NUMBER 13-17-00046-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MARSHA ELLISON, D/B/A ELLISON LEASE OPERATING, **Appellant and Cross-Appellees,**

v.

THREE RIVERS ACQUISITION LLC; THREE RIVERS OPERATING CO. LLC; CONCHO RESOURCES, INC.; COG OPERATING, LLC, **Appellees and Cross-Appellants,**

SAMSON RESOURCES CO.; SAMSON LONE STAR LIMITED PARTNERSHIP; SAMSON LONE STAR LLC; SAMSON EXPLORATION, LC; S/D OIL AND GAS CORP.; ET AL **Appellees.**

On appeal from the 51st District Court of Irion County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Longoria

This suit concerns the boundary between two mineral estates in Irion County.[1] Appellant Marsha Ellison d/b/a Ellison Lease Operating brought suit against eleven defendants: Concho Resources, Inc., COG Operating LLC, Three Rivers Acquisition LLC, and Three Rivers Operating Company (collectively, "Concho"); Samson Resources Co., Samson Exploration, LLC, Samson Lonestar, LLC, and Samson Lonestar Limited Partnership (collectively, "Samson"); Sunoco Logistics Partners Operations GP LLC, and Sunoco Partners Marketing & Terminals L.P. (collectively, "Sunoco"); and S/D Oil and Gas Corporation. The suit against S/D Oil was tried separately and is not part of this appeal.

In the present suit, Ellison pled several causes of action, including trespass-to-try-title, conversion, unlawful drainage, gross negligence, and nonpayment of oil and gas proceeds. Concho counterclaimed for breach of contract and sought declaratory judgment that a 2008 Boundary Stipulation confirmed that the boundary between the two leasehold estates was in a different location than that claimed by Ellison. Ellison filed a motion for summary judgment, claiming that she established that her leasehold encompassed a certain disputed tract of 154 acres. Concho moved for summary judgment on all of Ellison's claims, asserting that a 2008 letter agreement, signed by Marsha Ellison's late husband, Jamie Ellison: (1) relinquished and waived any claim of ownership over the disputed land; and (2) ratified the boundary as depicted in the

[1] This case is before this Court on transfer from the Third Court of Appeals in Austin pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.).

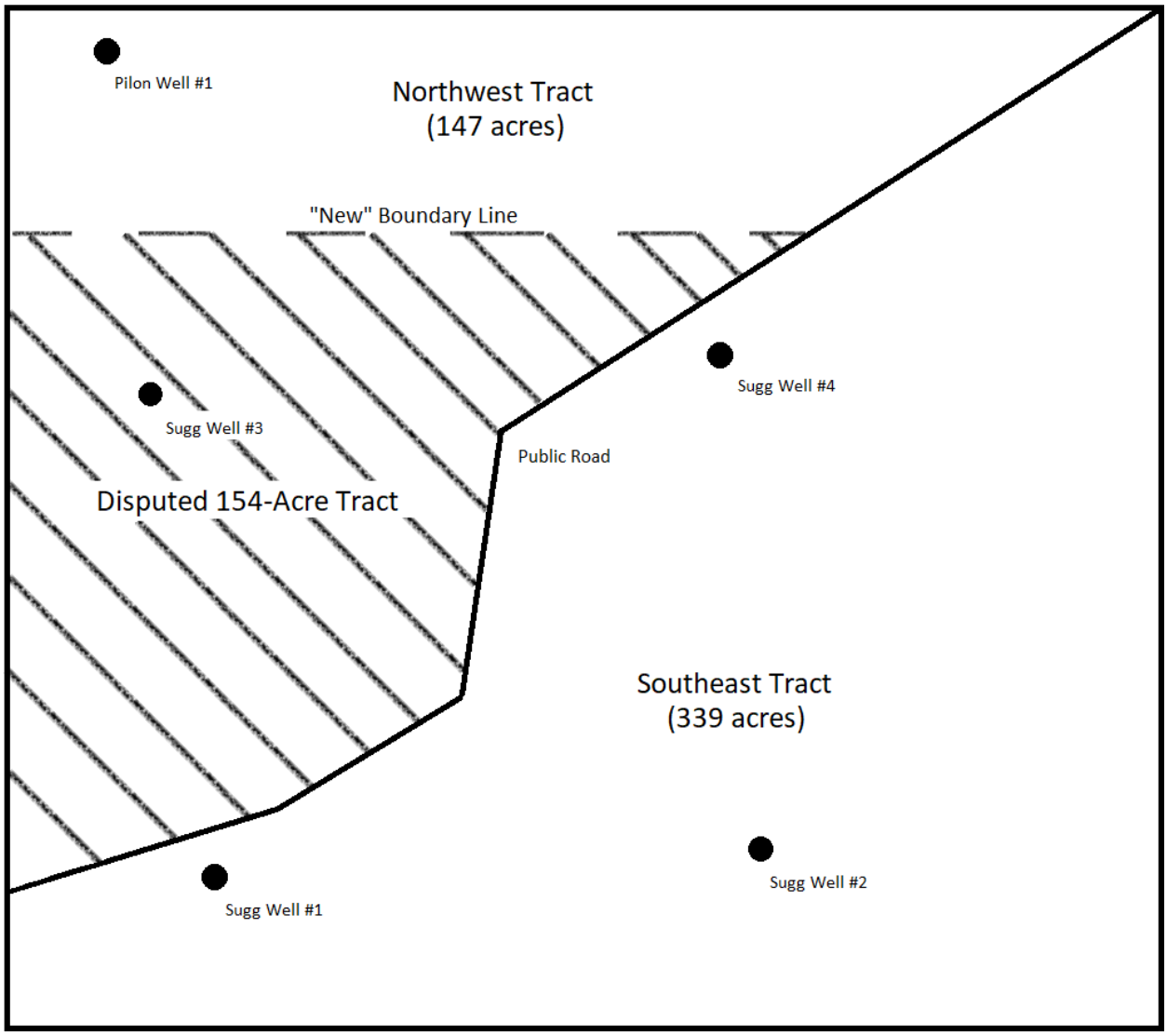
Boundary Stipulation. The trial court granted Concho's motion, and dismissed all of Ellison's claims with prejudice. The case proceeded to a jury trial on Concho's counterclaims, and the jury returned a verdict in favor of Concho. Samson and Sunoco filed a joint motion for summary judgment, and Sunoco filed an independent motion for summary judgment; the trial court granted both motions.

