Recent Decisions Impacting the Oil & Gas Industry

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I. SCOPE OF THE ARTICLE

This article surveys ten selected oil and gas cases decided by Texas state and federal courts from April 29, 2015 through October 8, 2015. Below are one-paragraph abstracts of the selected cases. Full case summaries follow the abstracts.

II. ABSTRACTS

1. Grantors could not rely on the discovery rule, a limited exception to statutes of limitations, because they were charged with notice of an obvious and material omission in an unambiguous deed when they executed it. Grantors agreed to reserve mineral rights in a real estate contract, but then conveyed fee simple title to grantee in an unambiguous notarized deed. Over four years later, grantors discovered the discrepancy and demanded that grantee issue a correction deed. Grantee refused because she believed that any claims grantors had against her were time-barred. Nevertheless, grantors filed a litany of claims against grantee and sought a declaratory judgment stating that they had reserved the mineral estate. The Texas Supreme Court agreed with grantee and held that "a grantor who signs an unambiguous deed is presumed as a matter of law to have immediate knowledge of material omissions"; Texas Property Code section 13.002 imposes constructive notice on grantors such that "obvious omissions are not inherently undiscoverable"; and thus grantors could not avail themselves of the discovery rule because it applies "in limited circumstances where the nature of the injury incurred is inherently undiscoverable." *Cosgrove v. Cade*, No. 14-0346, 2015 WL 3976719 (Tex. June 26, 2015).

2. An excluded-assets provision in a purchase-and-sale agreement did not entitle seller to a portion of buyer's subsequent judgment against the United States. Seller sold the remaining half of its interests in several federal oil and gas leases to buyer. In so doing, seller utilized an excluded-assets provision to reserve ownership of all claims and causes of action arising prior to October 1, 1995. In 2002, buyer sued the United States alleging that it repudiated the leases when it determined that Congress' 1990 amendments to the Coastal Zone Management Act mandated a permanent development ban. Seller sued buyer when it refused to tender half of the subsequent judgment in its favor pursuant to the excluded-assets provision. Seller argued that buyer's claim arose in 1990 when Congress amended the Coastal Zone Management Act. Buyer argued that its claim arose in 2001 when the United States interpreted the 1990 amendments to require it to cease development. The Texas Supreme Court rendered judgment that seller take nothing because the parties' purchase-and-sale agreement could not be reasonably construed as "reserving, in perpetuity, any claim, cause of action, or resulting judgment that could ever be asserted under laws in existence at the time of conveyance." *Plains Exploration & Prod. Co. v. Torch Energy-Advisors Inc.*, No. 13-0597, 2015 WL 3653330 (Tex. June 12, 2015).

3. Pipeline operator could not deduct compression costs it incurred after producer successfully delivered gas despite the fact that it is industry custom for producers to share in the costs of downstream centralization of compression. Natural-gas producer and pipeline operator entered into a contract whereby producer would transfer gas from his wells into operator's gathering system, and operator would pay producer a percentage of the proceeds it obtained through resale to a gas processor. The

contract provided that neither party was obligated to compress any gas but that if operator did so "to effect delivery of producer's gas" then operator was entitled to deduct certain costs associated with the compression. Producer sued operator for breach of contract alleging that operator deducted compression costs that were not necessary "to effect delivery" because they were incurred after producer successfully delivered gas. Operator counterclaimed and sought, among other things, declarations that it had the right to deduct compression costs and to extend the contract for an additional five years. The Texas Supreme Court held that the phrase "to effect delivery" referred only to compression that operator installed if producer failed to deliver at pressures necessary to overcome operator's working pressure at the point of transfer, and that the contract did not support operator's purported five-year extension. *Kachina Pipeline Co. v. Lillis*, No. 13-0596, 2015 WL 3653272 (Tex. June 12, 2015).

4. The strict evidentiary standard set forth by the Texas Supreme Court in *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) applies to nuisance and negligence claims alleging injuries caused by "emissions and migration of hazardous substances from nearby oil and gas operations." Plaintiffs sued defendants for private nuisance and negligence alleging that "toxic emissions from [their] oil and gas operations in the Eagle Ford Shale near [plaintiffs'] home in Karnes County caused damage to their health and their property." In their petition, plaintiffs specifically disclaimed (1) "that they were seeking 'any personal injury damages' that would invoke [the need for expert testimony under] *Merrell Dow Pharms. v. Havner*," and (2) "any and all claims seeking recovery for a diagnosed 'disease' that also occurs genetically and for which a large percentage of the causes are unknown." Plaintiffs argued that these disclaimers, coupled with the fact that they "only sought recovery for nuisance 'symptoms' typical of discomfort rather than disease," meant that they were not required to present medical expert testimony to prove the element of causation common to each of their claims. The trial court rejected this argument, granted defendants' summary judgment motions, and rendered judgment that plaintiffs take nothing. The court of appeals affirmed the trial court's decision and held that "[p]laintiffs seeking relief for injuries of any nature caused by exposure to or migration of a toxic substance must meet the stringent proof requirements imposed by the Texas Supreme Court in *Havner* and its progeny" because such claims are "in the nature of toxic tort claims which fall outside a lay person's general knowledge and experience." *Cerny v. Marathon Oil Corp.*, No. 04-14-00650-CV (Tex. App.—San Antonio Oct. 7, 2015, no pet. h.)

5. Lessee's right to explore for, develop, operate, produce, own, market, treat, and transport oil and gas did not interfere with surface owner's right to grant lessee of an adjacent tract permission to site wells and drill to reach his mineral estate because surface owner controlled the subterranean structures in which any hydrocarbon molecules might be found. Lessee of tract A sued lessee of adjacent tract B for trespass and tortious interference with contract after learning that it had obtained permission from tract A's surface owner to drill through the earth beneath tract A to reach the mineral estate underlying tract B. Lessee's claims failed because surface owner retained the right "to control the subterranean structures in which any hydrocarbon molecules might be found," and thus could grant permission to the lessee of tract B to site wells and drill

through the surface of tract A in order to reach his mineral estate. *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 WL 4933439 (Tex. App.—San Antonio Aug. 19, 2015, pet. denied).

