Oil and Gas Law: Case Law Update

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I. SCOPE OF THE ARTICLE

This article surveys selected oil and gas cases decided by Texas state courts from May 4, 2016 through October 23, 2016. Below are one-paragraph abstracts of the selected cases. Full case summaries follow the abstracts.

II. ABSTRACTS

1. The accommodation doctrine applies in the groundwater context. A dispute arose between the owners of the surface estate and the severed groundwater estate when the groundwater owner began implementing a proposed well field plan that would increase its water-extraction efforts but also injure the land's surface. The surface owner sued the groundwater owner, and the trial court granted the surface owner a temporary injunction, thereby enjoining the groundwater owner from engaging in activities that would further injure the surface. The court of appeals dissolved the temporary injunction and held the surface owner had no viable claims because the accommodation doctrine did not apply in the groundwater context. The Texas Supreme Court, as a matter of first impression, held that the accommodation doctrine applies in the groundwater context due to the many similarities between groundwater and mineral estates. *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, 2016 WL 3176683 (Tex. May 27, 2016).

2. The Texas Supreme Court limited the 'flexible and imaginative' approach for calculating damages in misappropriation of trade secrets cases by requiring experts to rely on objective evidence when available. An oil and gas engineer and a geologist sued an oil and gas operator for misappropriation of trade secrets after it used proprietary information to acquire more than 1,800 leases and drill more than 140 wells in the designated "sweet spot" areas. At trial, the jury found the operator liable on all claims and awarded a final judgment of more than $40 million, including $11.445 million for misappropriation of trade secrets. The court of appeals affirmed this award. The Texas Supreme Court, however, rejected the $11.445 million award because the engineer's and geologist's expert failed to rely on objective evidence that was available to more accurately determine actual damages. Without a proper calculation, the Court held that the existing award "paints an incomplete and misleading picture" and thus there was not legally sufficient evidence to support the total amount. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699 (Tex. 2016).

3. Heirs were conveyed "an undivided non-participating one-fifth of the whole and entire royalty interest" under any method of deed construction. Heirs A and Heirs B had conflicting views regarding the fractional royalty interest acquired by Heirs B. Heirs A contended that Heirs B merely had an undivided one-fifth of a one-eighth royalty interest due to the language in a prior deed. Heirs B argued that they had an undivided one-fifth of the whole and entire royalty interest. The trial court agreed with Heirs B. To determine the contested interest, the Fourth Court of Appeals not only construed the contested deed by considering the intent of the parties from the language in the four corners, but also appeased Heirs A and considered the deed in the chain of title, a disfavored deed construction approach. The court held that under either deed construction the result would be the same: Heirs B were conveyed "an undivided non-participating one-fifth of the whole and entire royalty interest." *Kardell v. Acker*, 492 S.W.3d 837 (Tex. App.—San Antonio 2016, no pet. h.).

4. To harmonize all provisions within the four corners of the lease, the Fourth Court of Appeals held that a lease termination provision only applied to monthly royalty payments. Lessor and Lessee entered into an oil and gas lease that had four provisions regarding the payment of royalties: (1) Lessee was required to pay monthly royalties based on a specific calculation; (2) royalties must be paid within 60 days following each month's production; (3) if royalties are not paid, the lease terminates; and (4) Lessee must make a true-up payment for any miscalculated monthly royalties on or before March 1st of each year. When true-up payments were not made, Lessor sued Lessee for breaching the lease and stated that the lease terminated. The trial court granted Lessor's motion for summary judgment. The court of appeals, however, determined that all royalty provisions of the lease could only be harmonized together when the lease termination provision exclusively applied to the monthly royalties. Thus, the court reversed the trial court's declaration regarding the lease termination and rendered judgment for Lessee on all claims that were based on the lease having been terminated. *Escondido Res. II, LLC v. Justapor Ranch Co., L.C.*, No. 04-14-00905-CV, 2016 WL 2936411 (Tex. App.—San Antonio May 18, 2016, no pet. h.).

5. The Fourth Court of Appeals held that Lessee's offset well did not comply with the lease's offset well clause because the commonly understood meaning of 'offset well' is a "well used to protect against drainage." Lessors and Lessee executed an oil and gas lease with an offset well clause that is triggered if another producing well is completed within 467 feet of the leased premises. Such a well was completed, and Lessee chose to drill an offset well. This offset well met all requirements under the lease; however, it was separated laterally from the triggering well by roughly 2,100 feet. Lessors sued Lessee for breaching the offset well provision of the lease. The trial court granted Lessee's motion for summary judgment because the offset well complied with all lease requirements. However, the court of appeals reversed the trial court's judgment. The court of appeals explained that the commonly understood meaning of offset well in the oil and gas industry is a "well that actually prevents drainage," and Lessee's expert witness did not conclusively prove that the well protected the Lessors' tracts. Accordingly, the court reversed and remanded the case. *Adams v. Murphy Expl. & Prod. Co.-USA*, No. 04-15-00118-CV, 2016 WL 3342353 (Tex. App.—San Antonio June 15, 2016, pet. filed).

