Opinion filed October 7, 2021

In The

Eleventh Court of Appeals

No. 11-19-00336-CV

KING OPERATING CORPORATION; KPEG OIL & GAS FUND, INC.; KING PRIVATE EQUITY GROUP, INC.; CLEARVIEW ENERGY II, LP; AND LA ROCA ENERGY, L.P., Appellants

V.

DOUBLE EAGLE ANDREWS, LLC AND MEI CAMP SPRINGS, LLC, Appellees

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On Appeal from the 132nd District Court
Scurry County, Texas
Trial Court Cause No. 25959

O P I N I O N

This dispute involves the parties' competing claims to the leasehold mineral estate in three tracts of land in Scurry County based on different oil and gas leases obtained from the same lessors. The trial court granted summary judgment in favor

of Appellees Double Eagle Andrews, LLC (DEA) and MEI Camp Springs, LLC (MEI) and awarded DEA and MEI attorney's fees.

In two issues, Appellants King Operating Corporation; KPEG Oil & Gas Fund, Inc.; King Private Equity Group, Inc.; and Clearview Energy II, LP (collectively the King Entities) and La Roca Energy, L.P. challenge both the summary judgment in favor of Appellees and the award of attorney's fees. We affirm the trial court's judgment to the extent that it orders that DEA has superior title to, and is awarded possession of leasehold title to, two of the tracts and that MEI has superior title to, and is awarded possession of leasehold title to, the third tract. We reverse the trial court's award of attorney's fees to Appellees and render judgment that Appellees take nothing on their claims for attorney's fees.

I. *Background*

Harold and LaJuana Robison own fifty percent of the mineral interests in the west half and northeast quarter of Section 25, Block 3 of the H&TC Ry. Co. Survey, Scurry County, Texas (Tract One) and one hundred percent of the mineral interests in (1) the west half of Section 26, Block 3 of the H&TC Ry. Co. Survey, Scurry County, Texas (Tract 2); (2) approximately 2.5 acres of land located in the southwest corner of the east half of Section 26, Block 3, H&TC Ry. Co. Survey, Scurry County, Texas described in a warranty deed dated January 27, 1923, recorded in Volume 52, Page 183 of the Scurry County Deed Records (Tract 3); and (3) the south half of Section 50, Block 3 of the H&TC Ry. Co. Survey, Scurry County, Texas (Tract Four).[1] Foy Dwaine and Jo Ann Williams own the surface of Tract One, the remaining fifty percent of the mineral interests in Tract One, and the executive right to lease all the minerals in Tract One.

[1]On August 24, 2017, the Robisons conveyed all their mineral interests in Scurry County to Bar-R-Bar, LLC, a company controlled by the Robisons.

On October 6, 2008, the Robisons signed a Paid Up Oil and Gas Lease (the Robison Lease) in which they granted, leased, and let to Maddox Oil Properties, Inc. the mineral interests in the "leased premises," which was defined to include all four tracts of land. On October 9, 2008, the Williamses signed a Paid Up Oil and Gas Lease that was effective October 7, 2008 (the Williams Lease), in which they granted, leased, and let to Maddox the mineral interests in Tract One. Through a series of assignments of the Robison Lease and the Williams Lease, the King Entities, other than Clearview Energy, and La Roca claim to own the leasehold interest in Tract One. King Operating drilled a producing well on Tract One but did not drill any wells on Tracts Two, Three, or Four.

Both the Robison Lease and the Williams Lease were "for the purpose of exploring for, developing, producing and marketing oil and gas, along with all hydrocarbon substances produced in association therewith." Each lease had a primary term of three years and "for as long thereafter as oil or gas or other substances covered" by the lease were "produced in paying quantities from the leased premises or from lands pooled therewith" or while the lease was otherwise maintained pursuant to its terms.

