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# ONE J

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## SUBJECT TO UNCERTAINTY: A CASE OF IGNORED INTENT – *WENSKE v. EALY*

KALEB R. SMITH\*

### *I. Introduction*

In June of 2017, the Supreme Court of Texas delivered an opinion in which they appeared to depart from long-standing rules of construction regarding the interpretation of deeds. The case was *Wenske v. Ealy*, in which the court set out to address a dispute that arose from a warranty deed conveying a mineral estate.<sup>1</sup> The dispute dealt with the reservation of a mineral interest and the proper delegation of the burden of an existing royalty exception, or non-participating royalty interest (“NPRI”).<sup>2</sup> The question came down to whether the language of the deed expressed an intent for the grantee to take the property subject to the entire burden of the NPRI, or if the exception was to be proportionately shared by both the grantor and grantee. In the end, the court was extremely divided in its five to four decision in which the majority held the intent of the parties did not expressly and clearly subject the granted interest to the entire burden of the

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\* Kaleb R. Smith, J.D. Candidate, University of Oklahoma College of Law, 2019; BBA Finance, Texas Christian University, 2013. I would like to extend my sincerest appreciation to the editorial board of the *Oil and Gas, Natural Resources, and Energy Journal*, past and present, who have worked tirelessly for the publication of this issue, and for their guidance and support throughout this process. I would also like to thank the OU College of Law’s professors of the Oil and Gas, Natural Resources, and Energy Center for their knowledge and advice. Lastly, I would like to thank my family for their encouragement, assistance, and support during this journey.

1. 521 S.W.3d 791, 793 (Tex. 2017).

2. *Id.*

NPRI.<sup>3</sup> Alternatively, the dissenting justices were of the opinion the parties were clear in stating what was subject to what.<sup>4</sup> They opined that the entire burden of the NPRI should be borne by the grantee.<sup>5</sup>

This case note examines how the majority opinion in *Wenske v. Ealy* establishes dangerous precedent regarding disputes surrounding the interpretation of mineral conveyances. Part two of this note discusses the law before the case. More specifically, it provides a refresher on some of the legal principals used in mineral conveyances, as well as methods of contract interpretation. Additionally, this section includes a summary of noted precedent in the case, how those decisions interpreted mineral deeds, and how they were decided. Part three of the note will address the case at hand, the background, a more specific expression of the issue, and a summary of both the majority and dissenting opinions. Lastly, part four analyzes this case and the effect that it will have on past and future mineral deeds.

## *II. Law Before the Case*

### *A. A Refresher of Non-Participating Royalty Interest*

The details and attributes of various oil and gas interests can be rather convoluted. The issue here deals with the treatment of an NPRI. A mineral estate contains five rights that may be severed: the right to develop, the executory right, the right to receive royalties, the right to receive bonus payments, and the right to receive delay rentals.<sup>6</sup> An NPRI is a royalty interest in the mineral estate that is non-possessory; the only right that is granted to an NPRI owner is the right to receive royalty payments.<sup>7</sup> The NPRI differs from the standard royalty interest in that the owner of the NPRI does not own the right to produce the minerals, rather the NPRI owner is entitled to receive a share of gross production.<sup>8</sup> This share of gross production is typically determined by a fixed royalty retained or granted in the deed.<sup>9</sup> Additionally, in regards to the other standard lease benefits, the

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3. *Id.* at 798.

4. *Id.* at 800.

5. *Id.*

6. French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797 (Tex. 1995).

7. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 75 (Tex. 2015) (quoting Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569 (1948)).

8. *Id.*; see also 1 ERNEST E. SMITH AND JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.4 (2017).

9. *Id.*

NPRI owner is not entitled to benefits, like delay rentals or bonuses, unless the deed creating the interest expressly provides for those additional benefits.<sup>10</sup>

*B. Unambiguous Contract Interpretation in Mineral Deeds*

A primary rule in contract interpretation was put forth in *French v. Chevron*, which stated, “If the language is unambiguous, the court’s primary duty is to ascertain the intent of the parties from the language of the deed by using the ‘four corners’ rule.”<sup>11</sup> This intent canon is often aided by the combination of the four corners rule to interpret the contract, as *French* suggested.<sup>12</sup> Typically, most courts examine the parties’ intent by examining the express language used in the instrument.<sup>13</sup> Although a little harsh, but maybe an accurate idea as a result of this case, a variation of the intent canon may even suggest mineral deeds must be construed only from the language of that deed; suggesting any prior case law interpreting other mineral deeds is probably irrelevant.<sup>14</sup>

The four corners rules mandates the court must review the entire document in an effort to determine the parties’ intent.<sup>15</sup> Essentially, it encourages the reader to review the entire document and harmonize all parts, thereby aiding in the interpretation of the intent of the parties.<sup>16</sup> The four corners rule requires the court to look to what is contained entirely within the four corners of the document, not individual terms, phrases, or clauses, to accurately determine the parties’ intent.<sup>17</sup> As one court put it, when “determining the legal effect of a deed, whether as to grant, exception, reservation, consideration, or other feature, the inquiry is not to be determined alone from a single word, clause, or part but from every word, clause, and part that is pertinent.”<sup>18</sup>

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10. *Id.*

11. 896 S.W.2d at 796 (citing *Luckel v. White*, 819 S.W.2d 495, 461 (Tex. 1991)).

12. Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 45 (1993).

13. *Id.* at 47.

14. *Id.* at 49 (citing *Kokernot v. Caldwell*, 231 S.W.2d 528, 532 (Tex. Civ. App. 1950) (writ ref’d)).

15. *Luckel v. White*, 819 S.W.2d 495, 461 (Tex. 1991).

16. Kramer, *supra* note 12, at 66.

17. *Id.* at 68.

18. *Id.* at 71-72 (quoting *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778, 781 (Tex. Comm’n App. 1928)).

Harmonization is often paired or combined with the four corners rule.<sup>19</sup> One way to think of harmonization, as it relates to the four corners rule, is that a court should begin by attempting to give effect to all provisions of the document.<sup>20</sup> If some of those provisions seem to conflict with each other, the court should then attempt to construe the conflicting provisions to avoid any conflicts. This should be done carefully by accounting for the parties' intent as evidenced by the overall language of the document.<sup>21</sup> Lastly, the court may be forced to anti-harmonize when doubt still exists regarding the proper construction of the deed.<sup>22</sup>

In the oil and gas field, parties who draft agreements have long, and reasonably, relied on a court's rule of interpretation when deciding how to express their intent.<sup>23</sup> Therefore, the courts are typically careful to change long-standing rules when doing so may change the ownership of minerals that have been conveyed in various deeds and other instruments by relying on the understood law previously set by the court.<sup>24</sup> Although, it does happen, as evidenced here in *Wenske v. Ealy*.

### C. The Subject-To Clause

Generally, a subject-to clause is used when land or an interest in land is being conveyed while there is already an oil and gas lease outstanding.<sup>25</sup> Therefore, the interest is conveyed subject to any existing lease and other possible interests in the chain of title.<sup>26</sup> Historically, the subject-to clause has not provided a reservation, but merely a recognition of outstanding interests in the chain of title.<sup>27</sup> This is meant to protect the grantor from an allegation that the warranty has been breached by the existence of an oil and gas lease.<sup>28</sup>

However, in practice, the use of the subject-to clause has been expanded and is often used for other purposes, which tends to lead to intervention by the courts. Even the majority in the case in question notes that "subject-to" clauses are used for various purposes beyond their original intent.<sup>29</sup>

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19. *Id.* at 72.

20. *Id.* at 77.

21. *Id.*

22. *Id.*

23. *Wenske v. Ealy*, 521 S.W.3d 791, 803 (Tex. 2017).

24. *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 895 (Tex. 1986).

25. *Wright v. E.P. Operating Ltd. P'ship*, 978 S.W.2d 684 (Tex. App. 1998).

26. *Id.*

27. *Id.*

28. *Kokernot v. Caldwell*, 231 S.W.2d 528 (Tex. Civ. App. 1950).

29. *Wenske*, 521 S.W. 3d at 796.

*D. Interpretation in Noted Precedent*

The majority and dissenting opinions offered a few notable Texas cases that should be considered in analyzing the intent of the parties when reviewing this case. Although the majority essentially dismissed the use of these cases in the application of the rule, the dissent notes the similarities between these past cases and the case at issue which can, and should have been, used for the analytical approach taken to the specific facts.

*1. Bass v. Harper*

First, and discussed in depth in both opinions, is *Bass v. Harper*, a dispute also arising from the conveyance of oil and gas royalties.<sup>30</sup> Specifically, Bass, the grantor, owned the surface estate and 8/14ths of a 1/8th royalty interest from an existing lease.<sup>31</sup> The remaining 6/14ths were properly reserved by prior owners and not separately in dispute.<sup>32</sup> Bass claimed he granted a half interest, or 7/14ths, to Miller, but the grant was subject to the existing 6/14ths royalty.<sup>33</sup> Therefore, Bass essentially only granted a 1/14th royalty interest. Essentially, the granting instrument conveyed an undivided one-half interest in the tract but was subject to the prior mineral reservations totaling 8/14ths.<sup>34</sup> Miller then conveyed, through a mineral deed, an undivided one-half interest in the oil, gas, and other minerals under the tract to the defendant, Harper.<sup>35</sup> Additionally, the Millers re-conveyed to Bass the surface estate.<sup>36</sup> Harper argued that Bass intended to convey a one-half interest in that which he currently owned, 4/14ths, to Miller.<sup>37</sup> The court held that “under the specific wording of the instrument, Bass granted and conveyed to Miller an undivided one-half (7/14ths) of the 1/8th royalty, and that the one-half interest granted (7/14ths) was subject to the outstanding 6/14ths royalty.”<sup>38</sup> Therefore, Bass conveyed 1/14th of the royalty interest, not 4/14ths.<sup>39</sup> Reviewing the intent of the parties and the plain language of the instrument, the court noted the only thing “subject to”

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30. 441 S.W.2d 825 (Tex. 1969).

31. *Id.* at 825.

32. *Id.*

33. *Id.*

34. *Id.* at 826.

35. *Id.*

36. *Id.*

37. *Id.* at 825.

38. *Id.* at 827.

39. *Id.*

anything was the grant conveying a one-half interest in the land to Miller.<sup>40</sup> What the grant was subject to was “the mineral reservations’ (6/14ths) contained in the deed[ ].”<sup>41</sup> Notable was the court’s notion the only thing “subject to” anything was “the grant itself.”