By six issues, which we have renumbered, Ellison argues that the trial court erred by: (1) granting Concho's motion for summary judgment; (2) failing to grant her own motion for summary judgment; (3) failing to enter a take-nothing judgment on Concho's breach of contract counterclaim; (4) granting the motion for summary judgment filed jointly by Sunoco and Samson; (5) granting the independent motion for summary judgment filed by Sunoco; and (6) committing various errors and omissions in the jury charge. On cross-appeal, Concho argues that the trial court erred by not awarding: (1) lost profit damages; (2) prejudgment interest; (3) attorneys' fees in connection with the defense and prosecution of claims under the Declaratory Judgment Act; and (4) appellate attorneys' fees. We reverse and render in part, and reverse and remand in part.

I. BACKGROUND

When J.D. Sugg died in 1925, his estate and family assumed 100% ownership of "Section 1," a 640-acre tract of land. Sugg's estate is the source of title to the 154 acres of land that are in dispute. Some of Sugg's heirs agreed to swap land with the Noelkes, nearby landowners. To effectuate the swap, the Sugg family executed a deed on July 26, 1927 ("the 1927 Deed"). One of the tracts conveyed in that deed is described as "Second Tract: All of Survey 1, Block 6, H & T.C. Ry. Co. lands located North and West of the public road which now runs across the corner of said Survey, containing 147 acres,

more or less" (the "Northwest Tract"). In 1930, the executor of Sugg's estate conveyed to A. A. Sugg by partition deed the remaining 493 acres (the "Southeast Tract"). This deed did not describe the boundaries or location of the Southeast Tract; the deed simply referred to it as the "493 acre tract." Below is a relative representation of the relevant area.



In 1939, the Sugg family commissioned a survey. According to the 1939 survey, the 1927 deed conveys all of the land north and west of the public road, including the disputed 154 acres; the survey also stated that the Northwest Tract contains 301 acres.

Between 1927 and 1987, the Northwest Tract was conveyed multiple times; by 1987, the Pilon Family Trust and three individuals owned the mineral estate of the Northwest Tract. On July 8, 1987, the Pilon Family Trust and the three individuals granted four identical oil and gas leases ("the Pilon Leases") to Questa Oil & Gas Co. ("Questa"). The description of the land leased in each of these Pilon Leases is as follows:

> 147 acre tract of land out of Survey 1, Block 6, H & TC Ry. Co. Survey, Abst. 312, lying N and W of the public road which runs NE and SW across said Survey 1, and being the same land conveyed to W.M. Hemphill, Trustee by E.S. Briant, Indep. Exec. of the Estate of J.D. Sugg, dec'd by Deed dated 7-26-27 & recorded in Bk. 17, Pg. 118.

Through a series of assignments, Questa's leasehold was assigned to Jamie Ellison, d/b/a Ellison Lease Operating in 1996. At about the same time, William and Carol Richey acquired the mineral fee interest in the Northwest Tract. Jamie and Marsha Ellison became the designated operators of Pilon Well #1, an oil and gas well drilled in the Northwest Tract. Marsha Ellison has continued as the sole operator since her husband's death in 2011. Through the duration of the leases, the Ellisons posted Railroad Commission signs at the gate entrance of the Northwest Tract on the public road boundary, designating themselves as owners and operators of the Pilon Leases and claiming 320 acres, consistent with their Railroad Commission filings. Irion County property tax public records and Ellison's income tax records also indicate that the Ellisons have claimed title to the disputed 154-acre since they received title.

Between 1930 and 2006, the Southeast Tract passed through the estate of A. A. Sugg to various family members. In 2005, the Suggs claimed that the Southeast Tract only contained 339 acres for ad valorem tax purposes on the Irion County tax rolls. In

2006, the mineral owners of the Southeast Tract (various members of the Sugg and Farmar families) granted an oil and gas lease to Samson.

In 2006, a Sugg family owner of the Southeast Tract executed and recorded a gift mineral deed, conveying the Southeast Tract to his four children. This deed is the only Sugg chain of title document that describes the boundaries of the Southeast Tract: "being a tract of land lying South and East of the public road which runs NE and SW across Survey [Section] 1, containing 493 acres, more or less." The four children subsequently executed the Sugg Lease of the Southeast Tract to a Samson affiliate and recorded a lease memorandum.

In October of 2006, Samson received a title opinion addressed to Tim Reece, Samson's landman; the title opinion covered the Southeast Tract, for purposes of drilling Samson's Sugg Well #1 on the tract. The title opinion acknowledges the Sugg 2005 property tax document showing that the Suggs only claimed 339 acres of land. The title opinion also advised that the 1927 Deed tract is shaped approximately like a triangle, which would be true only if the disputed 154 acres were part of the Northwest Tract. Furthermore, the attorney who wrote the title opinion warned that the Southeast Tract description in the original 1930 Sugg deed was defective and opined that he saw "no evidence of where the 493 acres is located on the ground. As a technical matter, this description is incorrect." Samson's surveyor prepared a preliminary survey plat (the Samson plat) for a W-1 well permit application. In the plat, Samson instructed the surveyor to credit 493 acres to the Southeast Tract.

In December of 2006, landman Reece sent a letter to the Ellisons titled "Statewide Rule 37 Exception Request" for Samson's Sugg Well #1 location. This letter did not

include the Samson Plat. Instead, it asked the Ellisons to waive objections to Samson's application to locate Sugg Well #1 "100 feet South of the public road."[2] The letter to the Ellisons shows an execution date of January 1, 2007. A similar letter was addressed to the Richey family as the owners of the mineral interest of the Northwest Tract. Later in 2007, after drilling Sugg Well #1, Samson received a division order title opinion for Sugg Well #1 and the Southeast Tract, again addressed to Reece. Comment No. 4 in the opinion repeated the concern from the 2006 title opinion that the Sugg Lease Southeast Tract description was inadequate; it further counseled to confine drilling to land not located within the boundary of the 1927 Deed tract. Over the next two years, Samson filed well applications for Wells #2, #3, and #4. In all these applications, Samson included the disputed 154 acres as part of the Southeast Tract.

In 2007, the Sugg family surface owners of the Southeast Tract executed a warranty deed that purported to convey to the Richey family only the surface of a "certain tract of land," located north and west of the public road, which "would be considered 154 acres." This deed vaguely asserted that the "South Boundary" of the Northwest Tract was located somewhere north and west of the public road and yet south of Richey's tract (see the approximate location of this "new boundary" on the map above). According to the record, Reece averred that he spoke with Jamie Ellison at this time, and again in 2008, to explain the legal effects of this deed.

