuss possible solutions. He then constructed a trench along the south side of his driveway that was approximately ten-feet wide and six inches deep. The Greens' suit was subsequently settled on October 13, 2010, when the parties entered into a *Compromise and Settlement Agreement* (hereinafter simply the "Agreement"). Pursuant to paragraph 9(a) of that agreement, Ronald agreed to do the following:

> [m]aintain the trench on Whittington's Property **or** take other steps reasonably necessary to prevent *excess water flow* onto the Greens' Property, **or** alternatively to erect a permanent structure, such as a concrete trench, that will prevent *excess water flow* onto the Greens' Property.

(Emphasis added). The Agreement did not define "excess water flow."

The following May, during a year of drought, a fire destroyed a significant portion of the remaining natural vegetation near Ronald's property. The next year, in June 2012, a significant rain event caused extensive water flow onto the Greens' property. As a result of that event, the Greens sought legal advice that resulted in a letter dated June 18, 2012, from their attorney to Ronald. That letter reminded Ronald of his contractual obligation under the Agreement to prevent "excess water flow" onto the Greens' property. The letter also alleged a breach of the Agreement, and it gave Ronald thirty days' notice to remedy the situation before legal action would be taken. Ronald's counsel answered the demand letter and disputed the Greens' assertion of

[3] "Surface water" is water that is diffused over ground from falling rains or melting snow and which continues to be such until it reaches some bed or channel in which water is accustomed to flow. *Bunch v. Thomas*, 121 Tex. 225, 49 S.W.2d 421, 423-24 (1932) (describing "surface water" as "flowing in its natural state, unhindered by the hands of man").

excess water flow, noting that water flowing onto the Greens' property was the natural flow of water downhill. The letter further indicated that, pursuant to the terms of the Agreement, Ronald would continue to maintain the trench to prevent any excess water flow caused by his improvements to the higher elevation property.

When Ronald took no additional remedial action, the Greens constructed a retaining wall along their property line. Construction began in late 2012 and the wall was functionally complete by April 2013.[4] According to Mr. Green, the wall is approximately two and one-half feet high and sits three inches off the Greens' property line. Of noteworthy importance, where the retaining wall is adjacent to Ronald's north entrance structure, the two structures are approximately four inches apart, potentially impeding the natural flow of water.

In late May 2013, a significant rain storm and hail event occurred. Debris dammed the gap between Ronald's north entrance structure and the Greens' newly constructed retaining wall, resulting in the retention of water on Ronald's property until it eventually spilled over the retaining wall and onto the Greens' property. Expert testimony established that the gap between Ronald's north entrance structure and the retaining wall created a bottleneck or damming effect that caused water during heavy rains to accumulate on Ronald's property until it reached a sufficient depth to flow over the retaining wall and onto the Greens' property.

[4] The Greens did not seek the advice of a civil engineer regarding the location or design of the retaining wall.

After that storm, in an attempt to further alleviate drainage issues, Ronald rented an excavator to widen and deepen the trench along the south side of his driveway. He also dug a new three-foot wide by three-foot deep trench. Notwithstanding these additional efforts, the Greens filed suit against Ronald in December 2013 alleging he had breached the Agreement by "failing to maintain his property and prevent excess water flow onto [Greens'] property." Based on this alleged breach, the Greens sought recovery of monetary damages for (1) the cost of constructing the retaining wall, in the amount of $30,513.20 and (2) necessary expenses associated with cleaning up mud and debris. The Greens also sought the recovery of reasonable and necessary attorney's fees. After Ronald filed his original answer, the Greens amended their petition to include a request for "specific performance of the contract in the form of a mandatory injunction requiring the removal of the gate in proximity to [the Greens'] retaining wall, to permit the flow of excessive water through the gate of [Ronald Whittington] without running over [the Greens'] retaining wall."[5]

In response, Ronald filed a counterclaim alleging the Greens violated section 11.086 of the Texas Water Code[6] by constructing the retaining wall, trespassing onto his property, and creating a nuisance. Ronald also sought a declaration of his rights under the Agreement pursuant to the provisions of UDJA. Specifically, Ronald sought a

[5] At trial, the Greens' expert recommended either moving the north entrance structure back two feet or installing a pipe of at least two and one-half feet in diameter so water could flow through at ground level, thereby preventing the accumulation of water on Ronald's property sufficient to keep water from flowing over the Greens' retaining wall.

