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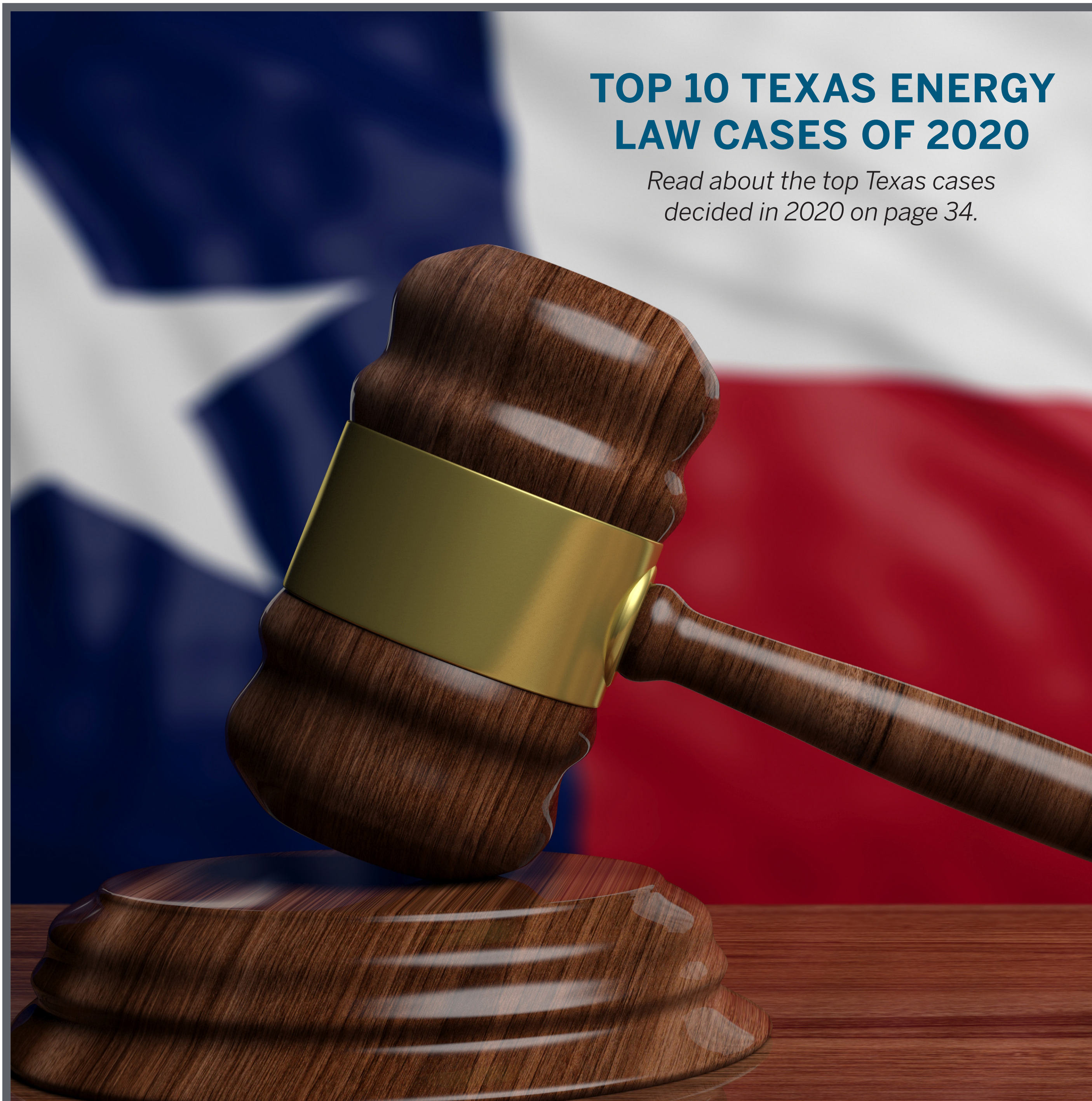
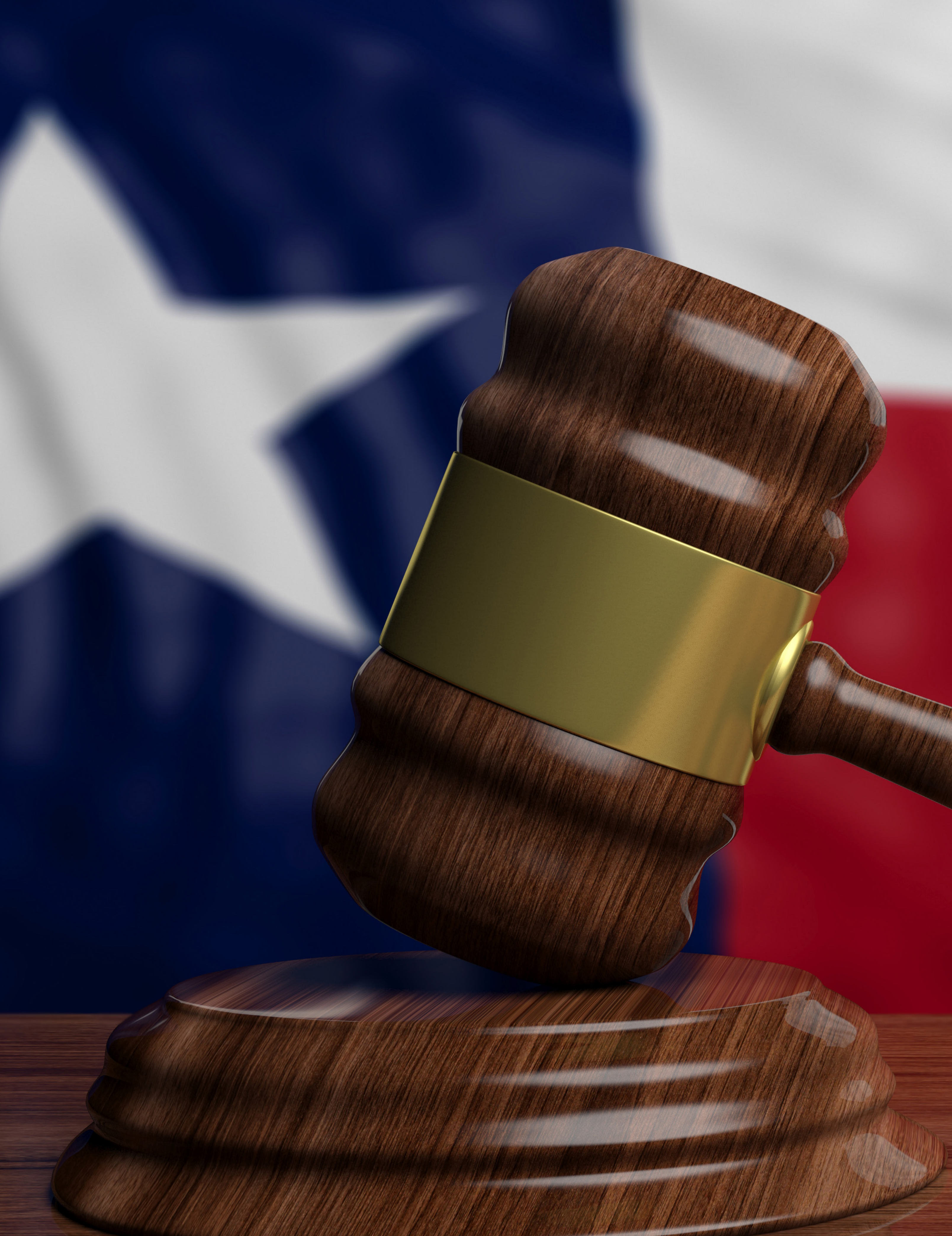
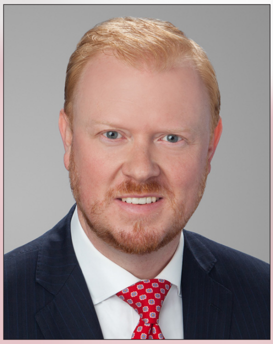


