2024 Annual Case Law Update

Prepared by

Mazurek, Belden & Burke, P.C.

An Energy and Transactional Law Firm

January 2025

Mazurek, Belden & Burke, P.C. is a San Antonio, Texas-based law firm that handles oil and gas matters, particularly in the fields of title examination, merger and acquisition due diligence, and regulatory advising. MBB represents clients in Texas, Ohio, Oklahoma, New Mexico, Utah, Colorado, and Massachusetts. To find out more about us, please visit: www.mbb-legal.com.

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,

Mazurek, Belden & Burke, P.C.

Acknowledgment

A sincere thank you to all those who helped publish the 2024 Case Law Update.

Joseph D. Belden, Shareholder
Tiffany M. Shute, Managing Associate Attorney
Benjamin Shaver, Managing Associate Attorney
Nicole Meche, Senior Associate Attorney
Georgia-Beth Molak, Senior Associate Attorney
Nicolas Botto, Associate Attorney
Alexia Contreras De Castillo, Associate Attorney
Candace Castillo, Associate Attorney
Jamie Cole, Associate Attorney
Ru Ding, Associate Attorney
Brendan Pak, Associate Attorney
Jacob Hernandez, Associate Attorney
Andrew Thetford, Associate Attorney
Kristyn Anderson, Law Clerk
Kambri Garcia, Law Clerk
Linda T. Hesles Quintero, Law Clerk
Kyra G. Chall, Law Clerk
Joshua J. Ensley, Law Clerk

Disclaimer

This Case Law Update is made available by Mazurek, Belden & Burke, P.C., for educational purposes and to give general information and a general understanding of the law only, not to provide specific legal advice. Acceptance of this Case Law Update and the use of the information presented herein does not create an attorney-client relationship between you and Mazurek, Belden & Burke, P.C. This Case Law Update should not be used as a substitute for competent legal advice from a licensed professional attorney in your state. Due to the rapidly changing nature of the law and reliance on outside sources, Mazurek, Belden & Burke, P.C. makes no warranty or guarantee concerning the accuracy or reliability of the content presented herein. Mazurek, Belden & Burke, P.C., and all contributing authors, expressly disclaim all liability to any person with respect to the content of this Case Law Update and with respect to any act or failure to act made in reliance on any material contained herein.

TABLE OF CONTENTS

A. NEW MEXICO CASE LAW UPDATE

COURT OF APPEALS CASES

Cordova v. Cordova [1]

New Mexico Court of Appeals

In this case, the court determined whether a will validly revoked a living trust. The court held that the will properly revoked the trust at issue as allowed by New Mexico Statute Section 46A-6-702(C)(2)(a). Maria Elena Cordova (the "Decedent") revoked a living trust (the "Trust") with a subsequent will (the "Will"). The pertinent language of the Decedent's Trust allowed her to:

> [A]mend or revoke [the Trust], in whole or in part, by written notice to both Decedent and Plaintiff Tim and that [u]pon any revocation, Decedent or Plaintiff Tim shall deliver to [Decedent]… any property as to which the [T]rust has been revoked, together with supporting instruments as may be necessary to release any interest [Decedent or Plaintiff Tim] may have in the property.[2]

The court applied New Mexico Section 46A-6-602(C)(2), which allows a settlor to revoke their trust with their will if the revocation method of the trust is (1) not expressly made exclusive and (2) the will expressly refers to the trust.[3] The plain language of the statute states that a trust's term must be made expressly exclusive and does not provide for any implied exclusion.[4] Here, the Decedent's Trust allowed her to revoke it by any method of her choosing; the Trust did not limit or otherwise expressly provide for an exclusive method for revocation. Further, the court indicated that in a similar case, a trust term that included language substantially similar to the language at issue was deemed nonexclusive.[5] Therefore, the Decedent did in fact revoke the Trust by her Will and properly revoked the Trust as allowed by statute.[6]

[1] *Cordova v. Cordova*, No. A-1-CA-39120, mem. op. (N.M. Ct. App. Oct. 10, 2024).
[2] *Id*. at ¶ 7.
[3] *Id*. at ¶ 6.
[4] *Id*. at ¶ 7.
[5] *Id*. at ¶ 8; *see also In re Schlict*, 2014-NMCA-074, ¶ 3, 329 P.3d 733.
[6] *Id*. at ¶ 9.

Guera Properties, LLC v. 1776 Properties, LLC [7]
New Mexico Court of Appeals

In this case, the court determined the lawful holder of an assigned right to redemption on a foreclosed property. In 2016, Dianah Rowland ("Rowland") was appointed the personal representative for the Estate of Lee Rowland, the owner of real property located at 6605 Cueva Escondida NW, Albuquerque, New Mexico ("Property"). Later, Ditech Financial, LLC ("Ditech") attempted to foreclose on a mortgage covering the Property. Then, Rowland assigned the estate's redemption rights ("1776 Assignment") to 1776 Properties, LLC ("1776"). The pertinent language of the assignment read:

> For valuable consideration of $2,500.00 payable 10 days after the redemption of 6605 Cueva Escondida N.W. Abq, NM 87120 Dianah Rowland, The Personal Representative of the Estate of Lee J. Rowland transfer[red] and assign[ed] his/her rights of redemption on the above-described property pursuant to the terms of the mortgage to 1776 Properties, LLC.[8]

In 2018, Ditech again filed to foreclose on the Property, and the district court subsequently entered a foreclosure decree in 2021. Before the Property was auctioned, Rowland assigned the estate's right of redemption, granted all of their rights, title, and interests in the Property to Guera Properties, LLC ("Guera"), and attempted to rescind the 1776 Assignment. Thereafter, the Property was sold at foreclosure subject to a one-month right of redemption. Subsequently, 1776 and Guera each filed petitions and claimed entitlement to the Property. Guera argued the 1776 Assignment was invalid for lack of consideration.

First, the court looked at the New Mexico redemption statute, which states that, "[a]fter sale of real estate…the real estate may be redeemed by the former defendant owner of the real estate…whose rights were judicially determined in the foreclosure proceeding."[9] Courts have found this right of redemption to be assignable, meaning the assignee of a former defendant owner can redeem a property. The court then explained, because assignments are treated like a contract, they require adequate consideration to be enforceable. Consideration is a party's obligation to perform their promise to uphold their end of the contract. If one party has no obligation to perform, but instead has an option to perform, they do not have adequate consideration, and therefore, there is no valid contract.

The court stated the phrase "payable 10 days after the redemption of the property" was unambiguous and interpreted it to mean Rowland would be paid for the redemption after the Property was redeemed. The court concluded that, because the language of the 1776 Assignment did not require 1776 to redeem the property, the 1776 Assignment lacked consideration.[10] Therefore, the 1776 Assignment was invalid, and 1776 had no right to redeem the Property.

---

[7] *Guera Properties, LLC v. 1776 Properties, LLC*, No. A-1-CA-40919, mem. op. (N.M. Ct. App. June 4, 2024).
[8] *Id.* at ¶ 2.
[9] NMSA 1978, §39-5-18(A) (2007).
[10] *Guera Properties, LLC*, No. A-1-CA-40919, mem. op. ¶ 16.

Koch v. David Family Oil and Gas Interests Partnership [11]
New Mexico Court of Appeals

In this case, the court determined whether a parties' status as a bona fide purchaser ("BFP") is critical in their legal claim to a property interest. After various transactions (the "Lease"), Robert Koch ("Robert") and his wife, Anne, were the uncontested owners of a 3.375% overriding royalty interest ("ORRI") in property located in southern New Mexico. Following the couple's divorce, Robert conveyed to Anne a "5/8ths of 3%" interest in the Lease.[12] However, this assignment appeared to be unrecorded. Later, Robert died in 1975, while living in Colorado, where his Will was probated. Even though Robert's estate included, and sold real estate located in New Mexico, there was no record of an ancillary probate proceeding established in New Mexico. The administrator of Robert's estate sold his ORRI in the Lease to Robert W. David ("David"), but the estate failed to recognize the split of the ORRI interest to Anne pursuant to their divorce. In 2005, Anne died, owning her separate property interest in the ORRI, which she received from the divorce, and left her ORRI interest in a family trust. Her heirs (the "Kochs") and David both claimed ownership in the ORRI of the Lease.

The lower court granted summary judgment in favor of the Kochs, holding David a BFP, to which this court disagreed.[13] This court noted that granting summary judgment is only appropriate when there are no genuine issues of material fact in the case, and granting summary judgment is primarily disfavored by the courts in New Mexico. As such, the court held that David was not on "actual" notice that the administrator of his estate was only appointed in Colorado's jurisdiction.[14] This meant David did not know he was dealing with Colorado's probate proceeding or that the ancillary proceeding was needed and not established in New Mexico. The court reasoned that the assignment language in the document that purported to convey the interest to David did not specify the jurisdiction or the court handling the probate case. The document description - "Estate of Robert Kock, deceased, by Samuel Kumagai, Personal Representative" described the assignor and nothing more. In addition, neither party asserted any indication that David understood his administrator's status. Therefore, there was a resulting genuine issue of material fact, as David's status as a BFP remained questioned and thus summary judgment was improper. The case was remanded to determine the status of David as a BFP.

[11] *Koch v. David Family Oil and Gas Interests P'ship*, No. A-1-CA-40432 (N.M. Ct. App. July 22, 2024).
[12] *Id*. at ¶ 6.
[13] *Id*. at ¶ 14.
[14] *Id*. at ¶ 16.

Lujan v. Acequia Mesa del Medio [15]
New Mexico Court of Appeals

In this case, the court identified the proper authority that governed landowners' rights related to acequias, including water distribution rights. Acequias are community irrigation systems, or community ditches, that are recognized under New Mexico law as political subdivisions of the state. In New Mexico, there are various rights associated with acequias - including an irrigation water right and a ditch right. The irrigation water right is the right to use water for irrigation, which runs with the land. The ditch right is the right to take water from a ditch for a certain time period, which is limited through an irrigation schedule created by a governing body that controls the distribution of water to landowners. Here, the irrigation rights were established in 1962 by *Chacon v. Chacon* (the "*Chacon* Decree"), while ditch rights were governed by Acequia Mesa del Medio ("AMM"). AMM regulates water use using a system of "customs, rules and regulations" known as the "*derecho* system" ("Derecho System") to control the water used from the ditch ("Acequia").[16] The issue in this case centered on AMM's distribution of water to the holders of ditch rights, more particularly, how AMM assigned a time period for taking water from the Acequia to members of AMM.

Here, the Lujans and other landowners argued that the *Chacon* Decree replaced the Derecho System under the doctrine of prior appropriation. They claimed that AMM's reliance on the Derecho System improperly dictated the timing and quantity of water each landowner could receive from the Acequia. They asserted that AMM should have adhered to the *Chacon* Decree when determining how water was distributed to landowners. However, the Lujans faced a significant obstacle: the *Chacon* Decree explicitly recognized existing water authorities and stated that it should not interfere with their governance:

> …nothing contained in the [*Chacon*] Decree shall be construed to impair or interfere with the authority of the commissioners and mayordomo to administer and apportion, within their various community ditch associations…[17]

Here, the Lujan's failed to present any contract, agreement, or other authority establishing that the *Chacon* Decree overrode the Derecho System. In fact, the *Chacon* Decree stated the opposite.

Further, an additional obstacle for the Lujans was the undisputed fact that irrigation rights and ditch rights were distinct and governed by separate legal frameworks. One cannot override or replace the other; instead, they operate in tandem. The *Chacon* Decree granted the Lujans the right to use the water from the Acequia, while the Derecho System governed when, where, and how that water would be distributed. Accordingly, the court determined that AMM had the authority to adopt "customs, rules, and regulations," known as the Derecho System, to determine the distribution of water to those who were entitled users of the Acequia.[18]

[15] *Lujan v. Acequia Mesa del Medio*, 2024-NMCA-043, 550 P.3d 861.
[16] *Id*. at ¶ 5-9.
[17] *Id*. at ¶ 27.
[18] *Id*. at ¶ 9.

Martinez v. Martinez [19]
New Mexico Court of Appeals

In this case, the court examined the character, use, and size of a disputed prescriptive easement and found that there was substantial evidence to support Plaintiff's argument that the prescriptive easement in question was twenty-six feet in width. Danette Martinez ("Danette") owned a parcel of land ("Parcel B") that lies immediately east of Defendant Michael Martinez's ("Michael") tract of land ("Tract 3"). In 1999, a survey of the lands indicated that a driveway measuring 39.73 feet wide existed between Parcel B and Tract 3 ("1999 Survey"). It was undisputed that Danette had a prescriptive right to cross Tract 3 over a portion of the existing driveway to enter and exit Parcel B by vehicle. The parties only disputed the size and location of the prescriptive easement. Danette argued that the prescriptive easement measured twenty-six feet, being the width between two gates placed where the driveway crosses into Parcel B, because the easement had been consistently used since 1979 and was as wide as the two gates during that time. Michael argued that the prescriptive easement measured only eight to ten feet, based on the findings in the most recent survey conducted in 2005.

To determine the establishment of a prescriptive easement, a court considers whether it "is created by an adverse use of land, that is open or notorious, and continued without effective interruption for the prescriptive period (of ten years)."[20] Generally, the prescriptive right to an easement is limited to the portion of servient [land] actually used and the character and extent of prescriptive easements are determined by the use for which the easement becomes acquired.[21]

The court relied on testimony by Danette and her husband indicating the easement was at least the width of two gates, the 1999 survey, and Michael's failure to present contradictory evidence. Danette testified that during her consistent use of the easement onto Parcel B between 1979 and 1989, the easement measured the same width as two gates. Danette further contended that a twelve-foot-wide trailer was moved on the property through the gates in or around 1979, indicating the easement must have been wider than ten feet at that time.[22] Danette's husband also testified regarding his reliance on the easement to access Parcel B through the gates since 1985, restating that the easement measured the width of two gates. Additionally, the court considered the 1999 Survey which indicated the driveway between Parcel B and Tract 3 was 39.73 feet wide. Although Michael provided contrary testimony that another surveyor found the easement only measured eight to ten feet in width in 2005, the court found that "[Danette] had already established a wider easement over a ten-year prescriptive period."[23] Furthermore, Michael failed to present evidence, prior to the 2005 survey, that the easement in question measured less than twenty-six feet wide. Therefore, substantial evidence confirmed that the prescriptive easement as used measured twenty-six feet, being the width between the two gates.

[19] *Martinez v. Martinez*, No. A-1-CA-40777, mem. op. (N.M. Ct. App. May 16, 2024).
[20] *Id.* at ¶ 8.
[21] *Id.* at ¶ 9.
[22] *Id.* at ¶ 10.
[23] *Id.*

Western Albuquerque Land Holdings, LLC v. Westland Partners, LLC [24]
New Mexico Court of Appeals

In this case, the court determined whether withholding consent under a minimum price provision breached the implied covenant of good faith and fair dealing of the operating agreement. Westland Partners, LLC ("Westland") and Western Albuquerque Land Holdings, LLC ("WALH") together formed a joint venture in the form of an entity (the "Company") whose main purpose was developing, and marketing and selling real property. The minimum price provision of the Company's Operating Agreement (the "Agreement") stated:

> [T]he price was $2.00 per square foot, to be increased by ten percent (10%) on an annual basis beginning one year after the date of [the] Agreement and on the same day of each year thereafter.[25]

The provision further explained that land to be sold could be sold at a lower price with the consent of WALH.[26] In 2012, the parties agreed that the minimum price on certain real property had increased above market value. However, WALH refused to consent to sell the land for a price below the minimum price. Westland asserted that there was a breach of the implied covenant of good faith and fair dealing based on WALH's refusal to consent to the sale of the land at any price that had not conformed to the minimum price stated in the Agreement. Westland asked the court to imply a reasonableness standard when interpreting the minimum price provision, arguing that the Agreement was silent regarding the manner of performance.

The court stated that under New Mexico law, the implied covenant of good faith and fair dealing required that neither party, in contract with the other, do anything that would injure the rights of the other to have received the benefit of their Agreement. The court continued, if a contract was silent regarding the manner of performance, the court would have looked at the contract's primary purpose and then inferred a standard of reasonableness.[27] However, the court explained that a reasonableness standard should not be applied to the Agreement because it would have contradicted the parties' expressed intention as set forth in the Agreement. The Agreement's primary purpose to sell the land at a certain price would not have been achieved if it had imposed a reasonableness standard, because the Agreement expressly authorized WAHL to refuse the consent to sales below the minimum price.[28] Therefore, the court determined that WALH's withholding consent did not breach the covenant of good faith and fair dealing.

[24] *Western Albuquerque Land Holdings, LLC v. Westland Partners, LLC*, 2024-NMCA-077, 557 P.3d 1032.
[25] *Id*. at ¶ 11.
[26] *Id*. at ¶ 2.
[27] *Id*. at ¶ 10.
[28] *Id*. at ¶ 12.

