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Texas Oil and Gas Case Law Update

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TEXAS OIL AND GAS CASE LAW UPDATE

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I. INTRODUCTION

As the Texas economy enjoys the impact of robust oil and gas exploration and development spurred on by the shale drilling boom, Texas courts continue to experience similarly swollen dockets of oil and gas disputes. The Texas Supreme Court remained active in the energy sector in the 2011-2012 term with significant opinions affecting the areas of pipeline condemnation, exploration and production industry contracts, and lessor–lessee relations. Texas intermediate appellate courts also issued dozens of opinions touching various aspects of the industry from title and conveyancing disputes to lease operating issues. The following update will address the significant Texas Supreme Court opinions from the 2011-2012 term as well as selected cases from the intermediate appellate courts.

II. PIPELINE CONDEMNATION

Following its landmark August 2011 opinion in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, the Texas Supreme Court remained busy in the pipeline condemnation arena first by reaffirming the *Denbury* decision not once but twice and then by issuing another significant opinion addressing the value-to-the-taker rule.

A. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC[2]

The Texas Supreme Court's August 2011 opinion in *Denbury* sparked considerable controversy among industry participants and commentators grappling with the potentially far-reaching ramifications of that decision on pipeline condemnation practice. The August 2011 opinion overturned the principally ministerial, but long-recognized, procedure administered by the Texas Railroad Commission to confer certified common carrier status on would-be pipeline operators allowing the companies to exercise the power of eminent domain.[3]

2. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012).

3. Professor Kramer's thorough analysis of the original *Denbury* opinion can be found in his article in this publication last year. *See* Bruce Kramer, *A Renaissance*

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Prior to *Denbury*, a company seeking certification as a common carrier needed simply to check the common carrier box on Form T-4 and provide the Commission with a letter committing the company to be operated as a common carrier rather than an exclusively private pipeline. The Texas Supreme Court held that more was required than potentially self-serving declarations about the applicant's intention to operate as a common carrier; rather, the applicant must make some showing to the Commission that its operations will serve a public purpose.[4] The Court's decision spurred strong commentary and a flurry of *amicus curae* briefs from the Texas Oil and Gas Association and others, along with a Motion for Rehearing from Denbury.[5] Among the criticisms in *Denbury's* Motion for Rehearing and the various *amicus* briefs was the complaint that the Court provided little to no guidance on how such a showing was to be made since any applicant is highly unlikely to have third-party transportation agreements in place prior to construction of the proposed pipeline, much less prior to approval of the application for certification as a common carrier.

In March 2012, the Court attempted to address this issue when it substituted a new opinion in place of the August 2011 opinion.[6] Although the Court denied Denbury's Motion for Rehearing, it offered a substituted opinion in an apparent attempt to clarify and limit the scope of the original opinion.[7] Reaffirming that "[u]nadorned assertions of public use are constitutionally insufficient," the Court held that for an applicant to qualify for common carrier status, "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."[8] How this burden is to be met in practice remains uncertain, but it may entail proof of specific anticipated future contracts with parties anticipated to be transporting hydrocarbons along or near the expected pipeline. The Court also attempted to address concerns regarding the scope of its opinion by narrowing its holding to those intending on constructing a CO2 pipeline and applying for common carrier status under section 111.002(6) of the Natural Resources Code.[9] It is unclear how the Court would distinguish a factual scenario involving a natural gas pipeline, and this is an issue that many in the industry are following eagerly. After the Court's March

Year for Oil and Gas Jurisprudence: The Texas Supreme Court, 18 TEX. WESLEYAN L. REV. 627, 628 (2011).

4. *Tex. Rice Land Partners, Ltd.*, 363 S.W.3d at 202.
5. *See id.* at 194, 197 n.13.
6. *See id.* at 194.
7. *Id.*
8. *Id.* at 195, 202.
9. *Id.* at 202 n.28.

2012 opinion, Denbury again requested rehearing.[10] In late 2012, the Court rejected the Motion for Rehearing, again reaffirming this significant and still controversial decision.[11]

B. Enbridge Pipelines (East Texas), LP v. Avinger Timber, LLC[12]

In *Enbridge Pipelines,* the Texas Supreme Court confronted the value-to-the-taker rule in the context of a condemnor who had previously improved and used the condemned tract under a long-term lease.[13] In 1973, Avinger Timber LLC's predecessor in interest leased twenty-four acres of rural land to a gas processing company.[14] The lease provided for a perpetual right of renewal.[15] The lessee constructed a gas processing facility and over the years constructed pipelines, roads, and an electrical transmission line under additional easements.[16] The lease provided that the lessee owned the processing plant and would remove it at the termination of the lease.[17] In 1998, the lease was renewed but without the perpetual right of renewal, which created a reversionary interest in Avinger.[18] Enbridge Processing succeeded as lessee and subsequently attempted to renew the lease with Avinger.[19] When negotiations failed, Enbridge Processing merged with Enbridge Pipelines and commenced condemnation proceedings.[20]

Avinger received a $47,580 commissioner's court award, but it appealed and later obtained a $20,955,000 jury verdict in district court, supported by Avinger's expert testimony as to the value of improvements made to the land over the past forty years plus the potential cost savings to Enbridge in not having to move the gas processing facilities.[21] Enbridge Pipeline argued at trial that the land should be valued in its pre-lease state as an undeveloped tract of rural real estate because the lease provided that the lessee was the owner of the improvements.[22] Avinger asserted that it was entitled to the value of the land enhanced by the surrounding pipeline infrastructure constructed over the term of the lease.[23] At trial, both parties moved to exclude

10. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 381 S.W.3d 465 (Tex. 2012) (denying rehearing).
11. *Id.*
12. Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC, No. 10-0950, 2012 WL 3800234 (Tex. Aug. 31, 2012).
13. *Id.* at *1–2.
14. *Id.* at *2.
15. *Id.*
16. *Id.*
17. *Id.* at *3.
18. *Id.* at *1.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at *3.
23. *Id.*

the other's expert.[24] Because Enbridge Pipelines's expert did not value the property as of the date of the taking, the trial court excluded that testimony, but the trial court allowed Avinger's expert to testify regarding the value of the improvements and the cost savings to Enbridge Pipelines.[25] The court of appeals affirmed the jury verdict, holding that Avinger's expert's testimony did not violate the value-to-the-taker rule, which prohibits measuring a land's unique value to a condemnor, and the project-enhancement rule, which prohibits consideration of any enhancement to the value of the property that results from the taking itself.[26]

The Texas Supreme Court reversed and remanded the case, holding that the trial court abused its discretion in allowing Avinger's expert testimony and focusing on Enbridge Pipeline's cost savings, which violated the value-to-the-take rule.[27] The Court noted that in the process of determining the compensation required to make the landowner whole, the value-to-the-taker rule prohibits compensation based on a tract's special value to the taker, as distinguished from its value to third parties who may not possess the power to condemn.[28] To the extent Avinger's expert relied on the costs saved by Enbridge in not having to move the facility, that testimony was improper for the jury to consider.[29] The Court noted however, that Avinger's experts could properly consider the effect the lease had on the value of the property.[30] Because the Court remanded the case due to violation of the value-to-the-taker rule, the Court did not reach the question of whether Avinger's expert testimony also violated the project-enhancement rule.[31] The Court affirmed the exclusion of the testimony of Enbridge Pipeline's expert noting that he failed to explain why the current use of the property was not the highest and best use, and because his valuation did not take into consideration unique factors relating to the tract in question such as the thirty-one year history as a gas processing site with all required permits, the pipeline infrastructure and easements, and the advantageous location of the tract within a prolific gas producing area.[32]

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24. *Id.* at *4.
25. *Id.*
26. *Id.*
27. *Id.* at *7.
28. *Id.* at *5 (citing City of Dallas v. Rash, 375 S.W.2d 502, 505 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.) (citing United States v. Miller, 317 U.S. 369, 375 (1943))).
29. *Id.* at *6.
30. *Id.*
31. *See id.* at *6–7.
32. *Id.* at *7.