TOP 10 TEXAS ENERGY LAW CASES OF 2020

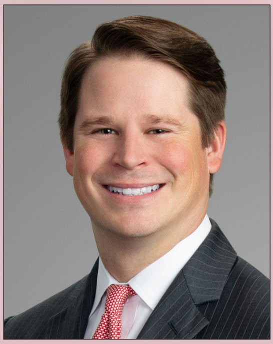
Read about the top Texas cases decided in 2020 on page 34.



Top 10 Texas Energy Law Cases of 2020



by/ RYAN SEARS



by/ RUSTY TUCKER

This article discusses significant oil and gas decisions, in chronological order, from state courts in Texas during 2020. It is not intended to be a strict legal analysis, but rather a useful guide for landmen in their daily work. Therefore, a complete discussion of all legal analyses contained in the decisions is not included.

SAMSON EXPL. LLC V. MOAK MORTGAGE & INVESTMENT CO., NO. 09-18-00463-CV, 2020 WL 238538 (TEX. APP. — BEAUMONT [9TH] JAN. 16, 2020) (MEM. OP.)

This case considered the duties owed by a unit operator to an unleased mineral interest owner in tracts within the unit, but upon which no well is drilled or completed.

Samson owned leases in a pooled unit created by a 2012 unit designation. Moak did not own any interest within the boundaries of the unit at the time the unit was created. Samson was the designated operator of the unit, and Moak was not a party to the operating agreement governing the unit.

After the creation of the unit, certain leases located on tracts within the boundaries of the unit were terminated when the lessors' interests were foreclosed via a mortgage that had not been subordinated to the leases. Moak acquired the minerals on some tracts and took leases from third parties that had acquired minerals on other tracts. The unit designation was never amended to include Moak's mineral interests or leases. Samson drilled and completed two wells in the unit, neither of which had a surface or bottom hole location on or within 467 feet of any of the mineral interest tracts.

Moak alleged that it owned real property in the pooled unit and asserted claims for accounting, conversion, unjust enrichment, negligence and to quiet title. Moak relied on *Wagner & Brown, Ltd.*

v. Sheppard, a 2008 Texas Supreme Court case, to argue the lessee pooled the "lands." As such, when a lease in the pooled unit terminated, the "lands" were still pooled. The trial court agreed and ruled that Moak's mineral interests were pooled because the leases described the lands pooled rather than leases pooled. Moak was, therefore, an unleased mineral co-tenant within the unit. The trial court rendered judgment that Moak take nothing on its claims to quiet title and for negligence, but found for Moak for conversion and unjust enrichment against Samson, entitling Moak to equitable damages in the amount of $43k. Samson appealed.

On appeal, the court determined that the *Sheppard* case was distinguishable. The original lease in *Sheppard* authorized pooling, including the reversionary interest. However, because the portions of land acquired by Moak were encumbered by deeds of trust prior to the execution of the leases, the legal and equitable estates had severed, and the original lessors never acquired equitable title because they defaulted under their respective loans. The original lessors lost their reversionary rights when their interests were foreclosed upon. Because the original lessors lost their reversionary rights and the leases were terminated by foreclosure, Samson no longer had the authority to pool any land or interest covered by the leases. Additionally, the court noted that a contractual relationship between Moak and Samson or between Moak and the other owners of mineral interests in the unit, which would give Moak the right to minerals produced from the unit, did not exist. Accordingly, the court held Samson had no obligation to pay royalties to Moak and reversed the trial court's rulings for Moak on its unjust enrichment and conversion claims.

Finally, the court found that equitable remedies were improper. Moak failed to prove a claim for unjust enrichment or conversion. Samson owed no duty to Moak as unleased mineral co-tenant with no interest in the pooled unit to offer an opportunity to ratify the pre-foreclosure mineral leases.

COPANO ENERGY LLC, ET AL. V. STANLEY BUJNOCH, LIFE ESTATE, ET AL., 593 S.W.3D 721 (TEX. 2020)

In this case, the Texas Supreme Court examined whether a series of emails between a landowner and a pipeline company was sufficient to show the parties' intent to be bound by the essential terms of an easement agreement.

In 2011, the landowners granted a 30-foot wide easement to Copano for the construction, operation and maintenance of a 24-inch pipeline on their properties, and the pipeline was completed as agreed. In December 2012, a landman for Copano contacted an attorney representing the landowners to discuss a proposed second easement. A series of emails between the landman and the attorney in December culminated in a Jan. 30, 2013, email in which Copano's landman wrote to the landowners' attorneys that: "pursuant to our conversation earlier, Copano agrees to pay your clients $70.00 per foot for the second 24-inch line it proposes to build."

In response, the landowners' attorney stated: "In reliance on this representation we accept your offer and will tell our client you are authorized to proceed with the survey on their property."

In February and March, communications were sent to the landowners by a different, contract landman acting on behalf of Copano. Those letters contained terms that differed from those Copano and the landowners had previously agreed upon. The attorney for the landowners emailed Copano's in-house landman regarding the differing compensation proposals, telling him, "THIS IS NOT OUR DEAL[.] WHAT IS GOING ON? PLEASE LET ME KNOW."

Responding via email, Copano's landman stated that he knew that was not what they had agreed to and that their "deal still stands."

Ultimately, an agreement on a second easement was never reduced to a formal writing, and the second pipeline was never built. In February 2014, the landowners sued Copano for breach of contract, alleging a contract to sell an easement to the landowners for $70 per foot. Copano moved for summary judgment, arguing in part that the statute of frauds barred the contract claim. The trial court granted summary judgment in Copano's favor. The Court of Appeals reversed summary judgment on the breach of contract claim. Copano petitioned the Texas Supreme Court for review, and it granted the petition.