[6] Section 11.086(a) provides that "[n]o person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded." TEX. WATER CODE ANN. § 11.086(a) (West 2008).

declaration interpreting the term "excess water" or, alternatively, a declaration that he complied with the terms of the Agreement. At the same time and on the same basis, Mary[7] filed a *Petition in Intervention* seeking monetary damages and equitable relief.

At a bench trial, Ronald testified that he had fully complied with the Agreement by maintaining the trench. He theorized that the May 2013 flow of water onto the Greens' property was not "excess water flow" as contemplated by the Agreement because the trench he was maintaining was sufficient to handle the change in the natural water flow caused by his improvements to the property.[8] He further contended that the Greens exacerbated the water flow problem and violated section 11.086 of the Texas Water Code by building their retaining wall, thereby diverting or impounding the natural flow of surface waters *onto his* property. When asked during cross-examination whether the close proximity of the retaining wall and the architectural structure on the Whittington property caused him any concern, Mr. Green stated that "we set back three inches, to make sure, you know, that we would have some water flow through there, and we felt like that would be sufficient."

At the conclusion of the trial, the trial court entered a *Final Judgment on All Claims* (1) finding that Ronald breached the Agreement, (2) awarding the Greens recovery of $33,175.75 in damages and $24,000 in attorney's fees, (3) awarding conditional attorney's fees of $17,500 in the event of an appeal, (4) ordering Ronald to "remove his entry structures or modify them by adding thirty (30) inch openings in the

[7] Mary married Ronald in 2012. She was not a party to the 2010 *Compromise and Settlement Agreement* and she was not named as a defendant in the Greens' suit to enforce that Agreement.

[8] A civil engineer testified at trial that the trench was more than sufficient to handle the flow of excess water caused by Ronald's development of the property.

center of the South structure and on the north edge of the North structure," and (5) denying both Ronald and Mary any relief on their counterclaim and plea in intervention. The trial court also found the Greens had trespassed onto Ronald's property and enjoined them from entering that property in the future; however, it awarded no monetary damages in Ronald's favor. The trial court subsequently entered *Findings of Fact and Conclusions of Law* supporting its judgment. Included within those findings is the factual finding that "excess water," as used by Ronald and the Greens in the Agreement, means "*any water* flowing off Whittington's property onto Greens' property." Following entry of judgment, Ronald and Mary timely filed a notice of appeal.

2010 COMPROMISE AND SETTLEMENT AGREEMENT

Ronald and Mary maintain the Agreement was not a valid contract because the parties did not have the requisite meeting of the minds concerning the term "excess water flow." Ronald and Mary maintain that "excess water flow" means the amount of water flow across the Greens' property, in excess of any natural water flow, directly caused by the modification or improvement of the Whittingtons' property. According to their interpretation of the Agreement, the parties intended "excess water flow" to mean that amount of water being diverted by the then-existing trench mentioned in the Agreement. Conversely, the Greens contend the trial court was correct in finding the Agreement to be an enforceable contract as written, including the trial court's determination that "excess water flow" meant *any water* flowing onto their property from the Whittington property.

