No. 121668

IN THE SUPREME COURT OF ILLINOIS

RAMSEY HERNDON LLC, Plaintiff / Appellee, v. LISA WHITESIDE, f/k/a LISA E. LUCHTEFELD, d/b/a BEAM OIL COMPANY, Defendant / Appellant.	)))))))))))	Appeal from the Appellate Court, Fourth District No. 4-15-0853 Justices Appleton & Steigmann, Justice Pope dissenting Appeal from the Circuit Court, Sixth Judicial Circuit, Macon County, Illinois, No. 2015-L-27 Honorable Thomas E. Little, Presiding

REPLY BRIEF OF THE DEFENDANT/APPELLANT LISA WHITESIDE, D/B/A BEAM OIL COMPANY

David M. Foreman
FOREMAN & KESSLER, LTD.
ARDC # 6197425
204 East Main Street
Salem, IL 62881
Tel: 618-548-8900
dforeman@foremanandkessler.com

ORAL ARGUMENT REQUESTED

No. 121668

IN THE SUPREME COURT OF ILLINOIS

RAMSEY HERNDON LLC, Plaintiff / Appellee, v. LISA WHITESIDE, f/k/a LISA E. LUCHTEFELD, d/b/a BEAM OIL COMPANY, Defendant / Appellant.	)))))))))))	Appeal from the Appellate Court, Fourth District No. 4-15-0853 Justices Appleton & Steigmann, Justice Pope dissenting Appeal from the Circuit Court, Sixth Judicial Circuit, Macon County, Illinois, No. 2015-L-27 Honorable Thomas E. Little, Presiding

REPLY BRIEF OF THE DEFENDANT/APPELLANT LISA WHITESIDE, D/B/A BEAM OIL COMPANY

David M. Foreman
FOREMAN & KESSLER, LTD.
ARDC # 6197425
204 East Main Street
Salem, IL 62881
Tel: 618-548-8900
dforeman@foremanandkessler.com

ORAL ARGUMENT REQUESTED

ARGUMENT

The Plaintiff did not "reserve" or "except" its override from the grant. It was conveyed to the Defendant. As such, Plaintiff's claim should be dismissed with prejudice.

Plaintiff's argument is entirely premised on the false proposition that an overriding royalty in an oil and gas lease is not an interest in real estate and therefore the Assignment in question is not subject to the rules that apply to instruments such as deeds, which convey interest in real estate. Such rules require, *inter alia,* that:

1.) The instrument must be construed liberally in favor of the Grantee and strictly against the Grantor, ***Jones v. Johnson,* 16 Ill. App. 3d 997 (5th Dist. 1974)**;

2.) Any and all ambiguities must be resolved in favor of the Grantee and against the Grantor, ***Jones v. Johnson,* 16 Ill. App. 3d 997 (5th Dist. 1974)**;

3.) Any interest not expressly and unambiguously excluded from the grant is included in the conveyance, ***Williams v. Ohio Petroleum Co.*, 18 Ill. App. 2d 194 (4th Dist. 1958) and 3 *Summers Oil and Gas,* Section 29:15 (3rd Edition 2014)**

and

4.) A subsequent intentions clause may not be repugnant to the grant, ***Law v. Kane*, 384 Ill. 591 (1943); *Gelfius v Chapman,* 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983)** and ***Jones v. Johnson,* 16 Ill. App. 3d 997 (5th Dist. 1974)**.

Oil and gas rights are an interest in real estate. A grant or lease of those rights is likewise an interest in real estate. In fact, the Illinois Supreme Court has held that the lessee's working interest in an oil and gas lease of indefinite duration is a freehold estate. ***Jilek v. Chicago, Wilmington & Franklin Coal. Co.*, 382 Ill. 241 (1943)** and ***Deverick v.***

***Bline*, 404 Ill. 302 (1949).** Hence, it stands to reason that any interest carved out from the working interest created by an oil and gas lease, such as an overriding royalty, must likewise be realty.

