NUMBER 13-18-00125-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

STEVE CHILDERS, **Appellant,**

v.

JIMMY YARBOROUGH AND NILGUY, LLC, **Appellees.**

On appeal from the 105th District Court of Kleberg County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

This appeal involves a dispute over the interpretation of an agreement dictating the "sharing of expenses and liabilities incident" to a water well owned in undivided interest by multiple co-tenants, including appellant Steve Childers. The water well is

located on property owned by appellees Jimmy Yarborough and Nilguy, LLC (Yarborough). By a single issue, Childers appeals the trial court's granting of summary judgment in Yarborough's favor. We reverse and remand.

I. BACKGROUND

On May 6, 1980, Jewel Higgenbotham conveyed five acres to James and Bonnie Richardson, along with "a 5/32nd interest in and to the Water Well [located on an adjacent property owned by Higgenbotham] . . . together with a ten (10) foot right of way and easement for the purposes of laying a water line from said well site and taking water therefrom." Pursuant to the deed, grantees agreed to "pay 5/32nd of the cost of maintenance of said well and 5/32nd of the cost of electricity required for same. Provided however, before any repairs or maintenance expenses are incurred, grantees shall be notified of the same." The recorded deed also stipulated that it was "understood and agreed that the granting of this easement shall not preclude the grantor from granting an easement along the same course and distance to other landowners nearby." Higgenbotham sold the undivided interest in the water well to several other parties.

In 1994, the Richardsons, several others owning a undivided interest in the water well, and Steven Crandall, the then-owner of the property on which the water well was located, executed an "Agreement Relating to the Sharing of Expenses and Liabilities Incident to a Water Well" (Expenses and Liabilities Agreement). The effect of this agreement is in dispute, and it reads as follows:

> WHEREAS, the above[-]named individuals own an undivided interest in and to that one certain water well located upon property owned by Steven Crandall or to be acquired by him by virtue of Deeds into them of such undivided interest.

WHEREAS, the physical location of the water well is described as follows . . .

WHEREAS, the above[-]named individuals have been governed by agreements regarding the sharing of expenses incident to the operation of that one (1) certain water well described hereinabove.

WHEREAS, the above-named individuals desire to further clarify their respective agreements to one writing setting forth the rights, duties, and obligations of each party with respect to the sharing of expenses and all other liabilities existing or potentially arising from the operation and supply of water from the water well referenced herein.

IT IS THEREFORE AGREED that all of the individuals referenced hereinabove shall share proportionally as their deeded interests appear in the expenses for electricity, repair, maintenance and any other expense associated with the providing of water from the referenced well for the useful life of said well or for so long as the above named individuals draw or utilize water therefrom. All expenses shall be billed on a quarterly basis, in advance based upon the previous year's average quarterly expenses and payment of each individual's proportionate share shall be remitted by the tenth (10th) day of the following. An independent billing agent may be employed to bill and receive for all expenses related to the jointly owned water well. Any expenses incurred for this service will be apportioned and billed in the same percentage as all other expenses of the water well. Should any party hereto fail to make payment as herein specified and required, their rights to receive water from the referenced well shall be terminated after five (5) days written notice to such party.

IT IS FURTHER AGREED that Steven H. Crandall and Roseanne Crandall, their heirs, executors, successors and assigns shall have no obligation nor responsibility to drill a second water well in the event the present well becomes incapable of supplying sufficient water to the parties hereto.

IT IS FURTHER AGREED that all parties hereto agree to indemnify hold harmless Crandall from any and all claims or demands whatsoever to which they may be subjected by any reason of any injury to any person or damage to any property resulting from or in any way connected with any and all actions and activities arising out of the providing of water from the well located upon property owned by the Crandalls or to be hereafter acquired by them. The parties to this agreement use and utilize the water from the well referenced herein at their sole risk and no representations or warranties are made by Crandalls as to the quality of the water taken from the referenced well.

> IT IS FURTHER AGREED that the agreement shall be for a term of years not to exceed the useful life of the referenced water well but in no event for more tha[n] twenty (20) years, and that said agreement shall be binding upon and inure to the benefit of the heirs, successors, administrators and assigns of the parties hereto. Any notice required by this agreement to be sent to any of the parties shall be sent to the address first above-referenced, however, any party to this agreement may change his/her own address by written notice to the other parties hereto specifying the new address.

