In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00212-CV

PBEX II, LLC; PBEX OPERATIONS, LLC; PBEX OPERATING, LTD.; WORD B. WILSON INVESTMENTS, LP; PRIMERO ENERGY, LLC; CHEL-TRAND HOLDINGS, LLC; WPW PERMIAN LLC; CBS PERMIAN, LLC; AND TORCH OIL & GAS COMPANY, APPELLANTS

V.

DORCHESTER MINERALS, L.P. AND DORCHESTER MINERALS OPERATING, L.P., APPELLEES

On Appeal from the 142nd District Court
Midland County, Texas
Trial Court No. CV53556, Honorable David G. Rogers, Presiding

April 28, 2023

OPINION

Before QUINN, C.J., and DOSS and YARBROUGH, JJ.

This appeal addresses the issue of whether a non-operating working interest in an oil and gas lease may be adversely possessed. The trial court held Dorchester[1] adversely possessed a working interest in an oil and gas lease. For more than a quarter of a

[1] Dorchester Minerals, L.P. and Dorchester Minerals Operating, L.P. (collectively, "Dorchester").

century, Dorchester paid the operating expenses attributable to the working interest, paid the royalties owed under the lease on the production, and retained the revenues from the sale of the minerals (less expenses, royalties, and taxes)–while Torch[2] did none of these things. Because we find adverse possession of non-operating working interests is permitted under Texas law, we affirm the summary judgment.[3]

On April 19, 2017, Torch filed suit against Dorchester under the theories of money had and received and constructive trust, and later added a claim for breach of contract. Dorchester, after filing its original answer and counterclaims, added the PBEX[4] parties as third-party defendants. In addition to other claims, Dorchester claimed trespass-to-try-title by adverse possession against PBEX and Torch. Dorchester also asserted adverse possession as an affirmative defense against Torch's claims and PBEX's third-party counterclaims. Torch and Dorchester filed cross-motions for summary judgment on the issue of adverse possession. The trial court granted Dorchester's motion and denied Torch's motion. Torch and PBEX now appeal the summary judgment granted in favor of Dorchester.[5]

[2] Torch Oil & Gas Company ("Torch").

[3] Originally appealed to the Eleventh Court of Appeals, this appeal was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. Should a conflict exist between precedent of the Eleventh Court of Appeals and this Court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

[4] PBEX II, LLC; PBEX Operations, LLC, PBEX Operating, Ltd., Word B. Wilson Investments, LP, Primero Energy, LLC, Chel-Trand Holdings, LLC, WPW Permian LLC; and CBS Permian, LLC (collectively "PBEX").

[5] The remaining claims were nonsuited making the summary judgment final and appealable.

Torch raises the following issues on appeal: (1) Dorchester could not establish adverse possession as a matter of law; (2) Dorchester failed to present sufficient evidence to establish its right to summary judgment; and (3) the trial court erred in granting a take-nothing judgment on all of Torch's claims against Dorchester. PBEX joins Torch's issues one and two and also raises its own separate issue: in the alternative, Dorchester's adverse possession was limited to the wells and the depths that were already drilled. Because Dorchester adversely possessed the working interest over the twenty-six years prior to Torch's filing the underlying lawsuit, we affirm the judgment of the trial court.

THE UNCONTROVERTED FACTS

The parties agree in their pleadings on the following facts: The oil and gas working interest that is the subject of this litigation was first acquired by Torch's predecessor-in-interest, Felmont Oil Corporation. In May 1982, Felmont executed an oil and gas lease (the "Willis Lease") with John Jerome Willis, Jr. and others, as lessors, to lease oil, gas, and other minerals underlying Section 4, Block 39, of the T&P Railroad Company Survey, T-3-S, located in Midland County ("Section 4"). Under the Willis Lease, Felmont became owner of 25% of the working interest in Section 4 (the "Working Interest").[6]

[6] A "working interest" is an operating interest under an oil and gas lease that bears all the costs of production and is held subject to the payment of royalties. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 714 n.9 (Tex. 2016) (citing *H. G. Sledge, Inc. v. Prospective Inv. & Trading Co., Ltd.*, 36 S.W.3d 597, 599 n.3 (Tex. App.—Austin 2000, pet. denied) (citing 8 Howard R. Williams & Charles J. Meyers, Oil & Gas Law note 1, 1191 (1999)); *see generally Kinder Morgan Prod. Co., LLC v. Scurry Cty. Appraisal Dist.*, 637 S.W.3d 893, 898–99 (Tex. App.—Eastland 2021, pet. denied) (working interest in a lease bears the cost of production, as opposed to royalty interest). "Working interest" is technically synonymous with leasehold interest, and that is the context in which it is used in this opinion. *See Broesche v. Jacobson*, 218 S.W.3d 267, 272–73 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also St. Paul Fire & Marine Ins. Co. v. Petroplex Energy, Inc.*, 474 S.W.3d 454, 460 (Tex. App.—Eastland 2015, pet. dism'd) (working interest acquired through assignment of 100% of lease).

