NUMBER 13-17-00515-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

KEVIN WAGENSCHEIN AND KIM GORDON, AS CO-TRUSTEES OF THE WAGENSCHEIN FAMILY TRUST II, KENNETH BUELTER, AND CAROL EDWARDS, **Appellants,**

v.

VIOLA L. EHLINGER, ERNA W. MUELLER, VICTOR H. WAGENSCHEIN, JANE CRAWFORD, AND VICKI WAGENSCHEIN, **Appellees.**

On appeal from the 267th District Court of DeWitt County, Texas.

OPINION

Before Chief Justice Contreras and Justices Longoria and Perkes
Opinion by Justice Perkes

This dispute concerns the construction of a mineral interest reservation included in a 1989 warranty deed. The trial court denied appellants' motion for summary judgment but granted appellees' motion for summary judgment. By two issues, appellants argue on appeal that (1) the reservation in the 1989 warranty deed created a tenancy in common as opposed to a joint tenancy; and (2) alternatively, if the interest created by the reservation in the 1989 deed is a joint tenancy with the right of survivorship, a conveyance to the Wagenschein Family Trust II (Trust II) severed the joint tenancy. Appellees, by a single cross-point, contend that appellants are barred from making their arguments under the doctrine of quasi estoppel. We affirm.

I. Background

Oswalt Edward Wagenschein and Marie Range Wagenschein owned a 241.69-acre tract of land located in DeWitt County, Texas. They had seven children: Viola Ehlinger, Erna W. Mueller, Victor H. Wagenschein, Clara Mae Binz, Paul E. Wagenschein, Frieda W. Buelter, and Norman O. Wagenschein (Wagenschein Heirs). Following their parents' deaths, the seven Wagenschein Heirs inherited the subject property and executed a warranty deed in 1989 conveying the surface and mineral estates to Harvey H. Mueller and Jane W. Mueller. The deed included the following reservation:

> THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's death, of an undivided one-half (1/2) of the royalty interest in all the oil, gas and other minerals that are in and under the property and that may be produced from it. Grantors and Grantors' successors will not participate in the making of any oil, gas and mineral lease covering the property, but will be entitled to one-half (1/2) of any bonus paid for any such lease and one-half (1/2) of any royalty, rental or shut-in gas well royalty paid under any such lease. The reservation contained in this paragraph will continue until

> the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.

In 2006, the Muellers executed an oil, gas, and mineral lease with Trinity Energy Services, L.L.C., who then assigned the lease to Pioneer Natural Resources USA, Inc. (Pioneer). Clara died in 2009, leaving Dwight Binz[1] and appellant Carol Edwards as her heirs. In 2010, Pioneer drilled and began production on its first well on the property. The surviving Wagenschein Heirs each signed division orders, accepting and receiving their respective shares of what would have been Clara's interest.

Norman died in 2011, leaving his children, appellees Vicki Wagenschein and Jane Crawford, as heirs. Paul died in 2012. However, prior to his passing, Paul conveyed his interest to appellants Kevin Wagenschein and Kim Gordon, who, in turn, conveyed that interest to the Trust II. Frieda died in 2014, leaving appellant Kenneth Buelter as her sole heir. After each death, Pioneer distributed the decedent's interest by signed division orders to the then-surviving Wagenschein Heirs. Like appellees, Pioneer interpreted the reservation as providing a joint tenancy with right of survivorship.

In 2015, appellants filed their original petition for declaratory relief. Specifically, they sought a judicial declaration that:

> the reservation in the Deed created in the Wagenschein Heirs, in equal shares as tenants in common, a life estate *pur autre vie*[[2]] in one-half (1/2) of the royalty, bonus, rental and shut-in payments under any existing or future oil and gas lease covering the property, to be enjoyed by the Wagenschein Heirs and their successors and assigns until the death of the last surviving Wagenschein Heir.

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[1] Although Dwight Binz was included as a plaintiff in the trial court, he was not named in the notice of appeal or the briefs.

[2] *Pur autre vie* is defined as "[f]or or during a period measured by another's life." *Pur autre vie*, BLACK'S LAW DICTIONARY (10th ed. 2014).