A lease divides the oil and gas rights into two distinct components: "royalty", being the lessor's share, and "working interest", being the lessee's share. An "overriding royalty" is a non-cost bearing interest which is carved out of the lessee's working interest. All such interest are interest in real estate, the conveyance of which must be in writing and be recorded in the County Recorder's Office, in order to provide constructive notice of ownership to the public. This is why the Assignment in question bears a recorder's stamp in the upper right hand corner, indicating it was recorded in the Macon County, Illinois Recorder's Office on November 17, 2009, as Document # 1785701 **(Plaintiff's Exhibit #3, C 23-31, A 43-51).**

The Plaintiff is correct about one thing. The lease itself does not create the overriding royalty. Rather the lease created the Plaintiff/Lessee's working interest from which the disputed overriding royalty was subsequently carved out. The overriding royalty was created by the Plaintiff's first Assignment, not the lease itself **(Plaintiff's Exhibit #2, C 14-22, A 34-42).** This however does not mean that the overriding royalty is personalty (i.e. not realty).

To the contrary, it proves the opposite, namely that an overriding royalty is an interest in real estate. It is merely a non-cost bearing portion of the working interest. It is taxed as real estate. Conveyances (i.e. Assignments) of overriding royalty are recorded in the County real estate records. Payments for the oil produced and sold, which are attributable to overriding royalties, are based upon an examination of the real estate records where the well is located.

To suggest that an overriding royalty is not an interest in real estate evidences a lack of understanding of the underlying subject matter of this suit and stands in stark contrast to the recorder's stamp on the very document upon which Plaintiff's claim is premised. **(Plaintiff's Exhibit #3, C 23-31, A 43-51)**

In short, an overriding royalty in an oil and gas lease is an interest in real estate and assignments or reservations of such interest must be in writing and they must be recorded in order to be effective as to third parties. This being the case, written instruments such as the Assignment in question must be construed in favor of the Defendant Grantee and against the Plaintiff Grantor.

In this case, the Plaintiff assigned all interest it owned in the lease to Defendant, subject only to any royalty or overriding royalty owned by third parties. "All" means "all". "Subject to" or "shall bear" does not mean the same thing as "except". The former refers to rights of third parties which affect the property conveyed, like easements of record, whereas the latter refers to something owned by the Grantor that is withheld or excluded from the grant.

The Plaintiff seeks to avoid the fact that an overriding royalty is an interest in real estate in order to circumvent the rule that conveyances must be construed liberally in favor of the Grantee/Assignee and strictly against the Grantor/Assignor, because if the rule applies, Plaintiff's claim must fail. Under the rule, all doubts must be resolved in favor of the Grantee/Defendant; Not the Grantor/Plaintiff.

To that end, the Plaintiff claims that the Assignment is merely a contract and that consequently the special rules that apply to deeds and other instruments conveying interest in real estate do not apply. The Plaintiff misapprehends an important distinction between contracts and deeds. Contracts are written agreements between two parties to do certain

things. Both parties agree to the terms and conditions set forth in the agreement. Both parties must execute the contract for it to be enforceable and both must perform or be held liable for damages resulting from non-performance.

A Deed or Assignment is not a purchase agreement between the parties. It is the performance of the purchase agreement (i.e. Buy-Sell Agreement). It is the conveyance of an interest in real estate pursuant to the parties' bilateral agreement. A Deed, or Assignment, is unilateral. It is not bilateral. It is only executed by the Grantor/Assignor. The Grantee/Assignee does not sign the instrument.

The Grantor is in complete control of the terms upon which his or her conveyance is conditioned. This is why the rule of law is that all interest of a Grantor passes to the Grantee unless it is specifically reserved or excepted from the grant. The burden is on the Grantor to clearly define any interest the Grantor seeks to exclude from the grant or conveyance. Not the other way around.

This fundamental rule of construction applies to all conveyances of real estate. The Plaintiff's argument, if accepted, would constitute a major departure from a cornerstone principle of real estate law. It would reverse the burden, shift the presumptions and equate a "condition" previously placed upon the interest being transferred in favor of a third party, with an "exception" to the grant.

If Plaintiff's argument is accepted, it would mean interest in oil and gas leases such as overriding royalty would not be subject to the statute of frauds. They would not need to be in writing. They would not need to be recorded. If so, then there would be no practical way for a first purchaser of the crude oil produced to determine who to pay or in what amounts. Examination of record title would be pointless for it would not reveal who owns the working interest or overriding royalty.