6. The Statute of Frauds barred an agreement to exchange an overriding royalty interest for landman services when there was no written description of the property. The court further held that a disclaimer of fiduciary duties should be honored in an "arms-length transaction between sophisticated businessmen." Developer and Investor entered into a series of business agreements to develop various areas predicted to have oil and gas. All parties to these agreements expressly disclaimed the creation of any fiduciary duties. Additionally, Developer and Investor entered into a separate agreement to exchange Developer's landman services for an overriding royalty interest. After a dispute that led Developer to stop providing landman services, Investor sued for an array of claims. At trial, the jury found for Investor on all claims. On appeal, the Seventh Court of Appeals first held that the express disclaimer of fiduciary duties must be respected as between two sophisticated businessman. The court further held that

because an overriding royalty interest in a lease constitutes real property, the agreement falls within the Statute of Frauds and as such a writing is necessary to identify the property with reasonable certainty. Without such a writing, the court concluded that the agreement violated the Statute of Frauds and was thus unenforceable. *Hardwick v. Smith Energy Co.*, No. 07-15-00083-CV, 2016 WL 3557273 (Tex. App.—Amarillo June 27, 2016, no pet. h.).

7. Because Grantors reserved their mineral interest from the land described in the deed rather than from the conveyance, Grantee received no interest in the mineral estate. An heir's successor-in-interest ("Successor") and a Grantee disputed the Grantee's interest in a mineral estate. Successor argued that the contested deed only conveyed the surface estate, as there were no express provisions indicating an intent to convey minerals. Grantee contended that the deed either conveyed an interest in the mineral estate or was ambiguous. The trial court granted Successor's motion for summary judgment. On appeal, the Fourth Court of Appeals considered the Grantors' reservation of the mineral estate and determined that the deed reserved a fraction of minerals under the land described, meaning that the Grantors reserved the minerals under the entire physical tract rather than solely reserving part of their interest under the conveyance. Because of this reservation, Grantee received no interest in the mineral estate. Accordingly, the court affirmed the trial court's judgment. *Combest v. Mustang Minerals, LLC*, No. 04-15-00617-CV, 2016 WL 4124066 (Tex. App.—San Antonio Aug. 3, 2016, pet. filed).

8. The Fourth Court of Appeals held that Heirs defeated Grantee's motions for summary judgment by producing some evidence of ownership in one-half of a mineral estate. Grantor conveyed her entire surface estate and one-half of her mineral estate to Grantee. Grantor's Heirs contend that they own the remaining one-half interest in the mineral estate. Because Grantee would not recognize this ownership interest, Heirs sued Grantee for trespass to try title, bad faith trespass, as well as other intentional torts. Both sides moved for summary judgment. Grantee claimed that Heirs have no mineral interest because they offered no evidence of ownership and there is a broken chain of title. The trial court granted Grantee's motions. After considering the timely-filed summary judgment evidence, the affidavits of heirship, death certificates, and relevant deeds, the Fourth Court of Appeals held that Heirs produced more than a scintilla of evidence to prove ownership, thereby defeating Grantee's no-evidence and traditional motions for summary judgment. The court further held that Grantee failed to satisfy its burden in conclusively disproving any essential element of the Heirs' claims. Accordingly, the court reversed and remanded the case for further proceedings. *Radcliffe v. Tidal Petro., Inc.*, No. 04-15-00644-CV, 2016 WL 4444428 (Tex. App.—San Antonio Aug. 24, 2016, no pet. h.).

III. CASE SUMMARIES

1. *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, 2016 WL 3176683 (Tex. May 27, 2016).

In *Coyote Lake Ranch*, the Texas Supreme Court held, as a matter of first impression, that the accommodation doctrine applies to the relationship between the owner of a severed groundwater estate and the owner of the surface estate.

Coyote Lake Ranch ("the Ranch") is comprised of more than 26,000 acres of land that is used for agriculture, recreational hunting, and raising cattle. During the 1950s, the Ranch conveyed its groundwater rights to the City of Lubbock ("the City"). However, when the City began implementing a proposed well field plan that increased its water-extraction efforts, the Ranch objected because it would injure the land's surface. The Ranch then sued the City for inverse condemnation, negligence, breach of contract, and declaratory judgment, seeking to enjoin the City from taking further action.