6. The breadth of a negation-of-warranty provision meant that lessee waived its breach of contract claim, but not its fraudulent inducement and negligent misrepresentation claims. Lessor leased the same mineral rights to lessees A and B. When lessee A brought this to lessor's attention, lessor attempted to return lessee B's consideration. Lessee B refused the payment and filed suit against lessor alleging, among other things, fraud, negligent misrepresentation, and breach of contract. In its defense, lessor pointed to a broad negation-of-warranty provision in its contract with lessee B. The court of appeals agreed that the breadth of the waiver meant that lessee B waived its breach of contract claim. However, the provision's breadth also caused the court of appeals to hold that lessee B's fraud and negligent misrepresentation claims could go forward. That was because, each of those claims required lessee B to show actual and justifiable reliance on lessor's misrepresentation; to disclaim reliance, parties must use "clear and unequivocal language"; and the court could find no case in which a court "treated a general disclaimer of warranty as so plainly correcting an earlier, specific misrepresentation to the effect that the [lessor] of a land interest himself had not already, recently [leased] the same interest to someone else as to warrant a rendition of judgment." *Orca Assets, G.P., L.L.C. v. JPMorgan Chase Bank*, No. 05-13-01700-CV, 2015 WL 4736786 (Tex. App.—Dallas August 11, 2015, no pet. h.).

7. Defendant won summary judgment on each of plaintiff's claims and on its counterclaim for unjust enrichment stemming from plaintiff's retention of erroneous royalty payments. Plaintiff validly conveyed all of his mineral and royalty interests (save an undivided one-half interest in all hard-core minerals) to defendant. Nevertheless, the company operating the property continued to tender half of the royalties to plaintiff. When defendant requested that plaintiff reimburse it, plaintiff promised to do so but then filed several meritless claims in an apparent attempt to void the conveyance instead. Defendant answered plaintiff's complaint and asserted counterclaims for breach of contract and unjust enrichment. The trial court entered summary judgment for defendant on all of plaintiff's claims and on its unjust enrichment counterclaim. *Huggins v. Royalty Clearinghouse, Ltd.*, No. A-14-CA-1058-SS, 2015 WL 4637630 (W.D. Tex. July 31, 2015).

8. Oil and gas royalty trust beneficiary could not file a derivative lawsuit against settlor and settlor's wholly-owned subsidiary because trustee's decision not to pursue the lawsuit was based on the sound advice of outside counsel and therefore did not constitute fraud, misconduct, or a clear abuse of discretion. Trust beneficiary filed suit, ostensibly on behalf of the trust, against settlor and settlor's wholly-owned subsidiary because she believed that their refusal to renegotiate pre-existing contracts resulted in the misappropriation of approximately $60 million in royalties. Trust beneficiary also filed suit against trustee because she believed it breached its fiduciary duty by refusing to object to settlor's alleged self-dealing. All defendants filed pleas to the jurisdiction and special exceptions. They argued that the case should be dismissed because trustee's

reasonable decision not to sue on behalf of the trust meant that beneficiary lacked standing to do so herself. The trial court denied the special exceptions, construed the pleas to the jurisdiction as special exceptions, and denied them as well. Defendants then petitioned for a writ of mandamus requiring the trial court to dismiss the action. The court of appeals held that the trial court abused its discretion by failing to grant the special exceptions and dismiss the claims against settlor and its subsidiary, but that dismissal of trust beneficiary's claims against trustee, despite their lack of merit, was procedurally inappropriate because trustee could obtain relief from the trial court on remand and by appeal. *In re XTO Energy Inc.*, No. 05-14-01446-CV, 2015 WL 4524197 (Tex. App.—Dallas July 27, 2015, no pet.).

9. Property owner had standing to sue oil company for damages stemming from a well that oil company negligently plugged long before the land belonged to owner, but was time-barred from doing so because surface damages caused by salt water emerging from a well are not inherently undiscoverable. Oil company plugged a well and abandoned all activity on a tract of land. Owner subsequently purchased the tract, and filed suit against oil company when salt water began leaking onto the tract's surface. Oil company argued that owner lacked standing and that its claims were barred by the statute of limitations. The trial court—applying "the well-established rule in Texas that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere subsequent purchaser does not have standing to recover for injuries committed before his purchase"—entered summary judgment for oil company because it determined that owner, as a subsequent purchaser, did not have standing. The court of appeals held that this was in error because an injury to land accrues to an owner when the thing that causes the injury commences to affect the land; and owner held title when the injury to his land accrued. Nevertheless, owner could not move forward with his claims because he was barred by the statute of limitations. *Ranchero Esperanza, Ltd. v. Marathon Oil Co.*, No. 08-14-00152-CV, 2015 WL 4504947 (Tex. App.—El Paso July 24, 2015, no pet.).

10. Reservation of an "undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas, and other minerals" reserved a floating 1/8 royalty interest. Grantors argued that this reservation clause, when read in context, unambiguously reserved a floating 1/8 royalty. Grantees argued that it unambiguously reserved a fixed 1/8 royalty. The trial court held for grantors. And the court of appeals affirmed because (1) at the time the deed was executed, there was a "common misconception . . . that the landowner's royalty would always be one-eighth of production obtained under the lease; (2) no oil and gas lease existed when the conveyance was executed; (3) the deed used language that contemplated the possibility of leases in the future; and (4) the deed "repeat[ed] three times the agreement that the royalties would be pooled and shared equally among the six grantors and the two grantees." *Medina Interests, Ltd. v. Trial*, No. 04-14-00521-CV, 2015 WL 3895902 (Tex. App.—San Antonio June 24, 2015, pet. filed).