In 2008, Samson proposed to drill Sugg Well #3, which is within the disputed 154-acre tract. Reece prepared a boundary stipulation of Ownership of Mineral Interest

[2] Normally, an oil well must be located at least 467 feet to the closest "property line, lease line, or subdivision line." 16 TEX. ADMIN. CODE § 3.37(a) (Tex. R. R. Comm'n, Statewide Spacing Rule). If an entity wishes to place a well less than 467 feet from a property line, then a Rule 37 exception is required. *See id*.

Agreement ("the 2008 Boundary Stipulation") for execution by the Sugg family and Richey family mineral owners. The Boundary Stipulation acknowledged that the Southeast Tract constituted only the "remaining" acreage in Section 1, after giving full effect to the 1927 Deed conveyance. However, Reece asserted in the Boundary Stipulation that there was a "question" as to the "physical location" of the 1927 Deed tract, which Reece claimed only contained 147 acres. The Boundary Stipulation purported to resolve the question by using the "new" boundary from Samson's 2008 New Survey Plat, which was a repeat of Samson's 2006 Preliminary Survey. The plat further gave credit to the 2007 Sugg Deed, stating that the surface and mineral ownership "appear to be different." The Boundary Stipulation stated it was effective as of July 8, 1987, the date the Pilon Leases were created.

In 2008, Reece delivered a letter to Jamie Ellison. The letter purportedly included a copy of the Boundary Stipulation and asserted that Reece had conversed with Jamie in 2007 about its subject matter. Reece represented to Jamie Ellison in the letter that the 2008 Boundary Stipulation was created and executed in 1987, even though it was written by Reece in 2008. Reece's letter to Jamie did not contain any words of conveyance; it simply requested, "Please signify your acceptance of the description of the Richey 147-acre tract as set out in the [Boundary] Stipulation by signing both copies of this letter . . . Upon your acceptance a more formal and recordable document will be provided." There is no evidence that any such second document was prepared or delivered to the Ellisons. Jamie Ellison allegedly signed and returned the letter although Marsha Ellison alleges

that his signature was possibly forged.[3] The record also reflects that Concho was unaware of Reece's letter until December of 2013, six months after Ellison filed this suit.

Samson subsequently drilled Sugg Well #3 within the disputed 154-acre tract. Well #4 was drilled in a location that is closer than the minimum distance required from the Northwest Tract, assuming the public road is the boundary. *See* 16 TEX. ADMIN. CODE § 3.37(a) (2018) (Tex. R. R. Comm'n, Statewide Spacing Rule).

In 2010, Samson sold the Sugg Lease and Sugg Wells #1, #3, and #4 to Three Rivers Acquisition LLC by quitclaim assignment. Three Rivers Acquisition LLC recompleted Sugg Well #1 without obtaining a new Rule 37 exception permit. In 2011, Three Rivers Acquisition LLC obtained an additional title opinion for the Southeast Tract. In 2012, Three Rivers Acquisitions LLC assigned the lease to COG Operating LLC. Concho also obtained a title opinion for the Southeast Tract. Throughout this time period, Sunoco purchased the oil produced from Sugg Wells #1, 3, and 4.

In 2013, Ellison filed a trespass-to-try-title suit against Concho and Samson. Concho filed counterclaims against Ellison for breach of contract and declaratory judgment. Both Ellison and Concho filed cross-motions for summary judgment. Concho argued that the 2008 letter to Jamie Ellison: (1) relinquished any claim of ownership Ellison might possess to land beyond the 147-acre tract as depicted in the 2008 Boundary Stipulation; and (2) ratified the boundary as depicted in the 2008 Boundary Stipulation and letter. The trial court granted Concho's motion and dismissed all of Ellison's claims with prejudice.

[3] At the trial court below, Ellison sought a continuance to further investigate the alleged forgery, but her continuance was denied.

Ellison settled her claims against Samson; however, Samson remained in the suit because Sunoco filed a cross-claim against Samson for indemnification. Against Sunoco, Ellison alleged claims of conversion and a claim for damages under section 91.404 of the Texas Natural Resources Code ("the division order statute"). *See* TEX. NAT. RES. CODE ANN. § 91.404 (West, Westlaw through 2017 1st C.S.). Sunoco filed one motion for summary judgment jointly with Samson and one motion for summary judgment separately; both generally argued that Ellison's claims against Sunoco fail regardless of the ownership of the disputed 154 acres because Sunoco was not the "payor" under the division order statute. The joint motion was concerned with Ellison's claims against Sunoco for the time period during which Samson operated the wells and sold the oil produced from the wells to Sunoco. Sunoco's separate motion dealt with Ellison's claims relating to the time periods that Samson's successors-in-interest owned and operated the wells and sold the oil produced to Sunoco. The trial court granted both motions for summary judgment and dismissed Ellison's claims against Samson and Sunoco.

After the trial court granted the motions for summary judgment in favor of Sunoco, Samson, and Concho, Concho was realigned as the plaintiff and the case proceeded to trial on Concho's counterclaim. The jury returned a verdict in favor of Concho, finding that the 2008 letter constituted an agreement and that Ellison Lease Operating breached the agreement. Concho was awarded $493,581.39 in lost profits and $850,000 in attorneys' fees at the trial court level and $0 in attorney's fees at the appellate level. Concho moved for judgment on the verdict, notwithstanding the verdict as to the appellate fees. Ellison moved for judgment notwithstanding the verdict. The trial court signed a judgment providing that Ellison take nothing; the judgment also offered declaratory relief

that: (1) the boundary between the leaseholds was the boundary as established in the 2008 Boundary Stipulation; and (2) the 2008 letter agreement is enforceable according to its terms. It awarded $1,030 in out-of-pocket damages to Concho for breach of contract and $392,479.39 in attorneys' fees for the breach of contract claim; the judgment declined to award lost-profits damages or attorneys' fees on the declaratory judgment claim. The judgment also awarded no appellate attorneys' fees. Ellison appealed, and Concho has cross-appealed.

II. THE CROSS MOTIONS FOR SUMMARY JUDGMENT

In her first two issues, Ellison argues by multiple sub-issues that the trial court erred by: (1) denying her motion for summary judgment; and (2) granting Concho's motion for summary judgment.

A. Standard of Review

The parties raised only traditional grounds for summary judgment. *See* TEX. R. CIV. P. 166a(c). We review a traditional summary judgment *de novo*. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). In a traditional motion for summary judgment, the movant has the burden to show both that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). All evidence favorable to the nonmovant must be taken as true, and all reasonable doubts must be resolved in favor of the nonmovant. *See Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998). "Summary judgment is proper if the defendant disproves at least one element of each of the plaintiff's claims, or establishes all elements of an affirmative defense to each claim." *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997);

see Lujan v. Navistar Fin. Corp., 433 S.W.3d 699, 704 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("When a defendant moves for traditional summary judgment, he must either: (1) disprove at least one essential element of the plaintiff's cause of action; or (2) plead and conclusively establish each essential element of his affirmative defense, thereby defeating the plaintiff's cause of action.").

