COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MARY ANN BRIDGES,

Appellant,

v.

LORRIE UHL, Individually and as Trustee of the LORRIE UHL GST TRUST, VICTORIA JOHNSON, Individually and as Trustee of the VICTORIA JOHNSON GST TRUST, SUSAN MERTZ SLAUGHTER, MICHAEL T. MERTZ, MORTIMER L. MERTZ, LAWSON MERTZ, LEONARD P. MERTZ, Individually and as Trustee of the LEN MERTZ TRUST, MAROLYN POWELL BEAN, INDIVIDUALLY AND AS TRUSTEE OF THE BEAN FAMILY TRUST, HELEN BUNGER BEAN, GEORGE DOUGLAS BEAN, DAVID JOE BEAN, DORCHESTER MINERALS OKLAHOMA, LP, ELDRIDGE-MILLER ENTERPRISES, LLC, BANK OF THE WEST, in its capacity as Co-trustee of the GEORGE W. ELKINS TRUST U/A/D 10/9/1986, as amended and restated, ANITA HINDS BROWN, individually and also in her capacity as co-trustee of the GEORGE W. ELKINS TRUST U/A/D 10/9/1986, as amended and restated, PATRICK B. WARD, individually and also in his capacity as co-trustee of the GEORGE W. ELKINS TRUST U/A/D 10/9/1986, as

No. 08-21-00130-CV

Appeal from the 112th

District Court

of Upton County, Texas

(TC # 18-09-U4673-OTH)

amended and restated, ROSEANN BELLINGER, SUSAN M. EBERHARDT, GWEN M. WILSON, individually and in her capacity as trustee of the GWEN M. WILSON REVOCABLE LIVING TRUST DATED 8/7/2004, KNABCO, LLC, DURHAM, INC., DURHAM GC, LTD., KENT SHARTEL MINERALS, INC., R.D. JONES, INC., BARBRA SOMMERS, Individually and in her capacity as Co-Trustee of the WILLIAM BURLINGHAM, III TRUST U/A/D 08/29/2008, AS AMENDED AND RESTATED, WILLIAM BURLINGHAM IV, Individually and in his capacity as Co-Trustee of the WILLIAM BURLINGHAM, III TRUST U/A/D 08/29/2008, as amended and restated, MILES MCLEAN HUNT, JONES-DAUBE MINERAL COMPANY, HX ROYALTY, LLC, MARGARET PRUET BREWER, GRAY BROGDEN, LINDA MARRS HAVRILLA, JEFFREY ALAN MARRS, LEE PRUET MARRS, MAURICE ADAMS MARRS III, MAMIE PRUET TAYLOR, HANNAH WILLIAMS, MAP RESOURCES, INC., CRADDICK PARTNER, LTD., THOMAS R. CRADDICK, STEVE A. YOUNKMAN, TDVD, LTD., TVD, INC., CTVD HOLDINGS, LTD., CTVD GP, LLC, HABANERO OIL & GAS, LP, HABANERO ENERGY, L.L.C., M. VIRGINIA MCCANN, Individually and as Trustee of the M. VIRGINIA MCCANN REVOCABLE TRUST, JOHN W. MCCANN, Individually and as Trustee of the M. VIRGINIA MCCANN REVOCABLE TRUST, PGRTM, LLC, FRANCES M. DAY, PATRICIA MORAN WALBRIDGE, JPMORGAN CHASE BANK, N.A. in its capacity as the Sole Trustee of the CAROLYN C. GILLMORE OIL TRUST, E3 LAND & MINERALS, LLC, GORDON W. MCMINN, AMIGAS CAPITAL, LLC, TRES IITFWI

HERMANOS, LLC, ALEXANDER CASTRO, IVOR BON, BEN SMITH, KACI CASTRO, EDWARD CASTRO, CHRISTOPHER WILSON, MARTHA WILSON, EUGENE CHENG, PAUL BUTSKI, ZACH HENDERSON, JEFF KOHL, SCRUBBIES OIL & GAS LLC, IITFWI LLC, FLORENCE SMITH, MRT LAND & MINERALS, LLC, ANABEL FISHMAN,

Appellees.

O P I N I O N

In this appeal, we are asked to interpret a reservation included in a 1940 warranty deed, and consider, as well, the applicability of multiple affirmative defenses raised by various parties. Appellant Mary Ann Bridges, the daughter and successor-in-interest to the grantors' reserved interest, sought declaratory relief regarding the deed's interpretation, and dependent on resolution of that claim, she further sought recovery of her share of royalties paid to Appellees[1] who, collectively, include over eighty individuals and entities holding mineral interests in the leased