## 2. *Duhig v. Peavy-Moore Lumber Co.*

It may also be important to address *Duhig v. Peavy-Moore Lumber Company* and the resulting *Duhig* Rule. Although not as important in this case, it is vital to the courts when there are issues in allocating royalties when there is an overconveyance in the warranty deed.<sup>42</sup> The rule should be viewed as a rule of law rather than a rule of construction and is based on a theory of breach of warranty and estoppel by deed.<sup>43</sup> In *Duhig v. Peavy-Moore Lumber Company*, the Supreme Court of Texas established a grantor cannot grant and reserve the same interest, so if the grantor does not own a large enough interest to satisfy both the grant and the reservation, the grant must be satisfied first based upon breach of warranty and estoppel by deed.<sup>44</sup> If there is an interest remaining after the grant is satisfied, that remaining interest may be used to satisfy the reservation.<sup>45</sup> The rule was the result of a conveyance of property to W.J. Duhig in which the grantor reserved an undivided one-half interest in the minerals.<sup>46</sup> Later, Duhig conveyed the property in a deed which retained an undivided one-half interest in the minerals.<sup>47</sup> The issue was whether Duhig only reserved the one-half interest that was reserved in the grant, or if he reserved the remaining one-half interest that was remaining after he received the

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40. *Id.*

41. *Id.*

42. *See generally*, *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940).

43. Joseph Shade, *Petroleum Land Titles: Title Examination & Title Opinions*, 46 BAYLOR L. REV. 1007, 1043 (1994).

44. *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 480 (N.D. 1991); Joseph Shade, *Petroleum Land Titles: Title Examination & Title Opinions*, 46 BAYLOR L. REV. 1007, 1043-1044 (“Where a grantor conveys an interest in the minerals and in the same instrument reserves a mineral interest, and where there is a prior interest outstanding that is not excepted from the operation of the deed, so that effect may not be given to both the interest that grantor has purported to convey and the interest grantor has attempted to reserve, under the rule of *Duhig v. Peavey-Moore Lumber Co.*, the grantee is not limited to a suit in damages for failure of title, but the attempted reservation will fail to the extent necessary to make the grantee whole. Where complete failure of the reserved interest is insufficient to make the grantee whole, he will also have a cause of action in damages for failure of title.”).

45. *See id.*

46. *Duhig*, 144 S.W.2d at 878.

47. *Id.*

property.<sup>48</sup> The court analyzed the problem by looking at what the granting clause actually conveyed.<sup>49</sup> After that was established, the court looked at what was retained in the deed and what, if any, affect it had on the diminution of what was granted.<sup>50</sup> In the end, the court held Duhig's deed only accounted for the original one-half interest that was retained when the property was granted to Duhig, and did not reserve the remaining one-half interest for Duhig when he granted the property to the grantee.<sup>51</sup> However, the important part in this case is not the specific holding, but the court's methodological approach in determining what the language of the deed actually conveyed and the rule established for doing so.<sup>52</sup> Essentially, *Duhig* established that when full effect cannot be given to both the granted interest and the reservation, the courts should give priority to the granted interest and the reservation will get what is left, if anything at all.

The dissent in *Wenske v. Ealy* noted *Duhig* because of this methodical approach used in construing the questioned deed.<sup>53</sup> The dissent praised the fact the *Duhig* court started by focusing on what was actually conveyed by the granting clause, and since it “identified the property itself, it conveyed *all* interest in the property even though the grantor did not own all the interest.”<sup>54</sup> Because of that determination, the *Duhig* court set out to determine whether, and if so how, the retained clause diminished the grant.<sup>55</sup> The dissent noted in the case at hand, what was conveyed by the granting clause must be determined, and then determine whether the subject-to clause diminished the grant.<sup>56</sup>

### 3. *Benge v. Scharbauer*

In *Benge v. Scharbauer*, the grantor attempted to convey the surface and 5/8ths of the mineral in the land while reserving for themselves a 3/8ths mineral interest.<sup>57</sup> However, a prior deed reserved a 1/4th mineral interest, and the grant to Benge did not except this prior interest.<sup>58</sup> Therefore, the deed granted and reserved a full interest without taking into account the

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48. *Id.* at 878-79.

49. *Id.* at 879.

50. *Id.* at 879-80.

51. *Id.* at 880.

52. *Wenske*, 521 S.W.2d at 808.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 259 S.W.2d 166, 168 (Tex. 1953).