APPLICABLE LAW

To establish an enforceable contract, three essential elements must exist: (1) an offer, (2) acceptance of that offer, and (3) consideration. *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied). To determine whether there was an offer and acceptance, and therefore, a "meeting of the minds," courts use an objective standard, considering what the parties did and said, not their subjective states of mind. *Id.* A meeting of the minds is not an independent element of a valid contract. *Id.* at 40. It is merely a mutuality subpart of the offer and acceptance elements. *Id.* A "meeting of the minds" is a mutual understanding and assent to the expression of the parties' agreement. *Id.*

If the written instrument is worded so that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and a reviewing court should construe the contract as a matter of law. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650 (Tex. 1999); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). If, however, the instrument is worded in such a way that its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning, it is ambiguous. *Id.* While the determination of whether a contract is ambiguous is a question of law, *R & P Enterprises v. La Guarta, Gavrel & Kirk*, *Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); an ambiguity in a contract generally creates a fact question. *Reilly v. Rangers Mgmt.*, *Inc.*, 727 S.W.2d 527, 529 (Tex. 1987).

In construing a contract, the primary concern of the reviewing court is to ascertain the true intentions of the parties as expressed in the instrument. *Italian*

*Cowboy Partners*, *Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333-34 (Tex. 2011); *Seagull Energy E & P*, *Inc. v. Eland Energy*, *Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). The parties' intent may be determined by considering the construction the parties placed on the contract as evidenced by their conduct. *Consolidated Engineering Co., Inc. v. Southern Steel Co.*, 699 S.W.2d 188, 192-93 (Tex. 1985). To ascertain the true intent of the parties, a reviewing court should examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *Coker*, 650 S.W.2d at 393. In determining the intent of the parties, the agreement should be construed in the context of the circumstances surrounding its formation. *Italian Cowboy Partners, Ltd.,* 341 S.W.3d at 336 n.8 (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997)). Contract terms are given their plain, ordinary, and generally accepted meaning unless the contract itself shows them to be used in a technical or different sense. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Here, the trial court did not make an express finding or conclusion as to whether the Agreement was ambiguous. It did, however, make a "fact finding" that the term "excess water," as used by the parties in the Agreement, "meant any water flowing off [the Whittingtons'] property onto Green's [sic] property." Findings of fact entered in a case tried to the bench have the same force and dignity as a jury's verdict upon questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 395 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Those findings, however, are not conclusive when a

complete statement of facts appears in the record if the contrary is established as a matter of law or if there is no evidence to support the findings. *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e*., 699 S.W.2d 199 (Tex. 1985) (per curiam).

A trial court's findings of fact are reviewable for legal and factual sufficiency by the same standards applied in reviewing the sufficiency of the evidence supporting a jury's finding. *Anderson*, 806 S.W.2d at 794. In reviewing a legal sufficiency issue, we consider only the evidence and reasonable inferences therefrom which, when viewed in their most favorable light, support the court's findings, disregarding all evidence and inferences to the contrary. *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990). If there is more than a scintilla of evidence to support the finding, the no-evidence challenge must fail. *Id*. Whereas, in considering a factual sufficiency issue, we review all the evidence and reverse only if the challenged finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1962). In a factual sufficiency review, we do not reweigh the evidence and set aside the finding merely because we feel that a different result is more reasonable. *Pool*, 715 S.W.2d at 634. The trier of fact is the sole judge of the credibility of the witnesses and the weight given their testimony, *Leyva v. Pacheco*, 163 Tex. 638, 358 S.W.2d 547, 549 (1962), and may believe one witness and disbelieve another in order to resolve inconsistencies in testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). We are also not bound by the trial court's conclusions of law based upon its findings of fact, and we review those conclusions *de novo* to determine their

correctness. *In re Humphreys*, 880 S.W.2d 402, 403 (Tex. 1994), *cert. denied*, 513 U.S. 964, 115 S. Ct. 427, 130 L. E. 2d 340 (1994); *Hydrocarbon Mgt. v. Tracker Exploration*, 861 S.W.2d 427, 431 (Tex. App.—Amarillo 1993, no writ).