An easement is an interest in real estate, and therefore, a contract for the sale of an easement is subject to the statute of frauds. To satisfy the statute of frauds, there must be a written memorandum that is complete within itself in every material detail and that contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony. Although multiple documents can comprise a single written contract, when considering multiple writings proffered as a single contract, the essential elements of the agreement must still be evident from the writings themselves, without resorting to oral testimony. The court held that the writings described here and relied upon by the landowners, even when considered together, do not satisfy the statute of frauds.

The court explained that the Jan. 30 emails contain an offer and an acceptance, but they did not say what was being offered or accepted. Other than the price per foot and the pipeline's size, the Jan. 30 emails contain none of the "essential elements of the agreement." The court reasoned that the landman's Jan. 30 email indicates that other terms of the deal may have been discussed in "our conversation earlier"; however, none of the writings tell anything about that conversation.

Although the landowners conceded the Jan. 30 emails did not themselves satisfy the statute of frauds on their own, they claimed to find the other essential terms — such as the easement's location and size — in the prior December emails from the landman to the landowner. The court explained that the landman's December emails did not supply the missing essential elements for two reasons: The emails themselves reflected no agreement to be bound by the terms they described, and no later writing evidenced an agreement to be bound by the terms stated in those earlier emails.

When it is alleged that an email amounts to a binding contract on the sender, the email's context must be carefully examined to determine whether it truly evidences the "grave intent to be legally bound." Here, neither the context of Copano's December emails, nor their verbiage reflected an intent to bind Copano to the easement terms stated in the emails. The entire email thread anticipates a future, in-person meeting at which the terms the landman's email described might or might not actually be offered. The future-tense phrasing of the December emails further confirms the absence of an agreement to be bound by the terms stated therein.

Texas courts have confirmed that such writings couched in futuristic language contemplating later negotiations do not satisfy the statute of frauds. The court conceded that the earlier emails could conceivably be used to supply essential terms if another writing confirmed that the parties later agreed to the terms stated in the forward-looking writing; however, a fundamentally "essential element in the contract," without which no contract can exist, is the parties' intent to be legally bound to the contract's terms. Nothing in the Jan. 30 emails reflect an agreement to the terms described in the previous emails.

Although the Jan. 30 emails suggest there was a "conversation earlier," there was no writing that indicated what was discussed in that conversation or what easement terms the landman had in mind when he used the words "pursuant to our conversation earlier." Therefore, there was no way of knowing from the writings whether the parties agreed in "our conversation earlier"— and therefore in the Jan. 30 emails — to the easement terms described in the December emails.

To satisfy the statute of frauds, the writing or writings "must contain the essential terms of a contract, expressed with such certainty and clarity that it may be understood *without recourse to parol evidence to show the intention of the parties."* Notably, the landowners sought support from their attorney's affidavit wherein he stated that Copano's landman offered the alleged easement terms both through email and at an in-person conversation. The court reasoned that the need for witness testimony to explain that "our conversation earlier" recapitulated the easement terms contained in prior emails demonstrates that the proffered writings do not "contain the essential terms of the contract … without recourse to parol evidence to show the intention of the parties."

The court further concluded that none of the other later writings (the February letters and emails and the March emails) made the essential showing that Copano ever agreed to the easement terms described in forward-looking language in the earlier emails. As a result, under the statute of frauds, the landowners' proffered contract was not enforceable and Copano could not be held liable for breach of it.

PIRANHA PARTNERS, ET AL. V. JOE B. NEUHOFF, ET AL., 596 S.W.3D 740 (TEX. 2020)

In this case, the Texas Supreme Court rejected the application of arbitrary rules of construction and surrounding circumstances to construe an assignment of overriding royalty interest; rather, the court looked to the entirety of the assignment itself and harmonized all of its words.

In 1975, Neuhoff Oil & Gas purchased a working interest in the Puryear lease, which covered all of the minerals under a tract of land in Wheeler County, Texas, referred to as Section 28. A few years later, Neuhoff Oil assigned its interest in the Puryear lease, but reserved for itself a 3.75% overriding royalty interest on all production under the lease. The Puryear B No. 1-28, located in the NW/4 of Section 28, was the only well on the Puryear lease until 1999. Neuhoff Oil received royalty payments on production from said well until it sold its overriding royalty interest at auction. Piranha Partners had the winning bid.

To effectuate the sale, Neuhoff Oil and Piranha executed an assignment of overriding royalty interests and oil and gas leases. The 3.75% overriding royalty on production from the Puryear B No. 1-28 well was then paid to Piranha. A few years later, Neuhoff Oil & Gas went out of business and assigned all of its remaining assets to individuals in the Neuhoff family. Over time, additional wells were drilled on Section 28 (including a well on the NW/4). The operator paid the 3.75% overriding royalty from the new wells to the Neuhoffs because it thought Neuhoff Oil only assigned its interest insofar as it covered the Puryear B No. 1-28 well. However, in 2012, the operator obtained title opinions indicating that Piranha owned the overriding royalty interest on all production under the Puryear lease — not just from the Puryear B No. 1-28 well. Accordingly, the operator retroactively paid Piranha the overriding royalties due on all of Section 28 and demanded a refund from the Neuhoffs.

To no surprise, the Neuhoffs sued, claiming Neuhoff Oil assigned Piranha its overriding royalty only in production from the Puryear B No. 1-28 well. On cross-motions for summary judgment, the trial court agreed with Piranha that the overriding royalty sold by Neuhoff covered all of Section 28. The Court of Appeals disagreed with both the trial court and the Neuhoffs, holding that Neuhoff Oil sold the overriding royalty in production from all of the NW/4 of Section 28. The issue the Texas Supreme Court had to decide was whether the assignment conveyed Neuhoff Oil's interest only in production from the Puryear B No. 1-28 well, in production from any well drilled on the NW/4, or in all production under the Puryear lease. The court held that the assignment unambiguously conveyed Piranha a 3.75% overriding royalty interest in all production under the Puryear lease.

The court's first task was to determine whether the assignment was ambiguous, considering its language as a whole in light of well-settled construction principles and the relevant surrounding circumstances. In doing so, the court looks not for the parties' actual intent but for their intent as expressed in the assignment. The court considered the entire assignment and, if possible, resolved any conflicts by harmonizing the assignment's provisions, rather than applying arbitrary or mechanical default rules. The assignment's granting clause in Section I provided:

> [Neuhoff Oil] does hereby assign, sell and convey unto [Piranha] .... without warranty or covenant of title, express or implied, subject to the limitations, conditions, reservations and exceptions hereinafter set forth .... all of [Neuhoff Oil's] right, title and interest in and to the properties described in Exhibit "A" (the "Properties").

After the granting clause, but still in Section I, the assignment provided:

> All oil and gas leases, mineral fee properties or other interest, INSOFAR AND ONLY INSOFAR AS set out in Exhibit A .... whether said interest consists of leasehold interest, overriding royalty interest, or both ...

The entirety of Exhibit A's description appeared as seen below.