58. *Id.*

1/4th mineral interest that was previously reserved. Thus, the court had to determine from which interest the 1/4th mineral interest was to be carved. Using *Duhig*, the court held the deed granted the grantee the surface and 5/8ths of the mineral estate and that the grantor only reserved, because of the previously reserved 1/4th mineral interest and subsequent breach of the warranty, a 1/8th mineral interest.<sup>59</sup> What was different about this grant is that it contained a provision, separate from the mineral interest grant, that mandated the grantee pay the grantor payment of 3/8ths of all royalties, bonuses, and delay rentals.<sup>60</sup> The court noted that had this additional provision been excluded from the instrument, the royalties, bonus payments, and delay rentals would have been split according to the grant post *Duhig* application by the court, 1/8th to the grantor and 5/8ths to the grantee.<sup>61</sup> The parties' intent was examined, and it was decided that although the fractional part of royalties, bonuses, and delay rentals one is usually entitled to is the same as the mineral interest he owns, if the parties express, in a plain and formal way, an alternate intention, they may make the fractional division of mineral interest compared to the royalties, bonuses, and delay rentals different.<sup>62</sup>

#### 4. *Pich v. Lankford*

*Pich v. Lankford* presents a similar issue from a series of conveyances and reservations between numerous parties concerning a 160-acre tract of land.<sup>63</sup> Simply put, an individual, Howard, owned all the surface and minerals but only 1/4th of the royalties.<sup>64</sup> Additionally, Pich owned a one-half royalty interest and Fuehr owned the last 1/4th of the royalty interest.<sup>65</sup> Howard later conveyed the land to Sharp "Save and Except" an undivided 3/4ths of the minerals.<sup>66</sup> However, 3/4th of the minerals had not previously been reserved, just 3/4ths of the royalties.<sup>67</sup> Sharp then conveyed the property to Lankford "Save and Except" an undivided 3/4th of the minerals.<sup>68</sup> Eventually, Howard quitclaimed to Pich any interest they had in the 3/4th of the minerals "excepted and reserved" in their deed to the

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59. *Id.*

60. *Id.*

61. *Id.* at 168-69.

62. *Id.* at 169

63. 302 S.W.2d 645, 646 (Tex. 1957).

64. *Id.*; see also *Wenske v. Ealy*, 521 S.W.3d 791, 809.

65. *Id.*

66. *Id.*

67. *Id.* at 646-47.

68. *Id.* at 646-47.

Sharps.<sup>69</sup> Shortly thereafter, the Sharps did the same from their deed to the Lankfords.<sup>70</sup>

Lankford sued Pich and Fuehr, alleging the reservations Pich claimed were illegal and constituted a cloud on their title and should be canceled.<sup>71</sup> Additionally, they claimed the exceptions from Howard and Sharp did not reserve any interest in their deeds and, therefore, conveyed nothing to Pich.<sup>72</sup> The court reviewed what the effect of the language was in the deeds by the Howards to the Sharps and by the Sharps to Lankford.<sup>73</sup> In reviewing the plain language of the deed, the court noted the deeds clearly excepted a 3/4th mineral interest and the deeds could not be interpreted to deal with a royalty interest based on the language used.<sup>74</sup> Therefore, a 3/4ths mineral interest never passed to Lankford.<sup>75</sup> The court explained that Pich acquired from Howard whatever right and interest they then owned and the language from the deed from Howard to Sharp did not reserve an interest in the minerals, it only excepted them from the grant.<sup>76</sup> Consequently, since the interest did not pass and was not outstanding, the effect of the language was to leave it with Howard. As a result of the interpretations of the grants, the court held that Pich owned 3/4th of the minerals and one-half of the royalties; Lankford owned 1/4th of the minerals, 1/4th of the royalties, and the surface estate; and Fuehr owned 1/4th of the royalty interest.<sup>77</sup> Normally, Fuehr's interest would have been carved out proportionally from the mineral interests, but Pich otherwise agreed it would be taken from his interest.<sup>78</sup>

The dissent in *Wenske v. Ealy* noted the methodical approach the *Pich* court took in its interpretation of the deeds.<sup>79</sup> The dissent noted first how “the [c]ourt looked to see what interest the deed granted and then explained that an interest that is reserved or excepted is ‘excluded from the grant and

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69. *Id.* at 646-47.

70. *Id.* at 647.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 649.

75. *Id.*

76. *Id.* at 650.

77. *Id.*

78. *Id.* (“Ordinarily the royalty interest adjudged to [ ] Fuehr would be carved out proportionally from the two mineral ownerships, but [Pich] asserted in his appeal brief that it should be carved out entirely from the mineral interest adjudged to [Pich] . . .”).

79. 521 S.W.3d at 811 (Boyd, J., dissenting).

does not pass to the grantee.”<sup>80</sup> Second the dissent noted how the *Pich* court explained that although not synonymous, both reservations and exceptions limit the interests from the granting clause.<sup>81</sup> Lastly, the dissent praised the efforts of the *Pich* court for recognizing “that the parties’ agreement controls even when a royalty interest might otherwise correspond proportionally to multiple mineral interests.”<sup>82</sup>

##### 5. *Selman v. Bristow*

Here, Bristow contends he was granted, through a warranty deed, ownership in a certain tract, except for a 1/8th royalty interest reserved by the grantor.<sup>83</sup> Subsequently, Bristow conveyed the tract to Selman by a warranty deed and reserved for themselves a 1/4th mineral interest.<sup>84</sup> However, the conveyance from Bristow to Selman did not address the 1/8th royalty interest reserved by the original grantor.<sup>85</sup> Therefore, the issue, and cause of disagreement, was how the burden of the 1/8th royalty interest was to be shared by the parties.<sup>86</sup> Bristow contended the 1/8th royalty interest must be proportionately shared, meaning since Selman owned 3/4ths of the mineral estate and Bristow owned 1/4th of the mineral estate, Selman should be burdened by 3/4ths of the 1/8th royalty interest and Bristow burdened by 1/4th of the 1/8th royalty interest.<sup>87</sup> Selman, of course, disagreed with this approach and instead argued all of the 1/8th royalty interest should burden Bristow out of their 1/4th reservation and the interest conveyed to them was unencumbered by the 1/8th royalty interest.<sup>88</sup> Therefore, the court had to determine which interest was actually conveyed by the deed from Bristow to Selman.<sup>89</sup> The court rejected the notion the 1/8th royalty interest must be shared proportionately by both of the mineral interest owners in this case.<sup>90</sup> The deed conveyed to Selman “an absolute fee simple title to all interest in the land except a 1/4th interest in the minerals.”<sup>91</sup> The court noted that to accept the idea the deed granted 3/4th