ANALYSIS

By their first issue, the Whittingtons contend the trial court erred in finding that Ronald breached the Agreement. The Agreement reflects a negotiated settlement between the parties of a then-existing dispute, concerning "excess water flow" from Ronald's property, onto the Green property, occasioned by improvements made to Ronald's property. The Agreement itself reveals that it is an offer of settlement (dismissal of the pending litigation), accepted in exchange for a promise of performance, to-wit: (1) maintenance of the then-existing trench, (2) performance of other steps reasonably necessary to prevent excess water flow, or (3) erection of a permanent structure that will prevent excess water flow, based on valuable consideration (relinquishment of the relative legal rights of the parties). As such, as a matter of law, the Agreement is an enforceable contract, subject to interpretation according to applicable rules of contract construction.

In that regard, we find the Agreement is ambiguous, as a matter of law, because the legal meaning or interpretation of the term "excess water flow" is uncertain and doubtful because, as it is used in the context of the Agreement, it is reasonably susceptible to more than one meaning. *MCI Telecomms. Corp.*, 995 S.W.2d at 650. Because the Agreement is ambiguous as to what the parties meant by the term "excess water flow," the trial court was required to interpret it in accordance with applicable rules of contract construction. One of the rules of construction applicable in this case is the

rule that the words used in the Agreement are to be given their plain, ordinary, and generally accepted meaning unless the contract itself shows them to be used in a technical or different sense. *Valence Operating Co.,* 164 S.W.3d at 662. Furthermore, in construing the intent of the parties, we must remain mindful of the fact that the Agreement was entered into in the context of the compromise and settlement of a lawsuit concerning the rights, duties, and obligations of adjacent landowners as it relates to the drainage of rain water from a higher elevation estate onto a lower elevation estate. *See Italian Cowboy Partners, Ltd.,* 341 S.W.3d at 336 n.8. *See also Mitchell v. Blomdahl,* 730 S.W.2d 791, 792 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (holding that the owner of a lower estate has the burden to receive waters flowing from the upper estate, so long as the water is flowing in its natural state, unhindered by the hands of man).

In construing the Agreement to ascertain the intention of the parties, the trial court found that uncertainty regarding the meaning of "excess water flow" created a fact dispute. *Reilly*, 727 S.W.2d at 529. The trial court then resolved that ambiguity in favor of the Greens by finding that the parties meant "*any* water flowing off [the Whittingtons'] property onto Green's [sic] property." In so doing, the trial court erred for at least two obvious reasons.

First, by finding that the term "excess" meant "any," the trial court failed to give the term "excess" its plain, ordinary, and generally accepted meaning. Secondly, the trial court failed to give the term "excess" its technical meaning within the context of the controversy. Reviewing the decision of the trial court *de novo,* we too must interpret the phrase "excess water flow," according to the intent of the parties. In doing so, we must

look to the circumstances surrounding the Agreement and remain mindful that the phrase was used in the context of an arm's length, fully negotiated settlement, of a then-pending legal dispute. As such, we must construe the phrase in the context of the law as it applies to the natural flow of water onto and across adjacent properties of different elevations. It is in this legal context that the parties reached their settlement, and by reviewing those circumstances, we find the Agreement itself shows the phrase in question to be a term of art used in a strict legal sense, i.e., defining the relative rights of the parties applicable to the natural flow of water onto and across lower-lying adjacent properties.