In February 1983, Felmont entered into a Joint Operating Agreement (the "JOA") with the other working interest owners that had leased the minerals under Section 4. The appointed operator under the JOA drilled two producing gas wells: the Moreland No. 1 and Moreland No. 2 wells (the "Moreland Wells").

In 1989, Torch succeeded to the interests of Felmont. In May 1990, Torch conveyed its interest in Section 4 to Dorchester's predecessors-in-interest, SASI Minerals Company ("SASI") and Baytech, Inc. ("Baytech"), and others (the "Assignment").[7] In June 1990, Torch, as seller, and SASI and Baytech, as buyers, also entered into an unrecorded Purchase Sale Agreement (the "PSA") for the sale of additional oil and gas interests.[8] Following these transactions, in October 1990, the appointed operator under the JOA at that time, Santa Fe Minerals, Inc. ("Santa Fe"), issued a division order confirming the reduction of Torch's interest in Section 4 to 0% (the "Division Order), and the Division Order was signed by Torch.[9] At the time of the conveyance, the Moreland Wells were still producing gas.

From May 1990 until September 21, 2016, Dorchester and its predecessors performed all the functions of the Working Interest owner: paying their share of the costs

[7] The parties dispute to what extent the interests of Torch were conveyed. Torch claims the Assignment passed only a 1/24 fee mineral interest in Section 4, while Dorchester contends all of Torch's interest in the tract was conveyed. We do not opine on the interpretation of the Assignment.

[8] While the PSA forms the basis of Torch's breach of contract claim against Dorchester, there is no evidence presented by any party that Dorchester was assigned the interests of SASI and Baytech in the agreement. We also note the copy of the PSA presented by the parties in the record does not contain an exhibit whereby Torch transferred any Section 4 interests, although both Torch and Dorchester appear to agree the PSA covered Section 4.

[9] Torch contends the signing of the Division Order was a "mistake" but does not cite any legal authority as to what effect its unilateral "mistake" has on the legal relationships of the parties, if any.

of production; receiving revenues from the sale of the Working Interest's share of gas; paying royalties to the lessors under the Willis Lease; and making elections required under the JOA. Torch did not file a lawsuit or take any other action to recover title to the Working Interest between 1990 and 2016.

On June 1, 2016, Torch assigned all of its interest in the Willis Lease and the minerals under Section 4, without limitation or exception, to PBEX II, LLC. Under this assignment, Torch no longer retained any interest in the Willis Lease or the mineral estate under Section 4.

On September 21, 2016, Torch sent a letter to Dorchester stating Torch "mistakenly notified the operator [under the JOA] that Torch had assigned its leasehold working interest in the Moreland Wells to [Dorchester's predecessors]" in 1990, thereby allowing Dorchester's predecessors to take "possession of Torch's interest." The letter also stated Torch "rescind[ed] and cancel[ed] any and all authority previously granted to [Dorchester and its predecessors] to possess" the Working Interest.[10]

Torch subsequently attempted to negotiate the execution of a "correction" by Dorchester to confirm that Torch retained the Working Interest in 1990, which Dorchester refused. Torch filed suit not long thereafter.

[10] Torch claims this letter was its revocation of the Division Order that was issued by Santa Fe under the JOA in 1990. However, we note there is no evidence in the record that any similar communication was made to the operator under the JOA in 2016. Further, the letter is dated after the June 1, 2016 conveyance between Torch and PBEX in which PBEX received all of Torch's rights in the Working Interest and Section 4, if any.

STANDARD OF REVIEW

"We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Knott*, 128 S.W.3d at 215; *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997)." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) (citations original).

"If the movant initially establishes a right to summary judgment on the issues expressed in the motion, then the burden shifts to the nonmovant to present to the trial court any issues or evidence that would raise a fact issue or otherwise preclude summary judgment." *Veliz v. Wells Fargo Bank, N.A.*, No. 07-18-00317-CV, 2020 Tex. App. LEXIS 3069, at *7 (Tex. App.—Amarillo Apr. 13, 2020, no pet.) (mem. op.) (citing *Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678–79 (Tex. 1979)). "To determine if a fact question exists, we must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented." *Masgas v. Anderson*, 310 S.W.3d 567, 572 (Tex. App.—Eastland 2010, pet. denied) (citing *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007)).

The parties in this matter agree on the operative facts of the underlying case, and therefore there are no disputed genuine issues of material fact precluding summary judgment.