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80. *Id.* (quoting *Pich*, 302 S.W.2d at 650).

81. *Id.*

82. *Id.*

83. *Selman v Bristow*, 402 S.W.2d. 520, 521 (Tex. Civ. App. 1966).

84. *Id.* at 521-22.

85. *Id.*

86. *Id.* at 522.

87. *Id.*

88. *Id.*

89. *Id.* at 523.

90. *Id.*

91. *Id.*

of the mineral interest subject to a proportionate reduction of the reserved royalty interest would be contrary to the actual language of the grant because “without the reservation clause, the deed clearly implies a grant of all of the surface and a full 3/4ths of the mineral estate.”<sup>92</sup>

### *III. Statement Of The Case*

#### *A. Facts*

The issue in *Wenske v. Ealy* dates back to 1988, when Benedict and Elizabeth Wenske purchased a fifty-five acre mineral estate from numerous parties, including Marian Vyvjala and Margie Novak.<sup>93</sup> As a part of this transaction, Vyvjala and Novak each reserved a 1/8th non-participating royalty interest (“NPRI”), amounting to a combined 1/4th NPRI.<sup>94</sup> The NPRI covered oil, gas, and any other minerals that may be present, and was active for twenty-five years from the date of the Wenskes’ purchase of the interest.<sup>95</sup> Many years later, in 2003, and after no apparent issues, the Wenskes initiated a sale of the property to Steve and Deborah Ealy via a warranty deed.<sup>96</sup> Supposedly, the warranty deed granted the entire surface estate to the Ealys and effectively split the mineral estate between the parties.<sup>97</sup> The Wenskes reserved a 3/8ths interest in the mineral estate and conveyed the remaining 5/8ths to the Ealys.<sup>98</sup> The pertinent language from the 2003 deed provides the following:

#### Reservations from Conveyance:

For Grantor and Grantor’s heirs, successors, and assigns forever, a reservation of an undivided 3/8ths of all oil, gas, and other minerals in and under and that may be produced from the Property. If the mineral estate is subject to existing production or an existing lease, the production, the lease, and the benefits from it are allocated in proportion to ownership in the mineral estate.

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92. *Id.*

93. 521 S.W.3d at 793.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

## Exceptions to Conveyance and Warranty:

. . .

Undivided one-fourth (1/4) interest in all of the oil, gas and other minerals in and under the herein described property, reserved by Marian Vyvjala, et al for a term of twenty-five (25) years in instrument recorded in Volume 400, Page 590 of the Deed Records of Lavaca County, Texas, together with all rights, express or implied, in and to the property herein described arising out of or connected with said interest and reservation, reference to which instrument is here made for all purposes.

. . .

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee . . . except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.<sup>99</sup>

Eventually, in 2011, the Wenskes and Ealys obtained an oil and gas lease on the mineral estate.<sup>100</sup> This oil and gas lease granted the parties a royalty on production based upon their proportional share of the interests.<sup>101</sup> Soon thereafter, in 2013, the parties began to dispute as to whose share of the royalties, the Wenskes' 3/8th or the Ealys' 5/8th, the 1/4th NPRI would be deducted and distributed.<sup>102</sup> The Wenskes believed their 3/8th mineral estate was unburdened by the NPRI due to the "subject-to" clause in the warranty deed thereby making the Ealys' interest "subject to the 1/4th royalty interest."<sup>103</sup> They believed the full burden of the NPRI was transferred to the Ealys' 5/8th interest through the deed.<sup>104</sup> However, the Ealys believed that not only was their 5/8th interest burdened by the NPRI,

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

but that the Wenskes' 3/8th interest was also burdened by the NPRI.<sup>105</sup> The Ealys argued the 1/4th NPRI should be proportionately shared between their and the Wenskes' interest in the mineral estate.<sup>106</sup>

#### *B. Issue*

The court set out to determine whether the language of the warranty deed between the Wenskes and the Ealys passed the entire NPRI burden proportionately across the parties or if the Ealys' interest was the only interest burdened by the 1/4th NPRI.<sup>107</sup> Essentially, the court set out to determine how the remaining 3/4ths royalty interest was allocated between the Wenskes and the Ealys.

