



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-15-00791-CV

**TALISMAN ENERGY USA, INC.,**  
Appellant

v.

**MATRIX PETROLEUM, LLC;** Matrix Petroleum Holdings, LLC; and  
JAR Resources Holdings, L.P.;  
Appellees

From the 218th Judicial District Court, La Salle County, Texas  
Trial Court No. 14-08-00158-CVL  
Honorable Russell Wilson, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice

Delivered and Filed: December 21, 2016

**AFFIRMED**

Talisman Energy USA, Inc. appeals from a temporary injunction order enjoining it from proposing and drilling additional oil and gas wells under a joint operating agreement. We affirm.

**BACKGROUND**

The appellant, Talisman, and the appellees, Matrix Petroleum, LLC<sup>1</sup>; Matrix Petroleum Holdings, LLC; and JAR Resources Holdings L.P. (“Matrix”), co-own mineral leases covering

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<sup>1</sup>Matrix Petroleum LLC is a predecessor-in-title (by assignment) to Matrix Petroleum Holdings LLC.

approximately 5,351 acres in LaSalle County, Texas, known as the Cooke Ranch. Talisman and Matrix acquired their mineral interests through a Term Assignment of Oil, Gas and Mineral Leases in 2010. Matrix acquired a 25% interest and Talisman's predecessor acquired a 75% interest. All oil and gas drilling, development, production, and related operations on the Cooke Ranch are governed by a joint operating agreement ("the agreement") dated February 27, 1954. Under the agreement, the leasehold owners agreed to pool and jointly develop their interests.

After a series of accounting disputes, Matrix filed suit against Talisman for breach of contract, conversion, fraud, and other causes of action. Matrix also sought an accounting. Matrix alleged Talisman was violating various provisions of the agreement, including provisions concerning consent to drill new wells (section 8) and drilling wells on a competitive basis (section 16). Matrix applied for a temporary injunction, alleging that Talisman was in the process of drilling three new wells in violation of the agreement. Matrix asked the trial court to compel Talisman to provide it with certain data and information and to enjoin Talisman from proceeding with new well operations pending trial on the merits. The trial court held a hearing on Matrix's application for a temporary injunction. After hearing evidence, the trial court found that Matrix had demonstrated a likelihood that certain wells that Talisman was proposing to drill were proposed in violation of sections 5<sup>2</sup>, 8, and 16 of the agreement, that Matrix had demonstrated a likelihood that Sections 8 and 16 of the agreement were covenants running with the land, and that Talisman's violation of these provisions was a substantial, ongoing violation of these covenants.<sup>3</sup> The trial court further found that Matrix was not required to demonstrate an irreparable injury because it was seeking to

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<sup>2</sup>Among other things, section 5 provided that an "Operator shall make no single expenditure in excess of \$2,500.00, without first obtaining the consent thereto by Non-operator...."

<sup>3</sup>Section 28 of the agreement states that its provisions "shall constitute covenants running with the lands and leases covered or affected hereby" and "shall extend to and be binding upon the parties hereto, their respective successors and assigns."

enforce covenants running with the land; however, even if Matrix was required to demonstrate irreparable injury, it had done so. The trial court granted Matrix's application for temporary injunction. Specifically, Talisman was "enjoined from conducting and ordered to cease drilling operations on the Cooke Ranch on the Proposed E & G Wells." Talisman was also ordered to provide Matrix certain data and information. Talisman appealed.

#### **ARGUMENTS PRESENTED ON APPEAL**

Talisman presents four arguments on appeal. First, Talisman argues the trial court abused its discretion in enjoining it from conducting drilling operations on certain proposed wells because it misconstrued section 8 of the agreement. Second, Talisman argues the trial court abused its discretion in excluding the testimony of its expert witness, who could have clarified the terms and usage of the provisions used in model form joint operating agreements, which Talisman claims are similar to the agreement in this case. Third, Talisman argues the trial court abused its discretion in issuing the temporary injunction because Matrix might not be entitled to a permanent injunction at trial "forever barring Talisman from drilling wells." Finally, Talisman argues Matrix demonstrated no irreparable injury because any injury could be compensated by damages.