ANALYSIS

I. DORCHESTER'S ADVERSE POSSESSION CLAIM

Dorchester claimed adverse possession under the twenty-five-year statute of limitations as both the basis for Dorchester's trespass-to-try-title claim and an affirmative defense to the claims of Torch and PBEX. *Brumley v. McDuff*, 616 S.W.3d 826, 832 (Tex. 2021);[11] TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.027; 16.021(1), (3). Whether Dorchester established its claim to the Working Interest by adverse possession is dispositive of whether the trial court erred in granting Dorchester's summary judgment and denying Torch's cross-motion for summary judgment.

By way of its adverse possession claim, Dorchester claimed title to the Working Interest. The purpose of Texas's adverse possession statutes is to promote stability and marketability of title and to encourage the cultivation and development of property.[12]

[11] "In a trespass-to-try-title action, a plaintiff may prove legal title by establishing: (1) a regular chain of title of conveyances from the sovereign to the plaintiff; (2) a superior title to that of the defendant out of a common source; (3) title by limitations (i.e., adverse possession); or (4) possession that has not been abandoned." *Brumley,* 616 S.W.3d at 832 (citing *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994) (citing *Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964)).

[12] *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 757 (Tex. 2003) (citing *Republic Nat. Bank of Dallas v. Stetson*, 390 S.W.2d 257, 262 (Tex. 1965) ("The policy behind statutes which permit adverse possession is the settlement and repose of titles."); *Wilson v. Daggett*, 31 S.W. 618, 619 (Tex. 1895)); *see also Taylor v. Watkins*, 26 Tex. 688, 690 (1863) ("It has been the policy of our legislature to favor and protect that class of people who use and cultivate the soil, against the aggressions of another class who make a livelihood by turning them out of their homes wherever they can find a defective title[.]"); *Todd v. Bruner*, 365 S.W.2d 155, 159–60 (Tex. 1963) ("The statutes of limitation are statutes of repose. They are intended to settle and support land titles . . . ."). "Without such laws, 'time, instead of lending a helping hand to cure apparent defects and remove opposing claims, will only be the means and afford a ready opportunity of rendering [titles] less secure against mistakes, frauds, and perjuries. The older the title the less secure it becomes against such attacks.'" *Id*. (citing *Howard v. Colquhoun*, 28 Tex. 134, 145 (1866)).

Statutes of limitation and repose offer certainty by barring stale claims from coming forward after a reasonable time thereby ensuring the settlement of title.[13]

In this case, Dorchester and its predecessors exercised rights belonging to the owners of the Working Interest for over twenty-six years prior to Torch's filing of the underlying lawsuit. By way of their claims, PBEX and Torch now seek to disturb the title to the Working Interest. As discussed below, the statute of limitations applies in this case, and Dorchester and its predecessors adversely possessed the Working Interest. For the reasons stated below, we overrule Torch and PBEX's first issue.

a. NON-OPERATING WORKING INTERESTS ARE SUBJECT TO ADVERSE POSSESSION

PBEX and Torch both argue that the Working Interest is "nonpossessory" in nature, and therefore not subject to adverse possession as a matter of law. PBEX and Torch insist that because the Working Interest is a "non-operator" interest, it is necessarily nonpossessory in nature, and nonpossessory interests in minerals are not subject to adverse possession. *See generally Moore v. Moore*, 568 S.W.3d 725, 733 (Tex. App.—Eastland 2019, no pet.) (possessory interests in minerals are subject to adverse possession, while nonpossessory interests, such as royalty interests, are not) (citations omitted).

[13] "Statutes of limitations are designed 'to compel the assertion of claims within a reasonable period while the evidence is fresh in the minds of the parties and witnesses' and to 'prevent litigation of stale or fraudulent claims.'" *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 199 (Tex. 2003) (citations omitted). "Society's interest in repose is to have disputes either settled or barred within a reasonable time. It is based on the theory that the uncertainty and insecurity caused by unsettled claims hinder the flow of commerce." *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (quoting *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 545 (Tex. 1986)).

In Texas, a working interest owner as a lessee under an oil and gas lease is granted the right to possess all of the oil, gas, and other minerals underlying the leased estate, subject to the payment of royalties to the lessor. *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003). Working interests in oil and gas leases are therefore possessory interests in real property and subject to adverse possession as a matter of law. *Id*.; *see also Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80–81 (Tex. 1989). Contrary to the urging of PBEX and Torch, there is no distinction between "operating" and "non-operating" working interests under Texas Law–all working interests are possessory. *Id*. Accordingly, the Working Interest is subject to adverse possession, and Dorchester was required to demonstrate all the requirements of adverse possession in order to prevail on its motion for summary judgment. *Pool*, 124 S.W.3d at 192–93.

b. DORCHESTER ACTUALLY, VISIBLY APPROPRIATED THE WORKING INTEREST.