"When both sides move for summary judgment, as they did here, and the trial court grants one motion and denies the other, reviewing courts consider both sides' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have entered." *Lazer Spot, Inc. v. Hiring Partners, Inc.*, 387 S.W.3d 40, 45 (Tex. App.—Texarkana 2012, pet. denied) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010)). In order to "be considered by the trial or reviewing court, summary judgment evidence must be presented in a form that would be admissible at trial." *Gallagher Healthcare Ins. Servs. v. Vogelsang*, 312 S.W.3d 640, 652 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

B. Concho's Motion for Summary Judgment

1. Superior Title to the Disputed 154 Acres

a. Applicable Law

The question of whether a deed or conveyance is ambiguous or not is a question of law for the Court. *See Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). A deed or conveyance is not ambiguous if it is worded in such a way that it can be given a definite or certain meaning. *See Smith v. Liddell*, 367 S.W.2d 662, 665 (Tex. 1963).

The intention of the parties and resulting legal effect of an unambiguous deed or conveyance must be ascertained solely from construction of the language expressed and

apparent within its four corners. The expressed and objective intent controls, not the subjective intent or what the parties meant but failed to express. *Luckel v. White*, 819 S.W.2d 459, 461–62 (Tex. 1991). Where parts of the deed appear to be contradictory or inconsistent, the courts will first attempt to harmonize that language, so as to give effect to all its provisions. *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.,* 966 S.W.2d 451, 465 (Tex. 1998).

However, where rules of property cannot otherwise resolve an ambiguity, or an irreconcilable conflict exists between terms that cannot be harmonized, the courts will utilize applicable canons of construction. *See Luckel*, 819 S.W.2d at 462; *see also Graham v. Prochaska*, 429 S.W.3d 650, 655 (Tex. App.—San Antonio 2013, pet. denied); Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds & Leases: An Encyclopedia of Canons of Construction,* 24 TEX. TECH. L. REV. 1, 72 (1993).

The Texas Supreme Court has held that "the specification of acreage is the least reliable data point in descriptions of land and will be rejected if it is inconsistent with the actual land conveyed." *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 645 (Tex. 2008).

b. Discussion

In her first sub-issue, Ellison asserts that she established as a matter of law that she has superior title to the disputed 154 acres. Indeed, Ellison's abstract of title proves the chain of title all the way back to the 1927 Deed. Moreover, Concho concedes that Ellison's title "is not in dispute." Rather, as we will discuss below, Concho argues that Ellison's title is immaterial because of the 2008 Boundary Stipulation and letter.

Ellison argues that there is no ambiguity in the original 1927 Deed. *See Reilly,* 727 S.W.2d at 529. She acknowledges that the metes and bounds description of the land

conveyed conflicts with the acreage listed; however, Ellison argues that the acreage is "the least reliable data point in descriptions of land" and that it should be "rejected if it is inconsistent with the actual land conveyed." *AIC Mgmt.*, 246 S.W.3d at 645. We agree with Ellison.

In a case similar to the one presently before us, the Supreme Court of Texas noted:

> When the specific description [by boundaries] is clear, there is no necessity for invoking the aid of the general description [by acreage amount].
>
> . . . .
>
> We have never held that there was a clear intent for the general description [by acreage] to control when directly contrary metes and bounds clearly defined an area owned by the grantor.
>
> . . . .
>
> Mere inconsistencies between the metes-and-bounds and the general description [acreage] do not themselves render the metes-and-bounds doubtful. Otherwise, an unambiguous metes-and-bounds description would never, on its own, control despite an inconsistent general description. In this case, the metes and bounds . . . cannot be harmonized with the general description [acreage]. The two conflict with each other, and the general description cannot override a particular description [boundaries] about which there can be no doubt. . . . [In this case,] the metes-and-bounds description conveys a larger area than the general description. If the court of appeals were right . . . does this mean that only the smaller area described in the general description [acreage] was conveyed, but not the larger area described by the metes and bounds? But surely such a conclusion would depart from the parties' true intentions as evidenced by the metes and bounds. For consistency's sake, the metes and bounds must control, lest tracing title be reduced to guesswork about the parties' true intent years after the conveyance occurs. The metes-and-bounds description is better evidence of intent.

Stribling v. Millican DPC Partners, L.P., 458 S.W.3d 17, 21–23 (Tex. 2015). In the present case, the 1927 Deed states that the Northwest Tract contains "147 acres, more or less." However, the metes-and-bounds description clearly indicates that the Northwest Tract consists of all land to the north and west of the public road. There is only one such public

road in the area, and Concho failed to produce any evidence indicating any uncertainty as to the location of the public road. The record contains no evidence to indicate the public road ever changed locations or that there is more than one public road. The clearly-defined metes-and-bounds description is controlling over the contradictory general acreage description and we will reject the listed acreage of 147 acres. *See id*.; *AIC Mgmt.*, 246 S.W.3d at 645. We conclude that according to the unambiguous 1927 Deed, the disputed 154 acres was originally conveyed as part of the Northwest Tract.

2. The 2008 Boundary Stipulation

a. Applicable Law

> When there is uncertainty, doubt or dispute as to where the true division line between the lands of the parties may be, they may fix it by parol agreement, which will be mutually binding upon them, even though they were mistaken as to the true location of the line. This is true whether the mistake be of a matter of fact or of law. *The existence of uncertainty, doubt or dispute is essential to the validity of such agreement*. Actual dispute, however, between the parties is not necessary. It is enough that the location of the line has not been definitely established and is doubtful or uncertain.

Gulf Oil Corp. v. Marathon Oil Co., 152 S.W.2d 711, 714–15 (Tex. 1941) (emphasis added); *see Moore v. Stone*, 255 S.W.3d 284, 291 (Tex. App.—Waco 2008, pet. denied); *Doria v. Suchowolski*, 531 S.W.2d 360, 363 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). Whether a boundary has been "definitely established" is determined on an objective basis from the factual evidence and rules of property, not on the subjective opinions of any of the boundary agreement parties. *See Gulf Oil Corp.*, 152 S.W.2d at 714.

> For a deed or instrument to effect conveyance of real property, it is not necessary to have all the formal parts of a deed formerly recognized at common law or to contain technical words. If, from the whole instrument, a grantor and grantee can be ascertained, if there are operative words or

> words of grant showing an intention of the grantor to convey title to a real property interest to the grantee, and if the instrument is signed and acknowledged by the grantor, it is a deed that is legally effective as a conveyance.