In that regard, it is settled law in this State that the owners of a lower elevation estate, here the Greens' property, have the burden to receive waters flowing from a higher elevation estate, here the Whittingtons' property, so long as the water is flowing in its natural state, unhindered by the hands of man. *Bunch*, 49 S.W.2d at 423; *Higgins v. Spear*, 118 Tex. 310, 15 S.W.2d 1010 (1929). This principle is true regardless of the amount of rain. It is true whether it is a time of drought, or a time of plenty. "Excess water" is not determined by the *amount* of water flowing onto the lower lying property; rather, it is determined according to how the natural flow of water is altered and affected by the "hands of man." Stated conversely, the owners of the higher elevation estate, here the Whittingtons, bear the responsibility for damages caused by changes made to that property which affect the natural flow of water, i.e., damages caused by water flow in excess of the flow of water in its natural state. Furthermore, in the context of the settlement of this particular dispute, excess water flow was addressed by the parties when the Agreement provided that the existing controversy could be compromised and

settled by Ronald's maintaining the then-existing trench, as one of three alternative ways to avoid excess water flow onto the Greens' property. As such, when the parties executed the Agreement, they impliedly agreed that the trench would divert any water flow in excess of the natural flow of water caused by Ronald's improvements to his property and, short of evidence showing further modification of the property, that means of diversion would remain sufficient—regardless of the *amount* of rain. Nowhere in the Agreement did Ronald agree to prevent *any* water from flowing off his property and onto the Greens' property. Because the trial court construed "excess water" to mean "any" water, its fact finding is against the great weight and preponderance of the evidence. Furthermore, because the trial court's ultimate legal conclusion regarding Ronald's breach of the Agreement is based on this erroneous finding of fact, we conclude the trial court erred in reaching the conclusion that Ronald breached the Agreement by failing to prevent excess water flow.

Furthermore, to the extent that the Greens contend that Ronald breached the Agreement by failing to maintain the trench on his property, the evidence is legally insufficient to establish the extent to which such a breach caused excess water, if any, to flow onto their property. Furthermore, the evidence is legally insufficient to establish a causal relationship between that alleged breach and any of the damages awarded. Ronald's first issue is sustained.

The Whittingtons' second issue challenges the measure of damages used by the trial court to calculate the damages resulting from Ronald's alleged breach of the Agreement. Specifically, the Whittingtons contend the trial court erred by awarding damages based upon a finding of permanent injury to the Greens' property. Because

we find the trial court erred in finding that Ronald breached the Agreement by failing to prevent excess water flow, regardless of the method of calculation, it also erred in awarding damages. Therefore, it is unnecessary for us to address issue two and we pretermit disposition of that issue. TEX. R. APP. P. 47.1.

By their third issue, the Whittingtons contend the trial court erred by granting affirmative injunctive relief to the Greens in the form of an order requiring Ronald to alter the two curved, brick entrance structures adjacent to his roadway. Specifically, the trial court ordered that Ronald "remove his entry structures or modify them by adding thirty (30) inch openings in the center of the South structure and on the north edge of the North structure." The Greens contend this affirmative injunctive relief was necessary to prevent *any* water from flowing onto their property. The problem with the Greens' argument is two-fold. First, they are attempting to apply an interpretation of "excess water" we have already rejected and, secondly, to accept their argument would be for us to renegotiate the terms of the Agreement. At the time the first lawsuit was settled, a dispute existed between the parties concerning the extent to which Ronald's alteration and improvement of his property had caused additional quantities of water to flow onto the Greens' property. In settlement of that dispute, the parties agreed that Ronald would do, at least, one of three things to prevent excess water flow onto the Greens' property. He could either (1) maintain the existing trench on his property, (2) take "other steps" reasonably necessary, or (3) erect a permanent structure to divert the flow of water. Nowhere did Ronald agree to alter or modify the already existing brick structures. To now impose that duty upon Ronald would be to alter or modify the terms

of the Agreement. Accordingly, the trial court erred in ordering Ronald to alter or modify those existing structures. Issue three is sustained.

Through their fourth issue, the Whittingtons contend the trial court erred by denying Ronald's claim for relief pursuant to UDJA. Initially, Ronald requested that the trial court declare that the Agreement was not an enforceable contract because he and the Greens did not have the requisite "meeting of the minds" to form a contract. As discussed above, we reject that argument and find the Agreement to be an enforceable contract.