PBEX and Torch argue that Dorchester did not meet the "actual, visible appropriation" requirement for adverse possession under the twenty-five-year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.027;[14] 16.021(1),(3).[15] In a slight

[14] ADVERSE POSSESSION: 25-YEAR LIMITATIONS PERIOD NOTWITHSTANDING DISABILITY. A person, regardless of whether the person is or has been under a legal disability, must bring suit not later than 25 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

[15] DEFINITIONS. In this subchapter:

(1) "Adverse possession" means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.

* * *

(3) "Peaceable possession" means possession of real property that is continuous and is not interrupted by an adverse suit to recover the property.

variation on their initial contention that "non-operator" working interests are not subject to adverse possession, PBEX and Torch contend, under the JOA, only the operator is engaged in the process of drilling and producing the minerals, and therefore only the operator can adversely possess the Working Interest.[16] PBEX and Torch argue the only way to "appropriate" the working interest in a leasehold is to conduct drilling operations, which is solely the operator's right to do under the JOA. They also argue Dorchester never "set foot on the property" and "virtually" possessed the Working Interest. All of these arguments are without merit, as PBEX and Torch attempt to conflate surface interests in real property with subsurface mineral interests.

No one can ever physically "set foot" on the minerals underlying a tract of land. For that reason, adverse possession of the mineral estate is distinct from adverse possession of the surface estate. *See Pool*, 124 S.W.3d at 195–96. Ownership of the "mineral estate" is the right to produce and possess the minerals "in place," and adverse possession of the minerals requires an act hostile to those rights. *Id*. Removal of the minerals is necessarily an act hostile to the mineral owner's right to exclusively produce and possess the minerals. *Id*. When the minerals are removed, the mineral estate is also depleted, which is antithetical to the mineral owner's rights to produce and possess the minerals in the estate. *Id*.

In this case, it is undisputed that, for twenty-six years:

(1) gas was being produced from Section 4 by the JOA operator;

[16] Torch and PBEX focus on the language from *Pool* stating: "In the case of oil and gas, [adverse possession of minerals] means drilling and production of oil or gas." *Pool* 124 S.W.3d at 193.

(2) the operator sold Torch's Working Interest share of the production and/or delivered the share of production to Dorchester and its predecessors;

(3) the operator turned over the revenues from the sale of the Working Interest share of production to Dorchester and its predecessors;

(4) the operator sent invoices for payment of expenses attributable to the Working Interest share of production to Dorchester and its predecessors, which Dorchester and its predecessors paid;

(5) Dorchester and its predecessors paid all the taxes due on the Working Interest;

(6) the operator under the JOA requested Dorchester and its predecessors make elections and "consent" or "not consent" for proposed operations on Section 4, and Dorchester and its predecessors made those elections; and

(7) Torch did not file suit to recover title, make any communications to the operator or Dorchester, pay any expenses, or receive any revenue from production on Section 4.

The Working Interest is a right to possess and produce the minerals underlying Section 4 under the Willis Lease. Those minerals were continually removed and sold for over twenty-six years, substantially depleting the mineral estate. There is no question the minerals were drilled and produced as is required under Texas Law for adverse possession. Nonetheless, PBEX and Torch insist, in order for there to be a hostile act to establish adverse possession, Dorchester and its predecessors had to literally perform the drilling and production activities themselves. However, the fact that Dorchester and its predecessors *acted as the owners* of the Working Interest for over twenty-six years is an act that is hostile sufficient to establish adverse possession.

In *Natural Gas Pipeline Co. of America v. Pool*, oil and gas lessors alleged their leases terminated sixteen and twenty-nine years prior to filing suit, and the leasehold under the leases reverted to the lessors. *Pool*, 124 S.W.3d at 190–92. The *Pool* Court

determined, even if the subject leases had terminated and the leasehold had reverted to the lessors, the lessee's continued payments of royalties on production to the lessors while the lessees retained the remainder of the production proceeds was hostile to the lessors' title to the leasehold. *Id*. at 197.[17] In determining the continued payment of royalties after the alleged expiration of leases was hostile to the lessors' rights, the *Pool* Court followed the rationale of the Michigan Court of Appeals regarding adverse possession of working interests. *Pool* 124 S.W.3d at 197 n.40 (citing *see generally Thomas v. Rex A. Wilcox Trust*, 185 Mich. App. 733, 463 N.W.2d 190, 192–93 (Mich. Ct. App. 1990)).

