2022 UPDATE OF FEDERAL, OHIO, OKLAHOMA AND TEXAS OIL AND GAS CASE LAW

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If you have any questions, or if you would like to discuss any of the cases set forth herein in greater detail, please do not hesitate to contact us.

Sincerely,

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Acknowledgment

A sincere thank you to all those who helped publish the 2022 Case Law Update.

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A. FEDERAL CASE LAW UPDATE

FEDERAL CIRCUIT COURTS OF APPEALS CASES

1. Tenth Circuit Court of Appeals

OXY USA Inc. v. United States Department of the Interior [1]

This case arose from an order by the United States Department of the Interior, Office of Natural Resources Revenue ("ONRR"), to a federal lessee to make extra royalty payments for removing carbon dioxide from lease properties. In particular, the court analyzed whether an arbitration panel's calculation formulas were arbitrary and capricious and whether its refusal of Hess to deduct its compression and dehydration costs was plainly erroneous. The court's affirmation of ONRR's reasoning provides a helpful analysis in dealing with federal leases.

The case centered around ONRR's computation of royalty payments owed under federal gas leases. Amerada Hess Corporation ("Hess") owned the leases at issue during the relevant audit period before being acquired by OXY USA, Inc. ("OXY"). The leases were made pursuant to the Mineral Leasing Act of 1920, which ordered federal lessees to pay the United States at least 12.5% of their royalties from the removal and sale of carbon dioxide ("CO_2") from the leased properties.[2] To ensure accuracy in calculating the royalty payments, the Federal Oil and Gas Royalty Management Act gave the Secretary of the Interior power to audit current and past federal oil or gas leases in order "to make additional collections or refunds as warranted."[3]

In general, ONRR allows lessees to determine the gas royalty value if the lessee disposed of production according to an arm's-length contract. However, if the lessee was not part of an arm's-length contract, the lessee must value its gas according to one of three benchmarks, including the following, applied in this case ("Second Benchmark")[4]:

> (2) A value determined by consideration of other information relevant in valuing like-quality gas, including gross proceeds under arm's-length contracts for like-quality gas in the same field or nearby fields or areas, posted prices for gas, prices received in arm's-length spot of sales of gas, other reliable public sources of price or market information, and other information as to the particular lease operation or the saleability of the gas…

After calculating the gas's royalty value, ONRR allows lessees to deduct a "transportation allowance" for transporting unprocessed gas to a point outside the lease. The lessee can include "[s]upplemental costs for compression, dehydration, and treatment of gas…only if such services (1) are required for transportation and (2) exceed the services necessary to place production into marketable condition."[5] Under the same regulations, all royalty payments are subject to audit and

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[1] *OXY USA Inc. v. United States Dep't of the Interior*, 32 F.4th 1032 (10th Cir. 2022).
[2] 30 U.S.C. § 226(b)(1)(A).
[3] 30 U.S.C. § 1711(a).
[4] 30 U.S.C. § 206.152(c)(2).
[5] 30 U.S.C. § 206.157(f)(9).

adjustment by ONRR. In the event of a conflict in terms, federal leases govern over an applicable regulation.

Here, Hess agreed to pay the requisite 12.5% of its royalties to the government on numerous federal leases in accordance with the federal regulation. A later agreement under the Bravo Dome Carbon Dioxide Unit Agreement ("Unit Agreement") provided that the agreement's terms would control where the lease and Unit Agreement conflicted. Upon approving the Unit Agreement, the Secretary of the Interior altered it, reserving "the right to establish higher minimum values for Federal substances." The effect was that Hess was required to pay the higher of either: (1) the net proceeds from the CO_2 gas or (2) a minimum value determined by the United States.[6]

During the audit period, Hess sold some the CO_2 to Fasken Oil and Ranch ("Fasken") under an arm's-length contract but did not make any other arm's-length transactions of CO_2 sales during this time. Rather, Hess used most of the produced CO_2 for its own enhanced oil recovery projects in the Permian Basin ("EOR"). Additionally, Hess owned a ten percent working interest in the EOR projects and purchased large amounts of CO_2 from other working-interest owners for its EOR projects. In transporting the CO_2 for the EOR projects, Hess had to maintain a particular pressure to transport the CO_2 to and from its destination, incurring high costs. Hess also deducted the transportation costs from total sales for auditing purposes. In 2004, Hess reported accumulated compression and dehydration costs associated with delivering CO_2 to the EOR units as a transportation allowance, which amounted to $806,290.73 during the audit period.

ONRR commenced its audit of Hess's royalty payments and calculations from January 1, 2002, to November 30, 2010. On December 19, 2011, ONRR ordered Hess to report and pay an additional $1,874,524.54, using the Second Benchmark because it could not find significant arm's length transactions in the EOR units.[7] In its report, ONRR informed Hess the Unit Average measurement was not appropriate because Hess purchased and used much of the CO_2 for itself in its EOR operations, reasoning that Hess would be more inclined to negotiate lower prices for the EOR Units in order to manipulate the market price on the CO_2 and obtain a higher price on its return rather than find a reasonable value to pay the government for its royalty share.

Based on another concurrent case involving Hess and non-federal lessors, ONRR used the "Smithson formula" suggested by Hess's valuation.[8] The *Smithson* formula considered multiple benchmarks and methods consistent with relevant contracts and similar contracting prices from a large pool of contracts during the same time period. Further, ONRR held Hess's compression and dehydration costs were not deductible from the royalty calculations as a transportation allowance because these costs were "necessary to place the carbon dioxide in marketable condition."[9] Hess appealed the ONRR order, and on September 13, 2016, the Director of ONRR ("Director") evaluated the findings and decided that ONRR was largely correct. OXY challenged the ONRR's decision in district court, which affirmed ONRR's judgment. Thereafter, OXY brought the present appeal.

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[6] *OXY USA Inc.*, 32 F.4th at 1038.
[7] § 206.152(c)(2).
[8] *Smithson v. Amerada Hess Corp.*, No. Civ-06-00624 MCA/RLP, 2010 WL 11508004 (D. N.M. Mar. 24, 2010).
[9] *OXY USA Inc.*, 32 F.4th at 1044.

In this case, the United States Court of Appeals, Tenth Circuit, evaluated OXY's arguments, including whether ONRR: (1) erred in finding the agency's valuation as reasonable, (2) was incorrect in rejecting Hess's Unit Average for a valuation method, (3) erred in applying the second regulatory benchmark to evaluate the governmental regulatory factors, and (4) erred in finding Hess could not deduct its compression and dehydration costs as a transportation allowance.

In analyzing ONRR's valuation methods, the court reiterated that the Unit Agreement and leases allow the Secretary to determine the minimum CO_2 royalty value after giving Hess notice and an opportunity to be heard. It agreed with the Director that whether evaluated under the terms of the lease or the Second Benchmark, the result was the same: because the Fasken Contract was the only confirmed arm's length contract, and other evidence was missing, the *Smithson* formula was appropriate. The court found that the Director was correct to reject Hess's Unit Average under both the lease terms and Second Benchmark because it included non-federal leases that the ONRR could not audit, used valuation methods unknown to the ONRR, and likely included non-arm's length sales.

Additionally, the court found the Director was reasonable to rely on the Second Benchmark because of the significantly small sample data Hess relied on to use the Unit Average due to the lack of significant arm's-length transactions. Further, the record did not reflect that Hess offered alternative royalty calculation methods once ONRR informed Hess of its decision against using the Unit Average. Under the Second Benchmark, the ONRR used the *Smithson* formula, and the court found ONRR's valuation was reasonable.

Next, the court evaluated OXY's argument that Director of the ONRR erred by rejecting the Unit Analysis measurement since ONRR had initially approved this unit of measurement in its preliminary analysis. The court held ONRR was reasonable in changing its position since the Unit Average yielded a price that was lower than ONRR could examine under the Unit Agreement. Finally, the court analyzed whether Director should have allowed Hess to deduct its compression and dehydration costs as a transportation allowance. To claim these costs as a transportation allowance, Hess had to show these costs "(1) were required for transportation and (2) exceeded what was necessary to compress and dehydrate CO_2 to place it in marketable condition . . . ."[10] Although the court conceded that compression and dehydration were required for transportation, compression and dehydration costs did not exceed the cost to place it in marketable condition. Rather, the evidence showed that costs to compress and dehydrate CO_2 were lower than that to place it in marketable condition. Under this test, the court found the Director was correct in refusing to allow Hess to deduct the CO_2 compression and dehydration costs as a transportation allowance.

The Tenth Circuit's holding will help producers more accurately calculate the oil and gas royalties owed to the United States in federal leases involving CO_2 and the importance of having arm's length contracts in federal leases to properly calculate royalty percentages. Be cautious about Unit Agreements that trump lease terms, especially if the Unit Agreements were modified by the U.S. Secretary of the Interior, as such modifications will then alter the terms of the lease. Track correct royalty payments for substances used internally, even if not sold at market. Additionally, try to accrue available data from arm's-length contracts in the area in and around the unit and from

[10] *Id*. at 1051.

market prices for the substances at the location they are used internally. When faced with a dispute in royalty payments, offer alternative calculations rather than simply refuting the result presented by the government.

B. OHIO CASE LAW UPDATE

SUPREME COURT OF OHIO CASES

Cleveland Botanical Garden v. Drewien [11]

In this case, the Ohio Supreme Court was asked to analyze whether Cleveland Botanical Garden ("CBG"), a sublessee of a city park ("Wade Park"), had violated use restrictions set forth in the original deed from 1882 (the "Wade Deed") to the City of Cleveland. CBG argued the reversionary rights had been extinguished by the Marketable Title Act ("MTA"). This brief is focused on the portion of the decision related to the MTA.

The Wade Deed contained numerous use restrictions and further provided that the land would revert to the grantor's heirs (the "Heirs") in the event the restrictions were violated. The trial court held that the MTA had extinguished the Heirs reversionary right, but the Eighth District Court of Appeals reversed the holding, reasoning that, because of the special nature of the park, it could not be subject to conventional land-title transactions.[12]

On appeal, the Supreme Court of Ohio was asked whether the MTA extinguished the reversionary rights of the Heirs because they had not filed a preserving notice pursuant to R.C. 5301.49(A). The court began its analysis by reviewing the plain language of the statute and concluded that the Wade Deed was the root of title.[13] CBG argued that the preservation notice created under R.C. 5301.49(A) created a separate method for preserving reversionary interests. The court rejected CBG's arguments for two reasons. First, the reversionary interest was created in the root of title and "[the MTA] provides only that interests and claims 'existing *prior to* the effective date of the root of title' may be extinguished." (court's emphasis.)[14] Second, to require the Heirs to file a preserving notice "would be redundant and futile since the reversionary interest is inherent in the root of title itself."[15] The court concluded by rejecting the Eight District's reasoning that the Wade Deed should not be treated as a conventional land-title transaction, reasoning that nothing in the MTA precludes its application in this case, as the private right of reversion is not an exception listed in R.C. 5301.53.[16]

In this case, the court makes it very clear that interests created in the root of title are <u>not</u> extinguished by the MTA, even if the owner does not file a preserving notice pursuant to R.C. 5301.49(A).

[11] *Cleveland Botanical Gardens v. Drewien*, -- Ohio St.3d --, 2002-Ohio-3706, -- N.E.3d --.
[12] *Id.* at ¶ 16.
[13] *Id.* at ¶ 60.
[14] *Id.* at ¶ 29, quoting R.C. 5301.47(A).
[15] *Id.* at ¶ 29.
[16] *Id.* at ¶ 33.

Fonzi v. Brown [17]

In this case, the court was asked two questions: (1) whether the Ohio Dormant Mineral Act ("DMA") may be enforced through a quiet title action filed by the surface owners before they satisfy the notice and recording requirements set forth in the statute and (2) whether the surface owners complied with the "reasonable-diligence" standard required by *Gerrity v. Chervenak*[18] for conducting a pre-notice search to locate the severed mineral holder. The suit involves an attempt by a surface owner to reunite minerals severed from lands in Monroe County in 1952, and an affidavit of abandonment filed in 2013 after notice by publication. The trial court granted summary judgment against the surface owners, the Seventh District Court of Appeals reversed the summary judgment, and this appeal was accepted by the Supreme Court of Ohio.

As to the first question, the surface owners argued the DMA creates two ways a mineral interest may be abandoned. First, through the notice and affidavit procedure outlined in the act. Second, through a quiet title action wherein a severed mineral interest should be conclusively presumed abandoned if twenty years have elapsed without a savings event. If a quiet title action were allowed, the mineral owner would have no recourse after receiving notice.

The court started its analysis by reviewing the plain text of the statute. R.C. 5301.56(B) requires two conditions prior to abandonment: (1) 20 years without a savings event and (2) proper notice of intent to declare the severed interest abandoned. The court concludes,

> The DMA provides a single method for a surface owner to procure mineral interests through abandonment. Twenty years without a savings event, service by mail (when feasible), and post-notice opportunity to preserve the mineral interest are indispensable elements of the act's abandonment process.[19]

As to the second question, the court distinguishes the facts in *Gerrity*[20] where the surface owner was determined to have used "reasonable diligence" as opposed to the surface owner in this case, where the search was limited to the records of Monroe County and limited internet research. The original deed in 1952 indicated the mineral holder lived in Washington County, Pennsylvania at the time. If the surface owner had extended their search to Washington County, Pennsylvania, they would have discovered the severed mineral holder still lived there. The court ultimately concluded that notice by publication was improper because the surface owner did not extend its search based on recitals in the public records.

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[17] *Fonzi v. Brown*, -- Ohio St.3d --, 2022-Ohio-901, -- N.E.3d --.
[18] *Id.* at ¶ 11; *see Gerrity v. Chervenak,* 162 Ohio St.3d 694, 2020-Ohio-6705, 166 N.E.3d 1230.
[19] *Fonzi*, at ¶ 20.
[20] The surface owner in *Gerrity* searched the public records of the county where the land was located, the county of the last known residence of the mineral interest holder, and a limited online search, and sent personal service through certified mail to the last known address. Only after the personal service was returned did the surface owner service notice by publication. See summary of facts in *Fonzi* at ¶25.

French v. Ascent Resources-Utica, LLC [21]

In this case, the court was asked to determine a single question: "is an action seeking a determination that an oil and gas lease has expired by its own terms a controversy 'involving the title to or the possession of real estate' so that the action is exempt from arbitration under R.C. 2711.01(B)(1)?"[22] R.C. 2711.01(B)(1) provides that a court may not stay proceedings pending arbitration if the controversy involves title to or possession of real estate.

The oil and gas lease contained an arbitration clause which stated that, "any questions concerning the lease or performance there under shall be ascertained and determined by three disinterested arbitrators[.]"[23] A dispute arose over whether the leases had expired by their own terms. During the suit, the lessee moved to stay the action pending arbitration, which was denied by the trial court. The Seventh District Court of Appeals reversed, and this appeal was accepted by the Supreme Court of Ohio.

In coming to its conclusion, the court reasoned that an oil and gas lease grants the lessee a real property interest because, (1) the lease must be recorded in the public records, (2) the lease encumbers the landowner's title, (3) the lease qualifies as a title transaction because it affects title to real estate for purposes of the Marketable Title Act, and (4) the lease affects the physical possession of the land because the lessee enjoys reasonable surface use. Ultimately, the court concluded that a dispute over the termination of an oil and gas lease, "… is a controversy involving the title to or the possession of real estate and … is not subject to arbitration."[24]

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[21] *French v. Ascent Res.-Utica, L.L.C.*, 167 Ohio St.3d 398, 2022-Ohio-869, 193 N.E.3d 543.
[22] *Id.* at ¶ 1.
[23] *Id.* at ¶ 5.
[24] *Id.* at ¶ 20.

Peppertree Farms, LLC v. Thonen [25]

In this case, the Supreme Court of Ohio answered the following question: did the grantor in a pre-1925 deed retain a life estate when the severance language omitted words of inheritance? The court began its opinion by discussing the common law in Ohio prior to 1925, when the General Assembly abrogated the Rule in *Shelley's* Case, which required words of inheritance for the grantor to pass or reserve a fee simple interest in real property.[26] If the deed did not contain words of inheritance, only a life estate was conveyed or reserved. Pre-1925 common law focused on whether an interest was excepted or reserved. If the grantor previously owned the interest being retained in the deed, the retention was effectively an exception. If the grantor was creating a new interest in the land, the retention was effectively a reservation. The distinction is important because if the grantor already owned fee simple title, and they were retaining a fee simple interest, the exception did not require words of inheritance to retain more than a life estate.[27]

In this case, the deeds wherein oil and gas interests were retained were executed before 1925 and the severance language omitted words of inheritance. The court analyzed the deeds as follows:

> In both deeds, the oil and gas rights were in existence and owned by the respective grantors at the time of conveyance. The grantors therefore held a fee-simple interest that was inheritable. For this reason, words of inheritance were not required to retain more than a life estate in the excepted interests in the oil and gas.[28]

The court further distinguished exceptions from reservations by noting that the purpose of an exception is to exclude an interest the grantor already owns from the conveyance, whereas the purpose of a reservation is to create a new interest in the land that did not exist prior to the transaction.[29] Thus, when determining whether an interest is excepted or reserved, the nature of the interest being retained is determinative, not whether the words "except" or "reserve" are used.

Another important distinction the court addressed was whether the retention of a royalty interest in oil and gas creates a new interest which would, therefore, have required words of inheritance to avoid a life estate. Dicta in the court's 1927 opinion *Pure Oil Co. v. Kindall*[30] suggests that a royalty interest is personal property and not realty. However, the court states that the dicta should not be considered determinative because the issue was not properly before the court.[31] The court goes on to distinguish royalties that have accrued, being personal property, from the right to receive unaccrued royalties, being real property, holding that "the right to future royalties may be retained by exception."[32]

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[25] *Peppertree Farms, LLC v. Thonen*, 167 Ohio St.3d 52, 2022-Ohio-395, 188 N.E.3d 1061. The Court also reaffirmed its holding in *West v. Bode*, 162 Ohio St.3d 293, 2020-Ohio-5473, 165 N.E.3d 298, that the Dormant Mineral Act and Marketable Title Act provide alternative, independent mechanisms to reunite the surface with severed minerals. This brief is focused on the words of inheritance issue.
[26] *Id*. at ¶ 2, citing G.C. 8510-1, 86 Ohio Laws 18 (1925).
[27] *Id.* at ¶ 2.
[28] *Id.* at ¶ 4.
[29] *Id.* at ¶ 18.
[30] *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 156 N.E. 119 (1927).
[31] *Peppertree*, at ¶ 25.
[32] *Id.* at ¶ 27.