Piranha argued that the reference to the lease identified the interest assigned, being all of the overriding royalties due under the Puryear lease. Conversely, although the Neuhoffs argued at trial that the reference to the well identified the interest conveyed (only the overriding royalties due from the Puryear B No. 1-28 well), on appeal the Neuhoffs agreed with the Court of Appeals and argued that the reference to the lands identifies the interest conveyed, being overriding royalties due from production from the NW/4 of Section 28. The parties presented argument on which rules of contract construction the court should apply, and spent considerable effort describing the circumstances of the sale — in a clearinghouse auction — and why those circumstances supported each respective party's arguments.

The court set aside inapplicable rules of construction and unhelpful surrounding circumstances and looked to the terms of the assignment. The court reasoned that its "holistic and harmonizing approach" to construe the assignment required it to consider

Exhibit A Description

Lands and Associated Well(s): Puryear #1-28
Wheeler County, Texas
NW/4, Section 28, Block A-3, HG&N Ry Co. Survey

Oil and Gas Lease(s)/Farmout Agreement(s):

Oil & Gas Lease(s)

Lessor:	[the Puryears]
Lessee:	Marie Lister
Recorded:	Volume 297, Page 818

all of the assignment's provisions and prohibited it from giving greater weight to the granting clause or to any other particular types of clauses. The court concluded the assignment's provisions unambiguously demonstrated the intent to convey all of Neuhoff Oil's overriding royalty interest in the Puryear lease, covering all of Section 28.

First, Paragraph 1 of Section 1 begins by describing "All oil and gas leases, mineral fee properties or other interests, INSOFAR AND ONLY INSOFAR AS set out in Exhibit A .... whether said interest consists of leasehold interest, overriding royalty interest, or both." Although this clause points to Exhibit A to determine the interest conveyed, the rest of the sentence provides, "which [interest] shall include any working interest, leasehold rights, overriding royalty interests and reversionary rights held by [Neuhoff Oil], as of the Effective Date."

Second, Paragraph 2 of Section 1 confirms the conveyance included:

> All presently existing contracts to the extent they are assignable and to the extent they affect the Leases, including agreements for the sale or purchase of oil, gas and associated hydrocarbons, division orders, unit agreements, operating agreements, and all other contracts and agreements arising from, connected with, or attributable to the production therefrom.

Conveying existing contracts to the extent they affect "the Leases," as opposed to just the well or the land, indicates that Neuhoff Oil conveyed its entire interest under the Puryear lease.

Finally, Paragraphs 1 and 3 of Section II reveals the parties' intent. Paragraph 1 states that the "overriding royalty interest(s) herein assigned, if any, are payable out of and only out of the oil and gas produced, saved and marketed pursuant to the terms and provisions of the oil and gas leases described in EXHIBIT A." Paragraph 3 provided that if "[Neuhoff Oil's] interest(s) in the oil and gas lease(s) described in EXHIBIT A is less than the entire fee title, then the interest(s) assigned herein shall be reduced proportionately."

The court explained that these paragraphs pointed directly to the leases described in Exhibit A and confirm that the interest assigned was the interest payable from the production under all of the Puryear lease. The court reasoned that in construing the assignment in its entirety and harmonizing all of its provisions, the only reasonable construction is that Neuhoff Oil conveyed its 3.75% overriding royalty interest in all production under the Puryear lease. Therefore, the court reversed the Court of Appeals' judgment, reinstated the trial court's summary judgment and held that the assignment unambiguously conveyed to Piranha all of the interest that Neuhoff Oil owned at the time of the conveyance.

In a dissenting opinion, two justices would have found the property description ambiguous and, remanded the case to a jury to "break the logjam" and let each side emphasize the surrounding circumstances in favor of its interpretation. When competing interpretations are reasonable and no context favors one over another, the contract is ambiguous. The dissent relied on "INSOFAR AND ONLY INSOFAR as set out in Exhibit A[,]" which described the NW/4 and the well. The majority, they say, ignored those descriptive limitations. Because the description contained an expressed geographic reference to the NW/4, the majority's construction was the least reasonable of the three readings. That the court should take a holistic and harmonizing approach to deed construction does not also mean that all provisions of the document will be helpful in interpreting an ambiguous provision.

MAYO FOUND. FOR MED. EDUC. & RESEARCH V. BP AM. PROD. CO., 447 F. SUPP. 3D 522 (N.D. TEX. — AMARILLO [7TH DIST.] MARCH 20, 2020, NO PET.)

Mayo Foundation Medical Education & Research was the successor lessor under an oil and gas lease that included Section 157 in Robert County, among other lands. The lease reserved a veto power in the lessor over any assignment of the lessee's interest in the lease. The third amendment of the lease, executed by Mayo and its lessee on May 29, 1998, replaced the original consent-to-assign clause with the following clause in Paragraph 7:

> The rights and obligations of the Lessee hereunder are not assignable or transferable in any respect by it, except upon the written approval of Bank One Trust Company, N.A., as Agent, or any successor Agent, which approval shall not be unreasonably withheld.

BP America Production Co. succeeded to the leasehold interest in the lease. BP and Latigo Petroleum finalized a purchase and sale agreement for lands including Section 157 in September 2019. However, pursuant to a 1996 operating agreement with Courson Oil & Gas, Inc., BP was first obligated to offer the interest in Section 157 to Courson, which Courson accepted. Mayo opposed the transfer due to its past business dealings and litigation with Courson and threatened to withhold approval. In January 2020, BP notified Mayo that Courson had elected to acquire BP's rights in Section 157 (they intended to close over the "soft consent"). Mayo filed a complaint, a motion for temporary restraining order (which was denied without prejudice), and a motion for a preliminary injunction. The appeal focused on the injunction.

The court was presented two primary questions: Given Texas' strong presumption against restraints on alienation of property and the presumption that an oil and gas lessee may freely assign its interests, the court had to decide if it should even recognize Paragraph 7 as enforceable; and if Mayo may validly withhold consent to assign, was such a refusal to consent "reasonable" in the case with Courson. In short, the consent-to-assign paragraph was valid but Mayo's refusal to consent was unreasonable.

The court relied upon the first restatement of property law to reach the conclusion that the consent to assign provision was valid and enforceable, which left the question of whether Mayo was reasonable in its refusal to consent.

The court lamented that there was essentially no case law guidance in Texas on what constitutes "reasonableness" in this context. To answer the question, the court looked to other jurisdictions, restatements, treatises and law review articles to establish the following factors to help it determine whether it was "reasonable" for a lessor to refuse to consent to the assignment of an oil and gas lease: assignee's solvency and track record on making timely royalty payments; assignee's industry reputation for honesty and reliability; assignee's prior working relationship with lessor; assignee's capacity to operate the leasehold in an efficient manner; whether assignee is a "lease flipper" that will not develop the property; and whether assignee would increase the number of non-cost-bearing interests on the property, such as overriding royalties and production payments.

Reviewing the briefing before it, the court found that Mayo presented no evidence that Courson failed to timely pay royalties and no evidence of malfeasance that tended to undermine Courson's reputation for honesty or reliability. To the contrary, the record indicated that Courson was an established and capable operator with active operations in the area.