In *Thomas*, when considering the adverse possession of a working interest by other working interest owners, the Michigan Court of Appeals determined "[a]cts of ownership which openly and publicly indicate an assumed control or use consistent with the *character of the premises* are sufficient [emphasis added]" to adversely possess a working interest, and concluded that the working interest owners in that case "had openly, notoriously, exclusively, and successively possessed full working interests in the oil and gas leases under color of title. They also received *one hundred percent* of the working interests proceeds generated by operation of the wells. Each assignment of the interests in the leases was recorded with the county register of deeds [emphasis added]." *Thomas*, 463 N.W.2d at 192–93. Of the adverse possessor working interest owners, only one, Wilcox, acted as the operator, but all working interest owners, operator and non-operator

[17] The *Pool* Court expressed it did not address whether the leases had terminated as the determination of adverse possession was dispositive. *Pool*, 124 S.W.3d at 190, 192, and 194 n.22.

alike, were found to have adversely possessed the full working interest in the subject minerals by their exercise of ownership of the entire working interest. *Id*.

The Texas Supreme Court applied these same principles in *BP America Production Co. v. Marshall*, in which a lessor, Vaquillas, claimed its lease had terminated due to cessation of production, and the lessee, Wagner, claimed it had adversely possessed the leasehold interest under the ten-year statute of limitations. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 69–71 (Tex. 2011).[18] At trial, a jury found Wagner had met the requirements under the statute of limitations and adversely possessed the leasehold by: paying taxes, drilling, production of oil and gas, paying royalties, and establishing its adverse possession of the leasehold through a duly registered deed. *Id*. at 69–70. Vaquillas, on appeal, did not contest the jury's findings; rather, it claimed that none of these acts by Wagner were "hostile" to Vaquillas's mineral title because, after the termination of the lease, Vaquillas and Wagner became cotenants. *Id*.

Addressing Vaquillas's argument, the *Marshall* Court recognized that "[c]otenants must surmount a more stringent requirement because acts of ownership 'which, if done by a stranger, would per se be a disseizin' are not necessarily such when cotenants share an undivided interest." *Id*. at 70 (citation omitted). Nonetheless, the Court held: "The test for establishing adverse possession, *both between strangers and cotenants*, is whether the acts unmistakably assert a claim of 'exclusive ownership' by the occupant [emphasis added]." *Id*. at 71 (citations omitted). The Court then focused on the rights of an unleased

[18] "Vaquillas" is identified in the opinion collectively as Vaquillas Ranch Co., Ltd., Vaquillas Unproven Minerals, Ltd., and Vaquillas Proven Minerals, Ltd., while "Wagner" is identified collectively as Wagner Oil Co. f/k/a Duer Wagner & Co., Jacque Oil & Gas Limited, Duer Wagner, Jr., Duer Wagner III, Bryan C. Wagner, James D. Finley, Dennis D. Corkran, David J. Andrews, H.E. Patterson, Brent Talbot, Scott Briggs, and Gysle R. Shellum. *Marshall*, 342 S.W.3d at 62.

cotenant, which is to receive "'the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same' as opposed to a fractional royalty from production paid to the lessor." *Id*. at 71–72 (citing *Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965)). The Court agreed with Vaquillas that the acts of drilling and production were not hostile between cotenants and could not be used to establish adverse possession of the leasehold by Wagner. *Id*. However, the Court found the payment of royalties by Wagner and its predecessors for sixteen years, without accounting to Vaquillas for the cotenant's share of production, constituted the hostile act sufficient to establish adverse possession of the leasehold interest. *Id.* at 72. In both *Pool* and *Marshall*, drilling wells were not hostile acts and were not dispositive on the issue of adverse possession. But the payments of royalties in conformity with allegedly expired leases were the hostile acts.

Here, like the lessees in *Pool* and *Marshall*, and like the working interest owners in *Thomas*, Dorchester and its predecessors' "administration" of the Working Interest for over twenty-six years established Dorchester's adverse possession claim to the Working Interest leasehold. By openly usurping all the benefits, liabilities, and obligations for the Working Interest, Dorchester and its predecessors held themselves out to the world as *the* owners, "an unmistakably hostile and unequivocal assertion of title inconsistent with the existence of" Torch's claim. *Marshall*, 342 S.W.3d at 72. Torch, like the lessors and working interest owners in *Pool*, *Marshall*, and *Thomas*, failed to exercise any rights whatsoever with regard to the Working Interest during the twenty-five-year limitations period.