B. OHIO CASE LAW UPDATE

OHIO SUPREME COURT CASE

Tera, L.L.C. v. Rice Drilling D, L.L.C. [29]

The Supreme Court of Ohio

In this case, the court determined whether an oil and gas lease between Tera, L.L.C. ("Tera") and Rice Drilling D, L.L.C. ("Rice") limited to the Utica Shale included rights to the Point Pleasant. The Supreme Court of Ohio held there were genuine issues of material fact regarding the meaning of certain terms within the lease agreement and remanded the case back to the trial court for further consideration.

The lease in question covered specific depths defined therein as "the formation commonly known as…the Utica Shale[.]"[30] Rice argued the common meaning of the phrase "Utica Shale" includes the Point Pleasant formation. Whereas, Tera argued the technical, geological meaning of the phrase "Utica Shale" excludes the Point Pleasant. The trial court awarded summary judgment on Tera's claims, and the 7th District Court of Appeals affirmed the decision, concluding the plain language in the lease was clear in that it did not grant Rice the right to produce from the Point Pleasant.

The Supreme Court explained, when presented with an issue of contract interpretation, the court's duty is to examine the contract as a whole and to presume the parties' intent is reflected by the language contained within the four corners of the contract. The Court found that the trial court relied on evidence outside the contract's plain language when it determined the Point Pleasant was beneath the Utica Shale and thus not part of the "formation commonly known as the Utica Shale." The Court noted that nothing in the lease agreement reflected the parties' intent as to whether the Point Pleasant formation was included in the Utica Shale formation. In fact, the lease agreement made no mention of the Point Pleasant formation at all. Therefore, the Court found the lease to be ambiguous because the language of the lease offered no guidance as to whether the Point Pleasant formation was part of the Utica Shale formation.[31]

The Court stated, "the purpose of summary judgment is not to try issues of fact, but rather to determine whether triable issues of fact exist."[32] When interpreting the meaning of an ambiguity within a contract, the factual determination is for the jury to make, not the judge. It would be improper for the court to step in and determine the definite legal meaning of an ambiguous term based on extrinsic evidence. Therefore, the Court concluded that neither party was entitled to summary judgment because there remained genuine issues of material fact to be litigated.[33]

[29] *Tera, L.L.C. v. Rice Drilling D, L.L.C.*, 176 Ohio St. 3d 505, 2024-Ohio-1945, 248 N.E.3d 196.
[30] *Id.* at ¶ 2.
[31] *Id*. at ¶ 14.
[32] *Id*. at ¶ 19.
[33] *Id*. at ¶ 20.

OHIO DISTRICT COURTS OF APPEALS CASES

1. First District Court of Appeals

Wynn v. Crumm [34]

1st District Court of Appeals Ohio, Hamilton County

In this case, the court was asked to determine whether a trust agreement provided the Trustee with a power of sale. Beatrice Crumm ("Trustee") was the Trustee of the Stephen D. Wynn Living Trust ("Trust"). Upon the termination of the Trust, the Trustee sold real estate owned by the Trust to a third-party. Thomas Wynn ("Beneficiary") challenged the validity of the deed, arguing "that title to the real property must be conveyed to the beneficiaries in kind."[35] The Trustee argued that the Trust Agreement provided her with the power to sell the property and distribute the proceeds to the beneficiaries. Article IV(B)(1), read as follows:

> Real Estate Division into Shares. Trustee shall divide all real estate then remaining in the Trust Estate into fourteen shares. Trustee shall distribute one such share, outright and free of trust, to each of Frank L. Wynn's children. [36]

Article V(C) and Article V(P) provide:

> Disposition of Assets. Trustee may sell, lease, exchange or grant options to purchase, publicly or privately, any asset, real or personal, and any right appurtenant thereto, for cash or upon credit, with or without security.
>
> In-Kind Division or Distribution. Upon any division, distribution, allocation or appointment of any assets, Trustee may make such division, distribution, allocation, or apportionment in money or in kind, or partly in money and partly in kind. [37]

The court began by holding that the Trust Agreement gave the Trustee options. She could either sell real property and distribute the proceeds of the sale to the beneficiaries or convey the real property directly to the beneficiaries. Furthermore, the Trust Agreement contained no language requiring the distribution of the property to the beneficiaries or forbidding the Trustee from selling the property. The Beneficiary argued that the Ohio Trust Code's requirement that the "trustee…administer the trust solely in the interest of the beneficiaries" supersedes the express powers set forth in the Trust Agreement.[38] The Court disagreed and stated "Trust Code only governs the trust relationship insofar as the trust agreement is silent on the relevant issue."[39] The Trust Agreement was not silent and there is no conflict, therefore, the Trust Agreement governs and the Trustee had the power of sale.

---

[34] *Wynn v. Crumm*, 1st Dist. Hamilton No. C-230341, 2024-Ohio-1447.
[35] *Id.* at ¶ 1.
[36] *Id.* at ¶ 8.
[37] *Id.* at ¶ 10.
[38] *Id.* at ¶ 13.
[39] *Id.* at ¶ 14 (citing R.C. 5801.04(A) and R.C. 5801.04(B)).

2. Second District Court of Appeals

Curtis v. Edsell [40]

2nd District Court of Appeals of Ohio, Montgomery County

In this case, the court analyzed the interpretation of a trust agreement to determine whether a beneficiary of the trust that was granted a life estate had the right to sell residential property in fee simple. Mary Joan Layne ("Layne") created and transferred her residential property ("Langdon Drive Property") into a revocable trust known as The Mary Joan Family Trust ("Trust"). Thereafter, Layne died on January 27, 2021, which made the trust irrevocable. Her two children, Derf D. Edsell ("Edsell") and Bambi L. Grissom ("Grissom"), were named as beneficiaries in the Trust. Section 2.9 of the Trust reads:

> Successor Trustee shall immediately transfer, convey, and deliver a life estate in and to… [the Langdon Drive Property] to Grantor's son, [Edsell] to have and to hold for and during the term of his life. Successor Trustee shall authorize Grantor's son, [Edsell] in his absolute discretion to sell said real estate at such time, at such price, to such person and upon such terms, including credit, as he shall deem advisable.[41]

Edsell asserted that Section 2.9 granted him absolute discretion to sell the Langdon Drive Property, including in fee simple. The court agreed that Section 2.9 of the Trust granted Edsell a life estate with the power of sale in fee simple since nothing in the plain language limited Edsell's power to only sell his life estate. Similarly, in *Bishop v. Remple*, the Ohio Supreme Court interpreted a power of sale provision in a will, by a holder of a life estate, as authorizing the sale of the entire fee, not just the life estate interest.[42] Thus, the court determined that Edsell had the authority to sell the Langdon Drive Property in fee simple.

Six weeks after Layne's death, Grissom died on March 11, 2021. Since Grissom died before the termination of Edsell's life estate, or the distribution date, the court looked to the Ohio anti-lapse statute or R.C. 5808.19(B)(1)(b), which states:

> If a beneficiary of a future interest under the terms of a trust [did] not survive the distribution date by at least [120] hours and if the beneficiary [was] a descendant of a grandparent of the transferor… and the deceased beneficiary [left] surviving descendants, a substitute gift [was] created in the beneficiary's surviving descendants.[43]

Here, because Grissom's contingent remainder interest will fail and the Trust did not account for such circumstance, the "[g]randchildren are substituted for Grissom as beneficiaries of her contingent remainder interest in the Langdon Drive Property." Therefore, the court concluded that Edsell had authority to sell the Langdon Drive Property in fee simple and that Grissom's grandchildren are contingent remainder beneficiaries in the Trust.

---

[40] *Curtis v. Edsell*, 2024-Ohio-3420, _ N.E.2d _ (2d Dist.).
[41] *Id*. at ¶ 25.
[42] *Id*. at ¶ 29 (citing *Bishop v. Remple*, 11 Ohio St. 277 (1860)).
[43] *Id*. at ¶ 53.

3. Third District Court of Appeals

Diller v. Pennucci [44]

3rd District Court of Appeals of Ohio, Mercer County

In this case, the court determined the applicability of the newly amended Ohio anti-lapse statute to a case in pending litigation. In 2019, Theodore Penno ("Penno") died testate. His will devised his farm to his brother, John Penno ("John") and the residue of his property equally to John and his sister, Mary Ann Diller ("Mary"). John predeceased Penno in 2016 and was survived by two children, Linda and David. Upon Penno's death, Mary claimed an interest in the farm through the residuary clause of the will, asserting that John's devise lapsed upon his death.

Originally, the trial court determined that the devise did not lapse under R.C. 2107.52. Mary appealed, arguing that the anti-lapse statute, R.C. 2107.52(A)(3)(a), did not apply because the statute in effect at the time of Penno's death only protected "an 'alternative devise,' a devise in the form of a class gift, and an exercise of 'power of appointment'" rather than a primary devise.[45] On appeal, this court found that the Ohio legislature explicitly defined "devise" in the statute at the time of Penno's death, which did not include a "primary devise," and, accordingly, the devise of the farm lapsed.[46] Linda and David appealed that judgment to the Supreme Court of Ohio, challenging the lower court's interpretation of the statute. While the case was pending, the Ohio legislature amended the definition of "devise" in R.C. 2107.52(A)(3)(a) to include a "primary devise."[47] The amended definition was explicitly retroactive and took effect on April 3, 2023. As such, the Supreme Court of Ohio directed the case be returned to the trial court. The second trial court held the devise of the farm to John was still not subject to anti-lapse.

On second appeal, Linda and David argued the most recent decision made by the trial court failed to apply the revisions to R.C. 2107.52, which would have prevented the devise from lapsing. Mary, however, argued that the retroactive statute could not be applied because she had a vested interest in the property, and the first appellate court decision controlled the outcome in this case. This court held that "the law of the case at the time [the] original judgment in *Diller* was released" controls the settled application of the statute.[48] The court iterated that the law-of-the-case doctrine is necessary to ensure consistency of results in a case and to avoid endless litigation.[49] The original version of R.C. 2107.52 applicable upon initial adjudication caused the devise of the farm to lapse. Therefore, the court concluded that the revised anti-lapse statute did not apply in this specific case, and the trial court's judgment was affirmed.

[44] *Diller v. Pennucci*, 2024-Ohio-1244, 240 N.E.3d 399 (3d Dist.).
[45] *Id.* at ¶ 5.
[46] *Id.* at ¶ 6.
[47] *Id.* at ¶ 8.
[48] *Id.* at ¶ 16; *see Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410, ¶5 ("…the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court.").
[49] *Id.* at ¶ 13.

4. Fourth District Court of Appeals

Bethel Oil and Gas, LLC v. Redbird Development, LLC [50]
4th District Court of Appeals of Ohio, Washington County

In this case, the court held that Bethel sufficiently alleged facts demonstrating injury to their real and personal property that were traceable to defendants' waste injection wells. Bethel Oil and Gas, LLC, Robert E. Lane, and Sandra K. Lane (collectively "Bethel") sought damages for property injury on the basis of negligence, negligence per se, trespass, nuisance, and conversion. The trial court granted the defendants' motion to dismiss the complaint for failure to state a claim on which relief could be granted and denied plaintiffs' motion to amend the complaint. On appeal, Bethel argued that the trail court committed an error by dismissing their claims, which credibly alleged that the defendants' large-volume, high-pressure waste-fluid injection operations collectively caused flooding damage to the development of Bethel's mineral estate. Conversely, the defendants argued that Bethel's complaint was "nothing but utter speculation and fail[ed] to allege the 'operative facts' that give rise to the claims for relief."[51]

Bethel has an exclusive ownership interest in the right to develop and produce oil and gas beneath the property they own, extending to the deepest possible depths of Ohio's oil and gas reservoirs. Accordingly, Bethel has drilled, owned, and operated subsurface oil and gas wells in the Berea Sandstone Formation. The 16 defendants (collectively "Redbird") engaged in fracking operations that produced residual waste fluid containing various salts and toxic substances that intermixed underground. Each defendant owned, operated, and/or managed one or more injection wells in Washington County and/or Athens County to handle waste fluids generated as a consequence of regional, hydraulic fracking operations. Bethel alleged that Redbird injected waste fluid from their fracking operations into their respective injection wells, and that this waste fluid contaminated their property and the Bethel Wells. According to Bethel's complaint, Redbird's fracking injection wells "infiltrated, flooded, contaminated, polluted, and/or damaged certain of the Bethel Wells and damaged [Bethel] and [Bethel's] property."[52] Essentially, Bethel claimed that the collective scope of Redbird's action resulted in a large-scale contamination and pollution of Ohio's oil and gas reservoirs, which prevented them from further development of oil and gas on their property.

Bethel argued its complaint provided Redbird adequate notice of the claims, and they were not required to support the claims with evidence or scientific proof when the petition was filed. Ultimately, the court determined that Bethel's complaint sufficiently identified the injury to their mineral estate and traced Redbird's purported unlawful conduct. The court emphasized that at the pleading stage, Bethel did not need to prove that Redbird's conduct caused their injury or scientifically detail how their conduct caused Bethel's injury. Instead, the complaint need only give notice of the injuries alleged. Consequently, the court remanded the case back to the trial court to litigate Bethel's claims.

[50] *Bethel Oil and Gas, LLC v. Redbird Development, LLC*, 2024-Ohio-5285, _ N.E.3d _ (4th Dist.).
[51] *Id.* at ¶ 33.
[52] *Id.* at ¶ 7.

5. Seventh District Court of Appeals

Bounty Minerals, LLC v. LL&B Headwater II, LP [53]
7th District Court of Appeals of Ohio, Jefferson County

In this case, the court determined whether a "Term Royalty Conveyance" burdened subsequent oil and gas leases. In November 2007, the Waliguras executed an oil and gas lease with Mason Dixon Energy, Inc. (the "Mason Dixon Lease") for a primary term of five years, with an option to extend for an additional five years. In 2011, the Waliguras conveyed a 1/8 term royalty interest (the "Term Royalty") which is now owned by LL&B Headwater II, LP ("LL&B"). The Term Royalty was to last for so long as an existing oil and gas lease (the "Mason Dixon Lease") remained in effect,[54] subject to the following anti-washout clause:

> In the event that the [Mason Dixon Lease] is terminated, surrendered, cancelled, released or is otherwise determined to be no longer valid at any time before the primary term or any extensions thereof or the secondary term of the [Mason Dixon Lease] would otherwise expire, then the grant contained in this Term Royalty Conveyance shall apply to any lease or leases granted by the grantor * * * within three years after the [Mason Dixon Lease] ceases to be valid.[55]

On September 13, 2017, the Mason Dixon Lease expired by its own terms at the end of its extended primary term. The Waliguras then executed a new lease (the "Salt Fork Lease") on September 20, 2017. LL&B claimed the Term Royalty applied to the new lease due to the anti-washout clause, the Waliguras disagreed, and this suit followed.

The Waliguras argued the anti-washout clause only preserves the Term Royalty in the event the Mason Dixon Lease terminated "at any time before the primary term or any extension thereof or the secondary term…would otherwise expire," and because the Mason Dixon Lease terminated due to a lack of exploration or production at the end of its extended primary term, the anti-washout clause did not take effect. In support of its interpretation of the anti-washout clause, LL&B relied on the last antecedent rule, arguing the qualifier "before" would only modifies the phrase "[in the event the lease is] otherwise determined to be no longer valid."[56] To interpret the clause, the court relied on 2A Singer, *Statutes and Statutory Construction*, Section 47:33, 369 (6th Ed. 2000), which states, "[t]he last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.'"[57] Therefore, the "last antecedent is the entire clause preceding the modifier."[58] Accordingly, the modifier "before" applies to "terminated, surrendered, cancelled, released," and "is otherwise determined to be no longer valid."[59] Since the lease expired by its own terms at the end of its extended primary term, the anti-washout clause did not extend the Term Royalty to the Salt Fork Lease.

---

[53] *Bounty Minerals, LLC v. LL&B Headwater*, 2024-Ohio-944, 239 N.E.3d 962 (7th Dist.).
[54] *Id.* at ¶ 7.
[55] *Id.* at ¶ 26.
[56] *Id.*
[57] *Id.* at ¶ 29, quoting *In re Estate of Kurtzman*, 65 Wash.2d 260, 264, 396 P.2d 786 (1964).
[58] *Id.* at ¶ 30.
[59] *Id.*

Cardinal Minerals, LLC v. Miller [60]

7th District Court of Appeals of Ohio, Monroe County

In this case, the court looked at whether Cardinal Minerals, LLC ("Cardinal") was the holder of a mineral interest under the Dormant Mineral Act ("DMA"), and if a quitclaim deed executed by Cardinal amounted to champerty.[61]

In 1922, S.E. Pfalzgraf sold a tract of land ("Property") reserving the mineral estate. In 2012, the surface owners ("Millers") initiated the abandonment process under the DMA by serving notice of intent by publication, followed by filing an affidavit of abandonment, and requesting a notation of abandonment. The Millers then entered into an oil and gas lease covering the Property. Ultimately, a producing well was completed, and royalties were paid to the Millers.