Peppertree Farms, LLC v. Thonen (396) [33]

In this companion case to *Peppertree Farms I*,[34] the Supreme Court of Ohio addressed two issues related to the Marketable Title Act: (1) whether a recorded will that does not affect title to real property qualifies as a recorded title transaction and (2) does the transfer of a severed interest through intestacy affect title to real property, and if so, what must occur to result in a recorded title transaction? The court also reiterated its holdings from *Peppertree Farms I* regarding the necessity of words of inheritance when reserving an oil and gas interest. This brief is focused solely on the MTA title transaction issue.

The owner of a severed oil and gas interest died testate in 1972 with a holographic will which was admitted to probate in Monroe County. The will did not specifically devise the oil and gas estate, nor did it contain a residuary clause. The successors to the decedent argued the will should qualify as a title transaction under the MTA, thereby preserving the severed oil and gas interest from extinguishment. The court began by quoting the MTA's definition of a title transaction:

> 'Title transaction' means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.[35]

The court went on to hold that the will was <u>not</u> a recorded title transaction because it does not contain a specific devise of the severed oil and gas interest, nor does it include a residuary clause. Although the will was recorded after the root of title, it did not actually transfer any interest in the severed oil and gas.[36] Because the severed interest did not pass through the will, the court then addressed whether the passage of title through intestacy preserved the severed interest from extinguishment. The court stated that intestate succession does affect title to real property, but, in this case, there was nothing recorded to evidence the passage of title. Thus, the severed oil and gas interest was extinguished by operation of the MTA.[37]

This case contains two very important distinctions related to the MTA. First, to qualify as a title transaction under the MTA, a probated will must specifically devise the severed interest or contain a residuary clause. Second, for intestate succession to qualify as a title transaction under the MTA, evidence of the heirship must be recorded. We note that the court did not state whether an affidavit of heirship would qualify to preserve an interest, and we recommend the best practice of obtaining a certificate of transfer.

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[33] *Peppertree Farms, LLC v. Thonen*, 167 Ohio St.3d 61, 2022-Ohio-396, 166 N.E.3d 1069.
[34] *Peppertree Farms, LLC v. Thonen*, 167 Ohio St.3d 52, 2022-Ohio-395, 188 N.E.3d 1061. This case is referred to herein as *Peppertree Farms I.*
[35] *Peppertree Farms II*, at ¶ 25, quoting R.C. 5301.47(F).
[36] *Id*. at ¶ 26.
[37] *Id.*, citing *Corban v. Chesapeake Exploration, LLC*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76, N.E.3d 1089, to explain that even though a delay rental payment affects title to real estate, because no evidence of the payment was recorded, the payment itself did not qualify as a title transaction.

Senterra, Ltd. v. Winland [38]

In this case, the Supreme Court of Ohio addressed whether the *Duhig* Rule applied to render a deed void on its face and applied the Marketable Title Act ("MTA") to determine whether certain oil and gas severances were extinguished. Rather than summarizing the facts of the case, we have included a flowchart of the chain of title following this brief to illustrate when the severances occurred and which instruments the court analyzed. As of 2012, Senterra, Ltd. ("Senterra") owned the surface and at least one-eighth of the oil and gas.

In 2018, Senterra filed a quiet title suit, arguing the MTA extinguished oil and gas severances from the 1925 and 1941 conveyances and the severance in the 1954 deed was ineffective due to the *Duhig* rule,[39] thus, resulting in Senterra owning all of the oil and gas under the lands. Senterra argued that George Russell's attempted reservation of one-fourth of the oil and gas should be considered ineffective based on the *Duhig* rule. The argument was rooted in the fact that the 1954 deed did not mention the prior exceptions, therefore, the grantees in said deed had an expectation of receiving three-fourths of the minerals. Because the grantor was unable to satisfy that expectation, the attempted reservation of one-fourth of the oil and gas should fail pursuant to *Duhig*.

The trial court agreed with Senterra and held that the attempted reservation failed. The Seventh District Court of Appeals disagreed, holding that the *Duhig* rule was superseded by the MTA because there was a forty-year unbroken chain of title allowing its application. The parties in the suit had previously stipulated the root of title was a 1971 deed which specifically referenced the 1954 severance. Accordingly, the appellate court determined that the 1954 severance was preserved from extinguishment by specific references to said severance throughout the forty years following the root of title. Senterra then appealed the Seventh District's ruling.

The court began its analysis of the *Duhig* rule by reviewing the recent Supreme Court of Texas decision in *Trial v. Dragon*, which the Supreme Court of Ohio asserted stands for the proposition that the *Duhig* rule can only apply "if the grantor owns the exact interest to remedy the breach *at the time of execution* and equity otherwise demands it" (court's emphasis).[40] Accordingly, because George Russell only owned three-eighths of the oil and gas at the time of the 1954 deed, the *Duhig* rule would not apply as the purported grant of three-fourths of oil and gas could not be satisfied through its application. Ultimately, the court held that the MTA controlled in this situation and not the *Duhig* rule, thereby affirming the appellate decision that the 1954 severance was preserved from extinguishment.

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[38] *Senterra, Ltd v. Winland*, -- Ohio St.3d --, 2022-Ohio-2521, --N.E.3d --.

[39] *Id.* at ¶ 1, referencing *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 507-508, 144 S.W.2d 878 (1940). The *Duhig* rule estops a grantor from claiming title to a reserved interest when the grant and reservation cannot both be satisfied by the deed. The doctrine of "estoppel by deed" is sometimes referred to as the *Duhig* rule.

[40] *Id.* at ¶ 20 and 23, quoting *Trial v. Dragon*, 593 S.W.3d 313 (Tex. 2019).

Editorial Commentary on *Senterra* and *Trial v. Dragon*

It is our opinion that the Supreme Court of Ohio misconstrued the *Duhig* rule and, particularly, the Supreme Court of Texas' ("SCOTX") decision in *Trial v. Dragon*. In *Trial*, the SCOTX was asked to determine whether a deed warranty breach could be remedied by the application of the *Duhig* rule or by the application of the after-acquired title doctrine. The grantor in the breaching deed owned one-fourteenth of the minerals but purported to convey full fee title. There was no reservation or exception in the deed of any interest. Thereafter, the grantors heirs inherited a one-fourteenth mineral interest from their mother.[41] The successors of the grantee argued that the inherited minerals passed to them automatically through the warranty pursuant to *Duhig* or the after-acquired title doctrine.[42]

The SCOTX determined the *Duhig* rule did not apply to the facts <u>because there was no reservation in the deed</u>. The dicta quoted by the majority in *Senterra* at ¶ 20 is a sentence fragment taken completely out of context. The SCOTX was asked to expand the *Duhig* rule to apply to a fact scenario that it had never been applied to before, and the decision, rightly in our opinion, rejected the argument. Simply put, the *Duhig* rule applies to situations where a grant <u>and</u> reservation cannot both be satisfied. *Trial* is a case primarily related to the application of the after-acquired title doctrine when a breach of warranty occurs, not the *Duhig* rule, and we do not recommend any attorney rely on *Senterra* as an accurate representation of Texas law for situations where *Duhig* would normally apply.

On the face of the 1954 deed analyzed in *Senterra*, the grantee expected to receive 3/4 of the oil and gas and the grantor to retain 1/4. The grantor could not satisfy both the grant and reservation because he did not own 100% of the oil and gas at the time, therefore, the *Duhig* rule should apply. Once you determine the *Duhig* rule applies, then the analysis shifts to what interest, if any, is transferred to the grantee through the application of the *Duhig* rule. We recommend examiners take a three-step approach to applying *Duhig*: (1) if the grantor reserves an interest, determine what interest the grantee expects to receive; (2) look at the chain of title to determine whether the grantor can satisfy both the grant and reservation or if the warranty has been breached; (3) if the warranty has been breached and the grantor owns <u>any</u> interest that can satisfy even part of the grant, then *Duhig* operates to automatically vest that interest in the grantee. The analysis does not ask whether the grantor can satisfy the <u>entire</u> grant, because that is not how the rule is supposed to work. In essence, the *Duhig* rule mitigates the damage caused by a breach of warranty. It would be illogical for the rule to only apply when <u>all</u> damages can be mitigated. If the grantor cannot satisfy the entire grant through *Duhig*, then the remaining interest is still subject to the breach of warranty and, potentially, the application of the after-acquired title doctrine.

The dissent in *Senterra* reviewed numerous Ohio court decisions which apply the actual *Duhig* test (referred to as "estoppel by deed" in the Ohio decisions) which indicate the *Duhig* rule should have applied to the 1954 reservation. Unfortunately, the majority's opinion in *Senterra* casts a large shadow over non-MTA related title disputes in Ohio that involve a breach of warranty due to an over conveyance.

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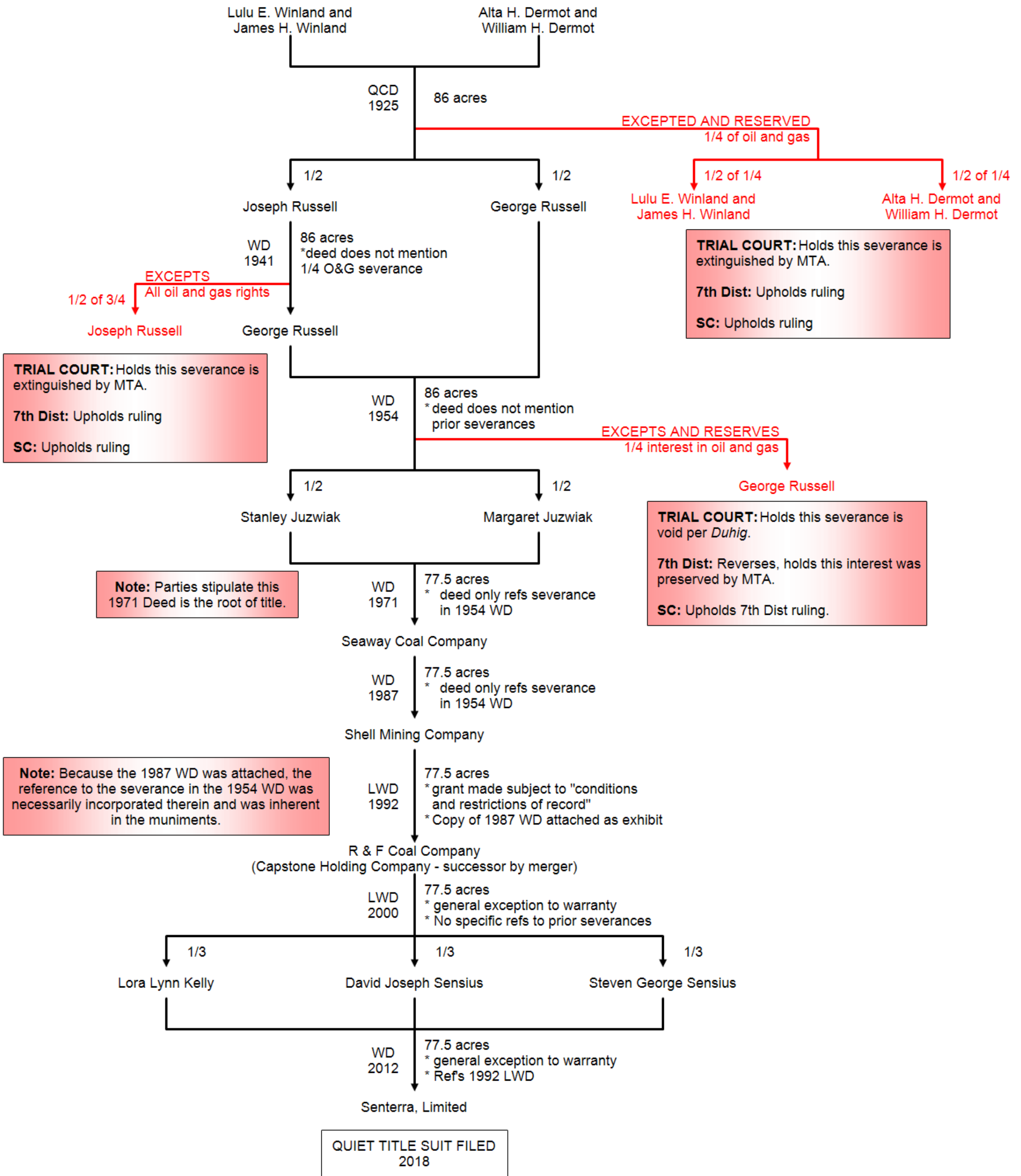
[41] We note that Texas is a community property state. The wife of the grantor did not join in the deed, and she owned the other one-half mineral interest as her separate property.

[42] The *Duhig* rule and after-acquired title doctrine are different applications of the larger "estoppel by deed" doctrine which is used when a grantor breaches their warranty and then claims to own an interest in the land. *Duhig* applies when the grantor attempts to also retain an interest in the deed. After-acquired title applies when the grantor breaches the warranty and then later acquires an interest in the land from a third party.

Senterra Chain of Title



Stalder v. Gatchell [43]

This case involved a number of issues, of which this brief shall focus on the court's application of the Dormant Mineral Act ("DMA"). The court was asked whether a severed oil and gas interest was preserved from abandonment by the production of oil and gas from by the holder of any interest in the lands.

In 1904, one-half of the oil and gas estate was severed from the surface of a tract of land in Monroe County. In 2011, Gulfport Energy Corporation ("Gulfport") obtained an oil and gas lease from the owner of the surface and the remaining one-half of the oil and gas. A title dispute arose between the oil and gas interest owners over whether the severed interest had been abandoned pursuant to the DMA. Gulfport began producing oil and gas under the lands in 2015, which was prior to the surface owner providing DMA notice to the holders of the severed oil and gas interest. In 2017, Gulfport acquired a protection lease from successors claiming to own the severed oil and gas interest. The protection lease was backdated to 2014. In 2020, the trial court determined that the surface owner's notice and affidavit of abandonment satisfied the requirements of the DMA such that the severed oil and gas interest had been abandoned.

After the landowner's dispute was resolved, a new dispute arose over whether Gulfport was obligated to pay additional bonus money related to its surface owner lessor's successful DMA suit. Gulfport argued its production of oil and gas from the property preserved the severed interest from abandonment and, therefore, no additional bonus money should be paid.

The court began by analyzing the rationale of its prior holding, in *Sharp v. Miller*,[44] that the recording of an oil and gas lease between the producer of oil and gas and the surface owner was not a savings event that would preserve a severed interest from abandonment because the severed interest was not involved in the title transaction.

The court then resolved the question directly by relying on the plain language of the statute:

> [T]he plain language of the DMA … shows that in order to constitute a savings event, production had to occur before the notice of abandonment was served and this production had to be 'by' a person who occupied the status of holder at the time.[45]

Essentially, to determine whether production of oil and gas preserves a severed interest from abandonment, the producer must be a holder of the severed interest, and the production must occur prior to delivery of DMA notice. The backdating of the protection lease was not an effective means of preserving the interest from abandonment.

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[43] *Stalder v. Gatchell*, 7th Dist. Monroe No. 20 MO 0010, 2022-Ohio-1325, appeal not allowed, 167 Ohio St.3d 1482, 2022-Ohio-2765, 192 N.E.3d 511.

[44] *Sharp v. Miller*, 2018-Ohio-4740, 114 N.E.3d 1285 (7th Dist.).

[45] *Id.* at ¶ 91.

OHIO DISTRICT COURTS OF APPEALS CASES

1. Seventh District Court of Appeals

Bates v. Bates [46]

This case addressed whether Ohio law permits multiple grantors to create new property rights by making a reservation in favor of one or more parties to a deed and whether the estoppel by deed doctrine applies when such a reservation is made.

As of 1934, Howard Bates owned approximately 122.492 and 1.101 acres of property located in Noble County. A year later, Howard died intestate; thus, a 1/3 interest in the property descended to his wife, Anna, and a 1/9 interest descended to each of their six surviving children: Harry, Olive, Margaret, Martha, Bonnie, and Byron. In 1971, Harry conveyed his 1/9 interest to Byron and Byron's wife, Donah. Subsequently, Anna and the remaining four children conveyed their total 7/9 interest to Byron and Donah, reserving a life estate, as well as a 1/2 interest to the oil and gas estate, specifically to Anna (the conveyance hereinafter referred to as the "Deed"). Anna then died intestate, survived by all of her children except Harry; he was survived by his children: Jon, Gloria, and Howard.

Byron and Donah thereafter conveyed their entire interest in the property to their son and his wife, Jeffrey and Melanie (hereinafter "Appellants"). On October 31, 2014, Appellants sent a notice of intent to declare the reserved oil and gas interest as abandoned under R.C. 5301.56 to Jeffrey's aunts and cousins. On December 16, 2014, Martha, one of Jeffrey's aunts, filed a claim to preserve the mineral interest, stating that she intended to preserve her rights and the rights of all mineral right holders under R.C. 5301.56(C)(2). On December 26, 2014, Appellants filed an affidavit of abandonment, correcting it with a new affidavit on January 15, 2015.

In 2019, Howard and his wife, Rita (hereinafter collectively "Appellees"), filed suit, seeking to quiet title to a 1/36 interest in the oil and gas estate.[47] Appellants filed an answer, counterclaim, and crossclaim, asserting ownership pursuant to the estoppel by deed doctrine, and later filed a third-party complaint against all of the other lineal heirs (hereinafter "Third-Party Defendants"). The Appellants proceeded to file a motion for summary judgment, arguing (i) that the language within the Deed was ambiguous, (ii) that based on the conduct of the parties, they owned the entire surface and mineral estate, (iii) that, alternatively, if not so entitled, a latent ambiguity existed in the Deed's reservation and thus, they owned all but a 1/6 oil and gas interest. The Third-Party Defendants also filed a motion for summary judgment, asserting that estoppel by deed did not apply and that multiple grantors can agree to collectively reserve their shares.

The trial court granted the motions for summary judgment filed by the Appellees and Third-Party Defendants, finding that nothing indicated that Olive, Margaret, Martha and Bonnie intended to convey more than the interests they actually possessed at the time the Deed was executed and thereby rejecting the estoppel by deed theory. The Appellant's assertion that the oil and gas

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[46] *Bates v. Bates*, 7th Dist. Noble, No. 21 NO 0482, 2022-Ohio-1055.

[47] The claims against L.D. Jenkins and Antero Resources Corporation were not part of the appeal and are not discussed in this brief.

reservation was actually a life estate terminating upon Anna's death was not raised in the pleadings and could not be argued in summary judgment. The trial court proceeded to discuss the issue, finding the Deed unambiguous and the reservation of the life estate separate from the oil and gas reservation. The trial court then explained that Ohio law authorizes multiple grantors to create new property rights through a reservation in favor of one of the grantors in a conveyance. Thus, since the grantors in the Deed collectively owned a 7/9 interest in the property, they could collectively reserve a 1/2 interest in the oil and gas estate and convey it to Anna. Further, because the Deed specifically reserved a 1/2 interest, the court rejected the latent ambiguity argument. Lastly, the trial court ruled that the affidavits of abandonment filed by the Appellants were invalid since the claim to preserve was timely filed and no dispute as to such existed.