Alternatively, Ronald requested that the meaning of the phrase "excess water" be defined as "the difference in the amount of water flow from a property prior to development of the property and after development of the property." Finally, Ronald requested a declaration that maintenance of the trench on his property constituted full and complete performance of his obligations under the Agreement to prevent excess water flow.

A declaratory judgment may be used to declare the rights of the parties under a written agreement. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (West 2015). By way of his counterclaim, Ronald sought to have the trial court declare the rights and legal relations of the parties to the Agreement. UDJA is remedial and its purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." *Id.* All orders, judgments, and decrees under UDJA are to be reviewed under the same standards as other orders, judgments, and decrees. *Id.* at § 37.010.

In a suit for declaratory relief, a trial court has limited discretion to refuse a declaratory judgment, but it may do so where judgment would not remove the uncertainty giving rise to the proceedings. *SpawGlass Constr., Corp. v. City of Houston*, 974 S.W.2d 876, 878 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Furthermore, when a declaratory judgment counterclaim has greater ramifications than the original suit—such as settling future disputes—a court may allow the counterclaim. *Winslow v. Acker*, 781 S.W.2d 322, 328 (Tex. App.—San Antonio 1989, writ denied).

Here, an ongoing controversy existed between the parties concerning the extent to which improvements to the Whittingtons' property caused additional quantities of water to flow onto the Greens' property during times of rain. Because the rain falls on all parties in quantities determined solely by meteorological considerations and not the acts of the parties,[9] and because water naturally flows downhill according to the topography of the land, the dispute was never about the *amount* of water that flowed from the higher property to the lower property. As owners of the lower elevation estate, the Greens were obligated to receive waters flowing from the higher elevation estate, here the Whittingtons' property, so long as that water was flowing in its natural state, unhindered by the hands of man. *Bunch*, 49 S.W.2d at 423. Therefore, the dispute was about the extent to which Ronald's improvements ("the hands of man") caused rain that would otherwise be absorbed by his property, or diverted elsewhere, to flow downhill onto the Greens' property. As such, Ronald was never responsible for preventing *any* water from flowing onto the Green property, only excess water.

[9] "[Y]our Father in heaven . . . sends rain on the just and on the unjust alike." Matthew 5:45 (NKJV).

Because the parties, in an arm's length, fully negotiated settlement, agreed that Ronald's maintenance of the trench on his property constituted full and complete compliance of his obligation to prevent excess water flow, the trial court erred by failing to enter a declaratory judgment to that effect. Short of establishing that Ronald had changed the nature of his property to cause additional quantities of water to flow onto the Greens' property, Ronald was entitled to a declaratory judgment in order to resolve future disputes. Issue four is sustained.

Finally, by his fifth issue, Ronald maintains the trial court erred in granting the Greens their attorney's fees and in denying his request for attorney's fees. Because we have found that Ronald did not breach the Agreement, we find the trial court erred in awarding the Greens a judgment for recovery of their attorney's fees. Furthermore, because we have found Ronald was entitled to prevail on the contract claim and he was entitled to a declaratory judgment, the trial court also erred by failing to consider his request for attorney's fees. Issue number five is sustained.

## CONCLUSION

Having sustained issues one, three, four, and five, the judgment of the trial court is reversed, in part, and judgment is rendered that Appellees, Jay Green and Connie Green, take nothing from Appellant, Ronald Whittington, on their claim for breach of the *Compromise and Settlement Agreement* of October 13, 2010. Furthermore, judgment is rendered declaring that Ronald's maintenance of the trench on his property constitutes full and complete performance of his obligations under the Agreement to prevent excess water flow onto the Greens' property. Finally, this matter is remanded, in part, for the determination of attorney's fees, if any, to be awarded to Ronald Whittington pursuant to

either section 37.009 or section 38.001 of the Texas Civil Practice and Remedies Code.

In all other respects, the judgment of the trial court is affirmed.

Patrick A. Pirtle
Justice