III. Title and Conveyancing Disputes

A. Coghill v. Griffith[33]

This lease construction dispute required the determination of whether particular clauses in a conveyance constituted a fraction of royalty that was subject to a 1953 or a fractional royalty. In 1961, Coghill's predecessor in title conveyed to Griffith's predecessor in title 191 acres in Rusk County, Texas that were subject to a 1953 mineral deed with a ten-year primary term.[34] The 1961 Deed contained the following reservation:

> [T]his Grantor excepts from this conveyance and reserves unto himself, his heirs and assigns an undivided one-eighth (1/8) interest in and to all of the oil royalty [and] gas royalty . . . It is understood and agreed that this sale is made subject to the terms of said lease, but the Grantor reserves and excepts unto himself, his heirs and assigns an undivided one-eighth (1/8) of all royalties payable under the terms of said lease, as well as an undivided one-eighth (1/8) of the usual one-eighth (1/8) royalties provided for in any future oil, gas and/or mineral lease covering said lands or any part thereof?
>
> Nevertheless, neither the Grantee herein, nor his heirs, executors, administrators, and assigns of the Grantee shall make or enter into any lease or contract for the development of said land or any other portion of the same for oil, gas or other minerals, unless each and every such lease, contract, leases or contracts, shall provide for at least a royalty on oil of the usual one-eighth (1/8) to be delivered free of cost . . . [A]nd in the event Grantee, nor [sic] the heirs, executors, administrators and assigns of the Grantee, or as in the status of the fee owners of the land and minerals, or as a fee owner of any portion of the same, shall operate or develop the minerals therein, Grantor shall own and be entitled to receive as a free royalty hereunder, (1) an undivided one-sixty fourth (1/64).[35]

The 1953 lease ultimately expired, and new leases were executed in 1976 and 1981 with a royalty of 3/16 for each lease. In 1981, Griffith's predecessor signed a division order providing that he and Coghill were entitled to 1/8 of the 3/16 royalty for minerals produced from the subject property. In 2007, Griffith claimed that the 1981 division order was based on an incorrect construction of the 1961 deed's mineral reservation. Griffith argued that Coghill was entitled to only 1/8 of a 1/8 royalty, even though subsequent leases may provide for more than a 1/8 royalty. Griffith claimed entitlement to 1/8 of the 3/16 royalty under the 1976 and 1981 leases and to the additional 1/8 of 1/16 royalty that Coghill received under the 1981 division order. Under this construction, Coghill would never benefit from increased royalties under subsequent leases after the 1953 lease expired.

33. Coghill v. Griffith, 358 S.W.3d 834 (Tex. App.—Tyler 2012, pet. denied).
34. *Id.* at 835–36.
35. *Id.*

First distinguishing between a fraction of royalty and a fractional royalty, the court noted that the lease at issue contained five clauses relevant to the quantum of reserved interest. Harmonizing the first two fraction of royalty clauses with the minimum royalty and fee owner development clauses, as well as the unusually phrased reservation in the future leases clause of an "undivided one-eighth (1/8) of the usual one-eighth (1/8) royalties," the court determined that the lease provides a fraction of royalty with a minimum 1/64 interest reserved in all future leases.

B. Thomson Oil Royalty, LLC v. Graham[36]

This case involved an attempt by a mineral lessee to obtain damages for fraud, breach of contract, breach of warranty of title, and unjust enrichment, where the lessor previously leased her interest to a different operator.[37] Two operators, EOG Resources, Inc. ("EOG") and Thomson Oil ("Thomson"), were trying to obtain mineral leases in San Augustine County, and in doing so, both operators contacted Camille Tucker Graham ("Graham").[38] According to the documents viewed by the trial court, Graham signed a memorandum of oil, gas, and mineral lease with EOG on July 21 covering 306 acres for $127,000.00.[39] Two days later, Thomson offered to lease the same 306-acre tract and an additional 241-acre tract.[40] On July 25, Graham signed the lease with Thomson covering 306 and 241 acres for $136,755.00.[41] Subsequent to this transaction, Thomson contacted EOG seeking to assign both tracts.[42] EOG recorded its memorandum of oil, gas, and mineral lease in the Real Property Records of San Augustine County on July 30—which Thomson's manager, Terry Scull, viewed.[43] Scull later spoke to Graham who told him that she had previously leased the 306 acres to EOG, to which Graham had her attorney send Thomson a letter requesting return of the signed lease and a refusal to pay the bank draft.[44] On August 25, Thomson paid the bank draft for $136,755.00.[45] Two days later, Thomson filed the lease covering the 306-acre tract and the 241-acre tract in the Real Property Records of San Augustine County.[46]

36. Thomson Oil Royalty, LLC v. Graham, 351 S.W.3d 162, 166 (Tex. App.—Tyler 2011, no pet. h.).
37. *Id.* at 164–66.
38. *Id.* at 166.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

The trial court granted Graham's motion for traditional summary judgment, and the case was appealed.[47] The primary issue for the appellate court was the affirmative defense of ratification.[48] When a contract is procured by fraud, it can be ratified.[49] This ratification occurs when a party affirmatively acknowledges, performs, or acts under it; however, actual knowledge is required.[50] In essence, in order for a party to ratify the lease, he or she needs to have knowledge of all of the material facts relating to the fraudulent transaction.[51] Additionally, a ratification is effective as to the whole of the agreement, not simply to individual parts.[52]

The appellate court opined that when Graham leased her 306 acres to Thomson, the contract was voidable and could only be voided by Thomson.[53] However, because Thomson's manager, Scull, viewed the memorandum of oil, gas, and mineral lease from Graham to EOG, Thomson was imputed with having actual knowledge of the fraudulent event.[54] At that point, although Thomson could have voided the agreement,[55] Thompson instead filed its lease with Graham in the Real Property Records of San Augustine County, thereby ratifying the lease.[56] Accordingly, the court of appeals affirmed the trial court's summary judgment in favor of Graham.[57]

C. EOG Resources, Inc. v. Hurt[58]

This case involved a determination of when a party can be classified as a third-party beneficiary—more specifically, when the issue involves an oil and gas lease transaction.[59] Standard Investment Company ("SIC"), as lessor, and EOG, as lessee, entered into an oil and gas lease transaction covering over 11,000 acres of land known as the Houston Ranch.[60] Notably, a surface use restriction and damages provision was also addressed within the lease.[61] One year after the oil and gas lease transaction, James Hurt ("Hurt") entered into a grazing lease agreement with SIC over the Houston Ranch.[62] This lease ex-

47. *Id.* at 165.
48. *See id.* at 165–66.
49. *Id.* at 165.
50. *Id.* at 165–66.
51. *Id.*
52. *Id.* at 166.
53. *Id.*
54. *Id.*
55. *See id.*
56. *Id.*
57. *Id.* at 167.
58. EOG Res., Inc. v. Hurt, 357 S.W.3d 144 (Tex. App.—Fort Worth 2011, pet. denied).
59. *See id.* at 147.
60. *Id.* at 146.
61. *Id.*
62. *Id.*

pired on January 2006.[63] In July of that year, Hurt executed a similar lease; however, the lessor was "Molly Houston (in care of Jim Howard)" instead of SIC.[64] In January 2008, Hurt received a shipment of 327 head of cattle on the Houston Ranch, and on June 27, 2008, Hurt shipped back only 293 head of cattle, thus missing 34 head of cattle.[65] Hurt discovered that a portion of the fence surrounding the pasture had been damaged, which was approximately 250 feet from the edge of the Houston Ranch Number 22-H well site (with work being performed by Outlaw Enterprises, hired by EOG, from June 16, 2008 to June 18, 2008).[66] After Hurt contacted EOG, the fence was repaired within two days, and Hurt recovered all but ten or eleven head of cattle.[67] Hurt sued EOG for compensation of $7,250.00 for the lost cattle based on the assumption he was a third-party beneficiary under the oil and gas lease. The trial court rendered judgment for Hurt, and EOG appealed.[68]

The court of appeals focused on Hurt's status as a third-party beneficiary and determined that because Hurt was not a party to the original oil and gas lease between SIC and EOG, the only way he could recover was to obtain third-party beneficiary status.[69] To be a third-party beneficiary, the court noted, a party "must show that he is either a 'donee' or 'creditor' beneficiary of the contract."[70] Therefore, for Hurt to show this, he must have been owed a debt, contractual obligation, or another enforceable legal commitment.[71] The court examined the entire lease agreement and confirmed that EOG and SIC entered their agreement for their own benefit, not for the benefit of Hurt.[72]

Hurt next argued that he should be afforded third-party beneficiary status because according to the lease, he was a "Lessor's tenant" in certain sections of the lease, and therefore, EOG and SIC intended for him to be a party to the contract.[73] The court dispelled this argument by holding that because Hurt's agreement with SIC expired in January 2006, he was not considered a "Lessor's tenant."[74] Additionally, Hurt's subsequent lease was with Molly Houston, not SIC, even though she was noted as one of SIC's owners in the original lease.[75] Because there was no language to indicate she was acting on behalf of

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 146–47.
67. *Id.* at 147.
68. *Id.*
69. *Id.* at 151.
70. *Id.* at 148.
71. *See id.*
72. *Id.* at 148–49.
73. *Id.* at 149.
74. *Id.*
75. *Id.*

