
Susan Davis Van Dyke et al. v. The Navigator Grp. et al., No. 11-18-00050-CV, 2020 WL 7863330 (Tex. App.—Eastland Dec. 31, 2020) (mem. op.)

March 2, 2021

Facts and Background

This appeal concerns a reservation of a double fraction of “minerals and mineral rights” in a 1924 Deed. This is an interesting case in that the court applied fixed versus floating NPRI principles to a full mineral interest reservation. In the 1924 Deed, Mulkey conveyed certain property to White and Tom, with this reservation:

It is understood and agreed that one-half of one-eighth of all minerals and mineral rights in said land are reserved in grantors, Geo. H. Mulkey and Frances E. Mulkey, and are not conveyed herein.

Appellants Davis *et al*, heirs and assigns of the Mulkeys, claimed ownership of one-half of the minerals and mineral rights pursuant to the reservation in the Deed. Conversely, the Appellees Navigator *et al*, heirs and assigns of White and Tom, claimed that the Mulkey Assignees only own one-sixteenth of the minerals and mineral rights and that they own the other fifteen-sixteenths. Both parties filed various motions for summary judgment. The trial court agreed with the White Assignees and declared, among other things, that the Deed was unambiguous and that it “reserved 1/16th of the mineral and mineral rights to [the Mulkey’s] (1/2 of 1/8) and conveyed 15/16ths of the minerals and mineral rights to [White and Tom] of the land conveyed.”

Summary Judgment

A trial court must grant a traditional motion for summary judgment if the moving party establishes that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. When, as here, the parties file cross-motions for summary judgment and the trial court grants one party’s and denies the other’s, appellate courts review the summary judgment evidence presented by both parties and determine all the issues presented. If any theory advanced in a motion for summary judgment supports the trial court’s grant, appellate courts will affirm the judgment.

The Mulkey Assignees assert claims under the estate misconception theory and the presumed grant doctrine, among various affirmative defenses including estoppel.

Deed Interpretation

When interpreting an unambiguous deed, the court's primary goal is to ascertain the parties' intent as expressed in the instrument. The focus is on the words contained within the four corners of the deed, not on the parties' subjective intent. Surrounding circumstances may inform meaning, however, they may not be used to "make the language say what it unambiguously does not say or to show that the parties probably meant, or could have meant, something other than what their agreement stated."

1st Issue on Appeal: The Estate Misconception Theory

The Mulkey Assignees maintained that the trial court erred when it entered summary judgment on ownership of the minerals and mineral rights because it failed to construe the deed "in light of the 'estate misconception' prevalent at the time" the grantors executed the 1924 Deed. If considered in light of the estate misconception theory, the Mulkey Assignees argued, the effect of the reservation is that they own one-half of the mineral estate. Contrarily, the White Assignees asserted that the reservation is unambiguous, that the deed contains no conflicting provisions, and that the deed plainly describes the interest reserved as a "fraction of a fraction." The court of appeals agreed with the White Assignees.

The estate misconception theory refers to a once-pervasive misunderstanding that, if an owner executed a mineral lease, he retained only one-eighth of the minerals rather than a fee simple determinable with the possibility of reverter in the whole. In the 1920's and 30's royalty became standardized at one-eighth of production. The Texas Supreme Court took judicial notice that "the usual royalty provided in mineral leases [during that era] was one-eighth. Although the estate misconception theory is not new to oil and gas jurisprudence in Texas, the court reasoned it would be new to Texas jurisprudence if it were to apply the theory to construe a reservation in which clear language was employed and in which there was an absence of contradictory fractions or terms.