They also sought reformation along the same lines and attorney fees. In their amended petition, appellants alternatively sought "a judicial declaration that even if the deed created a joint tenancy, the joint tenancy as to [Paul's] interest was severed by [Paul's conveyance]."

Appellees subsequently filed their first amended original answer and counterclaim. In their pleading, they generally denied appellants' allegations and pleaded the affirmative defenses of estoppel, waiver, limitations, ratification, and unclean hands, unjust enrichment, or contribution. In addition, they counterclaimed for a declaration that:

> the Pioneer interpretation of the deed is correct and that the surviving defendants own, collectively, 1/3 each of the reservation and that the reservation in question is held by defendants as joint tenants with the right of survivorship with the reservation to terminate and revert to grantees in the 1989 deed upon the death of the last of the original grantors to die.

Appellants filed a traditional motion for summary judgment.[3] Appellants argued that (1) they are the successors to undivided interests in the royalty and bonus in the property that should have passed to them through inheritance and that (2) appellees wrongfully claimed such royalty and bonus interests are held in joint tenancy. Appellants sought a summary judgment declaring that the interests in royalty and bonus at issue in this case are inheritable in a tenancy in common.

Appellees filed a response to appellants' motion for summary judgment and a cross-motion for summary judgment.[4] Appellees sought a summary judgment declaring that "the reservation in the deed in question creates a life estate in favor [of] the surviving

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[3] In support of their motion, appellants submitted a copy of the 1989 warranty deed, a 1989 farm and ranch earnest money contract, and the affidavits of attorneys Thomas Barry and Robert Park.

[4] In support of their cross-motion and response, appellees submitted the affidavit of Michael A. Sheppard, the 1989 deed, division orders, deposition excerpts and discovery answers of Kenneth Buelter, deposition excerpts and discovery answers of Kevin Wagenschein, deposition excerpts of Kim Gordon, deposition excerpts of Dwight Binz, and the affidavit of Victor H. Wagenschein.

grantors . . . ." They further contended that appellants are estopped from bringing their claims because appellants' parents received the benefits of the deed reservation, as interpreted by Pioneer.

The trial court denied appellants' motion for summary judgment, but granted appellees' motion for summary judgment, declaring that:

> the royalties reserved in said deed pass to the surviving original grantors upon the death of each of the seven original grantors and, at the time of the rendering of this judgment, record title to the royalties reserved in said deed is shared by the three surviving grantors, Viola Ehlinger, Erna W. Mueller, and Victor H. Wagenschein in equal one-thirds. Per the terms of the royalty deed, the royalty reservation terminates on the death of the last of the original grantors to die as provided therein.

In addition, the trial court held that:

> [t]he judgment of the Court is based upon the four corners of the deed in question which the Court finds is not ambiguous. The Court rules that any evidence offered by either side extrinsic to the four corners of the 1989 deed for the purpose of explaining the 1989 deed will not be considered and all objections so [sic] such evidence are SUSTAINED AND IT IS SO ORDERED.

II. STANDARD OF REVIEW

We review the trial court's granting of a motion for summary judgment de novo. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018); *Tex. Commerce Bank-Rio Grande Valley, N.A. v. Correa*, 28 S.W.3d 723, 726 (Tex. App.—Corpus Christi–Edinburg 2000, pet. denied). The movant is required to establish that no genuine issue of material fact existed, and that judgment should be granted as a matter of law. TEX. R. CIV. P. 166a(c); *Tarr*, 556 S.W.3d at 278. Where the only question presented to the trial court is a question of law and both sides move for summary judgment, the appellate court should render the judgment that the trial court should have rendered. *See Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110,

116 (Tex. 2018) (citing *Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001)); *see also Dakota Util. Contractors, Inc. v. Sterling Commercial Credit, LLC*, No. 13-16-00538-CV, ___ S.W.3d ___, ___, 2018 WL 4144201, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 30, 2018, pet. denied).