SIC, Hurt was not a party to the contract between SIC and EOG.[76] The court went on to further indicate that even if Hurt was classified as a "Lessor's tenant," he would still not be able to enforce the lease agreement because he stated that the head of cattle were "lost," and under the relevant surface damage provision for "lost cattle," only the lessor, and not a "Lessor's tenant," was entitled to compensation.[77]

In dicta, the court of appeals recognized that even had all of Hurt's other claims succeeded, he may still not have recovered because there was no indication in the record that SIC owned anything other than the executive rights.[78] The court opined that because the owner of the executive right is not capable of granting surface leases, absent specific authority, SIC would not have possessed the legal capacity to grant a grazing lease.[79] Accordingly, the court of appeals reversed the trial court judgment.[80]

D. Conley v. Comstock Oil & Gas, LP[81]

Here, the court of appeals solved a dispute as to the proper location of the Bartolo Escobeda Survey (the "Escobeda") and in connection, the proper ownership of the minerals underneath.[82] Margaret Brush Conley ("Conley") claimed ownership of the minerals severed from the surface in the early twentieth century.[83] In her suit, she sued Comstock Oil and Gas ("Comstock"), the operator of three wells in the Hamman Unit, and other landowners who leased to Comstock, all of whom claimed ownership to the minerals under the wells.[84] Conley alleged that the land on which the wells were drilled lie within the boundaries of the Escobeda, which had a survey date of 1835.[85] The trial court was asked to determine the proper boundary of the Escobeda in relation to two other surveys—the L.T. Hampton and the Thomas Colville.[86] The trial court ruled in favor of Comstock as to their summary judgment motion.[87]

Conley's first issue on appeal was based on the supposition that the trial court erred in denying her summary judgment motion because the "boundaries of the Escobeda were judicially determined in a previous case brought by the surface owners of the Escobeda."[88] The

76. *Id.*
77. *Id.* at 150.
78. *Id.* at 150–51.
79. *Id.*
80. *Id.* at 152.
81. Conley v. Comstock Oil & Gas, LP, 356 S.W.3d 755 (Tex. App.—Beaumont 2011, no pet. h.).
82. *Id.* at 758–59.
83. *Id.* at 759.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 760–61.

court discussed *Carter v. Collins,*[89] in which Collins sued to recover the Colville league from those holding title to the Escobeda.[90] This court ultimately decided that according to the evidence, the boundaries of the Colville and the Escobeda did not conflict.[91] In the same manner, the court also referenced *Kilgore v. Black Stone Oil Co.*,[92] in which this court held that *Collins* established the boundary lines for the Colville Survey, among others, and that stare decisis prevented appellants from asserting a conflict between the Escobeda and the other surveys (which would have caused a different result from *Collins*).[93] Conley differentiated her claim by stating that the location of the Escobeda was different than in both *Collins* and *Kilgore*.[94] The court commented that Conley's citation of *Collins* in her motion for summary judgment would have determined the boundaries of the Escobeda to the south and east of the Colville, and to the north and east of the Hampton.[95] Additionally, Conley would assert that based on the stare decisis decision in *Kilgore*, the location of the Escobeda was established as a matter of law.[96] Comstock, however, argued that res judicata prevented Conley from asserting the location of the Escobeda as a matter of law because Comstock's predecessor was a defendant in *Kilgore*.[97] The court did, however, state that in order for stare decisis to control, the same disputed issue must be at hand; therefore, although *Collins* determined that there was no conflict between the boundaries of the Escobeda and the Colville, that did not mean there was no conflict between the Escobeda and the fifteen other surveys in issue.[98] The court held in that case, stare decisis would not establish the location of the Escobeda as a matter of law.[99]

The court of appeals briefly addressed Comstock's motion for summary judgment but upheld its denial because the present action was not shown to be "based on the same claims as were raised or could have been raised in the first action."[100] The court reasoned that *Kilgore* concerned ownership of the minerals beneath a different tract of land—not the land in this suit.[101]

89. W. T. Carter & Bro. v. Collins, 192 S.W. 316 (Tex. Civ. App.—Beaumont 1916, writ ref'd).

90. *Conley*, 356 S.W.3d at 761–62.

91. *Id.* at 761.

92. Kilgore v. Black Stone Oil Co., 15 S.W.3d 666 (Tex. App.—Beaumont 2000, pet. denied).

93. *Conley*, 356 S.W.3d at 761–62.

94. *Id.* at 761.

95. *Id.* at 762.

96. *Id.*

97. *Id.*

98. *Id.* at 763.

99. *Id.*

100. *Id.* at 763–64.

101. *Id.* at 764.

The final issue the court addressed was Comstock's claim for summary judgment based on the doctrine of "presumed lost deed."[102] Comstock argued that because Conley and her predecessors had acquiesced their possession in the land and minerals in the fifteen surveys for such a long period of time, as a matter of law, it passed to Comstock and the landowners.[103] "The presumption of a lost grant or conveyance may be established as a matter of law under circumstances where the deeds are ancient and the evidence is undisputed."[104] Based on the documents in the record, the court concluded that nothing indicated that anyone holding title to the Escobeda chain of title ever asserted a claim to the land at issue.[105] Therefore, because of the extended period of time that the Escobeda grantees claimed neighboring lands, and not the lands at issue, they acquiesced their claim under the fifteen surveys at issue in this case.[106] Accordingly, the court affirmed Comstock's summary judgment motion as to this issue.[107] The court also looked at Comstock's claim for adverse possession and ruled that according to the real property and production records reviewed, Comstock continuously exercised dominion through production and operations to satisfy the ten-year adverse possession statute.[108]

E. Philipello v. Nelson Family Farming Trust[109]

In *Philipello*, the court concluded that a term reservation of "one-eighth (1/8) of the royalty in oil, gas, and other minerals in and under may be produced with the oil and gas" reserved in said grantor one-eighth of the royalty in all oil, gas, and other minerals that may be produced from the property and was not to be proportionately reduced based on the grantor's fractional mineral interest in such property.[110] Here, the Nelson Family Fund Trust ("Nelson Trust") conveyed approximately 110.26 acres of land in Robinson County, Texas ("Property") to Nathan P. and Shari K. Philipello (collectively, "the Philipellos"), subject to (i) all previous mineral and royalty reservations, (ii) a reservation of royalty in favor of the Nelson Trust, and (iii) various exceptions to the conveyance.[111] At the time of this conveyance, the court acknowledged that the Nelson Trust owned at least a ¼ mineral interest in the Property and that the Nelson Trust did not

102. *Id.* at 764–66.
103. *Id.* at 764–65.
104. *Id.* at 765.
105. *Id.* at 765–66.
106. *Id.* at 766.
107. *Id.*
108. *Id.* at 766–69.
109. Philipello v. Nelson Family Farming Trust, 349 S.W.3d 692 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
110. *Id.* at 694–95.
111. *Id.* at 693.

own all of the minerals underlying the Property.[112] In the deed, the Property was described as 110.2 acres of land with various reference deeds and the metes and bounds description.[113] After the property description, the deed contained the following language:

> This Deed is subject to all previous mineral and/or royalty reservations.
> Reservations from Conveyance: SAVE AND EXCEPT and there is hereby reserved for Grantor and Grantor's heirs, administrators, successors or assigns, for a period of ten years from the date of this conveyance, one-eighth of the royalty in oil, gas and other minerals in and under and that may be produced with the oil and gas. At the expiration of such ten-year period, the entire royalty estate reserved herein shall revert to and be owned by Grantees, their heirs and assigns . . . .[114]

The Philipellos asserted that under the unambiguous language of the deed, the Nelson Trust reserved for a period of ten years, 1/8 of the royalty of the fractional share "of the minerals that it owned prior to the conveyance to (the Philipellos)."[115] The Nelson Trust argued that the trial court correctly construed the unambiguous language of the deed to reserve to the Nelson Trust for the period of ten years, 1/8 of the royalty in oil, gas, and other minerals in and under the Property.[116]

The court then acknowledged two lines of cases that could potentially apply to a reservation of a mineral interest or royalty in a deed in which the grantor owns an undivided fractional mineral interest.[117] Here, the court, in dicta, briefly summarized the property "conveyed" versus the property "described" distinction but then noted that neither lines of these cases applied to the deed at issue.[118] The court pointed out that the reservation did not expressly state that the oil, gas, or other minerals were in and under the property conveyed or the property described.[119] As a result, the court concluded that it was reasonable to construe the reservation as reserving an undivided 1/8 term royalty interest in the entire Property.[120]

F. ETC Texas Pipeline, Ltd. v. Payne[121]

In this declaratory-judgment action involving a pipeline easement, the court of appeals affirmed that failing to transport gas through a