In 2021, Cardinal Minerals, LLC ("Cardinal") formed a business with the primary purpose of locating and acquiring what it deemed to be insufficiently abandoned mineral interests. Cardinal located the Pfalzgraf heirs and purchased the majority of the mineral interest nine years after it was publicly abandoned through a series of quitclaim deeds. Cardinal then filed a suit to quiet title against the Millers, claiming the attempt to deem the severed mineral interest abandoned failed because the Millers did not satisfy the notice requirements of the DMA. The Millers successfully argued at trial that Cardinal lacked standing to bring suit because it was not a legal holder of the severed mineral interest. Cardinal filed this appeal.

Cardinal argued it "stepped into the shoes" of the Pfalzgraf heirs and, thus, had standing to sue the Millers.[62] The court stated that Cardinal cannot step in the shoes of the Pfalzgraf heirs and does not fit within the definition of "holder" under the DMA.[63] The court began by explaining that a quitclaim deed does not establish ownership but, instead, only conveys whatever interest that grantor has in the property. The court held that, at the time Cardinal acquired the quitclaim deeds, the Pfalzgraf heirs did not own an interest in the minerals because it had been recorded as abandoned nine years prior. Under the DMA, only the holder of a mineral interest can challenge its abandonment. Here, the court noted the Pfalzgraf heirs did not seek a judicial declaration before quitclaiming the interest nor did they file a claim to preserve.[64] The court ultimately held that Cardinal lacked standing to bring suit because, "the assignment of rights to a lawsuit [are] to be void as champerty."[65]

[60] *Cardinal Minerals, LLC v. Miller*, 2024-Ohio-3121, 249 N.E.3d 868 (7th Dist.).
[61] Champerty is a form of maintenance in which a nonparty in a lawsuit furthers a party's interest with the view of sharing the disputed property if the suit succeeds.
[62] *Cardinal Minerals, LLC*, 249 N.E.3d at ¶ 49.
[63] *Id*. at ¶ 16; *see also* R.C. 5301.56(H)(2) (defining "holder" as "the record holder of mineral interest, and any person who derives the person's rights from…and whose claim does not indicate…that it is adverse to the interest of the record holder.").
[64] *Id*. at ¶ 8 (citing Ohio Rev. Code Ann. § 5301.56).
[65] *Id*. at ¶ 51.

Gateway Royalty II, LLC et al. v. Gulfport Energy Corporation [66]
7th District Court of Appeals of Ohio, Belmont County

In this case, the court examined whether post-production costs were part of operating expenses and, if not, whether they should be deducted from the overriding royalty interest payments. The overriding royalty interest ("ORRI") was created by an instrument with the following relevant clause:

> The [ORRI] conveyed shall be free and clear of all drilling, development, and operating expenses; however, the [ORRI] shall bear its proportionate share of (i) all severance, excise, production, and other similar taxes measured by the amount of or value of the production attributed to said interest; (ii) oil and gas used as fuel in conducting operations on the lease or lands pooled therewith; and (iii) oil and gas used for treating production to make it merchantable.[67]

The ORRI owner, Gateway Royalty II, LLC ("Gateway"), argued that post-production costs should not be deducted from the ORRI. The operator, Gulfport Energy Corporation ("Gulfport"), argued that the oil and gas industry standard did not per se prohibit a lessee from deducting post-production costs from the ORRI. Gulfport deducted four post-production expenses from Gateway's ORRI payments. Specifically, the expenses of compression, processing, gathering, and fractionalization. Gulfport argued that the well-established meaning of "operating expenses" in the oil and gas industry did not encompass post-production costs, and, as such, they could be deducted from ORRI payments.

The Court of Appeals began by defining "operating expenses" as expenses required to keep the business running or incurred in the course of ordinary activities of an entity. The court then reasoned that an "overriding royalty" is ordinarily free of any expenses for exploration, drilling, development, operating, marketing, and other costs incident to the production and sale of oil and gas, unless the assignment granting the ORRI expressly allows these costs to be deducted.[68] The court examined the ORRI assignment language at issue and found that it was unambiguous because it excluded expenses for operating costs and did not expressly authorize the deduction of the four post-production expenses.

Next, the court reviewed evidence supplied by Gateway. The evidence showed that Gulfport itemized "gathering, processing, and compression" under the heading "operating expenses" in its SEC reports and that Gulfport had a demonstratable history of deducting post-production costs when their agreement expressly provided otherwise. Based on the evidence and its interpretation of the contract, the court held that Gulfport was only authorized to deduct the costs specifically enumerated in the contract, and that "operating expenses" did not include post-production costs.

[66] *Gateway Royalty II, LLC et al. v. Gulfport Energy Corporation*, 2024-Ohio-4844, _ N.E.3d _ (7th Dist.).
[67] *Id*. at ¶ 4.
[68] *Id*. at ¶ 29.

Henderson v. Stalder [69]

7th District Court of Appeals of Ohio, Monroe County

In this case, the court was asked whether severed mineral interest holders were properly notified pursuant to the statutory requirements of the Dormant Mineral Act ("DMA"). Here, the ownership of the oil and gas rights underlying approximately 15.669 acres in Monroe County ("Property") was at issue. In 1910, S.W. and Aura Egger reserved one-half of all coal, oil, and gas underlying the Property ("Egger Interest") in a warranty deed to Caroline Snider and the heirs of August Snider, as follows:

> Also excepting the one-half of all coal, oil and gas in and underlying said premises.[70]

In this case, the Hendersons claimed title to the Egger Interest. The Stalders owned the surface estate. After discovering the Egger Interest, the Stalders retained an attorney to have the Egger Interest deemed abandoned under the DMA. Title research revealed that "Vivian Egger Henderson" was an heir to the Eggers Interest. The Hendersons are Vivan's nieces and nephews through marriage. After a potential address for Vivian was found in Portage County, Ohio, a failed attempt at service via certified mail was made to that address. In June 2014, the Stalders served notice on "S.W. and Aura Egger and their heirs" by publication in *The Monroe County Beacon*. No claim to preserve was filed by any owner of the Egger Interest during the 30-day period following notice, and the Stalders recorded a Notice of Failure to file in September 2014. The Stalders then entered into oil and gas leases covering the Property, which led to the Hendersons filing a suit to quiet title to the Egger Interest.

The Hendersons argued that the Stalder's abandonment notice published in the *Monroe County Beacon* was defective, since it failed to name the known holders of the Egger Interest as required by the DMA. In their notice by publication, the Stalders only listed S.W. and Aura Egger as holders of the Egger Interest, despite having traced the interest to Vivian Egger Henderson. The court emphasized that R.C. 5301.56(F) requires the notice include the name of each holder and the holder's successors and assignees, as applicable. According to the Ohio Supreme Court's discussion of the DMA in *Gerrity*,[71] when the identity of a holder is known, the notice by publication must include their name. Because the Stalders did not include Vivian Egger Henderson's name in the notice by publication, the notice failed to comply with the mandates prescribed by R.C. 5301.56. For these reasons, the court determined that the abandonment was neither completed nor proper under the DMA claim.

[69] *Henderson v. Stalder*, 2024-Ohio-3037, 249 N.E.3d 841 (7th Dist.).
[70] *Id*. at ¶ 3.
[71] *Gerrity v. Chervenak*, 162 Ohio St.3d 694, 2020-Ohio-6705, 166 N.E.3d 1230.

Johnston v. Shale Play Land Services, Inc., et al. [72]
7th District Court of Appeals of Ohio, Jefferson County

In this case, the court analyzed what constitutes constructive notice under the bona fide purchaser statute. Cellis Johnston and her late husband (collectively "Johnston") owned mineral rights in nearly 114 acres of land. On April 8, 2020, Johnston signed and recorded a general warranty deed ("Deed") which conveyed the mineral rights to Shale Play Land Services, Inc. ("Shale Play"). Additionally, when negotiating the Deed, the Johnstons and Shale Play also entered into a two-page purchase agreement ("Agreement") executed by Shale Play's president, Jason Andrews. The Agreement obligated Shale Play to pay the purchase price for the Deed through certain installment payments as outlined therein.[73] On September 3, 2020, Shale Play recorded a deed ("Taurus Deed") conveying the mineral rights to The Taurus Corporation ("Taurus"). The Taurus Deed was executed by Andrews on August 22, 2020, and delivered to Taurus a few days later. After the Taurus Deed was delivered, Shale Play failed to make the installment payments as required by the Agreement. On June 6, 2022, Johnston filed a complaint claiming the Deed was void, but Taurus asserted a bona fide purchase defense.[74] We note that the Deed made no reference to the Agreement and the Agreement was not filed of record.

After determining the Deed was voidable, and not void, because it was obtained through fraud in the inducement, the court addressed Taurus' bona fide purchaser defense. Johnston argued that Taurus acquired enough facts to induce "a prudent person to make inquiries by which the person would have or could have obtained knowledge of an adverse claim."[75] Taurus argued that, under Ohio's recording statute, a buyer is only charged with constructive knowledge of encumbrances that are part of the public record. R.C. 5301.25(A) reads, in part:

> All deeds, land contracts…and instruments of writing properly executed for the conveyance or encumbrance of lands…shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.[76]

Here, Taurus's title search provided no evidence of an encumbrance on the mineral rights. Accordingly, Taurus was required to have actual knowledge of the encumbrance and had no duty to inquire about the suspicious means by which Andrews may have acquired the Deed. The court concluded that Taurus was a bona fide purchaser because it had no actual notice that the Johnstons were owed installments under the Agreement and the encumbrance was not filed of record.

---

[72] *Johnston v. Shale Play Land Services, Inc. et al.*, 2024-Ohio-5934, _ N.E.3d _ (7th Dist.).
[73] *Id*. at ¶¶ 5-6.
[74] The court determined the Deed was voidable because it was obtained through fraud in the inducement. This brief focuses on the bona fide purchaser defense of Taurus.
[75] *Id*. at ¶ 57. Evidence presented at trial indicated Taurus purchased the minerals at a cut-rate price, and that communication between Taurus and Andrews indicated Andrews needed to make a quick sale.
[76] *Id*. at ¶ 60.

Melchiori v. Nowak [77]
7th District Court of Appeals of Ohio, Belmont County

In this case, the court examined whether a will admitted to probate constitutes a title transaction under the Marketable Title Act ("MTA"), thereby preventing the extinguishment of a mineral interest. In deeds recorded in 1959 and 1975, Mary Melchiori and her husband, Charles Melchiori, conveyed the surface estate in their property, excepting and reserving the mineral estate. Mary Melchiori died and her will was admitted to probate in 1988. In her will, Mary Melchiori devised her real and personal property to her husband; if her husband failed to survive her, then all real and personal property would pass to her children.

Thereafter, the heirs of Mary Melchiori filed a complaint to quiet title against the successors in interest to the 1959 and 1975 deeds ("Surface Owners"). On competing motions for summary judgment, the trial court entered summary judgment in favor of the Surface Owners and denied the heirs' motion for reconsideration. The heirs appealed, raising one assignment of error: the will qualified as a title transaction under the MTA and, thus, the severed mineral estate was not yet subject to the application of the MTA because 40 years had not passed since the will was admitted to probate.

Ohio courts have held that "title transactions" as defined by R.C. 5301.49(D), include filings in the probate court, and that the MTA does not require the title transaction to be filed of record in the recorder's office.[78] Thus, the filing of wills in the probate court suffices as "recording" under the MTA.

Under the MTA, a title transaction is "any transaction affecting title to any interest in land, including title by will or descent…" [79] Therefore, a will is considered a title transaction only if it affects the title to an interest in land. To determine whether Mary's will distributed her mineral interests, the court analyzed whether the devise in the will was specific or general. The court explained that if the devising clause is specific, the will must also contain a residuary clause to distribute the mineral interests not separately listed therein. On the other hand, if the clause is a general devise, the clause transfers all property, including mineral interests, with the same effect as a residuary clause. The court found that Mary's will did not describe any specific property; rather, the clauses therein described all of Mary's property and were, therefore, general devises that would serve to transfer all of Mary's property (including oil and gas rights) upon her death. Because the mineral estate was transferred pursuant to the will, the court held the will constituted a valid recorded title transaction under the MTA, effectively transferring her mineral interest and preventing its extinguishment.

[77] *Melchiori v. Nowak*, 2024-Ohio-2740, 249 N.E.3d 231 (7th Dist.).
[78] *Id*. at ¶ 19.
[79] R.C. 5301.47(F).

Moore v. SWN Production Company, LLC [80]
7th District Court of Appeals of Ohio, Monroe County

In this case, the court determined whether surface owners exercised reasonable diligence to identify the holders of mineral rights under the Dormant Mineral Act ("DMA"). In 1982, George and Theresa Moore ("Moores") conveyed 40 acres in Monroe County, Ohio ("1982 Deed") to Gary and Teresa Zollinger ("Zollingers"). The 1982 Deed listed the Moores' address in Hartford County, Maryland, and contained the following reservation:

> EXCEPTING AND RESERVING the 3/4 of all royalty of oil and gas produced from these premises as reserved by former grantors and also reserving the 1/2 of all the coal underlying these premises as reserved by former grantors…[81]

The Moore interest remained dormant for decades. After the death of George and Theresa, their heirs became the successors in interest. In 2010, an attorney on behalf of the Zollingers sent letters via certified mail to the Moores at their last known address in Maryland, notifying them of the intent to have their dormant mineral interest deemed abandoned. Additional notice was provided by publication, however, the Moores did not respond. Ultimately, the interest was deemed abandoned and in 2022, the successors in interest to the Moores executed an affidavit in an attempt to preserve their mineral interest. Thereafter, the Moores filed a quiet title suit against the Zollingers.

Under the DMA, to effectuate abandonment of a dormant mineral interest, surface owners must provide notice of the intent to abandon to the holders of the dormant mineral interest, or their successors. Appellants, being the successors to the Moores, claimed the Zollingers failed to exercise reasonable diligence in their search for the holders of the dormant mineral estate. Under Ohio law, the issue of reasonable due diligence must be decided based on the facts and circumstances of each individual case. Under *Gerrity*, a review of public records where the property is located will generally establish a baseline of reasonable diligence unless information revealed by the initial search indicates the that the surface owner should continue to look elsewhere.[82]

In this case, the court held the Zollingers exercised reasonable diligence to locate the owners of the dormant mineral interest. The attorney searched Monroe County public records, where the lands at issue were located, sent notice via certified mail to the Moores at the last known address listed in the 1982 Deed, and published notice in the local paper that specified the severed mineral interests. The Moores argued that because the 1982 Deed listed an out of state address, this obligated the Zollingers to conduct a public records search in Monroe County to effectuate reasonable diligence. The Court disagreed and stated the record lacked evidence that a search in Hartford County, Maryland would have revealed any additional information. Ultimately, the court held the Zollingers exercised reasonable diligence and the dormant mineral interest was deemed abandoned pursuant to the DMA.

[80] *Moore v. SWN Production Co., LLC*, 2024-Ohio-5517, _ N.E.3d _ (7th Dist.).
[81] *Id*. at ¶ 7.
[82] *Id*. at ¶ 31.

RL Clark, LLC v. Hammond [83]

7th District Court of Appeals of Ohio, Belmont County

In this case, the court analyzed whether a royalty reservation in a 1902 deed was extinguished by the Marketable Title Act ("MTA"). In 1902, Issac Wise and Hannah Wise conveyed 8 acres in Belmont County to George Green, "excepting the one-half (1/2) of the oil and gas royalty" interest ("Wise Deed"). Said reservation was repeated in subsequent deeds in 1908 and 1925. Subsequently, a 1956 deed ("Dunfee Deed") was established as the root of title in this case and contained the following language:

> [s]ubject also to such interest in the oil and gas royalties as have hereto been reserved by former grantors.[84]

The court applied the three-step *Blackstone* test to determine whether the language in the Dunfee Deed was a specific or general reference.[85] The court determined that the Dunfee Deed contained a reference to a prior mineral interest described in the root of title. The court concluded that the reference in the root of title was general because, although it identified an oil and gas royalty interest, it did not contain a specific identification of a recorded title transaction.[86] As such, the court held that the Dunfee Deed was the root of title and the above-quoted language was a general reference which did not preserve the reserved royalty from extinguishment by the MTA.

The court also analyzed Appellant's argument that oil and gas leases throughout the chain of title served as savings events as to the royalty reservation in the Wise Deed. The court noted that, while an oil and gas lease *may* serve as a savings event under the MTA, said lease must contain a connection to the reserved interest. The court made it clear that if a party is trying to prove a non-participating royalty interest is preserved in the chain of title, a description of that interest must appear in the recorded documents.[87] Accordingly, the court concluded the royalty interest in the Wise Deed was extinguished under the MTA.

---

[83] *RL Clark, LLC v. Hammond*, 7th Dist. Belmont No. 23 BE 0047, 2024-Ohio-5051.

[84] *Id*. at ¶ 6.

[85] *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E. 3d 132 at ¶12 (specifying the 3-step *Blackstone* test as: (1) Is there an interest described within the chain of title? (2) If so, is the reference to that interest a "*general reference*"? (3) If the answers to the first two questions are "yes," does the general reference contain a specific identification of a recorded title transaction?).

[86] *RL Clark, LLC*, 2024-Ohio-5051 at ¶ 59.