#### *C. Holding*

After analysis, the court held for the Ealys in finding both their and the Wenskes mineral interest were burdened by the 1/4th NPRI.<sup>108</sup> The court felt the only reasonable interpretation of the deed led to the conclusion that both the Wenskes and Ealys bore the burden of the NPRI depending on their proportionate interests.<sup>109</sup> The court held the deed granted 5/8ths of the mineral interest to the Ealys, reserved 3/8ths for the Wenskes, and put the Ealys on notice that the entire mineral estate, both the Wenskes' and the Ealys' interests, were subject to the 1/4th NPRI.<sup>110</sup> Rationalized by claiming to give "the words of [the] deed their plain meaning, reading it in its entirety, and harmonizing all of its parts . . .," the court felt it could not place the entire NPRI burden on the Ealys' interest.<sup>111</sup>

#### *D. Decision of the Case*

In the court's analysis, the court claimed it was "reinforce[ing] a trend in [its] mineral-deed jurisprudence," supposedly casting off "rigid, mechanical rules of deed construction" as "relics of a bygone era" by "ascertain[ing] the parties' intent by careful examination of the entire deed."<sup>112</sup> The court

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105. *Id.* at 793-94.

106. *Id.*

107. *Id.* at 792.

108. *Id.* at 798.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 792, 796, 798.

based its analysis upon effectuating the parties' intent, determined by a careful and detailed review of the deed in its entirety.<sup>113</sup>

The court began by noting that neither the Wenskes nor the Ealys believed their warranty deed was ambiguous; therefore, the court felt the majority, if not all, of its analysis hinged on the actual language in the deed and the intent underlying that language.<sup>114</sup>

In the bulk of its analysis, the court directly dealt with the language of the deed, determined to discover the true intent of the parties as expressed within the four corners of the document.<sup>115</sup> The court expressly dismissed the reasoning of the appellate court's use of any arbitrary rules, noting, "The parties' intent, when ascertainable, prevails over arbitrary rules. And we can ascertain the parties' intent here by careful examination of the entire deed."<sup>116</sup> The court recognized the construction of the deed in this case hinged on the parties' use of the subject-to clause, "the precise effect of [the] conveyance being 'subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty' in the deed."<sup>117</sup> The court concluded the interest granted to the Ealys was very much in fact burdened by the NPRI, but could not find that it did not also burden the Wenskes' reserved interest.<sup>118</sup> Urging against the isolation of certain words or phrases, the court felt the entire context of the language should be taken into account, or harmonized, when determining intent.<sup>119</sup> The use of "mechanical rules" or "magic words" was completely dismissed by the court when determining intent.<sup>120</sup>

Typically, a principal of oil and gas law dictates that under a conveyance of mineral interest, the nature of that interest includes the right to receive the corresponding interest in the royalty.<sup>121</sup> The court noted that along the same lines, the NPRI, generally, would burden the entire mineral estate as it limits the royalty interest attached to the mineral interest.<sup>122</sup> However, the court dismissed the idea that the foregoing principal truly made a difference in this case.<sup>123</sup> Instead, the court recognized that parties to a contract are

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113. *Id.* at 792.

114. *Id.* at 794.

115. *Id.* at 795.

116. *Id.* at 795-96 (citations omitted).

117. *Id.* at 796.

118. *Id.* at 797.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

able to allocate the division of interest in any manner they wish, and these wishes should, if expressly made in the deed, control the outcome of interpretation.<sup>124</sup> However, if the parties want their deed to stray from the generally accepted principals of oil and gas law and mineral conveyances, the court stated, “they should ‘plainly and in a formal way express that intention.’”<sup>125</sup> The court felt there were no such intentions made in the warranty deed that convey part of the mineral interest from the Wenskes to the Ealys.<sup>126</sup> Instead, the court concluded that the combined exceptions to conveyance and exceptions to warranty, read with the subject-to clause, only indicated an intent to avoid a breach of warranty, not an attempt to reserve a 3/8th mineral interest unburdened by the existing NPRI.<sup>127</sup> The court held the warranty deed between the Wenskes and the Ealys could not reasonably be read as conveying the entire burden of the NPRI to Ealys 5/8ths interest.

The court anticipated confusion and wanted to make clear that not all conveyances of fractional mineral interest burdened by an NPRI would result in a proportionate share burdening all the fractional mineral interest owners. Instead, the court believed its opinion was just the opposite, requiring that in an interpretation of “an unambiguous deed, the parties’ intent—determined by a careful and detailed examination of the document in its entirety—is paramount.”<sup>128</sup> The court added, “Rigid, mechanical, arbitrary, and arcane rules, which at one time offered certainty at the expense of effectuating intent, are relics of a bygone era.”<sup>129</sup> The court acknowledged the awareness that those who drafted agreements relied on the court for principals, definitions, continuity, and predictability, especially in regards to oil and gas law.<sup>130</sup> However, the court believed that nothing expressed in its opinion challenged existing principals of oil and gas law nor opened up for debate the meaning of clearly defined terms in deed disputes.<sup>131</sup> Instead, the court believed the interpretation based upon intent only helped to further the principal of certainty under the law.<sup>132</sup>

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124. *Id.*

125. *Id.* (quoting *Benge v. Scharbauer*, 259 S.W.2d 166, 169 (Tex. 1953)).