The cases upon which the Mulkey Assignees relied dealt with deeds that contained contradictory fractions and terms, where the issue was whether the interests in question were fixed or floating royalty interests. A "fixed" or "fractional" royalty interest is constant and is not tied to the amount of royalty provided for in a particular lease. A "fraction of royalty interest" is known as a "floating" royalty interest because it "varies depending on the royalty in the oil and gas lease in effect and is calculated by multiplying the fraction in the royalty reservation by the royalty in the lease." The court discussed the well-known, leading cases on the topic, such as, *Luckel v. White*, 819 S.W.2d 459, *Concord Oil v. Pennzoil Exploration*, 966 S.W.2d 451, *U.S. Shale Energy v. Laborde Properties*, 551 S.W.3d 148, and *Graham v. Prochaska*, 429 S.W.3d 650.

Additionally, the court of appeals found the reasoning in *Hudspeth v. Berry*, No. 2-09-225-CV, 2010 WL 2813408 (Tex. App.—Fort Worth July 15, 2010, no pet.) (mem. op.), particularly instructive in the case at bar. The *Hudspeth* court considered whether a reservation in a 1943 deed was a fractional royalty interest or a fraction of royalty interest. There were no conflicting fractions in *Hudspeth* and that court distinguished *Luckel* and *Concord* by noting that there were conflicting fractions in each of those cases.

The *Hudspeth* court held that the interest was a fractional royalty interest (that is, fixed) because there were no conflicting fractions in the reservation and because the plain language of the deed was unambiguous. The court analogized the reservation here to the fractions in *Hudspeth* as there were no conflicting provisions to harmonize in the 1924 Deed. Here, the court reasoned, “the language in the 1924 Deed is clear: the reservation was one-half of one-eighth of the minerals and mineral rights, and there was no other language employed to describe the reservation.”

Moreover, the estate misconception theory is built upon the principle that mineral owners in the era in which the 1924 Deed was executed assumed that after they had executed an oil and gas lease they retained only a one-eighth interest in the minerals. The Mulkeys could not have been operating under the estate misconception theory because they owned all the attributes of the mineral estate. There had been no conveyance of any of the bundles of sticks comprising the mineral and mineral rights ownership and there was no lease of the minerals at the time they executed the 1924 Deed. The court here further adopted the reasoning of *Graham*, which did involve conflicting fractions, for the proposition that, as a general rule, courts construe simple fractions, such as a fraction of one-eighth (or a variation thereof), as a fixed royalty interest, the extent of which is calculated simply by multiplying the fractions.

Here, the court held that because the 1924 Deed was unambiguous and contained no inconsistencies to be harmonized, the Mulkeys reserved a one-sixteenth interest in the mineral estate and conveyed the remaining fifteen-sixteenths to White and Tom.

2nd Issue on Appeal: The Presumed Grant Doctrine

The Mulkey Assignees maintained that the trial court erred when it entered summary judgment on ownership of the minerals and mineral rights because it failed to “interpret the [1924 Deed] in accordance with the presumed grant doctrine,” which they argued would have established their ownership of one-half of the minerals, or, at the very least, that fact issues existed. The doctrine of presumed lost deed or grant operates as a common law form of adverse possession and can establish title by circumstantial evidence. To establish title by this doctrine, the evidence must show (1) a long asserted and open claim, adverse to that of the apparent owner; (2) non-claim by the apparent owner; and (3) acquiescence by the

apparent owner in the adverse claim. If established, the law permits an inference that the apparent owner has parted with his title.

The Mulkey Assignees asserted the applicability of this doctrine on the grounds that, for decades, predecessors to the White Assignees and the Mulkey Assignees acted as equal owners of the minerals and that it established their ownership of one-half of the minerals as a matter of law by operation of the presumed grant theory.^[1] Accordingly, the Mulkey Assignees urged the court of appeals to presume a conveyance of a seven-sixteenths mineral interest from White and Tom back to the Mulkeys following the 1924 Deed. Conversely, the White Assignees argued that the Mulkey Assignees' reliance on the presumed grant doctrine is misplaced because their claim was not based on a gap or missing link in the chain of title that would necessitate a presumed grant but, rather, solely on their mistaken interpretation of the unambiguous 1924 Deed. The court of appeals agreed. Although a gap in the chain of title is not an express element to the presumed grant doctrine, however, courts ordinarily apply it in cases where a party's lack of complete record title to land it has claimed for a long time is due to a gap. *See, e.g., Howland v. Hough*, 570 S.W.2d 876, 878 (grant presumed where plaintiff's chain of title to a tract of land showed continuous record conveyances except for a gap from 1845 to 1878); *see also Adams v. Slattery*, 295 S.W.2d 859; *Seddon v. Harrison*, 367 S.W.2d 888; *but see Conley v. Comstock, LP*, 356 S.W.3d 755, 766 (a well operator lessee established title to mineral interests by a presumed grant in a trespass to try title action).