III. Applicable Law And Analysis

In their first issue, appellants argue that the reservation in the 1989 deed created a tenancy in common, as opposed to a joint tenancy, in a one-half interest in royalty and bonus income attributable to the lands described in the 1989 deed. By their second issue, appellants alternatively argue that Paul's unilateral conveyance[5] of his undivided interest to his heirs severed the joint tenancy as to an undivided one-fourth of a one-half interest in royalty and bonus income attributable to the lands described in the 1989 deed. Appellees raise a "cross-point"[6] arguing that appellants are barred from making their arguments under the doctrine of quasi-estoppel. We first address appellees' cross-point.

A. Quasi-Estoppel

Although the trial judge ultimately ruled in appellees' favor, the judgment is silent regarding appellees' quasi-estoppel argument. The trial court's indecision does not

[5] Whether a joint tenant with an express right to survivorship can unilaterally sever his interest through conveyance, thereby converting the estate into a tenancy in common and destroying the survivorship interests of the original joint tenants, is a matter of first impression in Texas.

[6] A "cross-point," as defined by the rules of civil and appellate procedure, is a method for an appellee to raise alternative grounds which would support the judgment after the trial court renders judgment notwithstanding the verdict. *See* Tex. R. App. P. 38.2; Tex. R. Civ. P. 324(c). The trial court did not render judgment notwithstanding the verdict in this case. Appellees' "cross-point" is more accurately described as a "counter-point" in that its function is to show that appellants' position is wrong. *See Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018) ("Counter-points assist the appellate court in finding the answers given to the points of the appellant. From the standpoint of the advocate, their function is to show that the point or points of the opposite party are not valid. Cross-points, on the other hand, are really 'points' which are used to preserve error committed by the trial court. They are the means by which an appellee may bring forward complaints of some ruling or action of the trial court which the appellee alleges constituted error as to him." (citations and quotations omitted)).

preclude us from reviewing the issue on appeal. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625; *Robbins v. Reliance Ins. Co.*, 102 S.W.3d 739, 746 (Tex. App.—Corpus Christi–Edinburg 2001), *judgm't withdrawn*, No. 13-00-645-CV, 2003 WL 1847115 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.). A defendant who conclusively establishes an affirmative defense such as quasi-estoppel is entitled to summary judgment. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

"Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000) (citing *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.—Corpus Christi–Edinburg 1994, writ denied)); *see Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349 S.W.3d 258, 268 (Tex. App.—Dallas 2011, pet. denied) ("Quasi-estoppel (estoppel by contract) is a term applied to certain legal bars, such as ratification, election, acquiescence, or acceptance of benefits."). To prevail on a defense of quasi-estoppel, appellees had to prove: (1) the appellants, on behalf of the Wagenschein Heirs, acquiesced to or benefited from a position inconsistent with appellants' present position; (2) it would be unconscionable to allow the appellants to assert their present position; and (3) appellants had knowledge of all material facts at the time of the conduct on which estoppel is based. *See Lopez*, 22 S.W.3d at 864.

Appellees argue that appellants are quasi-estopped from taking their current positions—i.e., that the 1989 deed created a tenancy in common as opposed to a joint

tenancy, and that Paul's conveyance terminated any joint tenancy—because they knowingly accepted the benefits of a joint tenancy. We agree.

Following the passing of each Wagenschein Heir, the surviving heirs received and signed amended oil and gas division orders. The orders stipulated that the "interest formerly credited to [the deceased Wagenschein Heir] shall hereafter be credited as indicated below in accordance with the [deed]" and dictated the new fractions for each royalty interest. Subsequent payments received by the surviving Wagenschein Heirs reflected the increase in apportioned interest. Therefore, at the time Paul conveyed his deeded interest to heirs Kevin and Kimberly, Paul had already knowingly received the benefit of joint tenancy by surviving two of his seven siblings and receiving his share of their interests. For example, at Clara's death, her interest did not go to her heir, appellant Carol; instead, it went to Paul and the surviving siblings. Paul affirmatively accepted an apportionment increase in his interest from one-seventh to one-sixth. Upon Norman's death, instead of his interest going to his heirs, the interest again went to Paul and the surviving siblings. Once more, Paul affirmatively accepted an increase in his interest from one-sixth to one-fifth. Similarly, Frieda, who passed after Paul, had accepted an increased interest on four separate occasions before the time of her death.