[1] Appellees include the following parties: Lorrie Uhl, Individually and as Trustee of the Lorrie Uhl GST Trust, Victoria Johnson, Individually and as Trustee of the Victoria Johnson GST Trust, Susan Mertz Slaughter, Michael T. Mertz, Mortimer L. Mertz, Lawson Mertez, Leonard P. Mertz, Individually and as Trustee of the Len Mertz Trust, Marolyn Powell Bean, Individually and as Trustee of the Bean Family Trust, Helen Bunger Bean, George Douglas Bean, David Joe Bean, Dorchester Minerals Oklahoma LP, Margaret Pruet Brewer, Gray Brodgden, Linda Marrs Havrilla, Jeffrey Alan Marrs, Lee Pruet Marrs, Maurice Adams Marrs III, Mamie Pruet Taylor, Hannah Williams, MAP Resources, Inc., Kent Shartel Minerals, Inc., R.D. Jones, Inc., Barbra Sommers, Individually and in her capacity as Co-Trustee of the William Burlingham, III Trust u/a/d 08-29-2008, as amended and restated, William Burlingham, Individually and as Co-Trustee of the William Burlingham, III Trust u/a/d 08/29/2008, as amended and restated, Miles McLean Hunt, M. Virginia McCann, Individually and as Trustee of the M. Virginia McCann Revocable Trust, John W. McCann, Individually and as Trustee of the M. Virginia McCann Revocable Trust, PGRTM, LLC, Frances M. Day, Patricia Moran Walbridge, E3 Land & Minerals, LLC, Gordon W. McMinn, Amigas Capital, LLC, Tres IITFWI Hermanos, LLC, Alexander Castro, Ivor Bon, Ben Smith, Kaci Castro, Edward Castro, Christopher Wilson, Martha Wilson, Eugene Cheng, Paul Butski, Zach Henderson, Jeff Kohl, Scrubbies Oil & Gas LLC, IITFWI LLC, Florence Smith, MRT Land & Minerals, LLC, Anabel Fishman, HX Royalty, LLC, JP Morgan Chase Bank, N.A. in its capacity as the Sole Trustee of the Carolyn C. Gillmore Oil Trust, Craddick Partner, Ltd., Thomas R. Craddick, Steve A. Younkman, TDVD, Ltd., TVD, Inc., CTVD Holdings, Ltd., CTVD GP, LLC, Habanero Oil & Gas, LP, and Habanero Energy, L.L.C., Durham, Inc., Durham GC, Ltd., Jones-Daube Mineral Company, Eldridge-Miller Enterprises, LLC, Bank of the West as Co-Trustee of the George W. Elkins Trust, Anita Hinds Brown as Co-Trustee of the George W. Elkins Trust, Patrick B. Ward Individually and as Co-Trustee of the George W. Elkins Trust, Roseann Bellinger, Susan M. Eberhardt, and Gwen M. Wilson Individually and as Co-Trustee of the Gwen M. Wilson Revocable Living Trust.

mineral estate. The parties filed cross motions for summary judgment. On appeal, Appellant asserts the trial court erred in granting summary judgment in favor of Appellees, while also denying her cross motion for summary judgment, and otherwise determining that Appellees conclusively proved their affirmative defenses. Because we construe the 1940 deed as reserving a "floating" 1/2 royalty interest, not a "fixed" 1/16 interest, and no other basis barred Appellant's recovery on her claims, we reverse and render in part, and reverse and remand in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The 1940 deed

Prior to May 1940, Magnus F. and Myrtle Klattenhoff owned in fee simple a 640-acre tract located in Upton County, Texas. In May 1940, the Klattenhoffs sold the tract to Virgil J. Powell via warranty deed (the 1940 deed). In this deed, the Klattenhoffs expressly reserved a nonparticipating royalty interest (NPRI) as follows:

> Grantors, their heirs and assigns, reserve unto themselves, their heirs and assigns, an undivided one-half (½) of the usual one-eighth (1/8) royalty in, to and under the above[-]described land, covering the oil, gas and other minerals, said royalty reservation, however being wholly non-participating, … if, as and when production is obtained, grantors, their heirs and assigns, shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one-sixteenth (1/16) of the total production, it being the intention that this royalty reservation is wholly non-participating in bonuses, delay rentals, etc.

Over the following decades, after a series of conveyances, Appellees, collectively, came to own 100% of the tract's mineral estate. Meanwhile, the Klattenhoffs retained their ownership of the NPRI reserved by the 1940 deed.

B. The 1975 deed

In April 1975, the Klattenhoffs conveyed their reserved royalty interest to Appellant, their

daughter, via a royalty deed (the 1975 deed).[2] The granting clause of the royalty deed stated that the Klattenhoffs:

> . . . have granted, sold, conveyed, assigned, and delivered, and by these presents do grant, sell, convey, assign, and deliver, unto the said [Appellant] an undivided 1/2 of the usual 1/8 royalty interest, and being all of [the Klattenhoffs'] royalty interest, and to all of the oil royalty, gas royalty, and royalty in casinghead gas, gasoline, and royalty in other minerals in and under and that may be produced and mined from [the tract][.]

The parties all agree in this instance that Appellant continues to hold the royalty interest conveyed to her by her parents. The dispute here centers not on ownership, but on the nature and quantum of the reserved royalty interest.

C. Oil and gas leases

In 2007, parties who had succeeded Virgil J. Powell's interest in the mineral estate of the tract executed an oil and gas lease (the 2007 lease) with lessee Hanley Petroleum. Separately, in 2010, other successors of Powell's interest executed a similar oil and gas lease (the 2010 lease) with third-party operator Concho Operating, LLC. Both of these leases provided for a 1/4 royalty on oil and gas produced and saved from the land. The 2007 lease stated: "Royalty percentage' means twenty-five percent (25%);" while the 2010 lease provided for a royalty of the "the equal one-fourth ($1/4^{th}$) part of all oil produced and saved … from said land."

Even though other leases cover the tract, the 2007 Lease and the 2010 Lease are the only two of record. Hanley Petroleum never obtained production under the 2007 Lease, but Concho Operating did produce under the 2010 Lease.

D. Dispute over payment of unpaid royalties

In 2013, Appellant noticed increasing news coverage of drilling activity in the area. With

[2] An acknowledgment by the Clerk of the County Court, Upton County, Texas, certifies the 1975 deed was filed for record and properly recorded in the property records of said county.

her son, she soon visited the local courthouse to investigate whether production from the tract was tied to her royalty interest. A landman who happened to be present in the building confirmed that production was occurring on the land. This information was later confirmed by an Upton County Appraisal District employee who further noted Appellant was not listed in Concho Operating's 2010 division order. Earlier leases, however, had listed her interest in their orders.