#### **APPLICABLE LAW AND STANDARD OF REVIEW**

The decision to grant or deny a temporary injunction lies within the sound discretion of the trial court. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending trial on the merits. *Id.* Generally, to obtain a temporary injunction, a party must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* However, a party seeking a temporary injunction to enforce a restrictive covenant is not required to prove irreparable injury;

it is only required to prove that the defendant intends to do an act that would breach the covenant. *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, pet. denied).

We cannot reverse an order granting a temporary injunction unless the trial court clearly abused its discretion. *Butnaru*, 84 S.W.3d at 204; *Munson*, 948 S.W.2d at 815. A trial court abuses its discretion when it misapplies the law to the established facts or when the evidence does not reasonably support the conclusion that the applicant has a probable right to recovery. *Munson*, 948 S.W.2d at 815. In determining whether there has been an abuse of discretion, we view the evidence in the light most favorable to the trial court's temporary injunction ruling, and indulge every legal presumption in favor of its ruling. *Id.*; *Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed).

#### **FAILURE TO PROPERLY CONSTRUE THE AGREEMENT**

Talisman argues the trial court abused its discretion by enjoining it from proposing wells to be drilled under the agreement because it misconstrued section 8 of the agreement, which sets out procedural requirements for proposing new well locations on the Cooke Ranch.<sup>4</sup> In response, Matrix points out that Talisman did not challenge the trial court's finding that Talisman violated section 16 of the agreement. According to Matrix, the trial court's finding regarding section 16

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<sup>4</sup>Section 8 provides:

Except as otherwise provided in the preceding Section 7 or in this Section 8, no well shall be drilled on the leased acreage in search of oil or gas unless all parties hereto consent to the drilling of such well; provided, however, that neither the provision of said Section 7 nor this Section 8 shall operate to relieve either party hereto from the obligations of reasonable development of the leased acreage for oil and gas or the obligation to prevent drainage of oil and gas from the leased acreage imposed by the jointly owned leases, as certain of such leases are modified by this agreement. In the event the parties hereto cannot agree upon the drilling of any well of oil or gas, which well is not covered by the preceding Section 7, then the party desiring to drill such well shall give the other party written notice of such desire, specifying the location, proposed depth and estimated cost of such well. The other party shall have thirty days after receipt of such notice within which to notify the party desiring that such well be drilled whether or not he or it elects to participate in the cost of drilling such well at such location. Failure to give such notice within such period of thirty days shall be construed as an election by said other party not to participate in the cost of drilling such well at such location. . . .

independently supports the temporary injunction and this court should affirm the trial court's ruling on that basis. In its reply brief, Talisman argues that section 16 did not provide an independent ground for the trial court's temporary injunction, but even if it did, this ground for granting the temporary injunction was meritless.

Section 16 provides that “[a]ll wells drilled hereunder shall be drilled on a competitive basis at the usual rates prevailing in the area...” It further provides that an operator could use its own tools and equipment in drilling wells, but its charges for the tools and equipment “shall not exceed the prevailing rate in the field, which rate shall be agreed to before the commencement of a well. . . .” At the temporary injunction hearing, Matrix presented evidence that Talisman was violating section 16 by exceeding the prevailing market rates for tools and equipment—often by well over 60%. Additionally, Matrix presented evidence that Talisman was not conferring to reach an agreement on these matters as required in section 16. In its temporary injunction order, the trial court found that “Matrix has demonstrated a likelihood that the wells Talisman is proposing to drill on the Cooke Ranch, namely the E-1H and G-5H and G-6H wells...were proposed in violation of Sections 8 and 16 of the [joint operating agreement].” We conclude that section 16 of the agreement provided an independent ground for the trial court's temporary injunction.