Plaintiff's theory, if successful would apply to other conveyances of real estate. It would drastically alter the way deeds have been construed in this State for over a century. Conditions to which the conveyance is subject would be elevated to new exceptions in favor of the Grantor. It would allow an alleged subsequent "intentions clause" to supercede the clear, unequivocal grant of "all" interest in the lease. That is an untenable, illogical and unreasonable result.

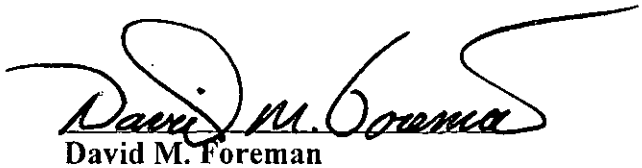
Simply put, since working interest in an oil and gas lease is an interest in real estate, then portions thereof, which have been carved out and created therefrom are likewise real estate. The Plaintiff executed the Assignment, not the Defendant. The burden is on Plaintiff to clearly exclude any interest it seeks to retain from the grant. Any and all ambiguity must be resolved in favor of Defendant, not Plaintiff.

The Plaintiff signed the Assignment conveying all interest it owned to Defendant, subject only to interest owned by third parties, namely the royalty owned by Lessor and the overriding royalty owned by Co-Defendant John Basnett. If Plaintiff wanted to except the overriding royalty from the grant, it should have clearly and unambiguously said so. It did not. This is simply a money grab by a remorseful seller after the horse he sold won the derby.

It is submitted that "all" means "all". The Assignment is clear. It conveyed all interest which the Plaintiff owned to Defendant. It did not "reserve" or "except" anything. As such, the document which the Plaintiff attached to its Complaint defeats the cause of action it attempts to state and the trial court was correct in dismissing Plaintiff's cause of action with prejudice.

WHEREFORE, the Defendant, Lisa Whiteside, respectfully request this honorable court enter an Order reversing the Appellate Court's decision and reinstating the Trial Court's decision.

FOREMAN & KESSLER, LTD.



David M. Foreman
FOREMAN & KESSLER, LTD.
ARDC # 6197425
204 East Main Street
Salem, IL 62881
Tel: 618-548-8900
dforeman@foremanandkessler.com

No. 121668

IN THE SUPREME COURT OF ILLINOIS

RAMSEY HERNDON LLC, Plaintiff / Appellee, v. LISA WHITESIDE, f/k/a LISA E. LUCHTEFELD, d/b/a BEAM OIL COMPANY, Defendant / Appellant.	)	Appeal from the Appellate Court, Fourth District No. 4-15-0853 Justices Appleton & Steigmann, Justice Pope dissenting Appeal from the Circuit Court, Sixth Judicial Circuit, Macon County, Illinois, No. 2015-L-27 Honorable Thomas E. Little, Presiding

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the reply brief under Rule 342(a), is 6 pages.

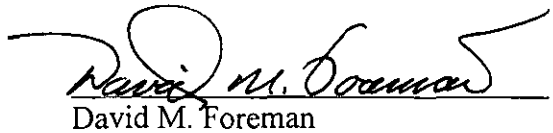
David M. Foreman
FOREMAN & KESSLER, LTD.
ARDC # 6197425
204 East Main Street
Salem, IL 62881
Tel: 618-548-8900
dforeman@foremanandkessler.com

CERTIFICATE OF SERVICE

I, the undersigned, do hereby Certify, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that the statements set forth in this Certificate are true and correct and that a true and correct copy of the **Reply Brief** was mailed to:

Mark S. Cochran
Bellatti, Barton & Cochran, LLC
944 Clock Tower Drive, Suite A
Springfield, Illinois 62704

in compliance with Rule 12 of the Rules of Practice of the Illinois Supreme Court, by placing said copy in an envelope, legibly addressed to the foregoing, securely sealed and sufficiently stamped and depositing same in the United States Mail at Salem, Illinois on the 21st day of June, 2017, all in compliance with said Rule.



David M. Foreman
ARDC # 6197425
204 East Main Street
Salem, IL 62881
Phone (618) 548-8900
dforeman@foremanandkessler.com