With assistance from her family, Appellant contacted Concho Operating to inquire about its failure to include her on such payments. By August 2014, Concho Operating acknowledged her entitlement to royalties, and placed her in pay status. The next month, she received her first royalty payments for production dating back to February 2012. Concho calculated the royalties at a 1/16 "fixed" nonparticipating royalty interest. Appellant disputed this calculation, however, contending that Concho owed 1/2 of the 1/4 of production, based on binding lease terms.

E. Procedural History

In September 2018, Appellant filed a lawsuit pleading multiple, alternative causes of action. In her live pleading, she asserted claims against individuals and entities (collectively, Appellees), who all held interests in the leased minerals, contending they owed her a duty to ensure that she received full royalties owed to her under the pertinent lease based on ownership of her NPRI. Her claims included an action for declaratory judgment, a suit to quiet title, a claim for trespass to try title, monetary claims for unjust enrichment and money had and received, and equitable accounting. The crux of her suit asserted her payments should have amounted to a "floating" 1/2 of any royalty interest provided in a lease covering the tract, not a "fixed" 1/16 of production. Responding, Appellees filed general denials, special exceptions, affirmative defenses, and a counterclaim for breach of the general warranty, contending in pertinent part that Appellant had known at least since April 1975 that the royalty deed conveyed a fixed 1/16 royalty. The parties

filed cross motions for partial summary judgment as to the interpretation of the 1940 warranty deed. Grouped together in a variety of configurations, Appellees also included grounds in support of traditional summary judgment on their affirmative defenses. In the Powell[3] Appellees' motion for summary judgment, they asserted limitations and presumed-grant doctrine, claiming Appellant's recovery was barred by those defenses. Appellee Dorchester Minerals Oklahoma LP's motion for summary judgment additionally asserted the affirmative defenses of quasi-estoppel, waiver, and limitations, and they also joined the Powell Appellees' motion. Lastly, the Marrs and MAP[4] Appellees' motion for summary judgment adopted the Powell defendants' motion and further briefed the issues. The remaining Appellees[5] joined the Powell, Dorchester, and Marrs and Map motions. The parties filed corresponding responses to each side's motion for summary judgment. Additionally, Appellees collectively filed a joint response requesting a hearing on previously filed special exceptions.

Following a hearing on the summary judgment motions, and after considering all motions and responses, the trial court entered judgment granting Appellees' motions for summary judgment and denying Appellant's motion. The trial court did not state on what grounds Appellees' motions for summary judgment were granted nor on what basis Appellant's motion was denied.

This appeal followed.

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[3] The Powell Appellees are Lorrie Uhl, Individually and as Trustee of the Lorrie Uhl GST Trust, Victoria Johnson, Individually and as Trustee of the Victoria Johnson GST Trust, Susan Mertz Slaughter, Michael T. Mertz, Mortimer L. Mertz, Lawson Mertez, Leonard P. Mertz, Individually and as Trustee of the Len Mertz Trust, Marolyn Powell Bean, Individually and as Trustee of the Bean Family Trust, Helen Bunger Bean, George Douglas Bean, and David Joe Bean.

[4] The Marrs and MAP Appellees are listed as follows: Margaret Pruet Brewer, Gray Brodgden, Linda Marrs Havrilla, Jeffrey Alan Marrs, Lee Pruet Marrs, Maurice Adams Marrs III, Mamie Pruet Taylor, Hannah Williams, and MAP Resources, Inc.

[5] In twelve different groups, the remaining Appellees indicated they were all joining the other motions for summary judgment.

II. ISSUES ON APPEAL

Appellant presents three issues on appeal. First, Appellant contends the trial court erred in granting Appellees' motions and denying her motion by interpreting deed language to reserve a fixed 1/16 nonparticipating royalty interest, not a 1/2 floating royalty. Second, Appellant asserts the trial court could not deny her motion for summary judgment based on Appellees' special exceptions attacking her petition, arguing that Appellees waived any possible review of the trial court's special exceptions ruling due to their failure to obtain a written order of such purported ruling and their lack of verified pleadings. Third, she maintains the trial court's granting of Appellees' motions for summary judgment could not be supported by any of their affirmative defenses because Appellees failed to conclusively prove entitlement to such defenses as a matter of law.

In this instance, Appellant has correctly observed that when a trial court's order does not specify the grounds for the ruling, the summary judgment may be affirmed on any meritorious theory advanced in a party's motion. *See Rosetta Res. Operating*, *LP v. Martin*, 645 S.W.3d 212, 226 (Tex. 2022) ("When a trial court's order granting summary judgment does not specify the grounds on which its order is based, the appealing party must negate each ground upon which the judgment could have been based."); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003) ("Because the trial court's order does not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious."). Accordingly, Appellant challenges each of the grounds that could support the trial court's judgment.

Proceeding in the order presented, we consider the deed interpretation issue first, before turning to the remaining two issues challenging additional grounds that could otherwise support

the trial court's summary judgment ruling.

III. THE INTERPRETATION OF THE 1940 DEED

In her first issue, Appellant asserts the trial court erred by its rulings on the parties' cross motions for summary judgment.

A. Standard of Review, Interpretation Principles, and Royalty Interests

1. Standard of Review

We review de novo a trial court's ruling on motions for summary judgment. *Knott*, 128 S.W.3d at 215. Traditional summary judgment is appropriate where there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). When both parties move for summary judgment on the same issue and the trial court grants one motion but denies the other, the reviewing court should review the evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004).