The Robisons signed a mineral lease (the DEA Lease) dated November 7, 2016, in which they granted, leased, and let Tracts Two and Three to DEA for "the purpose of exploring, drilling, operating for and producing oil and gas." The DEA Lease had a primary term of three years or "as long thereafter as oil or gas or other substances covered thereby are produced from said land."

King Operating filed an application with the Texas Railroad Commission to drill a well on Tract Two. DEA protested the application and filed this suit contending that the Robison Lease had expired at the end of its primary term; that it had superior right to title to the mineral interests in Tracts Two and Three; and that the Robisons had superior right to title to the mineral interests in Tracts One and

Four.[2] DEA asserted claims for trespass to try title, suit to quiet title, trespass to real property, bad faith trespass, conversion, tortious interference with an existing contract, and breach of contract. DEA also sought a declaratory judgment that the actions taken by Appellants did not "constitute drilling, reworking, or 'other operations' for purposes" of extending the term of the Robison Lease. As relevant here, DEA requested an award of attorney's fees for the "prosecution of this lawsuit" under Section 37.009 of the Uniform Declaratory Judgements Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011 (West 2020) (the DJA).

Appellants answered and asserted trespass-to-try-title, suit-to-quiet-title, and declaratory-judgment counterclaims related to the leasehold interest in Tract One. Appellants specifically alleged that the Robisons did not own the executive right to lease the minerals in Tract One because the Williamses were the sole owners of that right. Appellants requested a declaratory judgment that the Robison Lease was ineffective to convey the leasehold interest in Tract One; that under the Williams Lease, Appellants had superior title to the oil and gas leasehold estate covering the mineral interest in Tract One; and that DEA's claims created a cloud on Appellant's leasehold title to Tract One. Appellants also requested an award of attorneys' fees pursuant to the DJA.

DEA subsequently agreed with Appellants that Tract One was not part of the Robison Lease. Consequently, DEA filed a first amended petition in which it nonsuited its claims related to Tract One and sought title only to the leasehold interest in Tracts Two, Three, and Four.

Appellants filed amended motions for partial summary judgment on their trespass-to-try-title and declaratory-judgment counterclaims on the grounds that the Williams Lease was the valid lease for the minerals in Tract One and that the

[2]The Robisons assigned all their claims against Appellants relating to the Robison Lease to DEA, and DEA waived its claim for breach of warranty against the Robisons under the DEA Lease.

production of oil and gas from the well on Tract One perpetuated the Robison Lease as to the other three tracts. Appellants specifically requested declarations that they had superior title to the leasehold interest in Tract One; that DEA's claim to ownership of Tract One had created a cloud on Appellants' title; and that the production of oil, gas, or other substances from Tract One perpetuated the Robison Lease as to all four tracts of land. The King Entities, other than Clearview, also requested judgment in their favor for title to and possession of the wellbore on Tract One and the leasehold estate in the 40-acre proration unit surrounding the well. La Roca also requested judgment in its favor for title to and possession of the oil and gas leasehold on all four tracts.

MEI intervened in the lawsuit and alleged that, in November 2017, it had acquired a leasehold interest in Tract Four.[3] MEI asserted claims for suit to quiet title and trespass to try title as to the leasehold interest in Tract Four. MEI filed a motion for summary judgment on its claims on the ground that it held title to the mineral estate beneath Tract Four pursuant to the 2017 lease because the Robison Lease had expired at the end of the primary term. MEI requested an order quieting title to the mineral estate under Tract Four in MEI and awarding it title and possession of the mineral estate under Tract Four.

DEA filed an amended motion for partial summary judgment on its claims for trespass to try title, suit to quiet title, and for declaratory judgment on the ground that the Robison Lease included only Tracts Two, Three, and Four and was ineffective to convey the minerals in Tract One and that the Robison Lease had expired because Appellants failed to drill a well on land covered by the lease. DEA requested judgment that granted title and possession of Tracts Two and Three to DEA, that issued writs of possession as to Tracts Two and Three, that quieted

[3]Bar-R-Bar executed a lease for Tract Four with Resource Acquisition Management LLC on November 3, 2017. Resource Management assigned the lease to MEI on November 4, 2017.