On June 2, 1997, the Richardsons conveyed their deed to Childers, and the transfer of title included the interest in the well and easement access.

On November 3, 2009, Yarborough purchased the land on which the water well and easement were located from Crandall's estate.

On November 7, 2012, Childers attempted to access the well through a fence dividing his property from Yarborough's and discovered Yarborough had changed the locks. After Childers and Yarborough were unable to reach a resolution regarding water well access, Childers filed suit on September 21, 2016, claiming quiet title, trespass to try title, slander of title, and tortuous interference with property rights, among others.

Yarborough filed a motion for summary judgment on August 7, 2017, arguing that the Expenses and Liabilities Agreement "affirmatively and conclusively demonstrate[s] that [he] [is] not liable for any actions related to the water well." Yarborough asserted that Childers's ownership rights terminated upon the expiration of the agreement in 2014, as stipulated by the terms of the agreement. Childers countered that the agreement did nothing to "abrogate the co-tenants ownership right under the law to access or operate the well" after its prescribed expiration date, existing simply as a "cost sharing agreement . . . and nothing more." Following a hearing, the trial court granted Yarborough's motion. This appeal followed.

II. SUMMARY JUDGMENT

A. Standard of Review and Applicable Law

We review a summary judgment de novo. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 837 (Tex. 2018); *Wenske v. Ealy*, 521 S.W.3d 369, 372 (Tex. App.—Corpus Christi–Edinburg 2016), *aff'd*, 521 S.W.3d 791 (Tex. 2017). The movant in a motion for summary judgment has the burden to show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a (c); *Painter v. Amerimex Drilling I, Ltd*., 561 S.W.3d 125, 130 (Tex. 2018). If the movant carries this burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc*., 555 S.W.3d 79, 84 (Tex. 2018) (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)). In deciding whether a genuine issue precludes summary judgment, we must treat all evidence favorable to the non-movant as true and indulge every reasonable inference and resolve all doubts in its favor. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017).

Neither party challenges the validity or interpretation of the general warranty deeds involved. *See Farm & Ranch Inv'rs, Ltd. v. Titan Operating, L.L.C.*, 369 S.W.3d 679, 681 (Tex. App.—Fort Worth 2012, pet. denied); *Reeves v. Towery*, 621 S.W.2d 209, 212 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.) (providing that general warranty deed conveys all of the grantor's interest unless there is language in the instrument that clearly shows an intention to convey a lesser interest (citing *Waters v. Ellis*, 312 S.W.2d 231, 234 (1958))). Instead, the parties dispute whether the Expenses and Liabilities Agreement constituted a limitation on and subsequent relinquishment of the signers'

deeded rights as tenants in common; Yarborough's success on summary judgment is dependent on our resolution of this issue. *See Todd v. Bruner*, 365 S.W.2d 155, 160 (Tex. 1963) (providing that each tenant in common has a right to the enjoyment of property in which he owns an interest absent a terminating circumstance); *Gonzalez v. Gonzalez*, 469 S.W.2d 624, 631 (Tex. App.—Corpus Christi–Edinburg 1971, writ ref'd n.r.e.); *Taylor v. Higgins Oil & Fuel Co.*, 2 S.W.2d 288, 296 (Tex. App.—Beaumont 1928, writ dism'd w.o.j.); *see also* 86 C.J.S. Tenancy in Common § 27.

"'A contract's plain language controls, not what one side or the other alleges they intended to say but did not.'" *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 888 (Tex. 2019) (quoting *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017)). "We must 'presume parties intend what the words of their contract say' and interpret contract language according to its 'plain, ordinary, and generally accepted meaning' unless the instrument directs otherwise." *Id.* (quoting *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 763 (Tex. 2018)). "Consistent with our long-established precedent that no one phrase, sentence, or section of a contract should be isolated from its setting and considered apart from the other provisions," we must "consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Id.* (internal citations omitted).

If a written instrument is worded in such a way that a court may properly give it a certain or definite legal meaning or interpretation, it is not ambiguous, and the court will construe the contract as a matter of law. *Id.*; *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980). However, if a written instrument remains reasonably susceptible to more than one meaning after the rules of interpretation have

been applied, then the instrument is ambiguous, *see R & P Enters.*, 596 S.W.2d at 519, and "the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue." *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983).