2. Deed Interpretation Principles

Standard rules of contract interpretation apply to the interpretation of an oil-and-gas deed. *Nettye Engler Energy*, *LP v. BlueStone Nat. Res. II*, *LLC*, 639 S.W.3d 682, 689 (Tex. 2022). If a deed is worded in such a way that it can be given a certain or definite meaning, then the deed is not ambiguous. *Endeavor Energy Res.*, *L.P. v. Discovery Operating*, *Inc.*, 554 S.W.3d 586, 601 (Tex. 2018). Texas courts recognize that ambiguity does not arise merely because parties assert differing interpretations. *N. Shore Energy*, *L.L.C. v. Harkins*, 501 S.W.3d 598, 602 (Tex. 2016). Here, because the parties agree the deed is not ambiguous, we initially operate under that theory while interpreting the instrument. *See*, *e.g.*, *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991);

Garrett v. Dils Co., 299 S.W.2d 904, 907 (Tex. 1957).

The interpretation of an unambiguous deed is a question of law for the court. *Luckel*, 819 S.W.2d at 461. Our objective is to "'ascertain the true intentions of the parties as expressed in the writing itself,' beginning with the instrument's express language." *Nettye Engler*, 639 S.W.3d at 689 (quoting *Italian Cowboy Partners*, *Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011)); *see also Wenske v. Ealy*, 521 S.W.3d 791, 794 (Tex. 2017). To discern intent, words and phrases must be construed together and in context, not in isolation. *Hysaw v. Dawkins*, 483 S.W.3d 1, 13 (Tex. 2016). "Words and phrases generally bear their ordinary meaning unless the context supports a technical meaning or a different understanding." *Id.*; *see also In re Office of the Att'y Gen. of Tex.*, 456 S.W.3d 153, 155–56 (Tex. 2015) ("Given the enormous power of context to transform the meaning of language . . . . The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive.").

Eschewing the use of a mechanical approach to interpretation, the Supreme Court of Texas has repeatedly affirmed that courts must commit to a holistic approach, aiming to ascertain intent from all words and all parts of the conveying instrument. *Hysaw*, 483 S.W.3d at 13; *see also U.S. Shale Energy II*, *LLC v. Laborde Properties*, *L.P.*, 551 S.W.3d 148, 151 (Tex. 2018). "[A]pparent inconsistencies or contradictions must be harmonized, to the extent possible, by construing the document as a whole." *Hysaw*, 483 S.W.3d at 13. We may consider facts and circumstances surrounding the instrument's execution to the extent they "inform, rather than vary from or contradict, the [instrument's] text." *URI*, *Inc. v. Kleberg County*, 543 S.W.3d 755, 767 (Tex. 2018); *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981) (surrounding circumstances may inform the meaning of text and render it capable of only one meaning). Here, questions

specifically arise about the nature and size of the royalty interest reserved to the grantor by the 1940 deed.

3. Mineral Estates & Royalty Interests

A mineral estate encompasses five rights and attributes, including the right to receive royalties. *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995)(recognizing the rights include the right to develop, the right to lease, the right to receive bonus payments, the right to receive delay rentals, and the right to receive royalty payments). "The holder of the leasing privilege is the executive-interest holder." *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 75 (Tex. 2015). Among other privileges, "[t]he executive enjoys the exclusive right to make and amend mineral leases and, correspondingly, to negotiate for the payment of bonuses, delay rentals, and royalties, subject to a duty of utmost good faith and fair dealing to non-executive interest holders." *Id*. at 74-75. When minerals are leased to an operator for development, the typical lease conveys the mineral estate as a determinable fee, "less those portions expressly reserved, such as royalty." *Luckel*, 819 S.W.2d at 464. As the holder of such interest, the "'lessee-operator' has the present possessory interest in the mineral estate." *Graham v. Prochaska*, 429 S.W.3d 650, 656 (Tex. App.—San Antonio 2013, pet. denied) (citing *Luckel*, 819 S.W.2d at 464). And the "lessor-landowner" is left with a future interest in the mineral estate, namely, a possibility of reverter. *Id.*

Ordinarily, the owner of a present or future interest in the mineral estate may convey or reserve his or her mineral interest. *Luckel*, 819 S.W.2d at 464. The grantor does not need to part with all the attributes of the mineral estate as "individual [attributes] can be held back[ ] or reserved in the grantor." *French*, 896 S.W.2d at 797. A royalty interest is long defined as "a nonpossessory interest in minerals that may be separately alienated." *Luckel*, 819 S.W.2d at 463. Such interest may be conveyed or reserved in one of two ways: "'as a fixed fraction of total production'

(fractional royalty interest) or 'as a fraction of the total royalty interest' (fraction of royalty interest)." *Hysaw*, 483 S.W.3d at 9 (quoting *Luckel*, 819 S.W.2d at 464). A fractional royalty interest is referred to as a fixed royalty because it "remains constant" and is untethered to the royalty amount in a particular oil and gas lease. *Id*. A fraction of royalty interest is referred to as a floating royalty because it varies depending on the royalty in effect in the oil and gas lease, such that it is calculated by multiplying the fraction in the royalty reservation by the royalty in the lease. *Id.* Based on interpretation principles, the language used in the conveying or reserving instrument determines whether an interest is fixed or floating. *See id.* at 11–13.

B. Analysis

Here, the parties' disagreement is centered on whether the 1940 deed reserved a fixed royalty—meaning a fixed fraction of total production—or a floating royalty—meaning a fraction of the total royalty interest that varies depending on the royalty percentage negotiated in a lease by the mineral estate owner. Focusing closely on the pertinent language, the 1940 deed provides as follows:

> Grantors, their heirs and assigns, reserve unto themselves, their heirs and assigns, ***an undivided one half (½) of the usual one-eighth (1/8) royalty in, to and under the above[-]described land***, covering the oil, gas and other minerals, said royalty reservation, however being wholly non-participating, … ***if, as and when production is obtained***, grantor, their heirs and assigns, ***shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one- sixteenth (1/16) of the total production[.]*** [Emphasis added.]

