Opinion issued May 10, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00105-CV

RICHARD LEON CALVERT AND MELISSA CALVERT MORRIS, Appellants/Cross-Appellees

V.

DEBORAH CALVERT CRAWLEY, ROBERT D. CALVERT, JR., AND LAURA CALVERT BATES, Appellees/Cross-Appellants

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On Appeal from the Probate Court No. 4
Harris County, Texas
Trial Court Case No. 271,290-403

MEMORANDUM OPINION

This appeal is part of a decade-long probate dispute between two groups of step-siblings—appellants Richard Leon Calvert ("Richard") and Melissa Calvert Morris ("Melissa") (collectively, "appellants") and appellees Deborah Calvert

Crawley ("Deborah"), Robert D. Calvert, Jr. ("Robert"), and Laura Calvert Bates ("Laura") (collectively, "appellees")—over the division of mineral interests previously owned by their deceased father and grandmother. In the underlying lawsuit, appellees sued appellants, seeking a declaration of the parties' respective interests under a settlement agreement that purported to resolve prior litigation between them. Appellants countersued.

The probate court entered a partial summary judgment in favor of appellees on their claim against appellants, interpreting the settlement agreement as excluding appellants from an ownership interest in some of the contested properties, and on their affirmative defenses to appellants' counterclaims. After a bench trial on the issue of attorney's fees, the probate court rendered a final judgment for appellees.

On appeal,[1] appellants challenge the probate court's rulings in ten issues that can be organized in three general categories: alleged errors related to (1) the summary judgment interpreting the settlement agreement (Issues 1 through 3); (2) the summary judgment dismissing appellants' counterclaims (Issues 4 through 9); and (3) the award of attorney's fees to appellees (Issue 10).

[1] Appellees also filed a notice of appeal of the probate court's judgment. During the pendency of this appeal, however, appellees moved to dismiss their cross-appeal on the ground that they no longer desire to pursue it. We grant appellees' motion and dismiss their cross-appeal. *See* TEX. R. APP. P. 42.3.

We affirm the probate court's summary judgment rulings; however, because we agree with appellants that appellees were not entitled to recover their attorney's fees, we modify the judgment to eliminate the fees award.

Background

The parties are the surviving children of Robert D. Calvert, Sr. ("Calvert Sr."),[2] deceased in 1994, and grandchildren of Mary Ione Calvert ("Mary"), deceased in 2000. Before Calvert Sr.'s death, he and Mary were the owners of the surface and mineral rights to a 297.53-acre tract of land in the Burrell Morris Survey in Houston County, Texas (the "Burrell Morris Property"). In 1985, they sold the Burrell Morris Property's surface estate to MWI Land, Inc., reserving the mineral estate for themselves. Twelve years later, through a gift deed, Mary conveyed her interest in the mineral rights of the Burrell Morris Property to Deborah, Robert, and Laura. Mary had previously conveyed to Deborah, Robert, and Laura her entire one-half undivided interest in another tract of land—a 50-acre tract in the John Blunt Survey in Houston County that is included in a larger pooled acreage known as the Ella Jane Unit (the "Ella Jane Property")—through a special warranty deed.[3] The

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[2] Calvert Sr. was married twice. Appellees are the children of Calvert Sr.'s first marriage. Appellants are the children of Calvert Sr.'s second marriage.

[3] Appellees and the probate court referred to this property as the "Weldon Property" because it is located near Weldon, Texas. We have adopted the appellants' suggested reference—the Ella Jane Property—for the purposes of this appeal.

Burrell Morris Property and the Ella Jane Property are at the center of the parties' dispute.

In 2004, Deborah, as the independent executrix of Calvert Sr.'s estate and the trustee of testamentary trusts established in Calvert Sr.'s will, divided the estate's real property assets between the siblings through executrix deeds (the "2004 executrix deeds"). Deborah conveyed to herself, Robert, and Laura (1) the estate's interest in the mineral rights of the Burrell Morris Property, and (2) the estate's one-half undivided interest in the Ella Jane Property. Richard and Melissa received interests in other properties.

The prior Estate Litigation and resulting Settlement Agreement

In June 2011, Richard sued Deborah individually and in her representative capacities (the "Estate Litigation"). Richard asserted claims for fraud, breach of fiduciary duty, tortious interference with inheritance rights, and conspiracy, based on allegations that Deborah conspired with Robert and Laura to hide Calvert Sr.'s and Mary's assets and inequitably divided the estate. He later joined Robert and Laura as defendants in the Estate Litigation, and Melissa joined as a plaintiff asserting identical claims against Deborah, Robert, and Laura.

After two years of litigation, the parties agreed to settle their dispute under terms expressed in a Rule 11 Agreement signed by counsel for both sides, which provided that:

2. MWI mineral interests were owned equally by . . . Calvert, Sr. and Mary[.] All five children own the one-half interest previously owned by . . . Calvert, Sr. However, [Deborah, Robert, and Laura] own the one-half interest previously owned by Mary[.] In order to ensure that all of . . . Calvert, Sr.'s children . . . each own 20% of the MWI mineral interests in their entirety, [Deborah, Robert, and Laura] agree to jointly convey 40% of the MWI interests, previously owned by Mary . . . (or 20% of the entirety of the MWI mineral interest) to [Richard and Melissa] in equal shares. [Richard and Melissa] will draft the necessary paperwork to ensure that the proper interests are transferred ensuring a 20% interest in all of MWI mineral interests for each of the five parties in this lawsuit.

3. In exchange for the aforementioned items 1 and 2,[4] [Richard and Melissa] will dismiss any and all claims alleged or that could have been alleged with regard to the Estates of . . . Calvert, Sr. and Mary . . . and will enter into a more formal, global settlement agreement within two (2) weeks of approving such terms.

Although the Rule 11 Agreement expressed that Deborah, Robert, and Laura should convey a designated percentage of the "MWI interests" to equalize the parties' shares of the "MWI mineral interests," it did not define either of those terms.

As called for in the Rule 11 Agreement, the parties executed a formal Settlement Agreement, effective October 2013. The Settlement Agreement recited the parties' "wish to resolve all differences and disputes (real or potential) between

[4] The first item in the Rule 11 Agreement referenced a commitment by Deborah to convey a different property to Richard and Melissa's mother. That conveyance is not contested in this appeal.

them,"[5] and expressly incorporated the Rule 11 Agreement by reference and as an exhibit.

Section 1(c) of the Settlement Agreement obligated Deborah, Robert, and Laura to convey certain of the real property interests Mary had given them to Richard and Melissa, providing:

> DEBORAH, LAURA, and ROBERT agree to jointly convey an undivided forty percent (40%) interest in the MWI mineral interests received by them from Mary . . . to RICHARD and MELISSA in equal shares (with the result being that RICHARD, MELISSA, DEBORAH (individually), LAURA, and ROBERT shall each own a 20% interest in all of the MWI mineral interests that were previously owned by Mary . . . and . . . Calvert, Sr.).

Again, the term "MWI mineral interests" was undefined.

Deborah, Robert, and Laura further agreed to "split any after-discovered land and/or mineral interests" owned by Calvert Sr. and Mary "equally" with Richard and Melissa, meaning "twenty percent (20%) for each party," but their agreement was "limited to land and/or mineral interests discovered by all parties after the effective date" of the Settlement Agreement and did not "open the door for RICHARD or MELISSA to claim an interest in land or mineral interests deeded to DEBORAH, LAURA, or ROBERT prior to the filing of the [Estate Litigation]."

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[5] The Settlement Agreement excepted from its scope "those differences and disputes related to the computers and associated hardware and software." This appeal does not concern any disputes related to computers, hardware, or software.