Appellants' claims to title in Tracts Two, Three, and Four, and that declared that production on Tract One did not perpetuate the Robison Lease.

The trial court granted Appellees' motions for summary judgment and denied Appellants' motions for summary judgment.[4] Appellees subsequently requested an award of attorney's fees pursuant to the DJA. Appellants objected and asserted that, in a suit for title to real property, Appellees were limited to asserting a trespass-to-try-title claim and attorney's fees were not recoverable on that claim.

The trial court ruled that, even though "all parties filed claims asserting Trespass to Try Title claims and claims under the [DJA], this suit must be treated as a Trespass to Try Title cause of action"[5] and that Appellees could not recover attorney's fees on their trespass-to-try-title claims. The trial court, however, found that Appellees had prevailed in their defense of Appellants' declaratory-judgment counterclaims and thus could recover attorney's fees attributable to their defense of those counterclaims. The trial court signed a final judgment in which it (1) incorporated its summary judgment order, (2) ordered that DEA had superior title to Tracts Two and Three and awarded possession of the leasehold title to those tracts to DEA, (3) ordered that MEI had superior title to Tract Four and awarded possession of the leasehold title to Tract Four to MEI, (4) released Appellants' interests in Tracts Two, Three, and Four, (5) granted writs of possession to Appellees, (6) awarded DEA attorney's fees in the amount of $200,000, and (7) awarded MEI attorney's fees in the amount of $29,173.86 as well as contingent attorney's fees on appeal.

[4]After the trial court's summary-judgment ruling, DEA withdrew its tort claims and asserted that its claims for breach of contract were "alternative claims" and that, by granting summary judgment in favor of DEA, the trial court had rendered further pursuit of those claims "unnecessary at this time."

[5]We note that MEI did not file a claim for a declaratory judgment.

II. *Summary Judgments*

In their first issue, Appellants assert that the trial court erred when it granted Appellees' motions for partial summary judgment and determined that DEA had superior leasehold title to Tracts Two and Three and that MEI had superior leasehold title to Tract Four because (1) the Robison Lease defined "leased premises" to include all four tracts of land and provided that production anywhere on the leased premises would extend the lease as to all four tracts, and (2) Appellants drilled a producing well on Tract One. Appellees respond that, because the Robisons could not convey a leasehold interest on Tract One, the Robison Lease is void as to that tract and the plain language of the lease does not allow the lessee to maintain the lease through production on non-leased, unpooled lands.

We review a summary judgment de novo. *BPX Operating Co. v. Strickhausen*, No. 19-0567, 2021 WL 2386141, at *4 (Tex. June 11, 2021). We consider the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Id.* We credit evidence favorable to the nonmovant if reasonable jurors could do so and disregard contrary evidence unless reasonable jurors could not. *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 774 (Tex. 2017).

To prevail on a traditional motion for summary judgment, the movant must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Strickhausen*, 2021 WL 2386141, at *4. On competing motions for summary judgment, each party bears the burden to establish that it is entitled to judgment as a matter of law. *Farmers Grp., Inc. v. Geter*, 620 S.W.3d 702, 708 (Tex. 2021). When the trial court grants one motion and denies the other, we consider all the summary judgment evidence, determine all questions presented, and render the judgment that the trial court should have rendered. *Strickhausen*, 2021 WL 2386141, at *4.

Because a mineral lease is a contract, its construction is governed by the same general principles that govern the construction of contracts. *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884, 888 (Tex. 2021) (per curiam). The terms of the lease define the parties' respective rights and duties. *Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 595 (Tex. 2018). As with any contract, the parties are free to decide the terms of a mineral lease and "the law's 'strong public policy favoring freedom of contract' compels courts to 'respect and enforce' the terms on which the parties have agreed." *Id.* (quoting *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)).