Three clauses are significant to our interpretation of the nature and size of the royalty reserved by grantors. As shown by bold and italicized text, the first clause provides for "an undivided one half (1/2) of the usual one- eighth (1/8) royalty in, to and under the above[-]described land." Similarly, the second clause describes that "if, as and when production is obtained," grantor "shall receive one-half (1/2) of the usual one-eighth (1/8) royalty." Lastly, by

use of the conjunction "or," the third clause further describes that under the circumstances of the "the usual one-eighth (1/8) royalty, the grantor shall receive "one- sixteenth (1/16) of the total production[.]"

Appellees argue the three clauses are consistent and well-aligned. They point out that, mathematically-speaking, 1/2 of 1/8 is equal to 1/16, and all three fractions are listed. Accordingly, they contend the three clauses must be interpreted as reserving a fixed, 1/16 royalty to the grantor. Relying on *Hysaw* and *Laborde*, Appellant rejects the mathematical approach, contending that such a reading fails to harmonize other terms appearing on the face of the instrument which otherwise evidence an intent to reserve a 1/2 floating royalty interest.

Texas courts have long noted that disputes over a royalty interest being either fixed or floating are common when a deed contains double fractions or two or more differing fractions. *See Hysaw*, 483 S.W.3d at 9; *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 454 (Tex. 1998) (plurality op.); *Garrett*, 299 S.W.2d at 905. As the Supreme Court of Texas described, "[t]hese so-called double- and restated-fraction cases frequently involve multiples of 1/8." *Laborde*, 551 S.W.3d at 152. Indeed, this royalty rate was "so pervasive that, for decades, courts took judicial notice of it as the standard and customary royalty." *Hysaw*, 483 S.W.3d at 9. By some, the use of this "usual" rate has been described as "the legacy of the 1/8th royalty" or "historical standardization." *Id*. at 10. As the Supreme Court observed, this ubiquity of use "influenced the language used to describe the quantum of royalty in conveyances of a certain vintage." *Id*. at 10. Operating under this legacy, many landowners presumed the royalty would remain of such size regardless of whether future leases said otherwise. *See id.*; *Luckel*, 819 S.W.2d at 462–463. When interpreting a deed of this era, *Hysaw* cautioned courts about the possibility that the parties were operating under a false assumption. *Hysaw*, 483 S.W.3d at 10. "Though not

inexorably so, the reality is that use of 1/8 (or a multiple of 1/8) in some instruments undoubtedly embodies the parties' expectation that a future lease will provide the typical 1/8th landowners' royalty with no intent to convey a fixed fraction of gross production." *Id*.

Also, a related issue often implicated in double-fraction cases is the theory of "estate misconception." *Id*. As *Hysaw* further explained, "[t]his theory refers to a once-common misunderstanding (perpetuated by antiquated judicial authority) that a landowner retained only 1/8 of the minerals in place after executing a mineral lease instead of a fee simple determinable with the possibility of reverter in the entirety." *Id.* (citing *Concord*, 966 S.W.2d at 459–60 and *Prochaska*, 429 S.W.3d at 658); *see also* Frank W. Elliott, Jr., *The Fractional Mineral Deed "Subject to" a Lease*, 36 TEX. L. REV. 620, 622 (1958) (describing the "greatest source of confusion" in construing mineral deeds is that "[t]he lessor often thinks of his ownership as a 1/8th royalty interest rather than a possibility of reverter in all the minerals").

Although both the "legacy of the 1/8 royalty" and the "estate of misconception" are recognized theories that may be used as interpretive tools, *Hysaw* remains cautions about their use. The Supreme Court explained that either theory "may inform the meaning of fractions stated in multiples of 1/8, but these considerations are not alone dispositive." *Hysaw*, 483 S.W.3d at 13. "Consequently, before ascribing any particular meaning to double-fraction language in a conveying instrument, all the other language in the document must be considered to deduce intent." *Id*. at 14. As long stated, courts must holistically review the language "to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the 'four corners' rule." *Luckel*, 819 S.W.2d at 461; *see also Hysaw*, 483 S.W.3d at 13.

Applying deed construction principles, we agree that several surrounding terms included within the three clauses are descriptive of the royalty interest, and they inform the meaning of the

deed's text. *See URI*, 543 S.W.3d at 767. First, the deed expressly provides that grantors, "reserve unto themselves, their heirs and assigns, an undivided one-half (½) of the usual one-eighth (1/8) royalty in, to and under the above[-]described land, covering the oil, gas and other minerals . . .." In *Greer v. Shook*, this Court acknowledged that the use of "the double fraction 1/2 of 1/8, or alternatively the single fraction of 1/16," could demonstrate an intent by a grantor "that he was actually giving the grantee 1/2 of his entire royalty interest." 503 S.W.3d 571, 579 (Tex. App.—El Paso 2016, pet. denied). As *Greer* acknowledged, such was the case in many older deeds including those dating back to the 1920's. *Id.* Courts recognize that, at the time the deed was drafted, the standard royalty in virtually all lease agreements was then set at a rate of 1/8. *Id.*; *see also Luckel*, 819 S.W.2d at 462 ("One-eighth was the 'usual' royalty so standard in the 1920s and 1930s that all Texas courts took judicial notice of it."); *Laborde*, 551 S.W.3d at 153 (providing "this rate was typically 1/8 in 1951"). "Because many royalty interest holders believed their royalty interest would always be 1/8 and that the interest would never vary from that amount, a grantor would often use the 'near ubiquitous' 1/8 fraction as a shorthand to express the royalty interest he was conveying, or in other words, as a 'proxy' for his entire royalty interest." *Greer*, 503 S.W.3d at 579 (citing *Hysaw*, 483 S.W.3d at 9–11). Relatedly, we more recently stated, "the estate-misconception theory and the historical use of 1/8 as the standard royalty may inform the meaning of fractions stated in multiples of 1/8," while further cautioning, "these considerations are not alone dispositive." *WTX Fund*, *LLC v. Brown*, 595 S.W.3d 285, 293 (Tex. App.—El Paso 2020, pet. denied); *see also Prochaska*, 429 S.W.3d at 658 ("[A] party may argue that 'one-eighth' should be understood as a stand-in for the landowner's royalty and therefore convey or reserve unto them a floating royalty interest.").