In exchange, Richard and Melissa agreed to dismiss all claims against Deborah, Robert, and Laura in the Estate Litigation. As to Richard and Melissa, the Settlement Agreement provided:

> Release. RICHARD and MELISSA, their heirs, predecessors, successors, assigns, administrators, trustees, legal representatives, employees and their former, present and future agents and attorneys hereby remise, release, acquit and forever discharge DEBORAH (in her individual and representative capacities), LAURA, and ROBERT, their heirs, predecessors, successors, assigns, administrators, trustees, legal representatives, employees and their former, present and future agents and attorneys of and from any and all claims, demands, causes of action, damages, injuries, losses, lawsuits, obligations, liabilities of every kind and character, whether actual or potential, whether civil or criminal, presently known or unknown, disclosed or undisclosed, suspected or unsuspected, accrued or unaccrued which they may now have or may hereafter claim to have acquired against them, for or because of any act, omission, matter or thing done, omitted or suffered to be done by or on their behalf that in any way relates to the Estate of . . . Calvert, Sr., . . . and the Estate of Mary[.]

All parties agreed to cooperate in the execution and delivery of additional instruments as "reasonably requested from time to time in order to effectuate the provisions in th[e] Settlement Agreement." They warranted that each had "consulted with . . . or had the opportunity to consult with legal counsel" in executing the Settlement Agreement, had "relied on their own judgment," and had not been "induced to sign or execute the Settlement Agreement by promises, agreements, or representations not expressly stated therein." They "disclaim[ed] reliance on any fact, promise, undertaking or representation made by any other Party, save and except for the express agreements and representations contained in th[e] Settlement

Agreement." And they agreed that the Settlement Agreement's "provisions," "attachments," and "exhibits constitute[d] the[ir] entire agreement . . . and supersede[d] all previous negotiations and documents occurring or created prior to mediation."

The underlying lawsuit

Despite the settlement, the parties continued to disagree about the extent of their property interests. This disagreement came to a head over the mineral estate of the Ella Jane Property. Claiming title under the special warranty deed from Mary and a 2004 executrix deed, Deborah, Robert, and Laura leased the mineral interests to SEM Operating Company, LLC ("SEM"). Richard and Melissa signed separate oil, gas, and mineral leases with SEM, also purporting to lease a portion of the Ella Jane Property. According to Deborah, Robert, and Laura, this clouded their title to the Ella Jane Property and caused SEM to withhold royalty payments on SEM's lease of the Ella Jane Property.

SEM contended that because the term "MWI mineral interests" was undefined in the Settlement Agreement, it could not determine whether the Ella Jane Property was the subject of the Settlement Agreement and thus Richard and Melissa also held an interest. SEM encouraged the parties to resolve their dispute by executing "a Stipulation of Interest listing their interest in the [the Ella Jane Property]."

After the parties failed to agree on a stipulation or amendment to the Settlement Agreement regarding the Ella Jane Property, Deborah, Robert, and Laura filed the underlying suit against Richard and Melissa. They alleged a breach of the Settlement Agreement and asked the probate court for a declaratory judgment that, among other things:

- defined the "MWI mineral interests" in the Settlement Agreement; and
- determined the parties' respective interests in the (i) Burrell Morris Property, (ii) the Ella Jane Property, and (iii) certain other properties.

Deborah, Robert, and Laura alleged "it was commonly known in the area and well-understood between all [p]arties and their counsel that the 'MWI mineral interests' meant the mineral estate of [the Burrell Morris Property]." This was because "[t]he name 'MWI' comes from the fact that in 1985 . . . Calvert, Sr. and Mary . . . sold the surface estate of the [Burrell Morris Property] to MWI Land, Inc." They also sought an award of attorney's fees under the Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE § 37.009 ("In any proceeding under this chapter [on declaratory judgments], the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").

Richard and Melissa generally denied the allegations and pleaded the affirmative defenses of mistake, fraud, unconscionability, lack of mutual assent, and the statute of frauds. In addition, they asserted counterclaims related to the Settlement Agreement for breach of fiduciary duty, fraud, and conspiracy, which,

described generally, alleged again that Deborah, Richard, and Laura had conspired to obtain a lopsided division of assets by misrepresenting or concealing the nature of the property interests at issue. Richard and Melissa also asserted counterclaims based on pre-settlement conduct, which they acknowledged as essentially the same claims they brought in the Estate Litigation. Deborah, Robert, and Laura answered that the counterclaims were barred by the Settlement Agreement and by certain affirmative defenses, including limitations and the doctrines of release, waiver, and collateral estoppel.

The probate court's rulings (summary judgment and attorney's fees)

Deborah, Robert, and Laura moved for a traditional, partial summary judgment on their claim for declaratory relief, asserting there was "no genuine issue of material fact as to the legitimate ownership of any of the relevant real property interests." In support of their motion, Deborah, Robert, and Laura submitted various exhibits purporting to show the parties' shared understanding that the "MWI mineral interests" described only the mineral interests in the Burrell Morris Property and not the Ella Jane Property, including the parties' Rule 11 Agreement, the Settlement Agreement, correspondence from the parties' counsel, deeds, and deposition testimony. They argued parol evidence was admissible to aid the probate court in interpreting the "MWI mineral interests" referenced in the Settlement Agreement. They argued further that they were entitled to judgment as a matter of law on Richard

and Melissa's counterclaims because the counterclaims either were based on the same causes of action alleged, released, and dismissed with prejudice in the Estate Litigation, or "fail[ed] as a result of the releases and disclaimers" in the Settlement Agreement.

Richard and Melissa filed a competing motion for summary judgment, arguing that the statute of frauds barred enforcement of the Settlement Agreement because the "MWI mineral interests" were not adequately described. Richard and Melissa asserted that the "MWI mineral interests" could not be discerned from the four corners of the Settlement Agreement and that the probate court was prohibited from looking to parol evidence to ascertain the undefined term's meaning. Richard and Melissa made these same arguments in their opposition to Deborah, Robert, and Laura's summary judgment motion.

The probate court entered orders granting Deborah, Robert, and Laura's motion and denying Richard and Melissa's motion. In its order granting the partial summary judgment in favor of Deborah, Robert, and Laura, the probate court determined:

> a) The term "MWI mineral interest[s]" as used in the Settlement Agreement means on [sic] the mineral interest in and to that one certain 297.53-acre tract of land situated in the Burrell Morriss [sic] Survey in Houston County, Texas, and being the same mineral interest reserved by Mary Ione Calvert and Robert D. Calvert, Sr. in the General Warranty Deed dated October 7, 1985 and recorded at Volume 0816, Page 0385 of the Houston County Real Property Records;

b) Deborah, Robert and Laura each own 1/3 of the property described as "Tract 1" in the October 15, 2004 Executrix Deed, recorded as Instrument Number 045073 in the Houston County Real Property Records, and Richard and Melissa have no ownership interest in such property, and this land is that certain 50-acre tract in the John Blunt Survey, more particularly described as 50 acres, more or less, being the same tract of land described in that certain deed executed by J.P. Dire and S.V. Dire dated the 29th day of November, 1918 as of record in Book 90, page 3 & 4, of the Houston County Deed Records, in Houston County, Texas [the Ella Jane Property];

c) The Oil, Gas and Mineral Leases executed by Melissa . . . on April 10, 2014[,] and Richard . . . on June 11, 2014[,] with SEM . . . and any other leases for the above-described land are null and void, *ab initio*, as Melissa and Richard have no ownership interest in the property they attempted to lease;

d) [Deborah, Robert, and Laura] are the rightful owners of any royalties accruing from mineral leases on the [Ella Jane] Property . . . ;

e) SEM . . . and other third-party leasing [sic], or otherwise dealing with the [Ella Jane] Property . . . are entitled to rely on this judgment as a Stipulation of Interest that Deborah, Robert, and Laura are the sole owners;

f) Deborah, Robert, Laura, Richard, and Melissa each own 1/5 of the property described as "Tract 6" in the October 15, 2004 Executrix Deed, recorded as Instrument number 045073 in the Houston County Real Property Records, more particularly described as the 297.53-acre tract of land situated in the Burrell Morriss [sic] Survey in Houston County, Texas, and being the same mineral interest reserved by Mary Ione Calvert and Robert D. Calvert, Sr. In the General Warranty Deed dated October 7, 1985 and recorded at Volume 0816, Page 0385 of the Houston County Real Property Records, and this is the same property described as "MWI mineral interests" in the Settlement Agreement and was partially conveyed pursuant [sic] to Richard and Melissa [sic] the Settlement Agreement;

g) The [Ella Jane] Property . . . is owned by [Deborah, Robert, and Laura] alone in equal, undivided interests[.]