The Appellants appealed, asserting that the trial court erred in holding (i) that the Deed was unambiguous, (ii) that Anna Bates reserved a 1/2 oil and gas interest, and (iii) that the doctrine of estoppel by deed/after-acquired title did not apply. Regarding the first point of error, the court agreed that the issue was waived, then proceeded to discuss their analysis in depth. Analyzing the "four corners" of the Deed, the court found it unambiguous and reached the same conclusion as the trial court.[48] Appellants' second argument posited that the 1/2 reservation was a latent ambiguity because she only owned a 1/3 interest when the Deed was executed. The reservation language, being clear, did not meet the definition of "latent ambiguity." Furthermore, the Appellants failed to establish that multiple grantors could not combine their interests in order to reserve a greater interest in a single grantor. Ultimately, the court held that the Deed contained an unambiguous reservation of 1/2 of the oil and gas to Anna, and the grantors in the Deed were legally capable of reapportioning their ownership percentages without using a new deed.[49]

Lastly, the court addressed the applicability of the estoppel by deed doctrine.[50] The court's opinion omitted whether the granting language in the Deed specifically stated that a 7/9 interest was being conveyed or if it purported to grant full fee title prior to the reservations. We point out that the grantee in the deed already owned the remaining 2/9 interest in the lands. The court reasoned that "a grantee who accepts a conveyance is bound by all of its provisions and is precluded from denying their legal effect."[51] Because the grantee accepted the deed with the reservations in favor of Anna, the court held that estoppel by deed was not applicable in this case.[52]

[48] *Bates*, at ¶ 34.

[49] *Id.* at ¶ 44, citing *Nonamaker v. Amos*, 73 Ohio St 163, 76 N.E. 949 (1905) and *Smith v. Collectors Triangle, Ltd.*, 7th Dist. Harrison No. 19 HA 0010, 2020-Ohio-4823.

[50] *Id.* at ¶ 49–63.

[51] *Id.* at ¶ 56, citing 2 Ohio Jurisprudence 3d (1983) 24, at fn. 11, Estoppel and Waiver, Section 13, and 35 Ohio Jurisprudence 3d (1982) 290, 291-292, Deeds, Section 58.

[52] Editorial Comment: Estoppel by Deed is normally only applicable if a grant and reservation in a deed cannot both be satisfied. The legal theory posits that the grantor must first satisfy the grant before giving effect to the reservation and is, therefore, estopped from claiming the validity of the reservation over the grant. Because the Court previously determined that the grantors were legally capable of reapportioning their interest through the reservation, estoppel by deed should not apply in this case even though the interest granted by Anna (1/3) is smaller than that the interest reserved to Anna (1/2) because the remaining interest granted (4/9) resulted in the grantee receiving the exact interest the deed purports to convey: 7/9 less 1/2 of the oil and gas.

Hamm v. Lorain Coal (0028) [53]

In this case, the court determined whether the heir of a long-defunct corporation's part owner qualified as a holder under the Dormant Mineral Act ("DMA"). In 2018, the surface owners provided notice under the DMA to the Lorain Coal & Dock Company ("Lorain Coal") and then recorded affidavits of abandonment. After the affidavits were recorded, Anne Czarniecki ("Czarniecki"), an heir of one of the original owners of Lorain Coal, filed a claim to preserve claiming to be a holder of the severed minerals. The interests of multiple parties were addressed in the suit, but we have focused this brief on Lorain Coal and the interest of Czarniecki as her status as a "holder" was determinative for the entire matter.[54]

In January of 2019, the surface owners filed a complaint against Lorain Coal, Lorain Coal's former shareholders, officers, directors, and Czarniecki. The trial resulted in summary judgment in favor of the surface owner. On appeal, the successors of Lorain Coal and Czarniecki argued that summary judgment was improper because Czarniecki was a "holder" of the severed minerals under R.C. 5301.56(C)(2), and thus the oil and gas interests were preserved from abandonment.

The evidence presented demonstrated that the directors of Lorain Coal were instructed to distribute all remaining company assets among the shareholders. However, no distribution of the severed mineral interest ever occurred. Further evidence showed that all shares of stock had been returned in exchange for cash distributions. Thus, by 1969, all shares of stock in Lorain Coal had been returned to the company. The court reviewed Ohio law in effect at the time of Lorain Coal's dissolution, former R.C. 1701.88 (1955).[55] The former statute provided that the only mechanisms available to distribute the severed minerals were a deed by a member of the board of directors, a deed from a court-appointed receiver, or a quiet title suit distributing the property. Because none of the options were pursued, the court determined that the corporation remained the holder of the severed minerals.[56]

Finally, the court analyzed whether Czarniecki was a record holder. An affidavit was presented wherein Czarniecki asserted that her great-grandfather was a former owner of Lorain Coal and, through a series of testamentary distributions, Czarniecki had succeeded to one-third of all of her great-grandfather's former assets. Importantly, none of the evidence presented indicated that any of Czarniecki's predecessors actually owned any stock in Lorain Coal or minerals in the disputed lands at the time of their deaths. As previously discussed, evidence indicated that all of the shares of Lorain Coal were previously returned during the winding up. Because Czarniecki could not show that she actually owned shares in Lorain Coal or minerals under the lands, the court determined that she did not qualify as a record holder and affirmed the trial court's summary judgment.[57]

[53] *Hamm* v. *Lorain Coal & Dock Company*, 7th Dist. Belmont No. 20BE-0028, 2022-Ohio-1048.
[54] Czarniecki and her successor were the only parties to timely file claims to preserve, thus, the interests of the other successors of Lorain Coal would only also be preserved if Czarniecki were deemed to be a "holder" under the DMA.
[55] *Id.* at ¶ 35-38.
[56] *Id.* at ¶ 38-44.
[57] *Id.* at ¶ 48-54.

Marquette ORRI Holdings, LLC v. Ascent Resources-Utica, LLC [58]

In this case, the Seventh District Court of Appeals was asked to enforce an anti-washout clause[59] against the successors of the lessee which agreed to the clause. In 2010, an overriding royalty interest was assigned to Marquette in numerous oil and gas leases in Belmont and Jefferson Counties. The assignment contained the following anti-washout clause:

> The overriding royalty interest hereby assigned in a Lease shall be applicable and attached to all extensions, modifications, ratifications, amendments, renewals, top leases and/or new leases of such lease covering all or any portion of the lands and interests which are included in such lease as of the Effective Date, taken, contracted for or acquired by Assignor … within a period of [one (1) year] after the expiration or termination of such lease … The terms and conditions of this Assignment shall constitute covenants running with the lands and *shall be binding upon and inure to the benefit of the parties hereto* and their heirs, devisees, representatives, successors and assigns[.][60] (emphasis added)

As of 2014, the working interest in the leases had been assigned to Ascent. Thereafter, some of the assigned leases ultimately terminated when their primary terms expired. Within one year of such expiration, Ascent entered into new leases with the landowners. In 2020, Marquette filed a complaint against Ascent to enforce the anti-washout clause. The trial court determined that Marquette's overriding royalty interest terminated when the original leases expired and that the anti-washout clause did result in the overriding royalty interest attaching to Ascent's new leases. On appeal, the court was asked whether the anti-washout clause was enforceable.[61]

The court juxtaposed the italicized language from the anti-washout clause against the fact that Ascent was not the original lessee or the assignor in the overriding royalty assignment. The court reasoned, "[a] contract is binding only upon the parties to the contract and those in privity with them and an action for breach of contract can only be maintained by the parties to the contract or those deriving rights from the contracting parties."[62] Because the court determined there was no privity of contract between Marquette and Ascent, the court held that the anti-washout clause was not binding on Ascent, and thereby upheld the trial court's summary judgment.[63]

This is an important case of first impression in Ohio and, if the judgment is upheld by the Ohio Supreme Court, would result in anti-washout clauses being unenforceable against the successors of the parties who originally entered into the contract.

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[58] *Marquette ORRI Holdings, LLC v. Ascent Res.-Utica, LLC*, 2022-Ohio-3786, 199 N.E.3d 199 (7th Dist.).
[59] Throughout the Court's opinion the clause is referred to as the "extension and renewal clause." These types of clauses are commonly referred to in the oil and gas industry as anti-washout clauses and we have used that label throughout this brief.
[60] *Id.* at ¶ 3-5. We note that the original two-year anti-washout period was amended to one year in 2011.
[61] As this is a matter of first impression in Ohio, the Court reviewed case law from two other jurisdictions. *Id.* at ¶ 24-26, citing cases from Kansas: *Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc.*, 268 Kan. 840, 1 P.3d 909 (2000); and the Federal Fifth Circuit: *Avatar Expl., Inc. v. Chevron U.S.A., Inc.*, 933 F.2d 314 (5th Cir. 1991).
[62] *Marquette* at ¶ 28.
[63] *Id.* at ¶ 29-32.

C. OKLAHOMA CASE LAW UPDATE

SUPREME COURT OF OKLAHOMA CASES

Crown Energy Co. v. Mid-Continent Casualty Co. [64]

This case concerned the nature of a pollution exclusion in a commercial general liability policy. In particular, the court decided whether damages resulting from seismic activity were insurable "occurrences" or were excluded under an insurer's Pollution Exclusion.

The case centered around two 2015 commercial general liability policies (hereinafter referred to as "the policies") issued from Mid-Continent Casualty Company ("Mid-Continent") to Crown Energy Company ("Crown"). Particularly, these policies stated Crown would be covered for bodily injury or property damages to a third party if they are "caused by an 'occurrence' that takes place in the 'coverage territory.'"[65] The policy defined an "occurrence" as an accident resulting from constant or repetitive exposure to "substantially the same general harmful conditions."[66] The policies barred coverage if the bodily injury or property damage resulted from a "pollution incident" from waste facilities and work in accordance with oil and gas leases. In December 2016, Crown was one of the defendants in a separate class action lawsuit ("Reid Lawsuit") and submitted a claim for insurance coverage to Mid-Continent. In that lawsuit, plaintiffs alleged Crown's installation of wastewater disposal wells caused seismic activity and damaged plaintiffs' property. Mid-Continent denied coverage by asserting the damages were a result of a non-insurable pollution incident. Crown filed suit thereafter.

Crown requested declaratory relief against Mid-Continent and stated the underlying claims in the Reid Lawsuit were covered as an insurable "occurrence." In April 2018, the District Court of Oklahoma County granted part of Crown's motion for summary judgment and held Mid-Continent had a duty to defend Crown in the Reid Lawsuit. The Court of Civil Appeals, Division II, affirmed the trial court and reasoned the claims in the Reid Lawsuit did not involve Crown injecting pollutants "under pressure" into the land. Mid-Continent appealed, claiming: (1) Crown's wastewater disposal process was not an "occurrence" and (2) the pollution exclusion barred coverage in the Reid Lawsuit.

In analyzing the first issue involving "occurrence," the Supreme Court of Oklahoma cited *Cranfill v. Aetna Life Ins. Co.*[67] to discuss the foreseeability test. In *Cranfill*, the court stated an event is foreseeable if the consequences from that act are so "probable and natural" that a reasonable person would not view that act as accidental.[68] For example, although an insured's death may result from their own negligence or gross negligence, that act may still be accidental under the foreseeable test. Accordingly, the court acknowledged Crown's wastewater disposal procedures did pose some risk of seismic activity but did not equate to a "probable and natural" risk. Thus, Crown's actions were considered an accident under the "occurrence" definition in the policies. In addressing the

[64] *Crown Energy Co. v. Mid-Continent Cas. Co.*, 2022 OK 60, 511 P.3d 1064.
[65] *Id*. at ¶ 2, 511 P.3d at 1066.
[66] *Id*. at ¶ 13, 511 P.3d at 1069.
[67] *Id*. at ¶ 9, 511 P.3d at 1068(citing *Cranfill v. Aetna Life Ins. Co*., 2002 OK 26, 49 P.3d 703).
[68] *Id*. at ¶ 11, 511 P.3d at 1068.

pollution issue, the court relied on *National American Insurance Company v. New Dominion, LLC*[69] to support its holding that the pollution exclusion applied to pollution events, not all earthquake incidents. Further, Mid-Continent failed to specify how the damages alleged in the Reid Lawsuit were caused by the pollutants in the wastewater disposal wells, rather than solely from the earthquake itself. Accordingly, the court held Mid-Continent's pollution exclusion was ambiguous and insufficient to deny Crown's claims.

Based on the court's analysis, it held: (1) the seismic activity in the Reid Lawsuit was unforeseeable and constituted an occurrence and (2) Mid-Continent's pollution exclusion was ambiguous as applied to Crown's claim of coverage Thus, the court ruled in favor of Crown. This holding will assist attorneys and landmen in determining if their claims involving seismic activity are insurable.

[69] *Id*. at ¶ 16, 511 P.3d at 1071; *see National American Ins. Co. v. New Dominion*, 2021 OK 62, 499 P.3d 9.

Kingfisher Wind, LLC v. Wehmuller [70]

This case focused on the issue of whether Production Tax Credits ("PTCs") used to finance the building of a wind farm are "property" subject to ad valorem taxation. The Supreme Court of Oklahoma relied upon the Oklahoma Constitution, statutory definitions, and case precedent to determine that PTCs are intangible personal property, and therefore not subject to ad valorem taxation.

Kingfisher Wind, LLC ("Kingfisher Wind") began construction of a wind farm located in both Kingfisher County and Canadian County, Oklahoma. Kingfisher Wind was assessed ad valorem taxes for the value of the wind farm in each county and appealed the valuations. The two causes were consolidated on October 12, 2018 by the District Court of Canadian County.

Kingfisher Wind sought to have PTCs and certain contracts exempt from ad valorem taxation. The trial court held that PTCs were not taxable, thereby excluding their value from the taxable valuation. As a result, the County Assessors appealed. The County Assessors argued that PTCs are "of such an economic benefit to owning, operating, and determining the full fair cash value of the wind farm and its real property" that they need to be included to determine a "fair and accurate taxable ad valorem valuation of the wind farm."[71] Kingfisher Wind argued that "PTCs are intangible personal property…" meaning they are "precluded from taxation" according to the Oklahoma Constitution.[72] On appeal, the Supreme Court of Oklahoma held in favor of Kingfisher Wind, agreeing that PTCs are not subject to ad valorem taxation.

First, the court looked at the function of a PTC. PTCs are a federal tax equity financing concept which allows wind developers to finance the building of the facilities in exchange for a tax credit. In other words, they are a tax incentive and allow the owner of the PTCs to claim a tax credit on the energy produced and, in turn, save on subsequent tax payments. PTCs are not real estate or real property, even though they may be tied to real estate. In siding with Kingfisher Wind's contention that PTCs are intangible personal property, the Supreme Court of Oklahoma referenced the Oklahoma Constitution which specifies that "intangible personal property shall not be subject to ad valorem tax or to any other tax in lieu of ad valorem tax."[73]

Second, the court analyzed the difference between tangible and intangible personal property. The court referred to the statutory definition of tangible personal property being "personal property that may be seen, weighed, measured, felt, or touched or that is any manner perceptible to the senses."[74] However, regarding intangible personal property, it has been held that it is up to the courts to determine the difference for purposes of ad valorem taxation. In this case, PTCs are not a tangible physical thing, but contain tangible and intangible aspects. As a result, the court relied on case precedent holding that items containing "aspects of both tangible and intangible personal property … must be treated as intangible personal property."[75] Therefore, because PTCs share

[70] *Kingfisher Wind, LLC v. Wehmuller*, 2022 OK 83, 521 P.3d 786.
[71] *Id*. at ¶ 14, 521 P.3d at 789.
[72] *Id*.
[73] Okla. Const. art. 10 § 6A.
[74] Title 68 O.S. Supp. 2016 § 1352.
[75] *Kingfisher Wind*, at ¶ 23, 521 P.3d at 792; *see Globe Life & Acc. Ins. Co. v. Oklahoma Tax Comm'n*, 1996 OK 39, 913 P.2d 1322.

both characteristics, they must be held as intangible personal property. The court reasoned that "if the legislature had wished to statutorily define PTCs as tangible property" it would have done so. Therefore, because PTCs are not considered real estate or real property, but rather intangible personal property, they are not subject to ad valorem taxation.

OKLAHOMA COURT OF CIVIL APPEALS CASES

Peveto v. Peveto [76]

This case arose from various conveyances of a house between a husband and wife as joint tenants and the wife as sole owner. In particular, the court was tasked with deciding whether the deeds' fraudulent nature completely invalidated the conveyance and whether the deeds were successfully delivered.

In November 2000, the house, which was owned at the time by Burt Peveto ("Husband"), was transferred into joint tenancy between Husband and Lori Peveto ("Wife"). Two months later, Husband transferred all of his interest to Wife via a quitclaim deed. Three years later, both spouses transferred the house back into joint tenancy through a warranty deed. However, before this deed was filed, Husband prepared another quitclaim deed ("2004 Deed") which transferred all his interest to Wife. Title remained in Wife's name until 2007 when Husband prepared a warranty deed, executed by both spouses, transferring title back into joint tenancy ("2007 Deed"). Finally, in 2011, Husband transferred all of his interest back to Wife through a quitclaim deed ("2011 Deed"). Husband did not file the 2007 Deed until one month prior to filing for divorce in 2015. A year and a half after the divorce decree was already entered — which did not explicitly discuss the division of the house — Wife filed the 2011 Deed. Thereafter, Husband filed suit against Wife.

Husband alleged the quitclaim deeds were for estate planning purposes to avoid filing extra paperwork. However, Wife alleged Husband's multiple conveyances were an attempt to avoid creditors and only acknowledged filing the 2011 Deed. The trial court found the deeds were fraudulent and most were never delivered. Accordingly, the court held the original deed designating the house into joint tenancy was the controlling deed. This appeal followed.

In reviewing the series of conveyances, the Oklahoma Court of Civil Appeals did not dispute the trial court's holding that the deeds were created to defraud creditors. However, the appellate court also stated, "attempting to defraud creditors does not overcome the presumption of donative intent between the parties to the instrument."[77] Accordingly, the appellate court found the property successfully transferred to Wife as a gift, regardless of Husband's intent to convey his interest for estate planning purposes. As such, the trial court's decision that the deeds were void because of their fraudulent nature were not in accordance with binding precedent.

Turning to the issue of delivery, the appellate court emphasized that a grantee creates a presumption of successful delivery if: (1) the deed is in the grantee's possession and (2) the grantor has the burden of proving "by clear and convincing evidence that the deed was not actually delivered."[78] Here, the court deemed Wife's storage of the 2011 Deed in her filing cabinet a presumption of delivery, and Husband failed to rebut this presumption beyond his own testimony.