Because Talisman has failed to attack all independent grounds supporting the trial court's ruling, we cannot address Talisman's argument that the trial court erred in construing section 8 of the agreement. An appellant must attack all independent grounds that fully support the challenged ruling. *A New Hope Health Care, Inc. v. Garcia*, No. 13-16-00201-CV, 2016 WL 4578410, at \*2 (Tex. App.—Corpus Christi Sept. 1, 2016, no pet.). When an appellant fails to attack all independent grounds supporting the challenged ruling, we must affirm the ruling. *Britton v. Tex. Dept. of Criminal Justice*, 95 S.W.3d 676, 681-82 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The rationale for this rule is that if an appellant assigns no error to an independent ground

supporting the ruling, then we must accept the validity of the unchallenged ground, which renders any error in the challenged ground harmless. *Oliphant Fin. L.L.C. v. Hill*, 310 S.W.3d 76, 78 (Tex. App.—El Paso 2010, pet. denied). This rule has been applied in many different contexts. *See Britton*, 95 S.W.3d at 681-82 (plea to the jurisdiction); *Oliphant*, 310 S.W.3d at 76 (judgment dismissing for want of prosecution); *Garcia*, 2016 WL 4578410, at \*2 (order denying a motion to dismiss for failure to file an expert report). Furthermore, an appellant is precluded from raising a new issue in a reply brief. *Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 72 (Tex. App.—San Antonio 2011, no pet.); *Garcia*, 2016 WL 4578410, at \*2. Because Talisman failed to attack all independent grounds supporting the temporary injunction in its original brief, we must conclude that any possible error in construing section 8 of the agreement was harmless.

#### **EXCLUSION OF EXPERT TESTIMONY**

Talisman argues the trial court abused its discretion in excluding the testimony of its expert witness. According to Talisman, the trial court would have been far less likely to have erred in its interpretation of the agreement if it had admitted and considered the testimony of its expert.

We review a trial court’s decision to exclude expert testimony for an abuse of discretion. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). A trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference to any guiding rules or principles. *Id.*

At the temporary injunction hearing, Talisman offered its expert witness as a “professional landman to testify as to the custom and usage in the industry in the history of [joint operating agreements].” Talisman further explained that it wanted “to show that the [agreement in this case] is itself based on a model form” and “there are certain customs and usages in those forms in terms of what the consent means and how it’s intended to work.” Talisman further advised the trial court

that its expert's testimony concerned the construction of sections 5 and 8 of the agreement. The trial court excluded the expert testimony.

During Talisman's offer of proof, its expert testified that he was familiar with the model form agreements. According to Talisman's expert, the philosophy behind all of the model form agreements was that aggressive drilling under the joint operating agreement should be promoted and rewarded. Talisman's expert also testified that he disagreed with Matrix's interpretation of sections 5 and 8 of the agreement in this case.

The only case Talisman cites to support its argument is *Valence Operating Co. v. Anadarko Petroleum Corp.*, 303 S.W.3d 435 (Tex. App.—Texarkana 2010, no pet.). In *Valence*, the appellate court held the trial court properly admitted expert testimony about the common understanding of the term "commencement of operations" as used in a joint operating agreement because the expert's testimony was relevant and appropriate to aid a jury in determining a fact issue. *Id.* at 443-44.

Unlike the situation presented in *Valence*, the expert's testimony in this case was not presented to explain the meaning of a specific industry term to a jury. Rather, the expert's testimony was presented to aid the trial court in construing the agreement. The trial court could have properly concluded that the expert's testimony was not necessary to aid the court in construing the agreement. Therefore, the trial court's decision was not arbitrary or unreasonable and it did not abuse its discretion in excluding the expert's testimony.