In addition, the probate court determined Deborah, Robert, and Laura each held a 1/3 ownership interest in additional tracts of land, described in the summary judgment order as Tracts 2, 3, 4, and 5 in the 2004 executrix deeds. The probate court concluded that Richard and Melissa's counterclaims were barred as a matter of law and by the statute of limitations and the doctrines of collateral estoppel, release, and waiver.

After granting the partial summary judgment in favor of Deborah, Robert, and Laura, the probate court conducted a bench trial on their request for attorney's fees under the Declaratory Judgments Act. Deborah, Robert, and Laura nonsuited their remaining breach of contract claim the next day, and thereafter, the probate court rendered a final judgment awarding them $98,897.45 in attorney's fees. Richard and Melissa appealed.[6]

Summary Judgment

Nine of appellants' ten issues on appeal challenge the probate court's summary judgment (1) interpreting the Settlement Agreement and (2) dismissing

[6] Appellants' arguments on appeal are limited to the probate court's order granting appellee's motion for partial summary judgment and resulting request for attorney's fees. They do not argue that the denial of their own summary judgment motion was erroneous.

appellants' counterclaims. We address these issues in turn, as necessary for the disposition of this appeal. *See* TEX. R. APP. P. 47.1.

A. Governing Law

1. Summary judgments

We review summary judgments de novo, *Travelers Insurance Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010), and follow the usual standards that apply. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In a traditional motion for summary judgment, if the movant's motion and evidence establish its entitlement to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine issue of material fact. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). We consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). A fact issue exists if the summary judgment evidence rises to the level that reasonable and fair-minded people could differ in their conclusions. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Helix Energy Sols. Grp., Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017).

2. Contract construction

The Settlement Agreement is a contract, and "its construction is governed by legal principles applicable to contracts generally." *Kosty v. S. Shore Harbour Cmty. Ass'n*, 226 S.W.3d 459, 464 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). When construing a contract, we look to the language of the parties' agreement. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019). Our primary objective is to give effect to the parties' intentions as expressed in the agreement. *Id.*; *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 888 (Tex. 2019). When discerning the contracting parties' intent, we examine the entire agreement and give effect to each provision so that none is rendered meaningless. *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015). We give contract terms their plain and ordinary meaning unless the contract indicates the parties intended a different meaning. *Id.* We do not give any single provision controlling effect; rather, we consider all provisions with reference to the entire instrument. *Id.* "A contract's plain language controls, not 'what one side or the other alleges they intended to say but did not.'" *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)). We construe contracts under a de novo standard of review. *Barrow-Shaver Res.*, 590 S.W.3d at 479.

If a contract is worded in such a way that it can be given a definite or certain legal meaning, the contract is not ambiguous and courts construe the contract as a matter of law. *See id.*; *Union Pac. R.R. Co. v. Ameriton Props., Inc.*, 448 S.W.3d 671, 677 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Courts enforce an unambiguous contract as written and will not receive parol evidence "for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *Union Pac. R.R.*, 448 S.W.3d at 677–78.

"Only where a contract is ambiguous may a court consider the parties' interpretation and 'admit extraneous evidence to determine the true meaning of the instrument.'" *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam)). If the contract contains two or more reasonable interpretations, the contract is ambiguous, and a fact issue exists regarding the parties' intent. *Barrow-Shaver Res.*, 590 S.W.3d at 479; *Title Res. Guar. Co. v. Lighthouse Church & Ministries*, 589 S.W.3d 226, 232 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (stating ambiguity in contract arises only after application of established rules of interpretation leaves contractual language susceptible to more than one reasonable meaning).

"Contract language is not ambiguous simply because it is unclear or because the parties 'assert forceful and diametrically opposing interpretations.'" *Title Res.*

Guar., 589 S.W.3d at 232 (quoting *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding)); *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 746 (Tex. 2003) ("Lack of clarity does not create an ambiguity, and '[n]ot every difference in the interpretation of a contract . . . amounts to an ambiguity.'") (quoting *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994)). Whether a contract is ambiguous is a question of law we review de novo. *First Bank v. Brumitt*, 519 S.W.3d 95, 105 (Tex. 2017); *Union Pac. R.R.*, 448 S.W.3d at 678. This question "must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 449–50 (Tex. 2011) (quoting *David J. Sacks, P.C.*, 266 S.W.3d at 451).

The parol evidence rule is a rule of substantive law. *S. Green Builders, LP v. Cleveland*, 558 S.W.3d 251, 258 (Tex. App.—Houston [14th Dist.] 2018, no pet.). The rule applies "when parties have a valid, integrated written agreement, and precludes enforcement of prior or contemporaneous agreements." *Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011); *see West v. Quintanilla*, 573 S.W.3d 237, 243 (Tex. 2019) ("When parties have entered into a valid, written, integrated contract, the parol evidence rule precludes enforcement of any prior or contemporaneous agreement that addresses the same subject matter and is inconsistent with the written contract."). "[A] written

instrument presumes that all prior agreements relating to the transaction have been merged into it and will be enforced as written and cannot be added to, varied, or contradicted by parol testimony." *S. Green Builders*, 558 S.W.3d at 258. The rule does not, however, prohibit consideration of surrounding circumstances that "inform, rather than vary from or contradict, the contract text." *Houston Expl.*, 352 S.W.3d at 469; *Anglo-Dutch Petroleum Int'l*, 352 S.W.3d at 451 ("Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.").

In recent years, the Texas Supreme Court has clarified when courts may consider surrounding circumstances and parol evidence in construing contracts. "Because objective intent controls the inquiry, only circumstantial evidence that is objective in nature may be consulted." *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 768 (Tex. 2018). Accordingly, courts have described surrounding circumstances to include "the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction." *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22 (Tex. 2014); *Houston Expl.*, 352 S.W.3d at 469; *see also Kachina Pipeline*, 471 S.W.3d at 450 ("But while evidence of circumstances can be used to 'inform the contract text and render it capable of only one meaning,' extrinsic evidence can be considered only to interpret an ambiguous writing, not to create ambiguity.") (quoting *Americo Life*, 440 S.W.3d at

22)). Setting may also be critical to understanding contract language. *See Americo Life*, 440 S.W.3d at 22. In addition, "[f]acts attending the execution may or may not shed light on contract meaning and may or may not cross the parol-evidence line." *URI*, 543 S.W.3d at 768. "In deciding what facts and circumstances are informative, rather than transformative, ascertaining objective meaning is the touchstone." *Id.*

The Texas Supreme Court has stated:

> If a court concludes that the parties' contract is unambiguous, it may still consider the surrounding "facts and circumstances," but "simply [as] an aid in the construction of the contract's language." In other words, the parol-evidence rule "does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text." Courts may consider such contextual evidence "in determining the parties' intent *as expressed in the agreement*, but the court must determine the parties' expressed intent. *Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.*" . . . In the same way that dictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute's unambiguous language, circumstances surrounding the formation of a contract may inform the meaning of a contract's unambiguous language. *But courts may not rely on evidence of surrounding circumstances to make the language say what it unambiguously does not say.*

First Bank, 519 S.W.3d at 110 (emphasis added) (citations omitted); *see Pathfinder Oil & Gas*, 574 S.W.3d at 889 ("Circumstantial evidence is merely 'an aid in the construction of the contract's language' and may only be used to give the contract a meaning consistent with that to which its terms are reasonably susceptible.") (quoting *URI*, 543 S.W.3d at 765, 768)).