As in *Pool*, Torch and PBEX's claims to the Working Interest "are the types of claims that statutes of limitations were intended to foreclose." *Pool*, 124 S.W.3d at 199. By lying dormant on its claim to the Working Interest for twenty-six years, Torch acquiesced title to Dorchester, and Dorchester and its predecessors adversely possessed the Working Interest by acting as the exclusive owners of the Working Interest. *Supra*; *Marshall*, 342 S.W.3d at 71.

c. THE OPERATOR ADVERSELY POSSESSED THE WORKING INTEREST ON BEHALF OF DORCHESTER

PBEX, Torch, and the dissent focus on the disclaimer of agency between the operator and the non-operator parties under the JOA in arguing that Dorchester may not rely on drilling and production by the operator for adverse possession. *Tawes v. Barnes*, 340 S.W.3d 419, 429 (Tex. 2011).[19] However, Torch insists that it never assigned the Working Interest to Dorchester and its predecessors in the first place, and, according to Torch, Dorchester is not a party to the JOA. Therefore, Dorchester was not bound by the JOA's terms, and Dorchester and the operator could create an agency relationship by conduct outside the bounds of the JOA.[20]

Even if agency were disclaimed by Dorchester under the JOA, the actions of the operator would still allow Dorchester to adversely possess the Working Interest. Rather, the operator's production of the minerals and accounting for the Working Interest owner's

[19] ". . . JOAs are used for the primary purpose of allocating costs and revenues from production amongst the parties to the agreement, not to permanently transfer ownership interests in pooled oil and gas leases."

[20] "An agency relationship does not depend upon express appointment or assent by the principal; rather, it may be implied from the conduct of parties under the circumstances." *Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992).

share is analogous to that of a landlord/tenant relationship, in which the landlord gives permission to the tenant to use and cultivate the land, but the tenant is not an agent of the landlord. *See generally Woodmark Austin Ltd. P'ship v. Coinamatic, Inc.*, No. 07-07-00054-CV, 2007 Tex. App. LEXIS 9672, at *6 (Tex. App.—Amarillo Dec. 11, 2007, no pet.) (mem. op.).[21]

It is well established under Texas Law that adverse possession can occur through a tenant.[22] Similarly, when the operator began paying all the production proceeds, sending all requests for payment, and sending all election requests to Dorchester and its predecessors, the operator recognized Dorchester and its predecessors as the landlord/Working Interest owners. By "attorning to" Dorchester and its predecessors, the operator, like a surface tenant on behalf of a landlord claimant, adversely possessed the Working Interest on behalf of Dorchester and its predecessors for over twenty-five years.[23]

d. DORCHESTER CONTINUOUSLY POSSESSED THE WORKING INTEREST

Adverse possession under the limitations statutes requires that possession "is continuous and is not interrupted by an adverse suit to recover the property." TEX. CIV.

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[21] "To create a landlord-tenant relationship, no particular words are necessary, but it is indispensable that it should appear to have been the intention of one party to dispossess himself of the right to exclusive possession of the premises and of the other to possess that right."

[22] *See Salinas v. Shaw*, 198 S.W. 605 (Tex. App.—San Antonio 1917, writ dism'd w.o.j.); *Hufstedler v. Barnett*, 182 S.W.2d 504 (Tex. App.—Amarillo 1944, writ ref'd w.o.m); *Beauchamp v. Beauchamp*, 239 S.W.2d 191 (Tex. App.—Eastland 1951, writ ref'd n.r.e.); *Hines v. Pointer*, 523 S.W.2d 733 (Tex. App.—Fort Worth 1975, writ ref'd n.r.e.); *Strong v. Garrett*, 224 S.W.2d 471, 476 (Tex. 1949); *but cf. Gordon v. Gordon*, 224 S.W. 716, 717 (Tex. App.—Texarkana 1920, no writ) (tenant cannot adversely possess against his landlord).

[23] We note throughout both Torch's and PBEX's pleadings at the trial court they both complain that Dorchester "possesses" the Working Interest.

PRAC. & REM. CODE ANN. § 16.021(3). PBEX and Torch, including the dissent, argue the summary judgment evidence submitted by Dorchester shows one of Dorchester's predecessor's being in "non-consent," and they argue the "non-consent" interrupted the possession of the Working Interest under the twenty-five-year statute of limitations.[24]

Being in "non-consent" under the JOA meant Dorchester's predecessor did not affirmatively agree to participate in the costs of an activity proposed by the operator or other working interest owner, such as well drilling or reworking. The penalty for being in "non-consent" is Dorchester's predecessor would have been obligated to relinquish its share of production to the other "consenting" working interest owners temporarily. PBEX and Torch argue Dorchester's predecessor being in "non-consent" meant it was not entitled to receive possession of the minerals, thereby interrupting the adverse possession of the Working Interest. However, this argument ignores the fact that: (a) in order to be "non-consent," one must be recognized as a working interest owner under the JOA; (b) the production share that was to be relinquished by contract had to be credited to Dorchester's predecessor's account; and (c) the relinquishment of production was not a relinquishment of *title* to the Working Interest. *See Dorsett*, 164 S.W.3d at 663–64. Regardless of whether Dorchester's predecessors were in "non-consent," the Working Interest minerals continued to be depleted by the operator under the JOA, uninterrupted, for the exclusive benefit of Dorchester and its predecessors.