[87] *Id*. at ¶ 57 (explaining that Appellant's attempts preserve the right to receive an NPRI by the existence of leases in which they had no right to participation was not sufficient savings event under the MTA.).

Thomson v. K & R Conservation, LLC [88]
7th District Court of Appeals of Ohio, Belmont County

In this case, the court determined whether surface owners exercised reasonable diligence to identify the holders of mineral rights under the Dormant Mineral Act ("DMA"). In 1967, Alec and Martha Thomson conveyed 160 acres in Harrison County, reserving the oil and gas rights ("1967 Reservation"). In 1968, the Thomsons conveyed an additional 40 acres, reserving the oil and gas rights ("1968 Reservation"). Alec died in 1987, and his will was offered for probate in Summit County. The probate proceedings identified Alec's next of kin, each of whom possessed addresses in Summit County.

In 2014, K&R Conservation ("K&R"), successor in interest of the surface estate, filed an affidavit of abandonment in Harrison County under the DMA to declare the 1967 Reservation abandoned. Prior to filing the affidavit, K&R performed a public records search in Harrison County, which revealed a Summit County, Ohio address associated with Alec and Mary Thomson. K&R mailed notice of intent to abandon the mineral interests to this address, but the letter was returned unclaimed. Thereafter, K&R published its notice of intent in a local newspaper for a week. K&R did not conduct a public records search in Summit County. In 2017, K&R filed an affidavit of abandonment for the 1968 Reservation, following the same process and providing the same notice as they did for the 1967 Reservation. In 2018, Alec W. Thomson, an heir of Alec and Martha Thomson, recorded an Affidavit of Preservation in the Harrison County Records and a complaint to quiet title against K&R, asserting that K&R did not conduct a diligent search in attempting to identify the then current interest holders.

The DMA provides a mechanism for reuniting abandoned, severed mineral interests with the surface estate. It requires that notice be provided to the holder of the mineral rights or their successors via certified mail. Here, K&R claimed they satisfied the notice requirements through their diligent search of the Harrison County Records and argued there was no obligation to search Summit County. Relying on *Gerrity*, the court noted that a search in the county where real property is located is the *minimum* requirement to establish reasonable diligence under the DMA and that additional investigation may be required depending on the circumstances.[89] The court determined K&R had knowledge the mineral interest holders last resided in Summit County based on their initial search. Furthermore, when the letter sent to the Summit County address was returned unclaimed, this required further investigation by K&R of the public records in Summit County. K&R limited their search of the Harrison County records to Alec and Martha Thomson only. The court emphasized that a search of the Summit County records after learning that the mineral interest holder's last known address was in Summit County would have revealed Alec's probate proceedings, which listed his next of kin and their addresses and subsequent conveyances regarding the Summit County address. Ultimately the court held that K&R did not exercise reasonable diligence to identify the holders of the mineral rights and denied the abandonment claim.

[88] *Thomson v. K & R Conservation, LLC*, 7th Dist. Summit No. C.A. No. 31114, 2024-Ohio-6098.
[89] *Id.* at ¶ 20 (referencing *Gerrity v. Chervenak*, 162 Ohio St.3d 694, 2020-Ohio-6705, 166 N.E.3d 1230).

Triad Hunter, LLC v. Eagle Natrium, LLC [90]
7th District Court of Appeals of Ohio, Monroe County

In this case, the court determined that Triad Hunter, LLC ("Triad") sufficiently proved their claims for negligence and trespass caused by salt mining. Triad is a natural-gas producer that produced natural gas from the Marcellus and Utica Shale formations and owned mineral rights underlying the Ormet Property in Monroe County, Ohio. Triad's property was located west of the Ohio River, and the property had multiple natural gas wells. On the other hand, Westlake Chemical Corporation ("Westlake") owned a salt mine and plant called the "Natrium Plant" in West Virgina. The Natrium Plant was situated across the river from the Ormet Property. Westlake injected high-pressure water and chemicals into injection wells thousands of feet below the earth's surface to dissolve salt from the Salina formation, forming brine - which was then brought to the surface from an extraction well to produce products such as chlorine and PVC. During this process, the remaining void from the removed salt is filled with pressurized brine, creating "brine caverns" that can grow in "tendrils" that extend for miles. The Natrium Plant mines areas are known as Fields 1, 2, and 3; at issue here is whether the brine caverns from Field 2 extended under the Ohio River into the Ormet Property thereby causing damage to Triad's gas wells.

Westlake contended that Triad was required to, and failed to, present expert testimony to prove negligence during the operation of a subsurface salt mine because of the technical complexity involved in this dispute. Nonetheless, the court emphasized that a plaintiff needs to prove: (1) duty; (2) breach of duty; (3) causation; and (4) damages to prevail over a negligence action.[91] Here, the court found that Triad established Westlake's negligence.[92] A defendant owes a duty to a plaintiff if a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of any act. Next, to prove causation, the plaintiff must demonstrate that the defendant's conduct is both the actual cause and proximate cause of its damages. The trial court found that the plant operators knew that solution mining caused the brine caverns to grow in all directions and extended under the Ohio River.[93] Nonetheless, the plant operators failed to take further action to ascertain how far the brine caverns extended. Westlake knew that the caverns were "connected" to Triad's wells but continued to mine Field 2.[94] Thus, Westlake should have anticipated an injury was likely to result from its mining. In 2017, Triad attempted to drill two wells in the Ormet Property but found brine instead of the solid earth that was expected to be there. Triad then drilled a third well which also encountered brine and H2S gas, thereby causing Triad to evacuate the well site. Ultimately, Triad was unable to safely drill its planned wells in the Marcellus formation, resulting in lost profits estimated to be $95 million over 50 years. In this case, the court determined that the cause-and-effect relationship between Westlake's actions and Triad's damages were apparent without the aid of an expert witness.[95] Thus, Westlake's first argument lacked merit.

Westlake also argued that Triad failed to prove the element of intent in its trespass claim. The Ohio Supreme Court previously held that intentional conduct is an element of trespass, meaning Westlake must have either desired to cause the consequences of its act or believed that the

[90] *Triad Hunter, LLC v. Eagle Natrium, LLC*, 2024-Ohio-5188, _ N.E.3d _ (7th Dist.).
[91] *Id*. at ¶ 22.
[92] *Id*. at ¶ 34.
[93] *Id*. at ¶ 27.
[94] *Id*. at ¶ 28.
[95] *Id*. at ¶¶ 30, 34.

consequences of its act were substantially certain to occur.[96] Thus, to prevail, Triad had to prove that Westlake intentionally entered upon Triad's property without permission from Triad. Additionally, Triad had to prove that Westlake believed its continuous injections into Field 2 were substantially certain to cause its brine cavern to reach Triad's property. The evidence established that Westlake was aware of studies indicating there were alarming connections to the Marcellus formation and the existing brine fields were resulting in roof falls and cavity rubble. Next, the evidence established that Westlake knew its field was growing in all directions, including under the Ohio River, and 200 million gallons of injected water was unaccounted for in the span of only two years. Furthermore, the evidence established that Westlake knew that pressure tests showed a synchronization between Triad's wells and Field 2. Triad presented evidence that Westlake's Field 2 had an extremely large cavern suffering from roof collapses, which caused connections between the Salina salt formation and the Marcellus shale formation. Both West Virgina regulators and Ohio regulators raised concerns that the brine caverns were impacting oil and gas wells in Ohio - but Westlake failed to take any remedial actions. Due to Westlake's actions (and inaction to circumvent negative geological impacts), no tools could fit into Triad's wells and Triad had to abandon them. This led to the discovery that the brine found at Triad's #10 well, instead of the solid salt that should have been there, was similar in chemistry to the brine in Westlake's wells. Considering the evidence, Triad proved that Westlake's continuous injections into Field 2 were substantially certain to cause a trespass into Triad's property. The undisputed evidence that Westlake knew Field 2 had grown past its property lines, continued to solution mine despite this knowledge, and refused to take steps to control the cavern's growth equated to its direct intent to trespass. Thus, the court here affirmed the trial court's finding of intentional conduct to support a claim of trespass.[97] Accordingly, Westlake's second argument lacked merit.

In conclusion, the court affirmed the trial court's findings that Westlake was liable for acting negligently in the operation of a subsurface salt mine and trespassed upon Triad's property without permission from Triad.[98]

[96] *Id*. at ¶ 37.
[97] *Id*. at ¶¶ 52-53.
[98] *Id*. at ¶¶ 52, 63.

Wolfe v. Bounty Minerals LLC [99]
7th District Court of Appeals, Harrison County

In this case, the court determined whether the root of title deed at issue preserved a mineral reservation from extinguishment under the Marketable Title Act ("MTA"). In 1921, Wesley A. Holmes conveyed property by deed ("1921 Deed") to Emerson W. Long, reserving the mineral estate ("Holmes Interest"). In 1950, following subsequent conveyances, the surface owner conveyed the property to Pittsburgh Consolidation Coal Company ("PCCC") by deed ("1950 Deed"). The 1950 Deed restated the exact oil and gas reservation verbatim from the 1921 Deed. Finally, PCCC conveyed the property to Consolidation Coal Company ("CCC") by deed ("1966 Deed") which stated:

> Reference is hereby expressly made to each particular instrument described in this Exhibit A, to its record, and to all prior instruments of record described or referred to in each such instruments and their records…as fully and to the same extent as though each of such instruments and the descriptions, terms and conditions thereof were fully set forth and described herein. [100]

The heirs of Westly A. Holmes filed a complaint asserting that the MTA did not extinguish the Holmes Interest because the 1966 Deed, being the root of title, contained a specific reference to the Holmes Interest, of which the trial court agreed. The successors to CCC appealed, asserting that the trial court erred by applying the incorporation by reference doctrine to expand the preservation of the Holmes Interest from extinguishment under the MTA.

To determine whether the trial court erred, the court applied the *Blackstone* test to determine whether the reference in the 1966 Deed was general or specific.[101] The court stated that Exhibit A of the 1966 Consolidation Deed was more specific rather than general because it, "contain[ed] the volume and page number reference of the 1950…Deed…[t]he grantor and grantee names [were] also identified and the date of the instrument." [102] The court determined the 1966 Deed satisfied the *Blackstone* test because it referred specifically to the "reservations that it is subject to," specific enough that "A title searcher can find the 1950…Deed and the Holmes Interest through the specific information provided…"[103] The court of appeals held that, although the 1966 Deed did not restate the reservation, being expressly subject to the 1950 Deed was sufficiently specific to satisfy the elements of the *Blackstone* test. Thus, the court found that the application of the incorporation by reference doctrine by the trial court was proper, and that the 1966 Deed preserved the Holmes Interest from extinguishment by the MTA.

---

[99] *Wolfe v. Bounty Minerals LLC*, 7th Dist. Harrison No. 23 HA 0005, 2024-Ohio-2460.
[100] *Id.* at ¶ 11.
[101] *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E. 3d 132 at ¶12 (specifying the 3-step *Blackstone* test as: (1) Is there an interest described within the chain of title? (2) If so, is the reference to that interest a "*general reference*"? (3) If the answers to the first two questions are "yes," does the general reference contain a specific identification of a recorded title transaction?).
[102] *Wolfe*, 2024-Ohio-2460 at ¶ 75.
[103] *Id.* at ¶ 76.

6. Tenth District Court of Appeals

Pettitt v. Schaffner [104]
10th District Court of Appeals, Franklin County

In this case, the court looked at whether instruments executed by an undivorced, but separated couple were sufficient to extinguish dower rights. The Court found that the instruments did not extinguish the dower interest in the property, because absent a divorce or legal separation, the couple were still legally married. Donald and Barbara Pettitt were married in 1962. In 1988, Donald and Barbara began living separately. In 1993, Donald bought the property at issue ("Property"), where he resided with Jean Schaffner. In 2017, Donald and Barbara executed an Agreement to Resolve Property and Other Matters ("Agreement") in which Barbara agreed to transfer any interest she had in the Property to Donald. Subsequently, in 2017 Barbara executed a quitclaim deed that transferred any and all of her interest in the Property to Donald. Donald executed a transfer on death designation affidavit ("TODA") for the Property in which he designated Schaffner as the transfer on death beneficiary. Donald died intestate in 2019 survived by Barbara and Schaffner. Barbara, as administrator of Donald's estate, sought a declaration by the court that she had not released her dower interest in the Property and, as such, the Property should be treated as a probate asset.

In evaluating Barbara's arguments, the Court of Appeals stated that dower rights are terminated via divorce, dissolution of marriage, or legal separation. R. C. 3105.10(E) states, "Upon the granting of a judgment for legal separation, when by the force of the judgment real estate is granted to one party, the other party is barred of all right of dower in the real estate…" [105]. Additionally, the Court quoted R. C. 5302.22(D)(3) which states that if the owner of property is married, a transfer on death designation affidavit must include a statement by the owner's spouse subordinating their dower rights in the property.[106] Thus, the Court found the TODA null and void.

The Court then evaluated whether the Agreement and quitclaim deed executed between Barbara and Donald were sufficient to extinguish Barbara's dower rights. The Court stated that, based on the version of R.C. 3103.06 which was in effect at the time Barbara and Donald executed the Agreement, Barbara could not extinguish her dower rights through the Agreement unless it was reduced to a judgment for legal separation.[107] Similarly, the Court found that the quitclaim deed was also insufficient to extinguish Barbara's dower rights, stating that dower rights are vested by law, rather than through contract,. Accordingly, absent a judgment of legal separation, Barbara's dower rights were not extinguished by the deed. Thus, the court found the TODA was null and void, and neither the Agreement, nor the quitclaim deed were sufficient to extinguish Barbara's dower rights.

[104] *Pettitt v. Schaffner*, 10th Dist. Franklin No. 23AP-661, 2024-Ohio-5180.
[105] *Id*. at ¶ 19.
[106] *Id*. at ¶ 15.
[107] *Id*. at ¶ 20.

C. OKLAHOMA CASE LAW UPDATE

SUPREME COURT OF OKLAHOMA CASE

Latigo Oil & Gas, Inc. v. BP America Production Co. [108]

The Supreme Court of Oklahoma

The Court determined whether a preferential right of first refusal obligates the seller to exercise good faith when determining the allocated value of individual interests within a package deal. The Supreme Court of Oklahoma determined the trial court did not abuse its discretion in awarding Latigo Oil & Gas ("Latigo") a temporary injunction against BP America Production Co. ("BP") but refrained from making a definite ruling.

Between 1957 and 1960, Cabot Carbon Company and Sinclair Oil & Gas Company entered into three separate Joint Operating Agreements (the "Agreements") containing a preferential right to purchase clause. The party intending to sell or dispose of such interests had to provide notice to the other party; upon receipt of such notice, the subsequent party had ten days to exercise their preferential right to purchase the subjected interests on the same terms and conditions offered by the selling party. Latigo and BP were successors to interests subject to the Agreements. In March 2022, BP entered a Purchase and Sale Agreement with VR4-Moriah, LP ("VR4") to sell several mineral interests in lands covered by the Agreements along with other lands. BP notified Latigo, stating its intention to sell the interests to VR4. Latigo accused BP of failing to provide good faith valuations for the properties. As such, Latigo sued, and the trial court prohibited BP's sale to VR4.[109] On appeal, the appellate court held BP did not owe Latigo a duty to provide good faith valuations of the subject interests, relying on the precedent set in *Ollie v. Rainbolt.*[110] In *Ollie*, minority shareholders exercised their right to purchase stocks before selling them to a third party. While the third party offered to purchase additional stocks, the minority shareholders declined and claimed that the packaged deal violated their first right of refusal. The defendants treated the refusal to purchase all shares within the packaged deal as rejecting the offer. The *Ollie* court held "[it is] inappropriate to permit a seller to circumvent a party's negotiated right of first refusal by offering a package deal that included interests not covered by such right." [111]

Here, the Supreme Court of Oklahoma noted that the two cases are distinguishable because *Ollie* involved a purchase of stocks, while this case involved the purchase of oil & gas interests. In addition, the appellate court misconstrued *Ollie*, which states "packaged-deal offers are not considered bona fide offers for the purpose of right of first refusal agreements."[112] The Court further explained it was premature to make a definitive ruling, as the Court has yet to address this issue in the context of an oil and gas interest. The Court noted their substantial support for Latigo's assertions and valued other jurisdictions' decisions to uphold the principle that preferential rights are entitled to a good faith allocation of value in a packaged deal offer.

---

[108] *Latigo Oil & Gas, Inc. v. BP America Production Co.*, 2024 OK 35, 549 P.3d 1252.
[109] *Id*. at ¶ 11.
[110] *Ollie v. Rainbolt*, 1983 OK 79, 669 P.2d 275.
[111] *Latigo Oil & Gas, Inc.*, 549 P.3d at ¶ 19 (referencing *Ollie*, 669 P.2d 275 at ¶¶ 23-26).
[112] *Id*. at ¶ 20 (paraphrasing *Ollie*, 669 P.2d 275 at ¶¶ 18-22).