Notwithstanding the fact that the existence of a gap in title is not a prerequisite to establish a claim under the presumed grant doctrine, the court declined to find that the Mulkey Assignees were entitled to a presumed grant based on the facts of the case. Unlike in *Conley*, the Mulkey Assignees' claims at issue were not made in conjunction with a claim of superior right to the land on which the minerals were being produced. Further, the parties do not dispute title to the property itself; nor do they dispute joint ownership in the minerals. Rather, the Mulkey Assignees sought to use the presumed grant doctrine to establish the quantum of that ownership interest in the mineral estate.

However, the court reasoned that the quantum of interest was already established under the 1924 Deed, and the presumed grant doctrine cannot be used to reinterpret and alter its unambiguous terms. Accordingly, the court of appeals held that the Mulkey Assignees failed to establish ownership of one-half of the minerals as a matter of law and that there was no genuine issue of material fact as to their claim of a presumed grant.

Affirmative Defense Issues on Appeal: Equitable and Judicial Estoppel

The Mulkey Assignees raised affirmative claims and defenses of equitable estoppel and judicial estoppel. The White Assignees moved for summary judgment only on estoppel by deed and judicial estoppel.

The Mulkey Assignees argued that the White Assignees' summary judgment order must be reversed because (1) the White Assignees did not move for summary judgment on the Mulkey Assignees' affirmative defenses of equitable estoppel and (2) there was a genuine issue of material fact as to the equitable estoppel defenses. The Mulkey Assignees also argued that they had conclusively established, or at a minimum there was a genuine issue of material fact, as to their affirmative defense of estoppel by deed based on the recitals in the 1959 deeds and their affirmative defense of judicial estoppel based on the statements in the inventories filed in the 1965 probate proceedings (*see* the opinion for more details). The trial court granted the White Assignees' "no-evidence motion for summary judgment with respect to the Mulkey Assignees' 'affirmative claims and/or defenses' based on 'estoppel (both equitable and judicial).'" However, the White Assignees had not sought a no-evidence summary judgment on the Mulkey Assignees' equitable estoppel defense. Therefore, the trial court erroneously granted more relief than was requested by the White Assignees.

But the error did not matter. Unless the error caused the rendition of an improper judgment or prevented the Mulkey Assignees from properly presenting the case on appeal, it did not require the reversal of the White Assignees' summary judgment. The core issue in this appeal was whether the trial court properly granted summary judgment that, through the 1924 Deed, the Mulkey Assignees' predecessors-in-interest reserved only a one-sixteenth interest in the mineral estate. Because the court of appeals could not reverse the summary judgment in favor of the White Assignees on the construction of the 1924 Deed based on the Mulkey Assignees' equitable estoppel defenses, any error by the trial court when it granted the White Assignees' no-evidence summary judgment on those defenses did not cause the rendition of an improper judgment.

The court of appeals held that the trial court did not err when it granted the White Assignees' no-evidence summary judgment, and it affirmed the judgment of the trial court.

[\[1\]](#) The Mulkey Assignees point to a 1946 letter from Ethel Mulkey Stuckert to H. T. Mulkey which "provides evidence that the Mulkey Family entered into a contract with the White Family whereby the Mulkey Family would receive half of the mineral rights in the Mulkey Ranch" and would satisfy any such requirement.