Masgas v. Anderson, 310 S.W.3d 567, 570 (Tex. App.—Eastland 2010, pet. denied).

b. Discussion

Ellison argues that the 2008 Boundary Stipulation is void and legally ineffective because there was never any reasonable doubt or uncertainty as to the location of the boundary between the Northwest and Southeast Tracts. Concho argues that the Boundary Stipulation is an enforceable conveyance, regardless of any proof of uncertainty. Nonetheless, Concho additionally argues that there was uncertainty because the listed acreage was inconsistent with the boundary as listed in the 1927 Deed.

In a post-trial hearing, Concho made the following remark to the trial court:

> And this really relates to a fundamental difference in world view between the parties. Ms. Ellison treats the Boundary Stipulation as a conveyance. It was, as we said at trial, not a conveyance. What it was was what it calls itself, a boundary stipulation. And the Supreme Court has said, when there is genuine uncertainty as to the boundary, actual uncertainty among the parties. They are entitled in good faith to resolve that uncertainty between themselves. Without going through the time, the expense, the delay and the brain damage of litigating to the bitter end to find out who indeed is right about the boundary. The Boundary Stipulation establishes where the boundary always was. It didn't change the boundary. It fixed the boundary. And for that reason, neither the Boundary Stipulation, nor the (2008 Samson) Letter agreement was a conveyance.

Thus, it appears that Concho's appellate approach varies from the argument it advanced at the trial court. Below, Concho explicitly and repeatedly asserted that the 2008 Boundary Stipulation was not a conveyance; rather, it was merely a clarification, which was later ratified by the 2008 Letter, of the allegedly ambiguous 1927 Deed. *See Gulf Oil Corp.*, 152 S.W.2d at 714–15. However, on appeal, Concho takes the exact opposite

stance by primarily arguing that the 2008 Boundary Stipulation "fully satisfied the statute of frauds" and "had the effect of validly conveying mineral interests between the parties." More specifically, Concho argues that the Boundary Stipulation was an enforceable agreement that satisfied the Statute of Frauds because the Boundary Stipulation was in writing, signed by the parties, specifically described the affected land, and contained adequate words of grant and conveyance as are necessary to transfer the ownership of the mineral estate.

Inasmuch as Concho asserts that the Boundary Stipulation constituted a valid legal conveyance, we disagree. It is true that *Gulf Oil*, seems to apply, by its nature, to cases involving express oral boundary agreements or implied boundary agreements evidenced through the parties' conduct. *See id*. at 714–15. Here, we have a written boundary agreement. However, the Boundary Stipulation does not identify a grantor or grantee; also, there are no operative words of grant showing an intention by a grantor to convey the disputed 154-acres to anyone else. *See Masgas*, 310 S.W.3d at 570. Thus, the Boundary Stipulation was not a legally effective conveyance. *See id*.

The Boundary Stipulation appears to be close in nature to a "correction deed" in which a party seeks to retroactively "correct the defects and imperfections" of the original deed. *Myrad Properties, Inc. v. LaSalle Bank Nat. Ass'n*, 300 S.W.3d 746, 750 (Tex. 2009). A proper correction deed will relate back to the date of the deed it corrects. *See id*. After *Myrad*, the Legislature enacted statutes to allow correction deeds to make both nonmaterial and material corrections to a deed. *See* TEX. PROP. CODE ANN. §§ 5.027–.031 (West, Westlaw through 2017 1st C.S.). However, the underlying deed must still possess some "ambiguity or error" to correct. *Id*. § 5.027. And to the extent Concho

maintains that the 1927 Deed was ambiguous or erroneous regarding the boundary, we once again disagree. As discussed above, the 1927 Deed clearly defines the boundary line as the public county road. There is no evidence of doubt as to the location of the public road. Concho asserts that the conflict between the listed acreage and the metes-and-bounds description of the land created ambiguity as to the boundary. However, as we also discussed above, this inconsistency does not create uncertainty or ambiguity; we simply ignore the listed acreage because the unambiguous metes-and-bounds description overrides the general acreage. *See AIC Mgmt.*, 246 S.W.3d at 645.

Also, it is undisputed, as indicated in the map above, that Sugg Well #1 is located within the Southeast Tract. If the "new" boundary line were the true boundary to the Northwest Tract, as urged by Concho, the 2006 letter sent to Jamie Ellison makes no sense and serves no purpose. The 2006 letter sent by Reece to Ellison asked for permission to drill a well closer to the boundary than normally allowed. *See* 16 TEX. ADMIN. CODE § 3.37. However, permission would only be required if the public county road were the recognized boundary line. In other words, if the "new" boundary line were the recognized boundary line, Sugg Well #1 would be far away enough from the Northwest Tract as to not require a Rule 37 exception. Additionally, the 2006 Samson title opinion advised that the Northwest Tract, according to the 1927 Deed, was approximately shaped like a triangle; this description is only accurate if the boundary is the county public road. The title opinion even acknowledged that owners of the Southeast Tract only claimed 339 acres of land for tax purposes; again, this acreage is only accurate if the county public road is the recognized boundary. In other words, the 1927 Deed unambiguously identifies the public road as the boundary line, and the record shows no

evidence of a bona fide uncertainty or doubt as to the location of the boundary; to the contrary, the evidence in the record suggests that the defendants were aware that the public road was the true boundary.

In summary, the Boundary Stipulation was not a valid conveyance because it did not identify a grantor and grantee and it did not contain clear words of conveyance. Furthermore, the Boundary Stipulation seeks to substantively change the boundary of the 1927 Deed similar to a correction deed; however, we have found that the 1927 Deed was unambiguous and that there was no uncertainty regarding the boundary between the Northwest Tract and the Southeast Tract. Therefore, we conclude that the 2008 Boundary Stipulation agreement was invalid and void. *See Garza,* 988 S.W.2d at 290.

3. The 2008 Samson Letter

a. Applicable Law

Ratification and waiver are affirmative defenses. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 344 (Tex. 2011). "The elements of the affirmative defense of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act." *Samms v. Autumn Run Cmty. Improvement Ass'n, Inc.*, 23 S.W.3d 398, 403 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). However, "[i]t is well settled that a grantor cannot, by subsequent acts and declarations, ratify a void deed." *Durkay v. Madco Oil Co., Inc.,* 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied) (citing *Pure Oil Co. v. Swindall*, 58 S.W.2d 7, 11 (Tex. 1933)); *see Lasater v. Jamison*, 203 S.W. 1151, 1154 (Tex. Civ. App.—San Antonio 1918, writ ref'd) ("Her deed being a nullity, it could not be vitalized by a subsequent acquiescence, but could only be ratified

by an act having the essential elements of a conveyance."); *see also Jack v. State*, 694 S.W.2d 391, 397 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) ("A contract which is made in violation of a statute is illegal and void and therefore not subject to ratification.").