In identifying factors to help it determine whether or not Mayo's refusal to grant consent was reasonable, it noted that at least one commentator has argued that a lessor may "reasonably" withhold consent if the prospective assignee is a competitor in the field. In this case, evidence indicated that Mayo was actually a partial owner of Latigo Petroleum. Still, the court was unwilling to be the first Texas court to apply this factor as the decisive one in a case arising under Texas law. Mayo was not able to convince the court that its refusal to grant consent was reasonable.

U.S. District Courts grant preliminary injunctions only when the plaintiff establishes all of the following:

- It is substantially likely to succeed on the merits of the underlying case,
- It is substantially likely to suffer irreparable harm if the injunction is not granted.
- The threatened injury outweighs any harm that the injunction may occasion for the defendant.
- The injunction will not undermine the public interest (the "Winter test").

So, even though the consent-to-assign provision was valid, because Mayo failed to prove it had exercised the restraint in a reasonable manner, the court found that Mayo was not substantially likely to prevail on the merits — the first factor of the Winter test. Consequently, the court denied Mayo's motion for a preliminary injunction without prejudice for its ability to continue to prosecute its underlying case against BP.

TOMMY YOWELL, ET AL. V. GRANITE OPERATING, ET AL., NO. 18-0841, 2020 WL 2502141 (TEX. 2020)

This case deals with the cy pres doctrine (a doctrine to reform deeds as nearly as possible to accomplish the grantor's intent). In this case, a predecessor to Granite Operating leased mineral rights in Wheeler County in 1986. The lease was later assigned with a reservation of an overriding royalty in the Yowells, which included a provision saying that if the lease terminated, and the lessee obtained an "extension, renewal or new lease or leases" covering the same mineral interest, then the reserved override would carry over. The industry term for such a provision is an "anti-washout" clause.

This case deals with a convoluted chain of title. Essentially, the lessee was top-leased but struck a deal with the top lessee whereby it released the old lease in exchange for an assignment of the two top leases. Production was established, but the successor lessees, Granite and Apache, refused to credit the Yowells' overriding royalty, claiming that the rule against perpetuities voided it because the time period in which it could attach to the new leases was indefinite.

The trial court rendered judgment for Granite, and the Yowells filed this appeal. The Amarillo Court of Appeals affirmed the trial court's decision, concluding that the overriding royalty in the new leases was not certain to vest within 21 years of a life in being as required by the rule against perpetuities. The Court of Appeals rejected the Yowells' argument that § 5.043 of the Texas Property Code should be used to reform the assignments to avoid application of the rule against perpetuities on grounds that the four-year statute of limitations in § 16.051 of the Texas Civil Practice and Remedies Code barred the Yowells' claims.

The Yowells appealed to the Texas Supreme Court. The Texas Supreme Court essentially agreed with *Court of Appeals,* holding that the reservation of the overriding royalty created a springing executory interest to which the rule against perpetuities applied. However, the Texas Supreme Court disagreed that the four-year statute of limitations barred the Yowells from seeking reformation under § 5.043 of the Property Code and remanded the case to the Court of Appeals to determine how the statutory codification of the cy pres doctrine included in § 5.043 of the Property Code could be utilized to save the reservation.

Although *Yowell* did not offer any guidance on distinguishing extensions and renewals of oil and gas leases from new leases because Granite conceded that the top leases were "new" leases, it said it agreed with a 10th Circuit decision, *Independent Gas & Oil Producers Inc. v. Union Oil of Cal.*, which held that the rule against perpetuities did not apply to extensions and renewals with regard to an anti-washout clause arising in Oklahoma. However, the rule does apply to anti-washout clauses involving new leases. By its ruling, *Yowell* established that overriding royalty owners can argue that if the anti-washout clause with no time limits applies to extensions and renewals, the rule does not apply.

TERRANCE J. HLAVINKA, ET AL. V. HSC PIPELINE P'SHIP LLC, 605 S.W.3D 819 (TEX. APP. — HOUSTON [1ST DIST.] JUNE 18, 2020, PET. FILED NOV. 2, 2020)

The Hlavinkas owned nearly 16,000 acres in Brazoria County that they acquired in 2003 for the primary purpose of generating income from pipelines. HSC owns pipeline systems in Texas for the transportation of various products, including polymer grade propylene, which was at issue here. In April 2016, HSC's sole manager, Enterprise Products OLPGP Inc., applied to the Texas Railroad Commission for a permit to operate a new 44-mile long pipeline on behalf of HSC. HSC and the Hlavinkas could not agree on terms to the 30-foot wide and temporary workspace easement across four tracts of the land.

HSC filed a condemnation proceeding. The Hlavinkas filed a plea to the jurisdiction challenging HSC's eminent domain power — arguing that since HSC was not a common carrier, it did not have authority to condemn their property. HSC filed a traditional motion for summary judgment to establish its right to condemn as a matter of law. In support of its motion, HSC attached the following documents: a copy of a T-4 permit to operate the pipeline; an affidavit from Roger Herrscher, vice president of Enterprise; a pipeline tariff it filed with the RRC; and a redacted copy of the transportation service agreement between Braskem (HSC's customer) and HSC.

The trial court issued an order denying the Hlavinkas' plea to jurisdiction and granting HSC's motion for partial summary judgment. The Hlavinkas appealed, among other matters, the finding that HSC was a common carrier, to whom the power of eminent domain had been delegated by the state.

In Texas, under Section 111 of the Texas Natural Resources Code, common carriers have the right and power of eminent domain. Section 2.105 of the Business Organizations Code provides an independent grant of eminent domain authority for common carriers. HSC argued that it was a common carrier because propylene is an "oil product" and a "liquefied mineral." The court looked to the Natural Resources Code for the definition of "oil," the Texas Railroad Commission for the definition of "product," the industry definition of "crude oil" and the U. S. Energy Information Administration for the definition of "crude oil" to reach the conclusion that the propylene that HSC transported in the pipeline was an "oil product" for purposes of Section 2.105.

However, HSC's powers of eminent domain must be for a public use. To qualify as a common carrier under Section 111.001(6) of the Natural Resources Code, "a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." The burden is on the pipeline company to establish its common carrier bona fides.

The Texas Supreme Court has said that this test balances the property rights of Texas landowners with our state's robust public policy interest in pipeline development, while also respecting the constitutional limitations placed on the oil and gas industry. The court went into much greater detail, but it ultimately said that other than issuing a press release announcing the pipeline and filing a tariff with the Railroad Commission, there was no evidence that HSC was actively marketing the pipeline's resources to other suppliers of PGP in the vicinity. The court concluded that HSC did not establish it was a common carrier with the power of eminent domain because there was evidence that the pipeline would serve only HSC's private interest in selling its PGP to its customer Braskem by transporting the sold product in the most expeditious and least expensive way, by a pipeline traversing seized property. The court remanded for further proceedings.