As stated, "[o]bjective manifestations of intent control, not 'what one side or the other alleged they intended to say but did not.'" *URI*, 543 S.W.3d at 763–64 (quoting *Gilbert Tex. Constr.*, 327 S.W.3d at 127); *see Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 749 (Tex. 2020) ("The parol evidence rule prohibits us from relying on such evidence to 'create ambiguity in the contract's text,' to 'augment, alter, or contradict the terms of an unambiguous contract,' to 'show that the parties probably meant, or could have meant, something other than what their agreement stated,' or to 'make the language say what it unambiguously does not say.'") (citations omitted)). We cannot rewrite a contract or add to its language "under the guise of interpreting it." *Abdullatif v. Choudhri*, 561 S.W.3d 590, 602 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *S. Green Builders*, 558 S.W.3d at 259 (stating that trial court "could not rely on extrinsic evidence to create an intent that the contract itself does not express").

B. Appellees' Claim

1. Meaning of the "MWI mineral interests"

In their first issue, appellants contend the trial court erred in looking beyond the four corners of the fully integrated Settlement Agreement to determine that the "MWI mineral interests" referred only to the Burrell Morris Property. In their second issue, appellants contend that even if extrinsic evidence could be considered, the evidence raised a fact issue on whether the "MWI mineral interests" encompassed

all the family's mineral interests and therefore also included the Ella Jane Property. Thus, according to appellants, the probate court "erred either way." Because the resolution of these issues is interwoven, we consider them together.

We begin our analysis with the disputed language of the Settlement Agreement:

> DEBORAH, LAURA, and ROBERT agree to jointly convey an undivided forty percent (40%) interest in the MWI mineral interests received by them from Mary . . . to RICHARD and MELISSA in equal shares (with the result being that RICHARD, MELISSA, DEBORAH (individually), LAURA, and ROBERT shall each own a 20% interest in all of the MWI mineral interests that were previously owned by Mary . . . and . . . Calvert, Sr.).

Although the parties disagree as to the meaning of the "MWI mineral interests," their disagreement does not render this provision ambiguous. This provision is susceptible to only one reasonable interpretation—an unambiguous expression of the parties' intention that appellees "jointly convey" a determined percentage of the "MWI mineral interests" to appellants, in equal shares, so that each of the parties would own 20 percent of all "the MWI mineral interests that were previously owned by Mary . . . and Calvert, Sr." *See Barrow-Shaver Res.*, 590 S.W.3d at 479 (stating contract is unambiguous if language can be given certain or definite legal meaning).

The fact that the Settlement Agreement did not more precisely define the "MWI mineral interests" also does not make the language in the Settlement Agreement ambiguous. Under the contract-construction principles set out above, the

probate court could consider the circumstances surrounding the Settlement Agreement, because "[u]nderstanding the context in which an agreement is made is essential in determining the parties' intent as expressed in the agreement." *See Anglo-Dutch Petroleum Int'l*, 352 S.W.3d at 451 (emphasis omitted); *see also First Bank*, 519 S.W.3d at 110 ("If a court concludes that the parties' contract is unambiguous, it may still consider the surrounding facts and circumstances, but simply [as] an aid in the construction of the contract's language." (quotation omitted)). Because we have concluded that the Settlement Agreement unambiguously expresses the parties' intent that appellees convey the designated percentage of the "MWI mineral interests," however, we are mindful that such evidence is "of limited relevance" and "can only provide the context in which the agreement was reached." *See Anglo-Dutch Petroleum Int'l*, 351 S.W.3d at 452.

Considered for its limited purpose, the extrinsic evidence of the circumstances surrounding the execution of the Settlement Agreement supports the probate court's conclusion that the "MWI mineral interests," as used in the Settlement Agreement, refers only to the 297.53-acre tract of the Burrell Morris Property. The Settlement Agreement expressly incorporates and includes as an attachment the Rule 11 Agreement, which makes clear that the property to be conveyed as a result of the parties' agreement is the "MWI mineral interests" then owned by appellees but previously owned by Mary. The summary judgment evidence reveals that, per the

Rule 11 Agreement's directive that he should prepare the "necessary paperwork," appellants' counsel of record at the time drafted the deed to transfer the interests that were the subject of the parties' agreement from appellees to appellants.

The deed prepared by appellants' counsel included a recital that, on January 10, 1997, Mary gifted to each of appellees "an undivided one-third interest of all her mineral interests located in Houston County, Texas," and that appellees, in turn, were granting to appellants "an undivided forty percent (40%) interest of the mineral interests that [they] received from Mary . . . on January 10, 1997 and more fully described in Attachment 'A'." Attachment "A" was the January 10, 1997 deed from Mary to appellees, wherein she conveyed to appellees her interest in the mineral estate of the Burrell Morris Property. The January 10, 1997 deed noted that "[s]uch property interests were reserved in the General Warranty Deed with Vendor's Lien . . . dated October 7, 1985 from [Mary and Calvert Sr.] to MWI Land, Inc.[,]" further confirming that the "MWI mineral interests" are the mineral interests of the Burrell Morris Property. In addition, Attachment "A" included field notes describing the Burrell Morris Property by metes and bounds.

These field notes were included as Attachment "A" to the deed executed by appellees in June 2013, before the Settlement Agreement became effective, and filed of record after the Settlement Agreement was executed. In addition, the recital in the executed deed provided greater detail about the conveyance than the draft prepared

by appellants' counsel, stating that, on January 10, 1997, Mary had gifted to each of appellees "an undivided one-third interest in all of her mineral interests *in the 297.53*[-]*acre tract of land located in the Burrell Morris Survey*, Abstract No 170, located in Houston County, Texas" and that appellees were conveying to appellants "an undivided forty percent (40%) interest of the mineral estates that [they] received from Mary . . . on January 10, 1997 and more fully described in Attachment 'A'[,]" which was the field notes. (Emphasis added.) After the deed was recorded, appellants dismissed their claims in the Estate Litigation with prejudice. Whether treated as evidence of surrounding circumstances or as writings associated with the Settlement Agreement, these documents support an interpretation of the "MWI mineral interests" that is limited to the Burrell Morris Property.

Appellants urge that other evidence in the summary judgment record created a fact issue as to the meaning of the "MWI mineral interests" and whether it was broad enough to include the Ella Jane Property. But the evidence appellants point to—deposition testimony concerning the parties' respective understandings of the meaning of the "MWI mineral interests" and third-party opinions that the undefined term is ambiguous—is subjective evidence that we do not consider under the authorities referenced above, and thus cannot raise a fact issue. *See URI,* 543 S.W.3d at 757, 769 (noting "[o]bjective, not subjective, intent controls," and finding error in admission of extrinsic evidence of subjective intent).

In short, the probate court did not err in its interpretation of the Settlement Agreement. Based on the plain language of the unambiguous Settlement Agreement and consistent with the surrounding circumstances evidence, considered for its limited purpose, we conclude as a matter of law that the "MWI mineral interests" that are the subject of the Settlement Agreement include only the Burrell Morris Property and do not extend to the Ella Jane Property. Further, there was no fact issue as to the meaning of the "MWI mineral interests" that precluded summary judgment.

We overrule appellants' first and second issues.

2. Statute of frauds

In their third issue, appellants argue that even if the Settlement Agreement could be interpreted as a matter of law, it is unenforceable because the "MWI mineral interests" are not described in a manner sufficient to satisfy the statute of frauds. *See* TEX. BUS. & COM. CODE § 26.01. Appellants assert the Settlement Agreement "does not identify the city, county, or state where the 'MWI mineral interests' are located," or "reference any existing writing . . . that would provide the means or data by which the 'MWI mineral interests' could be identified." Assuming *arguendo* that the Settlement Agreement is subject to the statute of frauds as a contract for the sale of real estate, *see* TEX. BUS. & COM. CODE § 26.01(b)(4), we disagree with appellants that the statute of frauds bars its enforcement.