"Waiver is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right." *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). The elements of waiver include: (1) an existing right held by one of the parties; (2) the party's actual knowledge of the right's existence; and (3) the party's actual intent to relinquish the right. *See id*.

b. Discussion

Ellison argues that the 2008 letter could not be a proper ratification of the 2008 Boundary Stipulation because (1) the Boundary Stipulation was void, and (2) Jamie Ellison did not have full knowledge of the pertinent facts because of misrepresentations made to him. Concho argues that: (1) Jamie Ellison waived any complaint to the disputed acreage; and (2) the 2008 letter ratified the Boundary Stipulation, mooting the true location of the boundary.

As we held above, the Boundary Stipulation was void and ineffective as a conveyance because: (1) the Boundary Stipulation did not identify a grantor, a grantee, or clear words of conveyance; and (2) there was never any ambiguity or uncertainty in the 1927 Deed, which is a requirement for a correction deed to be valid. *See* TEX. PROP. CODE ANN. § 5.027; *Gulf Oil Corp.*, 152 S.W.2d at 714; *Masgas*, 310 S.W.3d at 570. Because the Boundary Stipulation was void, it cannot be ratified. *See Durkay,* 862 S.W.2d at 17; *Jack*, 694 S.W.2d at 397. Additionally, the Letter itself cannot be a valid conveyance because it also fails to identify a grantor, a grantee, and clear words of

conveyance. Thus, Concho failed to affirmatively establish each element of its ratification defense. *See Lujan*, 433 S.W.3d at 704; *see also Chavez v. Kansas City S. Ry. Co.*, 520 S.W.3d 898, 900 (Tex. 2017).

Likewise, we find that Concho failed to affirmatively establish its waiver defense. *See Ulico Cas. Co.*, 262 S.W.3d at 778. Concho claims that Jamie Ellison waived any right to the disputed 154 acres by signing the letter in 2008. However, summary judgment evidence showed that the Ellisons have continued to assert that they own the disputed 154 acres and that they have the right to possess it. *See id.* For example, filings the Ellisons submitted to the Railroad Commission, the Ellisons' tax records, and the signs posted alongside the county public road indicate that the Ellisons have always claimed title to the disputed 154 acres. Therefore, we conclude that Concho failed to affirmatively establish each element of waiver because Ellison raised issues of fact. *See id*.; *see also Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 625 (Tex. App.—Tyler 2014, no pet.).

4. Summary

The unambiguous metes-and-bounds description dictates that the disputed 154 acres are part of the Northwest Tract. The 2008 Boundary Stipulation is unenforceable and void because there is no genuine dispute as to the location of the boundary. The 2008 letter could not ratify the void Boundary Stipulation. Concho did not affirmatively establish all elements of its ratification and waiver defenses. Therefore, it was error to grant Concho's motion for summary judgment. We sustain Ellison's first issue.

C. Ellison's Motion for Summary Judgment

In her second issue, Ellison argues it was an error for the trial court to deny her motion for summary judgment. In her motion for summary judgment, she asserted that

she successfully proved superior title to the disputed 154 acres and that she should thus be awarded 100% leasehold title and ownership of that land. She also asserted that Concho is a bad faith trespasser as a matter of law.

1. Applicable Law

"To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004). A plaintiff must prevail on the superiority of its own title, not on the weakness of the defendant's title. *See id*.

Trespass to real property occurs when a party enters another's land without consent. *See Wilen v. Falkenstein*, 191 S.W.3d 791, 797 (Tex. App.—Fort Worth 2006, pet. denied). Once a party establishes all of the elements of trespass, the burden shifts to the other party to prove justification for their trespass, such as a good faith belief in their right to enter and drill, in order to avoid a finding of bad faith. *See Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 557 (Tex. App.—San Antonio 2011, no pet.).

> When a producer trespasses and extracts oil, gas, or other minerals, the method by which damages are calculated depends on whether the producer's actions are in good faith. A good faith trespasser with an honest and a reasonable belief in the superiority of his own title is liable for [the] value of minerals extracted minus drilling and operating costs. A bad faith trespasser is liable for the value of extracted minerals at the time of severance without making deduction for the cost of labor and other expenses incurred in committing the wrongful act or for any other value added.

Victory Energy Corp. v. Oz Gas Corp., 461 S.W.3d 159, 178 (Tex. App.—El Paso 2014, pet. denied).

"[I]n deciding whether an instrument is a quitclaim deed, courts look to whether the language of the instrument, taken as a whole, conveyed property itself or merely the grantor's rights." *Orca Assets, G.P., LLC v. Burlington Res. Oil & Gas Co.*, 464 S.W.3d 403, 410 (Tex. App.—Corpus Christi 2015, pet. denied). "[A] party acquiring property under a quitclaim deed is not eligible to claim bona fide purchaser status because it is charged with notice of title defects as a matter of law." *Id*. at 409.

2. Discussion

Concerning the 154 disputed acres, Ellison has proven superior title out of a common source. *See Martin*, 133 S.W.3d at 265. As we have held above, the Northwest Tract unambiguously includes the disputed 154 acres. Concho raises no defense that would defeat Ellison's superior claim to title other than those we have already rejected. Therefore, Ellison has conclusively established superior title to the 154 acres as a matter of law and is awarded 100% leasehold title and ownership of the dispute 154 acres. *See id*.

Ellison also argues that Concho is a bad faith trespasser as a matter of law. Because we hold that Ellison owns the disputed 154 acres, the record undisputedly demonstrates that Concho trespassed on Ellison's property by drilling an oil well within the disputed 154 acres. *See Wilen*, 191 S.W.3d at 797. And Ellison asserts that Concho provides no adequate justification to avoid a finding of bad faith. *See Prize Energy Res., L.P.*, 345 S.W.3d at 557. We agree.

Concho's chain of title includes the Sugg Lease assignments, which conveyed to it only whatever "right, title, and interest" the assignor may have owned, if any; such assignment was a quitclaim. *See Orca Assets, G.P.*, 464 S.W.3d at 410. Therefore, the

quitclaim put Concho on notice of all defects in its chain of title and all outstanding claims against its ownership, including Ellison's superior title to the disputed 154 acres. In addition, Concho was made aware and had knowledge of its trespass through multiple sources, including: (1) the Railroad Commission public records, which indicated that the Ellisons claimed title to the 154 disputed acres; (2) the Commission-required Pilon Lease sign posted at the gate entrance to the Northwest Tract; (3) Concho's own title opinions, which acknowledged the shape and location of the Northwest Tract; and (4) recorded documents in the Irion County official records for both the 1927 deed tract and the remainder tract. Looking at these factors together, we find that Concho did not have an honest and reasonable belief in the superiority of its title. *See Victory Energy Corp.,* 461 S.W.3d at 178.