The trial court granted the Ranch a temporary injunction, which enjoined the City from destroying the grass on the surface, proceeding with any drilling on the surface without the Ranch's consent, and erecting power lines. The Seventh Court of Appeals dissolved the temporary injunction and held that the Ranch failed to allege a viable cause of action against the City because the accommodation doctrine does not apply in the groundwater context. Specifically, the Seventh Court of Appeals deferred to the Texas Supreme Court or the Texas Legislature to pronounce such a change to the accommodation doctrine.

In deciding this case, the Texas Supreme Court answered the long-awaited question of whether the accommodation doctrine applies to groundwater. To answer this question, the Court analyzed the language of the deed which provides the City with the right to test and drill wells "at any time and location" but only "for the purpose of" engaging in operations to access the groundwater and further limits its surface use of the Ranch to what is "necessary and incidental" to those operations.

The City contended that this language allowed it "to do everything necessary or incidental to drilling anywhere" and thus, as the Court explained, would give it "an all but absolute right to use the surface heedless of avoidable injury." The Ranch, however, argued that the City can only do "what is necessary or incidental to fully access the groundwater" and thus the Ranch could severely restrict the City's drilling operations. Because the "necessary and incidental" standard in the deed failed to explain the limitations on the City's implied right to use the surface, the Court considered whether the accommodation doctrine should apply.

The Court held that it did. As applied in the mineral context, the accommodation doctrine allows the surface estate owner, who has a pre-existing surface use that would be precluded or impaired by the severed mineral estate owner's operations, to propose alternatives that allow for access to the minerals in a less injurious way to the surface and then the mineral estate owner must utilize one of those alternatives.

A key tenet of the accommodation doctrine is that "the mineral and surface estates must exercise their respective rights with due regard for the other's use." The Court explained that this principle was equally important for both mineral and groundwater estates due to their similarities. Both mineral and groundwater estates exist in subterranean reservoirs, can be severed from the surface estate, are subject to the rule of capture, are protected from waste, and have a right to use the surface when severed. The Court further dismissed the City's notion that a groundwater estate is not dominant and thus should not be covered by the accommodation doctrine by noting that "'dominant' in the law of servitudes means only benefitted, not superior." Thus, the

groundwater "estate is dominant for the same reason a mineral estate is; it is benefitted by an implied right to the reasonable use of the surface."

After extending the application of the accommodation doctrine, the Court noted that the trial court's temporary injunction was an abuse of discretion because it enjoined the City "from activities which are a lawful and proper exercise" of its rights as dictated by the express terms of the deed. Accordingly, the Court affirmed the court of appeals' judgment reversing the temporary injunction and remanded the case for further proceedings utilizing the accommodation doctrine.

2. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699 (Tex. 2016).

In *Southwestern Energy*, the Texas Supreme Court rejected a $11.445 million damages award for misappropriation of trade secrets because there was not legally sufficient evidence to support the total amount.

In this case, Toby Berry-Helfand, a reservoir engineer, and Gerry Muncey, a geologist, sued Southwestern Energy Production Company ("SEPCO"), an oil and gas operator, for misappropriation of trade secrets as well as many other claims, including breach of contract, breach of fiduciary duty, fraud, and theft.

For nearly seven years, Helfand conducted extensive research on the location of possible oil and gas "sweet spots" in the James Lime reservoir where gas production could be optimized with advanced drilling techniques. During this timeframe, Muncey assisted Helfand in creating a "treasure map" of the best drilling locations in the James Lime reservoir. After compiling this research and obtaining leases at two sweet spot locations, Helfand began marketing these prospects to key players in the industry, including SEPCO.

Despite executing a confidentiality and noncompete agreement and declining Helfand's deal, SEPCO used the detailed information it received about the sweet spots to acquire more than 1,800 leases and drill more than 140 wells in the same areas. While SEPCO's actions were ongoing, Helfand closed a deal with Petrohawk Properties, L.P., an energy company. The Petrohawk deal had three major components for Helfand: (1) a payment of $1.8 million; (2) a sliding scale overriding royalty interest, which generally averaged 3%; and (3) a "6.25% after-payout ('back-in') working interest."

In 2009, Helfand and Muncey sued SEPCO. At trial, the jury found SEPCO liable on all claims and awarded a final judgment against SEPCO of more than $40 million, including $11.445 million for misappropriation of trade secrets. This $11.445 million was derived from the calculation of 3%, which was the average amount of overriding royalty from the Petrohawk agreement, of SEPCO's total profit from the trade secrets of $381.5 million. The court of appeals took many actions, including reversing and remanding many claims and holding equitable disgorgement was not available as a matter of law, but the most interesting action it took was to affirm the $11.445 million actual damages award for the misappropriation of trade secrets. This award was heavily scrutinized by the Texas Supreme Court.

