

COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

**Cynthia A. Houchins and Darrell E. Houchins v. Devon Energy
Production Company, L.P. and Phillip Trew, Sr.**

No. 01-08-00273-CV (Tex. App. Oct. 15, 2009) · No. 01-08-00273-CV · Decided October 15, 2009

OPINION

PER CURIAM.

Opinion issued October 15, 2009 In The Court of Appeals For The First District of Texas NO. 01-08-00273-CV CYNTHIA A. HOUCHINS AND DARRELL E. HOUCHINS, Appellants V. DEVON ENERGY PRODUCTION COMPANY, L.P. AND PHILLIP TREW, SR., Appellees On Appeal from the 18th District Court Johnson County, Texas Trial Court Cause No. C-2005-00674 MEMORANDUM OPINION In this appeal, we must determine whether the language of a deed is ambiguous and whether the deed reserved mineral rights to the grantor.

The district court held the deed unambiguously reserved to the grantor all the minerals. We affirm.
Background On January 24, 1993, appellants Cynthia A. Houchins and Darrell E. Houchins and appellee Phillip H. Trew, Sr. signed a contract for sale of approximately 69 acres in Johnson County.

On February 2, 1994, Trew signed a warranty deed conveying the land to the Houchinses. The deed, in relevant part, states the following: That I, PHILLIP H. TREW, as his sole and separate property,... HAS, GRANTED, SOLD AND CONVEYED, and by these presents DOES HEREBY GRANT, SELL AND CONVEY unto DARRELL E. HOUCHINS and CYNTHIA A. HOUCHINS (Grantees)... all of that certain tract of land [description]....

This conveyance is expressly made subject to any and all restrictions, covenants and easements, if any, relating to the hereinabove described property, but only to the extent they are still in effect, shown of record... and to all zoning laws, regulations and ordinances of municipal or other governmental authorities, if any, but only to the extent they are still in effect, relating to the hereinabove described property.

This conveyance is also expressly subject to all restrictions, covenants and easements set forth in the Note and Deed of Trust executed and delivered to Grantor. To the extent that Grantor maintains any mineral rights to the subject property, Grantor expressly retains such mineral rights and exempts same from the conveyance herein. Grantees accept property in its “AS IS” condition.

The Houchinses signed a February 1, 1994 deed of trust in favor of Trew, as named beneficiary, with the 69 acres of land serving as security for a \$145,000 note from the Houchinses to Trew.

The deed of trust contains includes the following language, under the heading “GENERAL PROVISIONS”: 10.The use of the property securing this deed of trust shall include residential and personal agricultural use only, and same shall not be used primarily for the operation of a business.....

13.This deed of trust shall bind, inure to the benefit of, and be exercised by successors in interest of all parties. In February 2001, Trew signed an oil and gas lease on the land with a five-year primary term. The current successor-in-interest to the original lessee is appellee Devon Energy Production Company, L.P. Devon attempted to begin drilling on the land in December 2005, and the Houchinses denied Devon access, claiming they owned the minerals.

In December 2005, Devon sued the Houchinses and obtained a temporary injunction allowing it to exercise its rights under the oil and gas lease. The Houchinses filed a third-party action against Trew for reformation of the contract of sale, specific performance, a declaratory judgment, and damages under the Deceptive Trade Practices-Consumer Protection Act. See Tex. Bus. & Com.

Code Ann. §§ 17.41–.63 (Vernon 2002 & Supp. 2008) (DTPA). The Houchinses filed a counterclaim against Devon to quiet title to the land, for trespass to try title, and for a declaratory judgment. The Houchinses, Trew, and Devon each filed motions for summary judgment.

The district court rendered summary judgment for Trew and Devon, holding that “the deed was unambiguous in its mineral reservation to Trew.” The court rendered summary judgment on the Houchinses’ remaining claims against Devon, denied Trew’s motion for summary judgment based on his limitations defense to the Houchinses’ DTPA claims, and denied the Houchinses’ motion for summary judgment.

The remaining DTPA claims were tried to the bench, and the district court determined that the DTPA claims were groundless and brought in bad faith. The district court rendered final judgment that the Houchinses take nothing from Trew and Devon, that the deed unambiguously reserved to Trew all the minerals, that the Houchinses be permanently enjoined from interfering with Devon regarding the oil and gas lease, and that the Houchinses pay \$38,000 to Devon and \$37,500 to Trew.

Analysis On appeal, the Houchinses bring two issues. In their first issue, they contend that Trew failed to reserve any mineral interest. In their second issue, they contend that Trew and Devon are bound by the deed of trust provision that restricts use of the premises to agricultural and residential uses.