OKLAHOMA COURT OF APPEALS CASE

Butterfield v. Trustee of Johnny B. McCoy Revocable Trust [113]
Court of Civil Appeals of Oklahoma, Division No. 3

In this case, the court determined which conflicting party had superior title by addressing two issues: 1) whether possession carried a presumption of ownership; and 2) how to determine who has superior title when both parties have equal equitable interest. In October 2018, C.R. Butterfield ("Butterfield") moved onto property owned by Nita Carter ("Carter"). On January 2, 2019, Butterfield and Carter entered into a contract for deed for Butterfield to purchase the property. The contract called for monthly payments of $200, with a total purchase price of $5,000. On October 19, 2020, Carter executed a warranty deed for the same real property in favor of the Johnny B. McCoy Trust ("McCoy Trust"). The McCoy Trust promptly recorded the warranty deed on October 22, 2020. Thereafter, on October 29, 2020, Butterfield recorded his contract for deed. On January 19, 2021, Carter executed a warranty deed acknowledging payment of the purchase price, but Butterfield never recorded the warranty deed. On September 14, 2021, Butterfield filed this lawsuit against the McCoy Trust to quiet title to the property. The trial court granted relief in favor of the McCoy Trust, from which Butterfield appealed.

Butterfield asserted that his possession of the property created a presumption of ownership, relying on *Foley v. Brown*.[114] In *Foley*, the court quieted title in favor of the plaintiff because the plaintiff had a continuous, unbroken chain of title to the property, and the defendant had actual notice of said chain of title prior to purchasing the property. Accordingly, "Butterfield's argument that he has superior title to the property because possession carries with it the presumption of ownership is unsupported by the law."[115] After reviewing relevant case law and statutes, the court held that possession provides notice of a potential legal interest but does not create a presumption of ownership.

The court then considered whether Butterfield had a legal interest in the property and, if he did, whether that interest was superior to McCoy Trust's interest. The court explained that the contract for deed was an agreement to sell the property *in the future* once all of the required payments were made. Thus, Butterfield could not acquire any title to the property until he satisfied the terms of the contract. [116] The court found that the equities between Butterfield and the McCoy Trust were equal at the time the McCoy Trust filed its deed, and to determine whether the McCoy Trust had a superior interest in this property, the court applied the rule stating: "Where the equities are equal between two grantees of the same grantor, title belongs to the first to file a deed of record."[117] As a result, the court held that the McCoy Trust held superior title under its prior recorded deed.

[113] *Butterfield v. Tr. of Johnny B. McCoy Rev. Living Trust*, 2024 OK CIV APP 2, 542 P.3d 877.
[114] *Id*. at ¶ 7; *see Foley v. Brown*, 1992 OK 17, ¶3, 85 Okla. 1, 204 P. 267, 268.
[115] *Id*. at ¶ 15.
[116] *See Id.* at ¶ 22; *see Bartlesville Oil & Imp. Co. v. Hill*, 1911 OK 492, ¶12, 30 Okla. 829, 121 P. 208, 211.
[117] *See Id*. at ¶ 25; *see Elsey v. Shaw*, 1947 OK 387, ¶6, 199 Okla. 698, 190 P.2d 439, 440.

D. TEXAS CASE LAW UPDATE

SUPREME COURT OF TEXAS CASES

Albert v. Fort Worth & W. R.R. Co. [118]

Supreme Court of Texas

In this case, the Court determined whether a landowner established a prescriptive easement by adverse possession. In 1960, the Gulf, Colorado & Santa Fe Railway ("Gulf") conveyed Junior Meek ("Meek") a license allowing him to build a gravel road crossing a fee-owned railroad to access a highway from his tract of land ("Property"). The license restricted the gravel road for personal and agricultural use only and could not be assigned without Gulf's permission. Meek sold the Property in 1969, but he did not assign the license despite the gravel road being the only access point from the highway to the Property. Over the next 50 years, subsequent owners of the Property continued to use the gravel crossing without a license or an objection from Gulf. Fort Worth & Western Railroad Company ("Western") acquired the railroad in 2005 and sent trespass notices to the Property's owners for using the gravel crossing without a license; however, Western did not physically interrupt the gravel crossing's path over the railroad. Nathan Albert and his business partners (collectively "Albert") purchased the Property in 2016 and, despite Western's objection, continued use of the gravel crossing.

To acquire a prescriptive easement, one must use the dominant estate owner's land in a manner that is adverse, open and notorious, continuous, and exclusive for the required statutory period.[119] Here, Meek was the only person to use the gravel road with a license, and his license was not transferrable without the dominant estate owner's consent. Meek's "successors in interest openly trespassed on the Railroad Tract when they continued to use the gravel crossing."[120] Therefore, the continued use of the road by Meek's successors was adverse to Western's rights. Additionally, the use of the road remained continuous for decades and was readily discoverable. The road was well known within the community as the access point for the Property and was depicted as a "private road" on a 1941 Tobin Survey. Western's own employees testified that the gravel road was "open and obvious to anyone who" drove or walked by the area.[121]

Western argued that it and its predecessors had continuously used the railroad that crossed over the gravel road for over a century, thereby preventing the exclusivity element. However, the exclusivity of an adverse possession claim is based on whether the parties both use the land the same way.[122] The Court viewed the use of the gravel road versus trains traversing the tracks as fundamentally different uses.[123] The Court found that a reasonable jury could conclude Albert's predecessors use of the gravel road was adverse, open and notorious, continuous, and exclusive for the required statutory period, thereby establishing a permanent prescriptive easement across the gravel road.

---

[118] *Albert v. Fort Worth & W. R.R. Co.*, 690 S.W.3d 92 (Tex. 2024), reh'g denied (June 21, 2024).
[119] *Albert*, 690 S.W.3d 92 at 98; *see also Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979).
[120] *Id*. at 99.
[121] *Id*.
[122] *Id*. at 100.
[123] *Id*.

Ammonite Oil & Gas Corporation v. Railroad Commission of Texas [124]
Supreme Court of Texas

In this case, the court determined whether an offer to voluntarily pool, where the proposed horizontal wells would not reach the offeror's minerals, was fair and reasonable under the Texas Mineral Interest Pooling Act ("MIPA"). In a split decision, the Court found the proposal to pool was not a fair offer and would not prevent waste or protect correlative rights. Under MIPA, the Railroad Commission ("RRC") may order the pooling of interests in a common reservoir to avoid unnecessary drilling, prevent waste, and protect correlative rights if the applicant can show that the owner of a separately owned tract was denied a fair and reasonable offer to pool. MIPA may be used by both oil and gas lessees and stranded mineral owners when pooling is the only method available to qualify for a drilling permit, and a voluntary unit cannot be agreed to.

In 2015, the Texas General Land Office leased to Ammonite Oil & Gas Corporation ("Ammonite") the oil and gas underlying a winding stretch of river. EOG Resources, Inc. ("EOG") owned and operated oil and gas leases on both sides of the river. EOG was in the process of drilling several wells on either side of the river. Ammonite sent EOG offers proposing the formation of sixteen pooled units, which would include the river. However, the drilling plats showed that EOG's wells would not actually reach the riverbed. As such, EOG declined the offer because their leases prohibited them from entering into a voluntary pooling agreement. After EOG declined the offer to pool, Ammonite applied for a MIPA unit. The RRC rejected Ammonite's proposal under MIPA for the following reasons: (1) the offer was not fair and reasonable; and (2) forced pooling would not prevent waste, protect correlative rights, or avoid the drilling of unnecessary wells. This suit was Ammonite's final appeal of the RRC's order.

First, the Court considered whether Ammonite's pooling offers were fair and reasonable. "All orders effecting the pooling shall be made on terms and conditions that are fair and reasonable and will afford the owner [of each tract in the unit] the opportunity to produce or receive his fair share."[125] Here, EOG's wells as depicted on its permitted plats would not reach the minerals under the riverbed. The only way EOG's wells would access the minerals under the riverbed, was if EOG modified or extended its wells. The Court pointed out that Ammonite's offers did not suggest EOG extend or modify the wells to obtain production from the riverbed, nor were additional new wells proposed. As a result, the offer Ammonite made "required it to produce nothing and EOG's lessors to receive less[.]"[126] Additionally, by the time litigation started, EOG completed its wells, which do not drain the minerals beneath the river. The Court ultimately agreed with the RRC's findings and concluded that Ammonite's offer to form pooled units with EOG was unfair and unreasonable, as it would force EOG to share in its production when the wells would not drain the minerals under the river.

The Court also examined whether pooled units would prevent waste or protect correlative rights. Ammonite argued that its minerals would be stranded without the opportunity to produce its fair share of minerals in the reservoir if it could not force-pool its minerals with EOG's wells. However, the Court explained that a forced pooling order would not prevent waste or protect correlative rights. Even if the minerals under the riverbed were deemed stranded, "a forced-pooling order

[124] *Ammonite Oil & Gas Corp. v. Railroad Comm'n of Tex.*, 698 S.W.3d 198 (Tex. 2024).
[125] Tex. Nat. Res. Code § 102.017(a).
[126] *Ammonite Oil & Gas Corp*., 698 S.W.3d at 208.

would not change that fact because, as the [RRC's] order states, 'the wells have been drilled and are producing; they do not and will not produce riverbed minerals.'"[127] Additionally, the Court noted a forced-pooling order would do nothing to protect Ammonite's correlative rights. "Ammonite's rights to all the minerals beneath the riverbed was undisturbed by EOG's wells."[128] For these reasons, the Court believed forced pooling would not prevent waste or protect the correlative rights of Ammonite in the minerals under the riverbed.

In conclusion, the Court found Ammonite's offer to pool its acreage with EOG's wells was unfair and unreasonable since it would allow Ammonite to receive a share of the well's revenue without contributing acreage that would actually be drained by the wells. Ammonite's proposed unit also would not have prevented waste or protected correlative rights, which is the cornerstone of MIPA. The lengthy dissenting opinion asserts that (1) the RRC did not sufficiently explain why it determined Ammonite's offer to pool was unreasonable, which should result in an automatic rehearing, and (2) stranding minerals should be considered "waste" under MIPA because it has the same practical effect as drainage.

[127] *Id.* at 211.
[128] *Id.*

ConocoPhillips Company v. Hahn [129]
Supreme Court of Texas

In this case, the Court determined that the ratification of an oil and gas lease by the NPRI owner did not change the NPRI owner's share of royalties; conversely, the Court determined that the execution of a stipulation of interests did change the NPRI owner's share of royalties. Kenneth Hahn ("Hahn"), an NPRI owner brought action against a lessor and lessee under an oil and gas lease for trespass to try title to confirm his royalty ownership. Hahn and his three siblings owned varying interests in a 74.15-acre tract of land. Hahn and his brother initially owned the surface estate as cotenants, while each of the four Hahn siblings owned a 1/4 undivided share of the tract's severed mineral estate. In 2002, the two brothers executed and recorded two deeds, which conveyed exclusive surface ownership of the northeast 37.07 acres ("Tract A") to Hahn, while conveying his brother, George, surface ownership of the southwest 37.07 acres ("Tract B"). Thereafter, in 2002, Hahn executed and recorded a general warranty deed that conveyed Tract A to William and Lucille Gips ("Gips Deed"). The Gips Deed included the following reservation:

> SAVE AND EXCEPT [that] there is hereby reserved unto [Kenneth Hahn], his heirs and assigns, an undivided one-half (1/2) non-participating 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) in and to all of the oil royalty, gas royalty, and royalty in other minerals in and under and that may be produced from the herein described property.[130]

The reserved NPRI was for a term of 15 years, and the deed provided that Hahn and his heirs should not participate in the making of any oil, gas, or mineral lease covering Tract A. In July 2010, Gips and ConocoPhillips entered into an oil, gas, and mineral lease ("Gips Lease") for Tract A, which provided that "[t]he royalties to be paid by Lessee on oil and gas production are 1/4 of that produced and saved from said land."[131] In July 2011, Hahn and the Gipses executed a ratification of the Gips Lease, which recited that Hahn owned an NPRI. Shortly thereafter, in November 2011, ConocoPhillips approached Hahn to clarify certain aspects of the NPRI reserved in the Gips Deed; this resulted in a stipulation of interest, which was signed by Hahn and the Gips (the "Stipulation"). The Stipulation provided that:

> [F]or and in consideration of the premises and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, each of the undersigned does hereby acknowledge, stipulate and agree that it was the intent of the parties in the deed from Kenneth Hahn to William Paul Gips and Lucille Fay Gips, recorded in Volume 121, Page 625, Official Public Records, DeWitt County, Texas, that the interest reserved was a one-eighth (1/8) "of royalty" for a term of 15 years from June 9, 2003.[132]

In March 2012, ConocoPhillips amended the designation of its production unit to include Tract A, retroactive to October 1, 2011, and began paying royalties to Hahn on a 1/8 of 1/4 basis.

---

[129] *ConocoPhillips Co. v. Hahn*, No. 23-0024, 2024 WL 5249570 (Tex. Dec. 31, 2024).
[130] *Id.* at *1.
[131] *Id.* at *2.
[132] *Id.* at *3.

Hahn filed suit arguing he was entitled to a fixed 1/8 royalty. The trial court entered summary judgment holding that Hahn's royalty was converted to a floating 1/8 royalty by the Stipulation. On appeal, the Corpus Christi-Edinburg Court of Appeals held that the Stipulation was ineffective to change Hahn's royalty interest because it failed as a conveyance. This appeal followed.

As a starting point, the Court determined that the Gips Deed reserved a fixed 1/8 NPRI for Hahn. The Court addressed whether the lease ratification by Hahn changed Hahn's NPRI from fixed to floating and determined that it did not. To arrive at this decision, the Court considered whether a standard lease provision obligating the lessee to pay royalties to the mineral fee owner also applied to a pre-existing fixed NPRI. The Court relied on *Hysaw v. Dawkins* to determine that a fixed fraction of total production remains constant regardless of the amount of royalty negotiated in a subsequent oil and gas lease. In comparison, a fraction of royalty interest varies or "floats" in accordance with the size of the landowner's royalty in a mineral lease. Accordingly, since Hahn's interest was deemed a fixed share of production, it remained constant regardless of the amount of royalty expressly stated in the Gips Lease.[133] The Court further noted that the Gips Deed prohibited Hahn from participating in the making of any oil and gas lease over Tract A and held that the lessor royalty provision in the Gips Lease did not apply to Hahn's NPRI.

The next issue the Court considered was whether the Stipulation changed Hahn's NPRI from fixed to floating. Here, the parties agreed that if the Stipulation was effective, Hahn's fixed 1/8 NPRI would be reduced by the 1/4 royalty fraction in the Gips Lease. Thus, the dispute centered on whether or not the Stipulation was effective. Here, the Court relied on *Concho Resources, Inc. v. Ellison*, holding that a court should grant deference to a property owner's choice to resolve a boundary location by executing a stipulation, despite the parties' ability to obtain a court's determination of the boundary.[134] The court stated that they "have specifically encouraged the use of stipulations about the nature or amount of an NPRI to avoid the need for judicial clarification."[135] Thus, the court determined that *Concho Resources* supported the conclusion that the Stipulation was enforceable.

Hahn attempted to raise additional arguments against enforcing the Stipulation - first, he contended that the Stipulation was not enforceable as a conveyance because the interest to be conveyed was not identified with sufficient certainty. For a deed to accomplish a legally effective conveyance, (1) the instrument must be in writing; (2) the conveyed interest must be sufficiently described; (3) the grantor and grantee can be ascertained; (4) there are operative words or words of grant to convey title to a real property; (5) the instrument is properly signed and acknowledged by the grantor; and lastly, (6) the instrument is delivered and accepted by the grantee.[136] The Court concluded that the Stipulation was an effective conveyance by determining that each of these elements were met in the instrument. The Court focused on the fourth paragraph of the Stipulation, which states that Hahn and the Gipses:

---

[133] *Id*. at *8 (the court's conclusion agreed with the general rule that an NPRI interest in oil and gas is *not* leasable, because a royalty interest is non-possessory and distinguishable from a mineral interest).
[134] *Concho Resources, Inc. v. Ellison*, 627 S.W.3d 226 (Tex. 2021).
[135] *ConocoPhillips Co.*, 2024 WL 5249570 at *10.
[136] *Id*. at *12.

> do[ ] hereby acknowledge, stipulate and agree that it was the intent of the parties in the deed from Kenneth Hahn to William Paul Gips and Lucille Fay Gips, recorded in Volume 121, Page 625, Official Public Records, DeWitt County, Texas, [(i.e., the Gips Deed)] *that the interest reserved* was a one-eighth (1/8) "of royalty.[137]

Accordingly, because the Gips Deed contained only one reservation and because the Stipulation sufficiently identified it, the Stipulation's fourth paragraph memorialized the agreement between Hahn and the Gipses to create and reserve for Hahn a floating 1/8 NPRI in Tract A. In conclusion, the Court held that the Stipulation was enforceable as a conveyance, and, thus, Hahn owned a floating 1/8 NPRI subject to the royalty provided in the Gips Lease.

[137] *Id.* at *14.