III. CASE SUMMARIES

1. *Cosgrove v. Cade*, No. 14-0346, 2015 WL 3976719 (Tex. June 26, 2015).

In *Cosgrove*, Michael and Billie Cade sued Barbara Cosgrove over two acres of land that Cosgrove purchased from them in 2006. The parties' agreed to reserve mineral rights to the Cades in their real estate contract. Their notarized deed, however, granted the land to Cosgrove in fee simple absolute. Michael Cade discovered this discrepancy over four years later when he asked Chesapeake Energy, operator of a prior lease between the Cades and Dale Resources LLC, about the status of certain royalty payments and was informed that there was a problem with the deed's mineral reservation.

The Cades attempted to solve the problem by demanding that Cosgrove issue a correction deed pursuant to a provision in one of the closing documents that bound both parties to "fully cooperate, adjust, and correct any errors or omissions and to execute any and all documents needed or necessary to comply with all provisions of the above mentioned real estate contract." Cosgrove refused because she believed that any claims the Cades might have against her were time-barred.

Not to be deterred, the Cades sued Cosgrove for breach of contract, fee forfeiture, civil theft, and tortious interference with contractual relationship. They also sought a declaration that they had reserved the mineral estate. Cosgrove, in turn, sought attorney's fees and a declaration that the Cades' claims were barred because they failed to bring them within the applicable limitations periods. The parties stipulated "that the deed mistakenly—but unambiguously—failed to reserve mineral rights [to the Cades]."

Though the trial court refused to award Cosgrove attorney's fees, it agreed with her that the Cades' claims were time-barred and entered a summary judgment order to that effect. Both parties appealed.

The court of appeals reversed the trial court's judgment because it held that the "discovery rule delayed the accrual of limitation for a deed-reformation claim because 'a mutual mistake in a deed is a type of injury for which the discovery rule is available.'" Accordingly, it remanded the case back to the trial court for a trial on the merits. Cosgrove appealed to the Texas Supreme Court.

The Texas Supreme Court reversed the court of appeals' judgment, rendered judgment that the Cades take nothing, and remanded the issue of attorney's fees to the court of appeals. In so doing, the Court expressly held that the discovery rule—"which defers accrual of a claim until the injured party learned of, or in the exercise of reasonable diligence should have learned of, the wrongful act causing the injury"—does not apply in plain-omission cases because "[p]lainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes."[1] That is, as a matter of law, the Cades had actual knowledge of the deed's omission upon execution, and the limitations periods began to run on that date.

The parties executed their mistaken but unambiguous deed in October 2006. The Cades sued Cosgrove in February 2011. None of the Cades' claims had more than a four-year limitations period. Therefore the Cades' claims were time-barred.

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[1] The Court bolstered its conclusion by expressly recognizing that Texas Property Code section 13.002—"[a]n instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument"—provides all persons, including the grantor, with notice of the deed's contents as well.

2. *Plains Exploration & Prod. Co. v. Torch Energy-Advisors Inc.*, No. 13-0597, 2015 WL 3653330 (Tex. June 12, 2015).

In *Plains Exploration & Prod. Co.*, Torch Energy-Advisors Inc. acquired several oil and gas leases on undeveloped fields located outside territorial waters off the coast of California from Burdette Ogle, whose predecessors paid millions of dollars to the federal government in the form of bonus payments when the leases were issued. In 1994, Torch conveyed 50% of its interests to Nuevo Energy Company.

In 1996, Torch sold the remaining 50% of its leasehold interests to Nuevo. The parties' purchase-and-sale agreement ("PSA") contained an excluded-assets provision by which Torch retained ownership of "claims and causes of action 'arising' or 'attributable to periods of time' before the contract's stated effective date of October 1, 1995, and all revenue 'attributable' to the conveyed property for any period before the contract effective date."

In 2002, Nuevo sued the federal government in the Court of Federal Claims alleging that the government repudiated its lease agreements in 2001 when it determined that Congress' 1990 amendments to the Coastal Zone Management Act mandated a permanent development ban. While the suit was pending, Plains Exploration and Production Company merged with Nuevo and thus succeeded to Nuevo's interest under the 1996 PSA. Ultimately, the Court of Federal Claims ordered the federal government to pay Plains in excess of $83 million. Torch demanded that Plains tender half of this sum pursuant to the excluded-assets provision. And, when Plains refused, Torch sued Plains alleging a variety of contract, tort, and equitable claims.

Both the trial court and the court of appeals held that Torch's breach of contract claim must fall. They disagreed, however, as to whether the terms of the PSA were ambiguous and whether Torch's equitable claims could go forward. Eventually, the parties stipulated that "Torch's claim [was] governed by principles of contract law, not equity," and the PSA unambiguously determined whether or not Torch was entitled to a portion of Plains' judgment against the federal government.

Thus, the outcome of this case hinged on when Plains' claim against the federal government arose (i.e. when the federal government repudiated). Torch argued that the federal government repudiated in 1990 when Congress amended the Coastal Zone Management Act. On this view, Torch was entitled to a share of Plains' judgment because the excluded-assets provision reserved to it causes of action arising or attributable to periods of time before October 1, 1995. Plains argued that its claim arose in 2001 when the government interpreted the 1990 amendments to require all development to cease. On this view, Torch was entitled to nothing.

The Texas Supreme Court agreed with Plains and held that the PSA could not be reasonably construed as "reserving, in perpetuity, any claim, cause of action, or resulting judgment that could ever be asserted under laws in existence at the time of the conveyance." That is, the fact that "[n]one of the events precipitating [Plains' claims] occurred until well after the PSA's effective date, save for the enactment of a law that furnished the basis for it to happen," meant that the claims arose after

the PSA's effective date and that Torch was entitled to nothing.