The Wagenschein Heirs accepted the benefit of the reservation passing through survivorship, and appellants do not dispute the presence or legitimacy of any siblings' signatures on the deed imputing survivorship. Consequently, having once enjoyed the benefits of joint tenancy with right of survivorship, the now-deceased Wagenschein Heirs cannot today, through their heirs, sue to claim benefits as tenants in common. *See Lopez*, 22 S.W.3d at 864. As appellees argue and we agree, it would be unconscionable

to allow such a claim. *See id.*

Appellants argue that we must factor in an additional element in our quasi-estoppel analysis: "mutuality of parties"[7] because quasi-estoppel "may not be asserted by or against a 'stranger' to the transaction that gave rise to the estoppel." *See Deutsche Bank Nat. Tr. Co. v. Stockdick Land Co.,* 367 S.W.3d 308, 316 n.13 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (declining to engage in an analysis of what constitutes a stranger because the plaintiff did not dispute its stranger status). Cases cited by appellants are nonetheless distinguishable. *Cf. Leyendecker v. Uribe*, No. 04-17-00163-CV, 2018 WL 442724, at *5 (Tex. App.—San Antonio Jan. 17, 2018, pet. denied) (holding there was "no mutuality of parties" when the appellant made a representation to the IRS, and the appellee was a stranger to the transaction between appellant and the IRS). Here appellants, as heirs, were not strangers to the original transaction; they are bound by the same document that bound their ancestors and that they now seek to alter to their benefit. *See generally, Swilley v. McCain,* 374 S.W.2d 871, 875–76 (Tex.1964).

We conclude that appellees have provided evidence of each element in its defense of quasi-estoppel, and its operation bars appellants' Kevin, Kim, and Kenneth's claims. *See Frost Nat'l Bank*, 315 S.W.3d at 508; *Lopez*, 22 S.W.3d at 864. However, because appellant has brought forth no evidence that Carol, heir to Clara[8], received benefit from

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[7] *Deutsche Bank* appears to be the first Texas case which dictates that "mutuality of parties" is a prerequisite for quasi-estoppel. *See Deutsche Bank Nat. Tr. Co. v. Stockdick Land Co.* 367 S.W.3d 308, 316 n. 13 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *Whitacre P'ship v. Biosignia, Inc*., 591 S.E.2d 870, 882 (N.C. 2004); *Swilley v. McCain,* 374 S.W.2d 871, 875–76 (Tex.1964)). We note, however, that in *Swilley*, the court's estoppel discussion is in the context of res judicata. *See Swilley,* 374 S.W.2d at 875–76.

[8] Clara died in 2009, before Pioneer began production on its first well on the property and consequently, she never received the benefit from royalties in her lifetime.

the deed, we overrule the issues only as they pertain to appellants Kevin, Kim, and Kenneth.

B. Deed Interpretation

We next consider appellant Carol's argument that the reservation in the 1989 deed created a tenancy in common.

Texas recognizes two types of co-tenancies which may be deeded: a tenancy in common and a joint tenancy. *See* TEX. EST. CODE ANN. §§ 101.002, 111.001(a); *United States v. Craft*, 535 U.S. 274, 279–80 (2002); *Holmes v. Beatty*, 290 S.W.3d 852, 857–58 (Tex. 2009). Under a tenancy in common, the deeded interest descends to the heirs and beneficiaries of the deceased cotenant and not to the surviving tenants. *See* TEX. EST. CODE ANN. § 101.002. A joint tenancy, on the other hand, carries a right of survivorship. *See* TEX. EST. CODE ANN. § 111.001(a); *Holmes*, 290 S.W.3d at 857. In a survivorship, "[u]pon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it." *Craft*, 535 U.S. at 280.