112. *Id.*
113. *Id.* at 694.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 694–95.
119. *Id.* at 695.
120. *Id.*
121. ETC Tex. Pipeline, Ltd. v. Payne, No. 10-11-00137-CV, 2011 WL 3850043 (Tex. App.—Waco Aug. 31, 2011, no pet. h.) (mem. op.).

pipeline constitutes "non-use" of that pipeline, thereby causing the easement to be abandoned and to revert to the grantor/landowner.[122]

ETC Texas Pipeline, Ltd. ("ETC") was the successor-in-interest to Ferguson Burleson County Gas Gathering System ("Ferguson").[123] In 1995, Ferguson acquired a right-of-way and easement "to construct, maintain, operate, repair, alter, replace, change the size of and remove pipelines . . . for the transportation of oil, gas, [and other hydrocarbons]" through the grantor's land.[124] The agreement also stated that continuous non-use for eighteen months abandoned the easement and caused it to revert to the Grantor.[125] In 1996, a natural gas pipeline was installed across the Grantor's land.[126] In November 2002, the gas was re-routed away from that portion of pipeline.[127] Believing that ETC had abandoned the easement, the grantor filed a declaratory-judgment action alleging the easement had terminated and requested the court to order ETC to remove the pipeline and restore the property to its original condition.[128]

The trial court found that the easement had terminated because it had not been used to transport oil or gas since 2002.[129] ETC argued that the trial court improperly altered the terms of the easement, claiming it had maintained the easement by maintaining the pipeline.[130] The court of appeals affirmed the trial court: "the purpose for obtaining the easement was to facilitate the construction of a pipeline . . . for transportation of gas along the pipeline" and therefore when the gas was rerouted, the easement was not used.[131]

ETC argued it had continuously used the easement by cathodically protecting and pressurizing the pipeline, citing *Stephenson v. Vastar Resources, Inc.*,[132] in which a pipeline operator deactivated and purged gas from a 16.5-mile section of pipeline but continued to maintain its easement by cathodic protection, inspection, mowing, cutting, and keeping up the pipeline and right-of-way.[133] The *ETC* court distinguished this case from *Stephenson*, stating that ETC had not offered evidence showing the portion of the pipeline in question had been cathodically protected or inspected since 2002.[134]

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122. *Id.* at *1, *7.
123. *Id.* at *1.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at *2.
129. *Id.*
130. *Id.* at *5.
131. *Id.*
132. Stephenson v. Vastar Res., Inc., 89 S.W.3d 790, 793–94 (Tex. App.—Corpus Christi 2002, pet. denied).
133. *ETC Tex. Pipeline, Ltd.*, 2011 WL 3850043, at *5–6.
134. *Id.* at *6.

ETC then argued that the easement was still useful because it could be reconnected at any time.[135] The court again affirmed the trial court, noting that the pipeline had not been used to transport natural gas since 2002 and therefore was abandoned regardless of its potential future usefulness to ETC.[136]

However, the court agreed with ETC's contention that ETC could not be ordered to remove the pipeline and restore the property because those terms were not in the original easement agreement.[137] The court stated that declaratory-judgment actions are only "remedial" and may not request affirmative relief.[138] The grantors' request was an unauthorized request for affirmative relief, which improperly altered the rights that the parties contracted for.[139]

This case confirms that if a pipeline is no longer used to transport oil or gas, a pipeline operator should cathodically protect, inspect, cut, mow, and otherwise regularly keep up the pipeline and right-of-way to maintain its easement.

G. Reed v. Rice[140]

The descendants of Jeff Freeman appealed an adverse judgment on the adverse possession claim brought by Jewel Rice.[141] The appellate court affirmed the trial court's judgment.[142] The descendants argued that the landowner failed to prove that she maintained actual and visible possession of the property.[143] To establish adverse possession, the claimant must prove an actual and visible appropriation of the land of such a character as to unmistakably assert a claim of exclusive ownership.[144] The appellate court found that the trial court could find that the landowners' purpose in erecting the fence and posting the property was to visibly display their claimed ownership of the property.[145] Further, a duly recorded 1973 partition deed repudiated any cotenancy with the descendants.[146] Under Texas law, a cotenant may not adversely possess against another cotenant unless it clearly appears he has repudiated the title of his cotenant and is holding adversely to it.[147] When cotenants partition the whole of the property to the exclusion of a non-participating cotenant, the act of partition acts as an

135. *Id.* at *7.
136. *Id.*
137. *Id.* at *8.
138. *Id.*
139. *Id.*
140. Reed v. Rice, No. 09-10-00215-CV, 2011 WL 4537908 (Tex. App.—Beaumont Sept. 29, 2011, no pet. h.) (mem. op.).
141. *Id.* at *1.
142. *Id.*
143. *Id.* at *2.
144. *Id.* (quoting Rhodes v. Cahill, 802 S.W.2d 643, 645 (Tex. 1990)).
145. *Id.*
146. *Id.* at *3.
147. *Id.* (quoting King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 756 (Tex. 2003)).

ouster of the excluded cotenant.[148] The trial court received ample evidence that the descendants had notice that the landowner's possession of the property was hostile to them.[149] The descendants were aware that the landowner claimed the property to the exclusion of whatever interest they might have held in it.[150]

In their second issue, appellants contended that the trial court erred in granting judgment for adverse possession based upon a patent from the State acquired in 1973.[151] The court noted that the issuance of a patent is a mere ministerial act that does not defeat vested legal rights.[152] The descendants' claim that the state issued a patent outside of the prior landowner's chain of title was not supported by the record.[153]

H. Chesapeake Exploration, L.L.C. v. Dallas Area Parkinsonism Society, Inc.[154]

Here, the court concluded that an oil and gas lease that contained a special warranty did not amount to a quitclaim deed.[155] In this case, Dallas Area Parkinsonism Society, L.L.C. and American Cancer Society High Plains Division, Inc. (the "Charities") acquired ownership of two tracts of land totaling approximately eighty-three acres in Tarrant County, Texas (the "Property") from the independent executors of an estate.[156] The Charities negotiated two oil and gas leases covering the Property.[157] In the course of negotiations, the Charities agreed to send the leases to Chesapeake with Chesapeake agreeing to pay "within thirty (30) days of clearing the title."[158] The leases were executed, and a total of $498,000 was paid in bonus consideration.[159] In each of the leases (the terms of which were virtually identical), the granting clause contained the following:

> In consideration of a cash bonus in hand paid and covenants contained herein, lessor hereby grants, leases and lets exclusively to Lessee the following described land, hereinafter called "the Leased premises . . . for the purpose of exploring for, developing, producing and marketing oil and gas . . . .[160]

148. *Id.* (citing *King Ranch, Inc.*, 118 S.W.3d at 756).
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* (quoting Atl. Ref. Co. v. Noel, 443 S.W.2d 35, 39 (Tex. 1968)).
153. *Id.*
154. Chesapeake Exploration, L.L.C. v. Dallas Area Parkinsonism Soc'y, Inc., No. 07-10-0397-CV, 2011 WL 3717082 (Tex. App.—Amarillo Aug. 24, 2011, no pet. h.) (mem. op.).
155. *Id.* at *1.
156. *Id.*
157. *Id.*
158. *Id.* at *2.
159. *Id.*
160. *Id.* at *4.

Paragraph 23 of an Addendum to the Lease contained the following:

> [The Lessor] does hereby bind themselves, their heirs, executors, administrators, successors and assigns to warrant and forever defend all and singular the said property unto the said Lessee, herein, their heirs, successors and assigns against every person whomsoever claiming the same or any part thereof, by, through and under [Lessor], but not otherwise.[161]

A title opinion later revealed that the mineral estate belonged to a third party and not the Charities.[162] Chesapeake then sought recovery of its bonus money, which the Charities refused to repay.[163] In the trial court, the Charities asserted that the special warranty provision in the lease did not warrant title but warranted that the Charities "had taken no action to encumber the title or otherwise divest itself of any title it may have."[164] The trial court rendered summary judgment in favor of the Charities on all of Chesapeake's causes of action and issued a final judgment wherein it ordered that Chesapeake take nothing.[165] The Charities asserted that the special warranty provisions "simply warrant[ed] that *if* the grantor has title, he has done nothing to encumber or otherwise divest himself of title."[166]

The court noted that in deciding whether an instrument is a quitclaim deed, courts generally look to whether the language of the instrument, taken as a whole, conveyed the property itself or merely the grantor's rights.[167] What is important and controlling is not whether the grantor actually owned the title to the lands, but whether the deed purported to convey the property.[168] After reviewing the lease as a whole, the court concluded that the language of both the granting clause and the warranty clause supported a conclusion that the leases purported to convey title to the Property itself and not merely quitclaim the Charities' rights therein.[169]