3. *Kachina Pipeline Co. v. Lillis*, No. 13-0596, 2015 WL 3653272 (Tex. June 12, 2015).

In *Lillis*, Michael Lillis and Kachina entered into a contract whereby "Lillis would transfer gas from his wells into Kachina's gathering system at specified delivery points and Kachina would pay Lillis a percentage of the proceeds it obtained through resale to Davis [Gas Processing]."

As "[a] producer can successfully deliver gas only if its pressure is sufficient to overcome the working pressure in the gathering system," the contract accounted for the parties' "rights and responsibilities as to pressure." Specifically, the contract provided that "neither party hereto shall be obligated to compress any gas" but if Kachina "installs compression to effect delivery of [Lillis'] gas, [Kachina] will deduct from proceeds payable to [Lillis] a value equal to [Kachina's] actual costs to install, repair, maintain and operate compression plus 20% of such costs to cover management, overhead and administration."

After an initial five-year term, the contract was to continue month-to-month and was cancelable by either party upon thirty days' notice. Finally, the contract provided that "[u]pon termination or cancellation . . . , prior to [Lillis] selling gas to a third party," Kachina has the option to "continue the purchase of gas under the [contract's] terms . . . with such adjustments in the price . . . as may be required to yield the same economic benefit to [Lillis], as would be derived from the proposed third[-]party offer." Lillis entered into a natural-gas-purchase agreement with Davis Gas Processing before the expiration of the initial five-year term. This lawsuit followed.

Lillis filed suit against Kachina for breach of contract because Kachina deducted compression costs that it incurred after he successfully delivered gas. Kachina filed a counterclaim alleging that Lillis breached the contract by failing to notify it of Davis Gas Processing's offer. Kachina also sought declarations that it had the right to deduct compression costs and to extend the contract for an additional five years.

The trial court held that the contract permitted Kachina to deduct compression costs from its payments to Lillis and also allowed it the option to extend the contract for an additional five-year term. The court of appeals reversed the trial court's judgment on both accounts. Kachina then appealed to the Texas Supreme Court.

Kachina argued that it was permitted to deduct compression costs because the phrase "to effect delivery" referred to any compression that aided in the final delivery to Davis Gas Processing. Several amici bolstered Kachina's argument by pointing to the fact that such language is common in the natural gas industry, and is generally understood to mean that pipeline operators such as Kachina may install compressors to serve multiple producers, who will then share those costs proportionally based on their share of total production. Lillis argued that the phrase "to effect delivery" referred only to compression that Kachina installed if he failed to deliver at the pressures necessary to overcome Kachina's working pressure at the point of transfer.

The Supreme Court agreed with Lillis on this issue because the word "delivery" in the parties' contract consistently referred to transfers between

Lillis and Kachina. Read in context, the Court held, the contract sought to place the duty to maintain sufficient pressure on Lillis by giving Kachina "two options" if he failed to do so. First, it could do nothing and walk away. Second, it could install the necessary compression and deduct the costs it incurred from the payments it owed to Lillis. The Court recognized that "downstream centralization of compression is both common and critical to the efficient transportation of gas to market . . . [and] that producers often contract to share in such costs." However, the Court held that this contract did "not express an objective intent that Lillis would do so, and industry custom cannot impose obligations beyond those within the written [contract]."

Kachina proffered several arguments concerning the term-extension issue as well. First it argued that it was allowed to purchase after termination "under the terms of the [contract]"; that one of the terms of the contract was the five-year period; and thus that it could extend the contract term an additional five years. The Court rejected this argument because the contract also provided that it would become month-to-month at the expiration of the initial five-year term.

Kachina's second argument was that "because the market price of gas fluctuates, a new five-year term [was] required to confer the same economic benefit on Lillis as he would have received through his deal with Davis." The Court rejected this argument because it did not jibe with the contract's plain language which did not contemplate an option to extend for any more than a month at a time.

Finally, Kachina argued that the court of appeals' construction yielded "the absurd result that Lillis may cancel the [contract] every month, requiring Kachina to perpetually exercise its option." The Court noted that, in essence, Kachina was insisting that "the business of natural-gas transportation requires substantial upfront investment in equipment and maintenance and therefore is not suited to such an unpredictable short-term arrangement." But the Court held that "those general concerns are not implicated here where Kachina's upfront investment has already taken place . . . ; [it] had the initial five-year commitment to secure a return on that investment[;] and it could have specifically contracted for a longer fixed term if the economics required."

All told, the Texas Supreme Court affirmed the court of appeals' judgment in Lillis' favor and remanded the case to the trial court for consideration of Lillis' request for an accounting and costs and fees.

4. *Cerny v. Marathon Oil Corp.*, No. 04-14-00650-CV (Tex. App.—San Antonio Oct. 7, 2015, no pet. h.).

In *Cerny*, Michael and Myra Cerny sued Marathon Oil EF, LLC and Plains Exploration and Production Company for private nuisance and negligence alleging that "toxic emissions from [their] oil and gas operations in the Eagle Ford Shale near [the Cernys'] home in Karnes County caused damage to their health and their property."