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[76] *Peveto v. Peveto*, 2022 OK CIV APP 7, 508 P.3d 979.
[77] *Id*. at ¶ 9, 508 P.3d at 983 (citing *Metcalf v. Metcalf*, 2020 OK 20, ¶ 17, 465 P.3d 1187, 1191).
[78] *Id*. at ¶ 14, 508 P.3d at 983 (citing *Abrams v. Neal*, 1936 OK 622, ¶ 17, 61 P.2d 11003, 1105).

The court, quoting *Johnson v. Craig*, stated "[the] real test of delivery is this: Did the grantor by his own acts or words, or both, intend to divest himself of title? If so, the deed is delivered."[79] The court, under this simplified analysis, found Husband had donative intent because the 2011 Deed only had Wife's name and she solely paid the mortgage and taxes for the home after Husband created the 2011 Deed. Thus, Husband's donative intent was clear in transferring his interest in the home, regardless of whether the reasoning was for fraudulent or estate planning purposes. The court went further to emphasize that after a deed intended for estate purposes is delivered, further discussion or filing of the deed has no effect as to the validity of that deed.[80]

In holding for the Wife, the court held that the 2011 Deed had donative intent and properly conveyed all of Husband's interest in the home to vest Wife as sole owner. This holding is instructive to both attorneys and owners of real property to understand the broad interpretations of delivery and donative intent in their actions.

[79] *Id*. at ¶ 15, 508 P.3d at 984 (quoting *Johnson v. Craig*, 1913 OK 142, ¶ 6, 130 P. 581, 583).
[80] *Id.* at ¶ 16, 508 P.3d at 984.

D. TEXAS CASE LAW UPDATE

SUPREME COURT OF TEXAS CASES

Mitchell v. Map Resources, Inc. [81]

This case stemmed from a mineral interest owned by Elizabeth S. Mitchell ("Mitchell") in Reeves County, Texas. Mitchell died in 2009. Her heirs, being the petitioners, sued to declare void a 1999 default judgement foreclosing a tax lien on Mitchell's interest. The court was faced with the issue of whether the judgement against Mitchell violated her constitutional right to procedural due process as a result of not being properly served with notice of the underlying foreclosure suit.

In the underlying suit, the taxing authorities sued around 500 owners of more than 1,600 parcels of mineral property in response to failed payment of property taxes. The taxing authorities notified those 500 property owners that they were being sued by citations posted on the door of the Reeves County courthouse. Despite an alleged diligent search, the taxing authorities swore citation by posting was necessary because they were unable to locate any of the 500 defendants' contact information for personal service. Additionally, Mitchell's middle initial was misidentified on the defendant list posted on the door of the courthouse. About a month following service by publication and a five-minute bench trial, the court signed a default judgment that foreclosed tax liens on all 1,600 parcels, including Mitchell's mineral interests. The properties were then sold at a sheriff's sale. As a result, Mitchell's heirs brought this suit sixteen years later.

In this case, the Supreme Court of Texas analyzed three issues; (1) whether information available in relevant public records could be considered in a collateral attack on a judgement that alleged an individual's constitutional due process rights were violated; (2) whether Mitchell's due process rights were violated in the 1999 suit if those public records are to be considered; and (3) whether the suit is barred by the Tax Code's statute of limitations.

The petitioners argued the affirmative in the first two issues and claimed the Tax Code's statute of limitations was inapplicable in this case. The petitioners sought declarations that the foreclosure judgement was void as to Mitchell because her federal and state constitutional rights had been violated due to lack of proper service. The petitioners alleged the taxing authorities' attorney had given false testimony that Mitchell's address could not be found following a diligent inquiry because, at that time, eight warranty deeds were publicly recorded which stated Mitchell's ownership to the property and listed a post office where she could be reached. Therefore, according to Texas Rule of Civil Procedure 117a, the petitioner's argued the taxing authorities violated both the United States and Texas Constitutions when they failed to properly serve Mitchell, despite having knowledge of her address. Additionally, the petitioners further alleged the resulting deeds and sales of property were also void due to the judgement being void.

Conversely, the respondents, being the current owners of the property, argued those publicly recorded deeds and tax records that indicated where Mitchell could be reached for personal service should not be considered in the collateral attack on the foreclosure judgment because they are outside the record of the underlying suit. Furthermore, the respondents argued that even if the

[81] *Mitchell v. MAP Res., Inc.*, 649 S.W.3d 180 (Tex. 2022), reh'g denied (Sept. 2, 2022).

foreclosure judgment violated Mitchell's due process rights, the judgment should not be declared void because it is barred by the Tax Code's statute of limitations.

Previously, the trial court and the appellate court both found for the respondents. Those courts reasoned the petitioners failed to prove how Mitchell's due process rights were violated and declined to consider the publicly recorded warranty deeds based on the exclusion of extrinsic evidence in collateral attacks. Contrarily, the Supreme Court of Texas answered in agreement with the petitioners. The court determined relevant public records that contained contact information of a defendant served by publication could be considered by a court hearing a collateral attack of that judgment on due process grounds. Consequently, the court held Mitchell's procedural due process rights were violated when she was served by a posting rather than personal service because the publicly recorded deed records contained Mitchell's mailing address. Furthermore, the court held the petitioner's suit was not barred by the Tax Code's statute of limitations.

The court relied on Texas Rule of Civil Procedure 117a, the U.S. Constitution, and case precedent to conclude that in a collateral attack on a default judgement, contact information available in deed and tax records may be considered in deciding whether service by posting satisfied due process. Texas Rule of Civil Procedure 117a requires that in order for citation by publication or posting to be justified, the attorney must prove the defendant was absent, transient, or that its name and residence "cannot be ascertained after diligent inquiry."[82] This rule follows the requirements of due process stated in the U.S. Constitution where it's clearly explained that the government is prevented from "depriving a person of his or her 'property, without due process of law."[83] Well-settled case law from *Mullane* reinforced the applicability of this due process requirement by holding "when an unknown defendant can be identified or a known defendant's address can be ascertained from publicly recorded instruments, notice by posting or publication is insufficient to satisfy due process."[84] As a result, the court agreed with the petitioners that an individual's due process rights were violated if notice is not personally served when the address is "readily ascertainable from public records" that would be searched by someone who actually wanted to find the individual's contact information.[85]

Next the court addressed the issue of whether Mitchell's due process rights were violated in the 1999 suit when those public records were considered. The court found in the affirmative, agreeing with the petitioners. The court relied on case precedent from *PNS Stores, Inc. v. Rivera*[86] to determine the effect of a jurisdictional defect on a judgement attacked collaterally. *PNS Stores* explained the presumption of a collateral attack as valid disappears when the record "exposes such personal jurisdictional deficiencies as to violate due process."[87] Therefore, because Mitchell's address was easily ascertainable for personal service to be satisfied, and due to there being no evidence that personal service was ever attempted, the court held service by posting was insufficient. As a result, Mitchell's due process rights were violated, and the underlying suit lacked personal jurisdiction over Mitchell. Accordingly, a jurisdictional defect was present and thus, sufficient to void the judgement.

[82] Tex. R. Civ. P. 117a(3).
[83] U.S. Const. amend. XIV, § 1.
[84] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).
[85] *Mitchell*, 649 S.W.3d at 190.
[86] *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267 (Tex. 2012).
[87] *Id*. at 273.

Lastly, the court relied on case precedent in applying the Texas Tax Code to determine that the statute of limitations did not bar the petitioners' suit in this case. The district courts in *Mennonite* and *E.R.* held "a nonjudicial tax foreclosure and sale was void" because it lacked "constitutionally adequate notice."[88] Therefore, those courts held the suits were not subject to the Tax Code's statute of limitations. Likewise, the court in this case held that the petitioners' suit was not barred by the Tax Code's statute of limitations because Mitchell was not served constitutionally adequate notice.

In conclusion, the Supreme Court of Texas determined (1) information available in relevant public records could be considered in a collateral attack on a judgement that alleged an individual's constitutional due process rights were violated; (2) Mitchell's due process rights were violated in the 1999 suit because there were publicly recorded documents that contained her address, which required Mitchell to receive personal service; and (3) the Tax Code statute of limitations did not bar the petitioners' suit because the service was not constitutionally adequate. This case provides clarity as to what information is to be considered in a collateral attack on a judgement alleging a violation of an individual's due process rights; when personal service is required to satisfy constitutional due process requirements; and when the Tax Code's statute of limitations is inapplicable.

[88] *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *In re E.R.*, 385 S.W.3d 552 (Tex. 2012).

Nettye Engler Energy, LP v. Bluestone Natural Resources II, LLC [89]

This case resolves a dispute concerning the interpretation of a royalty clause within a deed. Specifically, the Supreme Court of Texas addressed whether, and to what extent, the royalty interest was subject to a proportionate share of postproduction costs.

In 1986, Nettye Engler Energy, LP's ("Engler") predecessors conveyed a 646-acre tract in a special warranty deed (the "1986 Deed") that contained a royalty reservation. The 1986 Deed described the reservation as:

> "a free one-eighth (1/8) of gross production of any such oil, gas or other mineral said amount to be delivered to Grantor's credit, free of cost in the pipeline, if any, otherwise free of cost at the mouth of the well or mine…"[90]

In 2004, the minerals were leased, and the lessee drilled thirty-four producing wells. Quicksilver Resources, Inc. ("Quicksilver") served as the wellsite operator for the first several years. Quicksilver sold both the producer's share and Engler's share of production and valued it at the point of sale to the purchaser's pipeline, therefore rendering it free of production costs as well as postproduction costs. In 2016, BlueStone Natural Resources II, LLC ("BlueStone") assumed operations. Contrary to Quicksilver's operation where Engler was compensated for its share of production based on the value at the end of the production line, BlueStone valued Engler's compensation at the beginning of the production line, where the unprocessed gas enters the gathering pipeline in the onsite gathering system. This difference caused Engler's royalty payments to bear a proportional share of postproduction costs, which led Engler to sue BlueStone for common law conversion and money had and received.

The main dispute hinged on the proper construction of the 1986 Deed's language which concerned the exact location where delivery occurred. Engler argued that the language of "in the pipeline" referred to either the distribution pipeline at the point of sale or to the offsite transportation pipelines, contending that delivery is downstream of the wellsite because (1) a gas gathering pipeline is not a pipeline as that term is used in the 1986 Deed and (2) use of the term "otherwise" to introduce the alternative delivery point "at the mouth of the well or mine" negates the interpretation of "the pipe line, if any" as including any pipeline at or near the wellhead. Conversely, BlueStone argued that delivery occurred in the gathering pipelines comprising the onsite gathering system, which satisfied the delivery obligation under the 1986 Deed. The trial court granted summary judgment in agreement with Engler's position. However, the court of appeals reversed, therefore ruling in favor of BlueStone.

The Supreme Court of Texas affirmed the court of appeals' judgment and held that (1) a gas gathering pipeline is a "pipeline" based on the common, industry, and regulatory meaning of the word, and (2) the 1986 Deed did not prohibit an "at the well" valuation.[91] Additional evidence in support of this decision was found through statutes, regulations, case law, and the usual meaning of the term "pipeline". Furthermore, the 1986 Deed did not "specify any particular pipeline or any

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[89] *Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC,* 639 S.W.3d 682 (Tex. 2022).
[90] *Id*. at 685.
[91] *Id*.

particular type of pipeline" but instead "contemplates that there may not be any pipeline for delivery and, in that case, delivery defaults" to an onsite location being the mouth of the well or mine.

In response, Engler argued that the language of "otherwise" within the 1986 Deed precluded delivery near the mouth of the well if any pipeline existed. However, when the court applied the plain meaning of "otherwise", it found that the definition did not support Engler's argument, nor did it prohibit "the possibility that the two delivery points may yield the valuation."

Lastly, in differing from the appellate court's reasoning, the court held that contracts are construed according to their terms. The case law of *Burlington* confirmed that "the decisive factor in each [contract-construction] case is the language chosen by the parties to express their agreement."[92] The appellate court construed *Burlington* to rule every single "at the pipeline" deed as being interpreted as "at the wellhead". Here, however, the court clarified that was not the rule given in *Burlington*, as there could be other language in the contract that changes the result between the parties.

In conclusion, the Supreme Court of Texas affirmed the court of appeals' decision by holding that BlueStone satisfied its obligation to deliver Engler's share of production "free of cost in the pipeline," as required under the 1986 Deed. This case reinforces the court's process in deed interpretation and clarifies the law laid out in *Burlington*.

[92] *See Burlington Res. Oil & Gas Co. v. Tex. Crude Energy, LLC*, 573 S.W.3d 200 (Tex. 2019).

TEXAS DISTRICT COURTS OF APPEALS CASES

1. Second District Court of Appeals—Fort Worth

Giant Resources, LP v. Lonestar Resources, Inc. [93]

This case arose from a dispute between Giant Resources, LP ("Giant") and Lonestar Resources Inc., Lonestar Resources, America, Inc. and Eagleford Gas 8, LLC (collectively "Lonestar") over brokerage fees. Giant, who serves as a broker between landowners and oil and gas producers, obtained oil and gas leases in Gonzales County, which it offered to Lonestar for purchase. The issue the court examined was whether Giant should be reasonably compensated for providing brokerage services to Lonestar. The court analyzed the issue by finding similarities between this case and *Peko Oil USA v. Evans*.[94] As a result, the court held Lonestar was not required to compensate Giant based on the quantum meruit theory.

The case centered around a confidentiality agreement ("Agreement") executed on September 29, 2014, between Giant and Lonestar. The Agreement provided that "Giant may disclose to Lonestar certain information relating to leases, lands and other properties, which will be detailed in Exhibit A."[95] An Exhibit A did not exist at that time but would be created as Giant presented potential lease opportunities. Importantly, Paragraph 11 of the Agreement stated that "no contract or agreement providing for a transaction between the parties shall be deemed to exist between the parties" unless the parties come to a definitive agreement.[96] In May 2015, Giant sent Lonestar listed properties for lease and Lonestar responded that it had already reviewed the acreage and was not interested. However, shortly after the Agreement expired, Lonestar leased the land directly from the landowners.

Giant initiated this lawsuit and sought quantum meruit for the reasonable value of the services provided to Lonestar. Lonestar responded with a motion for summary judgment and claimed Giant could not recover under quantum meruit since the services were performed to obtain future benefits or contracts. The trial court denied the first motion, and Lonestar filed another motion for summary judgment on the basis that Giant's claims were barred by the statute of frauds and limitations. The court granted this motion based on the statute of frauds and entered a take nothing final judgment. Giant appealed and Lonestar raised a cross-point claiming the trial court erred in not granting its first summary judgment motion because "a future transaction or business opportunity cannot form the basis for a quantum meruit claim."[97] The appellate court sustained Lonestar's cross-point.

A claim for quantum meruit cannot be based on services performed for a potential business transaction. The court compared the similarities of this case to *Peko Oil USA* and found the work completed by Giant was done in anticipation of future business, which does not constitute recovery under quantum meruit.[98] In *Peko Oil USA*, the court held as a matter of law that the services

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[93] *Giant Res., LP v. Lonestar Res., Inc.*, No. 02–21–00349–CV, 2022 WL 2840265 (Tex. App.—Fort Worth July 21, 2022, no pet.).
[94] *Peko Oil USA v. Evans*, 800 S.W.2d 572 (Tex. App.—Dallas Oct. 29, 1990) (writ denied April 3, 1991).
[95] *Giant Res., LP*, 2022 WL 2840265, at *2.
[96] *Id.*
[97] *Id*. at *4 (citing *Peko Oil USA*, 800 S.W.2d at 576, 578).
[98] *Id*.

provided by Sunbelt Oil to Peko Oil were "preliminary services that were performed with a view to obtaining business through a hoped-for contract."[99] Here, the purpose of the agreement was for Giant to confidentially assist Lonestar in seeking future business ventures, but Lonestar had no obligation of payment under the agreement to Giant until there was a definitive agreement. Lonestar was not required to pay Giant for their time and effort spent preparing the information on the leases. Therefore, Giant could not recover under quantum meruit as a matter of law.

This decision is informative for attorneys and oil companies who choose to utilize brokerage services as a reminder to clearly define the terms of any confidentiality agreements.

[99] *Id*. at *5 (citing *Peko Oil USA*, 800 S.W.2d at 576, 578).

TotalEnergies E&P USA, Inc. v. Dallas/Fort Worth International Airport Board [100]

The dispute in this case centered around whether the contractual obligation to drill a certain number of wells was satisfied by drilling vertical wells as opposed to horizontal wells, when the lease amendment was silent as to such specific terms. The Second District Court of Appeals relied on the rules governing contract interpretation and prior case law to make their decision.

This case arose from a 2006 oil and gas lease between Appellees, Dallas/Fort Worth International Airport Board, City of Dallas, City of Fort Worth (collectively, "DFW") and Chesapeake Exploration, L.L.C. ("Chesapeake"). The lease included "Continuous Development" provisions and granted Chesapeake the exclusive right to explore, drill, and produce oil and gas on DFW's land. The Continuous Development provisions allowed Chesapeake, at the end of the lease term, to retain acreage around each producing well and to release the remainder or retain all leased acreage by continuously developing the leasehold. Different sized retained acreage tracts were based on whether the well was vertical or horizontal. Years after the initial lease, DFW, Chesapeake, and Appellant TotalEnergies E&P USA, Inc. ("Total") ratified a lease amendment which altered the Continuous Development provisions to allow Total and Chesapeake to maintain the lease provided they drilled "fourteen new wells" over a two-year period (herein, the "drilling commitment"). The remainder of the original lease, including the differentiation between horizontal and vertical wells, remained valid aside from the amendment's contradictions to the original lease term.

The dispute began in 2015, after Chesapeake informed DFW that in order to be more economically prudent, and although they had never drilled vertical wells on the leasehold, they would drill vertical wells rather than horizontal wells to satisfy the drilling commitment. As a result, DFW filed a suit seeking a declaration that the drilling commitment required horizontal wells, not vertical wells. Total argued the vertical wells were sufficient to satisfy the drilling commitment as a matter of law. The trial court agreed with DFW, and Total appealed. The appellate court reversed the holding of the trial court and ruled in favor of Total by finding the drilling of vertical wells satisfied the drilling commitment.