IV. Leasing Issues and Disputes Regarding Lease Operations

A. Exxon Corp. v. Emerald Oil & Gas Co.[170]

The Texas Supreme Court withdrew its prior opinion of December 17, 2010, and substituted a new opinion (but maintained the same

161. *Id.* at *2.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at *3.
166. *Id.* (emphasis in original).
167. *Id.* at *4.
168. *Id.*
169. *Id.* at *5.
170. Exxon Corp. v. Emerald Oil & Gas Co., 348 S.W.3d 194 (Tex. 2011).

judgment).[171] In 1991, Exxon, a working interest owner in several thousand acres in Refugio County, Texas (the "Leases"), plugged several wells and abandoned the Leases.[172] In 1993, Emerald leased a portion of the lands previously covered by the Leases and encountered cut casing and metal, refuse, and environmental contaminants when trying to re-enter certain wells.[173] Concluding that Exxon intentionally sabotaged the wells, Emerald filed suit against Exxon, and the royalty owners later intervened.[174] In essence, the royalty owners and Emerald alleged that Exxon failed to fully develop the Leases and sabotaged the wells before abandoning the lease.[175] Emerald brought claims for negligent misrepresentation, fraud, tortious interference with business opportunity, breach of regulatory duty to plug wells properly, breach of duty to avoid committing waste, and negligence per se in violating several sections of the Texas Natural Resources Code.[176] The royalty owners brought claims for statutory and common law waste, breach of alleged regulatory duty to plug wells properly, negligence, negligence per se, negligent misrepresentation, tortious interference with economic opportunity, breach of lease, and fraud.[177]

Reasoning that Exxon owed no duty to future lessees such as Emerald, the trial court granted summary judgment for Exxon on Emerald's claims for breach of regulatory duty to plug wells properly, breach of common law and regulatory duties to avoid committing waste, and negligence per se.[178] The court of appeals reversed, and Exxon then appealed to the Texas Supreme Court.[179] In a prior opinion that still stands, the Texas Supreme Court reversed and rendered that Emerald take nothing.[180] Emerald, as a subsequent lessee, did not have standing to sue Exxon for injury to the property covered by the Leases that occurred before Emerald acquired its interest.[181] The case then proceeded to trial on Emerald's claims for fraud, negligent misrepresentation, and tortious interference with business opportunity, and on all of the royalty owners' claims.[182] The trial court granted a directed verdict in Exxon's favor on Emerald's three remaining claims and on all of the royalty owners' claims except common law and statutory waste and breach of lease.[183]

171. *Id.* at 198.
172. *Id.* at 200.
173. *Id.*
174. *Id.* at 201.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 201–02.
180. *Id.* at 202.
181. *Id.* at 201.
182. *Id.*
183. *Id.*

On appeal, the Texas Supreme Court primarily addressed issues regarding statutes of limitations.[184] Specifically, Exxon alleged that the royalty owners' claims for statutory and common law waste, breach of lease, and fraud and Emerald's claims for fraud, negligent misrepresentation, and tortious interference were barred by applicable statutes of limitations.[185] Emerald and the royalty owners contend that (1) they filed suit timely because Exxon fraudulently concealed its wrongful conduct, tolling the statute of limitations; and (2) the nature of their injuries was difficult to discover, thus also delaying accrual of their claims.[186] After reviewing the evidence, including correspondence between Exxon and the royalty owners in which Exxon threatened to plug certain wells on the Leases and correspondence from Emerald to the royalty owners regarding its discovery that Exxon improperly cut casing and left "junk" in certain wells, the Texas Supreme Court held that Emerald and the royalty owners had actual knowledge of Exxon's alleged wrongful actions more than two years before they filed suit.[187] In so holding, the Texas Supreme Court clarified that the statute of limitations begins to run when a party has actual knowledge of a wrongful injury, even if he does not know the specific cause of the injury, the party responsible for it, the full extent of it, or the chances of avoiding it.[188] Accordingly, Emerald's claims for negligent misrepresentation and tortious interference with business opportunity and the royalty owners' claims for statutory and common law waste, were barred by limitations.[189]

Because Emerald's claim for fraud had a four-year statute of limitations, however, the court found that Emerald's claim was timely.[190] Nonetheless, a necessary element of a claim for fraud is that the defendant made a material, false representation and intended to induce the party's reliance on the representation.[191] The court noted that the existence of and reliance on false public filings, such as Texas Railroad Commission ("RRC") reports regarding plugging operations, do not alone satisfy the intent-to-induce reliance element of fraud.[192] Nonetheless, the evidence showed that Exxon knew, at the time it filed its plugging reports, of a special likelihood that Emerald's predecessor, specifically, would rely on the inaccurate plugging reports.[193] Accord-

184. *Id.* at 202–09.
185. *Id.* at 202.
186. *Id.* at 203.
187. *Id.* at 203–08.
188. *Id.* at 207–09.
189. *Id.* at 209.
190. *Id.* at 216–17.
191. *Id.* at 217.
192. *Id.* at 218–19.
193. *Id.* at 219–20.

ingly, the trial court erred in granting a directed verdict in favor of Exxon on Emerald's fraud claim.[194]

While many of the issues in this case turned on evidentiary findings regarding the statute of limitations and an intent to induce reliance on misrepresentations, this case also highlights the types of claims, both statutory and common law, that a lessor or subsequent lessee might bring against a prior lessee. Notably, reliance on false public filings, such as RRC reports, would not satisfy the intent-to-induce element of fraud unless the party filing had special knowledge that a specific person or entity would rely on them.

B. Prize Energy Resources, L.P. v. Cliff Hoskins, Inc.[195]

The main issue before the court was whether the trial court properly resolved a title dispute to mineral interests in a certain tract located in McMullen County, Texas (the "Baker Property").[196] In 2001, there were four owners of the mineral estate: (1) Burlington Resources ("Burlington") owned a 25% mineral interest and had leased its interest (the "Burlington Lease"); (2) the Baker Trusts owned a 25% mineral interest and had leased its interest (the "Baker Lease"); (3) the Rutherfords owned a 25% mineral interest subject to the Baker Lease; and (4) BP America Production Company ("BP"), successor to Atlantic Richfield Company ("ARCO"), owned a 25% mineral interest not subject to a written lease.[197] Both the Burlington and the Baker Trust leases (collectively the "Leases") contained a "continuous production or operations" clause that, in the event production ceased, allowed the lessee to maintain the lease for as long as drilling or reworking operations were prosecuted with no cessation of more than sixty consecutive days.[198]

ARCO and the Rutherfords had previously entered into a Joint Operating Agreement (the "JOA") covering the Baker Property.[199] The Rutherfords contributed the Leases, which covered 75% of the mineral interests in the Baker Property, to the JOA.[200] ARCO contributed its unleased 25% mineral interest to the JOA so that the Baker Property could be developed as a whole, but ARCO retained its possibility of reverter in the event the JOA ever terminated.[201] The JOA also provided that it shall remain in full force and effect for as long as any of the oil and gas leases subject to it remain or are continued in

194. *Id.* at 221.
195. Prize Energy Res., L.P. v. Cliff Hoskins, Inc., 345 S.W.3d 537 (Tex. App.—San Antonio 2011, no pet. h.).
196. *Id.* at 545.
197. *Id.*
198. *Id.* at 546.
199. *Id.* at 545–46.
200. *Id.* at 546.
201. *Id.*

force.[202] ARCO, the operator, then sold its rights under the JOA to Prize Energy ("Prize") but retained its royalty interest and its right of reverter to its 25% mineral interest.[203] It is undisputed that there was a seventy-one-day period in 2001 when no operations took place on the Baker Property, but Prize and the Rutherfords nonetheless continued developing the Baker Property and drilled and completed seven more wells.[204] Eventually, BP deeded its claimed (reverted) 25% mineral interest to Cliff Hoskins, Inc. ("Hoskins") but reserved a 6.25% nonparticipating royalty interest in the 25% mineral interest.[205]

BP and Hoskins filed suit against Prize and the Rutherfords and asserted claims to quiet title to their interests, plus claims for bad faith trespass and recovery of unpaid proceeds under the Texas Natural Resources Code ("TNRC").[206] The trial court granted summary judgment in favor of Prize and the Rutherfords on all of the plaintiffs' claims for trespass.[207] However, the trial court also granted the declaratory relief sought by Hoskins and BP regarding their interests in the Baker Property, finding that the Leases and the JOA terminated in August 2001, at which time Hoskins's and BP's mineral rights and interests reverted, making them unleased cotenants.[208] The trial court further found that Prize and the Rutherfords were not trespassers even though they developed the property following termination of the JOA.[209]