In the Cernys' petition, they specifically disclaimed (1) "that they were seeking 'any personal injury damages' that would invoke [the need for expert testimony under] *Merrell Dow Pharms. v. Havner*," and (2) "any and all claims seeking recovery for a diagnosed 'disease' that also occurs genetically and for which a large percentage of the causes are unknown." Instead, the

Cernys characterized the damages they sought as:

> Compensation for '(a) reasonable and necessary medical expenses incurred in the past for treatment due to the defendants' conduct; (b) reasonable and necessary medical expenses [which] are likely to be incurred in the future due to defendants' conduct; (c) loss of earning capacity.'
>
> '[R]ecovery for their symptoms which are typical of discomfort rather than disease' due to past and future 'fear, apprehension, offense, discomfort, annoyance, sickness, injury to health, exacerbation of physical health or pre-existing condition, harm from assault on plaintiffs' senses, nausea, loss of peace of mind, emotional harm or distress, inconvenience, and deprivation of enjoyment of their property.' They allege these damages also include (i) past and future physical pain and suffering, (ii) past and future mental pain or anguish, (iii) disfigurement, (iv) loss of enjoyment of life, and (v) loss of use of their property.
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> Remediation damages to repair damage to the structure of the home.
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> Loss of market value of the property due to sinkholes, chemical pollution, noxious odors, dead trees, and dead animals on the property.
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> Punitive damages (re: gross negligence).

Citing *Havner*,[2] Marathon and Plains filed no-evidence and traditional motions for summary judgment. The main thrust of their argument was that the Cernys could not prove the element of causation common to all of their claims. The Cernys responded with a wealth of evidence, including affidavits from experts. However, the trial court struck the vast majority of the Cernys' evidence because it consisted of "inadmissible hearsay[;] unqualified lay opinions[;] and unreliable, speculative, and conclusory expert opinions." The trial court then entered summary judgment for Marathon and Plains and rendered judgment that the Cernys take nothing.

The Cernys took an appeal. They argued that they were not required "to present medical expert testimony to prove causation of their physical injuries . . . because their petition disclaimed recovery for any 'personal injury damages' that would invoke *Merrell Dow Pharms. v. Havner*,' and only sought recovery for nuisance 'symptoms' typical of discomfort rather than disease." By way of contrast, Marathon and Plains argued that "the Cernys' nuisance and negligence claims are in the nature of toxic tort claims which fall outside a lay person's general knowledge

[2] In *Havner*, the Texas Supreme Court held that expert testimony is necessary in a toxic tort case in order to prove (1) the applicable standard of care, (2) that the defendant's conduct more than doubled the risk, as shown by two epidemiological studies, (3) that the plaintiff's injuries were caused by the defendant's conduct, and (4) that the plaintiff's injuries were not caused by other possible sources.

and experience, and must therefore be proven with expert testimony."

The court of appeals agreed with Marathon and Plains and held that the strict evidentiary standard set forth by the Texas Supreme Court in *Havner* applies to nuisance and negligence claims alleging injuries caused by "emissions and migration of hazardous substances from nearby oil and gas operations."

The Cernys could not meet the heightened *Havner* standard in this case because, among other reasons, they (1) "suffered from multiple chronic health conditions that existed prior to the defendants' commencement of oilfield operations"; (2) lived in a "home [that] had foundation damage prior to the defendants' operations"; and (3) failed to rule out alternative causes of their injuries.

5. *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 WL 4933439 (Tex. App.—San Antonio Aug. 19, 2015, pet. denied).

In *Lightning Oil Co.*, Briscoe Ranch, the surface estate owner, executed a lease with Lightning Oil Company that allowed Lightning "to explor[e] for, develop[], operat[e], produc[e], own[], market[], treat[] and transport[] oil and gas" from a tract adjacent to the Chaparral Wildlife Management Area ("CWMA").

Anadarko E&P Onshore LLC leased a mineral estate underlying the CWMA and obtained "permission from Briscoe Ranch to place drilling rigs on the surface estate overlying [Lightning's mineral estate] and to drill through the earth . . . to form wells that open[ed] and bottom[ed] in the CWMA."

Lightning sued Anadarko for injunctive relief, trespass, and tortious interference with contract in order to prevent Anadarko from drilling on the land above its mineral estate. Lightning argued that (1) as leaseholder, it has the right to both "exclude others from drilling . . . [and] to determine who can drill through the earth within the boundaries circumscribing the [mineral estate it leased]"; (2) "that Briscoe Ranch's permission is not enough [to overcome these rights]"; and (3) that it "should not have to trust Anadarko not to take any seismic surveys as Anadarko drills through subterranean structures that harbor Lightning's oil and gas."

By way of contrast, Anadarko argued that "Briscoe Ranch, as the surface estate owner, controls the subterranean structures, and Anadarko needs only Briscoe Ranch's permission." That is, "[a]ccording to Anadarko, because it ha[d] the surface estate owner's permission to site and drill, Lightning's claim[s] . . . must fail as a matter of law."

The trial court, without stating grounds for its decision, granted Anadarko's motion for summary judgment on each of Lightning's claims. Lightning appealed. And the court of appeals affirmed the trial court's decision.

Lightning's trespass claim failed because it could not show that "it owned or otherwise had a legal right to exclude others from the property." That is, the court of appeals concluded that because "the surface estate owner controls the earth beneath the surface estate," Briscoe Ranch could permit Anadarko to penetrate the earth under the Briscoe Ranch to access Anadarko's mineral estate in the CWMA.

Lightning's tortious interference with contract claim failed as well. This was because Anadarko could assert the justification defense. When accused of tortious interference with contract, "[a] defendant may justify its actions 'based on the exercise of either (1) [its] own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." The court of appeals held that Anadarko established its justification defense as a matter of law when it proved that Briscoe Ranch gave it permission to site and drill.

The court of appeals summed the case up nicely when it wrote that

> Lightning's lease conveyed to it 'the right of exploring for, developing, operating, producing, owning, marketing, treating and transporting oil and gas . . . .' Its lease did not convey any right to control the subterranean structures in which any hydrocarbon molecules might be found, and Texas law does not automatically convey such a right in an oil and gas lease. Thus, as the surface estate owner, Briscoe Ranch could grant Anadarko permission to site wells on the surface . . . and drill through the earth within [its] boundaries . . . to reach Anadarko's adjacent mineral estate.