Second, the phrase, "if, as and when production is obtained," reflects the grantors' fully

contemplated the royalty reservation would take effect prospectively regardless of when a lease was negotiated. *See Laborde*, 551 S.W.3d at 153 ("the language … reserves 1/2 of the royalty, which must refer to a royalty that could come into being at some point in the future." (internal quotations marks omitted)). Third and finally, the deed confirms that grantors, as well as their heirs and assigns, "shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one-sixteenth (1/16) of the total production." The first half of the phrase is repetitive of what has already been stated; and the last half of the clause is offset by a comma, indicating it is a nonrestrictive dependent clause. *See id*. at 154 (determining that "the same being equal to one-sixteenth (1/16) of the production" indicates a nonrestrictive dependent clause). In *Laborde*, the Supreme Court noted that "[s]uch a clause 'gives additional description or information that is incidental to the central meaning of the sentence,'" but it "'could be taken out of the sentence without changing its essential meaning.'" *Id*. Of note, no emphasis should be placed on such a clause, otherwise it "improperly makes it essential to the sentence rather than incidental." *Id.* Thus, when considering all words and phrases of the deed's reservation, giving effect to all its parts, and considering surrounding circumstances informing the meaning of the text, we conclude the 1940 deed reserved a 1/2 floating royalty interest, not a 1/16 fixed royalty interest.

Absent the additional indicators of intent, it would be plausible to read the double fractions of the first two clauses (1/2 of 1/8) as a mathematical expression describing a 1/16 fixed royalty. However, when the deed is interpreted holistically, not mathematically, as required by *Laborde* and *Hysaw*, that descriptive language in the text, as well the deed's overall structure, confirms the grantors' intent to reserve a 1/2 floating royalty. *See Laborde*, 551 S.W.3d at 151; *Hysaw*, 483 S.W.3d at 13. Notably, the 1940 deed contains many of the recognized features of a floating royalty: first, it includes use of double fractions, thus eschewing the use of a single fraction, *see*

Greer, 503 S.W.3d at 579; *Hysaw*, 483 S.W.3d at 12; second, those fractions include multiples of 1/8, *see WTX*, 595 S.W.3d at 302; *Prochaska*, 429 S.W.3d at 658; third, there is repeated reference to the "usual" 1/8 royalty, which relates to the estate misconception, or the parties' use of the then-standard 1/8 royalty as a proxy for the landowner's royalty, *see Hoffman*, 630 S.W.3d at 432; *Luckel*, 819 S.W.2d at 462; and fourth, the prospective contemplation of the royalty taking effect at a later time is reflected by the phrase, "if, as and when production is obtained." *See Laborde*, 551 S.W. 3d at 153. Read together, the deed expressly describes a reservation of a royalty interest, not minerals or land, and when production is obtained, it further confirms that grantors, and their heirs and assigns, shall receive 1/2 of the "usual one-eighth (1/8) royalty."

We conclude the 1940 deed is not ambiguous and there is only one reasonable and certain interpretation of its language. *See Endeavor Energy.*, 554 S.W.3d at 601. Accordingly, we hold the 1940 deed reserved a floating 1/2 nonparticipating royalty interest.

We sustain Appellant's first issue.

IV. ALTERNATIVE GROUNDS TO SUPPORT SUMMARY JUDGMENT

Because Appellees filed special exceptions and affirmative defenses, the trial court could have granted summary judgment on other grounds that would preclude Appellant's recovery. As we earlier stated, an appellate court must affirm a trial court's judgment if an appellant fails to challenge all independent bases or grounds that fully support a complained-of ruling or judgment. *See*, *e.g.*, *Cardwell v. Gurley*, No. 05-09-01068-CV, 2018 WL 3454800, at *5 (Tex. App.—Dallas July 18, 2018, pet. denied) (mem. op.); *Oliphant Fin. LLC v. Angiano*, 295 S.W.3d 422, 423–24 (Tex. App.—Dallas 2009, no pet.). Here, Appellant's second and third issues further argue there were no other grounds that would support the trial court's judgment.

A. Special Exceptions

In her second issue, Appellant addresses Appellees' re-urging of special exceptions in the summary judgment proceedings. Appellant asserts the special exceptions provide no basis for the trial court's denial of her summary judgment motion. At trial, Appellees specially excepted to Appellant's request for declaratory relief asserting that a "declaratory judgment is not available to determine ownership of the mineral interest at issue." Second, they specially excepted to Appellant's petition asserting that "when declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a).

On appeal, Appellant asserts Appellees waived any possible review of their special exceptions because they failed to obtain a written order of the trial court's denial of same. *See Winfield v. Pietsch*, No. 07-09-0261-CV, 2011 WL 336131, at *6 (Tex. App.—Amarillo Feb. 3, 2011, no pet.) (mem. op.) ("[I]n the absence of any indication in the record that the trial court actually ruled on the issue raised by the special exception, granting summary judgment does not imply a ruling on a special exception[.]"); *In the Estate of Tyner*, 292 S.W.3d 179, 185–86 (Tex. App.—Tyler 2009, no pet.) (stating that the statement "all relief not expressly granted is denied" included in the final judgment did not imply a ruling on the special exceptions); *Gallien v. Washington Mut. Home Loans*, *Inc.*, 209 S.W.3d 856, 862 (Tex. App.—Texarkana 2006, no pet.) (holding special exceptions are waived without a written order on the special exceptions). Here, our record does not contain an order ruling on Appellees' special exceptions. Additionally, Appellees do not present an argument asserting their special exceptions formed a basis to support the trial court's summary judgment ruling. Because the absence of an order makes the issue unreviewable, and it could not otherwise support a denial of Appellant's motion, there is no need

to further address the second issue. *See* TEX. R. APP. P. 47.1.