While the statute of frauds provides that all contracts for the sale of real estate must be in writing, no requirements for the writing, other than it be signed by the "person to be charged with the promise . . . or by someone lawfully authorized to sign for him," are set out. *See id.* § 26.01(a). But courts have determined the statute of frauds "does not require that a complete description of the [property] to be conveyed appear in a single document." *Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 753 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Rather, a property description is sufficient if the writing "furnish[es] within itself, or by reference to some other existing writing, the means or data by which the [property] to be conveyed may be identified with reasonable certainty." *Long Trusts v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2006) (quotation omitted); *see also Stergiou*, 438 S.W.3d at 753 (description of land may be obtained from documents prepared in course of transaction, including deeds drafted by counsel during subsequent negotiations to finalize settlement). If the description is enough to allow a person familiar with the area to locate the premises with reasonable certainty, it is sufficient to satisfy the statute of frauds. *Reiland v. Patrick Thomas Props., Inc.*, 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (noting legal description in conveyance must furnish enough information to locate general area of property and indicate its size, shape, and boundaries); *see also Tex. Builders v. Keller*, 928 S.W.2d

479, 481 (Tex. 1996) (noting reasonable certainty does not require metes-and-bounds description).

Although it may not be used to supply the description of the property, extrinsic evidence may be used "for the purpose of identifying [the property] with reasonable certainty from the data in the [contract]." *Wilson v. Fisher*, 188 S.W.2d 150, 152 (Tex. 1945). That is, an "uncertain description" of the property may be "made certain by the aid of extrinsic evidence" when the writing "furnishes a key or a nucleus description." *Templeton v. Dreiss*, 961 S.W.2d 645, 658–59 (Tex. App.—San Antonio 1998, pet. denied); *see also Pickett v. Bishop*, 223 S.W.2d 222, 223 (Tex. 1949) (recognizing "settled rule" that description using words such as "my property," "my land," or "owned by me," is sufficient when extrinsic evidence shows grantor owns only one tract of land answering description).

With these principles in mind, we conclude that the "MWI mineral interests" can be identified with reasonable certainty from the information contained in, as well as the documents referenced in, the Settlement Agreement and its attachment. First, the Settlement Agreement is not devoid of any description of the property. To the contrary, the Settlement Agreement refers to the property by a particular name (the "MWI mineral interests"), identifies the current owners of the property (appellees), and the source of their ownership (appellees "received" the property "from Mary").

Again, the Settlement Agreement expressly incorporates and includes as an attachment the Rule 11 Agreement, which addresses the same "MWI mineral interests" and also makes clear that the property to be conveyed is the "MWI mineral interests" then owned by appellees but previously owned by Mary. In addition, the Rule 11 Agreement references the creation of an additional document to effectuate the parties' agreement regarding the conveyance—the "necessary paperwork to ensure that the proper interests are transferred ensuring a 20% interest in all of the MWI mineral interests for each of the five parties in the lawsuit"—and obligates appellants to draft the document. The summary judgment record indicates that, consistent with this directive, appellants' counsel of record at the time prepared the "necessary paperwork" referenced in the Rule 11 Agreement—a deed transferring mineral interests from appellees to appellants. The deed was executed by appellees, as grantors, in June 2013, and thus was an existing writing at the time the Settlement Agreement became effective in October 2013.

The deed provides additional, descriptive information that allows the "MWI mineral interests" to be identified with reasonable certainty. Specifically, the deed recites that the source of the mineral interests being conveyed from appellees to appellants was the deed executed by Mary on January 10, 1997,[7] "wherein she gifted

[7] The January 10, 1997 deed from Mary to appellees also describes the Burrell Morris Property and notes that the mineral interests being conveyed to appellees by that

to [appellees] an undivided one-third interest of all of her mineral interests in the 297.53[-]acre tract of land located in the Burrell Morris Survey, Abstract No 170, located in Houston County, Texas," i.e., the Burrell Morris Property. The deed further provides that the interest being conveyed to appellants was "an undivided forty percent (40%) interest of the mineral interests that [appellees] received from Mary . . . on January 10, 1997 and more fully described in Attachment "A." The deed thus identifies the property by tract, survey, and county. And the referenced Attachment "A" to the deed—the field notes from the January 10, 1997 deed from Mary to appellees—further identifies the 297.53-acre tract by metes and bounds.

This identifying information, considered together with the information in the Settlement Agreement and incorporated Rule 11 Agreement, is enough to allow a person familiar with the area to locate the "MWI mineral interests" with reasonable certainty. *See Reiland*, 213 S.W.3d at 437. We therefore conclude that the statute of frauds does not bar enforcement of the Settlement Agreement.

We overrule appellants' third issue.

C. Appellants' Counterclaims

Appellants also challenge the summary dismissal of their counterclaims. Appellants' counterclaims fall into two categories: (1) "counterclaims related to

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deed "were reserved in the General Warranty Deed . . . from [Mary and Calvert Sr.] to MWI Land, Inc. filed for record in Houston County, Texas."

[the] Settlement Agreement" and (2) "counterclaims related to actions prior to settlement." The counterclaims in the first category rested on allegations that appellants were induced by appellees' acts or omissions to execute the Settlement Agreement and included causes action for breach of fiduciary duty, fraudulent misrepresentation, fraudulent nondisclosure, statutory fraud, and conspiracy. The second category of counterclaims also included causes of action for breach of fiduciary duty, fraudulent misrepresentation, and conspiracy, but these causes of action were based on Deborah's pre-settlement conduct administering Calvert Sr.'s estate and the testamentary trusts and, by appellants' own admission, were the same claims asserted in the Estate Litigation.

In their fourth through ninth issues, appellants argue the probate court's summary judgment dismissing all their counterclaims—whether related to inducing the Settlement Agreement or administering the estate and trusts—must be set aside for the following reasons:

- appellees did not conclusively establish their affirmative defense of limitations as to any counterclaim (Issue 4);

- appellees did not conclusively establish their affirmative defense of release as to any counterclaim because there is a fact issue on "the validity of the Settlement Agreement as a whole and therefore [also on] the validity of the releases, waivers, and disclaimers of reliance" in the Settlement Agreement (Issue 5);

- Deborah's failure to disclose material facts about the nature and extent of the property interests at issue created a fact issue as to whether the

Settlement Agreement was unenforceable as a result of "extrinsic fraud" under Texas Supreme Court precedent (Issue 6);

- a fact issue exists on the counterclaim alleging that appellees "conspired to deprive [appellants] of their inheritance" in the Settlement Agreement (Issue 7);

- the summary judgment evidence established that the primary purpose of the Settlement Agreement was "the transfer of real property," and therefore the counterclaim for statutory fraud was viable (Issue 8); and

- appellees did not conclusively establish their affirmative defense of collateral estoppel as to the "counterclaims related to actions prior to settlement" because those claims were not actually litigated in the Estate Litigation (Issue 9).

We begin our analysis of the counterclaims with appellants' fifth and sixth issues, which are intertwined, because they are dispositive of this portion of the appeal. *See* TEX. R. APP. P. 47.1.

2. Affirmative Defense of Release

Appellants' fifth and sixth issues challenge appellees' affirmative defense of release as a ground for summary judgment. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993) (noting release extinguishes claim or cause of action and is absolute bar to any right of action on released matter). As an initial matter, we note that appellants' briefing on appeal could be read as suggesting that appellees sought summary judgment on the ground of release only as to the breach-of-fiduciary-duty and fraudulent-nondisclosure counterclaims related to the Settlement Agreement. But we do not read either appellees' summary

judgment motion or the probate court's summary judgment order so narrowly. Rather, the summary judgment record shows that appellees argued their entitlement to judgment as a matter of law on *all* counterclaims based on appellants' releases in the Settlement Agreement.

In their motion for summary judgment, appellees specifically argued that all causes of action in both categories of counterclaims were barred by the Settlement Agreement releases. Regarding the first category of counterclaims—those related to the Settlement Agreement—appellees argued:

> *Each claim* brought by [appellants] . . . relates to property interests to which [appellants] allege entitlement from [Calvert Sr.] or Mary or Deborah's actions in administering the Estates. As shown in the Settlement Agreement, each of those claims were expressly waived by [appellants] and is barred.