B. The Expenses and Liabilities Agreement

Yarborough argues, in part, that the "cotenants who signed the Expenses and Liabilities Agreement chose to limit their rights as tenants in common" because the agreement "provided no right for any cotenant to repair, maintain, or otherwise enter the well" after its termination, and Childers cannot now claim rights that his predecessors voluntarily relinquished. Whereas, Childers asserts that his co-tenancy water well rights remain intact following the termination of the Expenses and Liabilities Agreement, because the agreement only served to limit Yarborough's liabilities and further delineate the co-tenants' shared financial responsibilities beyond what was already provided for in the deeds.

We observe first that the purpose of the Expense and Liability Agreement is well-identified in both its chosen namesake and introductory paragraph, wherein it states:

> WHEREAS, the above-named individuals desire to further clarify their respective agreements to one writing *setting forth the rights, duties, and obligations of each party with respect to the sharing of expenses and all other liabilities existing or potentially arising from the operation and supply of water from the water well* referenced herein.

The subsequent paragraphs discuss financial apportionment concerning "the expenses for electricity, repair, maintenance and any other expense associated with the providing of water from the referenced well" and indemnify Crandall and his successors from "any and all claims or demands whatsoever to which they may be subjected by any

reason of any injury to any person or damage . . . arising out of the providing of water from the well located upon property owned by the Crandalls . . .”

The parties take particular issue with paragraphs six and eight of the agreement. With respect to paragraph six, which absolves Crandall and his assignees “[of] obligation []or responsibility to drill a second water well in the event the present well becomes incapable of supplying sufficient water to the parties hereto,” we find such language to be unambiguous and consistent with the previously apportioned interest rights stipulated to in the warranty deeds. The deeds explicitly provide for only an interest in this specific well, in addition to an easement to the water well, and the water contained therein. Thus, in its reiteration of existing deeded limitations, paragraph two provides no discernable support for Yarborough’s proposed interpretation of relinquishment of co-tenancy rights.

Regarding paragraph eight, which states in part that “the agreement shall be for a term of years not to exceed the useful life of the referenced water well but in no event for more tha[n] twenty (20) years,” we likewise find no interpretation which would support the repudiation of co-tenancy rights. The twenty years expiratory language speaks to the cessation of Yarborough’s protection against liability and of billing remittances as delineated by the Expenses and Liabilities Agreement—not to an explicit or implicit termination of the cotenants’ individually deeded interests in the water well. Yarborough argues such unfavorable interpretation would produce an absurd result, subjecting Yarborough and his successors to a “burden . . . in perpetuity” because the shared interest in the specified well water and easement are located on Yarborough’s property. *See generally Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831 (Tex. 2012) (“Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface.”).

However inconvenient, Yarborough's complained-of consequence was knowingly and uncontrovertibly deeded as discussed *supra*. *See generally Gulf, C. & S.F. Ry. Co. v. Fenn*, 76 S.W. 597, 599–600 (Tex. 1903, no writ) (upholding the validity of an unambiguous contract which conveyed certain land and a perpetual right to take water).

There exists no language in the Expenses and Liabilities Agreement which can be construed as an abrogation of Childers's co-tenancy interest by his predecessors. *Cf. Bybee v. Oregon & C.R. Co.*, 139 U.S. 663, 664 (1891) (providing that a plaintiff may deed his ownership "of an undivided half of a certain water-ditch and water-right on the sought side of [a] river, . . . and in lawful possession of the same, as tenant in common" and said deed will be considered a "conveyance of a perpetual right"). Thus, the trial court erred in construing otherwise as a matter of law and in granting Yarborough's summary judgment. *See Rodriguez*, 547 S.W.3d at 837; *R & P Enters.,* 596 S.W.2d at 519; *Wenske*, 521 S.W.3d at 372. We sustain Childers's sole issue on appeal.

III. CONCLUSION

We reverse the trial court's judgment and remand the action for further proceedings not inconsistent with this opinion.

GREGORY T. PERKES
Justice

Delivered and filed the
28th day of May, 2020.