B. Affirmative defenses

In her third issue, Appellant argues that Appellees failed to establish their asserted affirmative defenses, and therefore, those defenses could not support a granting of Appellees' motions for summary judgment. Collectively, Appellees asserted multiple affirmative defenses to include the following: statute of limitations, estoppel by deed, presumed-grant theory, and quasi-estoppel and waiver. We address each affirmative defense in turn.

1. Limitations Defense

Appellant asserted Appellees' limitations defense could not support the grating of summary judgment. In their motions for summary judgment, Appellees asserted limitations barred recovery for Appellant's claims of declaratory judgment and for the monetary claims of unjust enrichment and money had and received. Additionally, Appellees argued limitations barred a claim of deed reformation, which they assert is the claim Appellant should have pled. We address each claim separately.

a. <u>The UDJA claim</u>

Appellant asserts the statute of limitations does not apply to UDJA claims that relate to old property records. In response, Appellees assert a trespass to try title is the exclusive remedy for the underlying nature of Appellant's suit because she is seeking to establish a superior title. Appellees continue that even if the UDJA was a proper vehicle, nonetheless, Appellant's claim had sought reformation of the 1940 deed and a four-year statute of limitations applied. Viewing Appellant's claim as one seeking an interpretation of the 1940 deed, we must otherwise determine whether Appellees conclusively established the applicability of a limitations defense.

Appellant asserts that no statute of limitations applies to UDJA claims. *See Outlaw v.*

Bowen, 285 S.W.2d 280, 284 (Tex. App.—Amarillo 1955, writ ref'd n.r.e.) ("In Texas the statutes of limitation do not apply to a partition suit . . . nor to a suit for a declaratory judgment, at least until the provisions of such are set in action by the actual occurrence of a controversy[.]"). Additionally, she argues this Court has previously addressed such UDJA actions seeking to interpret old instruments for the purposes of resolving new disputes. *See WTX*, 595 S.W.3d at 302–03. Of note, this Court has frequently addressed UDJA actions like Appellant's here (i.e., interpreting old instruments) such as to resolve new, current disputes. *See e.g.*, *id.* (1951 deed, 2015 lawsuit); *Greer*, 503 S.W.3d at 576–77 (1927 deed, 2013 lawsuit); *see also Concord*, 966 S.W.2d at 462 (the Texas Supreme Court reviewing a 1937 deed in a 1990s lawsuit). Additionally, Appellees failed to conclusively establish a date of when Appellant's UDJA claims would have otherwise accrued.

We conclude this basis could not support a granting of summary judgment.

b. The monetary claims

Next, Appellees asserted Appellant's monetary claims for unjust enrichment and money had and received were barred by limitations. Unjust enrichment claims fall under the two-year statute of limitation. *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007). Appellees assert Appellant's claim accrued in August 2014, when she received and accepted royalties on a 1/16 royalty interest, more than two years before the suit was filed.

In addition to asserting her claims were not so barred by a limitations defense because she affirmatively pled the discovery rule, Appellant plainly asserts Appellees failed to negate her allegation. Appellant also asserts Appellees admitted their limitations defense could not support a full bar to recovery. Because it is true that "[when] the terms of an agreement call for periodic payments during the course of the contract, a cause of action for such payments may arise at the

end of each period[,]" Appellant has claims for each deficient payment each time it accrued. *Hooks v. Samson Lone Star*, *Ltd. P'ship*, 457 S.W.3d 52, 68 (Tex. 2015). We conclude this ground could not support a granting of summary judgment barring Appellant's recovery in its entirety.

c. The deed reformation claim

Appellees presented an argument to the trial court claiming Appellant had not sought an interpretation of the 1940 deed, but a reformation based on mutual mistake. For such claim, Appellees argue the statute of limitations is four years. They asserted the suit should have been brought in 1944. On appeal, Appellant contends she never argued the parties to the 1940 deed were mutually mistaken or that the deed should be modified; but rather, she simply asserted a reliance on the estate misconception theory and 1/8-royalty presumption as aids to deed construction. Additionally, Appellant contends no statute of limitations applies to a suit to quiet title or suits to remove clouds on title. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 ("Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues."); *Neill v. Pure Oil Co.*, 101 S.W.2d 402, 404 (Tex. App.—Dallas 1937, writ ref'd).

In pressing for a deed reformation, Appellees' arguments are conclusory and contradict a line of cases wherein the estate misconception theory is viewed as an interpretation aid and not as a separate cause of action for deed reformation. *See Concord*, 966 S.W.2d at 462; *WTX*, 595 S.W.3d at 302–03; *Greer*, 503 S.W.3d at 576–77. For this reason, we reject this basis as an affirmative defense to Appellant's claims.

We conclude that each of Appellees limitation defenses could not support a granting of summary judgment.

2. Estoppel by deed

Next, Appellant asserts Appellees' affirmative defense of estoppel by deed could not support a grant of summary judgment. At trial, Appellees asserted Appellant was "estopped from asserting her claims now based on the deeds and instruments executed by her and her predecessors, which acknowledged that her interest is a fixed royalty, not floating." Appellees argued, "[i]n the broadest sense, estoppel by deed stands for the proposition that all parties to a deed are bound by the recitals in it, which operate as an estoppel." *See Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 593 S.W.3d 324, 336 (Tex. 2020) (quoting *Trial v. Dragon*, 593 S.W.3d 313, 318 (Tex. 2019)).