On appeal, the Texas Supreme Court was tasked with determining if there was legally sufficient evidence supporting the $11.445 million damages for the trade-

secrets misappropriation. In its analysis, the Court noted that "[a] 'flexible and imaginative' approach is applied to the calculation of damages in misappropriation-of-trade-secrets cases"; however, "relying on imagination is not justified when objective evidence is available."

The Court rejected the $11.445 million award because Helfand's and Muncey's expert failed to consider the sliding-scale nature of Helfand's overriding royalty interest and instead merely used the average 3%. Such an oversight was a fatal flaw in the expert's calculation because "applying 3% across the board paints an incomplete and misleading picture." Thus, after having concluded that Helfand and Muncey sustained actual damages from the misappropriation, the Court remanded this case for a new trial.

3. *Kardell v. Acker*, 492 S.W.3d 837 (Tex. App.—San Antonio 2016, no pet. h.).

In *Kardell*, the Fourth Court of Appeals held that the heirs of the lessor's predecessor's sibling owned an undivided non-participating one-fifth of the whole and entire royalty interest.

This case deals with the language of four deeds that were executed among siblings between 1948 and 1980. In 1948, Mabel Snowden executed a deed (the "1948 Snowden deed") in which her four siblings, including Johnie Acker, received "an undivided four-fifths (4/5ths) interest as their separate individual property so that each will hold an undivided one-fifth (1/5th) interest in and to all of the oil, gas and other minerals acquired by Mabel [in the Real Property]." The deed further specified that all grantees would receive a non-participating royalty interest. Additionally, the deed contained a future lease clause, which contained conflicting fractional royalties. Specifically regarding future leases, the deed first stated that the grantees "shall have no interest…above one-eighth (1/8th) royalty," but later said grantees shall receive one-fifth (1/5th) royalty each for "all the oil, gas, and other minerals taken and saved under any such lease."

In 1953, per the request from Snowden, Acker and another sibling executed a deed (the "1953 Acker deed") in which Snowden was conveyed "an undivided two-fifths (2/5ths) interest…in and to all of the oil, gas, and other minerals in and to the [Real Property], the mineral interest hereby conveyed being all of the interest conveyed by Mabel M. Snowden to Johnie Lorene Acker and [the other sibling] by [the 1948 Snowden] Deed." Essentially, the 1953 Acker deed conveyed back to Snowden two-fifths interest in her real property.

In 1965, Snowden executed a deed (the "1965 Snowden deed") which re-conveyed to Acker an "undivided one-fifth (1/5th) interest as her separate, sole and individual property in and to all of the oil, gas and other minerals in and to the [Real Property], the mineral interest hereby conveyed being all of the interest conveyed by Johnie Lorene Acker to Mabel M. Snowden by [the 1953 Acker] deed."

Although the 1965 Snowden deed intended to re-convey the same interest to Acker that she had received from the 1953 Acker deed, the language of the 1965 deed failed to state that Acker was only to receive a non-participating royalty interest and not a mineral interest. Thus, in 1980, Acker and Snowden executed a correction deed (the "1980 Correction deed") to properly convey to Acker "an undivided non-participating

one-fifth (1/5th) of the whole and entire royalty interest as her separate, sole and individual property in and to all of the oil, gas and other minerals in the [Real Property]."

For nearly thirty years, there were no conflicts with the royalty interests detailed in the four deeds. However, in 2009, the Snowden heirs entered into an oil and gas lease, which led to a dispute with the Acker heirs regarding their royalty interest. The oil and gas lessee filed an interpleader action to resolve this dispute, and the Snowden heirs and the Acker heirs both filed motions for summary judgment. The Snowden heirs contended that the Acker heirs merely have an undivided one-fifth of a one-eighth royalty interest due to the language in the 1948 Snowden deed. The Acker heirs argued that they have an undivided one-fifth of the whole and entire royalty interest. The trial court granted the Acker heirs' motion.

On appeal, the Snowden heirs contended that the trial court misconstrued the 1980 Correction deed by failing to consider all of the deeds in the chain of title. The Fourth Court of Appeals explained that the proper method of deed construction is to "ascertain the intent of the parties from all of the language in the 'four corners' of the deed" while "harmonizing and giving effect to all parts of the deed." Following this approach, the court agreed with the trial court and held that the 1980 Correction deed "unambiguously conveys to Acker 'an undivided non-participating one-fifth of the whole and entire royalty interest in and to all of the oil, gas, and other minerals in' the real property."

However, the court further noted that even when utilizing the disfavored approach of considering the deed in the chain of title, the result would not change because the construction of the 1948 Snowden deed was governed by the court's prior decision in *Garza v. Prolithic Energy Co., L.P.*, 195 S.W.3d 137 (Tex. App.—San Antonio 2006, pet. denied).