Occidental Permian, Ltd. v. Citation 2002 Investment LLC [138]
Supreme Court of Texas

In this case, the court determined whether a property description in an Exhibit limited the depth of the interest conveyed in an otherwise unlimited grant. In 1987, Shell Western E&P, Inc. ("Shell") sold a number of oil and gas properties to the predecessor of Citation 2002 Investment LLC ("Citation"), which conveyed all right, title, and interest in and to the oil and gas fee, mineral and leasehold estates as described in an Exhibit attached thereto (the "1987 Assignment"). We have reproduced a caption from the Exhibit below.[139]

I.	II.	III.	IV.	V.	VI.
Shell Lease Number	Instrument Date and Record	Lessor-Lessee or Grantor-Grantee	Tract Description	Interest Assigned in Described Tract	Being Subject to the Following Agreements
T-8888-B2 KC-32642 KC-32940	Oil and Gas Lease 09-16-29 Upton County Volume 36, Page 115 Reagan County Volume 18, Page 100	State of Texas to Shell Petroleum Corp.	Original Permit #9153 embracing N1/2 Sec 14 Block 58, University Land, 320 acres in Reagan and Upton Counties, Texas, from surface to base of lower Spraberry formation. Original Permit #9153 embracing N1/2 Sec 14 Block 58, University Land,	100% WI. 87.5% NRI (oil) 90% NRI (gas) 1/8 ORRI.	Farmout Agreement and Assignment dated 03-15-84 to John L. Cox for S1/2 of E1/2 Section 12 and N1/2 Section 14, Block 58, University Lands. Benedum-Spraberry Unit and Unit Operating Agreements dated 11-01-65 (Shell's interest is 9.89311%).

In 1997, Shell assigned all of its interest in the same leases to Occidental Permian, Ltd. ("Occidental"). Occidental argued that Column IV of the to the 1987 Assignment limited the assigned interests to the specific depths described therein; resulting in Shell continuing to own the deep rights which were purportedly assigned to Occidental in 1997. Citation believed it received all rights in all lands and depths covered by each lease described in the 1987 Assignment, and this suit arose to resolve the dispute. The Court's interpretation of the 1987 Assignment was made by harmonizing the language in three provisions, all reproduced below, with the exhibit thereto. The 1987 Assignment granted the following interests:

Sub-Grant 1:

> All of SHELL WESTERN'S right, title and interest in and to the oil and gas, fee, mineral and leasehold estates described in [the Exhibit.]

[138] *Occidental Permian, Ltd. v. Citation 2002 Investment LLC*, 689 S.W.3d 899 (Tex. 2024).
[139] *Id.* at 903 (example exhibit included by the Court).

Sub-Grant 2:

> All of SHELL WESTERN'S right, title and interest in and to any contracts or agreements, including, but not limited to…rights above or below certain footage depths or geological formations, affecting the property described in [the Exhibit.]

The 1987 Assignment was also made subject to the following catch-all provision:

> It is the intent of this ASSIGNMENT to transfer and convey to CITATION ... *all rights and interests now owned by* SHELL WESTERN ... in the leases and other rights described herein, *regardless of whether same may be incorrectly described or omitted from Exhibit A*.[140]

Occidental argued the Column IV of the Exhibit should be interpreted as a limitation of the granting clause, and that the catch-all provision was merely a Mother Hubbard Clause and should not be construed as broadening the grant to include depths not described on the Exhibit. Citation argued the clauses resulted in Shell assigning all of its interest in the leases without limitation.

The Court rejected Occidental's interpretation, emphasizing that a Mother Hubbard clause is "a catch-all for small, overlooked interests…not a reservation of interests."[141] Additionally, the Court relied on the fact that the Exhibit did not define what each column entailed, holding that Columns I-III described the "leasehold estates" whereas Columns IV-VI appeared to describe "contracts or agreements" which are referenced in the second grant sub-part. Finally, the Court determined that none of the uses of "subject to" in the 1987 Assignment resulted in a reservation of any interest in the leases to Shell. Thus, Citation obtained all of Shell's interest in the leases without limitation through the 1987 Assignment.

[140] *Id*. at 902.
[141] *Id*. at 906.

Samson Exploration, LLC v. Bordages [142]
Supreme Court of Texas

In this case, the Court determined whether an oil and gas lease provision called for simple or compound interest on unpaid royalties. Samson Exploration, LLC ("Samson") held oil and gas leases with three families, including the Bordages family. The Bordages sued Samson for unpaid royalties, and Samson paid the Bordages royalties plus late charges, per its calculations. The issue that remained was whether Samson owed the Bordages simple or compounded interest on the late charges. The Late Charge Provision of the lease provided:

> [R]oyalty payments are due by the first day of the calendar month following some sixty days after production. If not timely paid, a late charge is imposed the next day 'based on the amount due' and 'the maximum rate allowed by law.' That charge is payable on the last day of the month.[143]

The Bordages and Samson both agreed that the lease imposed an interest at 18%. However, Samson disagreed that the late charges would be compounded and, instead, should be treated as a simple rate of interest.

Here, the Court determined that the late charge began to accrue interest at the maximum rate allowed by law, which is a simple interest rate (absent specific language, to the contrary). Furthermore, the late charge became due and payable, on the last day of the month in which it was assessed. The Court stated that most interest clauses contain the language "per annum" or "per month," and clauses like that in the Bordages' lease typically serve to specify the timing of payment rather than to imply compound interest.[144] Accordingly, if the due date was missed, simple interest continued to accrue on the unpaid royalty "for every calendar month and/or fraction thereof from the due date until paid."[145] The Court explained that the provisional language provided payment date predictability for the Bordages and created a fixed point to determine the maturation of legal rights for any unpaid late charges. The Court reiterated the default rule in Texas is absent clear and specific contractual or statutory authorization, compound interest is prohibited, and only simple interest is available.

The Court concluded that a plain reading of the Late Charge Provision showed that it only called for simple interest.[146] Accordingly, the Court held that without clear and express language stipulating compound interest, only simple interest is available.

---

[142] *Samson Expl., LLC v. Bordages*, 694 S.W.3d 195 (Tex. 2024).
[143] *Id*. at 199.
[144] *Id*. at 208-209 (overruling the Court's previous application of temporal language to imply compound interest in *Lewis v. Paschal's Adm'r*, 37 Tex. 315 (1873)).
[145] *Id*. at 209.
[146] *Id*.

Scout Energy Management, LLC v. Taylor Properties [147]
Supreme Court of Texas

In this case, the Court determined whether two payments made under the saving clause of a lease secured a full year of constructive production *each* or whether early payment reset the deadline. Taylor Properties ("Taylor") owned land in a unit covered by two leases, both of which contained a savings clause, which stated:

> [W]here gas from a well producing gas only is not sold or used, Lessee may pay as royalty $50.00 per well per year, and upon such payment it will be considered that gas is being produced within the meaning of [the habendum clause]….[148]

The wells ceased production and ConocoPhillips, the successor to the original Lessee, made two payments to Taylor under the savings clause in September 2017, and then again in October 2017. Each receipt bears a notation reading "Mth Begin" under which a date is listed. When Scout Energy Management, LLC ("Scout"), ConocoPhillips' successor-in-interest, made a payment in December 2018, Taylor stated the payment was too late and the leases had terminated. Taylor sued Scout for trespass to try title and a declaration that the leases had terminated prior to the 2018 payment. The trial court held the language was ambiguous but the shut-in payment was timely and the leases did not terminate. The Court of Appeals held the leases were unambiguous, but that the leases had terminated prior to the 2018 payment due to the notation on the check receipts.

The issue on appeal was whether the two payments secured two full years of constructive production from the date of first payment *or* whether early payment of the subsequent year's royalty reset the deadline so that the lease terminated one year after that payment. The Court held the savings clauses were unambiguous and interpreted the provision "per well per year" in conjunction with "upon such payment" to mean that each payment provided for one full year of constructive production regardless of how early the subsequent year's payment was made.

Finally, Taylor argued the notations on the shut-in checks and receipts expressly reflected the parties intent that the check was to cover a period that began on the date stated on the check receipt, regardless of whether a shut-in royalty had previously been paid. Taylor argued the "Mth Begin" notation on ConocoPhillips' check receipts constituted a new agreement or modification of the lease. The Court rejected this argument and held that the notations on the check receipts provided by ConocoPhillips's were too vague to constitute a new contract or lease modification that altered the terms of the savings clause between Taylor and Scout. Accordingly, the court held the payments made pursuant to the savings clause prevented the lease from terminating.

[147] *Scout Energy Management, LLC v. Taylor Properties*, No. 23-1014, 2024 WL 5249490 (Tex. Dec. 31, 2024).
[148] *Id.* at *1.

TEXAS DISTRICT COURT OF APPEALS CASES

1. Second District Court of Appeals—Fort Worth

Maverick Natural Resources, LLC v. Glenn D. Cooper Oil & Gas, Inc. [149]
Fort Worth Court of Appeals

In this case, the court determined whether an offer letter was unenforceable for lack of consideration. In March of 2021, Cooper Oil & Gas, Inc. ("Cooper") sent Maverick Natural Resources, LLC ("Maverick") a letter ("Letter") offering to purchase all right, title and interests in wells and leases in Crane County. The Letter included an exclusive right for Cooper to purchase these properties until the closing date, April 15, 2021. The Letter also included the disputed provision, "sole discretion" within a paragraph that provides:

> A reasonable diligence time…will be required. Should [Cooper], in its sole discretion, desire to move forward to a closing, no financing contingencies shall be had, and closing will occur promptly. Should [Cooper] discover anything during its diligence period it determines unacceptable, no closing or exchange of funds shall occur.[150]

On the closing date, Cooper and Maverick were still negotiating terms. Within a week, Maverick decided not to sell the property to Cooper. Cooper sued Maverick claiming the Letter amounted to a valid contract and that Maverick had breached that contract by refusing to sell the property. Maverick argued that the Letter was unenforceable due to a lack of consideration. The court held, "[f]or a contract to be enforceable, it must be supported by valid consideration."[151] The court noted that a promise to perform may constitute valid consideration. However, when a person makes a promise but retains the option to terminate the contract, that "promise" is illusory and not binding. When a party retains the option to terminate the contract, that party must provide separate consideration for the option. "Otherwise, the freedom to walk away within consequence renders the promise to perform illusory, undermining the contract as a whole."[152]

In the present case, the court gave effect to the parties' intent as expressed within the written agreement. The clear language in the Letter stated that closing would not take place if Cooper discovered "anything unacceptable" during the diligence period or if Cooper exercised the 'sole discretion' not to move forward with the contract. Therefore, the court ruled that Cooper's promise was illusory and also lacked separate consideration, thus creating an unenforceable contract.

---

[149] *Maverick Natural Resources, LLC v. Glenn D. Cooper Oil & Gas, Inc.*, No. 02-23-00183-CV, 2024 WL 2970845 (Tex. App.—Fort Worth June 13, 2024, no pet.) (mem. op).
[150] *Id*. at *4.
[151] *Id*. at *3.
[152] *Id*.

2. Fourth District Court of Appeals—San Antonio

Fasken Oil and Ranch, Ltd. v. Puig [153]
San Antonio Court of Appeals

In this case, the court determined if the deed language "free of cost forever" prohibited the deduction of post-production costs. In 1960, the Puig's conveyed their property, reserving a non-participating royalty interest. Fasken operated oil and gas wells on the property and deducted post-production costs from the Puigs' royalty payments. The 1960 deed (the "Deed") included the following language:

> There is SAVED, EXCEPTED, AND RESERVED, in favor of the undersigned, B.A. Puig, Jr., out of the above described property, an undivided one-sixteenth (1/16) of all the oil, gas, and other minerals, except coal, in, to, and under or that may be produced from the above described acreage, to be paid or delivered to Grantor, B.A. Puig, Jr., as his own property *free of cost forever*. Said interest hereby reserved is Non-Participating Royalty…[154]

As a general rule, "a royalty is free of the expenses incurred to bring minerals to the surface (production costs) but not expenses incurred thereafter to make production marketable (post-production costs)."[155] In *Hyder*, a deed contained similar language for a "cost-free (except for its portion of production taxes)" interest.[156] In that case, the Supreme Court of Texas held that the "cost-free" language deviated from the general rule that a royalty is subject to post-production costs. Here, Fasken argued that *Hyder* should be distinguished from this case because the language analyzed therein was a parenthetical exception for production taxes rather than generic cost-free language. The court of appeals disagreed, holding that the language in the Deed was similar enough to *Hyder*, and the "free of cost forever" language in the Deed must be read under its plain meaning, which includes production and postproduction costs.

Fasken also argued that the "free of cost" language only referred to production costs already exempt from the royalty because the clause did not expressly change the valuation point from the wellhead. The court noted that a wellhead valuation requires the deduction of post-production costs from the sales price. A clause that describes a royalty calculated at the wellhead while also excluding post-production costs does not actually exclude the post-production costs, since there are no marketing costs to deduct from the value at the wellhead. The court ultimately held that the Deed did not contain an express valuation point. Thus, under a plain language reading of the Deed, "free of cost forever" referred to all production and post-production costs. This is an important case because the court decided not to apply the general rule that a wellhead valuation is the default and may only be changed through express language. Instead, the court held that cost-free language absent the identification of an express valuation point results in a sales-point valuation that is not subject to post-production costs.

---

[153] *Fasken Oil and Ranch, Ltd. v. Puig*, No. 04-23-00106-CV, 2024 WL 4608591 (Tex. App.—San Antonio Oct. 30, 2024, pet. filed) (mem. op.).
[154] *Id*. at *2.
[155] *Id*. (quoting *Devon Energy Prod. Co., L.P. v. Sheppard*, 668 S.W.3d 332, 336 (Tex. 2023)).
[156] *Chesapeake Exploration, L.L.C. v. Hyder*, 483 S.W.3d 870 (Tex. 2016).

Liska v. Dworaczyk [157]
San Antonio Court of Appeals

In this case, the court interpreted a will to resolve two issues: (1) whether the devise of a mineral interest was limited to a specific unit or a larger tract of land, and (2) whether each devisee received an undivided 1/100th interest or an undivided 1/10th interest. Eugene Dworaczyk's will states:

> I hereby give, devise and bequeath to the hereinafter named individuals a ONE-TENTH (1/10) interest in the Mineral Interest I own in 118.4 acres near Gillet, Karnes County, Texas, known as the Dragon Unit; To [Eugene specified ten devisees by their full name, followed by:] a ONE-TENTH (1/10) INTEREST.[158]

The 118.4-acre tract described in the bequest contains two producing units: the Dragon Unit and the Bowers Unit. The Dragon Unit included only 21.26 acres out of the 118.4 acres. Liska, the independent executrix of Dworaczyk's estate, argued the devise was limited to the Dragon Unit. The beneficiaries argued the bequest described the entire 118.4-acre tract. When faced with two possible interpretations, Texas courts are directed to adopt an interpretation giving relevant meaning to all of the language. The court explained the construction proposed by the beneficiaries results in the words "known as the Dragon Unit" being rendered meaningless. Accordingly, based on the will's plain language, "the mineral interest described in the bequest is limited to the part of the 118.4 acres that comprises the Dragon Unit."[159]

Next, the court determined the size of each beneficiaries' share of the devise. Liska argued that by writing "one-tenth (1/10)" after each name, Dworaczyk intended to give each devisee 1/10th of the initially-stated 1/10th interest (or 1/100th each). The beneficiaries disagreed, arguing the bequest gave each devisee an undivided 1/10th interest. The trial court interpreted the devise as resulting in 1/10th to each devisee. In its decision, the court upheld the trial court's holding, explaining that "one-tenth (1/10)" next to each devisee's name was not an intention to divide the property further. Instead, Dworaczyk "simply list[ed] each of the devisees and specifie[d] the fraction of the mineral interest" each was to receive, which was consistent with the way Dworaczyk devised other interests in the will.[160]

[157] *Liska v. Dworaczyk*, No. 04-22-00170-CV, 2024 WL 251963 (Tex. App.—San Antonio Jan. 24, 2024, no pet.) (mem. op.).
[158] *Id*. at *1.
[159] *Id*. at *4.
[160] *Id*. at *6.

3. Sixth District Court of Appeals—Texarkana

Hunt County Appraisal District v. Lake Tawakoni Wind Point Park Corporation [161]
Texarkana Court of Appeals

In this case, the court examined whether a permit granted a possessory interest in real property or merely a license. The Sabine River Authority ("Sabine"), a political subdivision of the State, owned the fee interest in Lake Tawakoni Wind Point Park, a recreational park operated and open for public use in Hunt County. Sabine contracted with Lake Tawakoni Wind Point Park Corporation ("LT Corp.") to operate the park. Sabine granted LT Corp. a permit to operate the Park under a limited use permit. After LT Corp. began operating the Park, Hunt County Appraisal District ("County") sent LT Corp. a bill for taxes assessed on the value of the improvements.[162] LT Corp. protested the taxes assessed by the County.