126. *Id.*

127. *Id.*

128. *Id.* at 798.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

*E. Dissent*

The dissent agreed that the parties' intent was necessary in construing the deed. However, they disagreed on how the majority arrived at their conclusion and the precedent apparently ignored in doing so.<sup>133</sup> The dissent agreed with the majority in that the court must rely on the deed's plain language in order to determine the parties' intent, but they concluded the plain language expressly stated the only interest subject to the NPRI was the Ealys' interest.<sup>134</sup> The dissent stated, "The deed's plain language does not subject the Wenskes' mineral interest to anything."<sup>135</sup> The dissent claims that while the majority analyzed the typical meaning of "subject-to," they failed to consider, under this particular deed, what was subject to what.<sup>136</sup> The dissent felt this was the controlling question in the case and that it was completely ignored and left unaddressed by the majority; so, as a result, they reached the wrong conclusion in this case.<sup>137</sup>

The dissent analyzed the issue by first determining what was actually subject to anything.<sup>138</sup> The dissent felt the deed's granting clause unambiguously identified "that which is 'subject to' something is the interest granted, sold, and conveyed to the Ealys."<sup>139</sup> Deeply dissecting the language of the deed, the dissent felt the deed was clear in that the conveyance is "subject to" the "Reservation from Conveyance" and the "Exception to Conveyance and Warranty."<sup>140</sup> They felt the grant included all the surface and mineral interests to the Ealys, but their interest was "subject to" the reservations and exceptions.<sup>141</sup> One of those reservations being the Wenskes' 3/8ths interest and the exception being the 1/4th NPRI.<sup>142</sup> The dissent felt the deed only described one interest that was "subject to" anything, that being the interest the Wenskes conveyed to the Ealys.<sup>143</sup> The dissent believed that the plain language of the deed did not

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133. *Id.* at 799 (Boyd, J., dissenting).

134. *Id.* at 801, 803.

135. *Id.*

136. *Id.* at 801.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 802.

142. *Id.*

143. *Id.*

support the majority's view that the Wenskes' reserved interest was also "subject to" something.<sup>144</sup>

Next, the dissent set out to determine what the Ealys' interest was "subject to." The dissent noted that although, as they felt, the granting clause purported to convey all of the interest in the property to the Ealys, that was not actually possible due to the NPRI.<sup>145</sup> This was one of the reasons for the subject-to clause.<sup>146</sup> The other of which being the Wenskes' wish to keep a 3/8ths interest in the mineral estate.<sup>147</sup> The dissent felt the deed unambiguously provided for a grant subject to any reservations and exceptions, those of which being the 3/8ths reservation in the mineral estate by the Wenskes and the previous exception of a 1/4th NPRI. Therefore, the granting clause subjected the Ealys' interest to the reservation and exception.<sup>148</sup> The dissent interprets and reads the deed's language subjecting the Ealys' interest to the 1/4th NPRI, not 3/8ths of the 1/4th NPRI.<sup>149</sup> The dissent insisted that "just as the deed subjects the Ealys' interest to *all* of the Wenskes' 3/8ths mineral interest, it also subjects the Ealys' interest to *all* of [the] 1/4th interest in the royalties."<sup>150</sup> The dissent concluded the plain language suggested only that the Ealys' interest was subject to the 1/4th NPRI.<sup>151</sup>

The dissent felt the majority opinion would create mass uncertainty in the law because the principals and precedent that support the deed's plain language were not relied upon.<sup>152</sup> Noting basic concepts of mineral estates interests, the dissent noted that a severed royalty interest would typically burden the entire mineral estate because it limits the royalty interest that attaches to the underlying mineral interest and this royalty interest would be carved out proportionately from the multiple mineral ownerships, if there were more than one.<sup>153</sup> However, even though a severed fractional royalty interest will typically burden the entire mineral estate, the parties may contract around the norm by expressing intentions "plainly and in a formal

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 803.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 803-04.

153. *Id.* at 806 (citing *Pich v. Lankford*, 302 S.W.2d 645, 650 (Tex. 1057)).

way” to alter the burden.<sup>154</sup> The dissent felt as though that is exactly what the Wenskes did by granting all of the property to the Ealys, but making that interest subject to their reservation and the NPRI exception.<sup>155</sup>

The dissent then went into the precedent noted above, apparently dismissed by the majority, and compared the methodical approaches used to the present case.<sup>156</sup> The dissent believed that each of those cases used an approach similar to the one presented as an alternate to the majority and supported the dissenting view that the Wenskes expressed an intent to make the Ealys’ interest subject to their reservation and the entire burden of NPRI exception.<sup>157</sup>

In the end, the dissent felt the plain language of the deed supported a finding that the interest granted to the Ealys was subject to the entire burden of the NPRI, not just a proportional share.<sup>158</sup> They felt that “the inherent nature of the interests and [the court’s] relevant precedent” supported their conclusion.<sup>159</sup>

#### *IV. Analysis*

The five-to-four decision of the court in this case goes to show the divisiveness of the justices in the majority’s holding. Even though both the majority and the dissent based their conclusions, in effect, off the same concept of interpreting the deed via its plain language and the intent of the parties, per the four corners rule, they came to drastically different end results. It seems as if one side must have read more into the words than should have been, or the other side dismissed more than was appropriate. It seems to be the latter of the two, which in this case, was the majority opinion. Consequently, the majority has disrupted long standing rules for interpreting mineral conveyances, disregarding the language in the deed, principals of the interests, and years of precedent.