6. *Orca Assets, G.P., L.L.C. v. JPMorgan Chase Bank*, No. 05-13-01700-CV, 2015 WL 4736786 (Tex. App.—Dallas August 11, 2015, no pet. h.).

The events that gave rise to this dispute began when JPMorgan Chase Bank, acting as trustee of the Red Crest Trust, and Philip Mettham ("JPMorgan") leased the mineral rights to a 900-acre tract to GeoSouthern Energy Corporation. Thereafter, JPMorgan executed six leases on the same tract with Orca Assets, G.P., L.L.C. in exchange for approximately $3.3 million. GeoSouthern learned of the duplication and contacted JPMorgan. JPMorgan attempted to return Orca's consideration. But Orca refused the payment and filed suit against JPMorgan alleging, among other things, fraud, negligent misrepresentation, and breach of contract.

After conducting a pretrial conference pursuant to Texas Rule of Civil Procedure 166, the trial court rendered judgment for JPMorgan on each of Orca's claims. Orca appealed. And the court of appeals affirmed the trial court's judgment as to Orca's breach of contract claim, reversed its judgment as to Orca's fraud and negligent misrepresentation claims, and remanded the cause back to the trial court for further proceedings.

The court of appeals affirmed the trial court's judgment for JPMorgan on Orca's breach of contract claim because each of the parties' leases contained a broad negation-of-warranty provision that stated that the leases were "made without warranties of any kind, either express or implied, and without recourse against the lessor in the event of a failure of title." Such broad language, the court held, was sufficient to overcome Orca's arguments that (1) "the leases cannot reasonably be construed as waiving Orca's right to redress in the event JPMorgan failed to convey the property as promised, but if the phrase may be so construed, then it is ambiguous and

presents a fact issue for the jury"; and (2) that even if Orca waived any express warranties, "it did not waive the covenants implied under section 5.023 of the Texas Property Code."[3]

The negation of warranty provision's breadth, however, caused the court to reverse the trial court's judgment concerning Orca's fraud and negligent misrepresentation claims. Both fraud and negligent misrepresentation required Orca to show actual and justifiable reliance on JPMorgan's misrepresentation. To disclaim reliance, parties must use "clear and unequivocal language." And the court was "aware of no case . . . treat[ing] a general disclaimer of warranty as so plainly correcting an earlier, specific misrepresentation to the effect that the seller of a land interest himself had not already, recently sold the same interest to someone else as to warrant a rendition of judgment."

7. *Huggins v. Royalty Clearinghouse, Ltd.*, No. A-14-CA-1058-SS, 2015 WL 4637630 (W.D. Tex. July 31, 2015).

The crucial question in *Huggins* was what, if anything, was conveyed by a Mineral and Royalty Deed that William O. Huggins executed in favor of Royalty Clearinghouse, Ltd. ("RCH").

Huggins leased most of his mineral rights in three pooled units to Union Pacific Resources Company in 1990 and 1991. In 2007, RCH offered to buy Huggins' remaining "oil and gas mineral interests" in two of the three pooled units. Huggins responded that he would sell his interests in all three of the pooled units for $66,000. RCH accepted and sent Huggins the money and a deed to sign.

Before executing the deed, Huggins requested that language be inserted into it that made clear that he reserved an undivided one-half interest in all hard-core minerals. RCH acquiesced and sent Huggins a revised deed that contained language purporting to convey

> all of [Huggins]'s right, title, and interest in and to all of the oil, gas and other minerals, oil royalty, gas royalty . . . and royalty in all other minerals of any kind or character SAVE AND EXCEPT, there is hereby reserved unto [Huggins] . . . an undivided one-half(½) of all hard-core minerals, including, but not limited to, lignite coal . . . in, under and that may be produced, saved and marketed from the following described land:

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[3] Tex. Prop. Code Ann. § 5.023(a)(1) (West 2015) states in pertinent part:

> a) Unless the conveyance expressly provides otherwise, the use of 'grant' or 'convey' in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:
>
> (1) that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee.

The court of appeals held that "this covenant is included in the 'covenant of general warranty' and is the essence of the special warranty, both of which were emphatically excluded from this lease."

> All of the lots, tracts, or parcels of land owned by [Huggins] in the Alfred Kennon Survey, A–32, Burleson County, Texas[.]

The deed also provided that

> in the event an existing oil, gas and mineral lease . . . for any reason becomes terminated, canceled or forfeited, then . . . [RCH] . . . shall own all of [Huggins'] right, title and interest in and to all of the oil, gas and other minerals in, under and that may be produced, saved and marketed from the Subject Land, together with a like interest in and to all bonuses paid and royalties and rentals provided for in future leases covering the Subject Land.

Via letter, Huggins informed RCH that he had executed the revised deed, that RCH was entitled to collect royalties beginning in November 2007, and that "in the event [he] receive[d] any royalties from production from November and succeeding months, [he would] forward [them] to RCH."

The company operating the units sent Huggins an erroneous transfer order; both Huggins and RCH executed it; and thereafter Huggins began to receive, keep, and pay taxes on royalty payments. RCH eventually discovered this and requested, on multiple occasions, that Huggins reimburse it. Eventually, Huggins promised to do so. Instead of doing so, however, Huggins filed myriad meritless claims in an apparent attempt to void the deed.[4] RCH filed counterclaims for breach of contract and unjust enrichment.

Huggins' main claim was that the deed was void under the statute of frauds because its description of the property was too vague. Huggins' argument failed, however, because "according to more than a century of Texas law, . . . a deed purporting to convey all lands owned by the grantor in a State or in a named county is sufficient description to effect a conveyance."

The court rejected RCH's breach of contract claim because it was based on a deed. And a deed, said the court, is a conveyance—not a purchase contract. Though RCH likely had a colorable breach of warranty claim, the court declined to consider the matter. The court held for RCH on its unjust enrichment claim, however. This was because, Huggins conveyed all that he owned in the deed. As such, Huggins was not entitled to the royalty payments he had retained and was required to turn over those payments plus prejudgment interest to RCH.