We construe a mineral lease de novo with the primary objective of ascertaining the parties' intent as expressed within the four corners of the agreement. *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 743 (Tex. 2020); *Endeavor Energy Res.*, 554 S.W.3d at 595. We presume that the parties intended for every clause to have some effect and, we "examine the entire lease and attempt to harmonize all its parts, even if different parts appear contradictory or inconsistent." *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002). We must avoid construing the lease in a manner that renders any of its provisions meaningless. *Sundown Energy*, 622 S.W.3d at 888.

Generally, the most important consideration in our analysis is the lease's plain, grammatical language. *Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 615 S.W.3d 144, 148 (Tex. 2020); *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 200 (Tex. 2019) (noting that "the decisive factor in each case is the language chosen by the parties"). Although we "cannot interpret a contract to ignore clearly defined terms," *Sundown Energy*, 622 S.W.3d at 888 (quoting *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 64 (Tex. 2014)), we also "cannot be blind to the commercial realities of the context in which the parties were operating," *Geter*, 620 S.W.3d at 710. Therefore, we must

"determine, objectively, what an ordinary person using those words under the circumstances in which they are used would understand them to mean." *Endeavor Energy*, 615 S.W.3d at 148 (quoting *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 764 (Tex. 2018)).

We favor the consistent use of a term that is used more than once in a lease. *Geter*, 620 S.W.3d at 709. "Words used in one sense in one part of a [lease] are, as a general rule, deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise." *Id.* (quoting *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 736 (Tex. 1990)). While we are not required to apply this rule of construction rigidly, we presume that "identical words used in different parts of the same [instrument] should generally be given the same meaning." *Id*.

A mineral estate consists of five attributes: "(1) the right to develop, (2) the right to lease, (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments." *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 49 (Tex. 2017) (quoting *Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016)). Each attribute is an independent property right and may be separately conveyed or reserved by the owner. *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, 797 (Tex. 1995). The holder of the right to lease, or executive right, "enjoys the exclusive right to make and amend mineral leases and, correspondingly, to negotiate for the payment of bonuses, delay rentals, and royalties." *Hysaw*, 483 S.W.3d at 9. The right to develop, also referred to as the right of ingress and egress, "is a correlative right and passes with the executive rights." *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 492 (Tex. 2011) (quoting *French*, 896 S.W.2d at 797 n.1). "The non-executive mineral interest owner owns the minerals in place but does not have the right to lease them." *Id.* at 487.

Because the Robisons did not own the executive right on Tract One, they did not have the right to lease those minerals to Maddox. As such, when the Robisons included Tract One in the Robison Lease, they attempted to convey something that they did not have the right to convey. *See Extraction Res., Inc. v. Freeman*, 555 S.W.2d 156, 159 (Tex. App.—El Paso 1977, writ ref'd n.r.e.) ("It is elementary that one cannot convey what he does not own."). Accordingly, the Robison Lease did not include the mineral interests in Tract One. *See Geary v. Two Bow Ranch Ltd. P'ship*, No. 04-18-00610-CV, 2020 WL 354763, at *10 (Tex. App.—San Antonio Jan. 22, 2020, pet. denied) (mem. op.) (holding that, because the lessor did not own the executive right to lease one-half of the mineral interest, the lease did "not include that mineral interest"); *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1, 2, 5 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (holding that the mineral lease was void as to the entire tract of land because the owner of a royalty interest who had reserved the right to join in the execution of all oil, gas, and mineral leases covering the tract had neither executed nor ratified the lease).

The parties do not dispute that the Robison Lease failed to convey any mineral interest in Tract One. Rather, the question is whether, by including Tract One in the description of "leased premises," the parties to the Robison Lease intended that production on Tract One under any lease would hold the Robison Lease as to Tracts Two, Three, and Four. *See BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 394 (Tex. 2017) ("When a lease terminates 'is always a question of resolving the intentions of the parties from the entire instrument.'" (quoting *Andarko Petroleum*, 94 S.W.3d at 554)); *Mathews v. Sun Oil Co.*, 425 S.W.2d 330, 333 (Tex. 1968) ("It is a rule of general application that in the absence of anything in the lease to indicate a contrary intent, production on one tract will operate to perpetuate the lease as to all tracts described therein and covered thereby.").