On appeal, Prize and the Rutherfords first argued that the JOA did not terminate and BP's 25% mineral interest did not revert to BP; thus, BP could not have sold the 25% mineral interest to Hoskins.[210] In other words, Prize and the Rutherfords argued that BP still held only a reversionary right to the 25% mineral interest plus the right to receive royalties.[211] Prize and the Rutherfords supported their position by first arguing that BP and Hoskins had no standing to assert that the JOA terminated because they were not parties to the agreement.[212] Texas law is clear that, with the exception of intended third-party beneficiaries, only parties to a contract have the right to complain of a breach of that contract.[213] Although BP was not a party to the JOA, BP still claimed an ownership interest in the Baker Property by virtue of the reversion of its mineral interest, which was contingent

202. *Id.*
203. *Id.*
204. *Id.* at 546–47.
205. *Id.* at 547.
206. *Id.*
207. *Id.* at 547–48.
208. *Id.* at 548.
209. *Id.*
210. *Id.* at 549.
211. *Id.*
212. *Id.*
213. *Id.* at 551.

upon the JOA's termination.[214] As the holder of a reversionary interest, BP had standing to litigate title and assert its ownership rights in the Baker Property by virtue of the JOA terminating.[215]

Regarding title, the court of appeals held that there was cessation of operations on the Baker Property for more than sixty consecutive days, and accordingly, in August 2001, the Leases and the JOA terminated according to their express language without the need for any legal action by the lessors.[216] Therefore, the mineral interests automatically reverted back to the mineral owners, and the unleased 25% mineral interest contributed by ARCO (BP's predecessor) automatically reverted to BP free and clear of the JOA.[217] As a result, BP became an unleased cotenant in the Baker Property.[218] Likewise, Hoskins's cotenant rights in the Baker Property hinged on termination of the JOA and ensuing reversion to BP, which mineral interest BP then sold to Hoskins.[219]

The court next considered the plaintiffs' contention that Prize and the Rutherfords were bad-faith trespassers because they continued to operate on the Baker Property after the cessation of operations in August 2001.[220] Hoskins was able to prove all elements of trespass, namely, that the lessee continued to enter the premises under an oil and gas lease after its termination without a good-faith belief in the existence of the lease.[221] The burden then shifted to Prize and the Rutherfords to prove justification for their trespass.[222] Prize and the Rutherfords argued, and the court agreed, that their entry after August 2001 was justified under the law of cotenancy, which provides that a cotenant has a right to explore, drill, and produce minerals from the common estate without consent from any other cotenant, subject only to a duty to account for the value of any minerals taken, less the reasonable costs of production and marketing.[223] Because the Rutherfords were lessors under the Baker Lease, the Rutherfords' mineral interest subject to the Leases reverted back to them, and therefore they also were cotenants in the Baker Property and had the right to engage in drilling operations thereon.[224]

214. *Id.* at 551–52.
215. *Id.* at 552.
216. *Id.* at 552–53.
217. *Id.* at 553.
218. *Id.* at 553–54.
219. *Id.* at 554.
220. *Id.* at 555.
221. *Id.* at 556–57.
222. *Id.* at 557.
223. *Id.*
224. *Id.*

C. XTO Energy Inc. v. Pennebaker[225]

In this case, the Amarillo court of appeals overruled the district court's ruling that a lease had terminated for failure to pay royalties.[226] The lease at issue was executed in 2004, covering approximately thirty-four acres, which were included within two producing units.[227] The lease contained the following clause regarding the payment of royalties:

> If Lessee fails to timely pay royalties herein acquired; then in addition to all other rights and remedies available to Lessor, Lessor shall, at its option, have the right to cancel and terminate this lease as to all of the lands covered hereby by filing an affidavit of record in Tarrant County, Texas reciting the non-payment of royalties; provided, however, Lessor shall give written notice to Lessee at the address set forth above such intention to cancel or terminate this lease . . . .[228]

The lessor ("Pennebaker"), who had not been paid royalties on production from three wells, brought several causes of action against the lessee ("XTO") seeking a determination that the lease was void based on XTO's failure to timely pay royalties.[229] The court of appeals discussed the distinction between conditions and covenants and noted that generally the promise to pay royalties was a covenant which gives rise to the remedy of damages in the absence of the specific clause allowing for lease termination.[230] However, the royalty payment clause at issue created a condition allowing for lease termination if royalties were not timely paid.[231] Pennebaker presented summary judgment evidence reflecting that he had sent correspondence to XTO claiming that the lease had terminated for failure to pay royalties.[232] However, the record did not establish whether Pennebaker had filed an Affidavit of Non-Payment in the county records, as required by the specific termination language in the lease.[233]

In reversing the trial court's decision that the lease had terminated for failure to timely pay royalties, the court of appeals noted that Texas law disfavors lease forfeiture provisions and that courts will not declare a forfeiture unless compelled to do so by language incapable of another construction.[234] Because Pennebaker had not filed the Affidavit of Non-Payment in the county records (as specifically required

225. XTO Energy Inc. v. Pennebaker, No. 07-10-00396-CV, 2011 WL 6846196 (Tex. App.—Amarillo Dec. 29, 2011, no pet. h.) (mem. op.).
226. *Id.* at *1.
227. *Id.*
228. *Id.*
229. *Id.* at *1–2.
230. *Id.* at *3.
231. *Id.*
232. *Id.* at *4–5.
233. *Id.*
234. *Id.* at *4.

in the royalty payment clause), he had not strictly complied with all of the requirements necessary to terminate the lease for XTO's breach of the condition to timely pay royalties.[235] The court noted that Pennebaker was required to file the Affidavit of Non-Payment despite the fact that doing so would have potentially subjected Pennebaker to liability for slander of title given XTO's prior assertion that the lease remained in effect.[236] This case further illustrates that courts disfavor conditions which result in lease forfeiture and will require strict compliance with the terms of a condition before granting the remedy of lease termination.

D. Howell v. Aspect Resources, LLC[237]

This case emphasizes the importance of pleading the proper cause of action.[238] In dicta, the court noted that the common law duty to release an expired lease is not available in negligence actions, while it is available for a slander of title action.

Aspect Resources, LLC ("Aspect") leased oil and gas interests from V.H. Howell ("Howell").[239] The lease terminated the following year after Aspect failed to pay delay rentals.[240] Howell alleged that Aspect and Howell entered new leases months after the original lease terminated.[241] Howell claimed Aspect failed to make payments under the new leases and refused to release its prior lease, which had already terminated.[242]

Among other causes of action, Howell sued Aspect for negligence.[243] The trial court granted summary judgment in favor of Aspect on all claims, but in particular it held that there was no duty on which Howell could base a negligence claim.[244] The court of appeals affirmed.[245]

On appeal, Howell argued that the duty on which the negligence claim was based was the common law duty to release the expired lease.[246] The court of appeals resolved the motion solely on the grounds that Howell did not raise the argument early enough in the proceedings.[247] Howell identified the common law duty to release in

235. *Id.* at *3.
236. *Id.* at *2–3.
237. Howell v. Aspect Res., LLC, No. 09-10-00349-CV, 2011 WL 4389560 (Tex. App.—Beaumont Sept. 22, 2011, pet. denied) (mem. op.).
238. *See id.* at *6.
239. *Id.* at *1.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at *6.
246. *Id.* at *5.
247. *See id.* at *6.

his reply brief on appeal, but never in his response to Aspect's motion for summary judgment at trial.[248]

Nonetheless, the court's dicta proves instructive to practitioners: after confirming that all lessees have a duty to release expired leases, the court notes that if the duty is imposed within the lease, the cause of action rests in contract, not tort.[249] The breach of the common law duty gives rise to a slander of title cause of action, not an action in negligence.[250] The distinction between the two causes of action is significant because slander of title requires proof of loss of a specific sale, a significantly higher burden than a typical negligence cause of action.[251]

The court of appeals indicated that it was unprepared to accept the common law duty to release the original lease as a legal duty in a negligence cause of action absent authority that Howell could maintain a negligence suit for breach of a duty to release under an expired lease.[252] On the other hand, the court of appeals suggested that a slander of title action would be supported by the common law duty to release an expired lease.[253]

E. SM Energy Co. v. Sutton[254]

This case involves the construction of a lease provision relieving lessee of all obligations related to any released acreage or interest where an overriding royalty interest ("ORRI") existed on an entire lease but was extinguished as to the acreage included in a partial release.[255]

In 1966, Sutton Producing Corporation took a lease on 40,000 acres from Briscoe Ranch, Inc., which included a provision allowing Sutton to release any part or all of the leased premises or any mineral or horizon thereunder and thereby be relieved of all obligations as to the released acreage or interest.[256] Sutton subsequently assigned the lease reserving an overriding royalty interest of 5.46875%.[257] The assignment contained savings language providing that the ORRI would apply (1) to any amendments, extensions, or renewals; (2) to the lease or any part of it; or (3) to a new lease taken within twelve months after termination of the original lease.[258] Crimson Energy Company took