8. *In re XTO Energy Inc.*, No. 05-14-01446-CV, 2015 WL 4524197 (Tex. App.—Dallas July 27, 2015, no pet.).

In 1998, XTO Energy Inc. created the Hugoton Royalty Trust and designated Bank of America N.A. as its trustee. The Trust "receive[s] 80% of the net proceeds

[4] In his first amended complaint, Huggins brought the following claims: (1) "voidance of deed for insufficient property description in violation of the statute of frauds"; (2) reformation; (3) quiet title; (4) "adverse possession pursuant to the 3 year statute of limitation"; (5) "adverse possession pursuant to the 5 year statute of limitation"; (6) ratification; (7) "termination of royalty interest held by RCH by operation of law"; (8) unjust enrichment; and (9) breach of the covenant of good faith and fair dealing.

XTO receives from the sale of oil and gas from certain properties." In 1999, XTO conducted an initial public offering. Units of the Trust are now publicly traded on the New York Stock Exchange.

In 2013, Sandra G. Goebel, a unitholder/beneficiary, sent a letter to Bank of America "demanding that it, as trustee, bring suit against XTO and Timberland Gathering and Processing Company, Inc., as well as against Bank of America." Goebel alleged that XTO and its wholly-owned subsidiary, Timberland, misappropriated approximately $60 million in royalties that should have been paid to the Trust when it failed to renegotiate contracts that allowed Timberland to retain proceeds that otherwise would have been paid to the Trust as a portion of the net proceeds received by XTO. "Goebel further asserted that Bank of America knowingly failed to object to the self-dealing by XTO, which was a breach of the Bank's fiduciary duty to the Trust."

When Bank of America received Goebel's letter, it hired independent outside counsel; listened to his conclusions; and ultimately decided that Goebel's proposed claims had no merit "and would only result in fees, costs, and expenses of litigation being expended to the detriment of the Trust and the unitholders." This conclusion was primarily based on the fact that the conveyances that created the Trust expressly and unambiguously negated any duty of XTO to renegotiate existing sales contracts.[5]

Not to be deterred, Goebel filed this derivative action against XTO, Timberland, and Bank of America. Each defendant filed pleas to the jurisdiction and special exceptions. "[T]he trial court denied the special exceptions, construed the pleas to the jurisdiction as special exceptions, and denied them as well." The defendants then petitioned for a writ of mandamus requiring the trial court to dismiss the action.

The court of appeals' analysis proceeded in three parts. First, it addressed when, if ever, a beneficiary may file a derivative action despite a trustee's reasoned decision not to file suit on behalf of the trust. Second, it took up the question whether Goebel could file a derivative action in this case. And third, it decided whether the extraordinary mandamus remedy was the appropriate relief for each defendant.

As to the first question, the court of appeals noted that "this case—a case addressing the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue—seem[ed] to be a case of first impression in Texas." The court held that Texas law permits a beneficiary to file a derivative lawsuit on behalf of the trust when the trustee cannot or wrongfully decides that it will not do so itself. And, the court continued, a trustee's decision not to file a lawsuit on behalf of the trust is wrongful only if it constitutes "fraud, misconduct, or a clear abuse of discretion."

Under this rubric, Bank of America's decision not to file a lawsuit was not wrongful because, at least in most cases, a decision made after hiring, listening to, and relying on the advice of independent outside counsel does not constitute fraud, misconduct, or a clear abuse of discretion.

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[5] The clause in question stated, "[XTO] may amend such Existing Sales Contracts and may enter into one or more Sales Contracts in the future at the prices and on the terms [XTO] shall deem proper in [XTO's] sole and absolute discretion, which may include sales to affiliates of [XTO]."

The court further explained that Bank of America's decision in this case was justified because the advice it received from outside counsel was sound. That is, despite the fact that the court wrote, "because Bank of America determined, based on the advice of outside counsel, that the conveyances unambiguously negated any duty to renegotiate existing contracts, its failure to file suit based on parol evidence contradicting this interpretation could not be considered fraudulent, wrongful, or a clear abuse of discretion," it took the time to explain why Bank of America's decision not file suit was substantively correct.[6]

The question concerning whether the extraordinary mandamus remedy was the appropriate relief for each defendant was slightly more pernicious. "Mandamus may be available upon a showing that (1) the trial court clearly abused its discretion by failing to correctly apply the law and (2) the benefits and detriments of mandamus render appeal inadequate." Based on the court of appeals' analysis of the first question, it was clear that the trial court abused its discretion by failing to grant the defendants' special exceptions and allowing Goebel to override Bank of America's decision not to sue. Thus, the only remaining question was whether "the benefits and detriments of mandamus render[ed] appeal inadequate."

The court of appeals decided this question by reframing it. It wrote that

> [m]andamus review is more appropriately reserved for trial court errors where the very act of proceeding to trial, regardless of the outcome, would defeat the substantive right involved.
>
> The substantive right involved here is the right of a trustee to determine whether the Trust will pursue litigation. Because allowing Goebel to proceed to trial on behalf of the Trust defeats Bank of America's right as trustee to control the Trust's involvement in litigation, mandamus relief is appropriate.

The specific relief the defendants sought, however, was dismissal of Goebel's claims. Unless a pleading cannot be cured via amendment, "when special exceptions are granted, the pleader must be given an opportunity to amend the pleading." Dismissal of Goebel's claims against XTO and Timberland was proper because "Goebel concede[d] she [knew] of no facts other than those stated in her petition to support her assertion that Bank of America's refusal to bring suit against XTO and Timberland was wrongful."