(Emphasis added.) Regarding the second category of counterclaims—those related to actions prior to settlement—appellees argued they also "are all barred by the release that was included in the Settlement Agreement and was executed for each party." In addition, appellees requested in their conclusion a determination that the counterclaims were barred as a matter of law "due to release and waiver," without limiting that request to any specific counterclaim or category of counterclaims. On appeal, appellees continue to argue that the releases in the Settlement Agreement bar all counterclaims, asserting that "there was no genuine issue of material fact

concerning [a]ppellants' release and/or waiver of *each and every one* of their counterclaims[.]" (Emphasis added.)

Likewise, the probate court's summary judgment order does not restrict its determination on appellees' affirmative defense of release to any specific counterclaim or category of counterclaims. The summary judgment order broadly states that appellants' counterclaims "are barred as a matter of law due to release and waiver." The specific declarations on breach of fiduciary duty and fraudulent nondisclosure do not state the reason for the dismissal of these counterclaims; rather, the summary judgment order provides only that those counterclaims are "barred as a matter of law." *See Ajudani v. Walker*, 177 S.W.3d 415, 417–18 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("When . . . the trial court's summary judgment order does not specify the ground or grounds on which summary judgment was rendered, we will affirm the summary judgment if any of the grounds stated in the motion is meritorious."). We therefore consider whether the probate court erred by granting summary judgment as to all counterclaims—not just the breach of fiduciary duty and fraudulent nondisclosure counterclaims related to the Settlement Agreement—based on appellees' affirmative defense of release.

The release language relied on by appellees is contained in Section 1(f) of the Settlement Agreement, which provides in relevant part:

> Release. RICHARD and MELISSA . . . hereby remise, release, acquit and forever discharge DEBORAH (in her individual and representative

> capacities), LAURA, and ROBERT, . . . of and from any and all claims, demands, causes of action, damages, injuries, losses, lawsuits, obligations, liabilities of every kind and character, whether actual or potential, whether civil or criminal, presently known or unknown, disclosed or undisclosed, suspected or unsuspected, accrued or unaccrued which they may now have or may hereafter claim to have acquired against them, for or because of any act, omission, matter of thing done, omitted or suffered to be done by or on their behalf that in any way relates to the Estate of Robert Don Calvert, Sr., Deceased, and the Estate of Mary Ione Calvert, Deceased.

On appeal, appellants do not argue that the counterclaims fall outside the scope of or are not discharged by their releases in the Settlement Agreement. Instead, they argue that the summary judgment on the affirmative defense of release was erroneous because Deborah engaged in "extrinsic fraud" by failing to disclose material facts about the nature and extent of the property interests at issue.[8]

In support, appellants cite the Texas Supreme Court's opinion in *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984). The appeal in *Montgomery* was from the denial of a bill of review seeking to set aside an earlier agreed judgment entered between the same parties after they settled a dispute regarding the division of assets in a family estate.[9] *Id*. at 310–12. In considering whether the appellant was entitled to bill-of-review relief setting aside the agreed judgment, the Court observed:

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[8] Appellants also argue that the summary judgment on release was erroneous because the statute of frauds bars enforcement of the Settlement Agreement itself, which is an argument we have already rejected and do not revisit here.

[9] A bill of review is an equitable action used to set aside a judgment which is no longer appealable or subject to challenge by a motion for new trial. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

> It is fundamentally important that some finality be accorded to final judgments, and bills of review seeking relief from otherwise final judgments are scrutinized by courts of equity "with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted." While this court has always upheld the sanctity of final judgments, we have also always recognized that showing the former judgment was obtained by fraud will justify a bill of review to set it aside.
>
> In relation to attacks on final judgments, fraud is classified as either extrinsic or intrinsic. Only extrinsic fraud will entitle petitioners to bill of review relief.

Id. at 312 (internal citations omitted); *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003) ("Fraud in relation to attacks on final judgments is either extrinsic or intrinsic. Only extrinsic fraud will support a bill of review.").

The Court explained the difference between extrinsic fraud, which warrants bill of review relief, and intrinsic fraud, which does not. *Montgomery*, 669 S.W.2d at 312–13. Extrinsic fraud is fraud which denies a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. *Id.* at 312; *see also Boaz v. Boaz*, 221 S.W.3d 126, 131 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Extrinsic fraud is collateral fraud in the sense that it must be 'collateral' to the matter actually tried and not something that was actually or potentially in issue at the trial."). Intrinsic fraud, by contrast, relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. *Montgomery*, 669 S.W.2d at 313. That term includes such matters as "fraudulent instruments, perjured testimony, or any matter which was actually presented to and

considered by the trial court in rendering the judgment assailed." *Id.* Such fraud will not support a bill of review, because each party must guard against adverse findings on issues directly presented. *Id.* at 312. Issues underlying the judgment attacked by a bill of review are intrinsic and thus have no probative value on the fraud necessary to a bill of review. *See id.* at 312–13.

The distinction between extrinsic and intrinsic fraud as grounds for attacking a judgment thus represents a balance of the competing concerns identified in *Montgomery*. "On one hand, the sound policy of promoting finality in judgments arises from a general level of confidence that the adversarial process leading to judgment is reasonably effective to ascertain the merits of the controversy." *Browning v. Prostok*, 165 S.W.3d 336, 348 (Tex. 2005) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. a (1982)). "On the other hand, to fully insulate judgments from attack would give great protections to the most devious parties." *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. a (1982) ("[I]f judgments were wholly immune it would give powerful incentive to use . . . fraudulent tactics in obtaining a judgment.")). "As such, an attack on a judgment based on intrinsic fraud is not allowed because the fraudulent conduct may be properly exposed and rectified within the context of the underlying adversarial process itself." *Id.* But a collateral attack on a judgment based on extrinsic fraud is allowed "because such fraud distorts the judicial process to such an extent that confidence in the ability to

discover the fraudulent conduct through the regular adversarial process is undermined." *Id.*

Applying these concepts, the Texas Supreme Court held in *Montgomery* that a trustee who owed a duty of disclosure committed extrinsic fraud when he concealed trust assets to prevent their inclusion in an agreed judgment involving the beneficiary. 669 S.W.2d at 313 ("A fiduciary's concealment of material facts, used to induce an agreed or uncontested judgment, which prevents a party from presenting at trial his legal right, is extrinsic fraud."). The Court made clear, however, that "[w]here there is no effective concealment by the alleged fraud, as where a bill of review petitioner's prior pleadings show the alleged specific fraudulent acts were known and *in issue* in the prior suit, the fraud is intrinsic." *Id.* at 313–14 (emphasis in original).

Notably, this is not a bill of review appeal. Neither side has addressed whether or to what extent *Montgomery*'s analysis of extrinsic versus intrinsic fraud applies outside the context of a bill of review proceeding. *See Boaz*, 221 S.W.3d at 131 ("In the context of bill of review proceedings, fraud is classified as either 'extrinsic' or 'intrinsic.'"). But we need not, and thus do not, answer that question here because, even if the analysis applied, appellants have not raised a fact issue on extrinsic fraud.

As evidence of extrinsic fraud, appellants cited the duty of disclosure owed by Deborah in her representative capacities and identified two material facts which

they allege Deborah concealed to induce their execution of the Settlement Agreement. *See Montgomery*, 669 S.W.2d at 313 (trustee and executor owed fiduciary duty of full disclosure to beneficiary). First, appellants asserted that Deborah concealed the source of certain financial assets in an "American Funds" account so that she and the other appellees could exclude appellants from the division of nearly $400,000. Appellants claim to have discovered ledgers and charts evidencing these assets and their division during Richard's initial investigation of Deborah's conduct in administering the estate and trusts, but, when pressed about these documents in a 2011 deposition in the Estate Litigation, Deborah denied their existence. Then on February 28, 2013, not long before the parties signed the Rule 11 Agreement in the Estate Litigation, appellees obtained a protective order that restricted discovery on financial accounts. According to appellants, the protective order prevented them from analyzing evidence that could have supported their entitlement to part of the American Funds account assets.