3. Summary

We find that Ellison owns superior title to the disputed 154 acres and that Concho was a bad faith trespasser. The trial court erred in failing to grant her motion for summary judgment. We sustain Ellison's second issue.

III. CONCHO'S COUNTERCLAIM AND CROSS-APPEAL

Concho's counterclaim is predicated on the granting of its motion for summary judgment. In other words, Concho's breach of contract counterclaim can only be upheld if it holds title to the disputed 154 acres. Because we reverse the trial court's granting of Concho's motion for summary judgment and grant Ellison's motion for summary judgment, awarding Ellison title to the disputed 154 acres, we necessarily must also reverse Concho's counterclaim judgment. Accordingly, we reverse the trial court's award of attorneys' fees because it is an abuse of discretion to award attorneys' fees to a party

not entitled to any relief. *See City of Houston v. Harris Cty. Outdoor Advert. Ass'n*, 732 S.W.2d 42, 56 (Tex. App.—Houston [14th Dist.] 1987, no writ). We sustain Ellison's third issue.

On cross-appeal, Concho argues that the trial court erred in denying the monetary damages as determined by the jury in connection with its counterclaim. More specifically, Concho challenges the trial court's failure to award: (1) lost profit damages; (2); prejudgment interest; (3) declaratory judgment attorneys' fees; and (4) appellate attorneys' fees. However, as mentioned above, all of Concho's counterclaims for monetary damages are premised on its success on its motion for summary judgment. Because we are reversing and granting summary judgment in favor of Ellison, we overrule all of Concho's issues on cross-appeal.

IV. SUNOCO'S AND SAMSON'S MOTIONS FOR SUMMARY JUDGMENT

In her fourth and fifth issues, Ellison argues that she raised genuine issues of material fact on her conversion and section 91.404 claims and consequently that the trial court erred in granting Sunoco's and Samson's motions for summary judgment. Sunoco and Samson assert that their motions for summary judgment should be upheld, regardless of the outcome of Ellison's and Concho's motions for summary judgment.

More specifically, concerning Ellison's conversion claim against Sunoco, she argues that: (1) she owned the oil; (2) Sunoco exercised wrongful dominion and thus cannot claim good faith status; and (3) her conversion claim is viable for the two years prior to the filing of the current suit. Samson and Sunoco respond that: (1) Ellison did not own the oil; and (2) Sunoco, as a good-faith purchaser for value, could not exert

wrongful dominion over the oil. Samson and Sunoco appear to have different opinions regarding the statute of limitations.

Concerning Ellison's section 91.404 division order statutory claim, she argues that: (1) she was a "payee" and the division order statute does not rule out the possibility of multiple "payors"; and (2) her section 91 claim should be governed by the general four-year statute of limitations. Samson and Sunoco claim that: (1) Ellison's section 91 claim fails as a matter of law because Sunoco was not a "payor" and Ellison was not a "payee"; and (2) Ellison's section 91 claim should be governed by the two-year statute of limitations applicable in conversion cases.

A. Ellison's Conversion Claims

1. Applicable Law

"Conversion is classically defined as the unauthorized and wrongful assumption and exercise of dominion and control over the property of another, to the exclusion of or inconsistent with the owner's rights." *Rogers v. Ricane Enters., Inc.*, 930 S.W.2d 157, 165 (Tex. App.—Amarillo 1996, writ denied). Oil and gas are considered personal property once removed from the land. *See id*. Claims for conversion of personal property, such as oil in this instance, have a two-year statute of limitations. *See id*.; TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West, Westlaw through 2017 1st C.S.).

2. Discussion

In their motions for summary judgment, Samson and Sunoco assert that Ellison's conversion claim is defeated because: (1) Ellison did not own the oil and therefore Sunoco could not have exercised wrongful dominion; (2) regardless of who owns the oil,

Sunoco was a good-faith purchaser for value; and (3) the statute of limitations bars at least some of Ellison's conversion claims.

We first note that Sunoco, in its motion for summary judgment below, never argued that it was a good-faith purchaser for value. The same is true of the Sunoco and Samson joint motion for summary judgment; Sunoco and Samson never argued below that they were good-faith purchasers of value. Thus, we cannot affirm either of these motions for summary judgment on the ground that Sunoco was a good-faith purchaser for value. *See* TEX. R. CIV. P. 166a; *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996) ("[I]n an appeal from a summary judgment, issues an appellate court may review are those the movant actually presented to the trial court.").

Concerning the exercise of wrongful dominion, we have held that Ellison owns superior title to the disputed 154 acres and had a right to the oil from that land. Sugg Well #2 is wholly within the Southeast Tract so there is no dispute about the oil produced from that well. However, Sugg Well #3 is wholly within the disputed 154 acres. In addition, Sugg Wells #1 and 4 are very close to the property line of the disputed 154 acres, and by questioning the validity of the Rule 37 permits, Ellison raised a genuine issue of fact below concerning whether Sugg Wells #1 and 4 were misappropriating oil from the disputed 154 acres. Evidence presented also indicated that the oil produced from the wells might have been commingled with other wells; oil from Sugg Well #3 might have been commingled with oil from Sugg Well #1, for example. Thus, there is a genuine issue of material fact regarding possession of the oil produced from the wells and whether Sunoco exercised wrongful dominion. *See Provident Life & Acc. Ins. Co.*, 128 S.W.3d at 216.

Lastly, concerning the statute of limitations, Ellison concedes that her conversion claim is governed by a two-year statute of limitations and that any claim for oil converted more than two years before filing suit—June 21, 2013—is barred. However, she argues that she can still recover conversion damages from June 21, 2011 to June 21, 2013. Samson and Sunoco seem to take different stances on this point. Samson, and the joint motion for summary judgment filed below, agree with Ellison, acknowledging that if Ellison has a valid conversion claim, she would be "entitled to recover damages dating back to June 21, 2011." On the other hand, Sunoco, in its separate motion for summary judgment and on appeal, argues that Ellison's conversion claims are completely barred because the causes of action accrued when Sugg Wells #1, 3, and 4 were drilled—in 2007 and 2008. However, we agree with Ellison and the position taken in the joint motion for summary judgment that Ellison's conversion claims are not barred for any minerals converted within two years of filing suit. *See Rogers*, 930 S.W.2d at 176 (finding conversion damages for oil produced were available for the two years before suit was filed but any conversion damages concerning oil produced before that was time barred).