Ultimately, to reach this decision, the appellate court relied on the rules governing contract interpretation. The appellate court determined the oil and gas lease between the parties was unambiguous, thereby preventing the use of extrinsic evidence and interpreted the contract language according to its "plain, ordinary, and generally accepted meaning."[101] Total argued the language within the lease provided that either horizontal or vertical wells were included within the term "wells" and satisfied the drilling commitment. DFW argued that due to the leasehold's location in the Barnett Shale, the parties' implied understanding at the time of the lease execution and amendment was to drill horizontal wells, not vertical wells, because efficient production could only be accomplished by horizontal wells in the Barnett Shale. The court reviewed the lease to examine how the term "well" was used and defined. They determined that the term "well" was used multiple times throughout the lease in three ways: 1) standing alone, 2) modified by the term "horizontal" well, or 3) modified by the term "vertical" well. Through interpretation of the lease,

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[100] *TotalEnergies E&P USA, Inc. v. Dallas/Fort Worth International Airport Board*, No. 02-20-00054-CV, 2022 WL 872476 (Tex. App.—Fort Worth 2022, no pet. h.).

[101] *Id*. at *2 (citing *Endeavor Energy Res., L.P. v. Energen Res. Corp*., 615 S.W.3d 144, 148 (Tex. 2020)).

the court determined the plain language of the lease regarding the term "well" is a "generic, nonspecific term" that may be modified by the terms "horizontal" or "vertical" when necessary to distinguish one from the other.[102] Here, the language within the drilling commitment only included the term "well." As a result, there was no evidence that only horizontal wells were satisfactory, nor that vertical wells were prohibited from fulfilling the drilling commitment. The court cited precedent from the Supreme Court of Texas in *Brumitt* explaining that "we cannot go beyond the plain language of the lease."[103] The court went on to cite *Gilbert* stating when interpreting an unambiguous lease, we must "presume parties intend what the words of the contract say", not what the parties later allege they "intended to say but did not."[104]

The court further addressed their disagreement with DFW's argument that there was an implied covenant to reasonably develop the leasehold by drilling horizontal wells, not vertical wells, by stating that the covenant to reasonably develop cannot supersede the express terms of the lease.[105] The court emphasized that although an oil and gas lease may impose implied duties on the lessee, these duties are only extended if the lease is silent on such subjects. In this case, the drilling commitment did not modify or limit the type of well to a horizontal or vertical well, however it was not silent regarding reasonable development.

In conclusion, the Second District Court of Appeals—by applying the rules governing contract interpretation and prior case law—held that the plain language of the lease did not limit the drilling commitment to horizontal wells. As a result, the appellate court reversed the trial court's summary judgment in favor of DFW and rendered summary judgment in favor of Total with a declaration that the drilling commitment may be satisfied by drilling vertical wells. This holding demonstrates how the court interprets terms within an unambiguous lease and lease amendment and emphasizes the importance of express terms.

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[102] *TotalEnergies E&P USA, Inc.*, 2022 WL 872476, at *3.
[103] *Id*. at *4 (citing *First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017)).
[104] *Id*. at *2 (citing *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126-27 (Tex. 2010); *see also First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017)).
[105] *Id*. at *4 (citing *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 373 (Tex. 2001)).

2. Fourth District Court of Appeals—San Antonio

EnerVest Operating, LLC v. Mayfield [106]

This postproduction cost case arose from a dispute over the interpretation of the gas royalty and free-use provisions within oil and gas leases. Specifically, the court analyzed whether the lessee improperly deducted fuel gas as a postproduction cost in its royalty calculation.

Mayfield and Ingham (the "Lessors") entered identical leases covering several sections of land in Sutton County. The gas royalty provision in the leases required EnerVest to pay the market value royalties on all gaseous substances produced "at the mouth of the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale."[107] Additionally, the leases contained a free-use provision which gave EnerVest free-use "of oil, gas, and water . . . for all drilling operations hereunder, and the royalty shall be computed after deducting any so used."[108] EnerVest collected gas from one battery on the leased land and one battery off the leased land. To prepare the gas for sale, EnerVest used compressors and dehydrators which required fuel gas. EnerVest did not pay Mayfield and Ingham royalties on the fuel gas.

The Lessors alleged EnerVest miscalculated royalties by improperly deducting the fuel gas as a postproduction cost from the royalties. EnerVest argued the lease only required royalty payments to be calculated "at the mouth of the well," and, thus, no royalties were owed on the fuel gas. The trial court denied EnerVest's summary judgment motion and found EnerVest owed Lessors unpaid royalties on the fuel gas because the leases' free-use provision limited EnerVest's free-use of the gas to "drilling operations on the premises."[109] EnerVest appealed.

In its decision, the Fourth Court of Appeals primarily relied on *BlueStone Nat. Res. II, LLC v. Randle*,[110] wherein the Supreme Court of Texas held that leases that calculate market value "at the well" must subtract postproduction costs from sale proceeds. Accordingly, the lease language allowed EnerVest to deduct its fuel gas cost from the royalties it owed to Lessors. Additionally, the court also held the lease's reference to free-use for drilling operations was superseded by the "market value at the mouth of the well" valuation which requires the Lessors share in all postproduction costs. Finally, the Lessors argued that the actions of EnerVest's predecessors-in-interest, who did pay royalties on fuel gas, bound EnerVest to also pay the royalties. The court did not agree, holding that past conduct cannot alter the unambiguous language of the leases.

The court determined EnerVest appropriately calculated royalties by not including the fuel gas it used because the gas royalty provision required market value to be calculated "at the mouth of the well." This holding is instructive as to how courts will interpret lease language to calculate royalty payments.

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[106] *EnerVest Operating, LLC v. Mayfield*, No. 04-21-00337-CV, 2022 WL 4492785 (Tex. App.—San Antonio September 28, 2022. no pet.) (mem. op.).
[107] *Id*. at *1.
[108] *Id*. at *2.
[109] *Id*.
[110] *BlueStone Nat. Res. II, LLC v. Randle*, 620 S.W.3d 380 (Tex. 2021).

3. Fifth District Court of Appeals—Dallas

In the Interest of J.Y.O., A Child [111]

This case stems from a dispute involving the division of a marital residence during divorce proceedings (the litigants are referred to as "Husband" and "Wife" herein). The issue before the court is whether the trial court correctly characterized and awarded the Husband 100% of the interest in the marital residence as his separate property. The appellate court analyzed the issue by looking at several elements, focusing closely on the intent of the parties. As a result, the ownership of the marital residence was changed to an equal division.

On June 1, 2017, Wife filed for divorce and Husband filed a counterpetition, both requesting confirmation and division of property. The trial court divided the marital assets, including the marital residence at issue in this case. Husband bought the marital residence five years prior to their marriage in 2010. However, a deed was executed in 2016 where both Husband and Wife became owners. Wife contended the deed was a gift of one-half of Husband's interest which became her separate property.[112] The trial court decided the marital residence, amongst other assets, was Husband's separate property. Wife appealed and contended that the trial court abused its discretion by awarding the entire interest in the home to Husband.

The Fifth District Court of Appeals considered various elements to make its determination. The court relied on the inception of title rule. In the context of community vs separate property, when real property is gifted from one spouse to another, the property will be considered the grantee spouse's separate property. The evidence showed that the Husband is listed in the 2016 Deed as Grantor and Wife is listed as Grantor and Grantee; therefore, the presumption is that Husband gifted the property to Wife. At trial, Husband presented no evidence that he did not intend to vest an interest in Wife through the 2016 Deed. Alternatively, Wife testified that Husband intended to gift her a fifty-percent interest in the marital residence. After analyzing the circumstances surrounding the inception of title, the court held that Husband and Wife owned the marital residence as tenants in common, each holding an undivided one-half interest as their separate property. This case is an instructive illustration of the inception of title doctrine insofar as it relates to marital property.

[111] *In The Int. of J.Y.O.*, No. 05-20-00987-CV, 2022 WL 2071113 (Tex. App.—Dallas June 9, 2022, pet. filed) (mem. op.).
[112] *Id*. at *1.

4. Eighth District Court of Appeals—El Paso

Balmorhea Ranches, Inc. v. Heymann [113]

This case is a dispute over the ownership rights to 200 acres in Reeves County. The court was asked whether a gap in title from the early 1900s could be resolved by the "presumed grant" doctrine.

E.F. Rosenbaum ("Rosenbaum") acquired the 200-acre tract in 1919 which is part of Section 52. In 1926, Rosenbaum sold part of Section 52 to Balmorhea Livestock Company. The 1926 Deed did not explicitly include the 200 acres. In 1942, Balmorhea Livestock entered bankruptcy and conveyed all its real property to Balmorhea Ranches ("Balmorhea") by way of trustee deed which also did not describe the 200 acres. Balmorhea executed oil and gas leases in 1950 and 1955 leasing the portion of Section 52 described in the Trustee's Deed. Then, beginning in 1957, Balmorhea began executing oil and gas leases which purported to include the 200 acres. In 2018, Balmorhea sued the successors of Rosenbaum, seeking a declaratory judgment under the theory of presumed lost grant (or lost deed), claiming the 200 acres were conveyed to its predecessor by Rosenbaum but the deed must have been lost. The trial court held in favor of the successors of Rosenbaum, and Balmorhea appealed.

The doctrine of presumed lost deed or grant is a common law doctrine applicable to title disputes where property lacking a complete chain of title is claimed by one person for a long period of time.[114] The doctrine generally creates an evidentiary presumption of a deed executed in favor of the one asserting longtime ownership.[115] While the lost-deed doctrine is generally an issue of fact, it can be established as a matter of law where deeds are too old and evidence is undisputed.[116] Furthermore, because the gaps in title tend to be much older, they usually involve a proposed theory to explain the gap, such as evidence of theft, destruction of deeds, fraud creating confusing chains of title, or clerical error.[117]

On appeal, the court began its analysis with the 1926 Deed which not convey the 200 acres. Balmorhea argued the 1926 Deed inadvertently excluded the contested property, but the court disagreed, pointing to the sophistication of the Rosenbaum family and their attention to detail in transferring property in other conveyances of record. The court also noted that Rosenbaum specifically reserved his ownership in other parcels of land, indicating he understood what he owned. The court likewise looked at record title and found no gap or defect in title. Ultimately, the court determined that Balmorhea did not satisfy its burden of proving a lost deed existed. This case is a good illustration of what evidence a court will consider when applying the doctrine of presumed grant.

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[113] *Balmorhea Ranches, Inc. v. Heymann*, 2022 WL 1409796 (Tex. App.—El Paso Oct. 24, 2022, no pet.).
[114] *Id.* at *5, *see* Haby v. *Howard*, 757 S.W.2d 34, 39 (Tex. App.—San Antonio 1988, writ denied); *see Purnell* v. *Gulihur*, 339 S.W.2d 86, 92 (Tex. App.—El Paso 1960, writ ref'd n.r.e.).
[115] *Id.*, *see Humphries* v. *Texas Gulf Sulphur Co*., 393 F.2d 69, 75 (5th Cir. 1968).
[116] *Id.*, *see Jeffus v. Coon*, 484 S.W.2d 949, 954 (Tex. App.—Tyler 1972, no writ); *see also Howland* v. *Hough*, 570 S.W.2d 876, 879–880 (Tex. 1978).
[117] *Id*. at *6, *see Adams v. Slattery*, 295 S.W.2d 859, 861 (1956) (evidence of theft and loss); *see Jeffus v. Coon*, 484 S.W.2d 949, 953 (Tex. App.—Tyler 1972, no writ) (evidence of destruction to deed records); *see Humphries v. Texas Gulf Sulphur Co.*, 393 F.2d 69, 72; *see Miller v. Fleming*, 233 S.W.2d 571, 572-73 (clerical error).

Bridges v. Uhl [118]

In this case, the court was asked to determine whether an NPRI reserved in a 1940 deed was a fixed or floating interest. The 1940 deed provided:

> Grantors, their heirs and assigns, reserve unto themselves, their heirs and assigns, *an undivided one-half (1/2) of the usual one-eighth (1/8) royalty in, to and under the above[-]described land* [first clause], covering the oil, gas and other minerals, said royalty reservation, however being wholly nonparticipating, … *if, as and when production is obtained* [second clause], grantors, their heirs and assigns, *shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one-sixteenth (1/16) of the total production* [third clause], it being the intention that this royalty reservation is wholly non-participating in bonuses, delay rentals, etc. [Emphasis added.][119]

The court determined there were three clauses in the reservation that needed to be harmonized (each is italicized in the above quotation). The court relied on the Supreme Court of Texas opinion in *U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*,[120] which rejects a mathematical approach to interpreting so called "double-fraction" royalties in favor of a holistic approach.

Using the holistic approach described in *Laborde*, the court's analysis of the 1940 deed concluded that the first clause and third clause were indicative of the estate misconception.[121] As well, the use of "if, as and when …" in the second clause confirmed the interest was prospective in nature.[122] The court also rejected defenses (presumed-grant, estoppel, and waiver theories) which asserted that the royalty owner should be precluded from claiming the royalty was anything other than a fixed 1/16 due to a long history of accepting payment based a fixed 1/16 interpretation.[123] Ultimately, the court held that the 1940 deed unambiguously reserved a floating 1/2 "of royalty" NPRI.

This case is another example of the importance of harmonizing all clauses within deed interpretation, especially in deeds from the early twentieth century.

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[118] *Bridges v. Uhl*, No. 08-21-00130-CV, 2022 WL 17985705 (Tex. App.—El Paso Dec. 29, 2022, no pet. h.).
[119] *Id.* at *2.
[120] *Id.* at *5, *see U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*, 551 S.W.3d 148, 151 (Tex. 2018).
[121] *Bridges*, 2022 WL 17985705, at *7.
[122] *Id.* at *8.
[123] *Id.* at *8-9.

Citation 2002 Investment, LLC v. Occidental Permian, LTD. [124]

This case is an appeal of a partial summary judgment regarding the interpretation of an assignment of oil and gas interests.

In 1987, Shell Western E&P, Inc. ("Shell Western") sold oil and gas properties to Citation 1987 Investment LP ("Shell-Citation Assignment"). The assignment included an exhibit that described the leasehold estates to be included, with some of the descriptions referencing specific depths, such as "down to 8,393 feet."[125] Thereafter, in 1997, Shell Western conveyed the deep rights of the same properties to Altura Energy, Ltd.[126] ("Shell-Altura Assignment"). Occidental eventually succeeded to the rights assigned to Altura Energy, Ltd.

The issue at hand was whether the property description in the exhibit of the Shell-Citation Assignment limited the depth of the interest conveyed or whether the granting clause in the conveyance acted as unlimited grant of Shell Western's interest in those properties. The relevant granting clause in the third read:

> "It is the intent of this ASSIGNMENT to transfer and convey to CITATION and SHELL WESTERN does hereby convey and transfer to CITATION all rights and interest now owned by SHELL WESTERN, its successors and assigns, in the leases and other rights described herein, *regardless of whether the same may be incorrectly described or omitted* from Exhibit A... *"*.[127]

The court looked at the Shell-Citation Assignment and Exhibit A and concluded the documents were unambiguous, leaving the intent of the parties to control interpretation. The court found the plain language of the documents demonstrated a clear intent of the parties that all interests owned by Shell Western were to be conveyed, irrespective of an incorrect or omitted property description. Exhibit A, while informative to the agreement, was never intended to limit or control the specific interests transferred.

Occidental argued that the italicized language served as a Mother Hubbard clause, meant to clean up small errors. The court rejected this argument and pointed to the established understanding that in the oil and gas context, a Mother Hubbard clause protects a lessee against errors in the property description by covering strips, gores, and other small pieces of land adjacent to the land described in a conveyance.[128]

This case is important because the essential language in the Shell-Citation Assignment is often found in oil and gas assignments. Landmen and attorneys should ensure the parties to an assignment actually intend to effectuate a global conveyance of interests if similar language is to be included in the instrument.

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[124] *Citation 2002 Investment, LLC v. Occidental Permian, LTD.*, No. 08-21-00029-CV, 2022 WL 17850986 (Tex. App.—El Paso, December 22, 2022, pet. granted).
[125] *Id.* at * 1.
[126] Altura Energy, Ltd. later became Occidental Permian, Ltd.
[127] *Id.* at *4.
[128] *Id*. at *7.

Davis v. COG Operating, LLC [129]

In this case, the court was asked to interpret two deeds to determine whether a royalty interest was reserved in the second deed.[130] The first deed was executed in 1926, was titled "Royalty Deed," and conveyed the following described interest:

> 1/32 interest in all oil, gas and other minerals, in and under [the land] … this sale is made subject to [an oil and gas lease], but covers and included 1/4 of all the oil royalty and gas rentals, or royalty due and to be paid under the terms of said lease. It is agreed and understood that 1/4 of the money rentals … under the terms of said lease is to be paid to [Grantee], and in the event that the said above described lease for any reason becomes cancelled or forfeited, then and in that event, the lease interests and all future rentals, on said land, for oil, gas and mineral privileges shall be owned jointly by the said [Grantor], ---, each owning 1/4 interest in all oil, gas and other minerals, in and upon said land together with their record 1/4 interest in all future rents.

The court concluded that the intent of the parties to the 1926 deed was to unambiguously convey a 1/4 interest in oil, gas and minerals.[131]

The second deed was executed in 1939 and contained the following relevant provisions:

> [Granting] all that certain tract, parcel and piece of land … It is understood, however, that 1/32 of the oil, gas and other minerals has heretofore been conveyed to [the grantee in the 1926 deed], and this conveyance does not include such mineral interests so conveyed … It is further understood and agreed that we [Grantors] reserve unto ourselves, our heirs and assigns, one-fourth (1/4) of the 1/8 royalty usually reserved by and to be paid to the land owner in event of execution of oil and gas leases … in case of production we are to receive 1/4 of the 1/8 royalty, and the conveyance is executed subject to the mineral interest heretofore conveyed to [grantee in 1926 deed] and also to the 1/4 royalty interest reserved by us as hereinabove stated.

The court concluded that the reference to the 1/32 oil, gas and minerals conveyed in the 1926 deed put the grantee in the 1939 deed on notice of the entire 1/4 mineral interest previously conveyed. Further, the court relied on the estate misconception theory to determine the deed intended to reserve a floating 1/4 "of royalty" nonparticipating royalty interest and not a fixed 1/4 of 1/8 nonparticipating royalty interest. This case is another example of the Texas courts relying on the estate misconception theory resolve potential ambiguity in a deed containing double fractions.

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[129] *Davis* v. *COG Operating, LLC*, No. 08-20-00205-CV, 2022 WL 17477948 (Tex. App.—El Paso, Dec. 6, 2022, no pet.).

[130] The court also addressed non-interpretational defenses regarding the application of the *Duhig* rule and presumed grant; however, neither defense was upheld and this brief is focused on the deed interpretations.

[131] *Id.* at *6, citing *Concord Oil Co. v. Pennzoil Exploration and Prod. Co.*, 966 S.W.2d 451 (Tex. 1998), rejecting the "dual-grant" theory.