In support of their defense, Appellees cite a single case to assert "[t]he effect of estoppel by deed is to prevent a party to the deed from denying the truth of the recitals in a valid deed." *Angell v. Bailey*, 225 S.W.3d 834, 842 (Tex. App.—El Paso 2007, no pet.). There was no further development or support of this asserted affirmative defense in their motion for summary judgment, during the summary judgment hearing, or in Appellees' briefing. Appellees referenced the 1940 deed but did not point to any "recital" language that estopped Appellant's claim. Appellant contends Appellees' motion was insufficient to support any granting of summary judgment on this affirmative defense. We agree. Appellees failed to conclusively establish their affirmative defense of estoppel by deed, and it could not support a granting of summary judgment. *Cf. id.* (finding appellant was estopped from denying appellees interests and from denying the truth of the recitals in the instrument when it previously conveyed acres of land to appellees, there was no argument the deed was invalid, and appellant was privy to the language).

3. Presumed-grant theory

Appellant contends that Appellees asserted defense of the presumed-grant theory could not

support the granting of summary judgment because it was not plead as an affirmative defense in any of their pleadings in response to the suit and it was raised for the first time in their motion for summary judgment.

Rule 94 of the Texas Rules of Civil Procedure requires any "matter constituting an avoidance or affirmative defense," to be set forth affirmatively in a pleading to a preceding pleading. TEX. R. CIV. P. 94. Appellees assert they affirmatively plead equitable defenses of estoppel, quasi-estoppel, and adverse possession in their answers. However, they did not plead presumed-grant theory. Additionally, Appellees contend Appellant cannot now object to the affirmative defense because she did not specially except "to require the elements and factual bases for this common law form of adverse possession and other equitable defenses to be included in the answer." In support, Appellees cite a case where the court determined whether a party properly pleaded information specific enough to provide "fair notice." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). When plaintiff referred to the "incorrect version of a statute" in its pleading, the defendant did not specifically except the misidentification of the applicable statutory provision. *Id.* "When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader." *Id.* For these reasons, the Supreme Court of Texas found the court of appeals did not err in affirming the trial court's application of the correct version of the statute. *Id.* Appellant contends that Appellees' argument fails because it was not an error on the pleadings but rather an omitted defense entirely. We agree.

It is required that, when an affirmative defense is raised for the first time in a motion for summary judgment, the nonmovant has two choices: (1) object that the affirmative defense had not been pleaded, or (2) respond on the merits and try the issue by consent. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006). Here, Appellant satisfied both choices. Appellant objected

to the unpled affirmative defense under the presumed-grant theory and further asserted it could not be tried by consent. It is not required that Appellant specially except to Appellees' pleadings. Appellees failed to properly plead the affirmative defense of presumed-grant theory and Appellant made clear she was not trying the issue by consent. The presumed-grant theory could not support a grant of summary judgment.

4. Quasi estoppel and waiver

Lastly, Appellant contends Appellees' affirmative defense of quasi estoppel and waiver could not support a grant of summary judgment. In their motions for summary judgment, Appellees asserted the evidence conclusively established Appellant was estopped from asserting she was granted a 1/2 floating royalty, and, in the alternative, she had waived her ability to assert such claim.

Quasi estoppel is an affirmative defense that "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Teal Trading*, 593 S.W.3d at 337 (quoting *Lopez v. Muñoz*, *Hockema & Reed*, *L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000)). The doctrine applies when "it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. *Id.* To prevail on a claim for quasi-estoppel, Appellees would have had to prove (1) Appellant acquiesced to or benefited from a position inconsistent with her present position, (2) it would be unconscionable to allow Appellant to assert her claims, and (3) Appellant had knowledge of all material facts at the time of the conduct on which estoppel is based. *Lopez*, 22 S.W.3d at 864. Additionally, the affirmative defense of waiver "is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right." *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). "The elements of waiver include (1) an existing right, benefit,

or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentionally conduct inconsistent with the right." *Id.* (citing *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996)).

Appellees asserted that Appellant "was on notice that royalties in excess of 1/8 were being paid on the Subject Property, and yet she accepted, from 1974 until the filing of this lawsuit, classification of her royalty interest as a fixed 1/16, not floating 1/2 interest." Appellees further argued that "after years of directly (or implicitly) acknowledging the existence of a fixed 1/16 royalty and receiving the benefit of payment of fewer taxes in connection with same," Appellant now changed her position. In response, Appellant urges that it is not sufficient that she accepted payment under "one or two leases" to establish a knowing relinquishment of her interests when the Appellees failed to evidence the other leases covering the tract. Appellant further asserts the division orders do not carry any evidentiary weight to establish estoppel or waiver. We conclude the fact that Appellant previously accepted royalty payments is not dispositive because Appellees failed to show conclusive evidence of Appellant's knowledge of what she was receiving, what she should have been receiving, and that she had now changed her position. Consequently, these affirmative defenses could not support the grant of summary judgment in favor of Appellees.

Having looked to each affirmative defense asserted in Appellees' motions for summary judgment, we conclude the evidentiary record of each was independently insufficient to support the trial court's judgment granting their motions for summary judgment. Accordingly, we sustain Appellant's third issue.

V. CONCLUSION

For the foregoing reasons, we reverse and render in part, and reverse and remand in part. We reverse the trial court's denial of Appellant's motion for summary judgment and render a

partial summary judgment in her favor declaring the 1940 deed reserved a floating 1/2 royalty interest. We further reverse the trial court's grant of Appellees' various motions for summary judgment and remand the cause for further proceedings.

GINA M. PALAFOX, Justice

December 29, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.