The majority certainly was on the right track by attempting to use the plain language of the warranty deed and the parties’ intent in its interpretation; however, they seemed to have come up short in analyzing each and every word contained therein. The dissent’s main focus was to determine what was subject to what via a methodical approach.<sup>160</sup> The

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154. *Id.* (quoting *Benge v. Scharbauer*, 259 S.W.2d 166, 169 (Tex. 1953)).

155. *Id.*

156. *Id.* at 807.

157. *See generally id.* at 807-17.

158. *Id.* at 816.

159. *Id.*

160. *See id.* at 801-02.

failure of the majority to address what was really stated and meant in the deed resulted in thereby failing to answer what was subject to what. Just because the granting clause did not say explicitly that the grantees should be solely burdened by the NPRI, does not mean that is not what was intended by the parties.

Uncertainty will unfortunately result regarding the proper construction of a deed and how to properly retain an interest that is unburdened by an existing exception. The court has created doubt and uneasiness in the proper construction of these deeds, the granting clauses, and the subject-to clauses. Although the use of a subject-to clause to assign the burden of an NPRI in a warranty deed may not always have been the best and most clear way to shift the burden, it has long been used for that purpose. Intent in an agreement may not always be as easy to express as a court later determines it should have been. There are decades worth of agreements, deeds, and court cases that attest to that difficulty. The court here has, in effect, made the process of doing just that impeccably harder. The majority has ignored a mass amount of the language contained in the Wenskes' warranty deed and instead took a shortcut, by unduly wanting more expression in the granting and subject-to clause, to incorrectly determine the parties' intent. The court seemed to bypass basic understanding of the granting clause. No longer is the ability to grant an interest in a mineral estate subject to reservations and exceptions as simple as the plain language seems to demonstrate. It seems the court now requires some unspecified language which more expressly burdens the grantee with previously existing exceptions in the chain of title. It is almost as if, in addition to including the long-used "subject-to" language, the majority seems to suggest more explicit, direct, and repetitive language that the grantee's interest is the sole interest burdened by the existing NPRI is required. But this potential requirement is not really understood because the majority failed to establish a clear standard of what may have been required by the Wenskes or what may be required by future parties to accurately express intent.

Additionally, the court has arguably changed a rule of interpretation that has long been relied upon by lower courts, practitioners, and drafters of agreements. That is not to say rules of interpretation should be relied upon as concrete, just that their existence in precedent has long guided parties while drafting instruments. Even the dissent agreed that no rigid rules should be used to interpret the intent of deeds, but noted that changing adopted rules of construction used in interpreting agreements will have a negative impact on drafters who reasonably rely on that rule when

attempting to express their intent.<sup>161</sup> They even cited another Supreme Court of Texas oil and gas case in which the court opined it should “be loathe to change long-standing rules in the oil and gas field when doing so would alter the ownership of minerals conveyed in deeds which rely on the law established by this court and followed by lower courts, commentators, and especially lawyers advising their clients.”<sup>162</sup>

A solution may have to turn on the idea of adding additional language, perhaps an additional clause, in conveyances that expressly describes the parties’ actual intentions. The intentions of the parties could be clearly written and, perhaps, even the expected and intended surface, mineral, and royalty interest fractions of every known party could be noted to aid in a possible court interpretation of parties’ intended interests. However, this seems a bit redundant when you really think about what is being done. It is as if the repeated formalities and legalese used in conveyances for decades is not sufficient in explaining what the parties intend to do. If this is the case, then why is this language used at all? The standard and expected language used in these conveyances should be sufficient in portraying the parties’ use of the agreement. However, this additional clause, if not added carefully, may purport to contradict the otherwise certain language contained in the rest of the document. This risk of potential added uncertainty could reverse the positive effects that were intended by its addition.

Perhaps the biggest danger of this decision is not what effect it will have on the drafting of future grants, but what effects it will have on the decades worth of grants which have already been drafted. After this unexpected result from the court, drafters should be even more careful in drafting their conveyances. Intent should be clear and concise, without any room for alternate interpretation.

#### *V. Conclusion*

The majority opinion seemed to hinge on the fact that the deed granting the Ealys an interest in the property from the Wenskes did not explicitly state, and in exact language, that the NPRI would only burden the Ealys.

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161. *Id.* at 803. The dissent further states, “Our decisions can imbue words with ‘magic’ and drafters rely on that talismanic power to create certainty in their documents.” *Id.* at 803-4 (citing *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) (defining, definitively, “minerals”); *Clifton v. Koontz*, 325 S.W.2d 684, 690-91 (Tex. 1959) (defining the standard for “production” and “production in paying quantities”).

162. *Id.* at 804 (citing *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 859 (Tex. 1986)).

The majority failed to read deep enough into what the drafters wrote and what the deed was actually granting. By not carefully examining what was subject to what, as the dissent noted, the court has created the potential for mass uncertainty in an area of law that is complex and risky enough. *Wenske v. Ealy* presented an opportunity for the court to confirm how to effectively effectuate intent when there is an interest subject to another. Instead, the court seemed to ignore long standing rules of interpretations, subjecting drafters to confusion rather than clarity. Given the infancy of this decision, we will have to wait and see the level of impact it will have on conveyances. Nevertheless, there is no doubt that this decision will affect how courts and practitioners analyze conveyances for years to come.