As a procedural matter, however, dismissal of Goebel's claim against Bank of America was improper. This was because Goebel could amend her petition to assert claims against Bank of America in her individual capacity. And such claims would "not interfere with Bank of America's authority to control litigation on behalf of

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[6] For example, the court noted that although Goebel's petition was "extensive and detailed," nothing in it proved that XTO had a duty to renegotiate its contracts with Timberland. Of particular relevance to the oil and gas industry was Goebel's contention that the implied covenant to market oil and natural gas as a prudent operator obliged XTO to renegotiate. The court of appeals rejected this argument because "[a] contract may lessen the burden of the 'prudent operator' standard through an express provision specifying a lower standard." And such was the case here.

the Trust. Bank of America asked the court "to require the trial court to dismiss the claims against [it] because [it] face[d] no likelihood of liability absent a wrongful refusal to bring suit against XTO and Timberland." But the court held that mandamus was not appropriate because to the extent that her claims "lack[ed] merit, the bank ha[d] an adequate remedy in the trial court and by appeal."

All told, the court of appeals conditionally granted the defendants' petition for writ of mandamus in part. That is, the writ would issue only if the "trial court fail[ed] to vacate its previous order denying defendants' special exceptions and render an order granting [their] special exceptions, dismissing Goebel's claims against XTO and Timberland, and ordering Goebel to replead her claims against Bank of America."

9. *Ranchero Esperanza, Ltd. v. Marathon Oil Co.*, No. 08-14-00152-CV, 2015 WL 4504947 (Tex. App.—El Paso July 24, 2015, no pet.).

Marathon Oil Company plugged a well in 1989 and abandoned all activity on the land where the well was located ten years later. Ranchero Esperanza, Ltd. purchased the land in 2004. And, in 2008, the well that Marathon plugged began leaking salt water onto the surface.

Ranchero filed suit against Marathon alleging negligence, trespass, and nuisance. In response, Marathon filed a hybrid motion for summary judgment arguing in part that it was entitled to traditional summary judgment because Ranchero Esperanza lacked standing; and because its claims were barred by the statute of limitations.

The trial court—applying "the well-established rule in Texas that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere subsequent purchaser does not have standing to recover for injuries committed before his purchase"—entered summary judgment for Marathon because it determined that Ranchero Esperanza, as a subsequent purchaser, did not have standing to assert its claims. The trial court denied Marathon's motion in all other respects. Ranchero Esperanza appealed.

The court of appeals affirmed the trial court's judgment, albeit on different grounds. Ranchero Esperanza had standing, the court held, because an injury to land accrues to the owner of the land at the time the thing that causes the injury commences to affect the land; Marathon's alleged deficient plugging of the well did not affect the land until salt water was released onto its surface in July 2008; and thus the injury occurred in 2008 when Ranchero Esperanza was the owner of the property.

The trial court's entry of summary judgment for Marathon was proper, however, because Ranchero Esperanza's claims were barred by the statute of limitations. "As a general rule, a cause of action accrues for limitations purposes when a wrongful act causes some legal injury, even if the fact of the injury is not discovered until later and even if all resulting damages have not yet occurred." Each of Ranchero Esperanza's claims was subject to a two-year statute of limitations. Ranchero Esperanza's causes of action accrued on July 20, 2008, when an operating company discovered salt water emerging from the well. Ranchero Esperanza filed

suit on July 27, 2010, which was over two years later.[7]

10. *Medina Interests, Ltd. v. Trial*, No. 04-14-00521-CV, 2015 WL 3895902 (Tex. App.—San Antonio June 24, 2015, pet. filed).

In *Medina Interests, Ltd.*, the court interpreted a 1949 deed to determine whether the grantors reserved a floating or a fixed royalty interest.

Annie Trial and her eight children owned a 278-acre tract. In 1949, Mrs. Trial and six of her children sold their interest to the remaining two children, Alex and Leo. In so doing, the grantor-children (but not Mrs. Trial) reserved an "undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas and other minerals from said 278 acre tract of land."

The case turned on the court's interpretation of this reservation clause. Medina Interests, Ltd., Alex and Leo's successor-in-interest, argued that the language—"our undivided interest in and to the 1/8 royalties"—unambiguously reserved a fixed 1/8 royalty. By way of contrast, the grantor-children argued that the clause, when read in the context of the entire deed, unambiguously reserved a floating 1/8 royalty.

Noting that the language was unambiguous and thus that it need "not construe the deed against the grantors," the court held that the deed reserved a floating 1/8 royalty interest because (1) at the time the deed was executed, there was a "common misconception . . . that the landowner's royalty would always be one-eighth of production obtained under the lease"; (2) no oil and gas lease existed when the conveyance was executed; (3) the deed used language that contemplated the possibility of leases in the future; and (4) the deed "repeat[ed] three times the agreement that the royalties would be pooled and shared equally among the six grantors and the two grantees." The latter point was particularly crucial. Indeed, the court emphasized the following language from the deed:

> [*I*]*n the case of production of oil, and other minerals from said tract of land, each of the* [*T*]*rial heirs named above, except Mrs. Annie Trial, shall share in said royalties equally. . . .*
>
> [*I*]*n case of production of oil, gas or other minerals from said tract of land in paying quantities each of the Trial Heirs, either grantor or grantee, except Mrs. Annie Trial, shall share equally in said pooled royalties. . . .*
>
> Of course, Mrs. Lysey and her husband shall only receive one share, and Mrs. Barnett and her husband, one share of *said pooled royalties*, and Mrs. Annie Trial shall not receive any part of *said pooled royalties*.

All told, the court concluded that the six grantor-children reserved an undivided floating interest "in whatever royalty interest is paid to the landowner

[7] The discovery rule was not applicable in this case because that rule applies in cases where the nature of the injury is inherently undiscoverable, and the court held that surface damages arising from salt water emerging from a well are not inherently undiscoverable.

under any lease, whether present or future, that may be negotiated on the land."