248. *Id.* at *5–6.
249. *Id.* at *5.
250. *Id.*
251. *See id.*
252. *Id.* at *6.
253. *Id.* at *5.
254. SM Energy Co. v. Sutton, 376 S.W.3d 787 (Tex. App.—San Antonio 2012, pet. filed).
255. *See id.* at 789.
256. *See id.* at 788.
257. *Id.*
258. *Id.*

an assignment of the lease and subsequently executed a partial release of 22,000 acres back to Briscoe Ranch.[259] Over one year later, Briscoe Ranch executed new leases to Crimson covering the same 22,000 acres.[260] Through multiple conveyances, these leases were ultimately assigned to SM Energy.[261] Realizing in 2009 that they had not been paid any ORRI covering the 22,000 acres since the 2001 leases, Sutton sued to quiet title and for unpaid royalties.[262]

The principal issue in the case was whether the partial release of the 22,000 acres with new leases executed over one year later effectively extinguished Sutton's ORRI as to the 22,000 acres.[263] Sutton argued that the savings language in the original ORRI assignment applied and that the one-year period never began to run because the original lease remained in effect as to the 18,000 acres that was never released.[264] The court construed the original 1966 lease and held that since it allowed a partial release with relief from any corresponding obligations as to the released acreage, Sutton's ORRI had been effectively washed out by the partial release of 22,000 acres.[265] The court noted that the ORRI savings provision did not expressly apply to partial releases and that it was Sutton's burden to include an express provision in its ORRI instrument to save their ORRI from being washed out by a partial termination that the lease expressly contemplated.[266]

V. Disputes Regarding Industry Contracts: *Reeder v. Wood County Energy, LLC*[267]

In another significant decision affecting the exploration and production business, the Texas Supreme Court addressed the scope of the exculpatory clause in a 1989 American Association of Professional Landmen ("APPL") model form joint operating agreement ("JOA").[268] The exculpatory clause at issue contained standard language exempting the operator from liability for its activities except in the case of gross negligence or willful misconduct.[269] But because previous Texas cases had held that such an exculpatory clause did not absolve the operator of liability to non-operating working interest owners for breaches of the JOA other than those related to opera-

259. *Id.* at 788–89.
260. *Id.* at 789.
261. *See id.*
262. *Id.*
263. *Id.* at 789–92.
264. *Id.* at 790.
265. *Id.* at 791.
266. *Id.* at 791–92.
267. Reeder v. Wood Cnty. Energy, LLC, No. 10-0887, 2012 WL 3800231 (Tex. Aug. 31, 2012).
268. *Id.* at *3–5.
269. *Id.* at *3.

tions, the Court directly addressed whether such a limitation was justified by the JOA language.[270]

The case involved two overlapping oil producing units in Wood County, Texas—the approximately 1,900-acre Harris Sand Unit and the 313-acre Sub-Clarksville Unit covering a shallower formation within the parameters of the Harris Sand Unit.[271] David Fry, through his company Dekrfour, Inc., bought working interests in the Sub-Clarksville Unit.[272] He also conveyed interests in the Harris Sand Unit and entered into a Mutual Agreement and subsequent JOA with Secondary Oil Corporation describing the parties' various rights and responsibilities with respect to future production from the Harris Sand Unit and Sub-Clarksville Unit.[273] Dekrfour conveyed an 85% working interest to Secondary and transferred a 10% carried working interest to Nelson Operating, another of David Fry's entities.[274] Wendell Reeder acquired an interest in the Harris Sand Unit wells from Secondary and became operator of those wells by filing a P-4 form with the Railroad Commission.[275] Reeder then formed Wood County Oil & Gas, Ltd. with James Wade owning 45%, Hattie Scherbach owning 10%, and Reeder owning 45%.[276]

As production declined in the Harris Sand Unit wells, Reeder alleged that he wanted to conduct testing, as was then required by the Railroad Commission, and reworking operations on four wells, but when he sought funding from Wood County, Wade as president of the limited partnership declined to invest any additional funds.[277] Reeder alleged that because those repairs were not made, the Railroad Commission severed the unit and suspended the right to market production.[278] Ultimately the Harris Sand Unit was dissolved and the underlying leases were lost for failing to maintain production in paying quantities.[279] Reeder sued Dekrfour, Nelson Operating, and other working interest owners claiming to have the exclusive right of possession of the wellbores for oil production.[280] The defendants filed counterclaims against Reeder alleging, among other things, that he failed to maintain production in paying quantities as required by the JOA.[281] Wood County filed cross claims against Reeder as well.[282]

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270. *Id.* at *3–5.
271. *Id.* at *1.
272. *Id.*
273. *Id.* (citing Reeder v. Wood Cnty. Energy L.L.C., 320 S.W.3d 433, 439 (Tex. App.—Tyler 2010, pet. granted)).
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at *2.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*

The JOA between the parties contained an exculpatory clause modeled after the 1989 AAPL Model Form JOA:

> Operator shall conduct its activities under this agreement as a reasonable prudent operator, in a good and workmanlike manner, with due diligence and in accordance with good oilfield practice, but in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.[283]

The trial court submitted gross negligence and willful misconduct instructions in the jury charge as to the breach of contract claims based on the language of the JOA's exculpatory clause.[284] The jury found that Reeder had breached his duty as operator by failing to maintain production in paying quantities.[285] The trial court entered a take nothing judgment as to Reeder's claims and awarded damages to Dekrfour and the other non-operating working interest parties.[286]

Relying upon a series of cases principally construing language from the 1977 or 1982 AAPL Model Form JOAs, the Twelfth District Court of Appeals held that failure to maintain production in paying quantities did not constitute "operations" under the parties' JOA and thus it was not subject to the gross negligence and willful misconduct standard of the exculpatory provision.[287] The 1977 and 1982 JOA language in the exculpatory clause provided that an operator "shall conduct all such operations in a good and workmanlike manner."[288] The JOA in this case, patterned on the 1989 model form, used the language referring to "[operator's] activities under this agreement" instead of "all such operations" as in the 1977 and 1982 model forms.[289] The Texas Supreme Court concluded that the language change in the model forms was significant and effectively broadened the exculpatory clause's protection of operators.[290] The Court noted that the modifier "such" in the earlier model forms referred to operations under the JOA, while the deletion of that term in favor of the terms "its activities" evidenced an intention to include actions under the JOA beyond operations.[291] Accordingly, the Court held that the proper standard under the 1989 model form language exempted operators from liability for activities, including breach of contract, unless

283. *Id.* at *3.
284. *Id.* at *1.
285. *Id.* at *1–2.
286. *Id.* at *1.
287. *Id.* at *2, *4. Significantly, the court of appeals went on to hold that although it believed the wrong standard of care had been presented to the jury, the evidence would have been sufficient to uphold a jury verdict against Reeder under the standard of care that *should* have been submitted. *Id.* at *2.
288. *Id.* at *4.
289. *Id.* at *3, *5.
290. *Id.* at *5.
291. *Id.*

the liability-creating activities we conducted with gross negligence or willful misconduct.[292]

While the Court found that the jury was properly instructed, the Court disagreed that the record contained legally sufficient evidence to support liability under the gross negligence or willful misconduct standard.[293] The non-operating parties argued that evidence sufficient to uphold the jury award included Reeder's alleged inattentiveness and absence from the well sites, his failure to file forms with the Railroad Commission, his failure to perform fluid tests as required by the Commission, and the cessation of production on the wells.[294] In concluding that the record failed to support a finding of gross negligence or willful misconduct, the Court noted that (1) the JOA forbade Reeder from undertaking any action expected to cost more than $5,000 except for emergencies, (2) the required repairs would cost well in excess of $5,000, (3) Reeder's partners refused his request for funding, and (4) Reeder testified that he contributed $154,000 of his personal funds to try to bring the wells into compliance.[295]

After *Reeder*, a non-operating working interest owner subject to 1989 model form exculpatory language now must show more than a mere breach of the JOA, but it must instead demonstrate a breach "attended by gross negligence and willful misconduct."[296]

VI. Disputes Between Interest Owners

A. Shell Oil Co. v. Ross[297]

In this case, the Texas Supreme Court addressed the issue of whether or not a party could claim fraudulent concealment or the discovery rule to toll limitations based on a claim for underpayment of royalties.[298] Shell originally leased certain acreage from the Reusses (the "Reuss Lease"), which portions were subsequently divided between two pooled units—the Houston Unit and Lasater Unit.[299] Shell drilled two producing wells covered by the Reuss Lease ("Lease Wells"), and both Units contained producing wells (land not covered by the Reuss Lease) ("Unit Wells").[300] Royalties were paid to the Reusses on both the Lease Wells and the Unit Wells based on 1/8 of the amount realized by Shell (the Reuss Lease was subsequently administered by Ralph Louis Ross).[301] Under the pooling agreement, Shell