I. Interpretation of Trew Warranty Deed The operative language in the warranty deed reads as follows: “To the extent that Grantor maintains any mineral rights to the subject property, Grantor expressly retains such mineral rights to the subject property and exempts same from the conveyance herein.” Trew relies upon this language for his claimed reservation of mineral rights.

The Houchinses claim the provision is merely an exception to Trew's warranty of title, and is not a reservation of mineral rights to Trew. Alternatively, the Houchinses contend that the language is ambiguous, thus creating a fact issue as to the parties' intent. A. Exception vs. Reservation Relying on *Klein v. Humble Oil & Refining Co.*, 67 S.W.2d 911 (Tex. Civ.

App.—Beaumont 1934), aff'd on other grounds, 86 S.W.2d 1077 (Tex. 1935), the Houchinses contend that the operative deed language is an exception to the warranty rather than a reservation of mineral rights. The Houchinses contend that by using the verb "maintains," the clause refers only to mineral rights that have been previously exercised and thus "maintained" by Trew.

They contend this interpretation is supported by the clause's location within a paragraph that lists other exceptions to title, such as easements, governmental codes, and restrictions, and the fact that the paragraph concludes with further language of exception, emphasizing that the Houchinses were taking the property in "AS IS" condition. Invoking the "four corners" canon of construction, the Houchinses ask us to interpret the operative clause so as to be consistent with the other language of exception in the surrounding paragraph, rather than as an isolated reservation of rights.

E.g., *Davis v. Andrews*, 361 S.W.2d 419, 423 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.) ("four corners" canon). Finally, the Houchinses note that the language of the separate deed-of-trust document restricts use of the land to "residential and personal agricultural use only," and that the document, which is expressly referenced by the warranty deed, states that it applies to "all parties," further indicating that Trew did not intend to reserve minerals in the transaction.

The *Klein* case is not instructive to the issues presented by this appeal. In *Klein*, land was conveyed from the Steins to the Kleins, with an express reservation of one-eighth of all mineral rights. 67 S.W.2d at 912.

The Kleins later conveyed the same land to Baker with the following language: There is however excepted from this conveyance 1/8th of all mineral rights in and under ten acres of land... and it is understood that if no production of oil is had on said 10 acres within a period of twenty years from May 29, 1928, then this reservation shall lapse. Also understood that the owner of said rights is not to participate in any oil lease or rental bonuses that may be paid for any lease, and have no interest in any future oil and gas lease.

67 S.W.2d at 913 (emphasis supplied). The Beaumont Court of Civil Appeals concluded that the Kleins' exception of "1/8th of all mineral rights" referred to the Steins' prior reservation, and that the Kleins' subsequent exception was not a further reservation of an additional one-eighth of all mineral rights. *Id.* at 914-17.

The Houchinses argue that the Trew deed's use of the terms "retain" and "exempt" dictates that Trew has made an exception to Trew's warranty of title, similar to the deed in *Klein*, and thus is

not a reservation of mineral rights.

We disagree. Unlike Klein, this appeal does not call upon us to interpret one purported reservation of mineral rights in light of a prior grantor's reservation of mineral rights. Instead, here, the deed stated that "Grantor [Trew] expressly retain[ed] such mineral rights to the subject property." (Emphasis supplied.)

The Trew deed's reference to "Grantor" clearly specifies to whom the mineral rights were reserved, unlike the Klein case, in which the court had to determine whether the disputed language was a reservation of rights for the grantors, or alternatively an exception for rights previously reserved by a prior grantor.

As such, Klein is inapposite to this dispute. B. Interpretation of Deed Language Rather than focusing on characterizing the deed language at issue as an "exception" or a "reservation," our primary objective in construing a deed is to determine the intent of the parties from the four corners of the deed. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991). Even if the reviewing court could discern the actual subjective intent of the parties, it is not that intent that governs the interpretation of the deed.

Id. at 462; see also *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). Instead, we must discern the intent of the parties as expressed in the deed as a whole. *Luckel*, 819 S.W.2d at 462. "[W]e must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." J.M.

Davidson, 128 S.W.3d at 229; *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983) ("Generally, the parties to a contract intend every clause to have some effect and the Court will not strike down any portion of the contract unless there is an irreconcilable conflict.") (citing *Woods v. Sims*, 273 S.W.2d 617 (Tex. 1954)). No single provision taken alone will be given controlling effect; rather, all the deed provisions must be considered with reference to the whole instrument.

See *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). A reservation of minerals must be made by clear language to be effective, and courts do not favor reservations by implication. *Sharp v. Fowler*, 252 S.W.2d 153, 154 (Tex. 1952).