Relying on *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766 (Tex. 2017), Appellants argue that the term "leased premises" in the Robison Lease referred to the land within the described boundaries and not to the interest conveyed and that, by including Tract One in the description of leased premises, the Robisons expressed an intent that production anywhere within the boundaries of the described land would be sufficient to hold all the land, regardless of whether the Robisons actually conveyed any interest in a portion of the leased premises.

In *Samson*, the supreme Court addressed whether the lessee could reduce the amount of royalties it was required to pay based on the proportionate-reduction clause in the mineral lease. *Samson*, 521 S.W.3d at 787–88. The lessors, who owned only fifty percent of the mineral interests, argued that the "leased premises" referred to their fifty percent ownership in the leased tract while the lessee contended that the "leased premises" was the entire tract of land leased. *Id.* at 788. The supreme Court held that the stated purpose of the granting clause in the oil and gas lease was to describe "all that certain land" and that, to "describe land" meant to "outline its boundaries so that it may be located on the ground, and *not to define the estate conveyed therein*." *Id.* at 789 (quoting *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 894 (Tex. 1986)). Therefore, the "leased premises" referred to "the land within the boundaries" described by the lease and not to the fifty percent interest conveyed by the lessors. *Id. Samson*, however, did not address the situation that confronts us in this case—the complete failure to transfer any interest in a portion of the land described as the "leased premises."

The parties to the Robison Lease used the term "leased premises" numerous times in the lease. As relevant here:

- In the granting clause, the Robisons agreed to grant, lease, and let to Maddox the "following described land, hereinafter called leased premises" and then described all four tracts.

- In the habendum clause,[6] the Robisons agreed that the primary term of the lease was for three years and for as long thereafter as oil, gas, or other substances covered by the lease were produced in paying quantities from the leased premises or from lands pooled with the leased premises.

- In the operations clause, the Robisons agreed that, if Maddox drilled a dry hole on the leased premises or if all production permanently ceased and the lease was not otherwise being maintained, the lease would be maintained if Maddox commenced operations for reworking an existing well or for drilling an additional well on the leased premises within ninety days.

- The Robisons granted Maddox the right to pool all or part of the leased premises or interest therein with any other lands or interests whenever Maddox deemed it "necessary or proper to do so in order to prudently develop or operate the leased premises."

- The Robisons agreed that, in exploring for, developing, producing, and marketing oil and gas on the leased premises or lands pooled with the leased premises, Maddox had the right of ingress and egress and the right to conduct such operations on the leased premises as was reasonably necessary for those purposes, including geophysical operations, the drilling of wells, and the construction of facilities deemed necessary by Maddox to discover, produce, store, treat, or transport production.

- The Robisons agreed that Maddox's right of ingress and egress applied to the entire leased premises, notwithstanding any partial release or other termination of the lease.

The Robisons did not have the right to convey any interest in the minerals in Tract One, including any right to develop or produce the minerals, and could not grant Maddox the right to enter onto Tract One, to drill a well on Tract One, or to

[6]The habendum clause generally establishes the duration of the lease. *Endeavor Energy Res.*, 554 S.W.3d at 597. A typical habendum clause provides that the lease will extend to all acreage covered by the lease as long as oil and gas is produced anywhere on the property covered by the lease. *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 149 (Tex. 2004).

pool Tract One with other lands. Therefore, Appellants' interpretation of the Robison Lease would require us to construe "leased premises" to have different meanings in different parts of the lease. Specifically, we would be required to read "leased premises" to include Tract One for purposes of extending the primary term of the lease pursuant to the habendum clause but to then read "leased premises" to not include Tract One for purposes of the mineral interests granted to Maddox and the rights that Maddox had to pool the "leased premises" with other land and to explore, develop, produce, and market oil, gas, and other minerals from the "leased premises."