This evidence fails to raise a fact issue on extrinsic fraud. That the existence and source of funds in the American Funds account were the subject of discovery, deposition, and a protective order in the Estate Litigation establishes that the matter was at issue. Appellants knew before they executed the Settlement Agreement that the contents of the American Funds account were concealed by the protective order

and, with that knowledge, they elected to settle anyway.[10] Consequently, this allegation of fraud is intrinsic not collateral, and will not support relief setting aside the Settlement Agreement. *See Montgomery*, 669 S.W.2d at 313 ("Intrinsic fraud . . . is inherent in the matter considered and determined in the trial where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein." (quotation omitted)).

The same is true for the second alleged instance of extrinsic fraud, which is that "Deborah did not disclose that certain mineral interests had been leased and were producing income at the time the parties entered into the Settlement Agreement." In their summary judgment response, appellants identified a letter from SEM containing a detailed outline of the transactions associated with the Ella Jane Property and noting that, "[o]n August 18, 2013, [about two months before the Settlement Agreement became effective,] the Ella Jane #1 started producing." Appellants submitted affidavit testimony stating that Deborah did not disclose the fact of production in settlement negotiations and, had she done so, neither Richard nor Melissa would have agreed to the settlement terms. However, the same SEM

[10] Appellants could have excepted the American Funds account from the scope of the Settlement Agreement—as the parties did for their "differences and disputes related to the computers and associated hardware and software"—or refused to settle until the protective order was dissolved or reviewed on mandamus. Their failure to do any of these things suggests the decision to execute the Settlement Agreement was a matter of litigation strategy rather than fraud attributable to Deborah.

letter states that a lease for the Ella Jane Property was first filed in the Houston County public records on January 4, 2011, more than six months before appellants initiated the Estate Litigation and more than two years before the Settlement Agreement's effective date.[11]

The public availability of the Ella Jane Property lease stands in contrast to the facts of *Montgomery*, where the undisclosed oil-and-gas lease on the subject property had been executed before the beneficiary's attorneys examined records but was not recorded until later. *See* 669 S.W.2d at 312; *see also* TEX. PROP. CODE § 13.002 ("An instrument that is properly recorded in the proper county is: (1) notice to all persons of the existence of the instrument; and (2) subject to inspection by the public."). Given the Ella Jane Property lease was a matter of public record, the evidence does not support an inference that Deborah engaged in extrinsic fraud because it does not provide "proof of some deception practiced by [Deborah],

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[11] The timeline in the SEM letter states that, on December 28, 2010, appellees signed a lease in favor of ETOCO, LP and that a "[n]otice of said lease was filed on January 4, 2011 as Instrument # 1100040 in Houston County, Texas Official Public Records." In July 2012, ETOCO assigned the lease to Navidad Resources, LLC. The assignment to Navidad was filed as Instrument #1204889 in the Houston County public records. Further, in June 2013, Navidad "recorded the Ella Jane Declaration of Pooled Unit as Instrument # 1302730 in the Houston County, Texas Official Public Records. The subject tract [the Ella Jane Property] was listed as Unit Tract 10 and the above[-]mentioned lease was included in said Declaration." An amended declaration of the pooled unit was recorded one month later. And finally, on September 16, 2013, "Navidad filed an assignment of the above lease and unit to SEM. Said Assignment is recorded as Instrument # 1304204 in the Houston County, Texas Official Public Records."

collateral to the issues in the case, which prevent[ed] [appellants] from fully presenting" claims or defenses. *King Ranch*, 118 S.W.3d at 753.

Appellants have not identified any other concealed material facts as a basis for finding extrinsic fraud. On this record, we hold that appellants did not raise a fact issue as to extrinsic fraud and thus, to the extent the extrinsic fraud analysis applies in this case, a fact question does not exist as to the enforceability of the Settlement Agreement. Because there is no fact issue as to the enforceability of the Settlement Agreement due to extrinsic fraud and such is the only argument appellants make on appellees' affirmative defense of release, we hold that the trial court did not err in granting summary judgment as to appellants' counterclaims based on the releases contained in the Settlement Agreement. *See Ajudani*, 177 S.W.3d at 417–18 ("When . . . the trial court's summary judgment order does not specify the ground or grounds on which summary judgment was rendered, we will affirm the summary judgment if any of the grounds stated in the motion is meritorious.").

We overrule appellants' fifth and sixth issues and, because of our disposition of these issues, do not reach appellants' fourth, seventh, eighth, or ninth issues, which also challenge the probate court's summary judgment dismissing their counterclaims. *See Ajudani*, 177 S.W.3d at 417–18; *see also* TEX. R. APP. P. 47.1.

Attorney's Fees

In their tenth issue, appellants contend the probate court erred by awarding appellees their attorney's fees under the Declaratory Judgments Act. Appellants argue that because "(1) [appellees] sought declarations concerning their superior title to a number of tracts of real property and (2) the [probate] court, in granting [appellees'] motion for partial summary judgment, made declarations concerning title to real property, this lawsuit is, at its core, a trespass to try title action." Appellants assert that when a claim is in the nature of trespass to try title, the plaintiff may not proceed, as appellees did here, under the Declaratory Judgments Act to recover their attorney's fees.[12] Appellees respond that the "crux" of the lawsuit is the interpretation of the Settlement Agreement, and that the interpretation of "language in a written contract is the essence of a declaratory judgment action." We agree with appellants that appellees were not entitled to recover their attorney's fees under the Declaratory Judgments Act.

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[12] We observe that appellants did not file special exceptions to appellees' petition. *See* TEX. R. CIV. P. 91 (authorizing filing of special exceptions to challenge defective pleadings); *Brumley v. McDuff*, 616 S.W.3d 826, 831 (Tex. 2021) ("The proper response to a legally or factually infirm pleading is to file special exceptions objecting to the pleading."). Appellants first complained that appellees could not bring a claim under the Declaratory Judgments Act in their response to appellees' motion for summary judgment. On appeal, appellants have limited their argument about the procedural impropriety of appellees' declaratory-judgment action to the issue of the recoverability of attorney's fees.

This issue requires us to consider the nature of appellees' claim. In doing so, we examine the substance of appellees' petition rather than its form. *See Brumley v. McDuff*, 616 S.W.3d 826, 833 (Tex. 2021) ("[W]e examine the substance of a plaintiff's petition—not its form—to determine whether it states a trespass-to-try-title action."); *Kennedy Con., Inc. v. Forman*, 316 S.W.3d 129, 135 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("Any suit involving a dispute over the title to land is an action in trespass to try title, whatever its form and regardless of whether legal or equitable relief is sought."); *see also Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) ("[A] litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit.").

The line that separates claims impacting title that *can* be brought as declaratory judgment actions from those that *must* be brought as trespass-to-try-title actions is muddy. *See Lance v. Robinson*, 543 S.W.3d 723, 735 (Tex. 2018) (recognizing confusion in case law on whether claimant must seek relief related to property interests through action for trespass to try title, as opposed to suit under Declaratory Judgments Act); *AIC Mgmt. Co. v. AT&T Mobility, LLC*, No. 01-16-00896-CV, 2018 WL 1189865, at *10 (Tex. App.—Houston [1st Dist.] Mar. 8, 2018, pet. denied) (mem. op.) (same); *Jinkins v. Jinkins*, 522 S.W.3d 771, 785–86 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (same). The lack of clarity in this

area can be attributed, at least in part, to statutes that appear to overlap. *See AIC Mgmt.*, 2018 WL 1189865, at *10; *Jinkins*, 522 S.W.3d at 785–86.