292. *Id.*
293. *Id.* at *6–8.
294. *Id.* at *7.
295. *Id.*
296. *See id.* at *6.
297. Shell Oil Co. v. Ross, 356 S.W.3d 924 (Tex. 2011).
298. *Id.* at 925.
299. *Id.* at 926.
300. *Id.*
301. *Id.*

was required to split the royalty payment between the Rosses and the State of Texas for Unit Wells.[302] The Reuss Lease required Shell to pay based on "third-party sale prices"; however, Shell instead paid an "arbitrary price" for the Lease Wells from 1994 to 1997.[303] The Rosses sued Shell in 2002, alleging that the fraudulent concealment doctrine tolled the statute of limitations and therefore they could recover for breach of contract, fraud, and unjust enrichment based on underpayment of royalties.[304]

The trial court ruled that Shell breached the lease, as a matter of law, by using the weighted price rather than the third-party sale price as required by the lease.[305] The court of appeals affirmed the trial court's holding that the fraudulent concealment doctrine tolled the statute of limitations and that the Rosses could recover from Shell's knowing underpayment of royalties.[306] Shell appealed.[307]

The Texas Supreme Court recognized two possible doctrines on which the Rosses could recover: fraudulent concealment and the discovery rule.[308] In taking up the fraudulent concealment issue, the Court recognized that the statute of limitations would only be tolled until "the fraud is discovered or could have been discovered with reasonable diligence."[309] If readily accessible and publicly available information could reveal wrongdoing before the limitations period has run, then the fraudulent concealment doctrine cannot be used.[310] Although Shell underpaid the Rosses for years, the record indicated that there were factors the Rosses should have been aware and cognizant of to put them on notice of underpayment.[311] The court held that the seemingly large difference in royalty payments between the Unit Wells and the Lease Wells should have been one indication that underpayment had occurred.[312] Additionally, the discrepancy between the payment the Rosses and the State of Texas were receiving on the Unit Wells should have been a second indication of underpayment because they both should have been receiving the same payment.[313] This information was publicly available and readily accessible in the GLO records or in the El Paso Permian Basin Index and therefore, as a matter of law, the Rosses did not use reasonable diligence.[314] Accordingly, the Court reversed the appellate court and held that the

302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 927.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 928.
311. *Id.* at 928–29.
312. *Id.*
313. *Id.* at 929.
314. *Id.*

fraudulent concealment doctrine, and for the same reasons above, the discovery rule, did not toll the statute of limitations and the Rosses' claims were barred by limitations.[315]

B. Sundance Minerals, L.P. v. Moore[316]

In this case, the court of appeals answered a commonly litigated issue—what type of royalty was reserved in a specific deed?[317] A conveyance of real property was made by the Holders to the Armstrongs as to 515 acres while reserving "an undivided and non-participating one-half interest in the oil, gas, and other mineral rights."[318] The Holders further articulated this reservation by including language that they "shall be entitled to one-half of the usual one-eighth royalty received for such [sic] oil, gas and other minerals produced from said land."[319] The Armstrongs subsequently sold their interest to Sundance Minerals ("Sundance"), which leased the land to Quicksilver Resources for a 1/5 royalty.[320]

Sundance sued the Holders claiming that the initial mineral royalty reservation by the Holders was a fixed non-participating royalty interest of an overall 1/16 (being 1/2 of 1/8).[321] The Holders counterclaimed with their interpretation that they were entitled to 1/2 of whatever royalty was collected by Sundance in the oil and gas lease.[322] The trial court granted summary judgment for the Holders, and Sundance appealed.[323]

The court of appeals focused on the idea that this issue related to a "fractional royalty" and cited *Range Resources Corp. v. Bradshaw*,[324] to point out that "[a] 'fractional royalty' interest entitles the owner to the specified fractional amount stated in the deed of oil, gas, or other minerals produced from the land and remains constant *regardless* of the amount of royalty contained in a subsequently-negotiated oil and gas lease."[325] The court reasoned that the Holders' intent to reserve "one half of the usual one eighth" royalty does not dictate that they intended to limit their royalty to a 1/16 fixed royalty.[326] Instead, the court looked at the entire document and determined that the Holders intended to reserve a 1/2 royalty interest of whatever royalty was nego-

315. *Id.* at 929–30.
316. Sundance Minerals, L.P. v. Moore, 354 S.W.3d 507 (Tex. App.—Fort Worth 2011, pet. denied).
317. *See id.* at 511–13.
318. *Id.* at 510.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 493 (Tex. App.—Fort Worth 2008, pet. denied).
325. *Sundance Minerals, L.P.*, 354 S.W.3d at 512 (emphasis added).
326. *Id.*

tiated in any future oil and gas lease.[327] Accordingly, the court affirmed the trial court's summary judgment ruling for the Holders.[328]

C. Neidert v. Collier[329]

Neidert states that a properly executed settlement and release can cure a void transfer of oil and gas interests, even if the transfer should not have been entered into initially.

In this case, a family's oil and gas interests were divided among a mother; her daughter, Jeanne Alice; Jeanne Alice's husband, Robert; and trusts for their three children: Neidert, Collier, and Searls.[330] By power of attorney, Robert transferred all oil and gas interests owned by his mother-in-law to Jeanne Alice.[331] Ultimately through conveyances and wills, the rest of the oil and gas interests were conveyed to Jeanne Alice, except the amounts in the trusts for Neidert, Collier, and Searls.[332] When Jeanne Alice died, her will bequeathed all of her oil and gas interests to Collier and Searls.[333] On May 14, 2004, and December 23, 2005, respectively, Collier, Searls and Neidert executed two "Settlement and Release" agreements by which Neidert released all of her claims against Robert's estate, Jeanne Alice's estate, and all of her claims to oil and gas properties other than the interests in her trust.[334] Subsequently, Neidert claimed that Robert's transfers of oil and gas interests under power of attorney were void and could not be cured by execution of the settlement and release agreements.[335]

Without addressing whether a power of attorney can convey oil and gas interests, the court of appeals held that the two "Settlement and Release" agreements were effective and that Neidert had released all of her interest in the subject oil and gas properties.[336] The court held that a release is a contract.[337] If the release is unambiguous and if it mentions the claims released, the parties are bound by their intentions as expressed in the release.[338]

This case confirms that regardless of whether or not oil and gas interests are improperly conveyed, a properly executed settlement and release operates to release any claim to those interests.

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327. *Id.*
328. *Id.* at 512–13.
329. Neidert v. Collier, No. 11-10-00007-CV, 2011 WL 4526869 (Tex. App.—Eastland Sept. 29, 2011, no pet. h.) (mem. op.).
330. *Id.* at *1.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at *2.
335. *Id.*
336. *Id.* at *4–6.
337. *Id.* at *4.
338. *Id.*

D. Backhus v. Wisnoski[339]

This case involves whether a partition in real property, authorized under a will, was valid on all remaindermen.[340] The court of appeals affirmed the trial court's decision, holding that (1) the partition was invalid because the life tenants had purported to partition fee simple title, which would have prejudiced the remaindermen's right to fee simple title in the whole property after the last life tenant died and (2) the will did not authorize the partition to be binding on the remaindermen.[341] The court held that a life tenant cannot grant more rights than they would otherwise possess under a will.[342]

The court reformed the partition as follows:

1. The life tenants were authorized under the will to grant each other the exclusive right to execute oil, gas, and mineral leases in their respective portions of the property, and were authorized to specify a minimum required royalty. However, that grant could not be binding on the remaindermen. The court affirmed the trial court's deletion of language which would have bound the remaindermen.[343]
2. The court authorized the life tenants to exclude the right to retain payments from oil, gas, and mineral leases from their partition, because they were permitted to grant each other less rights than they would otherwise be permitted under the will. The court modified the partition accordingly.[344]

According to this case, a life tenant in real property may execute an oil and gas lease and may receive bonus payments and delay rentals for that lease; however, this grant cannot be binding on the remaindermen under the will after the life tenant has died.

339. Backhus v. Wisnoski, No. 14-09-00924-CV, 2011 WL 6396497 (Tex. App.—Houston [14th Dist.] Dec. 8, 2011, pet. denied) (mem. op.).
340. *See id.* at *1–2.
341. *Id.* at *1.
342. *Id.*
343. *Id.* at *5, *11–13.
344. *Id.* at *12–13.