In *Garza v. Prolithic Energy Co., L.P.*, the court was required to construe a contract with conflicting fractional royalty interests. Specifically, the granting clause provided the grantee an "undivided one-half (1/2) interest in and to all of the oil, gas, and other minerals in and under the property" whereas the future lease clause stated the grantee would "receive one-sixteenth (1/16th) of all oil, gas, and other minerals taken and saved under such future leases." The court harmonized these conflicting contract provisions and held "the 1/2 interest in the mineral estate entitled the grantee to consistently receive 1/2 in whatever royalty was paid under the future leases."

Applying the reasoning in *Garza* to this case, the court recognized the conflicting fractions in the future lease clause of the 1948 Snowden deed, "by first stating the grantees shall not have an interest in any oil payment above the one-eighth royalty received by the grantors in any future leases, but then stating the grantees shall receive under the future leases four-fifths part of all the oil, gas and other minerals taken and saved under the future lease to be received out of the royalty provided in such lease or leases," and held that the future lease provision would "entitle each of the grantees to consistently receive one-fifth of whatever royalty was owed under the future leases." Thus, under either deed construction, the Acker heirs were conveyed "an undivided non-participating one-fifth of the whole and entire royalty interest."

The court further dismissed the Snowden heirs' claim that this Court's prior decision in *Winslow v. Acker*, 781 S.W.2d 322 (Tex. App.—San Antonio 1989, writ denied) governed the construction of the contested Snowden deed and thus should be given res judicata or collateral estoppel effect, as that prior case did not construe the 1948 Snowden deed. Accordingly, the Fourth Court of Appeals affirmed the trial court's judgment and concluded that the Acker heirs were conveyed "an undivided non-participating one-fifth of the whole and entire royalty interest."

4. *Escondido Res. II, LLC v. Justapor Ranch Co., L.C.*, No. 04-14-00905-CV, 2016 WL 2936411 (Tex. App.—San Antonio May 18, 2016, no pet. h.).

In *Escondido*, the Fourth Court of Appeals held that a lease termination provision regarding royalties only applied to monthly royalty payments because any other interpretation would have rendered the true-up royalty provision meaningless.

In 2008, Justapor, lessor, and Escondido, lessee, entered into an oil and gas lease for the Justapor Ranch, which was an 803-acre tract. This lease had four specific provisions regarding the payment of royalties: (1) Escondido was required to calculate and pay royalties "on 1/4 of all gas production based upon the highest of various pricing measures"; (2) these royalties must be paid "within sixty days following each month's production"; (3) the lease terminates if the royalties are not paid and become delinquent; and (4) a true-up provision requires Escondido to pay the difference in any calculation errors for each month's royalty payments on or before March 1st of each year. In 2011, Escondido further agreed by letter to "convey certain interests it acquired in the Justapor Ranch to an entity designated by Justapor."

In 2013, Justapor sued Escondido for breaching the lease "by failing to reconcile royalty underpayments by March 1, 2012, or by March 1, 2013," and as such the lease terminated by its terms. Specifically, Justapor alleged multiple causes of action, including breach of contract, bad-faith trespass, and trespass to try title. Justapor also requested a declaration stating that Escondido is required to convey all of its interests in the Justapor Ranch per the 2011 agreement.

Both parties moved for summary judgment. Justapor contended that it was entitled to judgment because Escondido admitted that it intentionally failed to pay true-up royalties as required by the lease. Escondido argued that the lease did not terminate and thus it was entitled to summary judgment. The trial court granted Justapor's motion on all grounds.

On appeal, the Fourth Court of Appeals was tasked with determining whether the automatic termination provision of the lease applied to the true-up royalty payments. Escondido argued that the termination provision only applied to monthly royalties not paid within the allotted sixty-day period. Justapor, however, contended that the termination provision applied for all true-up royalty payments.

The court agreed with Escondido because the language of the termination provision could only be interpreted in one way in order to give meaning to both the monthly royalty provisions and the true-up royalty provision. In particular, the court noted that "if the termination provision is construed to terminate the lease if Escondido makes a timely underpayment of royalties

after a month's production, then the true-up provision of the lease would be superfluous." Such a construction is not reasonable. Thus, the court held that "the termination provision unambiguously does not apply to a breach of the true-up provision" and reversed the trial court's declaration regarding the lease termination. Further, following this determination regarding the lease termination, the court rendered judgment for Escondido on the trespass and trespass to try title claims as well as the accounting and declaratory judgments, as all of these claims were based on the lease having been terminated.