In the Matter of the Estate of Masters, Deceased [132]

This case discusses the four-year statute of limitations to file a will for probate. In particular, the court had to decide whether Kippy Bailey's attempt to probate a will after the limitations period ended was barred. The appellate court gave a helpful analysis by describing the circumstances in which a court may allow a will to be probated after the expiration of the four-year period.

The case arose in 2019 when Bailey filed an application to probate his partner, Robert Scott Masters', holographic will as a muniment of title six years after Masters' death. Under the will, Bailey was designated as the executor. Additionally, the will devised a house to Bailey and directed the distribution of specific gifts to members of Masters' family. After Masters' death, Bailey continued to reside in the house, paid property taxes, performed maintenance and paid utility bills. In late 2018, Bailey learned he did not have legal title to the house. Bailey filed the application to probate the will after discussing the matter with an attorney.

Masters' potential heirs (collectively "Masters' Heirs") filed an original answer and small-estate affidavit and alleged they were the rightful beneficiaries under Texas intestacy laws. Furthermore, Masters' Heirs asserted that the will could not be probated because Bailey, in his capacity as executor, knew of the will's existence at the time of Masters' death and did not file the will for probate until after the requisite four-year statute of limitations. The trial court approved Masters' Heirs' small-estate affidavit and denied Bailey's probate application as barred by limitations.

On appeal, the court recited the general rule that a will must be submitted for probate within four years after a testator's death.[133] Nevertheless, Texas provides certain exceptions to the four-year statutory requirement if the individual seeking to probate the will proves they were not in "default." The court described instances when an individual was not considered in default: (1) belief that probate is unnecessary based on the erroneous advice of an attorney; (2) a mistaken belief that the property was their separate property; (3) receiving royalty payments on mineral leases from third parties who did not raise the issue of proper title; or (4) a lack of financial resources to probate a will paired with the lack of knowledge of the need for probate.

In this case, the court relied on *Ramirez v. Galvan*[134] wherein the decedent's husband provided evidence that he: (1) paid his late wife's debts before her death and distributed her specific gifts in accordance with the will; (2) the wife left the residue of her estate, including her interest in the house, to him; (3) he continued to live in the house under the belief that he was the sole owner; and (4) he immediately contacted an attorney and filed an application for probate upon learning of the title issue. The *Ramirez* court noted that the house was community property and the husband had legal title to half by reason of its community property nature.

The court distinguished *Ramirez* from the present case as Bailey did not have a title interest in the property. Evidence provided showed Masters was the sole owner of the house before and after his death. Further, Bailey had experience in the process of transferring property through other written deeds, and Bailey did not present evidence of legal title or knowledge impediments as shown in

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[132] *In re Estate of Masters*, No. 08-20-00156-CV, 2022 WL 2827022 (Tex. App.—El Paso July 20, 2022, no pet.).
[133] Tex. Est. Code Ann § 256.003(a).
[134] *Ramirez v. Galvan*, No. 03-17-00101-CV, 2018 WL 454733 (Tex. App.—Austin Jan. 10, 2018, no pet.).

Ramirez. Accordingly, the court referenced the rule that "ignorance of the law is no excuse for failure to comply with the statute"[135] and found Bailey did not meet the burden of proof necessary to defeat the presumption of default.

Based on the court's analysis, it determined Bailey did not establish sufficient circumstances to overcome default and affirmed the trial court's judgment in favor of Masters' Heirs. This holding provides attorneys and individuals with guidance on some of the exceptions to the four-year statute of limitations applicable to Texas probate matters.

[135] *Brown v. Byrd*, 512 S.W.3d 753, 756 (Tex. App.—Tyler 1974, no writ).

Mark S. Hogg, LLC v. Blackbeard Operating, LLC [136]

This case stemmed from an assignment of the lessee's interest in a 1998 oil and gas lease. The court sought to determine whether the well named within an assignment, but not the lease giving rise to the rights of the well, constituted a valid assignment of the interest in the lease not explicitly identified within the assignment.

Mark, Betty, and George Hogg (collectively the "Hoggs") executed two leases with Three B Oil Company ("Three B"): one in 1994 and another in 1998. Subsequently, Three B drilled the Hogg #2 Well. In 2005, Three B assigned interests to Stanolind Oil and Gas Corporation ("Stanolind") specifically listing in Exhibit A and Exhibit A-1 the 1994 lease and Hogg #2 Well; however, it did not expressly include the 1998 lease ("2005 Assignment"). Subsequent assignments included both leases. In 2019, the Blackbeard, as successor of Stanolind, sued for trespass to try title in the 1998 lease interest, sought to quiet title, and sought a declaratory judgment that the 2005 Assignment included Three B's interest in the 1998 lease. Hogg cross-claimed for trespass to try title and a declaratory judgment that the 2005 Assignment did not include the 1998 lease. After a full hearing on the motions, the trial court granted Blackbeard's motion for summary judgment and denied Hogg's cross-motion, from which Hogg appealed. The appellate court affirmed the trial court's judgment in favor of Blackbeard.

The court's interpretation of the assigned hinged on the definition of "Lands" under Subparagraph A of the assignment which provided that, which indicated that, in addition to the leases included in Exhibit A, any lands covered by those leases were also assigned. The 1994 lease covered the same lands described in the 1998 lease. Thus, the court read the plain language of the document to include all of Three B's interests in the 1994 lease, which included all of the lands within the 1998 lease. The court then looked at the language of the clause defining units and properties, including any lands or all leasehold interests in a unit as described on Exhibit A-1, which in turn identified the Hogg #2 Well. The court pointed towards the parties' agreement to drill that well under the 1998 lease. When all provisions were read together, the court interpreted the 2005 Assignment to transfer and convey all of Three B's interest in the 1998 lease.

This case demonstrated that the express language of the entire instrument controls the court's interpretation of the document. Furthermore, interests do not need to necessarily be specified by the exact document from which they were created to be a valid conveyance of that interest, so long as the document contains broad language that, when read as a whole, includes that interest.

[136] *Mark S. Hogg, LLC* v. *Blackbeard Operating, LLC*, No. 08-20-00199-CV, 2022 WL 17069878 (Tex. App.—El Paso Nov. 17, 2022, no pet.).

5. Ninth District Court of Appeals—Beaumont

Gene Davis Sand & Materials, Inc. v. Winfree [137]

This case concerned a title dispute between two property owners of adjoining land when a 2014 deed attempted to alter the property description of the original 1998 deed. Specifically, the court analyzed the issue of whether the 2014 deed was void due to its material alteration of the 1998 deed's property description. In holding the 2014 deed as void, the court set forth a helpful analysis of steps to follow in making corrections to deeds.

The case revolved around a 1998 deed and two 2014 deeds (collectively "the 2014 Deeds"). Originally, William Winfree ("Winfree") conveyed 53 acres out of his 1,600-acre tract of land in Orange County to Gene Davis Sand & Materials, Inc. ("Davis") by a warranty deed recorded in 1998 (the "1998 Deed"). The property description retained an easement for Winfree on the east side of the property and noted Davis's 53 acres would be on the southwest edge of a pipeline right-of-way located on the northeast side of the property. Subsequently, Cary B. Dean and Jason R. Stevenson ("Dean" and "Stevenson") purchased the property from Davis in 2014. In preparing the purchase documents, the title company noticed the metes and bounds in the 1998 Deed's property description did not correctly return to a beginning point. Believing the issue was solely clerical, the title company fixed the issue and did not advise Dean and Stevenson whether to contact Winfree about the change. However, the new property description in the 2014 Deeds pushed Dean and Stevenson's property approximately 75 to 100 feet past the pipeline right-of-way onto Winfree's land. Winfree was not notified of the error in the 1998 Deed's property description, and the 2014 Deeds were recorded with the new property description. In 2019, Winfree filed suit.

The trial court found the property description in the 2014 Deeds altered the legal description in the 1998 Deed which constituted a material correction that required Winfree—the original grantor—to execute the 2014 Deeds. Accordingly, the 2014 Deeds did not satisfy the requirements of Section 5.029 of the Texas Property Code since Winfree was not a party thereto. Further, the trial court held Davis, Dean, and Stevenson could not change the legal description in the 1998 Deed because the four-year statute of limitations already passed and ordered the legal description of the 2014 Deeds to comply with the 1998 Deed's legal description. Thereafter, Davis, Dean, and Stevenson appealed and claimed the court erred because: (1) the evidence was insufficient to demonstrate the discrepancies between the 1998 and 2014 deeds divested Winfree of his ownership interest in the land above the pipeline right-of-way and (2) the parties were not barred by the statute of limitations because Dean and Stevenson did not suffer a legal injury until February 2019 when Winfree filed suit.

In reviewing the first point of error, the Ninth District Court of Appeals looked to § 5.028 of the Texas Property Code which addressed nonmaterial changes to deeds and § 5.029 which addressed material changes. § 5.028 did not require the parties of the original transaction to execute a correction instrument if the error was clerical. A change is clerical if it fixes legal descriptions "such as distance, angle, [or] direction,"[138] a misspelled party's name, marital status, the date of

[137] *Gene Davis Sand & Materials, Inc. v. Winfree*, No. 09-20-00173-CV, 2022 WL 3091488 (Tex. App.—Beaumont Aug. 4, 2022, no pet.) (mem. op., not designated for publication).
[138] Tex. Prop. Code Ann § 5.028(a).

conveyance, recording data, or a fact relating to an acknowledgement or authentication. Alternatively, § 5.029 required the original parties or their representatives to execute the correction instrument if the change was material. A change is material if land is added or removed from an existing conveyance which correctly conveyed other land. The appellate court found the change surpassed correcting a clerical error and was a material change because the correction to the property description in the 2014 Deeds pushed the boundary 100 feet onto land that was not conveyed from Winfree to Davis. The 2014 Deeds attempted to add land resulting in a material change requiring the application of § 5.029, which the parties did not comply with when Winfree's signature was not obtained on the 2014 Deeds.

As to the second point of error, the court needed to decide whether Davis, Dean, and Stevenson were time barred from challenging the 1998 Deed's legal description due to a four-year statute of limitations. The court relied on the rule that parties are presumed to know the contents of deeds if mistakes in the deeds are "plainly evident or clearly disclosed on the face of the deed."[139] Here, the discrepancy arose when the earnest money contract required the northeast boundary of Davis's land to extend 25 feet into the pipeline right-of-way, whereas the property description in the original survey and in the 1998 Deed did not extend 25 feet into the pipeline right-of-way. Dean and Stevenson became aware of the 1998 Deed property description error upon the sale of the property in 2014. Thus, Davis's statute of limitations began the date the 1998 Deed was executed by Winfree and Davis, and Dean and Stevenson's statute of limitations began on the execution date of the 2014 Deeds. Accordingly, Davis, Dean and Stevenson were estopped from challenging the 1998 Deed's legal description.

The court determined the 2014 Deeds were not properly executed in accordance with § 5.029 of the Texas Property Code and Davis, Dean and Stevenson were time barred from challenging the 1998 Deed's legal description. This holding will help attorneys and landmen understand the distinction between making material and non-material changes to instruments conveying real property and the requirements involved in making these changes.

[139] *Trahan v. Mettlen*, 428 S.W.3d 905, 909 (Tex. App.—Texarkana 2014, no pet.).

6. Eleventh District Court of Appeals—Eastland

Aaron v. Fisher [140]

This case centered around the conveyance of mineral interests in two deeds. The Eleventh District Court of Appeals addressed whether the 1971 Deeds conveyed an undivided 1/12 non-participating mineral interest as community or separate property and whether the granting of interpleader was appropriate. To determine these issues, the court applied the rules governing deed interpretation and analyzed the effects of providing an affidavit at the request of a party to the suit.

This dispute arose from Houston Parker's conveyance to his wife, Lilly, in a 1962 Mineral Deed. This conveyance included an undivided one-half (1/2) interest in the oil, gas, and minerals in and under 120 acres. In 1971, after Houston died, Lilly then conveyed to each of her six children "a[n] undivided One Twelfth (1/12) [non-participating] interest" to the minerals in and under the land described in that 1962 Mineral Deed. Three of those six children were W.T. Aaron, Chester Little, and Glen D. Aaron, I. W.T. was married to Lavon Aaron, and they never had children. W.T. died intestate in 2000. Lavon later died intestate in 2005 and was survived by her sister, Verda Fisher. Verda died intestate in 2016, survived by her two sons, James and Stephen Fisher (collectively, "the Fishers"). Lilly's son, Chester, married Audra Elam. Chester died intestate in 1998 and was survived by Audra, his sisters (Martha Heathcoat and Lillie Clement), and his half-brothers (W.T. and Glen Aaron, I). Audra died intestate in 2012 and was survived by the descendants of her siblings: James O. "Tony" Elam, Katie Elam Ward, and the wife of Stephen Elam, Debbie. Stephen and Debbie had one child, S.C. Elam (collectively, "the Elams"). Glen D. Aaron, I ("Glen I") died intestate, along with his wife, and was survived by his only son, Glen D. Aaron, II ("Glen II").

At the trial court, Glen II sought a declaration that he inherited and was the title owner of the non-participating mineral interest that his father, Glen I, received from Lilly in the 1971 conveyance. He further claimed that through intestate succession he was also entitled to portions of the 1/12 interest that Lilly conveyed to W.T. and Chester in 1971. The trial court disagreed with Glen II and held that each conveyance was a sale for consideration, becoming community property. In affirming the trial court's decision, the appellate court first established whether the 1971 Deeds conveyed the 1/12 interest as gifts or a sale for consideration. This was important to establish whether the interest was separate or community property. If the interest was conveyed as a sale for consideration, it would be community property, and the widows of both W.T. and Chester would have each inherited their respective 1/12 interest. However, if the interest was conveyed as a gift, it would be separate property. In that scenario, each widow would have only inherited 1/2 of the 1/12 interest and the other 1/2 of the 1/12 interest would have passed to the siblings.

The appellate court looked to the rules governing contract interpretation to determine whether language within the 1971 Deed conveyed the mineral interests as gifts or as sales for consideration. The court found the 1971 Deeds to be unambiguous, thereby limiting the scope of review to the "four corners of the document" by prohibiting any "extrinsic evidence from consideration." The unambiguous language within the 1971 Deeds stated that Lilly "grant[s], bargain[s], sells[s], convey[s], transfer[s], assign[s], and deliver[s]" the disputed mineral interests to those intended "for and in consideration" of the sum of $10.00 cash in hand paid and for "other good and valuable

[140] *Aaron v. Fisher*, 645 S.W.3d 299 (Tex. App.—Eastland 2022, no pet.).

consideration."[141] Consequentially, by analyzing the plain language of the 1971 Deeds, the court held that Lilly's conveyances of the mineral interest to W.T. and Chester were to be construed as sales for consideration. As a result, the mineral interests became community property accumulated during the marriages of W.T to Lavon and Chester to Audra, thereby passing to their widows upon their deaths through intestacy. Therefore, the mineral interests became the sole property of Lavon and Audra. Upon their subsequent deaths, the mineral interests passed according to the laws of intestacy to their surviving siblings, then eventually to the Fishers and the Elams, not to Glen II.[142]

Lastly, the appellate court addressed Glen II's claim that the trial court erred in granting Pioneer's petition for interpleader relief. The determining issue in this claim was whether Pioneer re-entered the case. An interpleader action allows court protection for a disinterested party who is unsure to which claimant funds should be paid. Interpleader relief may be granted so long as there are rival and competing claims to the funds and there is reasonable doubt as to who the funds belong. Pioneer was discharged from the suit with prejudice through an agreement of the parties. Glen II claimed that Pioneer re-entered the case when one of Pioneer's employees prepared an affidavit at the request of the Fishers. However, this court held that the action by Pioneer was one of an "operator" executing and furnishing relevant documents, at the request of the Fishers, to a "nonoperator" who "possessed oil and gas interests which could be potentially affected."[143] Consequentially, the court found in agreement with the trial court that Pioneer did not re-enter as a party to the case; therefore, there was no error in granting Pioneer's petition in interpleader.

In conclusion, the Eleventh District Court of Appeals held that Lilly conveyed undivided 1/12 interests to each of her six children in the 1971 Deeds as sales for consideration, which became community property. As a result, W.T.'s widow and Chester's widow each inherited their respective 1/12 interests, which were eventually passed along to the Fishers and the Elams, being that they were the eligible descendants under the laws of intestacy. The appellate court held that the trial court did not err in granting Pioneer's petition in interpleader, because Pioneer did not re-enter the suit as a result of an employee providing an affidavit at the request of the Fishers.

This holding provides a good example of differentiating when an interest is conveyed as separate property or community property through the application of unambiguous deed interpretation.

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[141] *Id*. at 307 (citing *Luckel v. White*, 819 S.W.2d 459, 461-62 (Tex. 1991)).
[142] *See* TEX. EST. CODE ANN. § 201.003(b) (West 2020).
[143] *Aaron*, 645 S.W.3d at 314.

Cowan v. Worrell [144]

This case arose out of a dispute over whether a road was a public road or a private drive. To determine this, the court looked at whether an implied dedication occurred and whether survey lines or landmarks controlled when assessing property boundaries.

This case centered around a road that sat on a 1.98-acre tract in Erath County. James and Nancy Cowan ("the Cowans") claimed that the disputed road was a part of their private drive, whereas their neighbors, Rex Worrell and Paige Worrell-Burrus (jointly, "the Worrells"), claimed that the disputed road was a public road. The Worrells had each used the disputed road as a means of getting to and from each of their properties. While Rex had an alternative means of accessing his property, Paige's use of the disputed road was the only reliable means of getting to and from her property because several times each year the alternative routes were flooded. Testimony from multiple individuals stated that the disputed road was viewed and used as a public road for as long as a century before the Cowans came into possession of their property. Additionally, according to the deed description of the Cowan's land, the southern boundary line of their property fell on the north line of the public road that intersected with F.M. 1702 and ran along the south line of the Anderson survey.

On October 6, 2017, the Cowans sent a letter to Paige, stating that she had thirty days to plan how she would get to and from her property without using the disputed road. The letter asserted that after the thirty days, the Cowans would place a fence on the south side of the disputed road to prevent Paige from using it. The Worrells responded to this letter twenty-five days later by seeking a declaratory judgment that the disputed road was a public road which the Cowans did not own. The Worrells also requested that the Cowans be prevented from blocking their access to the road. The trial court granted the Worrells their requests. On appeal, the Cowans disputed several holdings from the trial court's ruling, including: (1) that the road in question was a public road, rather than their private drive; (2) the metes and bounds description of the road; and (3) that the Cowans didn't own any portion of the road, because the southern boundary of their property terminated immediately north of the road. The Cowans argued that the trial court's adverse ruling was against the great weight and preponderance of the evidence.