BLUESTONE NAT. RES. II LLC V. NETTYE ENGLER ENERGY LP, NO. 02-19-00236-CV, 2020 WL 3865269 (TEX. APP. — FORT WORTH [2ND DIST.] JULY 9, 2020, PET. FILED AUG. 31, 2020) (MEM. OP.)

This is another case deciding whether language creating a nonparticipating royalty interest prohibited deduction of postproduction costs. (Spoiler alert: It did not.) BlueStone appealed the trial court's order granting Engler's summary judgment. The issue was whether the trial court erred by finding that Engler's nonparticipating royalty interest prohibited the deduction of postproduction costs for gathering and compressing gas.

By a 1986 deed, Engler's predecessors conveyed a tract of land in Tarrant County to BlueStone's predecessors that reserved a 1/8th nonparticipating royalty interest, using the following language:

> Grantor hereby excepts and reserves unto itself, its heirs, successors and assigns, an undivided one-eighth nonparticipating (1/8th) royalty interest in and to all of the oil, gas and other minerals. ... Grantee .... shall have the exclusive right ... to drill for and produce oil, gas and other minerals from the Subject Property and the exclusive power and right to execute oil and gas and other mineral leases covering the interest hereby excepted and reserved and to receive and keep any bonus, delay rental or any other payment other than royalty paid by any such lease, provided that .... Grantor .... shall be entitled to receive from Grantee .... and from any one [sic] else producing any oil, gas or other mineral, a free one-eighth (1/8th) of gross production of any such oil, gas or other mineral said amount to be delivered to Grantor's credit, free of cost in the pipe line [sic], if any, otherwise free of cost at the mouth of the well or mine....

BlueStone became the operator of the producing gas wells in 2016. Unlike its predecessor, BlueStone interpreted the NPRI to be a standard NPRI that was free of the cost of production but subject to postproduction costs. Accordingly, BlueStone paid Engler's royalties based on the value of gas produced, calculated at the point the gas entered the pipeline attached to the wells rather than at the point of sale, and it deducted postproduction costs, which included transportation, gathering and compression, regulatory fees, and severance taxes.

Engler filed suit once it learned BlueStone was deducting the postproduction costs. Both parties filed for summary judgment regarding the language of the 1986 deed. BlueStone argued that the language in the 1986 deed created a standard NPRI, and therefore, Engler's royalty interest was subject to postproduction costs. Engler argued that its reserved royalty was "cost free" and that the deduction of postproduction costs from its royalties was inconsistent with the 1986 deed. Alternatively, Engler argued that the 1986 deed prohibited the deduction of gathering and compression costs while gas was in the gathering system and that it should bear no postproduction costs until the gas was delivered into one of two major pipelines. The trial court denied BlueStone's motion, granted Engler's motion and found that BlueStone improperly deducted gathering and compression costs.

The court relied heavily on *Burlington Resources.* In that case, the court considered the question of where the valuation of the lessor's royalty occurred and whether the language of the lease involved conveyed a royalty burdened with postproduction costs. *Burlington Resources* focused on what "into the pipe line" meant. It concluded the phrase was equivalent of language that created a valuation point "at the wellhead or nearby." Further, the *Burlington Resources* court concluded that, like a valuation point at the wellhead or nearby, a valuation point defined as "into the pipe line" meant that the royalty interest was burdened with postproduction costs. Focusing on the "in the pipe line" phrase contained in the 1986 deed, the court concluded that the valuation point of the royalty interest was equivalent of a valuation point "at the wellhead" and therefore Engler's royalty interest bore postproduction costs.

The court was unpersuaded by Engler's attempts to distinguish *Burlington Resources* from the 1986 deed. First, Engler argued that "pipe line" as used in the 1986 deed referred to one of two specific "major" pipelines that were far from the wellhead, and it further contended that "pipe line" could not mean the gathering system connected at or near the wellheads that ultimately connected to the major pipelines farther away. The court disagreed and explained how the Texas Supreme Court had defined a gathering system to be a pipeline. Second, Engler argued that "free of cost at the mouth of the well" sets the valuation point for oil, and "free of cost in the pipe line" sets the valuation point for gas. Because the 1986 deed set out two distinct valuation points, Engler argued that indicated the intent of grantor's use of the phrase "in the pipe line" meant somewhere other than at the wellhead. The court disagreed and construed the phrase "free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine" to mean that if there was a pipeline, then the valuation was made "in the pipe line," and if there was not (otherwise) a pipeline, then the valuation was made "at the mouth of the well or mine." The court held that "in the pipe line" as used in the 1986 deed effectively set the valuation point at the wellhead.

Engler argued to no avail that *Hyder* was controlling in the interpretation of the 1986 deed. In *Hyder*, the court interpreted an overriding royalty provision that said the grantor held "a perpetual, cost-free (except only its portion of production taxes) overriding royalty of [5%] of gross production obtained." The *Hyder* court found the provision created a royalty interest free of postproduction costs; however, it focused specifically on the parenthetical "(except only its portion of production taxes)." Unlike in *Hyder*, the language in the 1986 deed did not specifically except any postproduction costs. Engler further argued under *Hyder* that the 1986 deed's "free one-eighth (1/8th) of gross production" language made the reserved royalty interest free of postproduction costs.

In response, the court explained that there were a number of cases supporting the view that the phrase "cost free overriding royalty" was often a synonym for an overriding royalty burdened with postproduction costs, and that "free" royalty generally created a royalty free of production costs, but burdened with postproduction costs. The court concluded that the term "free" as used in the 1986 deed was a reference to the free-from-production-cost nature of a standard royalty, not free from postproduction costs.

Lastly, Engler made a final argument that the grantors in the 1986 deed would have had no motivation to burden their royalty with postproduction costs. The court reasoned that the grantees would have had no such motivation either, but notwithstanding, as a reviewing court, it could not look to the drafters' subjective intent. The court held that the royalty provisions contained in the 1986 deed created a traditional royalty interest that was burdened by postproduction costs. The court reversed the trial court's order granting Engler's motion for summary judgment and rendered judgment in favor of BlueStone.

JATEX OIL & GAS EXPL. LP, ET AL. V. NADEL & GUSSMAN PERMIAN, LLC, ET AL., --S.W.3D--, NO. 11-17-00265-CV, 2020 WL 4873836 (TEX. APP. — EASTLAND [11TH DIST.] AUG. 20, 2020, NO PET.)

This appeal arises from a dispute between working interest owner Jatex Oil & Gas Exploration LP, Jatex's general partner Truitt, and the operator, Nadel & Gussman Permian LLC (N&GP), the operator of an oil and gas development known as the Clyde Prospect in Glasscock County. Appellant Jatex sued N&GP for breach of contract, failure to act as a reasonably prudent operator and tortious interference with a contract.

Jatex sold leases covering approximately 8,000 acres in the Clyde Prospect to N&GP, retaining a 6.25% working interest. In 2010, Jatex and the other working interest owners executed a joint operating agreement naming N&GP as operator.