After deciding the lease termination provision, the court considered Justapor's last two claims: (1) breach of the true-up provision and (2) breach of the 2011 letter agreement. First, Justapor argued in its motion for summary judgment that Escondido failed to comply with the pricing provision when calculating royalty payments and thus it breached. The court disagreed and held that summary judgment was improper because the pricing provision's meaning was uncertain and contained typographical errors. Second, regarding the 2011 letter, the court reviewed Justapor's summary judgment evidence and determined that Justapor failed to "designate an entity to which Escondido should convey its interests in the Justapor Ranch." Due to this failure to designate an entity, the trial court's award of specific performance or a declaration requiring Escondido to convey its property was improper. Accordingly, the court remanded these two claims for further proceedings.

5. *Adams v. Murphy Expl. & Prod. Co.-USA*, No. 04-15-00118-CV, 2016 WL 3342353 (Tex. App.—San Antonio June 15, 2016, pet. filed).

In *Adams*, the Fourth Court of Appeals held that the commonly understood meaning of "offset well" within the oil and gas industry is a "well used to protect against drainage."

In this case, the appellants, a group of lessors, own royalty interests in two tracts of land that were leased to appellee Murphy Exploration & Production Co. ("Murphy"). In the oil and gas leases for these tracts, there is an offset well clause. This clause states that if "a well is completed as a producer of oil and/or gas on land adjacent and contiguous to the leased premises, and within 467 feet of the premises covered by the lease," then Murphy, as lessee, must take one of three actions within 120 days: (1) commence drilling of an offset well "with due diligence to a depth adequate to test the same formation from which the well or wells are producing from on the adjacent acreage"; or (2) pay royalties to Lessors; or (3) "release acreage from [the] lease."

This provision was of great importance after a third party drilled a horizontal well on a tract adjacent to the leased premises and thus triggered the offset well clause. To satisfy its requirement under the offset well clause, Murphy chose to drill an offset well. Although Murphy's offset well "runs parallel to the [third party] well and bottoms in the same formation," "the two wells are separated laterally by approximately 2,100 feet." Due to the significant distance between the two wells, the Lessors sued Murphy for breaching the terms of its oil and gas leases.

At trial, both sides moved for summary judgment, arguing that the trial court could determine as a matter of law whether Murphy's offset well actually constituted an offset well under the lease.

Lessors said no; Murphy said yes. The trial court granted Murphy's motion.

On appeal, the Fourth Court of Appeals was tasked with determining the commonly understood meaning of an offset well. Lessors contended that Murphy breached the lease "because the offset well clause expressly required Murphy to drill an offset well—a well that actually prevents drainage" based on its commonly understood meaning. In contrast, Murphy argued that the contested offset well complied with every requirement of the lease and thus it did not have to be "drilled at a particular location or within any specific distance from a triggering well."

The court agreed with Lessors. In the oil and gas industry, the term offset well has been commonly understood to mean "a well used to protect against drainage." In light of this meaning, the court then evaluated whether Murphy could conclusively prove that its offset well actually was protecting Lessors' tracts from drainage. It could not. Although Murphy's expert witness generally stated that the well "is an offset well," the expert did not conclusively prove that the well protected Lessors' tracts against drainage and thus Murphy failed to prove as a matter of law that its well is an offset well. Accordingly, the court reversed the trial court's judgment and remanded the case.

6. *Hardwick v. Smith Energy Co.*, No. 07-15-00083-CV, 2016 WL 3557273 (Tex. App.—Amarillo June 27, 2016, no pet. h.).

In *Hardwick*, the Seventh Court of Appeals held that the Statute of Frauds barred an agreement between an investor and a developer to exchange an overriding royalty interest for landman services when there was no written description of the property. Further, the court held that a disclaimer of fiduciary duties should be honored when the "contractual limitation arises from an arms-length business transaction between sophisticated businessmen."

In this case, Mark Hardwick along with friends developed "a method of predicting the presence of oil and gas in certain locations." They presented this method to Lester Smith, an oil and gas investor, and they soon reached five separate agreements for developing five different prospect areas. These agreements were collectively referred to as the Fusselman Prospect Agreements ("FPA"). Notably, each of the FPA "expressly disclaim[s] the creation of a joint venture or partnership as well as the creation of any fiduciary duties between the parties to the FPA."

Subsequent to the FPA, Hardwick and Smith agreed to develop another area referred to as the "Bad Billy" area. In this agreement, Hardwick agreed to perform landman services in exchange for an overriding royalty interest.

In 2011, a conflict arose between Hardwick and Smith that resulted in Hardwick no longer performing landman services under any of the agreements. Smith sued Hardwick and his LLC for fraud, theft, breach of contract, and breach of fiduciary duties. Associated with his claims, Smith also sought damages, attorney's fees, interest, rescission of the FPA, and equitable forfeiture. At trial, the jury found for Smith on all claims.