There is also no fact issue created by the predecessor's "non-consent," because the penalty of relinquishment only applies in the case that the proposed activity is *both*

[24] We note that this argument was not raised by Torch or PBEX at the trial court, and they are raising the issue on appeal for the first time.

undertaken *and* oil and gas is successfully produced. *See generally id*. PBEX and Torch provided no evidence in their responses to summary judgment that Dorchester's predecessor actually relinquished any production under the JOA's "non-consent" provisions, and there is no evidence the "non-consent" penalty was ever applied. Accordingly, the "non-consent" status of one of Dorchester's predecessors did not interrupt Dorchester and its predecessors' possession of the Working Interest.

II. DORCHESTER'S SUMMARY JUDGMENT EVIDENCE

PBEX and Torch both raise the issue that Dorchester's summary judgment evidence failed to establish Dorchester's right to summary judgment on its adverse possession claims. They argue the documents presented by Dorchester are incomplete, containing several temporal gaps, and therefore the evidence could not establish the elements of adverse possession. PBEX and Torch also argue the "Affidavit of William Casey McManemin," submitted by Dorchester in support of its motion, is "conclusory" and not competent evidence, and therefore does not serve to bridge the gaps in documentary evidence.

"A conclusory statement is one that does not provide the underlying facts to support the conclusion and, therefore, is not proper summary judgment proof." *Van Adrichem v. AgStar Fin. Servs., FLCA*, No. 07-13-00432-CV, 2015 Tex. App. LEXIS 11734, at *5 (Tex. App.—Amarillo Nov. 13, 2015, no pet.) (mem. op.) (citing *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ)). "Conclusory statements are not susceptible to being readily controverted." *Van Adrichem*, 2015 Tex. App. LEXIS 11734, at *5 (citing *see Eberstein v. Hunter*, 260 S.W.3d

626, 630 (Tex. App.—Dallas 2008, no pet.) (readily controvertible statements by an affiant are not per se conclusory)). "'Could have been readily controverted' does not mean that the summary judgment evidence could have been easily and conveniently rebutted, but rather indicates that the testimony could have been effectively countered by opposing evidence." *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997) (citation omitted). A statement which can be controverted through evidence in "deposition testimony, interrogatories, or other discovery" is per se not conclusory. *Id*.

In this case, the statements PBEX and Torch insist are conclusory are as follows:

From 1990 to 2016, [Dorchester and its predecessors]

(1) paid their proportion of the costs reflected in the Joint Interest Billings ("JIBs") under the Moreland JOA for the continued drilling and production of oil and gas from the Moreland Wells;

(2) received revenues from the sale of oil and gas from the Moreland Wells;

(3) paid royalties from those revenues;

(4) made elections under the Moreland JOA;

(5) paid taxes on the [Working Interest] annually before becoming delinquent for as long as twenty-five years; and

(6) made filings in public records that reflected possession and ownership of the [Working Interest].

Neither PBEX nor Torch challenge the basis for McManemin's knowledge of the above statements. In addition to the above statements, copious documents, though incomplete, were attached to McManemin's affidavit supporting each of his statements above. While brief, each of the statements are statements of fact that are susceptible to being readily controverted by evidence. For example, PBEX or Torch could have controverted item (3) by producing evidence Dorchester or its predecessors failed to pay

royalties under the Willis Lease, including eliciting the deposition testimony of the lessors under the Willis Lease. However, the only evidence presented by Torch in response to Dorchester's Motion for Partial Summary Judgment was a reference to the "Declaration of James Perry Bryan, Jr. is[sic] Support of Motion for Partial Summary Judgment" previously attached to Torch's cross-motion for summary judgment. Not only does Bryan's declaration fail to controvert the statements of McManemin, he also confirms and supports some of McManemin's statements.[25]

As the statements by McManemin are susceptible to being controverted by proof they are not conclusory, and McManemin's affidavit is competent summary judgment evidence. Because Torch and PBEX did not offer any evidence to controvert his statements, Dorchester, through the affidavit testimony of McManemin, conclusively established its right to adverse possession of the Working Interest. We overrule Torch and PBEX's second issue.

III. SUMMARY JUDGMENT DISMISSING TORCH'S CLAIMS

Having resolved the issue of adverse possession against Torch, it could not prevail on its claims against Dorchester. For the reasons stated below, we overrule Torch's third issue.

a. TORCH'S CLAIMS FOR MONEY HAD AND RECEIVED AND CONSTRUCTIVE TRUST REQUIRED TITLE TO THE WORKING INTEREST

[25] "SASI [. . .] would have started receiving monthly joint interest billings (JIB's) from Santa Fe shortly after the Santa Fe Transfer Order was mistakenly signed by Torch."