"The construction of an unambiguous deed is a question of law for the court." *Wenske v. Ealy*, 521 S.W.3d 791, 794 (Tex. 2017) (quoting *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991)). We will "ascertain the intent of the parties from all of the language within the four corners" of the instrument, examining and harmonizing the entire instrument to "give effect to all provisions so that none will be meaningless." *Wenske*, 521 S.W.3d at 794; *see Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010); *see also Luckel*, 819 S.W.2d at 462 (holding that in construing a deed, we attempt to "harmonize" provisions that "appear contradictory or

inconsistent" so as "to give effect to all of its provisions"). Recently in *Hysaw v. Dawkins*, the Texas Supreme Court reaffirmed its "commitment to a holistic approach aimed at ascertaining intent from all words and all parts of the conveying instrument." 483 S.W.3d 1, 13 (Tex. 2016).

The parties here agree, as do we, that the deed at issue is unambiguous[9]; instead, the parties diverge on its proper interpretation. *See, e.g.*, *U.S. Shale Energy II LLC v. Laborde Props., L.P.*, 551 S.W.3d 148, 151 (Tex. 2018); *Luckel*, 819 S.W.2d at 461. Appellant argues that the reservation in the 1989 deed created a tenancy in common, as opposed to a joint tenancy, in a one-half interest in royalty and bonus income attributable to the lands described in the 1989 deed. Appellant's argument hinges on a single provision within the reservation that states, "Grantors and Grantors' successors . . . will be entitled to one half (1/2) of . . . any royalty . . . paid under any such lease." Appellant asserts that the term "successor" has been afforded a single specific meaning when used in legal documents; i.e., it solely refers to "one to whom property descends or [the] estate of the decedent." *Int'l Ass'n of Machinists, Lodge No. 6 v. Falstaff Brewing Corp*., 328 S.W.2d 778, 781 (Tex. App.—Houston 1959, no writ). As such, appellant claims that the provision made each cotenant's interest inheritable, and "[a]ny other construction would render the word 'successor' meaningless and thereby cause a complete disregard for the rules of deed construction."

Acceptance of appellant's interpretation, however, would require this Court to disregard the reservation's opening and closing statements:

> THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's

[9] There is no dispute between the parties as to the validity of the original warranty deed or the accompanying signatures of each of the Wagenschein Heirs.

> death . . . . The reservation contained in this paragraph will continue until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.

This language implies that the "survivors" of the Grantors—not the Grantors' respective heirs—are the beneficiaries of the reservation. *See Forehand v. Light*, 452 S.W.2d 709, 710 (Tex. 1970) (examining cases where the existence and usage of the word "survivor" was "vital" to the court's decision); *see, e.g.*, *Roberdeau v. Jackson*, 565 S.W.2d 98, 100 (Tex. App.—Austin 1978, no writ) (holding "words of survival" are necessary to create right of survivorship); *Terrill v. Davis*, 418 S.W.2d 333, 334 (Tex. App.—Eastland 1967, writ ref'd n.r.e.) (finding joint tenancy with right of survivorship even absent the words "joint tenancy" or "right of survivorship," where the word "survive" was used repeatedly).

The fact that the deed reserves an interest for the "Grantors' successors" does not indicate a contrary intent. When the deed is examined as a whole, *see Hysaw*, 483 S.W.3d at 13, it is apparent that the words "survivor" and "successor" carry synonymous meaning here. While "survivor" is defined as "[s]omeone who outlives another," the word "successor" is defined as "[s]omeone who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor." *Successor*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Survivor*, BLACK'S LAW DICTIONARY (10th ed. 2014). Consistent with these definitions—and in light of the "words of survival" in the opening and closing statements of the deed—the phrase "Grantors' successors" must refer to the surviving grantors, not the grantors' heirs. This construction "give[s] effect to all provisions so that none will be meaningless.". *See Wenske*, 521 S.W.3d at 794, *Luckel*,

819 S.W.2d at 462. We conclude the parties intended to reserve a joint tenancy with right of survivorship. We overrule appellant Carol's sole issue[10] on appeal.

IV. CONCLUSION

The trial court's judgment is affirmed.

GREGORY T. PERKES
Justice

Delivered and filed the
11th day of July, 2019.

[10] Appellants' second issue on appeal was not raised on behalf of appellant Carol.