Based on our review of all provisions of the Robison Lease, we can discern no intent by the parties that the term "leased premises" should not be used consistently throughout the lease. *See Geter*, 620 S.W.3d at 709. Rather, the parties intended for the term "leased premises" to refer to those tracts of land that were covered by the Robison Lease, which were those tracts of land in which the Robisons actually conveyed a leasehold interest to Maddox. *See Moore v. Jet Stream Invests., Ltd.*, 261 S.W.3d 412, 424 (Tex. App.—Texarkana 2008, pet. denied) (holding, after examining the entire lease, that "the intent of the parties was for 'said land' to refer to land subject to the lease" and that land that had been released from the lease "was no longer land subject to the lease"). Because the Robisons did not convey a leasehold interest in Tract One, Tract One was not land that was covered by the Robison Lease and was not part of the "leased premises." Therefore, the habendum clause in the Robison Lease applied only to Tracts Two, Three, and Four, and production on Tract One under the Williams Lease did not hold the Robison Lease as to Tracts Two, Three, and Four. *See Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 153 (Tex. 2004) (holding that production on land that was no longer part of a lease did not hold the lease as to other tracts of land that were still subject to the lease).

We hold that the trial court did not err when it granted Appellees' motions for summary judgment, denied Appellants' motions for summary judgment, and entered judgment that ordered that DEA had superior title to Tracts Two and Three and awarded possession of the leasehold title to those tracts to DEA and that MEI had superior title to Tract Four and awarded possession of the leasehold title to Tract Four to MEI. Accordingly, we overrule Appellants' first issue.

III. *Attorneys' Fees*

In their second issue, Appellants assert that the trial court erred when it awarded attorney's fees to Appellees for defending against Appellants' declaratory-judgment counterclaims because those counterclaims were substantively trespass-to-try-title actions for which attorney's fees may not be awarded. Appellees respond that they had a right to recover attorney's fees incurred in defending Appellants' declaratory-judgment counterclaims and that, by bringing claims under the DJA, Appellants waived any right to object to an award of attorney's fees under the statute.

We review a trial court's decision to award attorney's fees for an abuse of discretion. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex. 2018). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without regard to guiding legal principles. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

A trespass-to-try-title action is the exclusive method for determining title to real property. TEX. PROP. CODE ANN. § 22.001(a) (West 2014); *Brumley v. McDuff*, 616 S.W.3d 826, 831–32 (Tex. 2021). Although related claims may be used "to determine narrower questions of possession, a cloud on a title, or a non-possessory interest, a trespass-to-try-title action is the exclusive remedy for resolving overarching claims to legal title." *Brumley*, 616 S.W.3d at 832 (internal footnotes omitted); *see also Lance v. Robinson*, 543 S.W.3d 723, 736 (Tex. 2018) (A trespass-to-try-title action is the proper procedural vehicle "when the claimant is seeking to

establish or obtain *the claimant's* ownership or possessory right in the land at issue.").

The substance of the party's pleading, rather than its form, determines whether a claim sounds in trespass to try title. *Brumley*, 616 S.W.3d at 833. Therefore, when a party has satisfied the pleading requirements for a claim for trespass to try title, we disregard "other variations" and treat "any suit to establish title to land as a trespass-to-try title action." *Id.* at 832. A party may not transform a trespass-to-try-title dispute into a declaratory-judgment action through artful pleading or by pleading alternatively under the DJA. *Id.* at 836; *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 926 (Tex. 2013).

When a party prevails on a trespass-to-try-title claim, its remedy is title to, and possession of, the real property interest at issue. *Teon Mgmt., LLC v. Turquoise Bay Corp.*, 357 S.W.3d 719, 723 (Tex. App.—Eastland 2012, pet. denied). Therefore, attorney's fees are not recoverable on a trespass-to-try-title claim. *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004) (holding that, when the trespass-to-try-title statute governs a party's substantive claims in a case, the party "may not proceed alternatively under the [DJA] to recover their attorney's fees").