In 2011, Jatex and Truitt executed a promissory note to Security Bank with Jatex and Truitt's mineral interests in the Clyde Prospect, as well as other mineral interests unrelated to the Clyde Prospect as collateral. Jatex defaulted. In 2014, Jatex executed a new note, which provided for five monthly payments of 100% of Jatex's oil and gas proceeds. Jatex defaulted on the subsequent note and Security Bank foreclosed on the collateral and purchased it for $1.5 million. Truitt and Jatex maintained that the foreclosure would not have occurred but for N&GP erroneously withholding revenue from Jatex's share of the Clyde Prospect to offset expenses associated with a well operation to which Jatex did not elect to participate.

Jatex complained that under the joint operating agreement, a written consent election was required to include a nonoperator in a proposed drilling operation, and Jatex never made a written election to participate in the proposed operation. However, because N&GP treated Jatex as if it had elected to participate, but did not pay its proportionate share, it offset other revenue Jatex would have been entitled to receive against Jatex's proportionate share of deepening costs. Jatex contended that this revenue offset resulted in a chain reaction culminating in Security Bank foreclosing on its pledged interests. Jatex and Truitt then sued N&GP.

At trial, N&GP filed motions for summary judgment. Jatex and Truitt filed a response to the summary judgment motion that included an unsworn declaration by Truitt, which expressed an estimate of the fair market value to be $12 million of the interest foreclosed upon. The trial court granted N&GP's motion to exclude Truitt's economic evaluation from the summary judgment evidence.

On appeal, Jatex and Truitt argued that its opinions on value were admissible under the property owner rule. Under this rule, a property owner is generally qualified to testify to the value of his property even if he is not an expert and would not be qualified to testify to the value of the property. However, as this court held in *Wortham Bros., Inc. v. Haffner,* the rule does not apply to matters that are of a "technical or specialized nature." The court held that "an owner of a mineral interest is not qualified under the Property Owner Rule to give lay opinion evidence under Rule 701 on the value of mineral reserves because of the technical, specialized nature of that valuation." Therefore, the court concluded that the trial court did not abuse its discretion by granting N&GP's motion to strike Truitt's valuation.

The balance of the case focused on Jatex and Truitt's claims for breach of contract. The court dismissed any notion that Truitt recover for breach of the joint operating agreement, as Jatex — and not Truitt — was a party to the JOA. The court further explained that although N&GP may have been wrong to withhold revenues associated with Jatex's proportionate share of production, because Jatex had collaterally assigned all revenue to Security Bank and N&GP later paid those revenues directly to Security Bank, it discharged N&GP's obligations to pay the withheld revenue.

Finally, Jatex sought to recover "foreclosure damages" because N&GP's actions were the proximate cause of Security Bank going forward with the foreclosure. Jatex further argued that N&GP should have reasonably foreseen that debiting Jatex's account would have likely caused Security Bank to foreclose on the lien. The court disagreed because the foreseeability of consequential damages for a breach of contract is assessed at the time the contract is formed, not at the time that the contract is subsequently breached. The court held the trial court did not err in granting summary judgment in favor of N&GP. Nor did the court find error with the trial court's grant of a no-evidence summary judgment on Jatex's argument that N&GP tortuously interfered with an oral forbearance agreement that Jatex had with Security Bank. Jatex claimed the bank orally agreed to refrain from foreclosure so long as it could receive Jatex's Clyde Prospect revenues directly from N&GP. However, Jatex did not provide any details about the specific terms of the oral forbearance agreement or how Security Bank may have breached the oral forbearance agreement by proceeding to foreclose on the property; therefore, the court reasoned the trial court did not err by issuing a no-evidence summary judgment.

DAYSTON LLC V. JONATHAN D. BROOKE, --S.W.3D.--, NO. 11-18-00288-CV, 2020 WL 59500 (TEX. APP. — EASTLAND [11TH DIST.] OCT. 8, 2020, NO PET.)

In this case, the court voided a real estate contract because it failed to satisfy the Texas statute of frauds. In October 2017, Dayston, as seller, and Brooke, as buyer, executed a farm and ranch contract for the purchase of lands. The contract described the lands as "[t]he land situated in the County of Erath, Texas, described as follows: 3379 FM Hwy 913, 515 Tennyson Dr, and +/- 81.50 DC of A0681 Smith Hancock and A0057 DW Babcock or as described on attached exhibit, also known as Exhibit A."

Exhibit A further described the lands as:

> 3379 FM HWY. 913
> STEPHENVILLE, TX 76401
> To include:
> Legal: Acres: 8.290, A0057 BABCOCK D W; & HOUSE
> Legal: Acres: 1.740, A0057 BABCOCK D W;
>
> 515 TENNYSON DRIVE
> STEPHENVILLE, TX 76401
> To include:
> Acres: 8.246, S8010 SIMS CREEK SUBD, TRACT 1;
> Legal: Acres: 10.290, A0057 BABCOCK D W;
>
> 81.50 Acres – Part of A0681 SMITH HANCOCK & A0057 D W BABCOCK (1.91 ACS) Parcel
> *Please note the 81.50 acre parcel is being surveyed and renamed.
> Title company will convey the new legal address once completed.

Brooke sued Dayston, seeking a declaratory judgment to void the contract. Brooke filed a motion for summary judgment, which asserted the contract was void under the statute of frauds due to an insufficient legal description. Brooke also sought the return of earnest money held in escrow. Dayston argued that the property description was sufficient and that there was a genuine issue of material fact because a person familiar with the area could locate the land with reasonable certainty, including Brooke, who had visited the land multiple times. Furthermore, Dayston argued that the contract allowed it to provide a survey "within 5 days of the effective date" of the contract and since the survey was referenced by the contract, it satisfied the statute of frauds. In granting Brooke's motion for summary judgment, the trial court declared the contract void for an insufficient legal description and ordered the earnest money returned. The trial court found the extrinsic evidence to be inadmissible to cure the inadequate description of the lands. Dayston moved for a new trial, but it was overruled by operation of law. The appeal followed.

The issues on appeal were: whether the land survey and other attached extrinsic evidence were not properly before the court for review; whether the description in the contract, which incorporated the land survey, was sufficient to satisfy the statute of frauds; and whether the extrinsic evidence offered in response to the summary judgment was sufficient to create a genuine issue of material fact as to whether a person familiar with the area had the ability to locate the land with certainty.

To satisfy the statute of frauds, the writing must furnish within itself or by reference to other identified writings then in existence the means or data by which the particular land to be conveyed may be identified with specific certainty. Although courts may construe multiple writings prepared for the same transaction as one contract, any documents referred to and incorporated in the contested agreement must be in existence at the time the parties executed the contested agreement. If the writing and other identified writings do not sufficiently describe the property to be conveyed, then the writing violates the statute of frauds and is voidable.