Torch's claims of money had and received and constructive trust were based upon the presumption that Torch still has title to the Working Interest. If Torch had retained title to the Working Interest, then the money that had been received by Dorchester and its predecessors during the twenty-five-year period may have belonged to Torch. However, because Dorchester's trespass-to-try-title claim was properly resolved against Torch, it could not maintain its claims. The trial court did not err in granting Dorchester a summary judgment dismissing Torch's claims for money had and received and constructive trust.

b. TORCH'S CLAIM FOR BREACH OF CONTRACT IS BARRED BY LIMITATIONS

Torch also raised a claim for breach of contract against Dorchester based upon an alleged failure in 1990 by SASI Group, Dorchester's predecessor-in-interest, to comply with the "Further Assurances" clause of the PSA. Torch claims SASI was required to tell Torch it made a "mistake" in executing division orders that gave away all of Torch's interest in Section 4 to SASI and others. The parties agree the alleged breach occurred in 1990, and unless tolled, the four-year-limitations period ran on Torch's breach of contract claim in 1994. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004; *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006).[26]

Torch argues the "fraudulent concealment" rule tolls the accrual of the statute of limitations on its claim to 2016, when it discovered the contract breach. However, Torch is not excused from exercising diligence in protecting its interests, and "[f]raudulent concealment only tolls the running of limitations until the fraud is *discovered or could have*

[26] "It is well-settled law that a breach of contract claim accrues when the contract is breached." *Via Net*, 211 S.W.3d at 314 (citing *Stine v. Stewart*, 80 S.W.3d 586, 592, (Tex. 2002)).

been discovered with reasonable diligence [emphasis added]." *Marshall*, 342 S.W.3d at 67; *Pool*, 124 S.W.3d at 198.

In this case, Torch alleges it executed the Division Order reducing its interest in Section 4 to *0%* in October 1990. Regardless of any "fraudulent concealment," Torch had actual notice of the alleged breach of contract the moment it received the Division Order threatening to give all of Torch's interests to other parties. In addition, Torch admits in its pleadings that the Moreland Wells on Section 4 were producing at the time that Torch executed the Division Order. After the "mistaken" execution, Torch stopped receiving income from Section 4 production, which should have prompted further inquiry by Torch that would have led to the discovery of the "mistake." Under these circumstances, but for Torch's failure to use reasonable diligence, it would have easily discovered its injury well within the four-year statute of limitations.[27] *See generally HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888 (Tex. 1998).

We find the fraudulent concealment rule does not apply to Torch's claim for breach of contract. Accordingly, the limitations period on Torch's claim expired four years after the alleged breach, which was in 1994. The trial court did not err in granting Dorchester a take-nothing summary judgment on Torch's claim for breach of contract.

C. TORCH'S CLAIM FOR ATTORNEY'S FEES REQUIRED IT TO PREVAIL ON BREACH OF CONTRACT

Torch claimed a right to attorney's fees under Chapter 38 of the Texas Civil Practice & Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001. In order to

[27] We also note that there is no act of "concealment" alleged by Torch on the part of Dorchester whereby Dorchester or its predecessors attempted to hide the "mistake" from Torch.

recover attorney's fees, one must prevail on a breach of contract claim and recover damages. *Glass v. Frank Glass Family P'ship*, No. 11-16-00047-CV, 2018 Tex. App. LEXIS 7089, at *10 (Tex. App.—Eastland Aug. 30, 2018, pet. denied) (citing *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)). Torch's breach of contract claim being barred by the statute of limitations, the trial court did not err in granting Dorchester a take-nothing summary judgment on Torch's claim for attorney's fees.

IV. PBEX WAIVED ARGUMENT REGARDING THE EXTENT OF THE ADVERSE POSSESSION

Finally, PBEX urges, without support, that if Dorchester adversely possessed the Working Interest, then that adverse possession is limited to the Moreland Wells and the depths of those wells. However, PBEX failed to make this argument in its response to Dorchester's motion for summary judgment. "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c); *Starr v. Spoon*, No. 11-19-00408-CV, 2021 Tex. App. LEXIS 8737, at *8 (Tex. App.—Eastland Oct. 28, 2021, no pet.) (citations omitted); *see also* TEX. R. APP. P. 33.1. We overrule PBEX's third issue.

CONCLUSION

The trial court correctly rendered judgment in favor of Dorchester, and we affirm the trial court's judgment in all respects.

Alex L. Yarbrough
Justice

Doss, J., dissenting.