This case does not involve parties that sought an award of title to real property solely under the DJA. Rather, all parties alleged trespass-to-try-title claims and all parties sought summary judgment on their trespass-to-try-title claims. Even though Appellants and DEA also requested declarations as to the proper interpretation of the Robison Lease, those declarations were in support of their claims to title to the leasehold interests in Tracts Two, Three, and Four. Therefore, substantively, Appellants' counterclaims, regardless of how pleaded, were for title to the leasehold interests in Tracts Two, Three, and Four. *See MEI Camp Springs, LLC v. Clear Fork, Inc.*, 623 S.W.3d 83, 89 (Tex. App.—Eastland 2021, no pet.) (holding that a dispute over the ownership of the mineral estate based on a disagreement as to which

lease was in effect was substantively a title determination that should be prosecuted through a trespass to try title suit). Because Appellants' counterclaims were substantively for trespass to try title—a claim on which Appellees were not entitled to recover attorney's fees—the trial court abused its discretion when it awarded attorney's fees for Appellees' defense of those claims. *See Martin*, 133 S.W.3d at 267; *Acrey v. Langston Land Partners, LP*, No. 11-14-00025-CV, 2016 WL 1725371, at *6 (Tex. App.—Eastland Apr. 29, 2016, no pet.) (mem. op.) (holding that "a trial court does not have the authority to award attorney's fees in trespass to try title suits" and that "a party cannot recover attorney's fees under the [DJA] when the only issues, aside from attorney's fees, concern clearing of title or trespass to try title").

Appellees argue that, because Appellants filed counterclaims under the DJA, Appellants forfeited their right to complain about the award of attorney's fees under that statute. We recognize that both DEA and Appellants improperly relied on the DJA as a basis to resolve the question of title to the disputed leasehold interests and that Appellants arguably invited error by the trial court when they filed counterclaims for declaratory relief. However, Appellants also apprised the trial court of the error of awarding fees on Appellants' trespass-to-try-title counterclaims at a time when the trial court could have avoided the error. *See Lake Livingston Props., Inc. v. Stephen Hills Prop. Owner's Ass'n, Inc.*, No. 09-15-00304-CV, 2016 WL 7177698, at *3 (Tex. App.—Beaumont Dec. 8, 2016, no pet.) (mem. op.) (holding that, even though both parties invited error by invoking the DJA to resolve an issue of title to real property, the trial court could have "corrected" the error "had either of the parties timely advised the trial court of an objection to not resolving the dispute under the Property Code"); *HECI Expl. Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638 (Tex. App.—Austin 1992, writ denied) (holding that the appellant preserved its complaint as to the award of attorney's fees by raising an objection in

response to the appellee's summary-judgment motion and obtaining a ruling on the issue).

Because the trial court erred when it awarded attorney's fees to Appellees, we sustain Appellants' second issue.

IV. *This Court's Ruling*

We affirm the trial court's judgment to the extent that it orders that DEA has superior title to, and is awarded possession of leasehold title to, (1) the west half of Section 26, Block 3 of the H&TC Ry. Co. Survey, Scurry County, Texas and (2) approximately 2.5 acres of land located in the southwest corner of the east half of Section 26, Block 3, H&TC Ry. Co. Survey, Scurry County, Texas described in a warranty deed dated January 27, 1923, recorded in Volume 52, Page 183 of the Scurry County Deed Records and that MEI has superior title to, and is awarded possession of leasehold title to, the south half of Section 50, Block 3 of the H&TC Ry. Co. Survey, Scurry County, Texas. We reverse the trial court's award of attorney's fees to Appellees and render judgment that Appellees take nothing on their claim for attorney's fees.

W. STACY TROTTER
JUSTICE

October 7, 2021

Panel consists of: Bailey, C.J.,
Trotter, J., and Williams, J.