On appeal, the Seventh Court of Appeals considered the sufficiency of the evidence supporting the jury's findings regarding the FPA claims of fraud, breach of contract, and theft. The court found legally

sufficient evidence for all claims except the fraudulent inducement claim. Further, the court considered the breach of fiduciary duties claim regarding the FPA. Smith claimed that Hardwick owed him fiduciary duties because the "FPA activities established a joint venture between the parties." Hardwick, however, emphasized that all parties to the FPA disclaimed fiduciary duties. The court agreed with Hardwick and held that it "must honor the contractual terms that parties use to define the scope of their obligations and agreements," which is "especially true when the contractual limitation arises from an arms-length business transaction between sophisticated businessmen."

The court then considered Hardwick's challenge to Smith's recovery under the Bad Billy contract that exchanged landman services for an overriding royalty interest. The court explained that an "overriding royalty interest in an oil and gas lease is considered an interest in real estate that falls within the Statute of Frauds," thus requiring a written document "by which the property to be conveyed may be identified with reasonable certainty." Hardwick noted that "the identification of the property could not be determined with reasonable certainty" and as such the agreement violated the Statute of Frauds. The court agreed. There was "no written description of the property covered by the agreement" and the only referenced map failed to identify the Bad Billy area with reasonable certainty. Therefore, the court concluded that the Bad Billy contract violated the Statute of Frauds and thus was unenforceable.

7. *Combest v. Mustang Minerals, LLC*, No. 04-15-00617-CV, 2016 WL 4124066 (Tex. App.—San Antonio Aug. 3, 2016, pet. filed).

In *Combest*, the Fourth Court of Appeals held that a grantee received no interest in the mineral estate because the grantors reserved their mineral interest from the land described in the deed rather than from the conveyance.

This case focuses on the interpretation of one deed (the "Combest deed") from Inga and Horace Combest to Toni and Preston Combest in 2003. Prior to 2003, Inga and Horace acquired an "undivided one-half interest in the mineral estate" under the land at issue in this case.

In 2003, Inga and Horace executed the Combest deed to Toni and Preston. First, the deed provided a property description of the 80 acres of land in Texas. Second, the deed reserved to the grantors a mineral interest when it stated, "[t]he grantor herein…excepts from this conveyance and reserves unto themselves, their heirs, and assigns an undivided one-half (1/2) interest in and to all of the oil, gas, and/or other minerals." Third, the deed then listed the "Reservations from and Exceptions to Conveyance and Warranty."

At various times in 2012, Toni and David Combest, the sole heir of Horace and Inga Combest, separately entered into oil and gas leases with Chesapeake Exploration, LLC. After these leases were executed, David conveyed his total interest in the mineral estate to US Mineral Resources, LLC ("Mineral"). Mineral then conveyed its interest to Mustang Minerals, LLC ("Mustang"). Toni also conveyed one-half of her interest in the mineral estate to Mountain Laurel Minerals LLC ("Mountain").

Soon thereafter, Chesapeake pooled its leases from Toni and David and commenced drilling operations with success.

However, after making several royalty payments to Toni and Mountain for their combined undivided one-half interest in the mineral estate, Chesapeake stopped payments after Mustang complained that it owned all of the mineral estate.

Mountain sued Mustang for trespass to try title and Toni joined as intervenor. All parties filed motions for summary judgment and alleged that their interests arose under the Combest deed. Mountain mainly argued that the Combest deed conveyed the mineral estate to Toni or that it was ambiguous on its face. In contrast, Mustang contended that the Combest deed only conveyed the surface estate to Toni because "nothing on the face of the deed indicated an express intent to convey minerals." The trial court granted Mustang's motion and ordered that Toni and Mountain take nothing. Only Toni appealed the trial court's decision.

On appeal, Toni argued three points: (1) the trial court, as a matter of law, did not properly interpret the Combest deed; (2) in the alternative, the deed was ambiguous and thus a fact question for the jury; and (3) Mustang is precluded from receiving a take-nothing judgment because it is a foreign entity that has not registered with the Texas Secretary of State.

To determine whether the Combest deed conveyed mineral rights to Toni and thus Mountain, the Fourth Court of Appeals interpreted the language of the Combest deed by considering its "four corners" and "harmoniz[ing] all parts of the deed." The court also considered the Texas Supreme Court decision in *Averyt v. Grande, Inc.*, 717 S.W.2d 891 (Tex. 1986), which addressed the specific rules of deed construction to apply when "a grantor owns an undivided mineral interest and reserves a fraction of the minerals under the land in the deed."