The appellate court upheld the ruling of the trial court on all issues, stating that private lands may become public lands by dedication. The court found that there was an implied dedication of this disputed road to public use. The court came to this decision by applying a four-part test and it distinguished between the weight of survey lines versus natural or artificial landmarks when assessing property lines.

According to the four-part test, an implied dedication to the public exists when: "(1) the landowner's acts induce the belief that she intended to dedicate the road to public use; (2) the landowner is competent; (3) the public relies on the landowner's acts and will be served by the dedication; and (4) there is an offer and acceptance of the dedication."[145] The court turned to testimony from a descendant of the White family, which owned property abutting the disputed

[144] *Cowan v. Worrell*, 638 S.W.3d 244 (Tex. App.—Eastland 2022, no pet.).
[145] *Id*. at 254 (citing *Linder v. Hill*, 691 S.W.2d 590, 592 (Tex. 1985)).

road for more than a century before the Cowans acquired their land.[146] This testimony confirmed that the disputed road was always used as a means of getting to and from the White property, that the county had previously set up signs on the disputed road and maintained the road, and that the Whites believed the disputed road was their property but had held the disputed road out as a public road. Additionally, although the Cowans had helped maintain the road, the court did not find that this prevented the road from becoming public. Furthermore, multiple deeds in the public record for property surrounding the disputed road referred to it as a public road and an old county road. The court relied on these findings in combination with the fact that Paige, along with other members of the public, had relied on the acceptance of this road as a public road. She, as member of the public, was specifically served by this road being held out as a public road since it was her sole reliable means of getting to and from her property. Therefore, applying the facts of the case to the four-part test, the appellate court found that an implied dedication of the disputed road to public use had occurred.

Finally, the court distinguished which factor controlled in determining property boundaries when there was a conflict between survey lines and natural or artificial landmarks. The court found that natural or artificial landmarks controlled over survey lines to determine property boundaries. The court relied on expert testimony supported by prior case law which stated that when there is a conflict in the deed, "the more specific provisions will control over general expressions."[147] Based on this, the court determined that regardless of whether the Cowans' deed identified the southern boundary of their property as both the survey line and the north line of the public road, the north line of the public road was the controlling factor because it was an artificial landmark.

In its ruling, the court held that there was an implied dedication of this disputed road to public use through application of the four-part test and that the disputed road was not located within the boundaries of the Cowans' property since natural or artificial landmarks control over survey lines when there is inconsistency between the two.

This case reinforces the fact that private property does not need to be expressly dedicated to public use to become public lands; this may occur through an implied dedication. Additionally, it shows that natural or artificial landmarks control over survey lines when determining property boundaries.

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[146] *Id*. at 252.
[147] *Id*. at 258 (quoting *Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17, 20 (Tex. 2015)).

Endeavor Energy Resources v. Trudy Jane Anderson Testamentary Trust [148]

This case arose from a dispute regarding the validity of a correction deed in the reformation of the parties' original general warranty deed and whether one of the parties properly executed the correction deed. The court analyzed the requirements for executing a valid correction deed and its effectiveness in replacing an original general warranty deed.

The dispute began on March 31, 2003, when E.D. and Arah Holcomb ("the Holcombs") executed a farm and ranch contract with Charles Thomas (Tom) Anderson and his wife, Trudy Anderson, ("the Andersons"). The contract gave the Andersons surface rights to six tracts of the Holcombs' ranch and reserved the oil, gas, and mineral rights in those tracts to the Holcombs. Thereafter, the parties executed a general warranty deed ("2003 Deed"), which merged the six tracts into three tracts but did not preserve the language from the contract which reserved the oil, gas, and mineral rights in those tracts to the Holcombs. The Holcombs later conveyed executive rights to third parties under the impression that the mineral rights in the six tracts of land had been reserved. After the discrepancy between the contract and the 2003 Deed was realized, the Holcombs and Tom executed a correction warranty deed on March 26, 2007 ("2007 Correction"). The language in the 2007 Correction purported to replace the 2003 Deed, correct a mutual mistake, and preserve the oil, gas, and mineral rights of the Holcombs. Trudy passed away the year before and was not present during the execution of the 2007 Correction. Her will appointed Tom as executor of her estate, established a testamentary trust designating Tom as trustee and sole beneficiary, and devised all real property to Tom in a trust. In these capacities, Tom could use and invade the corpus of the trust with "full and absolute power and authority to sell and dispose of, under such terms as … may seem most appropriate, any or all the properties of our estates…."[149] Tom's authority was subject to the limitation that their children must join in any "sale or *conveyance*"[150] of real estate belonging to Trudy's trust estate. After the dispute arose over who owned the mineral rights in the tracts of land, the Andersons filed suit.

Tom filed a trespass to try title suit and sought to invalidate the 2007 Correction by alleging his signature was not binding as to Trudy's interest because his children did not join in the execution of said deed, as required by Trudy's will. The Holcombs requested a declaration confirming the validity of the 2007 Correction. Alternatively, the Holcombs sought to reform the 2003 Deed to correct the mistake. The trial court granted Tom's motion for summary judgment and invalidated the correction deed because it did not substantially meet the requirements of Texas Property Code § 5.029. The Holcombs appealed.

In reviewing the 2007 Correction, the Eleventh District Court of Appeals examined § 5.029 of the Texas Property Code to see if the deed complied with the statute's requirements. The statute requires the execution of each original party or a party's "heirs, successors, or assigns…"[151] if an original party is unavailable to create a valid correction instrument. Additionally, if the parties executed the correction instrument prior to September 1, 2011 (the statute's effective date), then

[148] *Endeavor Energy Res., LP v. Trudy Jane Anderson Testamentary Tr. By & Through Anderson*, 644 S.W.3d 212 (Tex. App.—Eastland 2022, pet. denied).
[149] *Id*. at 217.
[150] *Id*.
[151] *Id*. at 219.

the correction instrument only had to "substantially comply" with § 5.029 to remain valid. Because the correction deed was executed on March 26, 2007, it was then examined under the "substantial compliance" test. The court first determined whether Tom was Trudy's "heir, successor, or assign," on the date of the correction deed's execution. The court declared Tom as the sole successor to Trudy's trust assets because the children did not have a vested interest in either her estate or in the property held in the testamentary trust. Rather, Trudy devised all of her real estate to Tom without the restraint on alienation which is typically placed on life tenants. The court referenced Tom's ability as trustee to "invade the trust and dispose of the entire trust corpus" with the sole constraint that the Anderson children join in a sale or conveyance of real property held by the trust. Therefore, Tom's broad powers under Trudy's trust made him the sole successor for purposes of executing the correction deed subject to the aforementioned restraint.[152]

Next, the court examined whether Tom validly executed the 2007 Correction as the successor to Trudy's estate. The court relied on the following language within the correction deed to determine the intent of the parties: (1) Trudy and Tom were the original grantees, (2) Trudy passed away prior to the execution and recordation of the correction deed, and (3) the correction deed effectively corrected and replaced the 2003 Deed according to the parties' true intent.[153] For these reasons, the court found the parties intended to correct the deed with respect to both Tom and Trudy's interest in the property. Additionally, Tom's signature block was titled "Grantees" which caused the court to find that Tom executed the correction deed as executor, trustee, and individually. Lastly, the court held the 2007 Correction was not a conveyance because it was not meant to convey anything. Rather, the correction deed was meant to replace and substitute the 2003 Deed by clarifying "the scope of the conveyances and mineral reservations."[154] Therefore, the Anderson children were not required to join in the execution of the correction deed.

Based on the court's analysis, the 2007 Correction effectively clarified and replaced the 2003 Deed and reserved the oil, gas, and mineral rights to the Holcombs. This holding provides guidance on how to properly execute a correction deed in accordance with § 5.029 of the Texas Property Code.

[152] *Id*. at 221–22.
[153] *Id*. at 224.
[154] *Id*. at 222.

Hughes v. CJM Resources, LP [155]

The main issue of this case focused on deed interpretation. To determine whether the deed effectively conveyed all interests owned by the grantor, the Eleventh District Court of Appeals applied the four corners rule to assess the party's intentions and specifically analyzed whether the subject-to clause was intended to be an exception to the interest conveyed.

This case initially arose from a dispute between Rudolfo B. Hughes ("Hughes") and CJM Resources, LP ("CJM"), in which Hughes filed a prior lawsuit against CJM for fraud and negligent misrepresentation. In response, CJM asserted that Hughes lacked standing to bring this claim because Hughes had conveyed his interest to Decatur Mineral Partners ("Decatur"). In this case, Hughes admitted he conveyed his interest to Decatur on February 15, 2018, but argued that those rights were reconveyed to him by Decatur in a 2019 assignment that was made effective January 1, 2018. CJM argued that Decatur's reconveyance back to Hughes was ineffective because Decatur lacked possession of said interest due to their intervening conveyance of a mineral deed to Universal Royalty & Mineral Fund I, LP ("Universal") on November 21, 2018. CJM asserted that Decatur had effectively conveyed all interest it had previously received from Hughes to Universal. But Hughes argued there was an exception in the deed between Decatur and Universal, which effectively excluded Hughes' interests from being conveyed to Universal. The trial court ruled in favor of CJM. Based on its interpretation of the deed, Decatur transferred all interests, including those received from Hughes, to Universal and therefore, Hughes lacked subject-matter jurisdiction on his claims against CJM.

Hughes appealed the trial court's decision, asserting the trial court erred in ruling that he lacked standing on his claims against CJM. Hughes argued that his interest was not transferred in the deed from Decatur to Universal based on the presence of an exception in the deed. The Eleventh District Court of Appeals came to its interpretation of the deed by applying the four corners rule to determine the party's intentions, specifically addressing whether the subject-to clause was to be construed as an exception.

The court first deemed that the deed was unambiguous and thus, it must be interpreted according to the four corners rule. When this rule is applied, the court may only "ascertain the intent of the parties solely from the language in the deed."[156] Hughes first argued that Decatur's deed to Universal did not convey the causes of action that Decatur received from Hughes. The court determined that based off the language in the deed from Decatur to Universal which stated "all of [Decatur's] interest" in the lands, along with the reference to the prior deed from Hughes to Decatur, the intent of the parties was to convey all interest Decatur obtained from Hughes, including any causes of action. In his argument, Hughes also cited to language in the deed from Hughes to Decatur for comparison to the language in the deed from Decatur to Universal. Absent ambiguity, fraud, accident, or mistake, courts will not consider extrinsic evidence in construing intentions of parties to the deed.[157] Here, the court declined to compare the language from one deed to the other as they found no dispute of ambiguity, fraud, accident, or mistake.

[155] *Hughes v. CJM Res., LP*, 640 S.W.3d 623 (Tex. App.—Eastland 2022, no pet.).
[156] *Id*. at 627 (citing *Wenske v. Ealy*, 521 S.W.3d 791, 794 (Tex. 2017)).
[157] *Id*. at 628 (citing *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

Hughes then asserted that within the deed from Decatur to Universal, there was language in the subject-to clause that temporally limited the interest being conveyed to "after the date of the mineral deed."[158] Hughes argued that this language proved Decatur was excepting from the conveyance to Universal any interest it obtained prior to the date of the mineral deed, which was made effective January 1, 2018. Therefore, Hughes contended that the interests he conveyed to Decatur were excepted from the Decatur to Universal deed, because their conveyance occurred before January 1, 2018. Deeds are generally construed to convey to the grantee all of the interest in the lands owned by the grantor, unless the language in the deed contains the clear intention to grant a lesser estate.[159] Furthermore, for an exception in a deed to be valid, it must be reasonably certain through use of "clear and specific" language.[160] The court determined that although a subject-to clause may be used as an exception to a conveyance, the language in the deed must still identify the property it is excepting with reasonable certainty. The court concluded that the language in the deed failed to make it reasonably certain that the interests Hughes conveyed to Decatur were intended to be excluded from Decatur's conveyance to Universal, as there was no specific language excepting the causes of action or indicating that the grantor was withholding property from the conveyance. Accordingly, the court ruled that this language was solely a subject-to clause, not to be construed as an exception. The court further explained that agreeing with Hughes' interpretation of the language would have created conflicting meanings within the entirety of the deed, because the first paragraph purported to convey "all of [Decatur's] interest" received in the original deed from Hughes, thereby stripping away the meaning of "all" in the deed.[161]

In applying the four corners rule to the interpretation of the deed, the court ruled that the subject-to clause was not intended to be construed as an exception. As a result, the court affirmed the trial court's ruling that the deed from Decatur to Universal had effectively conveyed all interests to Universal, including Hughes' interest. Therefore, Hughes lacked standing to bring the causes of action against CJM, because Decatur no longer possessed Hughes' original interest when it attempted to reconvey said interest back to Hughes.

This case outlines and reinforces the process courts use when interpreting a deed, as well as highlights what is necessary for a subject-to clause to be construed as an exception in a deed.

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[158] *Id.* at 629.
[159] *Id.* at 627 (*citing Rahlek, Ltd. v. Wells*, 587 S.W.3d 57, 64 (Tex. App.—Eastland 2019, pet. denied)).
[160] *Id.* at 629.
[161] *Id.*

SM Energy Company v. Union Pacific Railroad Company [162]

This case centered around identical forum-selection clauses in three 640-acre oil and gas leases between SM Energy Company ("SM Energy") and Union Pacific Railroad Company ("Union Pacific"). The court had to decide whether the nature of the initial complaint was a trespass-to-try-title action or a declaratory judgment claim and thus, whether the forum-selection clause ("the F-S Clause") within the oil and gas leases was enforceable.

Beginning on July 17, 2020, Union Pacific sent letters to SM Energy stating it was in violation of the most-favored-nations provision within the leases. Union Pacific then requested SM Energy pay liquidated damages, which it did not do. Around a month later, another letter was sent, warning SM Energy the leases were breached. In response, SM Energy offered to pay but Union Pacific rejected the amount. Union Pacific later accepted a larger check sent by SM Energy, but further requested liquidated damages of an additional $5,243,502.40.

SM Energy initiated this lawsuit, asserting it was the rightful owner of the leasehold estate and Union Pacific unlawfully deprived SM Energy of its right to possession. Union Pacific filed a motion to dismiss, alleging Nebraska was the proper venue per the F-S Clause. The trial court granted the motion. In response, SM Energy requested the trial court provide findings of facts and conclusions of law, which it denied. This appeal then followed.

In its appeal, SM Energy alleged the nature of its claim was a trespass-to-try-title action and thus, enforcement of the F-S Clause was unreasonable because Nebraska courts lack subject matter jurisdiction. Additionally, SM Energy alleged enforcement of the F-S Clause would contradict Texas' public policy for adjudicating title disputes where the real property is located. Union Pacific countered that the nature of SM Energy's claim was instead akin to a declaratory judgment. The appellate court stated that the applicability of the F-S Clause was contingent upon the determination of whether this was a trespass-to-try-title action.[163]

In its analysis to determine whether SM Energy's initial suit was a trespass-to-try-title action, the court looked to "the substance of a claimant's pleadings, rather than the form of the pleading[.]" A trespass-to-try-title action required a plaintiff to plead the following: (1) the real names of the parties and their residence, (2) a legal description of the property, (3) interest of the plaintiff, (4) the plaintiff is either in possession or is entitled to possession, (5) defendant unlawfully entered and disposed plaintiff of the land and does not allow for possession, and (6) prayer for relief.[164] The court determined that while items in SM Energy's pleadings address the elements of a trespass-to-try-title action, the substance alleged a claim for a declaratory judgment on the obligations in the leases. The court held, "in order to reach the title issue as cast by SM Energy's pleadings, a court must first determine the validity of the liquidated damages provision." The issue of dispossession was secondary to the contract determinations. Accordingly, SM Energy's claim did not require it to be litigated in Texas because it was not a trespass-to-try-title action.

[162] *SM Energy Company v. Union Pacific Railroad Company*, No. 11-21-00052-CV, 2022 WL 2252423 (Tex. App.—Eastland June 23, 2022, no pet.).
[163] *Id*. at *3. (citing *Devon Energy Prod. Co., L.P. v. KCS Res.*, LLC, 450 S.W.3d 203, 216 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)).
[164] *Id*. at *4 (citing *Brumley v. McDuff*, 616 S.W.3d 826, 832-3 (Tex. 2021)).

Alternatively, SM Energy alleged it brought a suit to resolve a cloud on its title. However, the court was unpersuaded by the contention that "the possibility a declaration from a Nebraska court that Union Pacific may terminate the leases" presented a cloud. There was no way to show Union Pacific's claim was currently invalid or unenforceable because a ruling on the liquidated damages provision did not yet exist. SM Energy could not preemptively claim a cloud on its title.[165]

Next, SM Energy alleged that if the court enforced the F-S Clause, the result would be piecemeal litigation. In order to prevent multiple suits arising from the same subject-matter, Texas public policy is against piecemeal litigation.[166] However, because Union Pacific, in claiming that SM Energy breached the leases, did not pursue judgment in multiple suits or states, piecemeal litigation was not a risk. Ultimately, the court found SM Energy failed to meet its burden to prove the F-S Clause was invalid. This first issue was overruled.

In the second issue, SM Energy alleged this suit could not be properly litigated in Nebraska under Section 15.020 of the Texas Civil Practice and Remedies Code. The provision at issue provides that "[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county."[167] SM Energy argued that the lease was not a "major transaction" because the consideration did not exceed $1 million. The lease required a minimum royalty payment of $1,000.00 per lease year and shut-in royalties of $1,000 or $20.00 per gross mineral acre for each well, whichever is greater. The court stated the lease provision on its face was not enough to qualify as a "major transaction," but other documents related to the lease could help meet the requirement. The court stated the general rule is "that separate instruments or contracts executed at the same time, for the same purpose, and in the course of the same transaction are to be considered as one instrument, and are to be read and construed together."[168] There was a wire transfer confirmation from Union Pacific sent one week after execution of the lease, acknowledging a $2,400,000 lease bonus it received from SM Energy's predecessor-in-interest. Additionally, the property description listed made it clear the wire transfer was connected to the 640-acre lease. Furthermore, because this was a "paid-up" lease, this bonus payment represented the consideration paid by the original lessee. Thus, the court deemed the 640-acre lease to be a "major transaction."

Ultimately, the appellate court affirmed the trial court's decision and determined that the forum-selection clause was enforceable and doing so did not violate public policy against piecemeal litigation. This holding will help attorneys and landmen better understand the enforceability of forum selection clauses and the importance of initiating the correct type of suit.

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[165] *Id*. at *6.
[166] *Id*. (citing *Galveston, H. & S.A. Ry. Co. v. Dowe*, 70 Tex. 5, 7 S.W. 368, 371 (1888)).
[167] Tex. Civ. Prac. & Rem. § 15.020(b).
[168] *SM Energy Company*, 2022 WL 2252423, at *7 (citing *Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex. 1981)).