The Property Code mandates use of a trespass-to-try-title action to determine title to land. *See* TEX. PROP. CODE § 22.001(a) ("A trespass to try title action is *the* method of determining title to lands[.]" (emphasis added)). The Declaratory Judgments Act, however, allows a "person interested under a deed, will, written contract, or other writings constituting a contract" to "have determined any question of construction or validity arising under the instrument" and "obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE § 37.004(a). These statutes differ in their pleading and proof requirements, and, relevant here, only the Declaratory Judgments Act authorizes attorney's fees. *See Jinkins*, 522 S.W.3d at 786; *see also* TEX. CIV. PRAC. & REM. CODE § 37.009 (permitting award of reasonable and necessary attorney's fees in proceedings under Declaratory Judgments Act).

In recent years, the Texas Supreme Court has addressed distinctions between the various causes of action for settling questions related to title. *See Brumley*, 616 S.W.3d at 832–33; *Lance*, 543 S.W.3d at 735–37. First, in *Lance*, the Court held the claimants could bring an action to establish rights to an easement under the Declaratory Judgments Act, as opposed to the trespass-to-try-title statute, noting that an easement is a nonpossessory interest and the claimants did not assert any

ownership or possessory interest in the disputed area. 543 S.W.3d at 736–37. The Court explained that the trespass-to-try-title statute 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." *Id.* at 736 (emphasis in original). Then, in *Brumley*, the Court further clarified the nature of a trespass-to-try-title action:

> By statute, a trespass-to-try-title action is the method of determining title to lands. Although related claims exist 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. It embraces all character of litigation that affects the title to real estate.

616 S.W.3d at 831–32 (quotations and citations omitted).

Here, appellees expressly pleaded for and sought summary-judgment relief declaring *their* ownership interests in specific tracts of real property, which is precisely the relief the trespass-to-try-title statute is intended to address. *See Lance*, 543 S.W.3d at 736; *see also* TEX. PROP. CODE § 22.001(a) ("A trespass to try title action is the method of determining title to lands, tenements, or other real property."). In connection with appellees' claim for such relief, the probate court made more than 10 declarations regarding the disputed properties in its order granting summary judgment. These included declarations of who owns which tract of land, which may be paraphrased as follows:

- Appellees each own 1/3 of the Ella Jane Property in equal, undivided shares, and appellants have no interest in the Ella Jane Property.

- Appellants and appellees each own 1/5 of the Burrell Morris Property.
- Appellees each own 1/3 of the property described as "Tract 2" in the 2004 executrix deeds, and appellants have no interest in such property.
- Appellees each own 1/3 of the property described as "Tract 3" in the 2004 executrix deeds, and appellants have no interest in such property.
- Appellees each own 1/3 of the property described as "Tract 4" in the 2004 executrix deeds, and appellants have no interest in such property.
- Appellees each own 1/3 of the property described as "Tract 5" in the 2004 executrix deeds, and appellants have no interest in such property.

Appellees argue that despite their request for these declarations of ownership, this case falls within the narrow circumstances in which a declaratory judgment action may be used to resolve disputes related to property. According to appellees, the "crux" of the parties' dispute was the meaning of the "MWI mineral interests" in the Settlement Agreement, and the ownership declarations are merely incidental to or an indirect consequence of the probate court's construction. In support, appellees point to the probate court's first declaration that "[t]he term 'MWI mineral interest[s]' as used in the Settlement Agreement means on the mineral interest in and to" the Burrell Morris Property and subsequent declarations that, as a result of this construction, appellees are the "rightful owners of any royalties accruing from mineral leases on" the Ella Jane Property and the oil and gas leases executed by appellants on the Ella Jane Property are "null and void."

Admittedly, the courts have not been entirely consistent in answering the question whether a party may pursue declaratory relief when the controversy sought

to be resolved by the declaration implicates title but does not directly decide it. *Compare, e.g.*, *Hawk v. E.K. Arledge, Inc.*, 107 S.W.3d 79, 84 (Tex. App.—Eastland 2003, pet. denied) ("Any suit that involves a dispute over the title to land is, in effect, an action in trespass to try title, whatever its form."); *Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 118 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) ("While the [Declaratory Judgments Act] specifically provides a procedural method for the construction or validity of deeds by those whose rights are affected by such instruments, the substantive rights of the parties are governed by the Trespass to Try Title statutes."), *with Cadle Co. v. Ortiz*, 227 S.W.3d 831, 837–38 (Tex. App.—Corpus Christi 2007, pet. denied) (allowing plaintiff to litigate validity of lien under Declaratory Judgments Act, even though dispute "ultimately implicates title"); *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 730 (Tex. App.—Waco 1998, pet. denied) (permitting relief under Declaratory Judgments Act to construe oil and gas leases).

The Texas Supreme Court's holding in *Lance* resolves some of that confusion through its instruction that a trespass-to-try-title action is not required when the claimant does not seek an ownership or possessory right in the disputed land. *See* 543 S.W.3d at 736 ("[T]he trespass-to-try-title statute does not apply to a claimant who seeks to establish an easement, because such a claimant does not have such a possessory right. An easement is a nonpossessory interest that authorizes its holder

to use the property for only particular purposes." (citations and quotations omitted)); *accord Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc.*, 623 S.W.3d 851, 865 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) (citing *Lance* and holding declaratory judgment could be used to void defendant's lease and determine oysterman's right to access public fishing grounds because oystermen asserted a nonpossessory interest). But even the authority cited by appellees compels a conclusion that their claim does not fall within the category of claims for which relief may be sought under the Declaratory Judgments Act.

Appellees rely primarily on *Florey v. Estate of McConnell*, 212 S.W.3d 439 (Tex. App.—Austin 2006, pet. denied).[13] In *Florey*, the Austin Court of Appeals concluded that a declaratory judgment action was proper in a suit to determine the validity of a deed of trust because the plaintiff was not seeking title to the property. *Id.* at 448–49. Here, in contrast, appellees did seek declarations of ownership of the properties, and thus a different conclusion is required. *See Jinkins*, 522 S.W.3d at 786 (distinguishing *Florey* on same basis and noting that "[a]lthough resolution of

[13] Appellees also rely on two additional cases that do not support their contention. *See San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 637 (Tex. 2000); *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 788 (Tex. 1995). Neither case addressed the distinction between declaratory-judgment and trespass-to-try-title actions. *See San Antonio Area Found.*, 35 S.W.3d at 637 ("The central issue in this will construction case is whether extrinsic evidence is admissible to construe the term 'real property.'"); *Plainsman Trading*, 898 S.W.2d at 788 (deciding whether surface destruction test applies to non-participating royalty interest).

claims required construction of wills, the fact that the [Declaratory Judgments Act] might otherwise cover [the plaintiff's] claims does not mean his claim may be brought under the [Declaratory Judgments Act] if it must be brought as a trespass-to-try-title action.").

While it is true that appellees sought a construction of the Settlement Agreement, the real controversy—as alleged in appellees' petition—is the parties' continued dispute over ownership of real property. Appellees' request for a construction of the Settlement Agreement or a declaration of the invalidity of the oil and gas leases executed by appellants are not stand-alone controversies; rather, they go to the heart of the dispute over the ownership of the disputed properties because it is clear appellees intended to use such declarations to establish that they retained title to the Ella Jane Property under the Settlement Agreement. In other words, appellees' requests that the probate court determine the meaning of the Settlement Agreement and the validity of oil and gas leases were means to determine title to the disputed properties. Thus, even though appellees sought a declaratory judgment, their dispute was in the nature of a trespass-to-try-title action and must be treated as such. *See Martin v. Amerman*, 133 S.W.3d 262, 267–68 (Tex. 2004) (concluding that boundary dispute was governed by trespass-to-try-title statute and, therefore, appellants could not proceed under Declaratory Judgments Act to recover attorney's

fees). We therefore conclude the probate court erred by awarding appellees their attorney's fees under the Declaratory Judgments Act.

We sustain appellants' tenth issue.

Conclusion

Having concluded that appellees were not entitled to recover their attorney's fees, we modify the probate court's judgment to eliminate the award of attorney's fees. We affirm the probate court's judgment as modified.

Amparo Guerra
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.