The County argued that while Sabine was a tax exempt entity, Section 25.07 of the tax code authorized the taxation of LT Corp's leasehold interest in the property.[163] The court analyzed whether LT Corp.'s use of the property created a leasehold estate or a qualified license.

Here, the court explained that LT Corp. had a license to use the property, rather than a leasehold interest, because their use of the property was not exclusive but rather strictly limited to the permitted uses in the contract. [164] For example, LT Corp. was required to maintain the grounds of the Park but could not alter the Park without obtaining Sabine's consent. Sabine also retained the right to access every part of the premises and to terminate all of LT Corp.'s rights under the permit for any reason. The court held that because LT Corp. held no leasehold or possessory interest in the park, it was not an owner under the tax code, and the County's tax assessment was improper.[165]

[161] *Hunt Cnty. Appraisal Dist. v. Lake Tawakoni Wind Point Park Corp.*, No. 06-24-00016-CV, 2024 WL 4585608, (Tex. App.—Texarkana Oct. 28, 2024, pet. filed), reh'g denied (Nov. 19, 2024) (mem. op.).
[162] The County assessed $48,743.50 for improvements to the park.
[163] Tex. Tax Code Ann. §25.07; *see also* Tex. Tax Code Ann. § 1.04(16).
[164] *Hunt Cnty. Appraisal Dist.*, 2024 WL 4585608 at *5 ("certain purpose" was the defining characteristic of a license, as opposed to a possessory interest).
[165] *Id.* at *7.

Valence Operating Company v. Davidson [166]
Texarkana Court of Appeals

In this case, the court determined whether a deed clause reserved an interest in the mineral estate. Both parties in this case claimed ownership of the same mineral interest within a 64.5-acre tract of land located in Panola County. In 1951, E.L. Briggs and wife, Myrtle, sold the surface estate to their grandson, Jackie, while reserving all the minerals. In 1956, Myrtle and Jackie conveyed the surface estate and one-half of the minerals to Edmond E. Coleman and his wife, Mildred Coleman, subject to a life estate in the mineral interest reserved by Myrtle ("Briggs Deed"). The Briggs Deed contained the following language:

> IT IS UNDERSTOOD, HOWEVER, that all of the oil, gas and other minerals in and under the hereinbefore described tract of land are excepted and reserved unto Mrs. Myrtle Briggs, for and during her lifetime…and upon the death of the said Mrs. Myrtle Briggs, such minerals shall pass and vest in the Grantee herein, his heirs and assigns, in fee simple title.[167]

In 1964, prior to Myrtle's death, Edmond conveyed the property to Paul Carter and his wife, Eleanor Carter, that contained the following language ("Coleman Deed"):

> IT IS UNDERSTOOD AND AGREED that all Oil, Gas and other Minerals have been excepted and reserved by former owners.[168]

Myrtle died in 1965, terminating the life estate that was excepted and reserved in the Briggs Deed. Valence Operating Company ("Valence"), which claimed its ownership of the mineral estate through the grantees of the Coleman Deed, argued that the "excepted and reserved by former owners" language in the Coleman Deed did not serve as a reservation. Instead, Valence argued, the language merely narrowed the scope of the Coleman Deed to convey only what the Briggs Deed conveyed.

The court's analysis centered on whether the grantors in the Coleman Deed reserved an interest for themselves or excepted any portion of the mineral estate from the conveyance. A reservation creates a new right in favor of the grantor, whereas an exception excludes an interest from the grant. Relying on its analysis in a similar case, the court noted that the language in the Coleman Deed recited that mineral interests were previously reserved and excepted but did not act as a new reservation of a mineral interest. As such, the court concluded that the language used in the Coleman Deed only served to notify the Carters of the reservation from the Briggs Deed, did not reserve any additional portion of the mineral estate, and had no effect on the interest conveyed in the Coleman Deed.

---

[166] *Valence Operating Co. v. Davidson*, No. 06-23-00090-CV, 2024 WL 5180100 (Tex. App.—Texarkana Dec. 20, 2024, no pet. h.) (mem. op.).
[167] *Id*. at *2.
[168] *Id*. at *3.

4. Eighth District Court of Appeals—El Paso

Anadarko Petroleum Corporation v. Chevron U.S.A. Inc. [169]
El Paso Court of Appeals

In this case, the court determined whether an arbitration provision in a mineral farmout agreement applied to a dispute arising from a subsequently executed lease agreement. In 2006, Chevron and Anadarko executed a Mineral Farmout Agreement (the "MFA"). The parties later entered into a lease agreement pursuant to the MFA. The lease was silent about dispute resolution. In 2023, Chevron sued Anadarko, alleging that Anadarko failed to properly calculate and pay royalties under the lease. Anadarko argued that because the lease agreement was made pursuant to the MFA, any disputes arising from the lease or MFA had to be resolved via arbitration. Furthermore, the arbitration provision delegated the determination of arbitrability to the arbitrator, meaning the arbitrator would decide the scope of the arbitration provision. Section 16.11 of the MFA's dispute resolution read:

> If a dispute arises out of or relates to this Agreement, or the breach thereof…the Parties agree to submit the dispute to arbitration… [to] be conducted in accordance with the AAA's commercial Arbitration Rules…[170]

Chevron acknowledged the arbitration agreement in the MFA, but argued the clause does not apply to a dispute arising under the lease. Consequently, Chevron argued that because the lease did not contain an arbitration provision, it could not be compelled to arbitrate.[171] In contrast, Anadarko argued that the MFA and lease agreement were not separate agreements, as the lease incorporated various references to the MFA, including the arbitration provision.[172] Anadarko asserted that any limiting language of the MFA did not undermine the agreement's clear and unmistakable delegation of arbitrability issues.

As a general rule, a court must enforce an agreement to delegate arbitrability disputes to an arbitrator, provided that the agreement is clear and unmistakable. Accordingly, the court explained that when an arbitration agreement delegates the authority of arbitrability to the arbitrator, the arbitrator alone, not the court, must resolve whether the parties' dispute falls within the scope of the arbitration agreement. The court reasoned that if it were to determine whether the specific dispute required arbitration, it would render the parties' agreement to delegate the issue of arbitrability to an arbitrator meaningless. Even though the MFA and the lease agreement were executed years apart, the lease agreement was entered into pursuant to the MFA and incorporated the MFA by reference. Accordingly, the court held that the dispute over arbitrability must begin with the arbitrator, specifically noting that Chevron was free to assert its claims as to the applicability of the arbitration clause to the arbitrator and appeal the arbitrator's judgment if it so chose.

---

[169] *Anadarko Petroleum Corp. v. Chevron U.S.A. Inc.*, No. 08-24-00059-CV, 2024 WL 5085974 (Tex. App.—El Paso Dec. 11, 2024, no pet. h.) (mem. op.).
[170] *Id*. at *3.
[171] *Id*. at *5.
[172] *Id*. at *3.

Matter of Estate of Portillo[173]
El Paso Court of Appeals

In this case, the court determined whether the probate court modified the agreement of the parties when it interpreted the term "estate property" to exclude the surviving spouse's 1/2 community property interest. The court determined that the term "estate property" as used in the settlement agreement was unambiguous. "Estate property," the court explained, could only mean the decedent's estate and did not include the surviving spouse's community property share.

This appeal arose from a dispute regarding the distribution of Edward R. Portillo's estate. Three years after litigation, the parties came to an agreement that the remainder of the estate property was to be divided 35% to Amanda and 32.5% each to Leandra and Rebecca. Leandra, Edward's surviving spouse, argued that only Edward's one-half of the remaining community property estate should be distributed, while Amanda argued that the entire estate, including Leandra's one-half of the community property estate should be divided. The probate court held that "estate property" did not include Leandra's one-half of the community property.

On appeal, Amanda argued that the term "estate property" included the entirety of the community property estate. The court held that the interpretation of the settlement agreement depended on whether "estate property" had a definite meaning. Although not defined in the settlement agreement, the Texas Estates Code defines "estate" as "a decedent's property."[174] Additionally, the court reasoned that over a century's worth of case law established a "decedent's property does not include the surviving spouse's one-half interest in community property."[175] Therefore, the court held that the term "estate property" within the settlement agreement had a clear and unambiguous meaning and did not include the surviving spouse's half interest in community property.

[173] *Matter of Est. of Portillo*, No. 08-23-00167-CV, 2024 WL 1616567 (Tex. App.—El Paso Apr. 15, 2024, no pet.) (mem. op.).
[174] *Id*. at *3 (citing Tex. Est. Code Ann. § 22.012).
[175] *Id*. at *3 (citing *Carnes v. Meador,* 533 S.W.2d 365, 368 (Tex. App.—Dallas 1975, writ ref'd n.r.e)).

Montgomery, Trustee of Tri-Mont Irrevocable Trusts v. ES3 Minerals, LLC [176]
El Paso Court of Appeals

In this case, the court determined whether a 1955 Deed reserved a floating 1/4 NPRI or a fixed 1/32 NPRI. In 1955 J.D. Arthur and his wife, Elva J. Arthur conveyed to W. Travis Lattner, Jr., the following NPRI in lands in Reeves County, Texas:

> [T]he Grantors do hereby expressly include in this conveyance, a non-participating royalty of one-fourth (1/4th) of the landowner's usual one-eighth (1/8th) royalty on oil and gas produced and saved from said land[.][177]

Appellants, the Montgomery's, are successors in interest to W. Travis Lattner, while the Appellees, ES3 Minerals, are successors in interest to J.D. Arthur and Elva J. Arthur. Appellants alleged the 1955 Deed conveyed a floating 1/4 NPRI while Appellees argued it conveyed a fixed 1/32 NPRI. The trial court held the 1955 Deed conveyed a fixed 1/32 NPRI. The issue on appeal is whether the 1955 Deed conveyed a fixed or floating NPRI.

Under *Van Dyke v. Navigator*, the Supreme Court of Texas held that double fractions involving 1/8 create a rebuttable presumption under the estate misconception theory "1/8 reflects the entire mineral estate, not just 1/8 of it[,] or, in the context of royalty interests, that 1/8 was used as a placeholder for future royalties generally[.]"[178] The presumption may be rebutted by express language contained in the instrument. In this case, the 1955 Deed contained a double fraction involving 1/8, thereby triggering the rebuttable presumption that "1/8" refers to the entirety of the mineral estate and therefore conveys a 1/4 floating NPRI. The court examined the 1955 Deed to determine if it contained language rebutting the presumption. The court found that "[a] specific reference to the landowner's royalty and the use of the usual 1/8 royalty' supports the presumption of an intended floating interest." [179] Furthermore, the 1955 Deed contained no language sufficient to rebut the presumption that it conveyed a 1/4 floating NPRI.

[176] *Montgomery, Tr. of Tri-Mont Irrevocable Trusts v. ES3 Minerals, LLC*, 697 S.W.3d 397 (Tex. App.—El Paso 2024, no pet.).
[177] *Id*. at 400.
[178] *Id*. at 402 (citing *Van Dyke v. Navigator Grp*., 668 S.W.3d 353, 364 (Tex. 2023)).
[179] *Id*. at 405.

Rock River Minerals, LP v. Pioneer Natural Resources USA Inc. [180]
El Paso Court of Appeals

In this case, the court decided whether an assignment of royalty interest included a depth limitation when the description of the assigned interest referenced depths located within the geographic boundaries of the associated unit. The court held the assignment conveyed all overriding royalty interests owned in all depths of the land within the surface boundary of the unit. Michael L. Cass executed the Assignment and Bill of Sale at issue which granted the following:

> All right, title and interest of Seller in, to and under the Oil, Gas and Mineral Leases described on Exhibit "A", including… the oil and gas leasehold estates, fee mineral interests, royalty interests, *overriding royalty interests*, and other interests *in the lands* which are *described on* Exhibit A…[181]

Exhibit "A" described the lands as "…*all lands* from the surface of the earth *to all depths* located within *the geographic boundaries…*" of the unit, as described in the Unit Agreement.[182]

Rock River Minerals, LP ("Rock River"), as a successor of Michael L. Cass, argued the assignment incorporated the Unit Agreements by reference, and that, because the Unit Agreements were limited to the Spraberry Formation, the assignment must also be limited to the Spraberry Formation. Pioneer Natural Resources USA Inc. ("Pioneer") argued the assignment included no depth limitation because the exhibit thereto described the land as "to all depths" and the reference to the Unit Agreement was only to determine the boundaries of the lands conveyed.

The court began its reasoning by stating that the incorporation of the Unit Agreement did not necessarily mean it all of its provisions applied to the assignment. Here, the Unit Agreement was incorporated for an express purpose: "to describe the geographic boundaries of the lands in which the royalty interests are held." [183] As such, the reference to the Unit Agreement served to identify the property by defining the surface boundaries, but the reference did not act as an express depth limitation.

The court then looked to the dictionary definition and plain meaning of the word "geography," "a science that deals with the description, distribution, and interaction of the diverse physical, biological, and cultural features of the earth's *surface*." [184] Additionally the court noted the parties chose to use the word "unit" rather than "unitized formation" to define the boundaries of the interests conveyed.[185] Thus, within the assignment, the plain language of the term "geographic boundaries" was interpreted to mean the surface boundaries which includes all depths unless expressly limited otherwise.[186]

---

[180] *Rock River Minerals, LP v. Pioneer Nat. Res. USA Inc.*, No. 08-23-00216-CV, 2024 WL 4528917 (Tex. App.—El Paso Oct. 18, 2024, no pet. h.) (mem. op.).
[181] *Id*. at *2.
[182] *Id*. at *1.
[183] *Id*. at *3.
[184] *Id*.
[185] *Id*. at *4.
[186] *Id*.

5. Ninth District Court of Appeals—Beaumont

Allen v. Crown Pine Timber 1, L.P. [187]
Beaumont Court of Appeals

In this case, the court considered whether the General Land Office ("GLO") erred in 1907 when they recognized a 134-acre vacancy between the border of the 1874 Jose Delgado Survey ("1874 Delgado Survey") and the 1835 William Young League Survey ("1835 William Survey") and whether Crown Pine Timber 1, L.P. ("Crown") or Alvin C. Allen Jr. ("Allen") held superior title to the 134-acre tract. In 2016, Allen bought 134 acres ("Bristley Tract") in a tax foreclosure sale. Crown then sued, claiming the Bristley Tract was part of the 4,600 acres it acquired in 2007. Crown traced its title to the 1874 Delgado Survey which was patented in 1894 to Jose Delgado.

In the early 1900s, George R.L. Bristley sent a series of requests to the GLO claiming there was a vacancy between the border of the 1835 William Survey and the 1874 Delgado Survey. The GLO initially rejected Bristley's requests but then later recognized a 134-acre vacancy, which it patented to Bristley. Allen traced its title to the Bristley Patent.

Ownership of the Bristley Tract hinged on the calls of the 1874 Delgado Survey. Crown introduced evidence from a state land surveyor who re-surveyed the 1874 Delgado Survey by locating the natural and artificial monuments for the lines and corners of the survey and found no gaps between the Delgado Survey and earlier adjoining surveys.[188] Allen relied on his own surveyor who, without conducting field work, reported his findings that if the calls of adjoinder control over the calls for course and distance, then the property conveyed by the 1894 Delgado Patent would have encompassed more acreage than what the heirs of Jose Delgado were entitled to.[189]

The court stated that, when constructing grants to determine their boundaries, "first in importance are natural objects, such as streams [or] hills;" second are artificial objects, such as stakes, or marked trees; and lastly, the least important, being course and distance.[190] The court stated, "if the open calls for adjoinder tie the [1874 Delgado Survey] and [1835 William Survey] together such that they have a common border, a reasonable jury could reach just one conclusion – no vacant land existed[.]"[191]

The court stated further that the GLO had no authority to annul patents and awards when issued by the state through its proper offices because the right to annul a patent or award required judicial authority, and a patent that has been issued contrary to the law is void. When the governor signed the Bristley Patent, the state had already conveyed the 134-acre tract to the Delgado heirs. Thus, the court held that the Bristley Patent was void.[192]

---

[187] *Allen v. Crown Pine Timber 1, L.P.*, No. 09-21-00373-CV, 2024 WL 3055706 (Tex. App.—Beaumont June 20, 2024, pet. filed) (mem. op.).
[188] *Id*. at *4-5.
[189] *Id*. at *10.
[190] *Id*. at *11.
[191] *Id*. at *13.
[192] *Id*. at *16.

Premcor Pipeline Co. v. Wingate [193]
Beaumont Court of Appeals

In this case, the court determined whether granting language in an easement caused it to be "general" and, if so, whether the trial court could re-write the easements to limit its width. Jim Wingate was the owner and successor-in-interest to eleven parcels of land burdened by nine easements recorded in 1954 ("1954 Easements"). Premcor was the successor-in-interest to the 1954 Easements and owned two across the land at issue. The 1954 Easements were general easements and did not define a width for the pipeline right of way but stated the grantee "shall have the right to do whatever may be requisite for the enjoyment of the rights granted herein."[194] Wingate brought suit against Premcor after a disagreement regarding Premcor's use of the roads and bridges on his property. Thereafter, the trial court determined that the language of the 1954 Easements was ambiguous and rewrote the general easement to include a fixed width of 20 feet.