7. Twelfth District Court of Appeals—Tyler

Tiner v. Johnson [169]

A dispute over a right of first refusal provision in a Purchase and Sale Agreement led to the initiation of this suit. The issue before the court was whether the "Option" to purchase within the Agreement was an unreasonable restraint on alienation. The court analyzed the issue by weighing the benefits of the restraint against the negative consequences of enforcing it. As a result, the court found the option was void and set forth a helpful analysis regarding the restraint on alienation in these types of agreements.

On March 8, 1989, the Tiners (Sellers) and Johnson (Purchaser) entered into a Purchase and Sale Agreement ("the Agreement") for a fifty-percent interest in real property located in Van Zandt County, Texas, with a purchase price of $50,800.87. The Agreement included a provision in Section 9 titled "OPTION and RIGHT OF FIRST REFUSAL."[170] A subsection of Section 9, regarding the terms for the Option under the Agreement, contained the following disputed language:

> At the Option Closing, the Seller shall pay Purchaser a purchase price equal to the total of (i) the Purchase price… (iii) plus one-half (1/2) of the fair market value of all New Improvements, if any, located on the Property.[171]

The Agreement also provided that the Option to purchase would automatically terminate on March 31, 2089, at 11:59 p.m. and the Option "shall bind and inure to the benefit of Seller and Purchaser and their respective heirs, administrators, executors, successor[,] and assigns.". [172] Lastly, the Agreement provided that the option closing shall occur within 30 days of notice to the Purchaser.

On March 17, 2019, Johnson initiated a lawsuit seeking to void the option provision within the Agreement and to remove the cloud on her title, arguing the option was an unreasonable restraint on alienation and violated the rule against perpetuities. In Johnson's pleadings, she noted that on March 20, 2019, the Tiners, through written notice, sought to exercise the fixed-price option to repurchase their full fifty-percent interest contained in the Agreement. The Tiners responded with a counterclaim for breach of contract and filed a motion for leave. The trial court granted Johnson's motion for summary judgment but did not address the Tiners' motion. The Tiners filed a motion for a new trial, which was later denied and the Tiners appealed. In this appeal, the Tiners contended the trial court erred on three issues: 1) by granting summary judgment in favor of Johnson because the agreement does not put an unreasonable restraint on alienation and did not violate the rules against perpetuities, 2) by failing to reform the option in accordance with the rule against perpetuities, and 3) by dismissing their counterclaim for breach of contract.

The appellate court analyzed the restraint on alienation under a reasonableness standard. The court first looked to the Restatement of Property and found a restraint on alienation is defined as a

[169] *Tiner v. Johnson*, 647 S.W.3d 103 (Tex. App.—Tyler 2022, pet. filed).
[170] *Id*. at 105.
[171] *Id*.
[172] *Id*.

contract or conveyance that will lead to a later conveyance. The later conveyance creates a contractual liability on the conveyor when the liability stems from a breach of agreement not to convey; "or … to terminate or subject to terminat[e] all or part of the property interest conveyed."[173] The court then looked to the Restatement (Third) of Property wherein it defined reasonableness as being determined by "...weighing the utility of the restraint against the injurious consequences of enforcing the restraint."[174] The Restatement further lays out considerations in determining potential injurious consequences, being the nature, extent and duration of the restraint, and states that duration and price determine reasonableness in an option to purchase land.[175] "If the price is fixed, the effect of the option is to discourage the improvement of the land, and the option is unreasonable unless its duration is specified… Even if the duration is specified, an option for a lengthy period may be unreasonable unless the length is justified by the purpose, or unless it is clear that the parties expressly bargained over the specified duration." [176] Here, the court found the fixed cost for the option in this case was $50,800.87 and the duration of the option was for 100 years, expiring in 2089. Furthermore, the agreement also stated that the option in the Agreement "shall bind and inure to the benefit, of the buyers, the sellers, and their heirs, administrators, executors, successors, and assigns." The court found that the fixed-price option for this long length of time, constituted an unreasonable restraint on alienation as the injurious consequences outweighed the utility of the restraint. Furthermore, the court could not establish that the parties had negotiated the duration and time period of the option.

In response to the Tiners' contention regarding reformation and applicability of the rule against perpetuities, the court stated Section 5.043(a) of the Texas Property Code directly related to reforming those interests in violation of the rules against perpetuities but does not require a reformation of the interests in violation of unreasonable restraints on alienation. The court further reasoned the Tiners failed to bring forth authorities to support their argument that Section 5.043 does require reformation of this particular interest. Lastly, the court concluded that the trial court did not err in finding the Option void and granting summary judgment in favor of Johnson, as "a void agreement is no agreement at all; that is, it binds no one and is mere nullity."[177] After an agreement is found void, it loses all legal effects and "… cannot be rendered enforceable by defenses, such as waiver, estoppel, or ratification."[178]

The court affirmed the decision of the trial court and voided the Option in the Agreement. This holding is instructive for both attorneys and those who enter into Agreements containing option provisions by explaining how to weigh the issue of unreasonableness, what a void agreement is, and the ramifications following a void agreement.

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[173] *Id*. at 108
[174] *Id*. at 110.
[175] *Id*.
[176] *Id*.
[177] *Id.* at 112 (citing *XTO Energy Inc. v. Goodwin*, 584 S.W.3d 485, 494 (Tex. App.—Tyler Oct. 18, 2017, pet. denied)).
[178] *Id*. (citing *Watts v. Pilgrim's Pride Corp*., No. 12-04-00082-CV, 2005 WL 2404111, at *3 (Tex. App.—Tyler Sept. 30, 2005, no pet.) (mem. op.)).

8. Thirteenth District Court of Appeals—Corpus Christi-Edinburg

Hahn v. ConocoPhillips Company [179]

This appeal stemmed from a dispute over the calculation of mineral royalty payments.

Kenneth Hahn, George Hahn, Doris Steubing and Charles Hahn each owned a 1/4 mineral interest in a tract of land, while Kenneth and George each owned undivided one-half interests in the surface estate of the property. In 2002, Kenneth and George executed partition deeds wherein Kenneth received exclusive surface rights to Tract A, and George received exclusive surface rights to Tract B. Thereafter, Kenneth executed a deed ("2002 Deed") conveying Tract A to the Gipses, which reserved "an undivided one-half non-participating royalty interest in and to all of the royalty [Kenneth] now owns, (same being an undivided one-half (1/2) of [Kenneth's] one-fourth (1/4) or an undivided one-eighth (1/8) royalty."[180] In 2010, the Gipses entered into an oil-and-gas lease with Conoco ("Gipses' Lease"), from which the Gipses reserved 1/4 of the landowner's royalty in mineral production. Subsequently, Kenneth ratified the Gipses' Lease in 2011. Later that year, Conoco pooled Tract A into the Maurer Unit B and suggested Kenneth and the Gipses stipulate the ownership interests. The stipulation of interest stated Kenneth reserved a 1/8th "of royalty" for a term of fifteen years from June 9, 2002. In 2010, Kenneth entered into a lease with Conoco covering Kenneth's 1/4 mineral rights in Tract B, and Conoco subsequently pooled Tract B into the Maurer Unit B.

Kenneth filed suit "to confirm his title and ownership" in response to Conoco questioning his ownership. The trial court found (1) the partition deeds conveyed all surface and mineral interests of each tract to Kenneth and George, and (2) the Gipses had a 1/2 mineral interest in Tract A and which was burdened by Kenneth's 1/8 floating royalty interest in Tract A. Kenneth first appealed that decision in 2016, and the appellate court overruled the trial court's finding of a conveyance of more than the surface estate within the partition deed, and it rejected the interpretation of the deed to the Gipses as reserving a floating 1/8 "of royalty" non-participating royalty interest for a term of fifteen years. Conoco appealed that decision to the Supreme Court of Texas, but the petition was denied. A dispute then arose between Kenneth and Conoco concerning the calculation of Kenneth's royalty interest in the pooled Maurer Unit B. The trial court heard motions for summary judgment and ordered judgment in favor of Conoco, from which Kenneth appealed.

Kenneth and Conoco agreed to the tract participation rate of 0.12058814 for Tract A in the Maurer Unit B, representing about 12% of production. However, Kenneth argued his royalty interest should be calculated by multiplying his 1/8 interest in Tract A by the tract participation rate to get a royalty decimal of 0.01507352. Conoco argued Kenneth's royalty should be diminished by the Gipses' 1/4 landowner's royalty and that Kenneth's fixed 1/8 interest reservation transformed into a floating royalty interest from the ratification; therefore, Kenneth should receive a 1/8 of 1/4 of royalties for a total royalty decimal of 0.00376838. The appellate court found the trial court violated the four corners rule and improperly considered the stipulation of interest in holding that

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[179] *Hahn* v. *ConocoPhillips Company*, No. 13-21-00310-CV, 2022 WL 17351596 (Tex. App.—Corpus Christi-Edinburg Dec. 1, 2022, pet. filed) (mem. op.).
[180] *Id.* at *2.

the stipulation of interest ratified the Gipses Lease.[181] Contract law dictates a court may consider a document outside the four corners of the contract when the terms are ambiguous. The case law used to support the use of documents beyond the four corners to interpret a deed was distinguished by the appellate court as only applying to a narrow set of circumstances, and the court declined to extend those holdings to situations beyond property boundary disputes.[182] The appellate court concluded that Kenneth owned a fixed 1/8 NPRI in Tract A through June of 2017.

Lastly, the court evaluated whether ratification of the Gipses' Lease affected Kenneth's royalty interest. Generally, the executive rights owner has the power to execute leases that affect the interests of non-executives, with the exception of pooling.[183] Executive rights owners cannot bind an NPRI to a pooling provision without consent from an NPRI owner.[184] Here, as an NPRI owner, Kenneth owned no executive rights enabling him to lease with Conoco. Through ratification of the lease, Kenneth could only agree to have the fixed 1/8 NPRI pooled in the Maurer Unit B. When Kenneth ratified the pooling provision, wells had not been drilled within the pooled Maurer Unit B; thus, he signed without knowledge of where production would occur and acquiesced to the benefits and the burdens from the pooling clause. This was the only part of the lease to which Kenneth could ratify because only the pooling clause affected his interests as a non-executive owner in such a way to require Kenneth's agreement. Conoco argued Kenneth could not ratify the lease for pooling purposes only and contended the NPRI owner must ratify the entire transaction or none; however, the appellate court found this point contrary to case law precedent wherein the Supreme Court of Texas has held an executive may only bind an NPRI owner to pooling provisions with the NPRI owner's consent.[185] The court thus held the effect of the ratification was to bind Kenneth only to the pooling provision of the lease. While the court did not rule out that an NPRI owner might diminish their rights through a ratification with express provisions aimed at doing so, such provisions were not present in the current case. The court concluded Kenneth owned a fixed 1/8 royalty from production on Tract A for a fifteen-year term.

This case is a reminder that non-executive interest holders can only ratify those provisions within a lease which affect the non-executive's interest.

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[181] *Id.* at *8.

[182] *Id.*; *see Concho Resources, Inc.* v. *Ellison*, 627 S.W.3d 226 (Tex. 2021); *see Gulf Oil Corp. v. Marathon Oil Co.*, 152 S.W.2d 711, 714 (Tex. 1941).

[183] *Id.* at *10; *see KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 75 (Tex. 2015).

[184] *Id.*; *see Samson Expl., LLC. v. T.S. Reed Props, Inc.*, 521 S.W.3d 766, 775 (Tex. 2017).

[185] *Id*. at *13 (quoting *Montgomery v. Rittersbacher,* 424 S.W.2d 210, 215 (Tex. 1968)) ("owner has option to ratify or repudiate a lease containing provisions which as to his interest the holder of the executive rights had no authority to insert in the lease").

Myers-Woodward, LLC v. Underground Services Markham, LLC [186]

This case involved a dispute over royalty calculations and subsurface ownership. Specifically, the two issues before the court were whether the basic rule of royalty calculations being calculated at the wellhead should be applied and whether the surface owner owned all of the subsurface structures and had the right to store oil, gas and other gases or liquids in the caverns created by the salt mine. The court focused on the rules governing contract construction and the importance of the language used within a contract.

The lease at issue was between appellant, Myers-Woodward, LLC ("Myers") and appellee, Underground Services Markham, LLC and United Brine Pipeline Company, LLC (collectively, "the Company"). Myers owned all of the surface and a 1/8 non-participating royalty interest in salt and other minerals in and under the 160-acre subject property located near Clemville, Texas in Matagorda County. The Company owned the executive mineral interest in the salt under the property. The dispute centered around the calculation of royalty payments at the wellhead versus a "proceeds-based" or "amount realized" method and the discrepancy over who owned the subsurface caverns. The Company initiated this lawsuit against Myers and sought a declaratory judgment stating it no longer owed royalty obligations to Myers and that the Company owned the cavern space. Myers alleged that it was entitled to a 1/8 royalty based on the proceeds of the sale of the salt at the wells, free of production costs, and that the Company only owned the salt, not the subsurface geologic structures. The trial court held that the correct measure of royalties was a "one-eighth royalty based on the market value of the salt at the point of production" and granted Myers' motion in part, stating the Company is only authorized to use the subsurface caverns for specific purposes stated in the deed.[187] Following this decision, Myers appealed.

The appellate court first addressed the dispute over the royalty calculation, applying the rules of contract construction to find the intent of the parties based on the specific language expressed in the deed.[188] The royalty clause within the deed stated that Myers should receive "a royalty of 1/8 of all the gas or other minerals in, on, or under, or that may be produced from [Myers's Property]."[189]. The general rule for calculating oil and gas royalty interests is done so at the wellhead, being free of production expenses, but subject to postproduction costs.[190] If the parties wished to receive royalties calculated differently than under the general rule, the language in their agreement must speak to it.[191] For example, by including language stating the royalty will be calculated based on the "proceeds" or "amount realized". Here, the language in the royalty clause was silent as to whether the royalties would be paid at the wellhead or calculated using a "proceeds-based" or "amount realized" method. Thus, the court overruled Myers's first contention and upheld the trial court's decision, finding that the general rule applied, and royalties should be calculated at the wellhead and subject to postproduction costs.

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[186] *Myers-Woodward, LLC v. Underground Servs. Markham*, LLC, No. 13–20–00172–CV, 2022 WL 2163857 (Tex. App.—Corpus Christi June 16, 2022, reh'g denied Sept. 6, 2022) (mem. op.).
[187] *Id*. at 2-3*.
[188] *Id*. at *4.
[189] *Id*. at *5.
[190] *Id*. at *4 (citing *Burlington Res. Oil & Gas Co. LP* v. *Tex. Crude Energy, LLC*, 573 S.W.3d 198, 203 (Tex. 2019)).
[191] *Id*. at *7.

Additionally, the court addressed the issue of ownership over the subsurface caverns. The appellate court stated the surface "overlying a leased mineral estate is the surface owner's property, and those ownership rights include the geological structures beneath the surface."[192] Further, only the surface owner, as compared to the mineral owner, owns the "non-mineral 'molecules' of the land, i.e., the mass that undergirds the surface estate."[193] Therefore, the Company only owned the minerals and Myers owned the caverns as they sit within the geologic structure.

The court affirmed the trial court's decision that the appropriate calculation of royalty payments was at the wellhead rather than on a "proceeds-based" or "amount realized" calculation down the line. Additionally, the court found Myers was the subsurface owner, which included the caverns, and reversed the previous judgment. This holding will assist attorneys and landmen by providing an example of how courts may treat a subsurface land dispute and advises when the general rule of royalty calculation is applicable, emphasizing the importance of the specific language used in contracts and conveyances.

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[192] *Id.* at *11 (citing *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974)).
[193] *Id*. (citing *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv*., 630 F.3d 431, 442 (5th Cir. 2011)).

9. *Fourteenth District Court of Appeals—Houston*

Thistle Creek Ranch, LLC v. Ironroc Energy Partners, LLC [194]

This case involved a dispute as to whether a lease terminated due to lack of production in paying quantities. The Fourteenth District Court of Appeals addressed this issue by applying the legal principles governing contract construction, looking at the effect of a habendum clause within a lease and the definition of "operations," and outlining situations when the reasonably prudent operator test is unnecessary.

The mineral lease at issue was between Thistle Creek Ranch LLC ("Thistle"), as lessor, and Ironroc Energy Partners, LLC ("Ironroc"), as lessee. Thistle contended the trial court erred by holding that the lease was still valid rather than terminated due to Ironroc's lack of production in paying quantities. The appellate court affirmed the ruling of the trial court in favor of Ironroc.

The appellate court came to this decision by determining the effects of the habendum clause on the lease. Habendum clauses define the duration of mineral leases. In this case, the habendum clause provided for a primary term of three (3) years and a secondary term that would continue as long as "operations, as hereinafter defined, are conducted upon said land with no cessation for more than ninety (90) consecutive days."[195] The term "operations" was defined within the lease as use of a well "in search for or in any endeavor to obtain production of oil, gas, [etc.]… whether or not in paying quantities."[196] It was agreed that Ironroc produced gas under the lease with no cessation greater than ninety consecutive days. However, Thistle argued that "production" needed to be in paying quantities to maintain the lease. Consequently, the appellate court found the habendum clause did not include the word "produced," nor was production required to be in paying quantities according to the definition of "operations" within said lease. Therefore, the "written expression of the parties' intent," according to the four corners of the contract, indicated that production in paying quantities was not necessary to maintain the lease.[197] In response, Thistle argued that even if production was not required to be in paying quantities, Ironroc had to "conclusively establish that a reasonably prudent operator would, for the purpose of making a profit... continue to operate the well" in the same manner.[198] The appellate court rejected that argument on the grounds that the application of such a test was unnecessary due to the fact that a requirement of production in paying quantities was non-existent according to the habendum clause within the disputed lease.

In conclusion, the Fourteenth District Court of Appeals affirmed the ruling of the trial court that the lease had not terminated due to Ironroc's lack of production in paying quantities; Ironroc successfully complied with the habendum clause and the definition of "operations" within the lease; and the reasonably prudent operator test was inapplicable. This holding highlights the courts' process in analyzing whether a lease has terminated according to the terms of a habendum clause and emphasizes the importance of the language used to define terms in a lease.

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[194] *Thistle Creek Ranch, LLC v. Ironroc Energy Partners, LLC.*, No. 14-20-00347-CV, 2022 WL 1310957 (Tex. App.—Houston [14th Dist.] May 3, 2022, no pet.) (mem. op.).
[195] *Id*. at *2.
[196] *Id*.
[197] *Id*. at *1 (citing *Endeavor Energy Res., L.P. v. Discovery Operating Inc.*, 554 S.W.3d 586, 595 (Tex. 2018)).
[198] *Id*. at *3 (citing *BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476, 483 (Tex. 2017)).

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