In *Averyt*, the Texas Supreme Court distinguished between reserving a fractional interest from the conveyance and from the land described. "If the deed reserves a fraction of the minerals under the land *conveyed*, then the deed reserves a fraction of the part of the mineral estate actually owned by the grantor and conveyed in the deed." However, if "the deed reserves a fraction of the minerals under the land *described*, the deed reserves a fraction of the minerals under the entire physical tract, regardless of the part of the mineral estate actually conveyed."

Applying the reasoning in *Averyt* to this case, the court considered the deed in its entirety and held that the "Combest deed reserves a fraction of the minerals *from the land described*." Therefore, Mustang's interpretation was correct and Inga and Horace did not convey their interest in the mineral estate to Toni.

After making this determination, the court quickly dismissed Toni's other claims regarding the *Duhig* rule, as the deed contained a limiting clause and thus the *Duhig* rule was inapplicable, and the ambiguity of the deed. The court further rejected the notion that Mustang, as a foreign entity, was precluded from obtaining a take-nothing judgment simply because it had not registered to do business in Texas. Rather Mustang was defending itself, which the Texas Business Organizations Code explicitly allows. Accordingly, the Fourth Court of Appeals held that the Combest deed did not convey a mineral interest to Toni and affirmed the judgment of the trial court.

8. *Radcliffe v. Tidal Petro., Inc.*, No. 04-15-00644-CV, 2016 WL 4444428 (Tex. App.—San Antonio Aug. 24, 2016, no pet. h.).

In *Radcliffe*, the Fourth Court of Appeals held that the heirs of a grantor, who conveyed one-half of her mineral estate to a grantee, produced some evidence of ownership in one-half of the mineral estate to defeat the grantee's motions for summary judgment.

This case deals with the ownership of one-half of a mineral estate under 120 acres of land in Texas. In 1945, Emma Radcliffe, now deceased, owned land in Texas and conveyed her "entire surface estate and half of the mineral estate to Tidal Petroleum, Inc.'s predecessor-in-interest." A dispute arose when the Radcliffes – Emma's grandchildren, Brett and Robert, and Mamba Minerals, LLC, the successor-in-interest to grandchild Amber – notified Tidal that they had a one-half interest in the mineral estate. Tidal dismissed these claims of ownership.

In response, the Radcliffes sued Tidal for trespass to try title, bad faith trespass, and many other intentional torts. Both sides moved for summary judgment. Tidal contended that the Radcliffes do not own any mineral interest in the tract because they offered no evidence of such ownership and there is a gap in the chain of title. The trial court eventually granted Tidal's motions yet failed to specify the grounds for its decision.

On appeal, the Radcliffes primarily argued that Tidal's no-evidence and traditional motions for summary judgment should not have been granted because they produced more than a scintilla of evidence of ownership and that the produced evidence raised fact questions as to the disputed interest. The Fourth Court of Appeals agreed.

Regarding the trespass to try title claim, the court analyzed the chain of title for the one-half mineral interest from Emma to her heirs. To review the chain of title, the court considered all timely-filed summary judgment evidence, the affidavits of heirship, death certificates, and relevant deeds. The court concluded that the Radcliffes had produced "more than a scintilla of summary judgment evidence" to show that they take under intestate succession, as they produced some evidence of an unbroken chain of title for the one-half mineral interest from Emma down to her grandchildren. Thus, the court held that Tidal's no-evidence summary judgment motion was improperly granted.

The court then considered the Radcliffes' bad faith trespass claim. Because the court had already decided that there was more than a scintilla of evidence to show ownership, it focused its analysis on Tidal's assertion that there was no evidence of lack of consent because (1) "one cannot commit an unauthorized entry onto a nonpossessory interest" and (2) it "had an absolute right to enter under the doctrine of cotenancy."

First, the court explained that it is possible to bring a trespass action for a nonparticipating royalty interest (even though nonpossessory) or a mineral interest. Thus, Tidal's admission that it removed minerals from the tracts constituted more than a scintilla of evidence for the element of lack of consent. Second, the court quickly rejected Tidal's assertion regarding its absolute right to enter the land under the doctrine of cotenancy because its deed to the land had a reservation regarding future leases that expressly required "joinder by Grantors, their successors, or assigns, in any

such lease or leases." Therefore, the Radcliffes produced more than a scintilla of evidence on each contested element for the bad faith trespass claim.

Following its analysis for the claims above, the court held that the Radcliffes satisfied their burden of producing more than a scintilla of evidence for other alleged claims and that Tidal failed to satisfy its burden for the traditional motion for summary judgment, as many factual disputes existed and Tidal failed to conclusively disprove any essential element of the Radcliffes' claims. Accordingly, the court reversed the trial court's judgment and remanded the case for further proceedings.