We have no trouble concluding that the disputed language itself (i.e., "Grantor expressly retains such mineral rights") is sufficiently clear to indicate a reservation of mineral rights. The question we must decide concerns whether an intention to convey mineral rights is undercut by the location of this language within the broader context of the surrounding paragraph and the full warranty deed.

Giving effect to all provisions of the deed, we hold that Trew reserved all mineral rights in the warranty deed. To conclude otherwise would require us to treat as a complete nullity the deed's language stating that "[t]o the extent that Grantor maintains any mineral rights to the subject property, Grantor expressly retains such mineral rights and exempts same from the conveyance herein." No contortion of the plain, ordinary, and generally accepted meanings of the disputed terms is required to reach this conclusion.

Contrary to the Houchinses' argument, the reference to mineral rights that grantor "maintains" reasonably can be understood to refer to the mineral rights that were owned by the grantor prior to the conveyance. E.g., Black's Law Dictionary 1039 (9th ed. 2009) (defining "maintain" to include the meaning "[t]o continue in possession of (property, etc.)"). Similarly, the reference that grantor "retains" such mineral rights can reasonably be understood to refer to the grantor's intention to keep the mineral rights in his possession after the conveyance.

E.g., Merriam-Webster's Collegiate Dictionary 1063 (Frederick C. Mish ed., 11th ed. 2003) (defining "retain" to include the primary meaning "to keep in possession or use"); see also The New Shorter Oxford English Dictionary on Historical Principles 2571 (Lesley Brown ed., 1993 ed.) (defining "retain" to include the meaning "[k]eep hold or possession of; continue to have, keep, or possess").

In the alternative to their contention that the deed unambiguously conveys the property in fee simple, the Houchinses contend that the deed is ambiguous, because they contend it can be interpreted in some fashion other than reserving the mineral rights to the grantor.

We disagree. Deciding whether a deed is ambiguous is a question of law for the court. See J.M. Davidson, 128 S.W.3d at 229; Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983). We may look to principles of contract interpretation to determine whether a deed term is ambiguous. See, e.g., Brown v. Havard, 593 S.W.2d 939, 942 (Tex. 1980) (relying on general contract interpretation precedents to analyze whether a deed was ambiguous).

A deed term is not ambiguous because of a simple lack of clarity. See DeWitt County Elec. Co-op., Inc. v. Parks, 1 S.W.3d 96, 100 (Tex. 1999); Universal C.I.T. Credit Corp. v. Daniel, 243 S.W.2d 154, 157 (Tex. 1951). A deed term is not ambiguous merely because the parties disagree on its meaning. See Seagull Energy, 207 S.W.3d at 345; DeWitt County, 1 S.W.3d at 100.

An ambiguity arises only after the application of established rules of construction leaves a deed susceptible to more than one meaning. Brown, 593 S.W.2d at 942; see also DeWitt County, 1 S.W.3d at 100. For an ambiguity to exist, both potential meanings must be reasonable. See J.M. Davidson, 128 S.W.3d 229; Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex.

1996). Because the Houchinses' proposed construction would render the operative language ("Grantor expressly retains such mineral rights") meaningless, it cannot be a reasonable second interpretation. We conclude the deed is unambiguous in its reservation of mineral rights for the benefit of Trew. II. Effect of Deed of Trust Restrictions In their second issue, the Houchinses contend that Trew and Devon are bound by paragraphs 10 and 13 of the deed of trust, and that those provisions preclude drilling for oil and gas on the property: 10.The use of the property securing this deed of trust shall include residential and personal agricultural use only, and same shall not be used primarily for the operation of a business.....

13.This deed of trust shall bind, inure to the benefit of, and be exercised by successors in interest of all parties. To the extent that the Houchinses make this argument to show that Trew never intended to reserve the mineral rights, we have already held that Trew's statement in the deed that he "expressly retains" the mineral rights definitively shows he reserved them.

To the extent that the Houchinses are instead arguing that the deed of trust independently prohibits drilling for oil and gas on the property, regardless of who owns the mineral rights, then this argument has not been adequately briefed. It is the Houchinses' burden on appeal to present a clear and concise argument why the district court committed reversible error, with appropriate citations to authorities and to the record.

See Tex. R. App. P. 38.1(i); *Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237, 241–42 (Tex. App.—Houston [1st Dist.] 2006, no pet.). They have failed to do so with respect to this issue, and we are thus unable to consider it. Conclusion Construing the entire deed under the recognized canons of construction and in light of the arguments raised on appeal by the Houchinses, we hold that the deed is unambiguous, as it has only one meaning—Trew conveyed the land to the Houchinses with the exception of the mineral rights, which he excluded from the conveyance and kept for himself.

Accordingly, we overrule all of the issues and affirm the judgment of the district court. Michael Massengale Justice Panel consists of Chief Justice Radack and Justices Bland and Massengale.