B. Division Order Statute Claim

1. Applicable Law

Chapter 91 of the Texas Natural Resources Code addresses the liability of a payor for proceeds from the sale of natural gas and oil. *See* TEX. NAT. RES. CODE ANN. §§ 91.401–.404 (West, Westlaw through 2017 1st C.S.). These sections provide that, to prevail on her division order statute cause of action, Ellison would need to show that: (1) Ellison is a "payee"; (2) Sunoco is a "payor"; (3) Sunoco failed to pay Ellison the proceeds of the oil produced by Concho from the 1927 Deed tract, including the disputed 154 acres,

and sold to Sunoco; (4) Ellison gave Sunoco written notice by mail of Sunoco's failure to pay Ellison; (5) Sunoco did not pay the oil production proceeds within thirty days of the written notice; and (6) Ellison suffered injury as a result of Sunoco's failure to timely pay the proceeds. *See id*. §§ 91.401, .402, .404.

While there is no specific statute of limitations mentioned for section 91.404 causes of action, we and two sister courts have applied the general four-year statute of limitations in such lawsuits. *See Headington Oil Co. v. White*, 287 S.W.3d 204, 209–12 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Hay v. Shell Oil Co.*, 986 S.W.2d 772, 776 (Tex. App.—Corpus Christi 1999, pet. denied); *Koch Oil Co. v. Wilber*, 895 S.W.2d 854, 864 (Tex. App.—Beaumont 1995, writ denied).

2. Discussion

Sunoco and Samson do not dispute the last four elements of Ellison's section 91.404 claim. Rather, the brunt of their argument is that Sunoco is not the statutory "payor."[4] Ellison argues that she is the payee and the division order statute contemplates the existence of more than one payor.

Under Chapter 91:

> 1) "Payee" means any person or persons legally entitled to payment from the proceeds derived from the sale of oil or gas from an oil or gas well located in this state.
>
> 2) "Payor" means the party who undertakes to distribute oil and gas proceeds to the payee, whether as the purchaser of the production of oil or gas generating such proceeds or as operator of the well from which such production was obtained or as lessee under the lease on which royalty is due. The payor is the first purchaser of such production of oil or gas from an oil or gas well, unless the owner of the right to produce under an oil or gas lease or pooling order and the first purchaser have

[4] Sunoco makes a very brief argument concerning the first element, asserting that Ellison is not a statutory payee because she did not own title to the 154 disputed acres. However, we have already held above that Ellison owns title to the disputed 154 disputed acres. Thus, she would be a statutory payee.

> entered into arrangements providing that the proceeds derived from the sale of oil or gas are to be paid by the first purchaser to the owner of the right to produce who is thereby deemed to be the payor having the responsibility of paying those proceeds received from the first purchaser to the payee.
>
> 3) "Division order" means an agreement signed by the payee directing the distribution of proceeds from the sale of oil, gas, casinghead gas, or other related hydrocarbons. The order directs and authorizes the payor to make payment for the products taken in accordance with the division order. When used herein "division order" shall also include "transfer order."

TEX. NAT. RES. CODE ANN. § 91.401. According to Samson and Sunoco, Samson was the owner of the right to produce oil. Sunoco, as the first purchaser, would ordinarily be the "payor." *See id*. However, as mentioned in the statutes above, there is an exception to that general rule: the first purchaser and the owner of the right to produce can enter an agreement defining the owner of the right to produce as the payor. *See id*. Sunoco and Samson argue that the agreement in place between the parties established that Sunoco agreed to pay Samson and that Samson agreed to make payments to the interest owners. Thus, they argue that Sunoco cannot be the payor because Samson is "*the* payor" under the agreement and, according to them, there can only be one payor. *See id*. (emphasis added). Likewise, they argue that once Samson sold the lease and wells to Concho, Concho became "the payor," not Sunoco.

Ellison argues that the division order statute contemplates multiple payors. For example, section 91.403 mentions, "this section does not apply where payments are withheld or suspended by *a* payor." *See id.* § 91.403 (emphasis added). And section 91.404 talks about the notice a payee must give "[i]f a payee seeks relief for the failure of *a payor* to make timely payment of proceeds from the sale of oil or gas or an interest in oil or gas." *See id*. § 91.404 (emphasis added); *see also Prize Energy Res., L.P. v. Cliff*

Hoskins, Inc., 345 S.W.3d 537, 561 (Tex. App.—San Antonio 2011, no pet.) (holding that multiple parties, together, were "the payor"). Additionally, Ellison argues that Sunoco, as the first purchaser, only avoids liability if it entered into an arrangement with the owner of the right to produce. *See* TEX. NAT. RES. CODE ANN. § 91.401. However, Ellison asserts that Samson and Concho did not have the right to produce Ellison's oil on the disputed 154 acres; they only had the right to produce oil on the Southeast Tract, which leaves Sunoco as the statutory payor. *See FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 310–311 (Tex. 2011) ("[T]he mere fact that the applicant received the permit did not provide the applicant with any authority to drill on land that was not his, or shield him from tort liability or an injunction action should it be determined that he is not the rightful owner of the parcel."); *see also Am. Trading & Prod. Corp. v. Phillips Petro. Co.*, 449 S.W.2d 794, 801 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.) (noting that the defendants had no right to produce oil and no right to the proceeds of an oil well when the permit for the well was ultimately found to be unlawful). We find that Ellison at least raised a genuine issue of material fact concerning who is a statutory payor in this suit. *See Provident Life & Acc. Ins. Co.*, 128 S.W.3d at 216.

C. Summary

Ellison raised genuine issue of material facts on her conversion claim and her Chapter 91 claim against Sunoco. Therefore, it was error for the trial court to grant Sunoco and Samson's joint motion for summary judgment; it was also error to grant Sunoco's independent motion for summary judgment. We sustain Ellison's fourth and fifth issues.

Having sustained Ellison's first five issues, we need not address her sixth issue concerning jury charge error. See TEX. R. APP. P. 47.1.

V. CONCLUSION

We reverse the trial court's orders granting Concho's motion for summary and denying Ellison's motion for summary judgment, and we render judgment granting Ellison's motion for summary judgment. We further reverse the trial court's orders granting Sunoco's independent motion for summary judgment and Sunoco and Samson's joint motion for summary judgment. On Concho's counterclaim, we render judgment denying Concho all relief requested therein, including its claims for attorneys' fees. We remand to the trial court for further proceedings in accordance with this opinion.

NORA L. LONGORIA
Justice

Delivered and filed the
14th day of February, 2019.