Furthermore, the expert's testimony concerned sections 5 and 8 of the agreement. We have already concluded that section 16 provided an independent ground for the temporary injunction. Therefore, even if the trial court had abused its discretion in excluding the expert's testimony, any error in excluding the testimony would be harmless. *See* TEX. R. APP. P. 44.1(a)(1) (providing

appellate courts may not reverse a trial court's ruling unless the error complained of probably caused the rendition of an improper judgment).

### **RIGHT TO PERMANENT INJUNCTION**

Next, Talisman argues that the trial court abused its discretion in granting the temporary injunction because it was clear that Matrix would not be entitled to a permanent injunction at trial "forever barring Talisman from drilling wells." In support of this argument, Talisman points to evidence in the record indicating that the parties might lose their lease rights in the Cooke Ranch in late January 2017.

At a temporary injunction hearing, an applicant is not required to show that it will prevail on final trial. *Walling v. Metcalf*, 863 S.W.2d 56, 58 (Tex. 1993); *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968). The only question is whether the applicant is entitled to preservation of the status quo pending trial on the merits. *Metcalf*, 863 S.W.3d at 58. A temporary injunction should only issue if the applicant establishes a probable right on final trial to the relief sought, and a probable injury in the interim. *Metcalf*, 863 S.W.2d at 57; *Sun Oil Co.*, 424 S.W.2d at 218. A trial court may grant a temporary injunction to preserve the status quo pending trial even if the applicant's pleadings do not include a claim for equitable relief on final trial on the merits. *See Metcalf*, 863 S.W.2d at 58.

We reject Talisman's argument. Matrix sought both equitable relief and damages in its pleadings. Additionally, the trial court granted the temporary injunction on November 26, 2015, and set the case for trial on the merits on October 3, 2016. Thus, the case was set to go to trial before late January 2017, the time when the parties could possibly lose their lease rights. Because Matrix demonstrated a probable right on final trial to the relief sought and a probable injury in the interim, the trial court did not abuse its discretion in granting the temporary injunction.



**IRREPARABLE INJURY**

Finally, Talisman argues the trial court abused its discretion in granting the temporary injunction because Matrix failed to demonstrate irreparable injury. An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204. Here, the trial court found irreparable injury or its equivalent on grounds that (1) Matrix had demonstrated a likelihood that sections 8 and 16 constituted covenants running with the land; (2) that Talisman's actions threatened injury to real property; and (3) that the harm could not be measured by any pecuniary standard.

In its original brief, Talisman does not challenge the trial court's findings that the threatened injuries to Matrix were irreparable because they caused damage to Matrix's interest in real property, that sections 8 and 16 of the agreement were covenants running with the land, and that Talisman's violations of sections 8 and 16 were substantial, ongoing violations of these covenants. *See Butnaru*, 84 S.W.3d at 211 (noting equitable relief may be granted when a dispute involves real property); *Milton*, 948 S.W.2d at 815 (recognizing that a party seeking a temporary injunction to enforce a restrictive covenant is not required to prove irreparable injury; it is only required to prove that the defendant intends to do an act that would breach the covenant). Instead, Talisman attempts to challenge some of these findings for the first time in its reply brief. Again, Talisman is precluded from raising new issues in its reply brief. *See Vogt*, 373 S.W.3d at 72; *Garcia*, 2016 WL 4578410, at \*2. Because Talisman did not attack all of the trial court's irreparable injury or equivalent findings in its original brief, we must uphold the trial court's ruling. *See Garcia*, 2016 WL 4578410, at \*2; *Britton*, 95 S.W.3d at 681-82.

But even if Talisman had challenged all of the trial court's irreparable injury or equivalent findings, we would reject its irreparable injury argument. The record shows that Matrix presented

evidence that Talisman's drilling operations had caused waste and that Talisman's accounting and metering errors had led to losses that could not be calculated. Viewing this evidence in the light most favorable to the trial court's ruling, we conclude the trial court did not abuse its discretion in finding irreparable injury.

**CONCLUSION**

The trial court's temporary injunction order is affirmed.

Karen Angelini, Justice