While the description does not have to include metes and bounds, it must furnish enough data that identifies the property with reasonable certainty. However, when it is possible that more than one tract of land fits the description, the statute of frauds is not satisfied (e.g., an unidentified portion of a larger tract is insufficient). Although courts allow parol evidence when the writing contains a "nucleus of description" (descriptive words that help clarify the property in question), the extrinsic evidence cannot be the sole means to supply the location or description of the land, but can only help identify the land from the data in the writing. Notably, Texas courts have held a street address, standing alone, may be insufficient if there is uncertainty about the amount of land in the conveyance.

The contract listed the lands, separated by a series of commas and a conjunction, as two street addresses and an estimated number of acres within a large tract: "3379 FM Hwy 913, 515 Tennyson Dr, and +/- 81.50 AC of A0681 Smith Hancock and A0057 DW Babcock or as described on attached exhibit, also known as Exhibit A." The court said that on its face, "+/- 81.50" acres was an indefinite amount and insufficient to describe the land with certainty. Although the exhibit added a little clarity, it still described the land as two street addresses, listing the accompanying acres and 81.5 acres from two larger tracts of land. The court held, under *Morrow*, the description of the land was insufficient to identify it with certainty.

Dayston argued that the insufficient legal description was cured for the two following reasons: the conveyance could be located with reasonable certainty because Brooke personally visited the property on many occasions and the survey offered as an exhibit to the amended summary judgment response was incorporated into the contract by reference. The court found this argument to be unpersuasive because it directly opposed the Texas Supreme Court's ruling in *Morrow* that the "knowledge and intent of the parties will not give validity to [an agreement]." Because the contract stated that the "parcel is being surveyed" and that "the new legal address" will be provided "once completed," the court explained that the survey was not "then in existence" at the time the contract was executed as required under *Morrow* and its progeny. The court overruled this issue as the trial court was correct in ruling that the extrinsic evidence offered by Dayston was inadmissible and the contract was void under the statute of frauds. Because this issue was determinative, the court did not discuss Dayston's second issue regarding whether the extrinsic evidence offered in response to the summary judgment was sufficient to create a genuine issue of material fact.

DEVON ENERGY PROD. CO., ET AL. V. MICHAEL A. SHEPPARD, ET AL., NO. 13-19-00036-CV, 2020 WL 6164467 (TEX. APP. — CORPUS CHRISTI-EDINBURG [13TH DIST.] OCT. 22, 2020) (MEM. OP.)

This was an appeal brought by Devon Energy from the trial court's grant of summary judgment in favor of the lessor in a dispute concerning the valuation of oil and gas royalties. The parties jointly filed a stipulation setting forth 23 issues with the trial court, each asking whether Devon Energy violated the leases by failing to add particular amounts to the total figure upon which the lessors' royalty payments were based. Upon cross-motions for summary judgment, the trial court ruled in favor of the lessors on all 23 issues.

This case involved a very unique royalty provision found in a series of oil and gas leases. The leases contemplated lessor's royalty in three places: Paragraph 3(a)-(b), which is a standard provision that provides the royalty paid was to be a percentage of Devon Energy's gross proceeds from sales to downstream purchasers; Addendum L, which provided royalties were free of cost; and Paragraph 3(c) (the language at issue in this case), provided:

> If any disposition, contract or sale of oil or gas shall include any reduction or charge for the expenses or costs of production, treatment, transportation, manufacturing, process or marketing of the oil or gas, then such deduction, expense or cost shall be added to the market value or gross proceeds so that Lessor's royalty shall never be chargeable directly or indirectly with any costs or expenses other than its pro rata share of severance or production taxes.

The lessors filed suit in 2012 alleging that Devon Energy was selling the oil and gas produced from the leases under a contract that contained an $18/barrel "reduction" in the sales price attributable to gathering, handling and transportation. The lessors argued that Devon Energy breached the leases by failing to add the $18/barrel "reduction" to the amount upon which the royalty was calculated (the royalty base) pursuant to the "shall be added" provision in Paragraph 3(c).

The question for the court on appeal was whether the trial court erred in granting the landowners' summary judgment motion and denying Devon Energy's. The court concluded the trial court erred in granting the landowners' motion, but did not err in denying Devon Energy's. As a general rule, royalty payments are usually subject to postproduction costs; however, parties to a lease may agree to modify this general rule. The court discussed the following royalty cases: *Heritage Resources, Inc. v. NationsBank,* 939 S.W.2d 118 (Tex. 1996); *Judice v. Mewbourne Oil Co.,* 939 S.W.2d 133 (Tex. 1996); *Chesapeake Exploration v. Hyder,* 4833 S.W.3d 870, 872 (Tex. 2016); and *Burlington Resources Oil & Gas Co. v. Texas Crude Energy,* 573 S.W.3d 198 (Tex. 2019).

Devon Energy argued that this case involved a "gross proceeds" royalty, where lessors' royalty was based on the gross proceeds it actually received at point of sale, with no deductions. Again, broadly speaking, the lessors argued that the Leases did not limit their royalty to gross proceeds received by Devon Energy. The Court of Appeals explained that although Paragraphs 3(a) and 3(b) initially defined the royalty, at least in part, based on Devon Energy's gross proceeds, Paragraph 3(c) expressly contemplated the addition of certain sums to gross proceeds in order to arrive at the proper royalty base. Among many other things, the court noted taking Devon Energy's position rendered Paragraph 3(c) meaningless. Additionally, nothing in Addendum L modified or contradicted Paragraph 3(c).

The court examined the 23 stipulated issues concerning the leases, each of which fell within one of the following six categories: adjustment of fixed amount with stated purpose — issues 2, 7, 8, 10, 11 and 13; adjustment of fixed amount without stated purpose — issues 1, 3, 6 and 15-19; adjustment based on processor's actual costs — issues 4, 9, 12 and 15; adjustments for unit fuel-lease fuel — issues 20 and 21; (v) adjustment for production retained or lost by third parties — issues 14, 22 and 23; and (vi) excess value resulting from application of contractually fixed recovery factors — issue 5.

Based on its interpretation of the leases, the court held that Devon Energy was required to pay royalties on amounts attributable to postproduction costs of the types specified in the leases, even when those costs were born by a downstream purchaser rather than by Devon Energy. However, the leases did not require Devon Energy to pay royalties on amounts deducted from a sales price without a stated purpose; volume of gas which are used by Devon Energy for their own operations and never sold; volumes of gas which are deemed to be lost or unaccounted for by third parties; or the excess value retained by processors as a result of applying predetermined factors to measure how much of each liquid hydrocarbon is recovered. The Court of Appeals reversed the trial court's judgment on stipulated issues 1, 3, 5, 6, 14 and 16-23 and on stipulated issue 15 insofar as it concerned the fixed fee of 3 cents per gallon on the sale of drip condensate. The remainder of the trial court's judgment was affirmed.

CONCLUSION

We hope this article will help you address the legal issues presented by modern oil and gas activities. As always, if you believe one of these decisions might have a bearing on an action you are about to take or a decision you might make, consult a lawyer. ▲

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