Relying primarily on the decision in *SWEPCO*, the court explained that general easements do not require a fixed width; as such, "courts have long been reluctant to write fixed widths [into] easements when parties to the easements never agreed to a particular width."[195] The court further noted that a general easement without a fixed width does not render the easement ambiguous, and, as a matter of law, the court must interpret the easement relying on the language used in the instrument. The court does not have the discretion to allow outside evidence to interpret the contracted easement further if said easement is rendered unambiguous.

The *SWEPCO* decision noted that landowners are charged with awareness of existing easements that may encumber their property, including easements that do not contain a specified width but instead include general language.[196] Here, when Wingate bought the property, he knew that the 1954 Easements had no specified width and that Premcor had the right of ingress and egress for many purposes. The court cited *Atmos Energy Corp.*, explaining that a blanket easement does not mean an easement that grants "unrestricted use of the entire tract" but instead, that the grantee "merely has a vested interest in such land to use it for the purposes authorized in the instrument."[197] While Premcor must "utilize the land in a reasonable manner and only to the extent that is reasonably necessary," Premcor was granted the right "to do whatever may be requisite for the enjoyment of the rights herein granted, including the right of ingress and egress to and from the said tract of land, for the purpose of laying, maintaining, repairing, renewing, changing the size of, and restoring of pipelines."[198] As such, parties may intentionally choose not to set a fixed width for an easement, and the court may not overextend its power by declaring a fixed permanent width of an easement that intentionally excluded one. Therefore, the trial court erred in adding a defined width to the 1954 Easements, as they were unambiguous general easements with no defined fixed width as contracted between the parties.

---

[193] *Premcor Pipeline Co. v. Wingate*, No. 09-22-00117-CV, 2024 WL 1565334 (Tex. App.—Beaumont Apr. 11, 2024, no pet.) (mem. op.).
[194] *Id*. at *1.
[195] *Id*. at *11 (citing *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 690 (Tex. 2020)).
[196] *Id*.
[197] *Id*. at *12 (citing *Atmos Energy Corp. v. Paul*, 598 S.W.3d at 456).
[198] *Id*.

6. Eleventh District Court of Appeals—Eastland

Boren Descendants and Royalty Owners v. Fasken Oil and Ranch, Ltd. [199]
Eastland Court of Appeals

In this case, the court determined whether a deed conveyed a fixed or floating NPRI. In January 1933, the predecessor of Fasken Oil and Ranch, Ltd., Fasken Land and Minerals, Ltd., and Fasken Royalty Investments (collectively "Fasken") conveyed 90 sections of land to J.E. Mabee, the successors of whom are the Boren Descendants and Royalty Owners, the Mabee Ranch Royalty Partnership, L.P, and the remaining defendants in the underlying lawsuit (collectively "Descendants"), which contained the following reservation:

> Excepting, saving, and reserving from this conveyance, however, unto and for the use and benefit of the grantor, Midland Farms Company, and its successors and assigns forever, an undivided one-fourth (1/4) of the usual one-eighth (1/8) royalty in and to all oil, gas, and other minerals in, to, and under… said lands.[200]

Between 2013 and 2020, Fasken signed a series of division orders, agreeing to receive royalty payments as though it owned a fixed 1/32 NPRI. In 2019, Fasken revoked its division orders and initiated a suit to determine whether it owned a floating 1/4 NPRI. The trial court held that the deed reserved a fixed 1/32 NPRI, and Fasken appealed.

The appellate court began by discussing the cent Supreme Court of Texas decision in *VanDyke v. Navigator Grp. VanDyke* established "a presumption that the … use of such a double fraction was purposeful and that 1/8 reflects the entire mineral estate."[201] The presumption may be rebutted either by express language or the repeated use of fractions other than 1/8. The Descendants argued that the use of "the *usual* 1/8th" rebutted the presumption established by *VanDyke*. The court rejected this argument, holding that the use of "the usual 1/8th" did not rebut the presumption because use of that language has been held to create a floating NPRI. The court held the 1933 Deed was not ambiguous and there was no express language to rebut the presumption it conveyed a floating NPRI.

The Descendants next asserted various affirmative defenses, including estoppel by division order and presumed grant. The court rejected the estoppel by division order argument, stating there was no evidence the Descendants were parties to any documents included in the record or were aware of their existence at the time they were created. The court stated that a division order only operates to protect the parties to the division order and does not apply to the Descendant's claim.[202]

---

[199] *Boren Descendants and Royalty Owners v. Fasken Oil and Ranch, Ltd.*, 703 S.W.3d 874 (Tex. App.—Eastland 2024, no pet. h.).
[200] *Id*. at 882.
[201] *Id*. at 884 (citing *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353, 357, 364 (Tex. 2023)).
[202] *Id*. at 889. The Descendants also asserted other defenses which we did not deem relevant to this brief, including a presumed grant defense which was dismissed because it was not listed among the issues subject to the interlocutory appeal.

Green v. Century Oak Wind Project, LLC [203]
Eastland Court of Appeals

In this case, the court was asked to determine whether the effect of windfarms constituted a public and private nuisance on neighboring properties. Philip Alan Green and Jonathan Zackhery Wilks (the "property owners") sought a permanent injunction and monetary damages for public and private nuisances caused by a windfarm operated by Century Oak Wind Project, LLC ("Century Oak").[204] The property owners claimed the windfarm created several nuisances: a visible nuisance during the day, a visible nuisance at night, a constant audible nuisance, a constant vibrating nuisance, and a nuisance that would harm or destroy wildlife. Additionally, in their first amended complaint, the property owners asserted claims for intentional conduct causing nuisance injury, negligent conduct causing nuisance injury, and common nuisance.

The common nuisance complaint was based on Section 125.0015(a) of the Texas Civil Practice and Remedies Code, as the property owners alleged that Century Oak committed criminal trespass and disorderly conduct.[205] The court determined that the property owners failed to provide factual allegations showing that Century Oak controlled the property where the windfarm was located to the extent that it would control who entered the property. The property owners also failed to allege that Century Oak either habitually committed criminal trespass nor entered the property to do so. Regarding the disorderly conduct claim under criminal trespass, the property owners argued that the sound from the turbines rose to a level sufficient to constitute disorderly conduct.[206] However, the court held that because the wind turbines were located only a few hundred yards away on private property, they did not create an unreasonable nuisance that would legally qualify as disorderly conduct near a private residence. Therefore, the court affirmed the decision to dismiss the property owners' common nuisance claim.

The property owners asserted a daytime visible nuisance claim based on the wind turbine's size and paint color, alleging that it created a flicker effect that caused severe headaches, nausea, difficulty concentrating, and seizures. However, because the nearest turbines were several hundred yards away and miles from the nearest property lines, the only effect was on the duration of the shadow on private residences. Consequently, the court concluded that the turbine shadows were not a daytime nuisance but were merely an aesthetic complaint.[207]

The nighttime nuisance complaint stemmed from the Federal Aviation Administration-mandated flashing red lights affixed to the turbines. The property owners alleged that the lights deprived them

[203] *Green v. Century Oak Wind Project, LLC*, No. 11-23-00125-CV, 2024 WL 5081686 (Tex. App.—Eastland Dec. 12, 2024, no pet. h.) (mem. op.).
[204] *Id*. at *2 (defining "nuisance" as the "…the legal injury—the interference with the use and enjoyment of property—that may result from the wrongful act and result in the compensable damages.").
[205] *Id*. at *4 (explaining the requirement for a common nuisance claim through criminal trespass as "…the defendant 'maintain[ed] a place to which persons habitually go' to commit criminal trespass and disorderly conduct, and 'knowingly tolerate[] the activity and… fail[] to make reasonable attempts to abate the activity.'").
[206] *Id*. at *6 (stating that criminal trespass requires an "'intrusion of the entire body,' suggesting intrusion by a human body, rather than light or sound.").
[207] *Id*.

of "their ability to 'enjoy the night sky, the moon, and the stars.'"[208] The court acknowledged that bright lights could constitute a nuisance if they were sufficiently extreme in an individual's home. However, in this case, the complaint was purely an aesthetic-based complaint. Because the lights did not impact the property owners' residences, the court determined there was no nighttime nuisance.

The final nuisance claims alleged that the windfarm would affect and destroy wildlife due to audible and tactile inferences. Century Oak contended that the property owners' assertions for these remaining claims were correctly dismissed because they only plead legal conclusions rather than facts demonstrating that Century Oak intentionally caused interference amounting to a nuisance. However, the court reasoned that the property owners were not required to plead that Century Oak intentionally interfered with their use and enjoying their property.[209] Instead, specific acts of neglect are reserved for the factfinder, and Century Oak only needed to meet the fair-notice pleading standard, which it did.[210] Therefore, the court held that prospective nuisance claims could be enjoined and found that the trial court erred in dismissing the property owners' claims regarding auditory, tactile, and wildlife interference.[211]

In conclusion, the court determined that the daytime and nighttime interference did not constitute a nuisance; however, the facts pleaded by the property owners were sufficient to establish a prospective intentional nuisance claim.

[208] *Id*. at *7.
[209] *Id*. at *8 (referencing *CrossTex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 605).
[210] *Id*. (*see Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston 2014, pet. denied)).
[211] *Id*.

Patch Energy LLC v. Indio Minerals LLC [212]
Eastland Court of Appeals

In this case, the court decided whether the death of a testator qualified as the event that vested title in the devisee of a foreign will rather than the ancillary probate of the will in Texas. The court further determined whether the grantees of the intestate heirs were bona fide purchasers against the devisees. This case centers on competing claims to a portion of a royalty interest that had been reserved in a 1930 conveyance of lands located in Midland County. At the center of the dispute is the original landowner's will that was probated in Illinois and subsequently filed for record and admitted to an ancillary probate in Texas.

Here, Patch Energy LLC, Candlewood Resources LLC, and Prelly Minerals (collectively "Patch") traced their claim to the royalty interest from the original owner's intestate heirs. Conversely, Indio Minerals LLC, Gunner Investments, LLC, Gunner Oil Series, LLC, and Madaket Energy LLC (collectively "Indio") traced their claim to the royalty interest from the original owner's devisees under a will probated in Illinois more than 40 years after the original owner's death. The pertinent facts are as follows:

- In 1930, Viola Hoots Ash ("Viola") and her husband, conveyed by warranty deed their mineral interest in the NW/4 of Section 21, Block 38, Township 4-South, Texas & Pacific Railway Company Survey, Midland County, Texas, to J.R. Vandeventer, reserving an undivided one-eighth royalty interest in and to all oil, gas, and other minerals in, on, or under the property (the "Ash Interest").

- In 1974, Viola died in Macon County, Illinois. Viola's husband predeceased her, and Viola and her husband had no children. Viola's will devised the Ash Interest to her sister, Mary Shock Henard ("Henard").

- In early 2020, Patch discovered the Ash Interest in the tax rolls of Midland County. Patch was interested in acquiring the Ash Interest, and researched Viola's estate to identify her heirs. Patch inspected the real property records of Midland County and the probate records of Macon County, Illinois. Despite Patch's search, Patch's team could not "find any Last Will and Testament or administration of estate attributable to Viola." Accordingly, Patch sought to acquire the Ash Interest from Viola Ash's intestate heirs. Patch purchased the interests of 39 out of the 44 heirs Patch identified.[213]

- Similarly, in early 2020, Indio discovered the Ash Interest. After contacting the Macon County Circuit Court Clerk, Indio learned that Viola's will had been deposited with the Macon County Circuit Court Clerk's office 3 days after Viola died in 1974. Indio began researching Henard, the devisee under Viola's will, and discovered she had died in 1979. Henard's will devised her real property to three individuals, who had each passed. Nonetheless, Indio determined the

[212] *Patch Energy LLC v. Indio Minerals LLC*, 702 S.W.3d 911 (Tex. App.—Eastland 2024, no pet.).
[213] *Id*. at 916 (Indio later asserted that Patch had knowledge of the existence of Viola's will before purchasing its interest. Patch attached a deposition in their motion for summary judgment where it confirmed that Macon County Clerk's Office advised Patch of the existence of Viola's will).

heirs of Henard's devisees: Beverly Norton, Curtis Allen Thomas, David C. Thomas, Jennifer M. Bauer, Randy W. Bauer, Maurine Joyce Gregory, and William Randolph Major.[214]

- After Indio learned that Viola's will could be probated in Illinois since the will was timely established in Macon County. Viola's will was then admitted to probate in Illinois in August 2020, and admitted to probate through an ancillary proceeding in Midland County in 2022.

- Patch filed suit seeking a declaratory judgment that the Ash Interest passed under Texas' intestacy laws and not through Viola's will. The trial court held that title passed under the will and Patch could not qualify as a bona fide purchase for value against the will.

On appeal, Patch argued that a foreign will does not affect the passage of a real property interest unless it has been admitted to ancillary probate in Texas and asserted that a foreign will acts as a conveyance that vests title in a testator's devisees as of the date it is recorded. Accordingly, Patch contended that Indio could only have acquired superior title to the Ash Interest if Viola's will was probated or recorded in Midland County before Patch obtained its deed from Viola's heirs at law. In its analysis, the court noted that Section 101.001 of the Estate Code provides that if a person dies leaving a lawful will, all the person's estate (devised by will) immediately vests in the devisees.[215] Patch cited Section 503.051 of the Estate Code and *Slaton v. Singleton*, in support of its contention that they held superior title to the disputed portion of the Ash Interest; Section 503.051 states that: "[a] copy of a foreign will or other testamentary instrument…take[s] effect…*beginning at the time the instrument is delivered to the clerk to be recorded*."[216] However, Patch's interpretation was not well taken by the court. *Slaton* did not support Patch's interpretation of Section 503.051, that a foreign will vests title in a testator's devisees when the will was probated in Texas.

Conversely, Indio asserted that under *Long v. Shelton*, a foreign will that had been probated in Texas has the same impact as a domestic will and transfers title to real property to the testator's devisees on the date of the testator's death.[217] In *Long*, the court discussed a prior version of Section 503.051 and held that when a foreign will has been probated, the title of the devisee relates back to the testator's death and becomes effective from that date. Thus, under *Long*, the testator's death is the event that vests title in the devisee of a foreign will rather than the ancillary probate of the will. Accordingly, the court noted that neither the Estates Code nor established case law supported Patch's assertion that a devisee's interest under a foreign will does not vest until the foreign will has been admitted to ancillary probate in Texas.

Next, the court determined that Patch's status as a bona fide purchaser was relevant to the disputed Ash Interest and that Patch was not a bona fide purchaser of its interest acquired under the quitclaim deed. Patch cited two sections of the Estate Code, arguing that it did not have statutory notice of Viola's will when it acquired its portion of the Ash Interest since Viola's will was only on deposit

[214] Indio purchased the interests of Curtis Allen Thomas, Jennifer M. Bauer, Randall W. Bauer, and Beverly Marie Norton. Patch purchased the interests of William Randolph Major, Davis Clark Thomas, and Maurine Joyce Gregory.
[215] *Patch Energy LLC*, 702 S.W.3d at 920.
[216] Tex. Estates Code Ann. § 503.051; *see also Slaton v. Singleton*, 72 Tex. 209, 9 S.W. 876, 878 (1888).
[217] *Long v. Shelton*, 155 S.W. 945 (Tex. Civ. App.—Texarkana 1913, writ ref'd).

in Illinois at the time. Nonetheless, the court specified the proper portion of the Texas Estate Code to follow regarding foreign wills-Section 501.001, which provides:

> The written will of a testator who was not domiciled in this state at the time of the testator's death may be admitted to probate at any time in this state if: (1) the will would affect any property in this state; and (2) proof is presented that the will stands probated or otherwise established in any state of the United States[.][218]

Thus, the ancillary probate of a foreign will in Texas would make the foreign state's probate laws relevant; as such, there is no time limit for the Illinois will to be admitted to probate. Accordingly, Patch's status as a bona fide purchaser is relevant.

Lastly, the court determined that a party that takes an interest by a quitclaim deed cannot be a bona fide purchaser.[219] As stated by the court, "the granting clause in a deed purports to grant and convey the described property, whereas the granting clause in a quitclaim deed only purports to grant and convey whatever 'right, title, and interest' the grantor has in that property at the time the instrument is executed and delivered."[220] Indio asserted that both the Mineral and Royalty Deed and the Quit Claim Deed were intended only to convey the grantor's interest, whatever that may be, to Patch.[221] Accordingly, the court determined that Patch was not a bona fide purchaser of its interest since it took via quitclaim deeds.[222]

[218] Tex. Estates Code Ann. § 501.001.
[219] *Patch Energy LLC*, 702 S.W.3d at 925.
[220] *Id*. (referencing *Jackson v. Wildflower Prod. Co., Inc.*, 505 S.W.3d 80, 88-89 (Tex App.—Amarillo 2016, pet. denied)).
[221] *Id*. ("the grantee under a quitclaim deed… cannot be an innocent purchaser because the deed itself places the grantee on notice that there may be superior claims to title").
[222] *Id*. at 927.